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THE SETTLEMENT OF INTERNATIONAL ENVIRONMENTAL TRADE DISPUTE IN GATT: A CASE STUDY OF THE EUROPEAN UNION - UNITED STATES *GAS GUZZLER TAX* DISPUTE

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Canada

A CASE STUDY OF THE GATT *GAS GUZZLER TAX* DISPUTE

Abstract

This thesis addresses the issue of international trade and environmental protection, more particularly within the framework of the GATT dispute settlement system. In May 1993, the European Union took issue with the U.S. taxes on automobiles aimed primarily at environmental concerns. The European Union claims that the *gas guzzler tax*, the *luxury tax* and the *corporate average fuel economy (CAFE) payment* are discriminatory and therefore contrary to the principles of GATT Article III.

The study of this dispute and the prospective analysis of its outcome show that both the *gas guzzler tax* and the *luxury tax* do not constitute a violation of the General Agreement. However, the *CAFE payment* violate the national treatment obligation and is not justified under the GATT general exceptions. The *CAFE payment*, despite that it is primarily aimed at fuel conservation, constitute a means of arbitrary and unjustifiable discrimination.

The outcome of this dispute confirms the permissiveness and limits of the GATT rules toward legitimate environmental policies.

Résumé

Ce mémoire adresse la question des échanges internationaux et de la protection de l'environnement, plus particulièrement dans le cadre du système de règlement des différends du GATT. En mai 1993, l'Union européenne a pris action à l'encontre des taxes environnementales américaines sur les voitures. L'Union européenne prétend que les taxes américaines - "*gas guzzler tax*", "*luxury tax*" et "*corporate average fuel economy (CAFE) payment*" - sont discriminatoires et donc contraires aux principes de l'Article III du GATT.

L'étude de ce différend et l'analyse prospective de son dénouement démontre que certaines taxes américaines - "*gas guzzler tax*" et "*luxury tax*" - ne constituent pas une violation de l'Accord général. Toutefois, le "*CAFE payment*" enfreint l'obligation de traitement national et n'est pas justifié sous les exceptions générales du GATT. Le "*CAFE payment*", malgré qu'il vise principalement la conservation de combustible, constitue un moyen de discrimination arbitraire et injustifié.

Le dénouement de ce différend confirme la tolérance et les limites des règles du GATT à l'encontre des politiques environnementales légitimes.

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Table of Contents

INTRODUCTION

Environmental protection has, in the past years, become a major concern of the World Community. Internationally, this awareness can be seen through the increasing number of environmental agreements being concluded or under negotiation and the efforts of the various specialized agencies in their fields of expertise. However, no coherent institutional mechanism deals effectively with world-wide environmental problems and co-ordinates the proliferating number of international agreements and the diffuse work of the specialized agencies.

The General Agreement on Tariffs and Trade[1], created at a time where environmental protection was not accorded the political priority it currently holds, has been nevertheless indirectly involved in the control of the national environmental measures of its Contracting Parties, giving these measures an international dimension. In fact, the dispute settlement procedures of the GATT have been used more frequently for the settlement of international environmental disputes than the dispute settlement procedures of any other

[1] *General Agreement on Tariffs and Trade*, 30 October 1947, Can. T.S. 1947 No. 27, 55 U.N.T.S. 187, T.I.A.S. No. 1700, B.I.S.D. 1S/6 [hereinafter *GATT*]. Not yet in force. The GATT is applied provisionally by all contracting parties. The original contracting parties apply the GATT since January 1, 1948, under the *Protocol of Provisional Application of the General Agreement on Tariffs and Trade*, 30 October 1947, 55 U.N.T.S. 308, B.I.S.D. IV/77 [hereinafter *Protocol of Provisional Application*]. The contracting parties which have acceded since 1948 apply the GATT under their respective Protocol of Accession. The text of the General Agreement was amended in 1948 by means of five Protocols, in 1955 by means of three Protocols, only one of which entered into force and in 1965 with the introduction of a Part IV on Trade and Development. The text of the General Agreement in force as from 27 June 1966 is reprinted in B.I.S.D. IV/1. The term GATT is used herein to refer both to the General Agreement and the organisation and trading system that has evolved under the General Agreement.

world-wide organization since 1980[2].

From its beginning in 1948, the GATT has been involved in the regulation and liberalization of international trade. At that time, environmental concerns were limited to the specific protection of human, animal or plant life, with no explicit general reference to 'environmental protection' as such. However, environmental protection is allowed under the general rules of the GATT. GATT Article III places hardly any limit on the freedom of countries to apply non-discriminatory regulations to protect their environment from damage from domestic production activities or from the consumption of domestically produced or imported goods[3]. And the general exceptions in GATT Article XX for "measures necessary to protect human, animal or plant life or health" (Article XX(b)) and "measures relating to the conservation of exhaustible natural resources" (Article XX(g)) can justify the trade restrictions necessary for the protection of the environment.

Nevertheless, GATT rules have not prevented an increasing number of international disputes over the consistency of national environmental measures with the GATT and over the interpretation of the pertinent rules of the GATT.

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[2] Ernst-Ulrich PETERSMANN, "International Trade Law and International Environmental Law: Prevention and Settlement of International Environmental Disputes in GATT", (1993) 27 *Journal of World Trade* 43, 53.

[3] *Ibid.*

A recent dispute settlement proceeding under GATT Article XXIII, the 1991 Panel Report on U.S. Restrictions on Imports of Tuna[4], has raised, notably, the important question over GATT-consistency of extra jurisdictional environmental protection, i.e., "whether imports restrictions may be used to influence environmental measures of another country"[5] under GATT rules.

The 1991 U.S. embargo on Mexican tuna illustrates the conflict between national environmental law and GATT international commercial law. To help save dolphins killed by Mexican tuna fishing practices, the United States imposed an embargo upon yellowfin tuna and tuna products from Mexico under the 1972 *Marine Mammal Protection Act* [6]. Mexico challenged the U.S. action in the GATT. The dispute settlement panel ruled in favour of Mexico and determined that the U.S. embargo on Mexican tuna, even though designed to conserve dolphin, was inconsistent with the GATT[7].

In its concluding remarks, the *Tuna/Dolphin Panel Report* noted the fact "that the provisions of the General Agreement impose few constraints on a

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[4] *United States - Restrictions on Imports of Tuna (Mexico v. U.S.)*, GATT Doc. DS21/R, 3 September 1991, reprinted in "General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna", (1991) 30 *International Legal Materials* 1594 (hereinafter *Tuna/Dolphin Panel Report*). This Panel Report was never adopted by the GATT Council.

[5] E.-U. PETERSMANN, "International Trade Law and International Environmental Law: Prevention and Settlement of International Environmental Disputes in GATT", *supra* note 2, 54.

[6] *Marine Mammal Protection Act*, 1972, Pub. L. No. 92-252, 86 Stat. 1027, codified as amended at 16 U.S.C. 1371.

[7] For an analysis of the findings of the *Tuna/Dolphin Panel Report*, see Chapter 3 - B(ii): "Production Standards v. Product Standards"; Chapter 5 - C: "The Extra Jurisdictional Applicability of GATT Article XX", below.

contracting party's implementation of domestic environmental policies"[8]. However, as far as differences in environmental regulations of producers are concerned:

> [...] It seemed evident to the Panel that, if the CONTRACTING PARTIES were to permit import restrictions in response to differences in environmental policies under the General Agreement, they would need to impose limits on the range of policy differences justifying such responses and to develop criteria so as to prevent abuse. If the CONTRACTING PARTIES were to decide to permit trade measures of this type in particular circumstances it would therefore be preferable for them to do so not by interpreting Article XX, but by amending or supplementing the provisions of the General Agreement or waiving obligations thereunder. Such an approach would enable the CONTRACTING PARTIES to impose such limits and develop such criteria.[9]

To this date, the *Tuna/Dolphin Panel Report* remains unadopted by the GATT Council, and, as Mexico and the United States reached a mutually acceptable solution, there is very few chances that it will ever be[10]. Therefore the Panel Report is neither legally binding upon the United States nor officially part of GATT treaty practice.

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[8] *United States - Restrictions on Imports of Tuna (Mexico v. U.S.), supra* note 4, para. 6.2:

> "[...] a contracting party is free to tax or regulate imported products and like domestic products as long as its taxes or regulations do not discriminate against imported products or afford protection to domestic producers, and a contracting party is also free to tax or regulate domestic production for environmental purposes. As a corollary to these rights, a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own."

[9] *Ibid.*, para. 6.3.

[10] Mexico opted not to pursue the adoption of the Panel Report in the GATT Council "in order to avoid jeopardizing continuing negotiations regarding the North American Free trade Agreement (NAFTA)"; Stanley M. SPRACKER and David C. LUNDSGAARD, "Dolphins and Tuna: Renewed Attention on the Future of Free Trade and Protection of the Environment", (1993) 18 *Columbia Journal of Environmental Law* 385, 388.

However, the *Tuna/Dolphin Panel Report* was very much publicized, discussed and analyzed. Some commentators have seen a good report, strengthened by past GATT practice[11]. Others have seen a poorly reasoned and inconsistent report, unsupported by the language of the GATT, its drafting history and past GATT panel decisions[12]. As the reasoning of the *Tuna/Dolphin Panel Report* is more than likely to be embraced by a subsequent GATT panel, it is only a matter of time for it to become agreed GATT practice[13].

More recently, in May 1993, the European Union took issue with the U.S. taxes on automobiles. This dispute regards the U.S. tax regulation on high polluting automobile motors, which the Union considers to be discriminatory and therefore contrary to the principles of Article III. Consequently, the GATT Council agreed to establish a Panel to examine the European Union complaint against the United States. The outcome of this dispute is bound to stimulate the debate over the relationship between trade and environmental policies, and

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[11] See notably, John H. JACKSON, "World Trade Rules and Environmental Policies: Congruence or Conflict?", (1992) 49 *Washington and Lee Law Review* 1227; Ted L. McDORMAN, "The 1991 U.S. - Mexico GATT Panel Report on Tuna and Dolphin; Implications for Trade and Environment Conflicts", (1992) 17 *North Caroline Journal of International Law and Commercial Regulation* 461.

[12] See, notably, Steve CHARNOVITZ, "GATT and the Environment: Examining the Issues", (1992) 4 *International Environmental Affairs* 203; Eric CHRISTENSEN and Samantha GEFFIN, "GATT Sets its Net on Environmental Regulation: The GATT Panel Ruling on Mexican Yellowfin Tuna Imports and the Need for Reform of the International Trading System", (1991) 23 *University of Miami Inter-American Law Review* 569; Jeffrey L. DUNOFF, "Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?", (1992) 49 *Washington and Lee Law Review* 1407; Elizabeth E. KRUIS, "The United States Trade Embargo on Mexican Tuna: A Necessary Conservationist Measure or an Unfair Trade Barrier?", (1992) 14 *Loyola of Los Angeles International and Comparative Law Journal* 903.

[13] In the meantime, the European Union (then the European Community) issued a new GATT complaint against the *Marine Mammal Protection Act*, *supra* note 6. On July 14, 1992, the GATT Council granted the request of the European Union for a panel to determine whether the U.S. secondary embargo on certain tuna and tuna products is consistent with the GATT. The case is still pending in GATT; Thomas E. SKILTON, "GATT and the Environment in Conflict: The Tuna-Dolphin Dispute and the Quest for an International Conservation Strategy", (1993) 26 *Cornell International Law Journal* 455, 474. For a good description of the U.S. actions following the *Tuna/Dolphin Panel Report*, see T. E. SKILTON, *ibid.*, 470-474; Steve CHARNOVITZ, "Environmentalism Confronts GATT Rules: Recent Developments and New Opportunities", (1993) 27:2 *Journal of World Trade* 37, 37-40.

the role of the GATT over the harmonization of environmental standards.

The purpose of this thesis is to address the issue of international trade and environmental protection, more particularly within the framework of the GATT dispute settlement system. A study of the recent complaint on the U.S. fuel economy standards and *gas guzzler tax* to dealt with by the GATT and a prospective analysis of its outcome will constitute the principal achievement of this thesis.

The first part of this thesis sets the legal basis of the trade dispute involving the European Union and the United States. Chapter one briefly describes the salient features of the GATT dispute resolution process. Chapter two is dedicated to the facts underlying the dispute on U.S. fuel economy standards, notably, the European Union complaint to the GATT and the U.S. regulations involved.

A second part addresses the consistency of the U.S. taxes on automobiles with the GATT national treatment obligation. Chapter three presents the GATT obligation, more particularly the general provision (Article III:1) and the one specifically designed to address the issue of internal taxation (Article III:2). Chapter four analyzes the consistency of the U.S. regulations with the GATT principle of non-discrimination such as expressed by the national treatment

obligation.

A third part addresses the exoneration of the U.S. taxes under the GATT general exceptions. Chapter five presents the GATT exceptions, notably, the environmental exceptions (Articles XX(b) and XX(g)). Chapter six analyzes the possible justification of the U.S. regulations under the exceptions. The interpretation given previously to the GATT provisions addressed by the various panels and the CONTRACTING PARTIES, will be considered.

In conclusion, a reflection on the role that the GATT should play in the future protection of the environment is necessary. Can the GATT be amended, or interpreted, in order to respond to the urgent need for effective and universal environmental protection? Special attention will be given to the outcome of the international negotiations on new trade and environment rules that took place in the context of the Uruguay Round. A survey of the legal issues related to the liberalization of international trade and environmental protection is essential to fully understand the place of the GATT in the international legal order.

This thesis in no way pretends to present an exhaustive exposition of the GATT law. Attention will be given to only a few of the GATT provisions and panel reports that are in one way or an other relevant to the current dispute and the role that the GATT can play in the protection of the environment.

Moreover, it is important to note, that despite the fact that a special attention is dedicated to the dispute settlement system which resulted from the Uruguay Round negotiations, these improvements are not yet in force. Therefore, this thesis addresses the European Union - United States *Gas Guzzler Tax* Dispute in the perspective of the rules of the GATT 1947 and not of the GATT 1994.

Finally, the European Union - United States *Gas Guzzler Tax* Dispute is, at the time of this writing, still pending before the GATT. The final report has not been issued by the Panel, nor adopted by the GATT Council. Consequently, this thesis prospectively analyses the outcome of the dispute, with no regard to the examination and the findings of the GATT Panel in *United States - Taxes on Automobiles*.

PART I. THE GATT AND TRADE DISPUTE

1. Dispute Resolution and the GATT

The GATT origins, evolution and prospective developments are addressed in order to provide an acute understanding of the legal, political, and international context in which the CONTRACTING PARTIES dispose of the various disputes arising over the interpretation and application of the General Agreement.

On the multilateral front, GATT is the major agreement regulating trade relationships. It represents an organization as well as an agreement[14]. The GATT was not intended to be a permanent organization and it is characterized by its lean bureaucracy and flexible structure[15].

It is this international organization that has provided the framework for the different rounds of international commercial negotiations, such as the 'Tokyo

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[14] The organization was not originally intended. Effectively, the Agreement was foreseen to be an interim document in support of future tariff negotiations while the International Trade Organization (ITO), a more permanent organisation, was established. Essentially because the United States failed to ratified the Havana Charter, the ITO was never established. The GATT Agreement was also never ratified by the U.S. Congress. However, it did not need Congressional ratification to be effective as its adoption was authorized under the terms of the *Reciprocal Trade Agreements Act*. The United States became contracting party to the GATT when they accepted the GATT *Protocol of Provisional Application*, *supra* note 1, which Australia, Belgium, Canada, France, Luxembourg, the Netherlands and the United Kingdom also signed. This Protocol fixed the entry into force of the GATT on January 1, 1948. It resulted in the "establishment of a broad statement of principles, with no formal institutional structure to administer the agreement or monitor the adherence of the parties to it"; Robert P. PARKER, "Dispute Settlement in the GATT and the Canada-U.S. Free Trade Agreement", (1989) 23:3 *Journal of World Trade* 83, 85; Jeffrey M. WAINCYMER, "Revitalising GATT Article XXIII - Issues in the Context of the Uruguay Round", (1989) 17 *Australian Business Law Review* 3, 45 (Appendix).

[15] R. P. PARKER, *supra* note 14, 85; it consists in a small Secretariat in Geneva, where the bureaucracy is very small and has only minor administrative functions.

Round' and the latest 'Uruguay Round'[16].

> The GATT does not legislate specific terms of trade or commerce; rather, it provides a framework by which the parties make agreements with each other, known as "concessions", to liberalize trade on a *quid pro quo* basis. [...]
>
> A key feature of the GATT rules, therefore, is the maintenance of the balance of interests struck when contracting parties agree to concessions. [...]
>
> In this context, dispute resolution procedures have a special place. On the one hand, the dispute resolution mechanism must be capable of enforcing the agreement's terms. On the other hand, in the GATT context, dispute settlement takes into account the overarching principle of a balance of interests through mutually agreed concessions.[17]

A. The GATT Dispute Resolution Process - Its Origins and Overview of Key Themes

The earlier GATT (GATT 1947) contained some institutional provisions, notably various dispute resolution procedures. Those provisions were intended to ensure the efficiency of the tariff-reducing agreements over the non-tariff barriers prior to the establishment of the International Trade Organization[18].

The GATT dispute settlement mechanism is oriented towards negotiation and

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[16] The former ended in 1979 and the latter finally reached an agreement on December 15, 1993. The recent agreement of the Uruguay Round will transform the GATT into the World Trade Organization (WTO) as soon as January 1, 1995 and no later than July 1, 1995. The WTO will be broader than the pre-existing GATT regime, notably by including services and intellectual property, and will have more enforceable dispute settlement; *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, 15 December 1993, MTN/FA [hereinafter *Final Act*]. The *Final Act* was adopted on April 15, 1994 at Marrakesh, Morocco.

[17] R. P. PARKER, *supra* note 14, 85.

[18] J. M. WAINCYMER, *supra* note 14, 45-46 (Appendix); for more information on the International Trade Organization, *supra* note 18.

conciliation. It is not of judicial or arbitral nature. The mechanism relies upon several provisions[19], the most important being Articles XXII - *Consultation* - and XXIII - *Nullification and Impairment*. The former article provides for a first level of consultation on any matter affecting the operation of the General Agreement[20]. Should bilateral consultations fail to produce a satisfactory settlement, either of the concerned parties may seek the conciliatory intervention of the CONTRACTING PARTIES[21].

A second level of consultation is available through Article XXIII[22] in the event

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[19] Notably GATT Articles XIX (safeguards), XXVIII (modification of schedules of concessions), XXV(5) (waivers).

[20] GATT, *supra* note 1, Art. XXII, as amended by *Protocol Amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade*, 10 March 1955, 278 U.N.T.S. 168:

"**Article XXII**

Consultation

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with the respect to any matter affecting the operation off this Agreement.

2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1."

[21] By convention, the individual signatories of the GATT are referred to with lower-case letters - contracting parties - as the collective body of decision makers is referred to with capital letters - CONTRACTING PARTIES; GATT, *supra* note 1, Art. XXV:1, which provides: "Wherever reference is made in this Agreement to the contracting parties acting jointly they are designated as the CONTRACTING PARTIES".

[22] GATT, *supra* note 1, Art. XXIII, as amended by *Protocol Amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade*, *supra* note 20:

"**Article XXIII**

Nullification or Impairment

1. If the contracting party should consider that any benefit accruing to it directly or indirectly under this agreement is being nullified or impaired or that attainment of any objective of the Agreement is being impeded as a result of
   (a) the failure of another contracting party to carry out its obligations under this Agreement, or
   (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
   (c) the existence of any other situation,

that the previous level proves ineffective, or is simply by-passed[23]. Under Article XXIII, the consultation starts with written representations or proposals. If no satisfactory result is reached, then the matter can be referred to the CONTRACTING PARTIES[24] for a third-party dispute settlement procedure.

> While these provisions do allow for a broad range of dispute settlement devices, including third-party adjudication and the imposition (or threat) of sanctions, Articles XXII and XXIII demonstrate a real reluctance to force third-party dispute settlement procedures in GATT matters. Articles XXII and XXIII:1 emphasize negotiation and consultation as the first step in resolving disputes. Article XXIII:2, the real meat of the dispute resolution mechanism, implies a strong preference that third intermediaries issue 'recommendations' rather than 'ruling'. Even if the Contracting Parties do issue a ruling, sanctions will be imposed only if the matter is 'serious enough to justify action'.[25]

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the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposal made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than 60 days after such action is taken to give written notice to the Executive Secretary to the CONTRACTING PARTIES, of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him."

[23] However, the practice developed under the GATT makes use of the first degree of consultation (under Article XXII) a condition for the eligibility to resort to the second degree (under Article XXIII); Olivier LONG, "La place du droit dans le système commercial du GATT", (1993 IV) 182 *Collected Courses of the Hague Academy of International Law* 13, 93.

[24] In the course of time, the Assembly of the CONTRACTING PARTIES has taken the name of GATT Council; Pierre PESCATORE, "The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects", (1993) 10:1 *Journal of International Arbitration* 27, 27.

[25] R. P PARKER, *supra* note 14, 87.

Article XXIII requires the nullification or impairment of a benefit accorded under the GATT to come into force. However, a presumption exists under the practice of GATT that treaty violation in itself has an adverse impact on other contracting parties, which establishes a *prima facie* case of nullification or impairment. A mere violation of the Agreement can thus be sufficient in itself, if not rebutted and sufficiently serious, to warrant an imposition of sanctions[26].

Article XXIII covers complaints originating outside the specific terms of the Agreement itself. Effectively, any measures taken by another contracting party bringing the nullification or impairment of a direct or indirect benefit of the Agreement can give rise to a complaint, whether or not it constitutes a violation of the Agreement[27].

B. The GATT Dispute Resolution Process - Its Evolution

From its beginning, the GATT general mechanism created under Articles XXII and XXIII has been used in the settlement of disputes among contracting parties. While a certain balance between negotiation, conciliation and third-party adjudication was established, no procedural provisions existed regarding the consideration of a complaint.

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[26] *1979 Understanding, infra*, note 29, Annex, para. 5; R. P. PARKER, *supra* note 14, 87.

[27] GATT, *supra* note 1, Art. XXIII (1)(b) and (c), reprinted, *supra* note 22.

The weaknesses of the general mechanism have been progressively corrected over the years by the practice developed under the GATT and the decisions of the CONTRACTING PARTIES[28]. Its evolution reached a critical point in 1979 with the adoption by the CONTRACTING PARTIES of the *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance* [29] and the following *Ministerial Declaration on Dispute Settlement* [30].

The *1979 Understanding* with, in annex, the *Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII, paragraph 2)* essentially codifies the customary practice developed over the years[31]. In the early years, disputes were often settled informally[32]. However, trade issues became more and more complex and frequent recourse to the dispute settlement mechanism was necessary[33]. As the number of contracting parties increased, the settlement of disputes was referred to panels

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[28] In 1966, a special procedure was adopted by the Contracting Parties for the settlement of disputes between developed and developing contracting parties; B.I.S.D. 14S/18. This special procedure was confirmed in 1979 with the conclusion of the Tokyo Round. Special dispute settlement procedures are also included in the non-tariff barriers codes negotiated in the Tokyo Round.

[29] 28 November 1979, GATT Doc. L/4907, B.I.S.D. 26S/210 (hereinafter *1979 Understanding*).

[30] 28 November 1982, B.I.S.D. 29S/13. The *Ministerial Declaration on Dispute Settlement* is only worthwhile mentioning for the last sentence of paragraph x, which is worded: "It is understood that decisions in this process cannot add to or diminish the rights and obligations provided in the General Agreement." The political intention behind this sentence is obviously "to hamstring the panels in their freedom of interpretation and to prevent any 'dynamic' or 'constructive' development of GATT law."; P. PESCATORE, "The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects", *supra* note 24, 28.

[31] R. P. PARKER, *supra* note 14, 90.

[32] Joseph A. McKINNEY, "Dispute Settlement Under the U.S.-Canada Free Trade Agreement", (1991) 8:4 *Journal of International Arbitration* 89, 91.

[33] *Ibid.*: "More disputes have been dealt with since 1974 than were filed between 1948 and 1974, and more than one-third of all disputes handled by GATT have been filed since 1979."

and procedural rules emerged regarding the decision-making process, notably, panel formation and composition. The system started to operate more like a court[34].

The *1979 Understanding* insists on notification[35], reaffirms the importance of prior consultations[36] and codifies the resolution of dispute through the use of panels[37]. Special attention is given to the formation, composition, operation and function of panels. However, despite the institutionalization of the panel procedure, the use of negotiation and conciliation is encouraged throughout the whole process. A large number of steps are foreseen, and it is always possible for the parties to reach a satisfactory settlement before the panel submits its report to the Council, in which case it is the end of the matter[38].

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[34] R. P. PARKER, *supra* note 14, 88: hearings were held and reports considered in private by the panel, which reviewed its proposed findings with the countries involved in the cases it considered.

[35] *1979 Understanding*, *supra* note 29, para. 2-3.

[36] *Ibid.*, para. 4-6.

[37] *Ibid.*, para. 10-21.

[38] "The terms of 1979 Understanding and the Agreed Description reflect the cumbersomeness of the GATT dispute resolution procedure. The 1979 Understanding calls for at least eight distinct steps between the filling of a complaint and the final action by the Contracting Parties:

(1) consultation between the parties to the dispute;
(2) the use of good offices of other parties or the GATT officers;
(3) a request to establish a working party or a panel, on which request the Contracting Parties will render a decision 'in accordance with standard practice';
(4) composition of a panel by the Director-General of the GATT, subject to the agreement of the parties and the approval of the Contracting Parties;
(5) a hearing or hearings at which interested parties may present their views;
(6) consultation between the panel members and the parties to a dispute with a view to recommending to the Contracting Parties a mutually acceptable solution;
(7) preparation of a panel report and review of the proposed report by interested parties;
(8) consideration of the panel report by the Contracting Parties.

While the 1979 Understanding does propose time limits for most of these steps, it does not do so for all of them, and they are precatory rather than mandatory in that there is no specified sanction for non-compliance."; R. P. PARKER, *supra* note 14, 80.

The tension between political and legal solutions to disputes, i.e., between negotiation and adjudication, is not affected by the *1979 Understanding* [39].

> Today, in spite of the progressive codification of the basic procedures for the settlement of disputes by third party adjudication, consultations and conciliation leading to an amicable settlement through diplomatic negotiations are still preferred by the contracting parties. Thus, the major characteristics of the GATT system of settlement of disputes is the conciliatory character of the procedures. The objective is to redress the contractual balance of rights and obligations between the disputants in particular and among the contracting parties in general.[40]

The GATT system of settlement of trade disputes is generally seen as relatively efficient[41]. Over the years, the system has been improved on a number of occasions. However, most members of the GATT are of the opinion that there is room for more flexibility, efficiency and rapidity.

> The GATT dispute settlement has been criticized for inordinate delays in the appointment of panels and for the time required by these panels to render their decisions. Also, since the system requires consensus, any member of the GATT, including the parties to the dispute, can block the formation of a panel or the adoption of its report. [...] Implementation of panel recommendations has also been a problem, with the burden of oversight generally falling to the aggrieved party.[42]

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[39] *Ibid.*, 90.

[40] Jean-Gabriel CASTEL, "The Uruguay Round and the Improvements to the GATT Dispute Settlement Rules and Procedures", (1989) 38 *International and Comparative Law Quarterly* 834, 838-839.

[41] *Ibid.*, 834; J.-G. CASTEL, A. L. C. de MESTRAL and W. C. GRAHAM, *The Canadian Law and Practice of International Trade: With Particular Emphasis on Export and Import of Goods and Services*, Toronto, Emond Montgomery Publications, 1991, p. 450.

[42] J. A. McKINNEY, *supra* note 32, 91.

The principal criticism is that the GATT system provides too many opportunities for a party to a dispute to cause delay in the dispute settlement process[43]. The cause of this problem lies largely with the voting procedure in the GATT Council[44]. The practice of the GATT is that CONTRACTING PARTIES decide on the basis of consensus[45]. A proposal will be accepted unless one or more contracting parties specifically object to its acceptance[46]. Therefore, the losing party to the dispute can block the adoption of the panel report by refusing to join in a consensus decision to accept.

> According to customary practice, the decision of the Council is taken by consensus. Consensus comes close to unanimity or mutual agreement; but it is not simply unanimity. It is, rather, a state of non-objection, a resigned let-it-go. Objections and misgivings may be freely expressed, but final assent mops up any reservations which may have been previously expressed.[47]

Consequently, at the beginning of the Uruguay Round of Multilateral Trade Negotiations, the members of the GATT appointed a Negotiating Group on Dispute Settlement with the mandate to review the rules and procedures of the

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[43] Ronald A. BRAND, "Competing Philosophies of GATT Dispute Resolution in the Oilseeds Case and the Draft Understanding on Dispute Settlement", (1993) 27:6 *Journal of World Trade* 117, 134.

[44] GATT Council is an equivalent legal denomination for the Assembly of the CONTRACTING PARTIES, for which the Council is empowered to act in accordance with normal GATT practice; *1979 Understanding*, *supra* note 29, 215, Annex, para. 1, footnote 1.

[45] GATT Article XXV(4) provides for decisions by majority vote of the CONTRACTING PARTIES. However, the practice of the GATT Council has been to make decisions only by consensus. This practice has been codified in the *Ministerial Declaration on Dispute Settlement*, *supra* note 30, para. x, and reaffirmed in the *Mid-Term Review Agreement*, *infra* note 50, para. G.3; R. A. BRAND, *supra* note 43, 134-135.

[46] Rosine PLANK, "An Unofficial Description of How A GATT Panel Works and Does Not", (1987) 29 *Swiss Review of International Competition Law* 81, 111.

[47] P. PESCATORE, "The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects", *supra* note 24, 35.

dispute settlement process[48]. The Group identified important issues and submitted a list of improvements to the Trade Negotiations Committee[49].

Meeting at the Ministerial Mid-Term Review in December 1988, the Trade Negotiations Committee recommended a number of improvements to be applied on a trial basis for the remainder of the Round[50]. The *Mid-Term Review Agreement* foresees the maintenance of the existing rules and procedures. It essentially aims to ensure timely and efficient conciliations and settlements of trade disputes[51]. Its main features[52] are the establishment of strict time-limits[53] and the introduction, for the final resolution of disputes, of arbitration as an alternative to panel proceedings[54].

The *Mid-Term Review Agreement* has truly improved the effectiveness of the

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[48] The current Uruguay Round has for negotiating objectives to improve and strengthen the rules and procedures of the dispute settlement process in order to ensure prompt and effective and enforceable resolution of dispute; *Ministerial Declaration on the Uruguay Round*, 20 September 1986, B.I.S.D. 33S/19; J.-G. CASTEL, *supra* note 40, 843.

[49] J.-G. CASTEL, *supra* note 40, 843.

[50] *Improvements to the GATT Dispute Settlement Rules and Procedures*, 12 April 1989, B.I.S.D. 36S/61; MNT.TNC/7 (MIN), 9 December 1988, pp. 26-33 [hereinafter *Mid-Term Review Agreement*].

[51] *Ibid.*, para. A(3).

[52] For an exhaustive description of the improvements of the *Mid-Term Agreement*, see Ernst-Ulrich PETERSMANN, "The Mid-Term Review Agreements of the Uruguay Round and the 1989 Improvements of the GATT Dispute Settlement Procedures", (1989) 32 *German Yearbook of International Law* 280; J.-G. CASTEL, *supra* note 40.

[53] Time-limits for various phases of panel procedure are provided in an effort to have it completed within nine months. However, sufficient flexibility must remain "so as to ensure hight-quality panel reports, while not unduly delaying the panel process"; *Mid-Term Review Agreement, supra* note 50, para. F(f)(1); see also para. G(4):

> "The period from the request under Article XXII:1 or Article XXIII:1 until the Council takes a decision on the panel report shall not, unless agreed by the parties, exceed fifteen months."

[54] *Mid-Term Review Agreement, supra* note 50, para. E.

dispute settlement mechanism. However, the application of its improvements was kept under review until the end of the Round and the Negotiating Group on Dispute Settlement was given the mandate "to continue negotiations with the aim of further improving and strengthening the GATT dispute settlement system taking into account the experience gained in the application of these improvements"[55]. These efforts were rewarded with the conclusion of a new comprehensive Understanding on dispute settlement.

C. The GATT Dispute Resolution Process - The Uruguay Round System

With the conclusion of the Uruguay Round of Multilateral Trade Negotiations, agreement was reached on a number of issues. These have been consolidated in a comprehensive Understanding[56]. The new *Dispute Settlement Understanding* results of a systematic effort at reintegrating the separate dispute settlement systems of the various Tokyo Round Codes into a single system[57]. In this respect, the new Understanding provides a list of "covered agreements"[58].

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[55] *Ibid.*, para. 5. The major issues under negotiation were: (1) the adoption of panel reports, (2) appellate review and (3) implementation of the recommendations of the panel. Binding procedures, such as the automatic adoption of panel reports and implementation were also considered; [Joe GREENWALD], "International Trade Disputes - Non-Judicial Remedies or Judicial Review: What Do You Get? What Do You Give Up?", (1991) 137 *West's Federal Rules Decisions* 613, 617.

[56] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, an integral part of the *Final Act*, *supra* note 16, MTN/FA II-A2 [hereinafter *Dispute Settlement Understanding*].

[57] P. PESCATORE, "The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects", *supra* note 24, 38.

[58] *Dispute Settlement Understanding*, *supra* note 56, para. 1.1 and Appendix 1. However, the *Dispute Settlement Understanding* applicability is subject to the special and additional rules and procedures contained in the covered agreements, and in the case of conflict between the rules and procedures of the former and the latter, the ones of the latter will prevail; *ibid.*, para. 1.2 and Appendix 2.

On the whole, past achievements have been preserved. Moreover, the new *Dispute Settlement Understanding* incorporates the improvements of the *Mid-Term Agreement*. In this regard, the Understanding does not revolutionize the GATT dispute settlement mechanism.

Building on the achievements of the past years, the *Dispute Settlement Understanding* also tends to develop the means of dispute settlement[59]. This is first seen with the creation of a Dispute Settlement Body, which will be in fact "an *alter ego* of the Council"[60] but specialized for dispute settlement purposes[61]. As under previous GATT practice, decisions will be taken by consensus[62]. However, in regard to the potential source of delays that comes with consensus decision-making, an important distinction is worth mentioning. The *Dispute Settlement Understanding* provides for automatic establishment of panels and adoption of panel reports, unless there is a consensus decision of

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[59] As in other fields of international life, codification aims not only at making a rational digest of past experience, but also at developing international law - and GATT is no exception to this; P. PESCATORE, "The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects", *supra* note 24, 38.

[60] *Ibid.*, 38.

[61] The Dispute Settlement Body will have the authority "to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements."; *Dispute Settlement Understanding*, *supra* note 58, para. 2.1.

[62] The text of the new Understanding provide a definition to the concept of consensus decision-making:

> "The Dispute Settlement Body shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the Dispute Settlement Body when the decision is taken, formally objects to the proposed decision.";

ibid., para. 2.4 and footnote 1.

the Dispute Settlement Body not to do so[63]. This concept of "inverted consensus"[64] will facilitate the adoption of panel reports as they will be adopted unless there is a unanimous decision to reject them.

> Thus, the procedure would move from one in which a single party could prevent action to one in which action will occur automatically unless all parties agree otherwise.[65]

The *Dispute Settlement Understanding* goes a step further with the creation of an appellate review of panel reports[66]. Therefore, parties to the dispute will be provided with the opportunity to challenge a panel's findings before the Appellate Body. The adoption of the panel report will be delayed until the completion of the appeal[67]. The parties to the dispute will then be ultimately bound by the decision of the Appellate Body which may uphold, modify or reverse the legal findings and conclusions of the panel[68]. The adoption of the Appellate Report will also be facilitated by the procedure of inverted

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[63] *Ibid.*, para. 6.1 and 16.4. Automatic decisions for the establishment of panel and the adoption of panel reports is not a codification of previous practice despite that the establishment of a panel is considered a right, even thought it may be delayed: there is no case in GATT of a request for a panel being blocked forever; R. A. BRAND, *supra* note 43, 135-136 and footnote 110.

[64] P. PESCATORE, "The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects", *supra* note 24, 40.

[65] R. A. BRAND, *supra* note 43, 135.

[66] A standing Appellate Body will be established to hear appeals from panel cases. Only parties to the disputes will have the right to appeal a panel decision, which appeal will be limited to issues of laws covered in the panel report and legal interpretation developed by the panel. The appellate report will be adopted and unconditionally accepted by the parties unless the Dispute Settlement Body decides by consensus not to adopt the report; *Dispute Settlement Understanding*, *supra* note 56, para. 17.

[67] *Ibid.*, para. 16.4.

[68] *Ibid.*, para. 17.13.

consensus[69].

As to panels, the only notable change is the introduction of an Interim Review Stage. This new procedure comprises two steps. In a first one, the panel will submit the descriptive sections of its draft report to the parties for their comments[70]. In a second one, the panel will issue an interim report in confidence to the parties including both the descriptive sections of the panel's findings and conclusions[71]. If no written comments from the parties are received, the interim report will be considered the final report and will be circulated. If written comments are submitted, the panel will review the precise aspects of its findings, as requested, and the final report will include in its findings a discussion of the arguments made at the interim review stage[72]. At the request of a party, the panel will hold a further meeting with both parties.

> This means not only a loss of time but it will allow an intolerable intervention of the parties into the internal proceedings of the panels and put into jeopardy the independence of panel members. It will unbalance the reports because it is prescribed that the panel must take position on all objections raised by the parties at this late stage.[73]

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[69] *Ibid.*, para. 17.14.

[70] *Ibid.*, para. 15.1.

[71] *Ibid.*, para. 15.2.

[72] *Ibid.*, para. 15.3.

[73] P. PESCATORE, "The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects", *supra* note 24, 41.

The aim of the dispute solution mechanism is to secure a positive solution to a dispute[74]. In the search of this solution, the new Understanding stresses the primary importance of conciliation: is clearly to be preferred a mutually acceptable solution to both parties. In the event of this impossibility, the *Dispute Settlement Understanding* retains the traditional order of preference in determining the appropriate remedy[75]. Therefore, the first objective of a panel's recommendations will usually be to secure the withdrawal of the inconsistent measure[76]. If the implementation of the panel report is impracticable within a reasonable period of time[77], an alternative will be the resort to compensation, on a voluntary basis and in consistency with the covered agreements[78]. If there is no satisfactory agreement to compensation, the Dispute Settlement Body is to authorize, as a last resort remedy, the suspension of concessions or other obligations equivalent to the level of nullification or impairment[79]. Both compensation and the suspension of concessions are temporary measures to be applied until such time as the recommendations and the rulings of the panel report are implemented by full

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[74] *Dispute Settlement Understanding, supra* note 58, para. 3.7.

[75] R. A. BRAND, *supra* note 43, 138.

[76] *Dispute Settlement Understanding, supra* note 58, paras. 3.7 and 19.

[77] Prompt compliance with the recommendations and rulings of the panel report is essential. If immediate compliance is impracticable, a reasonable period of time in which to do so may be either the time proposed by the member concerned, the time mutually agreed by the parties to the dispute, or the time determined through binding arbitration in the absence of an agreement; *ibid.*, paras. 21.1 and 21.3.

[78] *Ibid.*, paras. 3.7 and 22.1.

[79] *Ibid.*, paras. 3.7, 22.2, 22.4 and 22.6.

compliance[80].

A section called 'Strengthening of the Multilateral System' is introduced. Accordingly, the Members shall have recourse to, and abide by, the rules and procedures of the *Dispute Settlement Understanding* whenever they seek a redress under the covered agreements[81]. Moreover, the new Understanding requires exclusive recourse to the GATT system for the settlement of trade dispute[82]. The resort to unilateral retaliation is also exclusively conditioned[83]. The choice of GATT as the sole forum for the settlement of dispute can be justified by the more legalistic nature of the new system. The fear of inaction should no longer exist with the introduction of automatic decisions and tighter time-limits, and the need for the availability of unilateral measures is reduced with the "substantially increased likelihood that sanctions authorization will come from the GATT itself"[84].

The *Dispute Settlement Understanding* creates an express difference in

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[80] *Ibid.*, paras. 3.7 and 22.8.

[81] A seeking of a redress results either from a violation of obligations, a nullification or impairment of benefits, or an impediment to the attainment of any objective under the covered agreements; *ibid.*, para. 23.1.

[82] *Ibid.*, para. 23.2(a).

[83] *Ibid.*, para. 23.2(c).

[84] R. A. BRAND, *supra* note 43, 138.

remedies applicable to violation and non-violation complaints[85]. The former result from GATT Article XXIII:1(a)[86] and the latter from either GATT Articles XXIII:1(b)[87] and (c)[88]. Upon determination by the panel that the matter under consideration constitutes a non-violation complaint, the procedures of the new Understanding would apply subject to the prescribe modifications[89].

In the case of a non-violation complaint of the type described in Article XXIII:1(b)[90], the most significant alteration in available remedies consist in the non-obligation to withdraw the offending measure[91]. As for the availability of retaliation, the language of the new Understanding is ambiguous[92].

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[85] Prior to the new Understanding, the distinction between violation and non-violation complaints had only limited significance since there was no express difference in remedies applicable; *ibid.*, 139.

[86] Nullification or impairment as the result of "the failure of another contracting party to carry out its obligation under this Agreement"; GATT, *supra* note 1, Art. XXIII, reprinted, *supra* note 22.

[87] Nullification or impairment as the result of "the application by another contracting party of any measure, whether or not it conflicts with the provision of this Agreement"; *ibid.*

[88] Nullification or impairment as the result of "the existence of any other situation"; *ibid.*

[89] *Dispute Settlement Understanding*, *supra* note 56, paras. 26.1 and 26.2.

[90] The opinion that the concept of non-violation complaints is both a useless and dangerous construction has been expressed:

> "It flows from a basic misunderstanding of the system of dispute settlement in GATT. And it is dangerous for the effects of GATT because it creates an easy escape from the obligations imposed by the General Agreement. In my opinion this part of the Draft Understanding should be deleted and the matter should be left to the speculation of professors fond of legal paradoxes.";

P. PESCATORE, "The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects", *supra* note 24, 41.

[91] Instead, the recommendation will consist of a mutually satisfactory adjustment, of which compensation may be part, as final settlement of the dispute; *Dispute Settlement Understanding*, *supra* note 56, paras. 26.1(b) and (d).

[92] An author has expressed the opinion that two possible and very different positions can be deduced from the language of the new Understanding: resort to retaliation is precluded due to the failure to expressly include it in the paragraph or, to the contrary, it is authorized under the normal procedures of the new Understanding; R. A. BRAND, *supra* note 43, 140.

In the case of a non-violation complaint of the type described in Article XXIII:1(c), the procedures of the new Understanding apply "only up to and including the point in the proceedings where the panel report has been issued to the Members[93]. As for the adoption, surveillance and implementation of the recommendations and findings, the *Mid-Term Agreement* [94] takes over.

Recent tendencies in dispute resolution in international trade lean toward more adjudicative, binding and enforceable dispute settlement mechanisms[95]. With automatic establishment of panels and adoption of panel reports, and their corollary, the appellate review, in addition to tighter time-limits, the Uruguay Round *Dispute Settlement Understanding* is an accurate example of these tendencies. "The risk of inaction that has been a widely criticized characteristic of GATT dispute settlement should no longer exist."[96] The new Understanding sets place in the continuing maturation of the GATT dispute settlement mechanism toward a more legalistic, rule-based system.

On the other hand, the new Understanding is faithful to its origins.

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[93] *Dispute Settlement Understanding, supra* note 56, para. 26.2.

[94] *Supra* note 50.

[95] The entry into force of the *Free Trade Agreement Between Canada and the United States of America* (FTA) on January 1, 1989, and of the *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America* (NAFTA) on January 1, 1994, and their respective dispute resolution mechanisms are, are acute examples of these tendencies.

[96] R. A. BRAND, *supra* note 43, 137.

Consultation, negotiation and conciliation are emphasized over third-party adjudication as the primary means of dispute settlement. Even after the dispute has been referred to panel review, the opportunity to settle any matter through negotiation remains at each stage of the process. The introduction of the Interim Review Stage is the most visible demonstration of the "tendency of governments to regain control of the system at all stages"[97]. These two antagonistic tendencies has inspired "not only a strengthening of dispute settlement but also a veiled return from genuine dispute settlement to mere conciliation"[98].

The credibility of the GATT dispute settlement system should be strengthened with the Uruguay Round improvements, but the creation of a "truly adjudicative and legalistic system of [trade] disputes administered by a permanent international judicial or quasi-judicial body"[99] will be for future negotiations.

In this respect, the *Final Act* [100] of the Uruguay Round foresees the full review of the dispute settlement rules and procedures, as set out in the new Understanding, within four years of its entry into force. Following the

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[97] P. PESCATORE, "The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects", *supra* note 24, 39.

[98] *Ibid.*

[99] J.-G. CASTEL, A. L. C. de MESTRAL and W. C. GRAHAM, *supra* note 41, p. 484.

[100] *Supra* note 16.

completion of the review, a decision will be taken on whether to continue, modify or terminate the Uruguay Round dispute settlement system[101].

D. The GATT Dispute Settlement Process - Its Present Situation

The members of the Trade Negotiations Committee of the Uruguay Round Multilateral Trade Negotiations have agreed that the results of the Round should enter into force as earlier as possible and no later than July 1, 1995[102]. Until then, it was agreed that the rules and procedures of the former GATT dispute resolution process will continue to be applied[103]. Moreover, the CONTRACTING PARTIES have been invited to keep the improvements of the *Mid-Term Review Agreement* [104] in effect until the entry into force of the *Dispute Settlement Understanding* [105]. In this respect, the objectives of GATT panel reports and their legal value are essential to appreciate their authority, in addition to be characteristic of the present situation the GATT

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[101] *Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, an integral part of the *Final Act, supra* note 16, MTN/FA III-9.

[102] *Final Act, supra* note 16, MTN/FA I, para. 3.

[103] *Dispute Settlement Understanding, supra* note 56, para. 3.11; *Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, supra* note 101:

> "The Ministers,
> *Agree* that existing rules and procedures of the GATT 1947 in the field of dispute settlement shall remain in effect until the date of entry into force of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* under the Multilateral Trade Organization. It is further agreed that in respect of disputes for which the request for consultation was made before the date of entry into force of the said Understanding, the relevant Councils or Committees shall remain in operation for the purpose of dealing with those disputes."

[104] *Supra* note 50. The improvements of the *Mid-Term Review Agreement* were being applied on a trial basis until the end of the Uruguay Round.

[105] *Decision on Improvements to the GATT Dispute Settlement Rules and Procedures*, an integral part of the *Final Act, supra* note 16, MTN/FA III-10.

dispute settlement mechanism[106].

(i) The Objectives of Panel Reports

In the GATT system, resort to panel review is possible only after tangible attempts to negotiate the differences have failed. Negotiations are possible, even after the dispute has been referred to panel review. Panels of experts are, primarily, impartial advisers. Their task consists in providing the parties with findings of fact, determination on any inconsistency with the agreement and recommendations, if any[107].

As a matter of fact, panel reports have as primary objective not to resolve the dispute on their own authority, but to gain approval of the GATT Council for the reasoned model of solution presented[108].

> Unlike judgements, panel reports are persuasive, not decisive documents. Their objective is to convey the opinion of the Council, not to decide directly the issue, and this influences deeply the style and the choice of arguments. Panels do their best to avoid controversial issues and try to present their arguments as being the expression of the obvious.[109]

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[106] For a description of 'When and How Panels Are Constituted' and 'How Panels Work in Practice' under the present GATT dispute settlement mechanism, see P. PESCATORE, "The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects", *supra* note 24, 29-34.

[107] *Mid-Term Agreement, supra* note 50, para. F(b)(1), Standard Terms of Reference; *1979 Understanding, supra* note 29, para. 16 and Annex, para. 6(i).

[108] Pierre PESCATORE, "Drafting and Analyzing Decisions on Dispute Settlement", in Pierre PESCATORE, William J. DAVEY and Andreas F. LOWENFELD, *Handbook of GATT Dispute Settlement*, Ardsley-on-Hudson (N.Y.), Transnational Juris Publications, 1991-, p. 16 (Part Two).

[109] P. PESCATORE, "The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects", *supra* note 24, 35.

(ii) The Legal Value of Panel Reports

Panels are created ad-hoc by the CONTRACTING PARTIES and their reports acquire legal authority only if they have been approved by the GATT Council[110]. In this respect, the consensus decision-making prevailing in the Council brings its share of uncertainties[111]. The GATT Council may decide to adopt the panel report as it is, or "complement its decision with its own understandings, but these understandings are then submitted also to the rule of consensus"[112].

Reports that have not been adopted by the Council have no legal authority whatsoever[113]. Non-adopted reports are not published in the official GATT series, Basic Instruments and Selective Documents (B.I.S.D.), and thus remain inaccessible to the general reader. It is therefore bad legal practice to make any reference to unpublished GATT reports without a clear warning of the legal value of these reports[114].

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[110] Once approved, Panel reports draw their full effect in regard to the parties to the dispute according to the action suggested by the panel, as seen in the light of the panel's findings; *ibid.*, 36.

[111] The *Mid-Term Review Agreement*, *supra* note 50, reaffirmed the right of the parties to a dispute to participate fully in the consideration of the panel report by the Council, and the practice of adopting panel reports by consensus, therefore blocking the adoption of a panel report is still possible; *ibid.*, para. G.

[112] P. PESCATORE, "The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects", *supra* note 24, 35.

[113] *Ibid.*, 36. The author John H. Jackson is more subtle regarding the effect of unadopted reports:

> [...] the unadopted report is in no way a 'decision' of the Contracting Parties, but it may have some influence because it is well reasoned and the panellists have a hight reputation. Thus, even such a panel report could conceivably be part of the overall practice of the GAT, which could be used at some future time in interpreting the GATT. This would be particularly so when, after time elapsed, it appeared that most or all Contracting Parties had accepted the implications of the panel report";

John H. JACKSON, *Restructuring the GATT System*, New-York, Royal Institute of International Affairs, 1990, p. 68.

[114] P. PESCATORE, "The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects", *supra* note 24, 38.

Panel decisions are essentially based on legal arguments[115]. The various GATT agreements[116] and decisions of the CONTRACTING PARTIES[117] are used as primary authorities[118]. The established practice[119] of the GATT is also recognised as having an important role.

> The principles of treaty interpretation include 'ordinary meaning' of the words, other agreement or instrument influencing the treaty which were accepted by the parties to the treaty at the time it was concluded, subsequent agreement between the parties to the treaty, 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its

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[115] Presumptions are used by the various GATT panels, most especially as regards issues of fact; Edmond McGOVERN, "Dispute Settlement in the GATT - Adjudication or Negotiation?", in Meinhard HILF, Francis G. JACOBS and Ernst-Ulrich PETERSMANN (eds.), *The European Community and GATT*, v. 4, Series «Studies in Transnational Economic Law», Deventer, Kluwer, 1986, p. 79. For an example of presumption used by GATT panels, see *infra* note 119.

[116] These include the General Agreement with its Annex I 'Notes and Supplementary Provisions' - a series of agreed interpretations which are considered definitive -, and various subsequent formal agreements which purport to interpret the GATT, such as the Tokyo Round Standards and Subsidies Codes; *Agreement on Technical Barriers to Trade*, 12 April 1979, B.I.S.D. 26S/8 (hereinafter *Standards Code*); *Agreement on the Interpretation and Application of Articles VI, XVI and XXIII*, 12 April 1979, B.I.S.D. 26S/56 (hereinafter *Subsidies Code*).

[117] These include GATT interpretations made in a short statement by the Chairman of the Contracting Parties:

> "Sometimes these are made in the context of a 'consensus view' of the CPs, without objection from any CP, sometimes as a statement of the Chair without any explicit connection to an agreement or a 'vote' (without objection) of the CPs. In all cases, however, it is safe to assume that the text has been carefully negotiated in advance and deemed acceptable to the interested CPs.";

J. H. JACKSON, *Restructuring the GATT System*, *supra* note 113, p. 57. The General Agreement does not grant to the CONTRACTING PARTIES the explicit power to make a legal and binding interpretation of GATT, such as some charters of international organizations do. However, the Contracting Parties are given the authority for "joint action [...] with a view to facilitating the operation and furthering the objectives of this Agreement."; GATT, *supra* note 1, Art. XXV:1. With the general language of Article XXV:1, interpreted in the light of the principles of international law as codified in the *Vienna Convention on the Law of Treaties*, *infra* note 119:

> "[...] it would seem likely that at least where there is no formal dissent by any GATT CP, various 'practice' actions of the GATT would be deemed very definitive interpretations. In the case where the majority of CPs agree, but without unanimity, there is still some ambiguity. It is possible that the practice of GATT in its four decades of existence has itself established an interpretation of the Article XXV powers to include the power to interpret.";

J. H. JACKSON, *Restructuring the GATT System*, *supra* note 113, p. 58.

[118] Other authorities, such as arguments appealing to historical, cultural and socio-economic considerations are irrelevant because panels are required to base their decisions on GATT provisions and these do no provide for such justifications; *Japanese Measure on Imports of Leather (U.S. v. Japan)* (1984), GATT Doc. L/5623, B.I.S.D. 31S/94, para. 44; E. McGOVERN, "Dispute Settlement in the GATT - Adjudication or Negotiation?", *supra* note 115, p. 79; see also the standard terms of reference, *Mid-Term Review Agreement*, *supra* note 50, para. F(b)(1).

[119] To have interpretative value, the practice developed in the application of the treaty must be sufficient to 'establish the agreement of the parties'; *Vienna Convention on the Law of Treaties*, 23 May 1969, UN Doc.A/CONF.39/27, reprinted in 8 *International Legal Material* 679, art. 31(3)(b); for example, the presumption of nullification and impairment was developed by GATT panels in regard to the application of GATT Article XXIII: when the complainant party establishes a clear infringement of the provisions of the General Agreement, "the action would, *prima facie*, constitute a case of nullification or impairment and would *ipso facto* require consideration of whether the circumstances are serious enough to justify the authorization of suspension of concessions or obligations"; *Uruguayan Recourse to Article XXIII (Uruguay v. Austria et al.)* (1982), GATT Doc. L/1923, B.I.S.D. 11S/95, para. 15. This practice of the GATT has now been codified and formally adopted by the CONTRACTING PARTIES; *1979 Understanding*, *supra* note 29, para. 5.

> interpretation', and other relevant rules of international law. In some circumstances the preparatory work can also be relevant. Each of these principles of interpretation plays a role in the GATT and associated agreements.[120]

Strictly speaking there is no such thing as a 'GATT jurisprudence'. In theory, the notion of binding precedent does not exist in international law. Therefore, with no precedential value, final reports are not binding on subsequent GATT panels[121]. However, in practice, "it is quite common for panels to cite earlier panel reports in support of a particular interpretation of a GATT rule"[122]. Adopted reports are published and, as panellists read them, goods ideas are bound to be retained[123]. "Thus the report may have 'persuasive effect'."[124] The need for certainty and the avoidance of repetitious litigation can be named as reasons for this practice.

> Panel reports have no formalized precedential value. Yet, there can be no doubt that in practice they do to some extent serve as

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[120] J. H. JACKSON, *Restructuring the GATT System*, *supra* note 113, p. 56; *Vienna Convention on the Law of Treaties*, *supra* note 119, art. 31-32. The doctrine of treaty interpretation was codified by the Vienna Convention, and this instrument must be regarded by GATT panels; E. McGOVERN, "Dispute Settlement in the GATT - Adjudication or Negotiation?", *supra* note 115, p. 80. It is interesting to note that, under the *Free Trade Agreement Between Canada and the United States of America* (FTA), panel reports have made on various occasions express references to the Vienna Convention; *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring* (16 October 1989), CDA-89-1807-01 (Ch. 18 Panel); *In the Matter of the Interpretation of and Canada's Compliance with Article 701.3 with Respect to Durum Wheat Sales* (8 February 1993), CDA-92-1807-01 (Ch. 18 Panel); *In the Matter of the Puerto Rico Regulations on the Import, Distribution and Sale of U.H.T. Milk from Québec* (3 June 1993), USA-93-1807-01 (Ch. 18 Panel).

[121] J. H. JACKSON, *Restructuring the GATT System*, *supra* note 113, p. 57; Christopher A. CHERRY, "Environmental Regulation Within the GATT Regime: A New Definition of 'Product.'", (1993) 40 *UCLA Law Review* 1061, 1067.

[122] E. McGOVERN, "Dispute Settlement in the GATT - Adjudication or Negotiation?", *supra* note 115, 78.

[123] "Yet in practice, the diplomats and officials who participate in the GATT system are very much influenced by precedent, and often mention precedents in some detail in GATT deliberations, as well as in formal dispute settlement panel 'findings'.";
J. H. JACKSON, *Restructuring the GATT System*, *supra* note 113, p. 57.

[124] *Ibid.*, p. 68.

> precedents. In quite a number of panel proceedings, reference is made to the findings of previous panels. [...] Panels themselves sometimes refer to previous reports, especially the more recently established panels. [Footnotes omitted][125]

Once adopted by consensus decisions of the GATT Council and subsequently confirmed by the annual plenary conferences of the CONTRACTING PARTIES, GATT panel rulings become part of GATT treaty practice. To that extend, panel rulings can be relied upon for interpreting the Agreement[126]. Consequently, in addition to its function of dispute settlement, the GATT dispute settlement system contributes, through agreed interpretations, to the development of GATT law[127].

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[125] Jan KLABBERS, "Jurisprudence in International Trade Law: Article XX of GATT", (1992) 26:2 *Journal of World Trade* 63, 65.

[126] J. H. JACKSON, *Restructuring the GATT System*, *supra* note 113, p. 68.

[127] E.-U. PETERSMANN, "International Trade Law and International Environmental Law: Prevention and Settlement of International Environmental Disputes in GATT", *supra* note 2, 53:

> "GATT dispute settlement panels have, in conformity with the general rules of interpretation of international treaties as laid down in Article 31 of the 1969 Vienna Convention on the Law of Treaties, consistently construed GATT rules in conformity with previous GATT dispute settlement rulings, even though GATT law does not know a doctrine of legally binding precedents (in the sense of *stare decisis*) and some GATT panel rulings have explicitly departed from prior panel arguments. Many of the clarifications of GATT rules, agreed upon in GATT dispute settlement rulings, have subsequently been formally included into the 1979 Tokyo Round Agreements and into GATT "secondary law" (such as GATT decisions on improvements of GATT dispute settlement procedures) so as to ensure a uniform multilateral application of agreed interpretations. [Footnotes omitted]"

2. The United States Taxes on Automobiles

The United States taxes on automobiles are aimed primarily at environmental concerns[128]. The U.S. tax on *gas guzzler* automobiles[129], tax on *luxury* automobiles[130] and the *corporate average fuel economy* standards[131] have one thing in common: they all intend to discourage either consumers from buying or manufacturers from producing gas guzzler automobiles by placing respectively a penalizing tax on their sale or a penalizing fine on their production.

The *Motor Vehicle Information and Cost Savings Act* [132], as amended by the 1975 *Energy Policy and Conservation Act* [133], sets mandatory fuel economy standards for automobiles manufactured in or imported into the United States.

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[128] Alan Charles RAUL and Paul E. HAGEN, "The convergence of trade and environmental law", (1993) 8:2 *Natural Resources & Environment* 3, 6.

[129] *Gas Guzzler Tax*, 26 U.S.C. 4064, reprinted in Annex A. The *gas guzzler tax* was first effective with respect to 1980 and later model automobiles; 1978, Pub. L. No. 95-618, Sec. 201(a). See Chapter 2 - B, below, for a description of the *gas guzzler tax*.

[130] *Luxury Passenger Automobiles*, 26 U.S.C. 4001-4003, reprinted partly in Annex A (hereinafter *luxury tax*). The *luxury tax* first when into effect on 1/1/1991; 1990, Pub. L. No. 101-508, Sec. 11221(a). See Chapter 2 - C, below, for a description of the *luxury tax*.

[131] *Motor Vehicle Information and Cost Savings Act*, 1972, Pub. L. No. 92-513, 86 Stat. 947, codified as amended at 15 U.S.C. 1901, *Improving Automotive Efficiency*, 2001-2012, reprinted partly in Annex C (hereinafter *CAFE payment*). The *CAFE payment* was first effective with respect to 1978 and later model year; Act Oct. 10, 1980, Pub. L. No. 96-425, 94 Stat. 1821, which amended the *CAFE payment* sections, effective on the date of its enactment on 10/1/1980, provided that the 1980 amendments "shall apply to the 3 model years preceding the model year during which this Act is enacted", i.e. the 1981 model year; Act Oct. 10, 1980, Pub. L. No. 96-425, @ 6(d), 94 Stat. 1828. The purpose of the 1980 amendments is:

> "(1) to amend certain Federal automobile fuel economy requirements to improve fuel efficiency, and thereby facilitate conservation of petroleum and reduce petroleum imports, and
> (2) to encourage full employment in the domestic automobile manufacturing sector.";

Act Oct. 10, 1980, Pub. L. No. 96-425, @ 2, 94 Stat. 1821. See Chapter 2 - D, below, for a description of the *CAFE payment*.

[132] *Ibid.*

[133] 1975, Pub. L. No. 94-163, 89 Stat. 901.

These standards were adopted as part of the U.S. national energy plan. Their purpose is to improve fuel efficiency of automobiles and therefore, facilitate conservation of petroleum by decreasing fuel consumption.

The fuel economy standards are applied to the average performance of a manufacturer's entire fleet of automobiles produced. Those manufacturers which fail to meet the required average fuel economy standards are subject to a civil penalty, the *CAFE payment*. This approach allows a manufacturer to produce some gas guzzling automobiles as long as its feet average is balanced by automobiles that exceed the applicable standard.

> The average fuel economy standard is weighted in such a manner that a manufacturer which produces a certain number of fuel-inefficient vehicles must produce a larger number of comparably more fuel-efficient vehicles to offset the "gas-guzzlers". The calculation is made on the assumption that all vehicles travel the same number of miles and, thus, given a certain fuel consumption standard, a larger number of fuel-efficient cars are needed to outweigh the consumption of the more fuel-inefficient cars. For example, assume that a manufacturer produced 10 automobiles rated at 20 mpg during a year when the mandated standard was 25 mpg. To meet the 25 mpg standard for its fleet this manufacturer must produce 15 automobiles having a fuel economy of 30 mpg.[134]

The *gas guzzler tax* was intended as an added incentive to force the automobile industry to alter their design plans to meet fleet-wide the fuel efficiency

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[134] UNITED STATES SENATE - COMMITTEE ON FINANCE, *The Fuel Efficiency Incentive Tax Proposal: Its Impact Upon the Future of the U.S. Passenger Automobile Industry*, Washington, U.S. Government Printing Office, 1977, p. 38.

standards mandated by the 1975 *Energy Policy and Conservation Act* [135]. Accordingly, the *gas guzzler tax*, effective with respect to 1980 and later model automobiles, imposes a tax on the sale of new gas guzzling automobiles that failed to meet the specific fuel economy standards.

> Under that approach, cars that burned gasoline excessively still could be produced and sold, but the purchaser would have to pay a heavy tax. The more the car violates the mandated standard, the heavier the tax.[136]

The *luxury tax* went into effect in 1991. It is imposed on the sale of luxury automobiles. Not primarily aimed at decreasing fuel consumption, the *luxury tax* is nevertheless considered an environmental tax since it is often imposed on car already subject to the *gas guzzler tax* [137].

A. Recourse to Article XXIII:2 by the European Union (DS31/2)

The European Union alleges that the US taxes on automobiles, i.e. the *CAFE payment* [138], the *gas guzzler tax* [139] and the *luxury tax* [140], are incompatible with GATT Article III:1 and III:2. Bilateral consultations between

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[135] *Supra* note 133; Bob RANKIN, "Gas Guzzler Tax", (1977) 35 *Congressional Quarterly Weekly Report* 2560, 2560.

[136] Bob RANKIN, "Senate Vote Gas Guzzler Ban", (1977) 35 *Congressional Quarterly Weekly Report* 1957, 1960.

[137] Lonnie E. GRIFFITH, Jr. et al. (eds.), "Gas Guzzling Automobiles", 34 *American Jurisprudence 2d*, Federal Taxation (1994) para. 50236.

[138] *Supra* note 131.

[139] *Supra* note 129.

[140] *Supra* note 130.

the European Union and the United States have failed to resolve this matter. Thus, the Union has requested the establishment of a panel. At its 12-13 May 1993 meeting[141], the Council agreed to establish a panel with the following standard terms of reference :

> to examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by the European Economic Community in document DS31/2 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2.

The European Union arguments[142], dated March 11, 1993, are as follow:

> The United States maintains three taxes or charges which are levied on the sales of cars in the United States and which have in common a particular, more than proportional, incidence on the sale of imported cars.
>
> These three taxes or charges are:
>
> (a) The Corporate Average Fuel [Economy] (CAFE) payment;
> (b) The so-called gas-guzzler tax;
> (c) The luxury tax, as it applies to cars.
>
> The so-called CAFE payment is a civil penalty payment which must be paid by a car manufacturer or importer, if the sales-weighted average of all model type fuel economies of cars produced by the manufacturer fall below a certain level (presently 27.7 mpg).

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[141] The Council had considered this matter at its meeting in March, and had agreed to revert to it at the meeting in May. The government of Sweden supports the Union's request, and reserved its right to appear before the panel as a third party. The governments of Japan and Australia reserved theirs rights as interested third parties and to make a submission to the panel.

[142] *United States - Taxes on Automobiles: Request for the Establishment of a Panel under Article XXIII:2 by the European Economic Community*, GATT Doc. DS31/2, 12 March 1993.

It is obvious that, since CAFE is calculated over full car production of a manufacturer, it favours large, integrated, full-line car makers and works to the disadvantage of limited-line car producers, who concentrate on the top of the car market, such as many of the European car makers which export to the US. Furthermore, the method of calculating CAFE for domestic and foreign fleets may also permit discrimination.

There is discrimination between imported products and like domestic products. Not only are individual imported cars treated differently from domestic cars, but a disproportionate amount of CAFE is paid by foreign manufacturers of cars. This is contrary to Article III:2 of the GATT. In addition it is clear that such internal charges are contrary to Article III:2, combine with paragraph 1, since they also serve to afford protection to domestic production of directly competitive or substitutable products.

The so-called gas-guzzler tax is an excise tax levied on the sale or use by the manufacturer or the importer of automobiles of a model type that does not meet fuel economy standards set by EPA. The threshold fuel economy standard presently is 22.5 mpg. The tax is $1,000 for model types with a fuel economy between 21.5 and 22.5 mpg, and goes progressively up to $7,700 for model types with a fuel economy of below 12.5 mpg.

The fuel economy cut-off point of 22.5 mpg is not founded on any reasonable or objective criterion and leads to discrimination against imported cars.

The objective of Article III of the GATT is to ensure equal treatment of imported products with domestic products, after clearing customs.

The incidence of the tax falls overwhelmingly on imported vehicles. Since Article III is concerned not with non-discriminatory intentions, but with discriminatory affects resulting from internal taxes and charges, the gas-guzzler tax is clearly contrary to Article III:2 and Article III:1 of the GATT.

The luxury tax is an excise tax imposed on the retail sale of certain so-called luxury items, boats, furs, jewelry and cars exceeding a certain price.

Insofar as it concerns automobiles, the luxury tax has a disproportionately higher incidence on imported cars than on Us-produced cars: in 1990, its year of introduction, over 80 per cent of automobiles subject to the tax would have been imported and almost 50 per cent of all cars imported from Europe would have been struck by it. The best calculations available indicate that in 1991 an even higher percentage of the tax was paid on imported vehicles.

The cut-off point of $30,000 for the imposition of the tax is capricious and the distinction between luxury and non-luxury cars is irrelevant for GATT purposes. The goal of Article III of the GATT is to ensure equal treatment of imported products with like domestic products, after clearing customs. For customs purpose all passenger cars are treated equally by the US (2.5 per cent duty); the distinction between luxury and "ordinary" cars is not used. Cars above and below $30,000 are "like" products and, in any case, are in competition with each other. If a tax of this kind falls disproportionately on imported products, it means that there is discrimination between imported and like domestic products, or, at the least, protection of domestic production of competitive products, and hence, an infringement of Article III:" and/or Article III:1 of the GATT.

Very high proportions of gas-guzzler taxes, luxury taxes and CAFE payments fall on imported cars. In addition, the luxury tax is levied on the negotiated price of the car which often already includes the gas-guzzler tax and the producers' allowance for CAFE. Therefore, the three taxes individually and collectively have a discriminatory incidence on car imports.

The European Community has held consultations under Article XXIII:1 with the United States on the above-mentioned taxes and charges on 15 July 1992 and on 20 September 1992. Information has been exchanged between the two parties, but on the fundamental legal questions no agreement between the parties proved possible. The Community therefore requests the CONTRACTING PARTIES to establish a panel under Article XXIII:2 of the GATT in order to consider the question whether the US gas-guzzler and luxury taxes and the Corporate Fuel Average [Economy] payments and their incidence on imported cars, in particular cars imported from the European Community, are contrary to Articles III:1 and III:2 of the GATT, severally and

jointly.[143]

B. The *Gas Guzzler Tax*

The *gas guzzler tax* [144] is a manufacturers excise tax[145]. The tax is imposed on the sale by the manufacturer[146] of each automobile whose fuel economy fails to meet the specified fuel economy standard of the automobile's model type. The amount of the tax depends on the fuel economy of the automobile sold.

The legislative text of the gas guzzler tax is found in Section 4064 of the Internal Revenue Code. Section 4064(a) reads:

> There is hereby imposed on the sale by the manufacturer of each automobile a tax determined in accordance with the following table:
>
> | If the fuel economy of the model type in which the automobile falls is: | The tax is: |
> |---|---|
> | At least 22.5 | 0 |
> | At least 21.5 but less than 22.5 | $1,000 |
> | At least 20.5 but less than 21.5 | 1,300 |
> | At least 19.5 but less than 20.5 | 1,700 |
> | At least 18.5 but less than 19.5 | 2,100 |
> | At least 17.5 but less than 18.5 | 2,600 |
> | At least 16.5 but less than 17.5 | 3,000 |

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[143] *Ibid.*, pp. 1-3.

[144] *Supra* note 129.

[145] Manufacturers excise taxes are imposed on manufacturers, producers, and importers of various items; 26 U.S.C. 4064 et seq. (Internal Revenue Code, Chapter 32 - Manufacturers Excise Taxes).

[146] A producer, an importer or the one who lengthens an existing automobile is a manufacturer; 26 U.S.C. 4064(b)(5), reprinted in Annex A.

At least 15.5 but less than 16.5	3,700
At least 14.5 but less than 15.5	4,500
At least 13.5 but less than 14.5	5,400
At least 12.5 but less than 13.5	6,400
Less than 12.5	7,700

The Environmental Protection Agency (EPA) Administrator measures the fuel economy[147] of the different 'model type' of automobiles[148]. If the fuel economy of the model type in which the automobile falls is under 22.5 mpg, a gas guzzler tax is imposed on the manufacturer for the sale of the automobile.

The tax is $1000 for model types with a fuel economy of between 21,5 and 22,5 mpg. The maximum amount is $7 700 for model types with a fuel economy less than 12,5 mpg. For example, an automobile with a fuel economy of 21,3 miles per gallon, such as the 1993 BMW 535i, is subject to a tax of $1 300 and an automobile with a fuel economy of 14,5 miles per gallon, such as the 1993 Mercedes Benz 600SEL, is subject to a $4 500 tax when sold by the manufacturer[149].

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[147] The term "fuel economy" means the average number of miles travelled by an automobile per gallon of gasoline (or equivalent amount of other fuel) consumed; 26 U.S.C. 4064(b)(2), reprinted in Annex A.

[148] The testing and calculation procedures for the determination of fuel economy shall be or yield comparable results to the procedures utilized by the EPA Administrator for model year 1975 (weighted 55 percent urban cycle, and 45 percent highway cycle): 26 U.S.C. 4064(c), reprinted in Annex A.

[149] *1993 Fuel Economy Guide Gas Guzzler*, provided by U.S. Internal Revenue Service, 26 May 1993, reprinted in Annex D.

C. The *Luxury Tax*

The *luxury tax* [150] is a retail excise tax[151]. The tax is imposed on the first retail sale of passenger vehicles that sell for more than $30 000, as indexed for inflation. The retail excise tax on boats, planes, jewelry and furs was repealed[152], retroactively effective on January 1, 1993[153]. As for automobiles, the *luxury tax* will not apply to any sale or use after December 31, 1999[154].

The tax is equal to 10 percent of the excess of the price over $30 000 on the "first retail sale"[155] of a passenger vehicle[156], such as ordered by Section 4001(a) of the Internal Revenue Code:

> There is hereby imposed on the 1st retail sale of any passenger vehicle a tax equal to 10 percent of the price for which so sold to the extent such price exceeds $ 30,000.

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[150] *Supra* note 130.

[151] Retail excise taxes are imposed on sales of luxury passenger vehicles, as well as on sales of heavy trucks, trailers and special fuels; 26 U.S.C 4001 et seq. (Internal Revenue Code, Chapter 31 - Retail Excise Taxes). The person responsible for collecting the retail excise tax and paying it over is generally the seller at retail.

[152] Pub. L. No. 103-66, Sec. 13161(a), enacted 8/10/93.

[153] Pub. L. No. 103-66, Sec. 13161(c).

[154] 26 U.S.C. 4001(f), reprinted in Annex B.

[155] 26 U.S.C. 4002(a): "[...] the term "first retail sale" means the first sale, for a purpose other than resale, after manufacture, production, or importation."

[156] 26 U.S.C. 4001(b), reprinted in Annex B; a passenger vehicle is any 4-wheeled vehicle which is manufactured primarily for use on public streets, roads, and highways, and which is rated at 6,000 pounds unloaded gross vehicle weight or less. Constitutes also a passenger vehicle a truck or a van that is rated at 6,000 pounds gross vehicle weight or less (rather than unloaded gross vehicle weight), or a limousine without regard to its weight.

The $30 000 threshold is indexed for inflation[157]. There was no increase for 1993, but the threshold is increased to $32 000 for taxable events occurring in 1994[158].

The *luxury tax* does not apply if the passenger vehicle is used exclusively in the active conduct of a trade or business of transporting persons or property for compensation or hire[159]. Additional exemptions from the *luxury tax* exist for passenger vehicles sold to governments and used exclusively in law enforcement, public safety or public work activities[160], or sold to any person for use exclusively in providing emergency medical services[161].

D. The *CAFE Payment*

The *Motor Vehicle Information and Cost Savings Act* [162] contains provisions relating to automotive fuel economy[163]. This section, entitled "Improving

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[157] 26 U.S.C. 4001(e), reprinted in Annex B. The indexation for inflation of the $ 30 000 amount started on 08/10/93; Pub. L. No. 103-66, Sec. 13161(c).

[158] Lonnie E. GRIFFITH, Jr. et al. (eds.), "Retail Excise Tax on Luxury Automobiles before 2000", 34 *American Jurisprudence 2d*, Federal Taxation (1994) para. 50001.

[159] 26 U.S.C. 4001(c), reprinted in Annex B.

[160] 26 U.S.C. 4001(d)(1), reprinted in Annex B.

[161] 26 U.S.C. 4001(d)(2), reprinted in Annex B.

[162] *Supra* note 131, and accompanying text. The *Motor Vehicle Information and Cost Savings Act* "is concerned with providing consumer information as to vehicles and setting standards to reduce the expense of vehicle operation and repair"; Herbert B. CHERMSIDE, "Improving Automotive Efficiency", *American Jurisprudence 2d New Topic Service*, Energy (1980), para. 33.

[163] 15 U.S.C. 2001-2012, reprinted partly in Annex C. The Act provides definitions for a number of terms, including the terms automobile, passenger automobile, fuel economy, average fuel economy standard, manufacturer, manufacture, import, model type, model year; 15 U.S.C. 2001, reprinted in Annex C.

Automotive Efficiency", foresees the creation of a civil penalty payment, called *CAFE payment* [164], imposed upon manufacturers who have failed to comply with the applicable average fuel economy standards.

In respect to passenger automobiles[165], the purpose of the average fuel economy standards[166] is to "increase the fuel economy of passenger automobiles by establishing minimum levels of average fuel economy for those vehicles"[167]. Therefore, when prescribing the average fuel economy standards, the Secretary of Transportation must determine the maximum feasible average fuel economy level for each model year that will result in a steady progress toward meeting the average fuel economy standard of 27.5 mpg[168].

Consequently, the average fuel economy standards applicable to passenger

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[164] *Supra* note 131.

[165] Average fuel economy standards applicable to each manufacturer of automobiles have been established separately for passenger automobiles and for nonpassenger automobiles; 15 U.S.C 2002(a) and (b). With respect to passenger automobiles, specific standards in miles per gallon have been prescribed for the model years 1978 through 1990 and thereafter; *Passenger Automobile Average Fuel Economy Standards*, 49 C.F.R. 531.

[166] 15 U.S.C. 2001:

> (7) "The term "average fuel economy standard" means a performance standard which specifies a minimum level of average fuel economy which is applicable to a manufacturer in a model year."
>
> (12) "The term "model year", with reference to any specific calendar year, means a manufacturer's annual production period (as determined by the EPA Administrator) which includes January 1 of such calendar year. If a manufacturer has no annual production period, the term "model year" means the calendar year."

[167] 49 C.F.R. 531.2.

[168] 15 U.S.C. 2002(a)(3)-(4), 2002(e), reprinted in Annex C; in determining the maximum feasible average fuel economy level, the Secretary considers technological feasibility, economic practicability, the effect of other federal motor vehicle standards on fuel economy and the need of the nation to conserve energy.

automobiles manufactured after model year 1977 range from 18.0 mpg to 27.5 mpg[169]. The specific standards for the model years 1978 to 1990 and thereafter are[170]:

Model year	Average fuel economy standard (miles per gallon)
1978	18.0
1979	19.0
1980	20.0
1981	22.0
1982	24.0
1983	26.0
1984	27.0
1985	27.5
1986	26.0
1987	26.0
1988	26.0
1989	26.5
1990 and thereafter	27.5

Exceptions exist for manufacturers of a limited number of cars. Upon proper application, the Secretary of Transportation may, by rule, exempt a manufacturer of less than 10 000 passenger automobiles from the general average fuel economy standards by the establishment of alternative average

[169] 15 U.S.C. 2002(a), reprinted in Annex C; the Secretary of Transportation can amend the statutory standards of 27.5 mpg for model year 1985 and any subsequent year. However, any amendment which has the effect of increasing an average fuel economy standard to a level in excess of 27.5 mpg or of decreasing a standard to a level below 26 mpg, must be submitted to the Congress; 15 U.S.C. 2002(a)(4), reprinted in Annex C.

[170] 49 C.F.R. 531.5(a).

fuel economy standards for such manufacturer[171].

The average fuel economy of a manufacturer for a given model year is calculated by the Administrator of the Environmental Protection Agency (EPA) according to the prescribed method of calculation:

> Average fuel economy for purposes of section 502(a) and (c) [15 USC @ 2002(a) and (c)] shall be calculated by the EPA Administrator by dividing--
>
> (A) the total number of passenger automobiles manufactured in a given model year by a manufacturer, by
> (B) a sum of terms, each term of which is a fraction created by dividing--
> (i) the number of passenger automobiles of a given model type manufactured by such manufacturer in such model year, by
> (ii) the fuel economy measured for such model type.[172]

Separate calculation of the average fuel economy of a manufacturer is required for domestically manufactured and nondomestically manufactured passenger automobiles[173]. The EPA Administrator separates the total number of

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[171] 15 U.S.C. 2002(c), reprinted in Annex C; the alternative average fuel economy standards are set at a level which the Secretary of Transportation determines is the maximum feasible average fuel economy level for the exempt manufacturer. For the list of the exempt manufacturers and their applicable alternative standards for specified model years, see 49 C.F.R. 531.5(b).

[172] 15 U.S.C. 2003(a)(1), reprinted in Annex C; 15 U.S.C 2001:

> (6) "The term "fuel economy" means the average number of miles travelled by an automobile per gallon of gasoline (or equivalent amount of other fuel) consumed, as determined by the EPA Administrator in accordance with procedures established under section 503(d) [15 USC @ 2003(d)]."
>
> (11) "The term "model type" means a particular class of automobile as determined, by rule, by the EPA Administrator, after consultation and coordination with the Secretary."

[173] 15 U.S.C. 2003(b), reprinted in Annex C.

passenger automobiles manufactured by a manufacturer[174] into the two previously described categories and calculates the average fuel economy of each category. Afterward, each category is treated as if manufactured by a separate manufacturer.

The testing and calculation procedures are established by the EPA Administrator and should be promulgated not less than 12 months prior to the model year to which they apply[175]. A procedure of judicial review of the rules promulgated under the statute is provided to any persons who have been adversely affected by any of these rules[176]. Public disclosure of the fuel economy calculations for each model type must be made[177] and the labelling of the fuel economy of each automobile is required[178].

Each manufacturer must submit a report of whether the manufacturer will comply with the average fuel economy standards and outlining a plan

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[174] A general definition is provided of the term "manufacture", which means to produce or assemble in, or to import into the customs territory of the United States; 15 U.S.C. 2001(9) and (10), reprinted in Annex C. For section 2003 (Calculation of average fuel economy), a specific definition is provided of "automobiles manufactured"; 15 U.S.C. 2003(c):

> "Any reference in this part to automobiles manufactured by a manufacturer shall be deemed--
> (1) to include all automobiles manufactured by persons who control, are controlled by, or are under common control with, such manufacturer; and
> (2) to exclude all automobiles manufactured (within the meaning of paragraph (1)) during a model year by such manufacturer which are exported prior to the expiration of 30 days following the end of such model year."

[175] 15 U.S.C. 2003(d), reprinted in Annex C.

[176] 15 U.S.C. 2004.

[177] 15 U.S.C. 2005(d)(2).

[178] 15 U.S.C. 2006.

describing the steps taken or to be taken in order to comply with such standards[179].

The failure of any manufacturer to comply with the applicable average fuel economy standards constitutes unlawful conduct[180] which makes the manufacturer liable to the United States for a civil penalty[181]. The amount of the penalty is equal to $5,00 for each 1/10 of a mile per gallon by which the average fuel economy of the manufacturer is exceeded by the applicable standard multiplied by the number of passenger automobiles manufactured by such manufacturer during the model year[182].

The amount of any civil penalty assessed against a manufacturer can be reduced by the amount of credit then available to the manufacturer[183]. Moreover, a manufacturer is not considered to have failed to comply with any applicable fuel economy standard if, after taking into account the credits available to the manufacturer, the average fuel economy of the manufacturer

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[179] 15 U.S.C. 2005(a). The Secretary and the EPA Administrator are given broad powers to hold hearings, take testimony, administer oaths, require attendance and testimony of witnesses and the production of written material; 15 U.S.C. 2005(b)(1).

[180] 15 U.S.C. 2007, reprinted in Annex C.

[181] 15 U.S.C. 2008, reprinted in Annex C.

[182] 15 U.S.C. 2008(b)(1)(A), reprinted in Annex C. A similar penalty is provided for failure to meet the standards for nonpassenger automobiles; 15 U.S.C. 2008(b)(1)(B), reprinted in Annex C.

[183] 15 U.S.C. 2008(b)(1)(A), reprinted in Annex C.

results in meeting or exceeding the applicable standard[184].

A manufacturer is entitled to a credit whenever the average fuel economy of the passenger automobiles manufactured by such manufacturer in a particular model year exceeds the applicable standard[185]. The amount of credit to which the manufacturer is entitled is equal to the number of 1/10 of a mile per gallon by which the average fuel economy of the manufacturer exceeds the applicable standard multiplied by the total number of passenger automobiles manufactured during such model year[186]. This credit is available to be taken into account, and may be deducted from the amount of any civil penalty assessed against the manufacturer, for any of the three consecutive model years immediately prior to, or immediately following, the model year in which the credit was earned[187].

Any person who fail to comply with any applicable provisions of the act, or with any applicable standard, rule or order commits an unlawful conduct[188]

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[184] 15 U.S.C. 2007(b), reprinted in Annex C. At any time prior to the end of any model year, a manufacturer which has reason to believe that its average fuel economy for passenger automobiles will be below such applicable standard for that model year may submit a plan, subject to the approval of the Secretary of Transportation, demonstrating that the manufacturer will earn sufficient credits within the next 3 model years which when taken into account would allow the manufacturer to meet that standard for the model year involved; 15 U.S.C. 2002(l)(1)(C), reprinted in Annex C.

[185] 15 U.S.C. 2002(l)(1)(B), reprinted in Annex C

[186] 15 U.S.C. 2002(l)(1)(D), reprinted in Annex C. Similar credits are provided in the case of nonpassenger automobiles; 15 U.S.C. 2002(l)(2), reprinted in Annex C.

[187] 15 U.S.C. 2002(l)(1)(B), reprinted in Annex C.

[188] 15 U.S.C. 2007(a)(3), reprinted in Annex C.

which renders such person liable to the United States for a civil penalty of not more than $10 000.00 for each violation[189].

[189] 15 U.S.C. 2008(b)(2), reprinted in Annex C.

PART II. THE CONSISTENCY OF THE U.S. TAXES WITH GATT ARTICLE III

3. GATT Article III - The National Treatment Obligation

The national treatment clause of Article III places on the parties of the GATT the obligation to treat imported and locally produced goods in a nondiscriminatory manner. The basic idea underlying Article III is that once imported goods have cleared customs, they should be treated no differently than locally produced goods.

> "National treatment" in GATT means that imported goods will be accorded the same treatment as goods of local origin with respect to matters under government control, such as taxation and regulation.[190]

A. The National Treatment Obligation

There are two major obligations of nondiscriminatory treatment in the General Agreement (GATT): the most-favoured-nation (MFN) and the national treatment obligations. The former obligation prohibits discrimination between goods from the different exporting counties of the GATT[191]. The latter obligation imposes the principle of nondiscrimination between domestically produced goods and imported goods.

> Whereas MFN requires equal treatment among different nations, the national treatment obligation requires the treatment of imported goods, once they have cleared customs and border

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[190] John H. JACKSON, *World Trade and the Law of GATT*, Indianapolis, Bobbs-Merrill Company Inc., 1969, p. 273.

[191] GATT, *supra* note 1, Art. I, as amended by *Protocol Modifying Part I and Article XXIX of the General Agreement on Tariffs and Trade*, 14 September 1948, 138 U.N.T.S. 334.

procedures, to be no worse than that of domestically produced goods.[192]

The GATT national treatment obligation is designed to "reinforce the basic policy of trade liberalization - minimizing government interference and distortion of transactions which cross borders"[193]. Essentially, Article III of the GATT states that the products of the territory of a contracting party imported into the territory of another contracting party shall be accorded national treatment, i.e. be treated as 'like domestic products' by the latter. One of the objectives of this rule is to prevent protectionism resulting from internal administrative and legislative measures (regulatory policies, domestic tax) that would defeat the purpose of tariff bindings.

Article III[194]

National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase,

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[192] John H. JACKSON, *The World Trading System: Law and Policy of International Economic Relations*, Cambridge, The MIT Press, 1989, p. 188.

[193] John H. JACKSON and William J. DAVEY, *Legal Problems of International Economic Relations: Cases, Materials, and Text on the National and International Regulation of Transnational Economic Relations*, 2nd ed., St-Paul (Minn.), West Publishing Co., 1986, p. 483.

[194] *GATT, supra* note 1, Art. III, as amended by *Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade*, 14 September 1948, 62 U.N.T.S. 80 (hereinafter *Protocol Modifying Part II and Article XXVI*). The text of the original Article III was amended in 1948 to conform to Article 18 of the Havana Charter;

> "The main change from the Geneva Article was to provide for the outright elimination of taxes protecting directly competitive or substitutable products in cases in which there was no substantial domestic production of a like product."

GENERAL AGREEMENT ON TARIFFS AND TRADE (Organization), *General Agreement on Tariffs and Trade Analytical Index: Notes on the Drafting, Interpretation and Application of the Articles of the General Agreement*, Geneva, Contracting Parties to the General Agreement on Tariffs and Trade, 1989, under Article III, p. 1 (hereinafter *GATT Analytical Index*).

> transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.
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> 2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in the excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.
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> [...]

Article III:1 establishes the general principle[195] that contracting parties should not use internal government measures (i.e. internal taxes and other internal charges, legislation and regulations) for the protection of domestic production. This broad principle is the underlying rationale of Article III.

The national treatment rule is very wide in scope. Its application is not confined solely to the items included in the tariff Schedules, but expands to any product in order to protect all imports from discriminatory treatment[196]. At

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[195] J. H. JACKSON, *World Trade and the Law of GATT, supra* note 190, p. 278.

[196] This argument was acknowledged in the first report on *Brazilian Internal Taxes (First Report) (France* v. *Brazil)* (1949), GATT Doc. CP.3/42, B.I.S.D. II/181, 192, para. 4:

> "The Working Party agreed that a contracting party was bound by the provisions of Article III whether or not the contracting party in question had undertaken tariff commitments in respect of the goods concerned."

the time of the GATT negotiations, a "lively controversy"[197] developed about the scope of the national treatment clause. Referring to these negotiations, the author John H. Jackson concluded:

> It was stated that the national treatment article had the purpose not only of protecting scheduled concessions but also of preventing the use of internal taxes and regulations as a system of protection. Four reasons were given for including the total national treatment of the ITO draft article in the GATT: (1) to do otherwise would be a retreat from existing international commercial policy; (2) many present treaties already had such a clause; (3) this article was part of the basis on which tariff negotiations at Geneva were held; and (4) it was necessary to protect not only the Schedule items but all exports and imports.[198]

B. Article III:1

Article III:1 is a broad, sweeping statement that expresses the underlying purpose of the national treatment obligation[199]. Although phrased in terms of what contracting parties should do, not in terms of what they are obliged to do, the principles of paragraph 1 are specifically incorporated into two mandatory provisions of Article III, i.e. those dealing with taxes and mixing requirements[200]. Therefore, the basic purpose of GATT national treatment

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[197] J. H. JACKSON, *World Trade and the Law of GATT*, *supra* note 190, p. 277.

[198] *Ibid.*

[199] Surprisingly, only four GATT panels have examined paragraph 1 of Article III: *United States - Measures Affecting Alcoholic and Malt Beverages* (*Canada* v. *U.S.*) (1992), GATT Doc. DS23/R, 16 March 1992; *Panel on Import, Distribution and Sale of Certain Alcoholic Drinks by Canadian Provincial Marketing Agencies* (*EEC* v. *Canada*) (1988), GATT Doc. L/6304, B.I.S.D. 35S/37; *EEC - Measures on Animal Feed Proteins* (*U.S.* v. *EEC*) (1978), GATT Doc. L/4599, B.I.S.D. 25S/49; *Uruguayan Recourse to Article XXIII* (*Uruguay* v. *Austria et al.*) (1962), *supra* note 119.

[200] GATT, *supra* note 1, Art. III:2 and III:5, as amended by *Protocol Modifying Part II and Article XXVI*, *supra* note 194; William J. DAVEY, "An Overview of the General Agreement on Tariffs and Trade", in P. PESCATORE, W. J. DAVEY and A. F. LOWENFELD, *supra* note 108, p. 28 (Part One).

obligation - internal taxes should not be applied so as to afford protection to domestic production - acquire imperative legal authority in these two definite provisions.

The legal effect of the principles of Article III:1 notwithstanding their express incorporation in paragraphs 2 and 5 is not clear. "Most commentators consider that paragraph 1 is simply hortative and does not impose substantive legal obligations on contracting parties."[201] The distinction has importance as the language of paragraph 1 is the legal basis of the *de facto* or implicit discrimination doctrine[202].

> In order to prevent protectionist abuses and indirect "*de facto* discrimination", GATT Article III:1, 2 and 5 prescribe that internal taxes, other internal charges and quantitative restriction, even if drafted in non-discriminatory terms, are inconsistent with Article III if they are "applied to imported or domestic products so as to afford protection to domestic production".[203]

The wording of paragraph 1 does not specify the criterion to be used to determine which imported products afford protection against domestic discrimination. However, a GATT panel[204] noted, such as it can be inferred

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[201] Christopher THOMAS and Greg A. TEREPOSKY, "The Evolving Relationship Between Trade and Environmental Regulation", (1993) 27:4 *Journal of World Trade* 23, 38.

[202] See Chapter 3 - B(i), below, for further discussion on *de facto* discrimination.

[203] E.-U. PETERSMANN, "International Trade Law and International Environmental Law: Prevention and Settlement of International Environmental Disputes in GATT", *supra* note 2, 65-66.

[204] *EEC - Measures on Animal Feed Proteins (U.S. v. EEC)* (1978), *supra* note 199, para. 4.3.

from the interpretative Note *ad* Paragraph 2[205], the distinction made by the General Agreement between "like products"[206] and "directly competitive or substitutable" products, and consequently applied both criterions to Article III[207].

(i) De Facto or Implicit Discrimination

National rules and regulations can be facially neutral, but in fact have a trade distorting effect in favour of domestic producers.

> One of the more difficult conceptual problems of GATT rule has to do with the application of the national treatment obligation in the context of a national regulation or tax which *on its face* appears to be nondiscriminatory, but which, because of various circumstances in the market place or elsewhere, has the effect of tilting the scales against the imported products.[208]

However, GATT Article III:1 specifically prohibits regulations and taxes imposed in a way "so as to afford protection to domestic production".

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[205] *GATT, supra* note 1, Annex I, Ad Art. III, Para. 2, as amended by *Protocol Modifying Part II and Article XXVI, supra* note 194.

[206] The "like products" criterion relies on the physical characteristics of the product. The GATT offers no definition for this criterion, neither past GATT practice. Past GATT decisions have been made on a case-by-case basis after examining a number of relevant factors, such as notably, 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; and the products' classification in tariff schedules; *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages (EEC v. Japan)* (1987), GATT Doc. L/6216, B.I.S.D. 34S/83, para. 5.6. For more on the GATT practice relating to like product determination, see *GATT Analytical Index, supra* note 194, under Article I, pp. 6-9 and Article III, pp. 13-14. The "like products" criterion is employed, notably, in the main most-favoured-nation obligation and in several paragraphs of the national treatment obligation of the General Agreement.

[207] The interpretation provided by the Note *ad* Article III, Paragraph 2 contributes to the interpretation of the first paragraph of Article III "because it implies that the "directly competitive or substitutable" standard is the one appropriate to paragraph 1"; Edmond McGOVERN, *International Trade Regulation: GATT, the United States and the European Community*, 2nd ed., Exeter, Globefield Press, 1986, p. 248. See Chapter 3 - C, below, for further discussion on this interpretative note.

[208] J. H. JACKSON, *The World Trading System: Law and Policy of International Economic Relations, supra* note 192, p. 192.

> Partly because of this language, under the GATT it can be strongly argued that even thought a tax (or regulation) appears on its face to be nondiscriminatory, if it has an *effect* of affording protection, and if this effect is not essential to the valid regulatory purpose (as suggested by Article XX), then such tax or regulation is inconsistent with GATT obligations.[209]

Accordingly, a recent GATT panel report[210] has made reference to the problem of government regulation that affords effective protection, even though it appears on its face to be nondiscriminatory[211]. The result has been an interpretation of Article III that prohibits both measures specifically designed to afford protection and those which have that effect, even when they appear facially neutral[212].

Therefore, a measure must be both formally and *de facto* nondiscriminatory to pass the national treatment test of Article III:1. This interpretation of GATT Article III:1 brings back the issue of the tension between the liberal trade goals and national policy goals. Many complicated problems arise from the variety of domestic programs and legislation designed to promote health, welfare,

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[209] *Ibid.*, p. 193.

[210] *United States - Measures Affecting Alcoholic and Malt Beverages (Canada v. U.S.)* (1992), *supra* note 199.

[211] *De facto* discrimination of indirect taxes is not a new issue within the GATT: In 1953, the United States claimed a violation of GATT Article III because of the discriminatory application of a Cuban sales tax on lumber, which was collected only on imports, even though the tax law revealed no discrimination on its face. The United States withdrew her charges following the termination of the exemption for domestic lumber; (1953) GATT Doc. L/63; J. H. JACKSON, *World Trade and the Law of GATT*, *supra* note 190, p. 284, footnote 25.

[212] J. H. JACKSON, "World Trade Rules and Environmental Policies: Congruence or Conflict?", *supra* note 11, 1236-1237; *In the Matter of the Puerto Rico Regulations on the Import, Distribution and Sale of U.H.T. Milk from Québec*, *supra* note 120, para 5.20.

various economics goals and product safety, or to prevent pollution[213].

> Consequently, in a number of cases, there arises a tension between the liberal trade goals of international economic policy, and national policy goals embodied in a wide variety of national laws and regulations, as well as laws and regulations of local government units.[214]

Difficulties arise on the determination of the appropriateness of a measure when compared with the extent of its *de facto* discriminatory effect on imports. "The key issue then becomes one of determining who should decide whether the regulation is appropriate."[215] The legitimate regulatory interest of governments is challenged at another level, which can be easily stretched beyond the protection of imports against domestic discrimination.

(ii) Production Standards v. Product Standards

Discrimination against imports can be subtle, such as through a regulation for standardization or safety. Standards can be related to the product itself or to its production process. However, the GATT does not allow for differential treatment based on characteristics of the production process, but only on characteristics of the product itself[216].

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[213] J. H. JACKSON and W. J. DAVEY, *supra* note 193, p. 484.

[214] *Ibid.*

[215] J. H. JACKSON, "World Trade Rules and Environmental Policies: Congruence or Conflict?", *supra* note 11, 1237.

[216] J. H. JACKSON, *The World Trading System: Law and Policy of International Economic Relations*, *supra* note 192, p. 193.

> When determining whether products are like, the analysis focuses on the characteristics of the products themselves rather than on differences in production methods or other characteristics of the country of origin which do not result in differences in the resulting products. [Footnote omitted][217]

Past GATT practice has placed the focus on the characteristics of the product itself. Measures which discriminate on the basis of differences in production processes of exporting countries may violate the GATT if these differences are not reflected in the characteristics of the finished products. This view was reinforced by the reasoning in the unadopted *Tuna/Dolphin Panel Report* [218].

> Article III:4 calls for a comparison of the treatment of imported tuna as a product with that of domestic tuna as a product. Regulation governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product. Article III:4 therefore obliges the United States to accord treatment to Mexican tuna no less favourable than that accorded to United States tuna, whether or not the incidental taking of dolphins by Mexicans vessels corresponds to that of United States vessels.[219]

The *Tuna/Dolphin Panel Report* insisted on an interpretation according to which "Article III covers only those measures that are applied to the product as

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[217] C. THOMAS and G. A. TEREPOSKY, *supra* note 201, 26. See also J. H. JACKSON, *The World Trading System: Law and Policy of International Economic Relations*, *supra* note 192, 138.

[218] *Supra* note 4. See the Introduction, above, for a brief discussion of the facts and developments of this panel report.

[219] *United States - Restrictions on Imports of Tuna (Mexico v. U.S.)*, *supra* note 4, para. 5.15.

such"[220], and therefore, leaving out of Article III production standards, i.e. measures which regulate the production process of a product, without affecting the product as such. Never having been adopted, the interpretation of this report has no legal value. Therefore, it remains to be seen whether its reasoning will become agreed GATT practice.

> As Article III applies to "all laws, regulations and requirements affecting (the) internal sale, offering for sale, purchase, transportation, distribution or us" of imported and like domestic products, it remains to be seen whether the narrow interpretation in the 1991 Tuna Panel Report - according to which "Article III covers only measures affecting product as such" - will become agreed GATT practice. Non-discriminatory PPMs [processes and production methods]and their enforcement at the border may not require any legal justification as long as they do not discriminate between like products and do not afford protection to domestic production in terms of GATT Article III. [Footnotes omitted][221]

Nevertheless, past GATT practice suggests that differences in production methods have no relevance to distinguish final products if their end uses and physical properties remain "like" from the viewpoint of consumer tastes and habits[222].

More recently, a recent panel report has emphasized the importance of the

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[220] *Ibid.*, para. 5.14:
"[...] The Panel noted that the MMPA regulates the domestic harvesting of yellowfin tuna to reduce the incidental taking off dolphin, but that these regulations could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product. [...]"

[221] E.-U. PETERSMANN, "International Trade Law and International Environmental Law: Prevention and Settlement of International Environmental Disputes in GATT", *supra* note 2, 68.

[222] *Ibid.*, 63. See, *supra* note 208, for a brief summary of GATT practice relating to like product determination.

purpose of the GATT national treatment obligation, as featured in Article III:1, on like product determination[223]. The panel found that the distinction made for purposes of protecting human life and health between products of similar physical characteristics - low alcohol beer and high alcohol beer - was justified since there was no evidence that the distinction had the purpose or effect of affording protection to domestic production. Therefore, the two varieties of beer were not considered as like products[224].

> It remains to be clarified through GATT practice to what extent health policy purposes [...], consumer policy purposes [...] and environmental policy purposes [...] can likewise influence the definition of like products and thereby justify differential treatment of similar products [...] if the distinctions are "not applied to imported or domestic products so as to afford protection to domestic production" (Article III:1). [...] GATT Article III prohibits only discrimination that has purpose or effect of favouring domestic over imported products, which is hardly ever an efficient and effective instrument of environmental policy. [Footnotes omitted][225]

The distinction between product and production standards has particular

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[223] *United States - Measures Affecting Alcoholic and Malt Beverages (Canada v. U.S.)* (1992), *supra* note 199, paras. 5.71 and 5.72:

"[...] The panel recalled [...] its earlier statement on like product determinations and considered that, in the context of Article III, it is essential that such determinations be made not only in the light of such criteria as the products' physical characteristics, but also in the light of the purpose of Article III, which is to ensure that internal taxes and regulations "not be applied to imported or domestic products so as to afford protection to domestic production." The purpose of Article III is not to harmonize the internal taxes and regulations of contracting parties, which differ from country to country. [...]";

"[...] In the view of the panel, therefore, it is imperative that the like product determination in the context of Article III be made in such a way that it not unnecessarily infringe upon the regulatory authority and domestic policy options of contracting parties. [...]".

[224] *Ibid.*, paras. 5.73-5.75.

[225] E.-U. PETERSMANN, "International Trade Law and International Environmental Law: Prevention and Settlement of International Environmental Disputes in GATT", *supra* note 2, 84.

importance in regard of the consistency of trade related environmental measures with GATT[226]. The national treatment obligation places hardly any constraints on a government's ability to protect its own environment through legitimate product standards[227]. However, production standards are subject to greater discipline as they must not discriminate between like products and not afford protection to domestic production. Despite the broad language of Article III:1, no panel has been faced with its application to new production standards.

C. Article III:2

Article III:2 is aimed at internal taxation, such as sales taxes or value added taxes. Its purpose is to promote non-discriminatory competition among imported and like domestic products. Consequently, imported products must not be subject to taxes in excess of those applied, directly or indirectly, to like domestic products. The intention underlying Article III:2 is that internal taxes on goods should not be used as a means of protection.

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[226] C. THOMAS and G. A. TEREPOSKY, *supra* note 201, 27.

[227] *Ibid.*, 42; E.-U. PETERSMANN, "International Trade Law and International Environmental Law: Prevention and Settlement of International Environmental Disputes in GATT", *supra* note 2, 63; J. H. JACKSON, "World Trade Rules and Environmental Policies: Congruence or Conflict?", *supra* note 11, 1238:

> "Even if a regulation is both *facially* nondiscriminatory and also *de facto* nondiscriminatory, some important issues about a "minimum standard" arise.
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> [...]
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> In summary, the GATT relatively easily accommodates national government environmental regulations that concern the characteristics of imported products. [...] Under the Tokyo Round Standards Code and the Uruguay Round phyto-sanitary draft test approach there might be some opportunity to challenge the regulation. Nevertheless, it would seem that the national treatment standard would not be a major impediment or a major conceptual problem for environmental regulation, unless a requirement of scientific justification was interpreted to require such a high degree of justification as to unreasonably inhibit governments from imposing environmental standards."

For more discussion on the 'minimum standard scientific justification approach', see J. H. JACKSON, *ibid.*, 1237-1239.

This paragraph is divided in two sentences. In its first sentence, Article III:2 proscribes the discriminatory application of an internal tax so as to protect local products against foreign competition. The second sentence prohibits, above and beyond the rule of the first sentence, the application of internal tax measures in a manner that affords protection to domestic production. By referring to the principles of Article III:1, the second sentence of Article III:2 therefore prohibits internal taxes that are "discriminatory in fact but not in form"[228], i.e. implicitly discriminatory[229].

The author John H. Jackson explains, as follows, the 'significant' distinction between the two sentences of Article III:2:

> The first sentence speaks of "like domestic products" and is designed to prevent discrimination between like products based on their origin. The second sentence, however, incorporates a more general obligation, i.e., not to "afford protection". Thus if, for some reason, a tax on one imported product affords protection to a *different* domestic product, it arguably is inconsistent with this obligation of the GATT. The preparatory work bears this out.[230]

The distinction between the two sentences of Article III:2 was acknowledged

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[228] Kenneth W. DAM, *The GATT: Law and International Economic Organization*, Chicago, University of Chicago Press, 1970, p. 118. However, this author is of the opinion that the scope of the second sentence of Article III:2 is considerably restricted by the interpretive Note; *ibid.*

[229] See Chapter 3 - B(i), above, for a discussion of this issue.

[230] J. H. JACKSON, *World Trade and the Law of GATT*, *supra* note 180, p. 281.

by the interpretative Note *ad* Article III, Paragraph 2[231], which affirms that the national treatment obligation applies not only to "like domestic products", but also to a "directly competitive or substitutable product"[232]. Accordingly, subsequent GATT practice shows that panels have considered both criterions in the application of Article III:2. A panel report recognized this past GATT practice and, after careful examination, confirmed it:

> The Panel concluded that the ordinary meaning of Article III:2 in its context and in the light of its object and purpose supported the past GATT practice of examining the conformity of internal taxes with Article III:2 by determining, firstly, whether the taxed imported and domestic products are "like" or "directly competitive or substitutable" and, secondly, whether the taxation is discriminatory (first sentence) or protective (second sentence of Article III:2). The panel decided to proceed accordingly also in this case.[233]

The national treatment provision affecting internal taxes goes further than the mere obligation of treating like imported and domestic goods in the same way. The concept of competitive products was introduced in order to address the internal discrimination that can be introduced between different competing

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[231] *GATT, supra* note 1, Annex I, Ad Art. III, Para. 2, as amended by *Protocol Modifying Part II and Article XXVI, supra* note 194. The interpretative Note *ad* Article III, Paragraph 2 reads:

> "A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product an, on the other hand, a directly competitive or substitutable product which was not similarly taxed.";

The concept of 'competitive or substitutable products' was eliminated from the text of the original Article III, but was preserved as an interpretative note by the *Protocol Modifying Part II and Article XXVI*; J. H. JACKSON, *World Trade and the Law of GATT, supra* note 180, p. 282.

[232] E. McGOVERN, *International Trade Regulation: GATT, the United States and the European Community*, note 207, p. 248:

> "By referring to the principles of paragraph 1, the second sentence of paragraph 2 superimposes this more comprehensive standard [the directly competitive or substitutable" standard] on the "like product" test of the first sentence."

[233] *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages (EEC v. Japan)* (1987), *supra* note 208, para. 5.5.

products. As a matter of fact, "it was recognized that different products could compete so that internal discrimination in favour of one product ("coincidentally" produced at home) could operate to prevent another product's sales"[234].

In summary, although Article III:2 expressly refers to "like domestic products", the national treatment obligation goes further and prohibits the use of internal taxation to protect a domestic industry, whether are not it is a producer of like products[235].

The definition of an 'internal tax' is not provided by the General Agreement. The interpretative Note *ad* Article III[236] indicates, however, that the

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[234] J. H. JACKSON, *World Trade and the Law of GATT*, *supra* note 190, p. 282. A citation of the preparatory work of the GATT, reprinted in *ibid.*, illustrated as follow the consequences of internal discrimination of competitive products:

> "Let us suppose that some country in its negotiations has secured the binding of the duty on oranges. Country A gets a binding on the duty of oranges from Country B. Now, Country B after that can proceed to put on an internal duty of any height at all on oranges, seeing that it grows no oranges itself. But, by putting on that very high duty on oranges, it protects the apples which it grows itself. The consequence is that the binding duty which Country A has secured from Country B on its oranges is made of no effect, because in the fact the price of oranges is pushed up so high by its internal duty that no one can buy them. The consequence is that the object of that binding is defeated."

[235] W. J. DAVEY, *supra* note 200, p. 29 (Part One). The purpose of Article III must be taken into account while interpreting Article III:2. The basic purpose of the national treatment obligation is to ensure, as emphasized in Article III:1, that internal taxes should not be applied so as to afford protection to domestic production; *United States - Measures Affecting Alcoholic and Malt Beverages (Canada* v. *U.S.)* (1992), *supra* note 139, para. 5.25:

> "Specifically, the purpose of Article III is not to prevent contracting parties from differentiating between different product categories for policy purposes unrelated to the protection of domestic production. The Panel considered that the limited purpose of Article III has to be taken into account in interpreting the term "like products" in this article. Consequently, in determining whether two products subject to different treatment are like products, it is necessary to consider whether such product differentiation is being made "so as to afford protection to domestic production."

[236] GATT, *supra* note 1, Annex I, Ad Art. III, as amended by *Protocol Modifying Part II and Article XXVI*, *supra* note 194. The interpretative Note *ad* Article III reads:

> "Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III."

classification chosen by the taxing state must not be the decisive factor. It is specified that any tax or other charge collected at the time or at the point of importation must be regarded as an internal tax or other internal charge if it applies also to like domestic products. Thus, the categorization of a measure as either 'internal tax' or 'import duty' rests not on the form given but essentially in the fact that an import duty applies "exclusively to imported products without being related in any way to similar charges collected internally on like domestic products"[237].

Article III:2 applies to taxes imposed on products, such as 'sales', 'purchase' and 'turnover' taxes[238], usually called 'indirect' taxes[239]. Moreover, a statement in the *Havana Reports* [240] indicates that income taxes, called 'direct' taxes, do not fall within the scope of the article of the Havana Charter

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[237] Interim Commission for the International Trade Organization (ICITO), *Reports of Committees and Principal Sub-Committees*, U.N. Doc. ICITO/1/8 (1948) p. 62, paras. 42-43 [hereinafter *Havana Reports*], reprinted in *GATT Analytical Index, supra* note 194, under Article III, p. 4. The Havana Conference sub-committee report, while not attempting to give a general definition of internal taxes, considered the Havana Charter provisions from which Article III is derived and concluded that certain charges, described as internal taxes in the laws of the importing countries, were in fact import duties because, (a) they were collected at the time of, and as a condition to, the entry of the goods into the importing country, and (b) they applied exclusively to imported products without being related to similar internal charges collected on like domestic products; J. H. JACKSON, *World Trade and the Law of GATT, supra* note 190, pp. 280-281; K. W. DAM, *supra* note 228, p. 116; E. McGOVERN, *International Trade Regulation: GATT, the United States and the European Community, supra* note 232, p. 248.

[238] J. H. JACKSON, *World Trade and the Law of GATT, supra* note 190, p. 284:

> "Complaints brought in GATT indicate that sales taxes, luxury taxes, and turnover taxes applied to products are subject to Article III and cannot be applied in such a way as to discriminate against imported goods. Granting exemptions from such taxes for domestic goods but not for imported goods is also a violation of Article III, as is a discriminatory *application* of such a tax even though the tax law reveals no discrimination on its face." [Footnotes omitted]

[239] Product taxes - such as a sales tax, excise tax or tax on a product at each stage of production - are usually called 'indirect taxes', by opposition to income or corporate taxes, called 'direct taxes'; J. H. JACKSON, *The World Trading System: Law and Policy of International Economic Relations, supra* note 192, p. 194; K. W. DAM, *supra* note 228, p. 124; E. McGOVERN, *International Trade Regulation: GATT, the United States and the European Community, supra* note 207, pp. 248-249.

[240] *Havana Reports, supra* note 237, p. 63, para. 44, reprinted in *GATT Analytical Index, supra* note 194, under Article III, p. 6.

that became Article III of the General Agreement.

4. Findings - The Inconsistency with Article III

The complaint of the European Union is based on the maintenance of three taxes or charges which are levied on the sales of automobiles in the United States. The European Union claims that the application of these taxes or charges is inconsistent with GATT Article III, more particularly paragraphs 1 and 2.

The *gas guzzler tax* and the *luxury tax* are both excise taxes. The *CAFE payment* is not a tax as such, but a civil penalty imposed for violation of statutory standards. Thereof, the following analysis will address together the claims of the European Union against the *gas guzzler tax* and the *luxury tax*. The *CAFE payment* will be the object of a separate analysis.

The European Union maintains that the U.S. taxes or charges have discriminatory effects on imported European automobiles. According to the Union, "cars imported from Europe amount to about 4 percent of the United States market while they are responsible for approximately 88 percent of the new taxes"[241]. The European Union argues that these taxes serve to afford protection to the U.S. domestic production of competitive automobiles, and hence, constitute an infringement of Articles III:1 and III:2 of the GATT.

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[241] A. C. RAUL and P. E. HAGEN, *supra* note 128, 6.

Article III:1 is a more general provision than either Article III:2 or III:4. Accordingly, in the event that a measure is found to be inconsistent with the more specific provisions of Article III, it would not be 'appropriate'[242] to consider its inconsistency with Article III:1.

A. The *Gas Guzzler Tax* and the *Luxury Tax*

The excise taxes levied on imported and domestic automobiles, the *gas guzzler tax* and the *luxury tax*, are both internal taxes subject to the national treatment provision of Article III:2.

> The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in the excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.[243]

In the present case, the consistency of the U.S. taxes with the first sentence of Article III:2 is not at stake. When indirect taxes are imposed at the point of retail sale, such as it is the case with the *gas guzzler tax* and the *luxury tax*, "discrimination can be avoided merely by treating imported and domestic goods

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[242] *United States - Measures Affecting Alcoholic and Malt Beverages (Canada v. U.S.)* (1992), *supra* note 199, para. 5.2.

[243] *GATT*, *supra* note 1, Art. III:2, as amended by *Protocol Modifying Part II and Article XXVI*, *supra* note 194.

in the same way"[244].

As a matter of fact, the sales of both imported and domestic automobiles are subject to the *gas guzzler tax* and the *luxury tax*, if applicable. The taxes apply to the sales of automobiles in the United States, with no regard to the origin, national or foreign, of the automobiles.

In the case of the *gas guzzler tax*, national producers and importers of foreign automobiles are indistinctively considered manufacturers[245], and hence, subject to the tax for the sale of each automobile which fuel economy falls under 22.5 mpg[246].

As for the *luxury tax*, the first retail sale of an automobile of which the price exceeds $30 000 is subject to the tax[247], regardless of the fact that the good originated from national production or importation[248].

As for the consistency of the two U.S. taxes with the second sentence of

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[244] E. McGOVERN, *International Trade Regulation: GATT, the United States and the European Community*, *supra* note 207, p. 249.

[245] 26 U.S.C. 4064(b)(5), reprinted in Annex A.

[246] 26 U.S.C. 4064(a), reprinted in Annex A.

[247] 26 U.S.C. 4001, reprinted in Annex B.

[248] 26 U.S.C. 4002(a), reprinted, *supra* note 155.

Article III:2, the analysis is more problematic. Indeed, the second sentence incorporates the more general obligation of Article III:1. Not only internal taxes should not discriminate among imported and like domestic products, but their application should not be in a manner that "afford protection to domestic production".

This requirement was recently discussed in a GATT panel report[249], which has led to an interpretation of Article III that prohibits *de facto* discrimination[250]. The *gas guzzler tax* and the *luxury tax* both appear to be nondiscriminatory on their face, such as previously discussed. Imported and domestic automobiles are treated in the same way at the point of retail sale. However, is the applications of the taxes having, in fact, an effect of affording protection to the U.S. domestic industry of automobiles?

The European Union claims that the taxes have a disproportionately higher incidence on imported automobiles than on domestically produced automobiles. The U.S. taxes have, according to the European Union, discriminatory effects on the imports from the European automobile industry, and therefore, are contrary to GATT Articles III:1 and III:2.

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[249] *United States - Measures Affecting Alcoholic and Malt Beverages (Canada v. U.S.)* (1992), *supra* note 199.

[250] See Chapter 3 - B(i), above, for a discussion of this issue.

In the case of the *gas guzzler tax*, the European Union argues that the threshold of the fuel economy standard is not founded on any objective criterion. The cut-off point of 22,5 mpg[251] set by the EPA is therefore discriminatory since its application leads to an incidence of the tax falling overwhelmingly on European automobiles.

As for the *luxury tax*, the European Union claims that the tax as an disproportionately higher incidence on imported automobiles than on domestically produced automobiles. The Union affirms that in 1990, over 80% of the automobiles subject to the tax have been imported. Regarding the European industry, almost 50% of all automobiles imported from Europe would have been struck by it.

The Union argues that automobiles above and below $30 000 are "like products" or, in any case, "competitive products" beneficiating from the non-discrimination obligation of GATT Article III:2[252]. The fact that the tax falls disproportionably on imported automobiles shows the discriminatory effect of the tax which affords protection to a domestic production of competitive products. Therefore, the *luxury tax* constitutes an infringement of Articles III:2

[251] 26 U.S.C. 4064(a), reprinted in Annex A.

[252] The European Union notes that for customs purpose, the distinction between "luxury" and other automobiles is not used; passenger automobiles are treated equally by the United States customs, i.e subject to a 2,5% duty.

and III:1 of the GATT.

Assuming that the alleged discriminatory effect that the two U.S. taxes have on the European automobiles is real, we are face with a difficult problem regarding the interpretation of Article III. The author John H. Jackson has addressed this particular issue previously, but only to emphasise the delicate decisions that will have to be made in interpreting the GATT national treatment obligation provision:

> One example of a de facto discriminatory regulation would be a regulation that imposed a higher tax on automobiles with greater horse power and speed, when the importing country knew that its own automobile production tended to concentrate heavily in automobiles with lesser horse power and speed. Likewise, a less favourable tax treatment for automobiles priced in excess of a certain amount of money, say $25,000, in circumstances where domestic production tended not to produce such higher priced autos while imports tended to concentrate in them, could be suspect. Clearly there are some difficult issues in these circumstances, particularly because governments may have a legitimate regulatory interest in classifying goods in certain ways, for example, taxing luxury goods more heavily than daily staples. Thus, there are some delicate decisions that have to be made in interpreting the GATT Article III.[253]

There is *de facto* discrimination. However, does it constitute an automatic violation of the GATT national treatment obligation? The central issue rest on the extend that must be given to the concept of *de facto* discrimination. We believe that *de facto* discrimination can be an indication of a potentially

[253] J. H. JACKSON, "World Trade Rules and Environmental Policies: Congruence or Conflict?", *supra* note 11, 1237.

violation of the GATT Article III, and for this reason, the cause of this discrimination deserves to be analyzed seriously.

However, the purpose of the national treatment obligation must be taken into account once a *de facto* discrimination has been acknowledged. The basic purpose is to ensure, as emphasized in Article III:1, that internal taxes should not be applied so as to afford protection to domestic production. More specifically, the purpose of Article III does not prohibit differentiation of product for policy purposes unrelated to the protection of domestic production[254]. Only when *de facto* discrimination has the effect of affording protection of domestic production will there be a violation of the GATT obligation.

Is there, in the present application of the U.S. taxes on automobiles, actual protection of the U.S. domestic production of automobiles, despite the neutral appearance of the taxes? The differentiation made by the *gas guzzler tax* and the *luxury tax* is not between categories of automobiles of the same fuel economy, or of the same price range. The discrimination is the result of the distinction between the overall production of a national industry and its foreign competitors.

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[254] *United States - Measures Affecting Alcoholic and Malt Beverages (Canada v. U.S.)* (1992), *supra* note 198, para. 5.25, partly reprinted, *supra* note 235.

Both U.S. taxes, the *gas guzzler tax* and the *luxury tax*, apply to specific products of these industries. It is not all products of an industry that are affected, but very specific ones. The reason why one product it subject to the taxes and an other one is not has nothing to do with the origins of such products, but with the very particular characteristics of the products.

GATT Article III:2, second sentence, refers to the principles of Article III:1. The later prohibits regulations applied so as to afford protection of domestic production. The two U.S. taxes do not violate this principle. Like automobiles are treated the same, with no regard to their point of origin. The grounds on which the *gas guzzler tax* and the *luxury tax* are applied, respectively the fuel economies and the sale prices of the automobiles sold in the U.S., result from legitimate regulatory purposes. The *de facto* discrimination that might result from such a practice does not afford protection to the U.S. domestic production of automobiles. Accordingly, there is no inconsistency with GATT Article III:2.

B. The *CAFE Payment*

The *CAFE payment* is a civil penalty payment. The penalty is imposed upon automobiles manufacturers who have violated the Section "Improving Automotive Efficiency" of the *Motor Vehicle Information and Cost Savings Act* [255], a federal statute.

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[255] *Supra* note 131, and accompanying text.

The European Union claims that the *CAFE payment* creates discrimination between imported and domestic automobiles. Since the *CAFE* fine is calculated over the full annual automobile production of a manufacturer, it favours large integrated, full-line automobile manufacturers and, consequently, works to the disadvantage of limited-line automobile manufacturers, such as many European automobile manufacturers. Furthermore, the Union argues that the separate calculation required for domestic and foreign fleets may also permit discrimination. This discrimination between imported products and like domestic products is contrary to Article III:2.

Moreover, the European Union argues that a disproportionate amount of CAFE fines is paid by foreign manufacturers of automobiles. Therefore, these internal charges are also contrary to Articles III:2 combined with paragraph 1, since they serve to afford protection to U.S. production of directly competitive or substitutable products.

A brief description of the *CAFE payment* highlights the first difficulty facing the analysis of its inconsistency with GATT Article III, more particularly paragraphs 1 and 2. Are we faced with "internal taxes or other internal charges of any kind"?

The *CAFE payment* is not a tax. It is a civil penalty payment, and from that

fact, can it falls within the meaning of "internal charges of any kind"? The later expression is large by definition. Moreover, the scope and purpose of the GATT national treatment obligation do not justify to give a restricted interpretation to these words. The *CAFE payment*, imposed upon manufacturers who have fail to comply with the applicable standards is, at the very least a charge: manufacturers are liable to the United States for a civil penalty equal to the amount calculated[256].

As for the consistency of the *CAFE payment* with the first sentence of GATT Article III:2, an analysis of the calculation method of the average fuel economy of each manufacturer is essential. The regulation requires separate calculation of the average fuel economy of a manufacturer for its domestically and nondomestically manufactured automobiles, and treats each category as if manufactured by a separate manufacturer[257]. It is important to note that the domestic category excludes automobiles which are exported[258], while the nondomestic category only includes automobiles which are imported within the U.S[259]. Therefore no regard is given to the overall automobiles' production

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[256] The CAFE payment is not an internal regulation required to enforce standards, which, according to the opinion of the Sub-Committee, is permitted under Article III as drafted; *Havana Reports, supra* note 237, p. 64, para. 48, reprinted in *GATT Analytical Index, supra* note 194, under Article III, p. 2.

[257] 15 U.S.C. 2003(b), reprinted in Annex C.

[258] 15 U.S.C. 2003(c), reprinted in Annex C.

[259] The term "manufacture" means to produce or assemble in, or to import into the customs territory of the United States; 15 U.S.C. 2001(9) and (10), reprinted in Annex C.

of a manufacturer, but only to the automobiles production aimed at the U.S. market.

The effect of this requirement is to give a same manufacturer two average fuel economies: one average fuel economy for all of its automobiles produced in the U.S. and one for all of the automobiles imported in the U.S. Therefore, domestically manufactured and nondomestically manufactured automobiles are not treated equally.

As a matter of fact, the point of origin of the manufactured automobile is the primary base for the calculation of the average fuel economy standard of the manufacturer. Therefore, depending of the internal organisation of a manufacturer, i.e. U.S. or foreign distribution of its production, a manufacturer can find itself liable to the U.S. for a CAFE fine. For example, a manufacturer that imports a large number of low fuel economy automobiles in the U.S. will be liable to a CAFE fine without regard to its U.S. domestic production of automobiles, which can be corresponding to an average fuel economy exceeding the applicable average fuel economy standard.

Assuming that the CAFE fine will be redistributed among the automobiles to which the penalty is addressed, it is fair to say that the sale price of these automobiles will be increased. Therefore, the nondomestic automobiles are not

treated equally with the domestic ones since, for a given fuel economy, the sale price of the former must absorb the redistribution of the CAFE fine while the later must not.

Only once the average fuel economies of the two categories have been calculated, the distinction between domestically and nondomestically manufactured automobiles has no relevance to the application of the *CAFE payment* [260]. A manufacturer is liable to the civil penalty independently of the origin of the manufactured automobiles. The distinction between domestic and nondomestic origins might be of no relevance thereafter, its effect will be, nevertheless, directly felt since it is at the basis of the calculation of the average fuel economy of the manufacturer.

However, the central issue rests on the calculation method of the average fuel economy. The 'average fuel economy' of a manufacturer is, as its appellation says, the *average* of the fuel economies of all model types of automobiles of a manufacturer's annual production. The calculation method of the average fuel economy of a manufacturer's annual production (model year) of passenger automobiles is conceptualised as follow[261]:

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[260] 15 U.S.C. 2001:
(9) "The term "manufacture" (except for purposes of section 502(c) [15 USC @ 2002(c)]) means to produce or assemble in the customs territory of the United States, or to import."

[261] 15 U.S.C. 2003(a), reprinted in Annex C.

$$\text{Average fuel economy} = \frac{\text{total number automobiles manufactured}}{\frac{\text{number of automobiles of model type } x \text{ manufactured}}{\text{fuel economy of model type } x} + \frac{\text{number of automobiles of model type } y \text{ manufactured}}{\text{fuel economy of model type } y} + (\ldots)}$$

Where model type *x* and model type *y* represent given model type of a manufacturer's annual production. There is no limit on the number of model types constituting a manufacturer's annual production (model year).

The calculation method of the average fuel economy of the manufacturer says a lot on the discriminatory potential of the *CAFE payment*. The U.S. regulation does not apply to any product, imported or domestic, but on the total annual production of a manufacturer. The penalty is owned when the average fuel economy of a manufacturer for a particular model year falls below the applicable average fuel economy standard.

As a matter of fact, it is not the failure of the automobile itself to meet with the standard that is the cause of the penalty imposed upon the manufacturer, but the failure of the average fuel economy of the total production of automobiles of the manufacturer. Therefore, automobiles of similar fuel economies might not be treated equally, and this discrimination rests on the total annual production of the manufacturer, not on the characteristics of the automobiles themselves.

As long as a manufacturer's annual production comprises a relatively large number of automobiles with a fuel economy exceeding the applicable average fuel economy standard, the same manufacturer can produce automobiles with

fuel economies falling below the applicable standard without being liable to any penalty. In fact, the average fuel economy of the manufacturer's annual production exceeds the average fuel economy standard, and therefore, no violation of the federal statute occurs.

Discrimination results when a manufacturer's annual production concentrates on automobiles with fuel economies that fall below the applicable standards. The product itself, the automobile with a fuel economy falling below the standard, is not subject to any penalty under the *Motor Vehicle Information and Cost Savings Act* [262]. However, the manufacturer is liable to a penalty if the average fuel economy of its annual production falls below the standard. Therefore, two manufacturers producing the same number of automobiles with the same fuel economy falling below the applicable standard will not be subject to the same penalty depending of the remaining of its annual production. If the remaining production contributes to make the average fuel economy of the manufacturer exceed the standard, no penalty will be due. If, on the contrary, the remaining production is of the same type, or the total production is limited to the former automobiles, the manufacturer will be violating the provisions of the federal statute, and therefore be liable to a penalty.

This description is exactly the situation of the foreign manufacturers by

[262] *Supra* note 131, and accompanying text.

opposition to U.S. manufacturers of automobiles. The later have hardly been liable to the *CAFE payment* while the former have paid more than 250 000 000$ of CAFE fines since 1983[263]. The *Summary of CAFE Fines Collected* [264] is the *de facto* proof of the discriminatory effect of the *CAFE payment* on foreign manufacturers of automobiles.

The domestic or nondomestic origins of the manufactured automobiles have no relevance as to the liability of a manufacturer to the *CAFE payment*. However, concept of 'average fuel economy' leads to a discriminatory application of the penalty. The calculation method of the average fuel economy might be facially neutral and, therefore, be consistent with the first sentence of GATT Article III:2, its application has discriminatory effects.

The *de facto* discrimination felt by the European automobile industry is a serious indication of a violation of the GATT national treatment obligation. The question then becomes one of determining if the *de facto* discrimination created by the *CAFE payment* affords protection to the U.S. domestic production of automobiles.

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[263] *Summary of CAFE Fines Collected*, provided by the National Highway Traffic Safety Administration, U.S. Department of Transportation, 19 July 1993, reprinted in Annex E.

[264] *Ibid.*

The distinction between the domestic and nondomestic production of a manufacturer as the basis for the calculation of separate average fuel economies is, as discussed above, discriminatory. However, the discriminatory implication of such a requirement is, as we believe, not essential to decide of the inconsistency of the *Motor Vehicle Information and Cost Savings Act* [265] with GATT national treatment obligation.

The *CAFE payment* does afford protection to the U.S. domestic production of automobiles. Since all of the CAFE fine will be redistributed among the automobile production of the liable manufacturer, the sale prices of these automobiles are likely increased. With no regard to the characteristics of the automobiles produced, but with the total production of the manufacturers, the discriminatory effect of the *CAFE payment* constitute a clear violation of the GATT national treatment obligation, more particularly the GATT Article III:2, second sentence.

Similar automobiles, that is to say, automobiles with a same fuel economy, are not treated the same due to the overall total production of the various manufacturers. The method of calculation of the average fuel economy, on which the liability to a CAFE fine is based, leads to a discriminatory application

[265] *Supra* note 131, and accompanying text.

of the *Motor Vehicle Information and Cost Savings Act* [266] affording protection to the U.S. domestic production of automobiles.

Having made this finding, it is now necessary to examine whether the *CAFE payment*, while contrary to GATT Article III national treatment obligation, is justified under the general exceptions of GATT Article XX.

[266] *Ibid.*

PART III. THE CONSISTENCY OF THE U.S TAXES WITH GATT ARTICLE XX

5. GATT Article XX - The General Exceptions

The GATT "general exceptions" contained in Article XX foresee certain exceptional cases where the national treatment obligation can be reduced, under certain circumstances defined in the Article. Indeed, Article XX contains a very broad list of exceptions[267] to all GATT obligations[268], including the national treatment obligations. It includes measures undertaken:

- to protect public morals;
- to protect human, animal or plant life or health;
- in relation to the importation or exportation of gold or silver;
- to secure compliance with GATT consistent regulations, including those relating to custom enforcement, import monopolies, protection of patents, trademarks and copyrights and prevention of deceptive practices;
- in relation to products of prison labour;
- for the protection of national treasures;
- for the conservation of exhaustible national resources;
- for the carrying out of intergovernmental commodities agreements;
- to restrict export of domestic materials to implement a governmental

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[267] The extent of the list of exceptions is the result of the tendency of the drafting sessions "to add to the list of general exceptions in order to meet the particular conditions existing in specific countries"; J. H. JACKSON, *World Trade and the Law of GATT*, *supra* note 180, p. 742.

[268] The language of Article XX states, in its preamble, that "nothing in this Agreement shall [...] prevent" the enforcement of measures for the purposes listed. Thus, all GATT obligations are subject to the exceptions of Article XX; *ibid.*, p. 744.

price-stabilization plan;

- to ensure the acquisition or distribution of products in short supply.[269]

Article XX, with its list of general exceptions to the obligations of the GATT, recognizes "the importance of a sovereign nation being able to act to promote the purposes on this list, even when such action otherwise conflicts with various obligations relating to international trade"[270].

> These exceptions, however, can be abused and can be a form of hidden protectionism. The more the international legal system imposes rules to limit such hidden protectionism, the less freedom there is for national or local governmental units to pursue even their legitimate domestic policies.[271]

A. The Environmental Exceptions

The general exceptions applicable to environmental issues are found in paragraphs (b) and (g) of Article XX. In recognition of the contracting parties interest in promoting policies other that trade liberalization, Article XX provides exceptions to the basic GATT disciplines.

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[269] GATT, *supra* note 1, Art. XX, as amended by *Protocol Amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade*, *supra* note 20.

[270] J. H. JACKSON, *The World Trading System: Law and Policy of International Economic Relations*, *supra* note 192, p. 208.

[271] J. H. JACKSON and W. J. DAVEY, *supra* note 193, p. 485.

Article XX[272]

General Exceptions

> 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;
>
> [...]
>
> (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 two general exceptions that apply to environmental protection regulations may, at first sight, afford contracting party considerable freedom to regulate for environmental ends. However, they will not permit all environmental protection measures, as the preamble establishes strict requirements.

The preamble preceding the list of exceptions sets two principles which must

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[272] GATT, *supra* note 1, Art. XX, as amended by *Protocol Amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade*, *supra* note 20. Only one amendment has been made to Article XX since the original 1947 Session of the GATT. The 1955 GATT Review Session did not bring the text of the GATT in conformity with the corresponding articles of the ITO Charter, such as amended at the Havana Conference. For the most part, the differences between GATT and the ITO Charter are not substantial: J. H. JACKSON, *World Trade and the Law of GATT*, *supra* note 180, p. 742.

be respected in order to invoke an exception[273]. This clause was added as an attempt to prevent abuse of the general exceptions[274], essentially the use of the latter to justify practices which have as their secret goal preventing import competition[275].

In effect, the preamble contains a "softer"[276] form of both the most-favoured-nation obligation[277] and the national treatment obligation[278].

> They allow departure from the strict language of Article I (MFN) and Article III (national treatment) to the extent necessary to pursue the goals listed in Article XX, but not to the extent of non-MFN discrimination or protection of domestic production, if neither is not necessary to pursue those listed goals.[279]

Therefore, in order to give effect to the provision, and "for the purposes of Article XX, a certain degree of discrimination is acceptable, on condition that

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[273] E. McGOVERN, *International Trade Regulation: GATT, the United States and the European Community, supra* note 207, p. 398.

[274] This addition was proposed by the United Kingdom at the 1948 London Conference to help guard against the danger of abuse of the general exceptions, despite the recognition that the practical protection against misuse of these exceptions depended on the utilization of the clauses on nullification and impairment of GATT Articles XXII and XXIII; J. H. JACKSON, *World Trade and the Law of GATT, supra* note 190, p. 741-742 (on the evolution of the 'General Exceptions').

[275] J. H. JACKSON, *The World Trading System: Law and Policy of International Economic Relations, supra* note 192, p. 207.

[276] *Ibid.*

[277] The MFN clause of Article I prohibits discrimination between goods from the different exporting countries of the GATT, whereas the Article XX preamble prohibits "arbitrary or unjustifiable discrimination between countries where the same conditions prevail".

[278] The national treatment clause of Article III prohibits discrimination against imported goods. All import restrictions favour domestically produced goods to some extent, but the preamble of Article XX requires that the restrictive measures implemented under the exceptions of that article avoid being "a disguised restriction on international trade"; J. H. JACKSON, *World Trade and the Law of GATT, supra* note 190, p. 743, note 2.

[279] J. H. JACKSON, *The World Trading System: Law and Policy of International Economic Relations, supra* note 192, p. 207.

this discrimination is not arbitrary or unjustifiable"[280]. Accordingly, the degree of discrimination acceptable is the principal interpretative problem of Article XX. The language of the preamble is so nebulous that it is difficult to ascertain exactly what it means[281]. Hopefully, a series of recent panel reports have included an interpretation of this clause[282].

B. The Interpretation of Article XX[283]

Article XX has been criticized because of its nebulous language. It leaves place for a number of interpretive problems, and some of them are central to the conflict between environmental protection and trade liberalization[284]. "Whether the language covers environmental measures is, at best,

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[280] J. KLABBERS, *supra* note 125, 90.

[281] J. H. JACKSON, *World Trade and the Law of GATT*, *supra* note 180, p. 744.

[282] *United States - Measures Affecting Alcoholic and Malt Beverages* (*Canada* v. *U.S.*) (1992), *supra* note 199; *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes* (*U.S.* v. *Thailand*) (1990), GATT Doc. DS/10R, B.I.S.D. 37S/200; *EEC - Regulation on Imports of Parts and Components* (*Japan* v. *EEC*) (1990), GATT Doc. L/6657, B.I.S.D. 37S/132; *United States - Section 337 of the Tariff Act of 1930* (*EEC* v. *U.S.*) (1989), GATT Doc. L/6439, B.I.S.D. 36S/345; *Japan - Restrictions on Imports of Certain Agricultural Products* (*U.S.* v. *Japan*) (1988), GATT Doc. L/6253, B.I.S.D. 35S/163; *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon* (*U.S.* v. *Canada*) (1988), GATT Doc. L/6268, B.I.S.D. 35S/98; *Panel on Import, Distribution and Sale of Certain Alcoholic Drinks by Canadian Provincial Marketing Agencies* (*EEC* v. *Canada*) (1988), *supra* note 199; *Canada - Administration of the Foreign Investment Review Act* (*U.S.* v. *Canada*) (1984), GATT Doc. L/554, B.I.S.D. 30S/140; *United States Imports of Certain Automotive Spring Assemblies* (*Canada* v. *U.S.*) (1983), GATT Doc. L/5333, B.I.S.D. 30S/107; *United States - Prohibition of Imports of Tuna and Tuna Products from Canada* (*Canada* v. *U.S.*) (1982), GATT Doc. L/5198, B.I.S.D. 29S/91.

[283] For a survey of the disputes involving Article XX of the GATT, see J. KLABBERS, *supra* note 125, 86-88. For the conclusions to be drawn from the interpretation of Article XX of the GATT, see *ibid.*, 88-93; see also Steve CHARNOVITZ, "Exploring the Environmental Exceptions in GATT Article XX", (1991) 25:5 *Journal of World Trade* 37, 47-54. For a survey limited to the disputes involving paragraphs (b) or (g) only, see E.-U. PETERSMANN, "International Trade Law and International Environmental Law: Prevention and Settlement of International Environmental Disputes in GATT", *supra* note 2, 55-62.

[284] J. H. JACKSON, "World Trade Rules and Environmental Policies: Congruence or Conflict?", *supra* note 11, 1240.

unclear."[285] The word 'environment' is non-existent from the letter of Article XX and environmental protection, most probably, not an issue at the drafting sessions of 1947[286].

(i) The Drafting History of Article XX

As a matter of fact, some authors consider that environmental protection was not a public issue in 1947 and that Article XX was not intended for that purpose[287]. It is, therefore, difficult to interpret the GATT provisions as justifying restrictions to trade in support of environmental policies[288]. "While some environmental regulations may be forced into some Article XX exceptions, these exceptions cannot cover all legitimate efforts at environmental protection."[289] Thus, amending the GATT become the solution to its deficiency in the area of environmental protection[290].

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[285] Eliza PATTERSON, "GATT and the Environment: Rules Changes to Minimize Adverse Trade and Environmental Effects", (1992) 26:3 *Journal of World Trade* 99, 107. This author is of the opinion that Article XX certainly does not cover the full range of policies aimed at environmental protection. For that reason, Article XX should be amended to include measures relating to the protection of the environment, both the contracting party's and that of the world at large.

[286] The text of the General Agreement does not specifically refer to the environment "since at the time of the drafting of GATT, environmental protection was not accorded the political priority it currently holds in many countries"; E.-U. PETERSMANN, "International Trade Law and International Environmental Law: Prevention and Settlement of International Environmental Disputes in GATT", *supra* note 2, 53. Specific references to the environment first entered the GATT family with the conclusion of the Tokyo Round of Multilateral Trade Negotiations in 1979; *Standards Code*, *supra* note 116, preamble and art. 2.2; *Subsidies Code*, *supra* note 116, art. 11:1(f).

[287] C. A. CHERRY, *supra* note 121, 1083; E. PATTERSON, *supra* note 285, 107; Matthew Hunter HURLOCK, "The GATT, U.S. Law and the Environment: A Proposal to Amend the GATT in Light of the Tuna/Dolphin Decision", (1992) 92 *Columbia Law Review* 2098, 2161; Steven SHRYBMAN, "International Trade and the Environment: An Environmental Assessment of the General Agreement on Tariffs and Trade", (1990) 20:1 *The Ecologist* 30, 33.

[288] M. H. HURLOCK, *supra* note 287, 2161; S. SHRYBMAN, *supra* note 287, 33.

[289] C. A. CHERRY, *supra* note 121, 1083.

[290] Due to the fact that environmental concerns played virtually no role in constructing the GATT regime in 1947, various amendments to the current GATT rules are proposed to conciliate environmental protection with trade liberalization, and respond to the present worldwide environmental conditions. See, notably, amendments proposed by C. A. CHERRY, *supra* note 121, 1083; E. PATTERSON, *supra* note 285, 99; M. H. HURLOCK, *supra* note 287, 2145.

> [...] the legislative history of this provision [GATT Article XX(b)] makes it clear that it was intended to protect "quarantine and other sanitary regulations". Further, it is a fundamental tenet of legal interpretation that the meaning and application of an agreement be determined by the intent of parties at the time that it was concluded or amended. Environmental protection was simply not a public issue in 1947, when Article XX(b) was drafted, and no effort has been made since then to amend the Agreement to reflect contemporary priorities. It is simply not plausible to suggest that environmental protection be left to a 40-year-old GATT provision that was never intended, nor used, for that purpose.[291]

Others are of the opinion that the drafting history of Article XX offers a different interpretation of what the GATT says about the environment[292]. The examination of the historical background of Article XX suggests that the provision intended to cover environmental as well as sanitary measures.

> A review of the history of Article XX demonstrates that it was designed to encompass environmental measures. There may be few issues that do not fit the Article XX framework - the preservation of scenic vistas perhaps. But just about everything else relates squarely either to the life or health of living organisms or to the conservation of truly exhaustible resources like clean air, fossil fuels, and stratospheric ozone[293]

However, whether the general exceptions include environmental policy measures goes beyond the strict interpretation of the original drafters intention.

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[291] S. SHRYBMAN, *supra* note 287, 33.

[292] J. L. DUNOFF, *supra* note 12, 1416-1417; S. CHARNOVITZ, "Exploring the Environmental Exceptions in GATT Article XX", *supra* note 283, 55. For a discussion on the drafting history of GATT Article XX, see S. CHARNOVITZ, *ibid.*, 38-47; Beline ANDERSON, "Unilateral Trade Measures and Environmental Protection Policy", (1993) 66 *Temple Law Review* 751, 758-763; see also *GATT Analytical Index*, *supra* note 194, under Article XX.

[293] S. CHARNOVITZ, "Exploring the Environmental Exceptions in GATT Article XX", *supra* note 283, 55.

The drafting history is only a "supplementary mean of interpretation"[294]. The applicability of the general exceptions to measures relating to the environment must be inferred from the letter of the General Agreement itself and its objectives.

> A special mention must be made of panel's frequent recourse to the drafting history of the General Agreement, which means, in fact, the drafting history of the Havana Charter. At first sight, this method might seem to provide convincing arguments by referring governments to their own intentions. In fact, however, the excessive use of these materials is out of place and even counterproductive for several reasons. *First*, it prompts the panels to shifts their attention from the analysis of substantive problems and from the consideration of GATT's objectives to textual research of a purely semantic character. *Second*, arguments based on textual history tend to foster a retrospective interpretation of an Agreement which, in the wake of the Havana Charter, was meant to be a forward-looking instrument aimed at creating a basis for the solution of the trade problems of the future, not at perpetuating past ideas about international trade. *Third*, attention must be drawn to the fact that only a small number of GATT's membership were involved in drafting the Havana Charter. The newer members of GATT have accepted the General Agreement at face-value but they cannot be engaged *a posteriori* in the meandering of preparatory work in which they had no part. Thus, panels would be well advised to turn away from the drafting history of the General Agreement, to look ahead to the "objectives" of the GATT as mentioned in Article XXIII:1, which is only another way of saying the "objective and purpose" of the General Agreement according to the language of the Vienna Convention on the Law of Treaties.[295]

It is also in John H. Jackson's view that one cannot rely too heavily on the

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[294] *Vienna Convention on the Law of Treaties, supra* note 118, art. 32.

[295] P. PESCATORE, "Drafting and Analyzing Decisions on Dispute Settlement", *supra* note 108, p. 23 (Part Two).

original drafting history when interpreting the GATT:

> Under typical international law, elaborated by the Vienna Convention on the Law of Treaties, preparatory work history is an ancillary means of interpreting treaties. In the context of interpreting the GATT, we have more than forty years of practice since the origin of GATT [...]. [Footnotes omitted][296]

Accordingly, in the light of the general rules of treaty interpretation[297], attention must also be given to the "context" of the provision, the subsequent treaty practice and "any relevant rules of international law applicable in relations between the parties"[298].

(ii) Article XX in the Light of GATT Panel Reports

Controversy over the applicability of Article XX started only after thirty-five years of GATT enforcement[299]. The first dispute involving Article XX took place in 1982[300]. Since, many disputes have arisen over the scope of the GATT general exceptions. By the end of 1993, the GATT Council had adopted

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[296] J. H. JACKSON, "World Trade Rules and Environmental Policies: Congruence or Conflict?", *supra* note 11, 1241-1242.

[297] *Vienna Convention on the Law of Treaties*, *supra* note 119, art. 31.

[298] E.-U. PETERSMANN, "International Trade Law and International Environmental Law: Prevention and Settlement of International Environmental Disputes in GATT", *supra* note 2, 70. This author is of the opinion that if these principles of treaty interpretation are taken into account, differentiated criteria for the interpretation of Article XX(b) and (g) may be obtained:

> "Article XX could thus be construed to justify not only product-related but also production-related measures if they are necessary to protect, [...] in the injured country or to achieve internationally agreed environmental goals.";

ibid., 71.

[299] Before 1982, no GATT panel had ever been established to examine Article XX. Article XX was mentioned in only one case and the matter was not pursued: *Uruguayan Recourse to Article XXIII (Uruguay v. Austria et al.)* (1982), *supra* note 119. In that case, some respondents tried to justified their activities by invoking paragraph (b) of Article XX. However, Uruguay "did not wish to question the conformity with the provisions of the General Agreement of the measures maintained by" the respondents concerned: *ibid.*, 111; J. KLABBERS, *supra* note 125, 63-64.

[300] *United States - Prohibition of Imports of Tuna and Tuna Products from Canada (Canada v. U.S.)* (1982), *supra* note 282.

10 panel reports on Article XX[301]. However, only three panel reports[302] have concerned either paragraphs (b) or (g), whereas the others have dealt with paragraph (d) of Article XX. While the former paragraphs are said to be the environmental provisions of the GATT, the latter[303], deals with measures necessary to secure compliance with GATT-consistent laws.

Consequently, the analysis of the environmental provisions of the GATT, paragraphs (b) and (g) of Article XX, is tributary of the 'jurisprudence' of paragraph (d). As a matter of fact, these paragraphs are construed by the same preamble. Moreover, the "necessary" requirement mentioned in paragraph (d) of Article XX is also found in paragraph (b) of the same Article, and was interpreted as having the same meaning in both paragraphs:

> The Panel could see no reason why under Article XX the meaning of the term "necessary" under paragraph (d) should not be the same as in paragraph (b). In both paragraphs the same term was used and the same objective intended: to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement too pursue overriding public policy goals to the extent

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[301] For a list of the 10 panel reports on Article XX, see *supra* note 282;
"All cases involved alleged violations of either Article III or Article IX (or both) of the General Agreement. [...] Article XX has also been invoke to justify alleged violations of Article I (MFN treatment), Article X (publication and administration of trade regulations), Article XIII (non-discriminatory administration of quantitative restrictions) and Article XVII (State trading enterprises).";
J. KLABBERS, *supra* note 125, 66-67.

[302] One case dealt with paragraph (b): *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes* (*U.S.* v. *Thailand*) (1990), *supra* note 282. Two cases dealt with paragraph (g): *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon* (*U.S.* v. *Canada*) (1988), *supra* note 282; *United States - Prohibition of Imports of Tuna and Tuna Products from Canada* (*Canada* v. *U.S.*) (1982), *supra* note 282.

[303] GATT, *supra* note 1, Art. XX, as amended by *Protocol Amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade*, *supra* note 20. Paragraph (d) of Article XX provides:

> (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;"

that such inconsistencies were unavoidable.[304]

GATT panels have, generally speaking, strictly enforced the conditions imposed in Article XX[305]. Accordingly, the burden to demonstrate that the requirements of Article XX are satisfied has been placed on the contracting party invoking a general exception[306].

> The Panel also noted the practice of the CONTRACTING PARTIES of interpreting these Article XX exceptions narrowly, placing the burden on the party invoking an exception to justify its use.[307]

The opening paragraph of Article XX requires governments that avail themselves of its general exceptions to take measures in such a way as to minimize the impacts of "arbitrary or unjustifiable discrimination" or of a "disguised restriction on international trade"[308]. These requirements have led

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[304] *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes* (*U.S.* v. *Thailand*) (1990), *supra* note 282, para. 74.

[305] C. THOMAS and G. A TEREPOSKY, *supra* note 201, 28: "Since Article XX is an exception to the obligations of the General Agreement, it has been narrowly construed by GATT panels."; C. A. CHERRY, *supra* note 121, 1067: "Exceptions under Article XX have been interpreted very narrowly by GATT dispute resolution panels [...]"; J. KLARBERS, *supra* note 125, 88: "[...] there seems to be a large consensus that Article XX calls for a restrictive interpretation."; SCHOENBAUM, Thomas J., "Free International Trade and Protection of the Environment: Irreconcilable Conflict?", (1992) 86 *American Journal of International Law* 700, 711:

> "In GATT panel decisions, Article XX has been interpreted as a limited and conditional exception, and a heavy burden of proof must be carried by the party invoking its provisions. In particular, the environmental exceptions, subsections (b) and (g), have been strictly and narrowly interpreted."

[306] J. KLABBERS, *supra* note 125, 89; Robert HOUSMAN and Durwood ZAELKE, "Trade, Environment, and Sustainable Development: A Primer", (1992) 15 *Hastings International and Comparative Law Review* 535, 540; E. McGOVERN, *International Trade Regulation: GATT, the United States and the European Community*, *supra* note 207, p. 400. GATT precedents support this burden of justification, notably, *United States - Measures Affecting Alcoholic and Malt Beverages* (*Canada* v. *U.S.*) (1992), *supra* note 199, para. 5.41; *United States - Section 337 of the Tariff Act of 1930* (*EEC* v. *U.S.*) (1989), *supra* note 282, para. 5.27; *Canada - Administration of the Foreign Investment Review Act* (*U.S.* v. *Canada*) (1984), *supra* note 282, 164, para. 5.20.

[307] *United States - Measures Affecting Alcoholic and Malt Beverages* (*Canada* v. *U.S.*) (1992), *supra* note 199, para. 5.41.

[308] In interpreting this requirement, the stress has been placed on "disguised", not on "restriction". Accordingly, trade measures publicly announced as such were found not to constitute a disguised restriction on international trade; *United States - Prohibition of Imports of Tuna and Tuna Products from Canada* (*Canada* v. *U.S.*) (1982), *supra* note 282, para. 4.8. Moreover, it is not the measure itself that needs to be examined, but its application. Therefore,

to an interpretation of Article XX which requires nations to use the least trade-restrictive measures reasonably available to it[309]. Accordingly, these measures would be justified under Article XX "only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it"[310].

The "necessary" requirement of paragraph (b) of Article XX was strictly construed[311]. As a matter of fact, tributary of the preamble, a party cannot justify a measure as "necessary" unless proof is made that the measure used is the least trade-distorting alternative available.

> [...] 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

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an exclusion order published in the Federal Register was found not to constitute disguised restriction; *United States Imports of Certain Automotive Spring Assemblies* (*Canada* v. *U.S.*) (1983), *supra* note 282, para. 56.

> "[...] in practice the stress has been laid on disguised rather than on restriction. Although logic may dictate that it is restriction that needs to be emphasized, still one cannot overlook the fact that the present interpretation, however unfortunate, seems to have become part of the *acquis organisatoire* of the General Agreement.";

J. KLABBERS, *supra* note 125, 93-94.

[309] *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes* (*U.S.* v. *Thailand*) (1990), *supra* note 282, para. 75; *United States - Section 337 of the Tariff Act of 1930* (*EEC* v. *U.S.*) (1989), *supra* note 282, para. 5.26; J. H. JACKSON, "World Trade Rules and Environmental Policies: Congruence or Conflict?", *supra* note 11, 1240.

[310] *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes* (*U.S.* v. *Thailand*) (1990), *supra* note 282, para. 75.

[311] *United States - Measures Affecting Alcoholic and Malt Beverages* (*Canada* v. *U.S.*) (1992), *supra* note 199; *EEC - Regulation on Imports of Parts and Components* (*Japan* v. *EEC*) (1990), *supra* note 282; *United States - Section 337 of the Tariff Act of 1930* (*EEC* v. *U.S.*) (1989), *supra* note 282; *Japan - Restrictions on Imports of Certain Agricultural Products* (*U.S.* v. *Japan*) (1988), *supra* note 282; *Canada - Administration of the Foreign Investment Review Act* (*U.S.* v. *Canada*) (1984), *supra* note 282.

degree of inconsistency with other GATT provisions.[312]

In the same way as the necessary requirement of paragraph (b), the exception for conservation of exhaustible resources of paragraph (g) was narrowly interpreted[313]. The terms "relating to" found at the beginning of paragraph (g), instead of the term "necessary" as it is the case for paragraph (b), suggests that a wider range of measures are covered by the Article XX(g) exception[314]. However, the preamble of Article XX indicates that the purpose of Article XX(g) was "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"[315]. Therefore, it was concluded that for this exception to be applicable, a trade measure had to be "primarily aimed at" the conservation of an exhaustible resource[316].

> 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 with the meaning of Article XX(g). The Panel, similarly, considered 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

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[312] *United States - Section 337 of the Tariff Act of 1930 (EEC v. U.S.)* (1989), *supra* note 282, para. 5.26.

[313] *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon (U.S. v. Canada)* (1988), *supra* note 282; *United States - Prohibition of Imports of Tuna and Tuna Products from Canada (Canada v. U.S.)* (1982), *supra* note 282.

[314] *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon (U.S. v. Canada)* (1988), *supra* note 282, para. 4.6.

[315] *Ibid.*

[316] *Ibid.*

> 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.[317]

C. The Extra Jurisdictional Applicability of GATT Article XX

At present, the issue of the extra jurisdictional applicability of GATT Article XX remains unsettled. This issue deals with the interpretation of Article XX. Does the text of the GATT provision lead to a jurisdictional interpretation of the applicability of Article XX, or to an extra jurisdictional interpretation of its applicability?

> When GATT Article XX provides an exception for measures necessary to protect human, animal or plant life or health, should it be interpreted to mean only the life or health of humans within the importing country, or extend to the life or health of humans throughout the world? This interpretative problem is intimately related to the process-product characteristic difficulty. As far as this author can determine, Article XX has not been interpreted to allow a government to impose regulations to protect life or health of humans, animals, or plants that exist outside of the government's own territorial borders.[318]

The language of Article XX does not expressly limit the applicability of the general exceptions to the jurisdiction of the contracting party. Therefore, the issue remains open to interpretation. However, "most commentators have

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[317] *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon (U.S. v. Canada)* (1988), *supra* note 282, para. 4.6.

[318] J. H. JACKSON, "World Trade Rules and Environmental Policies: Congruence or Conflict?", *supra* note 11, 1240-1241.

leaned toward the view that Article XX is limited to *domestic* life or health"[319].

> Although the language [of Article XX] is not explicitly restricted to health and safety of the *importing* country, it can be argued that that is what Article XX means. It allows exceptions from GATT obligations, which in general apply to "like product", implying a focus on the product itself, and not on the production process (unless that process affects the *product*). It might be possible to argue the contrary, but i am not aware of any such arguments which have been made in GATT, although the issue has apparently not been squarely posed. [Footnotes omitted][320]

In 1991, the unadopted *Tuna/Dolphin Panel Report* [321] specifically addressed this issue and rejected an extra jurisdictional application of Article XX. In its analysis of Article XX(b), the Panel noted that extra jurisdictional applicability is not expressly excluded by the text of the provision. Therefore, the Panel proceeded to the interpretation of the provision in the light of the drafting history and purpose of Article XX(b) as well as the consequences that an extra jurisdictional interpretation would have on the operation of the General Agreement as a whole[322].

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[319] S. CHARNOVITZ, "Exploring the Environmental Exceptions in GATT Article XX", *supra* note 283, 52. For example, see J. H. JACKSON, *The World Trading System: Law and Policy of International Economic Relations*, *supra* note 192, p. 209; J. Owen SAUNDERS, "Legal Aspects of Trade and Sustainable Development", in J. Owen SAUNDERS (ed.), *The Legal Challenge of Sustainable Development*, Calgary, Canadian Institute of Resources Law, 1990, p. 375.

[320] J. H. JACKSON, *The World Trading System: Law and Policy of International Economic Relations*, *supra* note 192, p. 209.

[321] *Supra* note 4. See the Introduction, above, for a brief discussion of the facts and developments of this panel report.

[322] *United States - Restrictions on Imports of Tuna (Mexico v. U.S.)*, *supra* note 4, para. 5.25.

As for the drafting history, the panel is of the opinion that it indicates "that the concerns of the drafters of Article XX(b) focused on the use of sanitary measures to safeguard life and health of humans, animals or plant within the jurisdiction of the importing country"[323]. Considering that the purpose of the Article XX exceptions is to allow contracting parties to impose GATT inconsistent measures to pursue overriding public policy goals to the extend that these inconsistencies were unavoidable, the Panel concluded:

> [...] if the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life and health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.[324]

The *Tuna/Dolphin Panel Report* proceeded also to the determination of the extra jurisdictional application of Article XX(g). The panel considered the interpretation previously given to Article XX(g)[325] and its purpose, and concluded: "The considerations that led the Panel to reject an extrajurisdictional application of Article XX(b) therefore apply also to Article XX(g)."[326]

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[323] *Ibid.*, para. 5.26.

[324] *Ibid.*, para. 5.27.

[325] *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon (U.S. v. Canada)* (1988), *supra* note 282, para. 4.8.

[326] *United States - Restrictions on Imports of Tuna (Mexico v. U.S.)*, *supra* note 4, para. 5.32.

The decisive argument of the *Tuna/Dolphin Panel Report* was the "functional concern over the effectiveness of the GATT"[327] tinted by the fear of "eco-imperialism"[328].

> Any other conclusion reached by the GATT [Tuna/Dolphin] Panel would allow certain countries to dictate to others what standards must exist, and this would clearly be an invasion of a country's sovereignty. [Footnotes omitted][329]

The *Tuna/Dolphin Panel Report* was never adopted by the GATT Council, and therefore, has no legal value. However, the panel report was very much publicized, and from the large number of comments that it induced, the *Tuna/Dolphin Panel Report* reasoning deserves full consideration.

> Moreover, the conclusions of the panel are consistent with academic opinion. [...] Finally, it should be noted that *not one* of the eleven countries making representations to the GATT Panel sided with the U.S. arguments. [Footnotes omitted][330]

The future only knows to what extend this Panel Report will influence subsequent GATT panels and, consequently, become part of GATT practice.

> Thus, the issue of extrajuridictional effect remains unsettled. It is submitted, however, that the Panel's decision was in accordance

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[327] E.-U. PETERSMANN, "International Trade Law and International Environmental Law: Prevention and Settlement of International Environmental Disputes in GATT", *supra* note 2, 69.

[328] "[...] the concern that powerful and wealthy countries will impose their views regarding environmental or other social or welfare standards on other parts of the world, even where such views may not be entirely appropriate."; J. H. JACKSON, "World Trade Rules and Environmental Policies: Congruence or Conflict?", *supra* note 11, 1241.

[329] T. L. McDORMAN, *supra* note 11, 475.

[330] *Ibid.*, 474.

with existing interpretations of the General Agreement and were the issue to arise again, a subsequent panel would most likely arrive at the same result.[331]

[331] C. THOMAS and G. A TEREPOSKY, *supra* note 201, 30-31.

6. Findings - The Justification Under Article XX

The *CAFE payment* is contrary to the national treatment obligation of Article III[332]. Nevertheless, the GATT obligation can be reduced if the *CAFE payment* qualifies under the general exceptions of Article XX. Accordingly, the inconsistent measure will be justified under the General Agreement and, therefore, no infringement of the latter will exist.

A. The Burden of the United States

In order to have the *CAFE payment* justified under the General Agreement, the United States will have to prove that the measure undertaken falls within one of the exceptions of Article XX. This burden of proof is heavy as Article XX carries a "softer"[333] form of both the most-favoured-nation obligation and the national treatment obligation in order to prevent hidden protectionism.

Among the various exceptions of Article XX, the United States are most likely to claim that the *CAFE payment* is justified under the 'environmental' exceptions of Article XX, i.e. either paragraph (b) or (g), arguing that the *CAFE payment* is primarily aimed at environmental concerns. The following analysis will therefore examine whether Article XX(b) or Article XX(g) could justify the

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[332] See Chapter 4 - B, above.

[333] J. H. JACKSON, *The World Trading System: Law and Policy of International Economic Relations*, *supra* note 192, p. 207.

CAFE payment.

Article XX[334]

General Exceptions

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

Article XX, with its general exceptions to the obligations of the GATT, recognizes the importance of a contracting party's sovereignty to pursue legitimate domestic environmental policies. However, justification under the environmental exceptions is conditional upon the demonstration that the measure in question is a ***bona fide*** environmental measure and not a disguised

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[334] GATT, *supra* note 1, Art. XX, as amended by *Protocol Amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade*, *supra* note 20.

trade measure[335]. Drawing this distinction is not an easy task. Accordingly, the United States bear the burden of proving that the *CAFE payment*:

> 1) was justified and not arbitrarily applied; and 2) was proportional in scope (i.e., "necessary") to the concern giving rise to the action so as to meet the objectives of the exceptions.[336]

B. The *CAFE payment* and Article XX(b)

Article XX(b) allows departure from the general national treatment GATT obligation upon the demonstration that the inconsistent measure is "necessary to protect human [...] life or health".

Under the General Agreement, the desirability of the objectives per se is not relevant[337]. Nevertheless, a first determination has to be made on whether the purpose of the inconsistent measure falls within the public policy area of Article XX(b). For example, in the only official report on Article XX(b)[338], the Panel did not consider whether a reduction in smoking was desirable, but accepted that smoking was hazardous to human health.

> In agreement with the parties to the dispute and the expert from the WHO, the Panel accepted that smoking constituted a serious risk to human health and that consequently measures designed to

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[335] T. L. McDORMAN, *supra* note 11, 479-480.

[336] R. HOUSMAN and D. ZAELKE, *supra* note 308, 546.

[337] Piritta SORSA, "The General Agreement on Tariffs and Trade (GATT)", in John KIRTON and Sarah RICHARDSON (eds.), *Trade, Environment & Competitiveness*, Ottawa, National Round Table on the Environment and the Economy, 1992, p. 182.

[338] *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes (U.S. v. Thailand)* (1990), *supra* note 282.

> reduce the consumption of cigarettes fell within the scope of Article XX(b).[339]

The United States argumentation will insist on the purpose behind the implementation of the fuel economy standards and the penalty attached to their violation: the improvement of automobiles' fuel efficiency and the conservation of petroleum[340]. Without questioning the desirability of the *CAFE payment* as a measure designed to improve automobiles fuel efficiency and petroleum conservation, a judgement has to be made on whether the objectives of the *CAFE payment* relate to the protection of human life or health.

Given the importance that environmental protection holds within the World Community and the fact that, one way or an other, environmental issues are related to the survival of the human race on the long run, it is possible to argue that the improvement of fuel efficiency is indirectly related to the protection of life or health. However, given the express exception for the conservation of exhaustible natural resources provided under Article XX(g), to fit within the scope of paragraph (b) a measure designed primarily at energy conservation would result in repudiating the context of the provision.

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[339] *Ibid.*, para. 73.

[340] See Chapter 2, above, for a brief discussion of the purposes of the U.S. taxes on automobiles. See also *supra* note 131.

Even if the scope of Article XX(b) were interpreted to included measure designed primarily at fuel efficiency improvement, the *CAFE payment* would not meet the necessary requirement set out in that provision. The corporate average fuel economy standards enforced under the *CAFE payment* are not the least trade-distorting alternative available. As a matter of fact, to argue that standards enforcing fuel efficiency serve to the protection of life or health - as fuel consumption is a source of air pollution - is one thing. To argue that these standards - as enforced under the *CAFE payment* - are the least trade-restrictive measures reasonably available is another thing.

The fuel efficiency objective could be met with measures consistent, or less inconsistent, with the General Agreement. The first example that comes to mind is the *gas guzzler tax* [341], which is primarily aimed at the same concerns and was found to be in consistency with Article III[342]. Another example could be as simple as the enforcement of automobile pollution standards. These two examples are consistent under the national treatment obligation of the GATT as they relate to characteristics of the product itself.

On the basis of the above considerations, the *CAFE payment* could not be justified under the exception in Article XX(b).

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[341] *Supra* note 129.

[342] See Chapter 4 - A, above, for an analysis of the consistency of the *gas guzzler tax* with the General Agreement.

C. The *CAFE payment* and Article XX(g)

Similarly, paragraph (g) allows departure from the general GATT obligation upon the demonstration that the inconsistent measure is "relating to the conservation of exhaustible natural resources".

From the previous discussion regarding the scope of Article XX(b)[343], it is obvious that the purpose of the *CAFE payment* falls within the public policy area of Article XX(g). As a matter of fact, the measure is designed to improve fuel efficiency, and thereby facilitate conservation of petroleum, an exhaustible natural resource.

For this exception to be applicable, the exceptional measure has to be "primarily aimed at" the conservation of an exhaustible resource[344]. The legislative history of the *CAFE payment* - its implementation by the 1975 *Energy Policy and Conservation Act* [345] as a part of the U.S. national energy plan - and its provisions leave no doubt that the measure is primarily aimed at the conservation of petroleum.

As for the requirement that the measure be "made effective in conjunction with

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[343] See Chapter 6 - B, above.

[344] *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon (U.S. v. Canada)* (1988), *supra* note 282, para. 4.6.

[345] *Supra* note 133.

restrictions on domestic production or consumption", the *CAFE payment*, as previously discussed[346], is equally applicable to domestic and foreign manufacturers once the calculation of their average fuel economy has been made. Therefore, as far as the *CAFE payment* is applicable to foreign and domestic manufacturers, it is considered to be a measure made effective "in conjunction with" restrictions on domestic consumption since it is primarily aimed at rendering effective these restrictions[347].

The *CAFE payment* qualifying under the requirements of paragraph (g), it is therefore essential to examine its consistency with those of the preamble. Accordingly, the *CAFE payment* must not be unjustified and arbitrarily applied.

The language of the preamble, a "softer" form of the most-favoured-nation and national treatment obligations, has led to the 'least trade-restrictive measures reasonably available' interpretation[348]. This interpretation might be related to the 'jurisprudence' developed under the necessary requirement of paragraphs (b) and (d), the language of the preamble applies also to paragraph (g). Accordingly, and as previously discussed under the analysis of paragraph (b),

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[346] See Chapter 4 - B. above, for an analysis of the *CAFE payment* with GATT Article III.

[347] *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon (U.S. v. Canada)* (1988), *supra* note 282, para. 4.6.

[348] *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes (U.S. v. Thailand)* (1990), *supra* note 282, para. 75; *United States - Section 337 of the Tariff Act of 1930 (EEC v. U.S.)* (1989), *supra* note 282, 393, para. 5.26; J. H. JACKSON, "World Trade Rules and Environmental Policies: Congruence or Conflict?", *supra* note 11, 1240.

petroleum conservation could be met with measures consistent, or less inconsistent, with the General Agreement. Therefore, the *CAFE payment* does not fulfil the requirements of the preamble.

Nevertheless, the purpose of the preamble is specifically to prevent abuses and protectionism. From that language, a certain degree of discrimination is acceptable, on condition that this discrimination is not arbitrary or unjustifiable[349]. This last condition causes the problem with the present analysis. The *CAFE payment* creates unjustifiable discrimination. Its primarily purpose might be legitimate, in fact it is discriminatory. The *CAFE payment* was adopted with the purpose of encouraging full employment in the domestic manufacturing sector[350]. This can be a legitimate purpose. However, considering the protectionist effect of the *CAFE payment* and the alternatives available, the requirements of the preamble cannot be fulfilled.

On the basis of the above considerations, the *CAFE payment* could not be justified under the exception in Article XX(g).

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[349] J. KLABBERS, *supra* note 125, 90.

[350] *Supra* note 131, and accompanying text.

CONCLUSION

The emergence of the environment as a policy concern confronts GATT with its contribution to the effectiveness of national environmental policies. Is there friction between trade agreements and environment agreements? Is there a need to reconcile the legal relationship between the objectives of these two?

The GATT allows each contracting party freedom to determine its domestic environmental policies. However, this freedom is limited as the measures used to implement environmental policies must not discriminate between foreign contracting parties and must not favour domestic protection.

> Contrary to the alarmist claims of some environmentalists, there is no inherent conflict between international free trade as it has evolved under the aegis of the GATT and protection of environmental quality. The GATT recognizes and contains policy instrument that can be used to protect domestic and global natural resources; the GATT and environmental protection are largely compatible.[351]

The analysis of the European Union - United States *Gas Guzzler Tax* Dispute shows the permissiveness and limits of the GATT rules toward legitimate environmental policies. When discrimination is involved, as in the case of the implementation of the *CAFE payment*, the GATT exceptionally recognizes that certain policy concerns are of such importance to justify an infringement of the

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[351] T. J. SCHOENBAUM, *supra* note 305, 728.

general obligations. But, in order to prevent protectionism, the GATT general exceptions set specifics requirements.

These requirements have been given a restrictive interpretation, accordingly with the purpose and language of the GATT provisions. This has resulted in the *least-trade restrictive alternative reasonably available* interpretation. A Contracting Party is required to exhaust all options reasonably available through measures consistent with the General Agreement[352]. However strong this requirement is, it is only appropriate. A measure that is inconsistent with GATT obligations should only qualify for an exception, if at all, after all other measures consistent with GATT obligations have proven to be futile.

> The GATT rules do not limit the freedom of countries to define and pursue their national environmental policy objectives as long as they do not cause transboundary pollution or employ unnecessarily trade-restriction means of achieving their policy objectives. GATT rules provide no basis for future GATT panels to challenge non-discriminatory, hight national environmental standards on environmental grounds. [Footnotes omitted][353]

> GATT does not interfere with the setting of purely domestic or internationally agreed production standards for environmental purposes. But it requires the use of non-discriminatory, efficient environmental policy instruments rather than inefficient trade restrictions.[354]

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[352] *United States - Restrictions on Imports of Tuna (Mexico v. U.S.), supra* note 4, para. 5.28.

[353] E.-U. PETERSMANN, "International Trade Law and International Environmental Law: Prevention and Settlement of International Environmental Disputes in GATT", *supra* note 2, 67-68.

[354] *Ibid.*, 72.

The *Tuna/Dolphin Panel Report* has brought the attention of the environmental community upon the GATT and its principles of free trade. Both environmental protection and trade liberalization are important crucial issues of this end of century. The tension between environmentalists and international free trade provoked by the recent GATT environmental trade disputes is only natural, but certainly not irreconcilable. Both sides must realize that the GATT can be an important instrument to enhance global environmental quality[355]. This can be achieved, on the one hand, by the recourse to GATT-permissible methods rater than through protectionism[356]. On the other hand,

> [...] the relationship between GATT law and environmental protection need to be clarified and extended. [...] These clarifications and modifications can easily be handle within the existing GATT framework; no fundamental revision of the Agreement is required to accommodate environmental values. Environmentalists, in turn, should en their alliances with protectionists and instead embrace the GATT as an important instrument to enhance global environmental quality. [Footnotes omitted][357]

As a matter of fact, there are limits to the ability of the GATT dispute settlement process to clarify GATT environmental rules:

> GATT law and GATT dispute settlement system can contribute to the effectiveness of environmental policies by preventing protectionist abuses and by clarifying market access rights and

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[355] T. J. SCHOENBAUM, *supra* note 305, 727.

[356] *Ibid.*, 726.

[357] *Ibid.*, 726-727.

> environmental property rights (e.g. the jurisdiction of Mexico to regulate tuna fishing methods on Mexican fishing vessels on the high seas). But , due to its limited jurisdiction, GATT law can only contribute little to the needed constitutional reforms of international environmental law and to the elaboration and enforcement of new environmental rules.[358]

Environmental protection is not mentioned under the Article XX exceptions, and consequently, the power to interpret GATT general exceptions for environmental purpose is limited. Preservation of our living environment has became a major preoccupation, and therefore, efforts should be made to better accommodate this legitimate concern within GATT law[359].

The year 1994 has seen the formal conclusion of the Uruguay Round[360], the latest round of multilateral trade negotiations of the GATT. The outcome is impressive despite that many issues were left unaddressed or unresolved. As far as environmental protection is concerned, the World Trade Organization (WTO), the successor to GATT, is a very shy attempt to address this legitimate

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[358] E.-U. PETERSMANN, "International Trade Law and International Environmental Law: Prevention and Settlement of International Environmental Disputes in GATT", *supra* note 2, 79.

[359] "[...] Article XX does not adequately accommodate environmental regulations that restrict international trade. Because its provisions are *exceptions*, they are vulnerable to the canon of interpretation, used in the GATT Panel in the tuna dispute, that exceptions should be interpreted narrowly. Moreover, these exceptions do not cover regulations intended to prevent extraterritorial environmental harm, and they require they regulation nation to exhaust all other options consistent with GATT before imposing an inconsistent regulation. Furthermore, a regulation must be "necessary" or "essential", or at least "primarily aimed at" achieving some permissible end. These qualifications are valid safeguards to the extend that they prohibit the use of environmental regulations as a pretext for economic protectionism. However, the time and expense involved in enacting environmental regulations that satisfy the "necessary" or similar standards in Article XX exceptions may prove too burdensome for many contracting parties. The strictures of Article XX may thus prevent the use of GATT-consistent regulations to protect extraterritorial environmental harm.";
C. A. CHERRY, *supra* note 121, 1083.

[360] 15 April 1994, Marrakesh, Morocco.

issue. Environmental protection was not added as an exception under Article XX and the principal goal of the GATT stays the same, i.e. to facilitate nondiscriminatory access to market, not environmental protection.

Nevertheless, the *Agreement Establishing the Multilateral Trade Organization*[361] refers explicitly to environmental protection and preservation as one of the objectives of the new organization. The preamble states that the relations of members in the field of trade and economic endeavour:

> [...] should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, [...][362]

Moreover, a Committee on Trade and Environment will be established under the auspices of the WTO. This more or less permanent Committee - it has a two years renewable mandate - is the result of a compromise between the antagonistic views of the industrialized countries and developing nations[363].

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[361] An integral part of the *Final Act*, *supra* note 16, MNT/FA II.

[362] *Agreement Establishing the Multilateral Trade Organization*, *ibid.*, Preamble.

[363] The former wanted a permanent committee while the latter wanted to give it a fixed term.

The Committee on Trade and Environment will be open to all members of the WTO. Its term of reference is broad and essentially concerned with the need to make trade and environment policies mutually supportive[364].

> [...] there should not be, nor need to be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other, [...][365]

The new dispute resolution process of the GATT is going to be faster, more efficient and enforceable. The adoption of panel reports will be virtually automatic as the new rule would minimize the ability of the contracting parties to block such adoption. The strengthening of the GATT's enforcement powers should enhance the confidence of the Contracting Parties in the renewed institution and confirm its role as an instrument toward global environmental quality.

The new GATT is much larger, and with the work of the Committee on Trade and Environment, it is expected that it will be able to adapt to the challenges of environmental protection.

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[364] *Decision on Trade and Environment*, proposed text for formal adoption of the *Final Act* at Marrakesh on 15 April 1994; *Communication from the Chairman* of the Trade Negotiations Committee, MTN.TNC/W/141, 29 March 1994.

[365] *Ibid.*

ANNEX A: The *Gas Guzzler Tax* (26 U.S.C. 4064)

TITLE 26. INTERNAL REVENUE CODE
SUBTITLE D. MISCELLANEOUS EXCISE TAXES
CHAPTER 32. MANUFACTURERS EXCISE TAXES
SUBCHAPTER A. Automotive and Related Items
PART I. Gas Guzzlers

@ 4064. Gas guzzler tax.

(a) Imposition of tax.
There is hereby imposed on the sale by the manufacturer of each automobile a tax determined in accordance with the following table:

If the fuel economy of the model type in which the automobile falls is:	The tax is:
At least 22.5	0
At least 21.5 but less than 22.5	$1,000
At least 20.5 but less than 21.5	1,300
At least 19.5 but less than 20.5	1,700
At least 18.5 but less than 19.5	2,100
At least 17.5 but less than 18.5	2,600
At least 16.5 but less than 17.5	3,000
At least 15.5 but less than 16.5	3,700
At least 14.5 but less than 15.5	4,500
At least 13.5 but less than 14.5	5,400
At least 12.5 but less than 13.5	6,400
Less than 12.5	7,700

(b) Definitions.
For purposes of this section --

(1) Automobile.
(A) In general. The term "automobile" means any 4-wheeled vehicle propelled by fuel --
(i) which is manufactured primarily for use on public streets, roads, and highways (except any vehicle operated exclusively on a rail or rails), and
(ii) which is rated at 6,000 pounds unloaded gross vehicle weight or less.
In the case of a limousine, the preceding sentence shall be applied without regard to clause (ii).
(B) Exception for certain vehicles. The term "automobile" does not include any vehicle which is treated as a nonpassenger automobile under the rules which were prescribed by the Secretary of Transportation for purposes of section 501 of the Motor Vehicle Information and Cost Savings Act (15 U.S.C. 2001) and which were in effect on the date of the enactment of this section.
(C) Exception for emergency vehicles. The term "automobile" does not include any vehicle sold for use and used --
(i) as an ambulance or combination ambulance-hearse,
(ii) by the United States or by a State or local government for police or other law enforcement purposes, or
(iii) for other emergency uses prescribed by the Secretary by regulations.

(2) Fuel economy. The term "fuel economy" means the average number of miles travelled by an automobile per gallon of gasoline (or equivalent amount of other fuel) consumed, as determined by the EPA Administrator in accordance with procedures established under subsection (c).

(3) Model type. The term "model type" means a particular class of automobile as determined by regulation by the EPA Administrator.

(4) Model year. The term "model year", with reference to any specific calendar year, means a manufacturer's annual production period (as determined by the EPA Administrator) which includes January 1 of such calendar year. If a manufacturer has no annual production period, the term "model year" means the calendar year.

(5) Manufacturer.
(A) In general. The term "manufacturer" includes a producer or importer.
(B) Lengthening treated as manufacture. For purposes of this section, subchapter G of this chapter, and section 6416(b)(3), the lengthening of an automobile by any person shall be treated as the manufacture of an automobile by such person.

(6) EPA Administrator. The term "EPA Administrator" means the Administrator of the Environmental Protection Agency.

(7) Fuel. The term "fuel" means gasoline and diesel fuel. The Secretary (after consultation with the Secretary of Transportation) may, by regulation, include any product of petroleum or natural gas within the meaning of such term if he determines that such inclusion is consistent with the need of the Nation to conserve energy.

(c) Determination of fuel economy.
For purposes of this section --

(1) In general. Fuel economy for any model type shall be measured in accordance with testing and calculation procedures established by the EPA Administrator by regulation. Procedures so established shall be the procedures utilized by the EPA Administrator for model year 1975 (weighted 55 percent urban cycle, and 45 percent highway cycle), or procedures which yield comparable results. Procedures under this subsection, to the extent practicable, shall require that fuel economy tests be conducted in conjunction with emissions tests conducted under section 206 of the Clean Air Act. The EPA Administrator shall report any measurements of fuel economy to the Secretary.

(2) Special rule for fuels other than gasoline. The EPA Administrator shall by regulation determine that quantity of any other fuel which is the equivalent of one gallon of gasoline.

(3) Time by which regulations must be issued. Testing and calculation procedures applicable to a model year, and any amendment to such procedures (other than a technical or clerical amendment), shall be promulgated not less than 12 months before the model year to which such procedures apply.

ANNEX B: The *Luxury Tax* (26 U.S.C. 4001-4003)

TITLE 26. INTERNAL REVENUE CODE
SUBTITLE D. MISCELLANEOUS EXCISE TAXES
CHAPTER 31. RETAIL EXCISE TAXES
SUBCHAPTER A. Luxury Passenger Automobiles

@ 4001. Imposition of tax.

(a) Imposition of tax.
There is hereby imposed on the 1st retail sale of any passenger vehicle a tax equal to 10 percent of the price for which so sold to the extent such price exceeds $ 30,000.

(b) Passenger vehicle.

(1) In general. For purposes of this subchapter [26 USC @@ 4001 et seq.], the term "passenger vehicle" means any 4-wheeled vehicle --
(A) which is manufactured primarily for use on public streets, roads, and highways, and
(B) which is rated at 6,000 pounds unloaded gross vehicle weight or less.

(2) Special rules.
(A) Trucks and vans. In the case of a truck or van, paragraph (1)(B) shall be applied by substituting "gross vehicle weight" for "unloaded gross vehicle weight".
(B) Limousines. In the case of a limousine, paragraph (1) shall be applied without regard to subparagraph (B) thereof.

(c) Exceptions for taxicabs, etc.
The tax imposed by this section shall not apply to the sale of any passenger vehicle for use by the purchaser exclusively in the active conduct of a trade or business of transporting persons or property for compensation or hire.

(d) Exception for law enforcement uses, etc.
No tax shall be imposed by this section on the sale of any passenger vehicle --

(1) to the Federal Government, or a State or local government, for use exclusively in police, firefighting, search and rescue, or other law enforcement of public safety activities, or in public works activities, or

(2) to any person for use exclusively in providing emergency medical services.

(e) Inflation adjustment.

(1) In general. If, for any calendar year, the excess (if any) of --
(A) $ 30,000, increased by the cost-of-living adjustment for the calendar year, over
(B) the dollar amount in effect under subsection (a) for the calendar year,
is equal to or greater than $ 2,000, then the $ 30,000 amount in subsection (a) and section 4003(a) (as previously adjusted under this subsection) for any subsequent calendar year shall be increased by the amount of such excess rounded to the next lowest multiple of $ 2,000.

(2) Cost-of-living adjustment. For purposes of paragraph (1), the cost-of-living adjustment for any calendar year shall be the cost-of-living adjustment under section 1(f)(3) for such calendar year, determined by substituting "calendar year 1990" for "calendar year 1992" in subparagraph (B) thereof.

(f) Termination.
The tax imposed by this section shall not apply to any sale of use after December 31, 1999.

@ 4002. 1st retail sales; uses;, etc. treated as sales; determination of price.

[...]

@ 4003. Special rules.

[...]

ANNEX C: The *Corporate Average Fuel Economy (CAFE) Payment* (15 U.S.C. 2001, 2002, 2003, 2007 and 2008)

TITLE 15. COMMERCE AND TRADE
CHAPTER 46. MOTOR VEHICLE INFORMATION AND COST SAVINGS IMPROVING AUTOMOTIVE EFFICIENCY

@ 2001. Definitions
For purposes of this part:
(1) The term "automobile" means any 4-wheeled vehicle propelled by fuel, or by alternative fuel, which is manufactured primarily for use on public streets, roads, and highways (except any vehicle operated exclusively on a rail or rails), and
(A) which is rated at 6,000 lbs. gross vehicle weight or less, or
(B) which--
(i) is rated at more than 6,000 lbs. gross vehicle weight but less than 10,000 lbs. gross vehicle weight,
(ii) is a type of vehicle for which the Secretary determines, by rule, average fuel economy standards under this part are feasible, and
(iii) is a type of vehicle for which the Secretary determines, by rule, average fuel economy standards will result in significant energy conservation, or is a type of vehicle which the Secretary determines is substantially used for the same purposes as vehicles described in subparagraph (A) of this paragraph.

The Secretary may prescribe such rules as may be necessary to implement this paragraph.

(2) The term "passenger automobile" means any automobile (other than an automobile capable of off-highway operation) which the Secretary determines by rule is manufactured primarily for use in the transportation of not more than 10 individuals.

(3) The term "automobile capable of off-highway operation" means any automobile which the Secretary determines by rule--
(A) has a significant feature (other than 4-wheel drive) which is designed to equip such automobile for off-highway operation, and
(B) either--
(i) is a 4-wheel drive automobile, or
(ii) is rated at more than 6,000 pounds gross vehicle weight.

(4) The term "average fuel economy" means average fuel economy, as determined under section 503 [15 USC @ 2003].

(5) The term "fuel" means gasoline and diesel oil. The Secretary may, by rule, include any other liquid fuel or any gaseous fuel within the meaning of the term "fuel" if he determines that such inclusion is consistent with the need of the Nation to conserve energy.

(6) The term "fuel economy" means the average number of miles travelled by an automobile per gallon of gasoline (or equivalent amount of other fuel) consumed, as determined by the EPA Administrator in accordance with procedures established under section 503(d) [15 USC @ 2003(d)].

(7) The term "average fuel economy standard" means a performance standard which specifies a minimum level of average fuel economy which is applicable to a manufacturer in a model year.

(8) The term "manufacturer" means any person engaged in the business of manufacturing automobiles. The Secretary shall prescribe rules for determining, in cases where more than one person is the manufacturer of an automobile, which person is to be treated as the manufacturer of such automobile for purposes of this part. Such term also includes any predecessor or successor of such a manufacturer to the extent provided under rules which the Secretary shall prescribe.

(9) The term "manufacture" (except for purposes of section 502(c) [15 USC @ 2002(c)]) means to produce or assemble in the customs territory of the United States, or to import.

(10) The term "import" means to import into the customs territory of the United States.

(11) The term "model type" means a particular class of automobile as determined, by rule, by the EPA Administrator, after consultation and coordination with the Secretary.

(12) The term "model year", with reference to any specific calendar year, means a manufacturer's annual production period (as determined by the EPA Administrator) which includes January 1 of such calendar year. If a manufacturer has no annual production period, the term "model year" means the calendar year.

(13) The term "Secretary" means the Secretary of Transportation.

(14) The term "EPA Administrator" means the Administrator of the Environmental Protection Agency.

@ 2002. Average fuel economy standards

(a) Standards for passenger vehicles manufactured after 1977; review of standards; report to Congress; standards for passenger automobiles manufactured from 1981 through 1984; amendment of standards.

Model year:	Average fuel economy standard (in miles per gallon)
1978	18.0.
1979	19.0.
1980	20.0.
1981	Determined by Secretary under paragraph (3) of this subsection.
1982	Determined by Secretary under paragraph (3) of this subsection.
1983	Determined by Secretary under paragraph (3) of this subsection.
1984	Determined by Secretary under paragraph (3) of this subsection.
1985 and thereafter	27.5.

(2) Not later than January 15 of each year, beginning in 1977, the Secretary shall transmit to each House of Congress, and publish in the Federal Register, a review of average fuel economy standards under this part. The review required to be transmitted not later than January 15, 1979, shall include a comprehensive analysis of the program required by this part. Such analysis shall include an assessment of the ability of manufacturers to meet the average fuel economy standard for model year 1985 as specified in paragraph (1) of this subsection, and any legislative recommendations the Secretary or the EPA Administrator may have for improving the program required by this part.

(3) Not later than July 1, 1977, the Secretary shall prescribe, by rule, average fuel economy standards for passenger automobiles manufactured in each of the model years 1981 through 1984. Any such standard shall apply to each manufacturer (except as provided in subsection (c)), and shall be set for each such model year at a level which the Secretary determines (A) is the maximum feasible average fuel economy level, and (B) will result in steady progress toward meeting the average fuel economy standard established by or pursuant to this subsection for model year 1985.

(4) The Secretary may, by rule, amend the average fuel economy standard specified in paragraph (1) for model year 1985, or for any subsequent model year, to a level which he determines is the maximum feasible average fuel economy level for such model year, except that any amendment which has the effect of increasing an average fuel economy standard to a level in excess of 27.5 miles per gallon, or of decreasing any such standard to a level below 26.0 miles per gallon, shall be submitted to the Congress in accordance with section 551 of the Energy Policy and Conservation Act [42 USC @ 6421], and shall not take effect if either House of the Congress disapproves such amendment in accordance with the procedures specified in such section.

(5) For purposes of considering any modification which is submitted to the Congress under paragraph (4), the 5 calendar days specified in section 551(f)(4)(A) of the Energy Policy and Conservation Act [42 USC @ 6421(f)(4)(A)] shall be lengthened to 20 calendar days, and the 15 calendar days specified in section 551 (c) and (d) of such Act [42 USC @ 6421(c) and (d)] shall be lengthened to 60 calendar days.

(b) Standards for other than passenger automobiles. The Secretary shall, by rule, prescribe average fuel economy standards for automobiles which are not passenger automobiles and which are manufactured by any manufacturer in each model year which begins more than 30 months after the date of enactment of this title [enacted Dec. 22, 1975]. Such rules may provide for separate standards for different classes of such automobiles (as determined by the Secretary), and such standards shall be set at a level which the Secretary determines is the maximum feasible average fuel economy level which such manufacturers are able to achieve in each model year to which this subsection applies. Any standard applicable to a model year under this subsection shall be prescribed at least 18 months prior to the beginning of such model year.

(c) Exemptions for manufacturers of limited number of cars.

(1) On application of a manufacturer who manufactured (whether or not in the United States) fewer than 10,000 passenger automobiles in the second model year preceding the model year for which the application is made, the Secretary may, by rule, exempt such manufacturer from subsection (a). An application for such an exemption shall be submitted to the Secretary, and shall contain such information as the Secretary may require by rule. Such exemption may only be granted if the Secretary determines that the average fuel economy standard otherwise applicable under subsection (a) is more stringent than the maximum feasible average fuel economy level which such manufacturer can attain. The Secretary may not issue exemptions with respect to a model year unless he establishes, by rule, alternative average fuel economy standards for passenger automobiles manufactured by manufacturers which receive exemptions under this subsection. Such standards may be established for an individual manufacturer, for all automobiles to which this subsection applies, or for such classes of such automobiles as the Secretary may define by rule. Each such standard shall be set at a level which the Secretary determines is the maximum feasible average fuel economy level for the manufacturers to which the standard applies. An exemption under this subsection shall apply to a model year only if the manufacturer manufactures (whether or not in the United States) fewer than 10,000 passenger automobiles in such model year.

(2) Any manufacturer may elect in any application submitted under paragraph (1) to have the applications for, and administrative determinations regarding, exemptions and alternative average fuel economy standards be consolidated for two or more of the model years after model year 1980 and before model year 1986. The Secretary may grant an exemption and set an alternative standard or standards for all model years covered by such application.

(d) Application for modification of standards.

(1) Any manufacturer may apply to the Secretary for modification of an average fuel economy standard applicable under subsection (a) to such manufacturer for model year 1978, 1979, or 1980. Such application shall contain such information as the Secretary may require by rule, and shall be submitted to the Secretary within 24 months before the beginning of the model year for which such modification is requested.

(2) (A) If a manufacturer demonstrates and the Secretary finds that--
(i) a Federal standards fuel economy reduction is likely to exist for such manufacturer for the model year to which the application relates, and
(ii) such manufacturer applied a reasonably selected technology,
the Secretary shall, by rule, reduce the average fuel economy standard applicable under subsection (a) to such manufacturer by the amount of such manufacturer's Federal standards fuel economy reduct., rounded off to the nearest one-tenth mile per gallon (in accordance with rules of the Secretary). To the maximum extent practicable, prior to making a finding under this paragraph with respect to an application, the Secretary shall request, and the EPA Administrator shall supply, test results collected pursuant to section 503(d) of this Act [15 USC @ 2003(d)] for all automobiles covered by such application.

(B) (i) If the Secretary does not find that a Federal standards fuel economy reduction is likely to exist for a manufacturer who filed an application under paragraph (1), he shall deny the application of such manufacturer.

(ii) If the Secretary--
(I) finds that a Federal standards fuel economy reduction is likely to exist for a manufacturer who filed an application under paragraph (1), and
(II) does not find that such manufacturer applied a reasonably selected technology,
the average fuel economy standard applicable under subsection (a) to such manufacturer shall, by rule, be reduced by an amount equal to the Federal standards fuel economy reduction which the Secretary finds would have resulted from the application of a reasonably selected technology.

(3) For purposes of this subsection:
(A) The term "reasonably selected technology" means a technology which the Secretary determines it was reasonable for a manufacturer to select, considering (i) the Nation's need to improve the fuel economy of its automobiles, and (ii) the energy savings, economic costs, and lead-time requirements associated with alternative technologies practicably available to such manufacturer.

(B) The term "Federal standards fuel economy reduction" means the sum of the applicable fuel economy reductions determined under subparagraph (C).

(C) The term "applicable fuel economy reduction" means a number of miles per gallon equal to--
(i) the reduction in a manufacturer's average fuel economy in a model year which results from the application of a category of Federal standards applicable to such model year, and which would not have occurred had Federal standards of such category applicable to model year 1975 remained the only standards of such category in effect, minus
(ii) 0.5 mile per gallon.

(D) Each of the following is a category of Federal standards;
(i) Emissions standards under section 202 of the Clean Air Act, and emissions standards applicable by reason of section 209(b) of such Act.

(ii) Motor vehicle safety standards under the National Traffic and Motor Vehicle Safety Act of 1966 [15 USC @@ 1381 et seq.].

(iii) Noise emission standards under section 6 of the Noise Control Act of 1972 [42 USC @ 4905].

(iv) Property loss reduction standards under title I of this Act [15 USC @@ 1911 et seq.].

(E) In making the determination under this subsection, the Secretary (in accordance with such methods as he shall prescribe by rule) shall assume a production mix for such manufacturer which would have achieved the average fuel economy standard for such model year had standards described in subparagraph (D) applicable to model year 1975 remained the only standards in effect.

(4) The Secretary may, for the purposes of conducting a proceeding under this subsection, consolidate one or more applications filed under this subsection.

(e) Determination of maximum feasible average fuel economy. For purposes of this section, in determining maximum feasible average fuel economy, the Secretary shall consider--
(1) technological feasibility;
(2) economic practicability;
(3) the effect of other Federal motor vehicle standards on fuel economy; and
(4) the need of the Nation to conserve energy.

For purposes of this subsection, the Secretary shall not consider the fuel economy of dedicated automobiles, and the Secretary shall consider dual fuelled automobiles to be operated exclusively on gasoline or diesel fuel.

(f) Amendment of average fuel economy standards.

(1) The Secretary may, by rule, from time to time, amend any average fuel economy standard prescribed under subsection (a)(3), (b), or (c), so long as such standard, as amended, meets the requirements of subsection (a)(3), (b), or (c), as the case may be.

(2) Any amendment prescribed under this section which has the effect of making any average fuel economy standard more stringent shall be--
(A) promulgated, and
(B) if required by paragraph (4) of subsection (a), submitted to the Congress,
at least 18 months prior to the beginning of the model year to which such amendment will apply.

(g) Exemption of emergency vehicles from fuel economy standards.

(1) At the election of any manufacturer, the fuel economy of any emergency vehicle shall not be taken into account in applying any fuel economy standard prescribed by or under subsection (a), (b), or (c). Any manufacturer electing to have the provisions of this subsection shall provide written notice of that election to the Secretary and to the Environmental Protection Agency Administrator.

(2) For purposes of paragraph (1), the term "emergency vehicle" means any automobile manufactured primarily for use--
(A) as an ambulance or combination ambulance-hearse,
(B) by the United States or by a State or local government for police or other law enforcement purposes, or
(C) for other emergency uses prescribed by the Secretary of Transportation by regulation.

(h) Application of other laws. Proceedings under subsection (a)(4) or (d) shall be conducted in accordance with section 553 of title 5, United States Code, except that interested persons shall be entitled to make oral as well as written presentations. A transcript shall be taken of any oral presentations.

(i) Consultation with Secretary of Energy; impact of proposed standards upon conservation goals; comments. The Secretary shall consult with the Secretary of Energy in carrying out his responsibilities under this section. The Secretary shall, before issuing any notice proposing under subsection (a), (b), (d), or (f) of this section, to establish, reduce, or amend an average fuel economy standard, provide the Secretary of Energy with a period of not less than ten days from the receipt of the notice during which the Secretary of Energy may, upon concluding that the proposed standard would adversely affect the conservation goals set by the Secretary of Energy, provide written comments to the Secretary concerning the impacts of the proposed standard upon those goals. To the extent that the Secretary does not revise the proposed standard to take into account any comments by the Secretary of Energy regarding the level of the proposed standard, the Secretary shall include the unaccommodated comments in the notice.

(j) Notification of Secretary of Energy; comments. The Secretary shall, before taking action on any final standard under this section or any modification of or exemption from such standard, notify the Secretary of Energy and provide such Secretary with a reasonable period of time to comment thereon.

(k) Adjustments or relief regarding standards for other than passenger automobiles.

(1) On the petition of any manufacturer for any model year beginning after model year 1981 and before model year 1986, the Secretary may conduct an examination of the impacts on that manufacturer or a class of manufacturers of any standard under subsection (b) applicable to 4-wheel drive automobiles. If after consideration of the results of that examination the Secretary finds in accordance with paragraph (2) that the manufacturer has demonstrated that such manufacturer or class of manufacturers would not otherwise be able to comply with such standard for that model year as it applies to 4-wheel drive automobiles without causing severe economic impacts, such as plant closures or reduction in employment in the United States related to motor vehicle manufacturing, the Secretary shall, by order, make an adjustment or otherwise provide relief regarding--

(A) the manner by which the average fuel economy of that manufacturer or class of manufacturers is calculated for purposes of that standard as it applies to 4-wheel drive automobiles, or

(B) other aspects regarding the application of that standard to the manufacturer or class of manufacturers with respect to such automobiles to the extent consistent with the provisions of this title [15 USC @@ 2001 et seq.].

(2) Any finding by the Secretary under paragraph (1) shall be made (A) after notice and a reasonable opportunity for written or oral comment, and (B) after consideration of the benefits available under the amendments made by the Automobile Fuel Efficiency Act of 1980.

(3) The authority of the Secretary under this subsection to make any adjustment or provide other relief shall not be effective for any model year after model year 1985.

(4) The Secretary shall notify the Congress of any adjustment or other relief provided under this subsection in the first annual report submitted to the Congress under section 512 [15 USC @ 2012] after the order is issued providing for that adjustment or relief.

(5) (A) Any final decision of the Secretary under this subsection shall be made, and notice thereof published in the Federal Register, not later than 120 days after the date of the petition involved. The Secretary may extend such period to a specified date if the Secretary publishes notice thereof in the Federal Register, together with the reasons for such extension. Any such decision by the Secretary shall become final 30 days after the publication of the notice of final decision unless a petition for judicial review is filed under subparagraph (B).

(B) Any person adversely affected by such a decision may, not later than 30 days after publication of notice of such decision, file a petition for review of such decision with the United States Court of Appeals for the District of Columbia or for the circuit in which such person resides, or in which the principal place of business of such person is located. The United States court of appeals involved shall have jurisdiction to review such decision in accordance with section 706(2)(A) through (D) of title 5, United States Code, and to affirm, remand, or set aside the decision of the Secretary. Except as otherwise provided in this subparagraph, section 504(c) and (d) [15 USC @ 2004(c), (d)] shall apply to such review to the same extent and manner as it applies with respect to review of any rule prescribed under this section or section 501, 503, or 506 [15 USC @ 2001, 2003, or 2006].

(6) The availability of any adjustment or other relief under this subsection shall not be taken into account in prescribing standards under subsection (b).

(l) Credits for exceeding average fuel economy standards.

(1) (A) For purposes of this part, credits under this subsection shall be considered to be available to any manufacturer upon the completion of the model year in which such credits are earned under subparagraph (B) unless under subparagraph (C) the credits are made available for use at a time prior to the model year in which earned.

(B) Whenever the average fuel economy of the passenger automobiles manufactured by a manufacturer in a particular model year exceeds an applicable average fuel economy standard established under subsection (a) or (c) (determined by the Secretary without regard to any adjustment under subsection (d) or any credit under this subsection), such manufacturer shall be entitled to a credit, calculated under subparagraph (C), which--

(i) shall be available to be taken into account with respect to the average

fuel economy of that manufacturer for any of the three consecutive model years immediately prior to the model year in which such manufacturer exceeds such applicable average fuel economy standard, and

(ii) to the extent that such credit is not so taken into account pursuant to clause (i), shall be available to be taken into account with respect to the average fuel economy of that manufacturer for any of the three consecutive model years immediately following the model year in which such manufacturer exceeds such applicable average fuel economy standard.

(C) (i) At any time prior to the end of any model year, a manufacturer which has reason to believe that its average fuel economy for passenger automobiles will be below such applicable standard for that model year may submit a plan demonstrating that such manufacturer will earn sufficient credits under subparagraph (B) within the next 3 model years which when taken into account would allow the manufacturer to meet that standard for the model year involved.

(ii) Such credits shall be available for the model year involved subject to--

(I) the Secretary approving such plan; and

(II) the manufacturer earning such credits in accordance with such plan.

(iii) The Secretary shall approve any such plan unless the Secretary finds that it is unlikely that the plan will result in the manufacturer earning sufficient credits to allow the manufacturer to meet the standard for the model year involved.

(iv) The Secretary shall provide notice to any manufacturer in any case in which the average fuel economy of that manufacturer is below the applicable standard under subsection (a) or (c), after taking into account credits available under subparagraph (B)(i), and afford the manufacturer a reasonable period (of not less than 60 days) in which to submit a plan under this subparagraph.

(D) The amount of credit to which a manufacturer is entitled under this paragraph shall be equal to--

(i) the number of tenths of a mile per gallon by which the average fuel economy of the passenger automobiles manufactured by such manufacturer in the model year in which the credit is earned pursuant to this paragraph exceeds the applicable average fuel economy standard established under subsection (a) or (c), multiplied by

(ii) the total number of passenger automobiles manufactured by such manufacturer during such model year.

(E) The Secretary shall take credits into account for any model year on the basis of the number of tenths of a mile per gallon by which the manufacturer involved was below the applicable average fuel economy standard for that model year and the volume of passenger automobiles manufactured that model year by the manufacturer. Credits once taken into account for any model year shall not thereafter be available for any other model year. Prior to taking any credit into account, the Secretary shall provide the manufacturer involved with written notice and reasonable opportunity to comment thereon.

(2) Credits for manufacturers of automobiles which are not passenger automobiles shall be earned and be available to be taken into account for model years in which the average fuel economy of such class of automobiles is below the applicable average fuel economy standard established under subsection (b) to the same extent and in the same manner as provided for under paragraph (1). Not later than 60 days after the date of the enactment of this subsection [enacted Oct. 10, 1980], the Secretary shall prescribe regulations to carry out the provisions of this paragraph.

(3) Whenever a civil penalty has been assessed and collected under section 508 [15 USC @ 2008] from a manufacturer who is entitled to a credit under this subsection, the Secretary of the Treasury shall refund to such manufacturer the amount of the civil penalty so collected to the extent that penalty is attributable to credits available under this subsection.

(4) The Secretary may prescribe rules for purposes of carrying out the provisions of this subsection.

@ 2003. Calculation of average fuel economy
(a) Method of calculation.

(1) Average fuel economy for purposes of section 502(a) and (c) [15 USC @ 2002(a) and (c)]shall be calculated by the EPA Administrator by dividing--
(A) the total number of passenger automobiles manufactured in a given model year by a manufacturer, by
(B) a sum of terms, each term of which is a fraction created by dividing--
(i) the number of passenger automobiles of a given model type manufactured by such manufacturer in such model year, by
(ii) the fuel economy measured for such model type.

(2) Average fuel economy for purposes of section 502(b) [15 USC @ 2002(b)]shall be calculated in accordance with rules of the EPA Administrator.

(3) In the event that a manufacturer manufacturers electric vehicles, as defined in section 512(b)(2) (15 U.S.C. 2012(b)(2)) [15 USC @ 2012(b)(2)], the average fuel economy will be calculated under 503(a)(1) and (2) [15 USC @ 2003(a)(1) and (2)]to include equivalent petroleum based fuel economy values for various classes of electric vehicles in the following manner:
(A) The Secretary of Energy will determine equivalent petroleum based fuel economy values for various classes of electric vehicles. Determination of these fuel economy values will take into account the following parameters:
(i) the approximate electrical energy efficiency of the vehicles considering the vehicle type, mission, and weight;
(ii) the national average electricity generation and transmission efficiencies;
(iii) the need of the Nation to conserve all forms of energy, and the relative scarcity and value to the Nation of all fuel used to generate electricity;
(iv) the specific driving patterns of electric vehicles as compared with those of petroleum fuelled vehicles.

(B) The Secretary of Energy will propose equivalent petroleum based fuel economy values within four months of enactment of the Act [enacted Jan. 7, 1980]. Final promulgation of the values is required no later than six months after the proposal of the values.

(C) The Secretary of Energy will review these values on an annual basis and will propose revisions, if necessary.

(b) Automobile categories.

(1) In calculating average fuel economy under subsection (a)(1), the EPA Administrator shall separate the total number of passenger automobiles manufactured by a manufacturer into the following two categories:
(A) Passenger automobiles which are domestically manufactured by such manufacturer and passenger automobiles which are included within this category pursuant to paragraph (3) (plus, in the case of model year 1978 and model year 1979, passenger automobiles which are within the includable base import volume of such manufacturer).

(B) Passenger automobiles which are not domestically manufactured by such manufacturer and which are not included in the domestic category pursuant to paragraph (3) (and which, in the case of model year 1978 and model year 1979, are not within the includable base import volume of such manufacturer).

The EPA Administrator shall calculate the average fuel economy of each such separate category, and each such category shall be treated as if manufactured by a separate manufacturer for purposes of this part.

(2) For purposes of this subsection:
(A) The term "includable base import volume", with respect to any manufacturer in model year 1978 or 1979, as the case may be, is a number of passenger automobiles which is the lesser of--
(i) the manufacturer's base import volume, or
(ii) the number of passenger automobiles calculated by multiplying--
(I) the quotient obtained by dividing such manufacturer's base import volume by such manufacturer's production volume, times
(II) the total number of passenger automobiles manufactured by such manufacturer during such model year.

(B) The term "base import volume" means one-half the sum of--
(i) the total number of passenger automobiles which were not domestically manufactured by such manufacturer during model year 1974 and which were imported by such manufacturer during such model year, plus

(ii) 133 percent of the total number of passenger automobiles which were not domestically manufactured by such manufacturer during the first 9 months of model year 1975 and which were imported by such manufacturer during such 9-month period.

(C) The term "base production volume" means one-half the sum of--
(i) the total number of passenger automobiles manufactured by such manufacturer during model year 1974, plus
(ii) 133 percent of the total number of passenger automobiles manufactured by such manufacturer during the first 9 months of model year 1975.

(D) For purposes of subparagraphs (B) and (C) of this paragraph any passenger automobile imported during model year 1976, but prior to July 1, 1975, shall be deemed to have been manufactured (and imported) during the first 9 months of model year 1975.

(E) An automobile shall be considered domestically manufactured in any model year if at least 75 percent of the cost to the manufacturer of such automobile is attributable to value added in the United States or Canada, unless the assembly of such automobile is completed in Canada and such automobile is not imported into the United States prior to the expiration of 30 days following the end of such model year. The EPA Administrator may prescribe rules for purposes of carrying out this subparagraph.

(F) The fuel economy of each passenger automobile which is imported by a manufacturer in model year 1978 or any subsequent model year, as the case may be, and which is not domestically manufactured by such manufacturer, shall be deemed to be equal to the average fuel economy of all such passenger automobiles.

(3)(A) After consideration of a petition (and comments thereon) for an exemption from the provisions of paragraph (1) filed by a manufacturer, the Secretary shall, by order, grant an exemption from such provisions for passenger automobiles manufactured by that manufacturer during the period provided for in such order, unless the Secretary finds, after notice and reasonable opportunity for written or oral comment, that the proposed exemption would, for such period, result in reduced employment in the United States related to motor vehicle manufacturing.

(B) Any exemption granted under subparagraph (A) shall be effective for a period of 5 model years or, at the request of the manufacturer, such longer period as the Secretary may provide, as specified in the order.

(C) An exemption granted under subparagraph (A) for any manufacturer shall not be effective unless the manufacturer--

(i) began automobile production or assembly in the United States after December 22, 1975, and before May 1, 1980; or

(ii) began automobile production or assembly in the United States on or after May 1, 1980, and has engaged in such production or assembly in the United States for at least one model year ending on or before December 31, 1985.

(D)(i) Any decision by the Secretary to grant or deny an exemption under subparagraph (A) shall be made, and notice thereof published in the Federal Register, not later than 90 days after the date of the petition for that exemption. The Secretary may extend such period to a specified date if the Secretary publishes notice thereof in the Federal Register, together with the reasons for such extension. In no event may such period be extended beyond the 150th day after the date of the petition for such exemption.

(ii) The period for written or oral comment provided in subparagraph (A) for any petition shall end not later than 60 days after the filing of the petition, except that such period may be extended by the Secretary for not to exceed an additional 30 days. If the Secretary fails to make a decision pursuant to this paragraph within the period for a decision in clause (i)--

(I) the petition shall be deemed to have been granted; and

(II) the Secretary, within 30 days after the end of such decision period, shall submit a written statement to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Interstate and Foreign Commerce of the House of Representatives [Committee on Energy and Commerce]setting forth the reasons for failing to decide within such decision period.

(E)(i) Any person adversely affected by a decision of the Secretary denying or granting an exemption pursuant to this paragraph may, not later than 30 days after publication of the notice of such decision, file a petition of review of such decision in the United States Court of Appeals for the District of Columbia. Such court shall have exclusive jurisdiction to review such decision, in accordance with section 706(2)(A) through (D) of title 5, of the United States Code [5 USC @ 706(2)(A)-(D)], and to affirm, remand, or set aside the decision of the Secretary.

(ii) The judgment of the court affirming, remanding, or setting aside, in whole or in part, any such decision shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28 of the United States Code [28 USC @ 1254].

Application therefor shall be made within 30 days after entry of such judgment.

(iii) Notwithstanding any other provision of law, a decision of the Secretary on an exemption pursuant to this paragraph shall not be subject to judicial or administrative review except as provided in this paragraph.

(iv) [Redesignated]
(F) Notwithstanding section 502(1) [15 USC @ 2002(1), in the case of any model year for which an exemption under this subsection is effective for any manufacturer--
(i) no credit may be earned under section 502(1)(1)(B) [15 USC @ 202 (1)(1)(B)]by the manufacturer; and
(ii) no credit may be made available under section 502(1)(1)(C) [15 USC @ 2002 (1)(1)(C)]for the manufacturer.

(4)(A) If a plan has been submitted by a manufacturer and approved by the Secretary under subparagraph (B), the EPA Administrator shall for each of the four model years covered by such plan include under paragraph (1)(A) (and exclude under paragraph (1)(B)) with respect to that manufacturer not more than 150,000 passenger automobiles which are manufactured by that manufacturer but which do not qualify as domestically manufactured if--
(i) the model type or types involved have not previously been domestically manufactured;
(ii) at least 50 percent of the cost to the manufacturer of each such automobile is attributable to value added in the United States or Canada;
(iii) in the case of any such automobile the assembly of which is completed in Canada, that automobile is imported into the United States not later than 30 days following the end of the model year involved; and
(iv) such automobile model type or types are domestically manufactured before the close of the fourth model year covered by such plan.

(B)(i) A manufacturer may submit to the Secretary for approval a plan, including supporting material, which shall set forth the actions, and the dates by which such actions are to be taken, which will assure that the automobile model type or types referred to in subparagraph (A) will be domestically manufactured before the end of the fourth model year covered by such plan.

(ii) The Secretary shall promptly consider and act upon any plan submitted under this subparagraph. The Secretary shall approve any such plan unless--
(I) the Secretary finds that the plan is inadequate to meet the requirements of this paragraph, or
(II) the manufacturer has previously submitted a plan which has been approved by the Secretary under this paragraph.

(C) This paragraph shall only apply with respect to model years beginning after model year 1980.

(c) Definition of "automobiles manufactured". Any reference in this part to automobiles manufactured by a manufacturer shall be deemed--

(1) to include all automobiles manufactured by persons who control, are controlled by, or are under common control with, such manufacturer; and
(2) to exclude all automobiles manufactured (within the meaning of paragraph (1)) during a model year by such manufacturer which are exported prior to the expiration of 30 days following the end of such model year.

(d) Testing and calculation procedures.

(1) Fuel economy for any model type shall be measured, and average fuel economy of a manufacturer shall be calculated, in accordance with testing and calculation procedures established by the EPA Administrator, by rule. Procedures so established with respect to passenger automobiles (other than for purposes of

section 506 [15 USC @ 2006]) shall be the procedures utilized by the EPA Administrator for model year 1975 (weighed 55 percent urban cycle, and 45 percent highway cycle), or procedures which yield comparable results. Procedures under this subsection, to the extent practicable, shall require that fuel economy tests be conducted in conjunction with emissions tests conducted under section 206 of the Clean Air Act. The EPA Administrator shall report any measurements of fuel economy and any calculations of average fuel economy to the Secretary.

(2) The EPA Administrator shall, by rule, determine that quantity of any other fuel which is the equivalent of one gallon of gasoline.

(3) Testing and calculation procedures applicable to a model year, and any amendment to such procedures (other than a technical or clerical amendment), shall be promulgated not less than 12 months prior to the model year to which such procedures apply.

(e) Rounding off of measurements of fuel economy. For purposes of this part (other than section 506 [15 USC @ 2006]), any measurement of fuel economy of a model type, and any calculation of average fuel economy of a manufacturer, shall be rounded off to the nearest one-tenth mile per gallon (in accordance with rules of the EPA Administrator).

(f) Consultation and coordination by Administrator with Secretary. The EPA Administrator shall consult and coordinate with the Secretary in carrying out his duties under this section.

@ 2007. Unlawful conduct

(a) Subject to subsection (b), the following conduct is unlawful:

(1) the failure of any manufacturer to comply with any average fuel economy standard applicable to such manufacturer under section 502 [15 USC @ 2002](other than section 502(b) [15 USC @ 2002(b)]),

(2) the failure of any manufacturer to comply with any average fuel economy standard applicable to such manufacturer under section 502(b) [15 USC @ 2002(b)], or

(3) the failure of any person (A) to comply with any provision of this part applicable to such person (other than section 502, 506(a), 510, or 511 [15 USC @@ 2002, 2006(a), 2010, or 2011]), or (B) to comply with any standard, rule, or order applicable to such person which is issued pursuant to such a provision.

(b) A manufacturer shall not be considered to have engaged in unlawful conduct, or to have failed to comply with any fuel economy standard applicable to such manufacturer under section 502 [15 USC @ 2002], if the average fuel economy of such manufacturer, after taking into account the credits then available to the manufacturer under section 502(1) [15 USC @ 2002 (l)], would result in the applicable standard being met or exceeded.

@ 2008. Civil Penalty
(a) Penalty for violations; credit against penalty.

(1) If average fuel economy calculations reported under section 503(d) [15 USC @ 2003(d)]indicate that any manufacturer has violated section 507(a)(1) or (2) [15 USC @ 2007(a)(1) or (2)], then (unless further measurements of fuel economy, further calculations of average fuel economy, or other information indicates there is no violation of section 507(a)(1) or (2) [15 USC @ 2007(a)(1) or (2)]) the Secretary shall commence a proceeding under paragraph (2) of this subsection. The results of such further measurements, further calculations, and any such other information, shall be published in the Federal Register.

(2) If, on the record after opportunity for agency hearing, the Secretary determines that such manufacturer has violated section 507(a)(1) or (2) [15 USC @ 2007(a)(1) or (2)], or that any person has violated section 507(a)(3) [15 USC @ 2007(a)(3)], the Secretary shall assess the penalties provided for under subsection (b). Any interested person may participate in any proceeding under this paragraph.

(b) Amount of penalty; compromise or modification.

(1)(A) Any manufacturer whom the Secretary determines under subsection (a) to have violated a provision of section 507(a)(1) [15 USC @ 2007(a)(1)] with respect to any model year, shall be liable to the United States for a civil penalty equal to (i) the amount obtained by multiplying $ 5 by (i) the number of tenths of a mile per gallon by which the average fuel economy of the passenger automobiles manufactured by such manufacturer during such model year is exceeded by the applicable average fuel economy standard established under section 502(a) and (c) [15 USC @ 2002(a) and (c)], multiplied by the number of passenger automobiles manufactured by such manufacturer during such model year, reduced by (ii) the credits then available under section 502 (1) [15 USC @ 2002 (1)]for such model year.

(B) Any manufacturer whom the Secretary determines under subsection (a) to have violated section 507(a)(2) [15 USC @ 2007(a)(2)]shall be liable to the United States for a civil penalty equal to (i) the amount obtained by multiplying $ 5 by (i) the number of tenths of a mile per gallon by which the applicable average fuel economy standard exceeds the average fuel economy of automobiles to which such standard applies, and which are manufactured by such manufacturer during the model year in which the violation occurs, multiplied by the number of automobiles to which such standard applies and which are manufactured by such manufacturer during such model year, reduced by (ii) the credits then available under section 502(1) [15 USC @ 2002 (1)]for such model year.

(2) Any person whom the Secretary determines under subsection (a) to have violated a provision of section 507(a)(3) [15 USC @ 2007(a)(3)]shall be liable to the United States for a civil penalty of not more than $ 10,000 for each violation. Each day of a continuing violation shall constitute a separate violation for purposes of this paragraph.

(3) The amount of such civil penalty shall be assessed by the Secretary by written notice. The Secretary shall have the discretion to compromise, modify, or remit, with or without conditions, any civil penalty assessed under this subsection against any person, except that any civil penalty assessed for a violation of section 507(a)(1) or (2) [15 USC @ 2007(a)(1) or (2)]may be so compromised, modified, or remitted only to the extent--

(A) necessary to prevent the insolvency or bankruptcy of such manufacturer,

(B) such manufacturer shows that the violation of section 507(a)(1) or (2) [15 USC @ 2007(a)(1) or (2)]resulted from an act of God, a strike, or a fire, or

(C) the Federal Trade Commission has certified that modification of such penalty is necessary to prevent a substantial lessening of competition, as determined under paragraph (4).

The Attorney General shall collect any civil penalty for which a manufacturer is liable under this subsection in a civil action under subsection (c)(2) (unless the manufacturer pays such penalty to the Secretary).

(4) Not later than 30 days after a determination by the Secretary under subsection (a)(2) that a manufacturer has violated section 507(a)(1) or (2) [15 USC @ 2007(a)(1) or (2)], such manufacturer may apply to the Federal Trade Commission for a certification under this paragraph. If the manufacturer shows and the Federal Trade Commission determines that modification of the civil penalty for which such manufacturer is otherwise liable is necessary to prevent a substantial lessening of competition in that segment of the automobile industry subject to the standard with respect to which such penalty was assessed, the Commission shall so certify. The certification shall specify the maximum amount that such penalty may be reduced. To the maximum extent practicable, the Commission shall render a decision with respect to an application under this paragraph not later than 90 days after the application is filed with the Commission. A proceeding under this paragraph shall not have the effect of delaying the manufacturer's liability under this section for a civil penalty for more than 90 days after such application is filed, but any payment made before a decision of the Commission under this paragraph becomes final shall be paid to the court in which the penalty is collected, and shall (except as otherwise provided in paragraph (5)), be held by such court, until 90 days after such decision becomes final (at which time it shall be paid into the general fund of the Treasury).

(5) Whenever a civil penalty has been assessed and collected from a manufacturer under this section, and is being held by a court in accordance with paragraph (4), and the Secretary subsequently determines to modify such civil penalty pursuant to paragraph (3)(C) the Secretary shall direct the court to remit the appropriate amount of such penalty to such manufacturer.

(6) A claim of the United States for a civil penalty assessed against a manufacturer under subsection (b)(1) shall, in the case of the bankruptcy or insolvency of such manufacturer, be subordinate to any claim of a creditor of such manufacturer which arises from an extension of credit before the date on which the judgment in any collection action under this section becomes final (without regard to paragraph (4)).

(c) Review of penalty by interested person.

(1) Any interested person may obtain review of a determination (A) of the Secretary pursuant to which a civil penalty has been assessed under subsection (b), or (B) of the Federal Trade Commission under subsection (b)(4), in the United States Court of Appeals for the District of Columbia, or for any circuit wherein such person resides or has his principal place of business. Such review may be obtained by filing a notice of appeal in such court within 30 days after the date of such determination, and by simultaneously sending a copy of such notice by certified mail to the Secretary or the Federal Trade Commission, as the case may be. The Secretary or the Commission, as the case may be, shall promptly file in such court a certified copy of the record upon which such determination was made. Any such determination shall be reviewed in accordance with chapter 7 of title 5, United States Code [5 USC @@ 701 et seq.].

(2) If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order, or after the appropriate court of appeals has entered final judgment in favor of the Secretary, the Attorney General shall recover the amount for which the manufacturer is liable in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the civil penalty shall not be subject to review.

(d) Prescription of additional amount by rule.

(1)(A) The Secretary shall, by rule in accordance with the provisions of this subsection and subsection (e), substitute a higher amount for the amount per tenth of a mile per gallon which would be used to calculate the civil penalty under subsection (b)(1) in the absence of such rule, if the Secretary finds that--

(i) the additional amount of the civil penalty which may be imposed under such rule will result in, or substantially further, substantial energy conservation for automobiles in future model years for which such higher penalty may be imposed; and

(ii) subject to subparagraph (B), such additional amount of civil penalty will not result in substantial deleterious impacts on the economy of the United States or of any State or region of any State.

(B) Any findings under subparagraph (A)(ii) may be made only if the Secretary finds that it is likely that--

(i) such additional amount of civil penalty will not cause a significant increase in unemployment in any State or region thereof;

(ii) such additional amount will not adversely affect competition; and

(iii) such additional amount will not cause a significant increase in automobile imports.

(2) Any rule under paragraph (1) may not provide that the amount per tenth of a mile per gallon used to calculate the civil penalty under subsection (b)(1) be less than $ 5.00 or more than $ 10.00.

(3) Any rule prescribed under paragraph (1) shall be effective for the later of--

(A) automobile model years beginning after model year 1981, or

(B) automobile model years beginning at least 18 months after such rule becomes final.

(e) Publication of proposed rule; hearing; evidence; publication of final rule; judicial review.

(1)(A) After the Secretary of Transportation develops a proposed rule pursuant to subsection (d), he shall publish such proposed rule in the Federal Register, together with a statement of the basis for such rule, and provide copies thereof to the manufacturers. He shall then provide a period of public comment on such rule of at least 45 days for written comments thereon. A copy of any such proposed rule shall be transmitted by the Secretary to the Federal Trade Commission and the Secretary shall request such Commission to comment thereon within the period provided to the public concerning such proposed rule.

(B) After such written comment period, any interested person, (including the Federal Trade Commission) shall be afforded an opportunity to present oral data, views, and arguments at a public hearing concerning such proposal. At such hearing such interested person (including the Federal Trade Commission) shall have an opportunity to question--

(i) other interested persons who make oral presentations,

(ii) employees and contractors of the United States who have made written or oral presentations or who have participated in the development of the proposed rule or in the consideration thereof, and

(iii) experts and consultants who have provided information to any person who makes an oral presentation and which is contained in or referred to in such presentation;

with respect to disputed issues of material fact, except that the Secretary may restrict questioning if he determines that such questioning is duplicative or is not likely to result in a timely and effective resolution of such issues. Any oral or documentary evidence may be received, but the Secretary as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

(C) A rule subject to this subsection may not be issued except on consideration of the whole record supported by, and in accordance with, the reliable, probative, and substantial evidence.

(D) A transcript shall be kept of any such public hearing made in accordance with this section and such transcripts and written comments shall be available to the public at the cost of reproduction.

(2) If any final rule is prescribed by the Secretary after such public comment period under subsection (d) it shall be published in the Federal Register, together with each of the findings required by subsection (d).

(3)(A) Any person aggrieved by any final rule under subsection (d) may at any time before the 60th day after the date such rule is published under paragraph (2) file a petition with the United States Court of Appeals for the circuit wherein such person resides, or has his principal place of business, for judicial review thereof. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the written submissions to, and transcript of, the written and oral proceedings on which the rule was based, as provided in section 2112 of title 28, United States Code [28 USC @ 2112].

(B) Upon the filing of the petition referred to in paragraph (1), the court shall have jurisdiction to review the rule in accordance with chapter 7 of title 5, United States Code [5 USC @@ 701 et seq.], and to grant appropriate relief as provided in such chapter. No rule may be affirmed unless supported by substantial evidence.

(C) The judgment of the court affirming or setting aside, in whole or in part, any such rule shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code [28 USC @ 1254].

(4) In the case of any information which is provided the Secretary or the court during the consideration and review of any such rule and which is determined to be confidential by the Secretary pursuant to the provisions of section 11(d) of the Energy Supply and Environmental Coordination Act of 1974 [15 USC @ 796(d)], any disclosure of such information by an officer or employee of the United States or of any department or agency thereof, except in an in camera proceeding by the Secretary or the court, shall be deemed a violation of section 1905 of title 18, United States Code [18 USC @ 1905].

1993 FUEL ECONOMY GUIDE GAS GUZZLERS 16:06:32 05-26-93
GUZZLER STD 22.5

MANUFACTURER	MODEL	CID/CYL	FSYS	TRANS-OD	COMB MPG(1)	PROJECTED SALES (2)	ENGINE DESCRIPTORS	INDEX	EXEMPT CODE
CHRYSLER	VIPER	488/10	FI	M6 - 2	18.6		(GUZZLER) (FFS)	2910	N
GENERAL MOTORS	CAPRICE	350/ 8	FI	L4 - 2	19.1		(GUZZLER) (POLICE) (FFS)	4103	N
GENERAL MOTORS	ALLANTE	279/ 8	FI	L4 - 4	19.7		(GUZZLER) (FFS)	4600	N
GENERAL MOTORS	COMMERCIAL CHASSIS	299/ 8	FI	L4 - 4	21.0		(GUZZLER) (FFS)	4660	N
ASTON MARTIN	VIRAGE/VOLANTE	326/ 8	FI	L4 - 4	14.8		(GUZZLER) (FFS)	7002	N
ASTON MARTIN	VIRAGE/VOLANTE	326/ 8	FI	M5 - 2	16.1		(GUZZLER) (FFS)	7002	N
AUTOKRAFT LIMI	A.C.MARK IV	302/ 8	FI	M5 - 2	20.1		(GUZZLER) (FFS)	10101	N
BMW	535I	209/ 6	FI	L4 - 2	21.7		(GUZZLER) (FFS)	12056	N
BMW	535I	209/ 6	FI	M5 - 2	21.3		(GUZZLER) (FFS)	12056	N
BMW	M5	216/ 6	FI	M5 - 2	17.6		(GUZZLER) (FFS)	12060	N
BMW	740I	243/ 8	FI	L5 - 2	21.2		(GUZZLER) (FFS)	12071	N
BMW	740IL	243/ 8	FI	L5 - 2	20.5		(GUZZLER) (FFS)	12071	N
BMW	750IL	304/12	FI	L4 - 2	16.9		(GUZZLER) (FFS)	12080	N
BMW	850CI	304/12	FI	L4 - 2	16.9		(GUZZLER) (FFS)	12080	N
BMW	850CI	304/12	FI	M6. - 2	16.3		(GUZZLER) (FFS)	12080	N
CHAMPAGNE IMPO	CHAMPAGNE 300 E	180/ 6	FI	A4 - 1	21.4		(GUZZLER) (FFS) (VARIABLE)	14101	N
CHAMPAGNE IMPO	CHAMPAGNE 190E 2.5 16VALVE	180/ 6	FI	A4 - 1	21.4		(GUZZLER) (FFS) (VARIABLE)	14101	N
CHAMPAGNE IMPO	CHAMPAGNE 190 E 2.6	180/ 6	FI	A4 - 1	21.4		(GUZZLER) (FFS) (VARIABLE)	14101	N
CHAMPAGNE IMPO	CHAMPAGNE 300E 4-MATIC	180/ 6	FI	A4 - 1	21.4		(GUZZLER) (FFS) (VARIABLE)	14101	N
CHAMPAGNE IMPO	CHAMPAGNE 260E	180/ 6	FI	A4 - 1	21.4		(GUZZLER) (FFS) (VARIABLE)	14101	N
CHAMPAGNE IMPO	CHAMPAGNE 260E 4-MATIC	180/ 6	FI	A4 - 1	21.4		(GUZZLER) (FFS) (VARIABLE)	14101	N
CHAMPAGNE IMPO	CHAMPAGNE 300E 24 VALVE	180/ 6	FI	A4 - 1	21.4		(GUZZLER) (FFS) (VARIABLE)	14101	N
CHAMPAGNE IMPO	CHAMPAGNE 300CE	180/ 6	FI	A4 - 1	21.4		(GUZZLER) (FFS) (VARIABLE)	14101	N
CHAMPAGNE IMPO	CHAMPAGNE 300CE 24 VALVE	180/ 6	FI	A4 - 1	21.4		(GUZZLER) (FFS) (VARIABLE)	14101	N
CHAMPAGNE IMPO	CHAMPAGNE IMPORTS 500SL	307/ 8	FI	A4 - 1	15.5		(GUZZLER) (FFS)	14161	N
CHAMPAGNE IMPO	CHAMPAGNE IMPORTS 500SE	307/ 8	FI	A4 - 1	15.5		(GUZZLER) (FFS)	14161	N
CHAMPAGNE IMPO	CHAMPAGNE IMPORTS 500SEL	307/ 8	FI	A4 - 1	15.5		(GUZZLER) (FFS)	14161	N
CHAMPAGNE IMPO	CHAMPAGNE IMPORTS 500SEC	307/ 8	FI	A4 - 1	15.5		(GUZZLER) (FFS)	14161	N
CHAMPAGNE IMPO	CHAMPAGNE 911 CARRERA4	220/ 6	FI	M5 - 1	21.4		(GUZZLER) (FFS)	14162	N
CHAMPAGNE IMPO	CHAMPAGNE 911 CARRERA4 TARGA	220/ 6	FI	M5 - 1	21.4		(GUZZLER) (FFS)	14162	N
CHAMPAGNE IMPO	CHAMPAGNE 911 CARRERA4 CABRI	220/ 6	FI	M5 - 1	21.4		(GUZZLER) (FFS)	14162	N
CHAMPAGNE IMPO	CHAMPAGNE 911 CARRERA2	220/ 6	FI	M5 - 1	21.4		(GUZZLER) (FFS)	14162	N
CHAMPAGNE IMPO	CHAMPAGNE 911 CARRERA2 TARGA	220/ 6	FI	M5 - 1	21.4		(GUZZLER) (FFS)	14162	N
CHAMPAGNE IMPO	CHAMPAGNE 911 CARRERA2 CABRI	220/ 6	FI	M5 - 1	21.4		(GUZZLER) (FFS)	14162	N
CHAMPAGNE IMPO	CHAMPAGNE 325I	181/ 6	FI	A4 - 1	20.2		(GUZZLER) (FFS)	14163	N
CHAMPAGNE IMPO	CHAMPAGNE 325IX	181/ 6	FI	A4 - 1	20.2		(GUZZLER) (FFS)	14163	N
CHAMPAGNE IMPO	CHAMPAGNE 325I CABRIOLET	181/ 6	FI	A4 - 1	20.2		(GUZZLER) (FFS)	14163	N
CHAMPAGNE IMPO	CHAMPAGNE 325I TOURING	181/ 6	FI	A4 - 1	20.2		(GUZZLER) (FFS)	14163	N
CHAMPAGNE IMPO	CHAMPAGNE 325IX TOURING	181/ 6	FI	A4 - 1	20.2		(GUZZLER) (FFS)	14163	N
CHAMPAGNE IMPO	CHAMPAGNE 325I COUPE	181/ 6	FI	A4 - 1	20.2		(GUZZLER) (FFS)	14163	N
CHAMPAGNE IMPO	CHAMPAGNE 525I 24 VALVE	181/ 6	FI	A4 - 1	20.2		(GUZZLER) (FFS)	14163	N
CHAMPAGNE IMPO	CHAMPAGNE 525I	181/ 6	FI	A4 - 1	20.2		(GUZZLER) (FFS)	14163	N
CHAMPAGNE IMPO	CHAMPAGNE 525IX	181/ 6	FI	A4 - 1	20.2		(GUZZLER) (FFS)	14163	N
CHAMPAGNE IMPO	CHAMPAGNE 530I	181/ 6	FI	A4 - 1	20.2		(GUZZLER) (FFS)	14163	N
CHAMPAGNE IMPO	CHAMPAGNE 525I TOURING	181/ 6	FI	A4 - 1	20.2		(GUZZLER) (FFS)	14163	N
CHAMPAGNE IMPO	CHAMPAGNE 525IX TOURING	181/ 6	FI	A4 - 1	20.2		(GUZZLER) (FFS)	14163	N
CHAMPAGNE IMPO	CHAMPAGNE Z1 ROADSTER	181/ 6	FI	A4 - 1	20.2		(GUZZLER) (FFS)	14163	N
CHAMPAGNE IMPO	CHAMPAGNE 730I	181/ 6	FI	A4 - 1	20.2		(GUZZLER) (FFS)	14163	N
CHAMPAGNE IMPO	CHAMPAGNE IMPORTS 560SEL	339/ 8	FI	A4 - 1	17.1		(GUZZLER) (FFS)	14164	N
CHAMPAGNE IMPO	CHAMPAGNE IMPORTS 500SE	339/ 8	FI	A4 - 1	17.1		(GUZZLER) (FFS)	14164	N
CHAMPAGNE IMPO	CHAMPAGNE IMPORTS 500SEL	339/ 8	FI	A4 - 1	17.1		(GUZZLER) (FFS)	14164	N
CHAMPAGNE IMPO	CHAMPAGNE IMPORTS 560SE	339/ 8	FI	A4 - 1	17.1		(GUZZLER) (FFS)	14164	N
CHAMPAGNE IMPO	CHAMPAGNE IMPORTS 500SL	339/ 8	FI	A4 - 1	17.1		(GUZZLER) (FFS)	14164	N
CHAMPAGNE IMPO	CHAMPAGNE IMPORTS 560SL	339/ 8	FI	A4 - 1	17.1		(GUZZLER) (FFS)	14164	N

1993 FUEL ECONOMY GUIDE GAS GUZZLERS
GUZZLER STD 22.5

16:06:32 05-26-93

MANUFACTURER	MODEL	CID/CYL	FSYS	TRANS-OD	COMB MPG(1)	PROJECTED SALES (2)	ENGINE DESCRIPTORS	INDEX	EXEMPT CODE
CHAMPAGNE IMPO	CHAMPAGNE IMPORTS 560SEC	339/ 8	FI	A4 - 1	17.1		(GUZZLER) (FFS)	14164	N
CHAMPAGNE IMPO	CHAMPAGNE IMPORTS 500SEC	339/ 8	FI	A4 - 1	17.1		(GUZZLER) (FFS)	14164	N
CHAMPAGNE IMPO	CHAMPAGNE 400SEL	303/ 8	FI	A4 - 1	18.2		(GUZZLER) (FFS)	14166	N
CHAMPAGNE IMPO	CHAMPAGNE 500SE	303/ 8	FI	A4 - 1	18.2		(GUZZLER) (FFS)	14166	N
CHAMPAGNE IMPO	CHAMPAGNE 500SEL	303/ 8	FI	A4 - 1	18.2		(GUZZLER) (FFS)	14166	N
CHAMPAGNE IMPO	CHAMPAGNE 500SEC	303/ 8	FI	A4 - 1	18.2		(GUZZLER) (FFS)	14166	N
CHAMPAGNE IMPO	CHAMPAGNE 500SL	303/ 8	FI	A4 - 1	18.2		(GUZZLER) (FFS)	14166	N
CHAMPAGNE IMPO	CHAMPAGNE 420SE	303/ 8	FI	A4 - 1	18.2		(GUZZLER) (FFS)	14166	N
CHAMPAGNE IMPO	CHAMPAGNE 420 SEL	303/ 8	FI	A4 - 1	18.2		(GUZZLER) (FFS)	14166	N
CHAMPAGNE IMPO	CHAMPAGNE 420SEC	303/ 8	FI	A4 - 1	18.2		(GUZZLER) (FFS)	14166	N
CHAMPAGNE IMPO	CHAMPAGNE 400SE	303/ 8	FI	A4 - 1	18.2		(GUZZLER) (FFS)	14166	N
CX AUTOMOTIVE	XM-V8	182/ 6	FI	M5 - 2	19.2		(GUZZLER) (FFS)	16923	N
CX AUTOMOTIVE	XM-V8A	182/ 6	FI	A4 - 2	19.2		(GUZZLER) (FFS)	16923	N
CX AUTOMOTIVE	XM-V8BREAK	182/ 6	FI	A4 - 2	19.2		(GUZZLER) (FFS)	16923	N
MERCEDES BENZ	300E-4MATIC	181/ 6	FI	A4 - 1	21.6		(GUZZLER) (FFS)	20035	N
MERCEDES BENZ	300TE-4MATIC	181/ 6	FI	A4 - 1	21.6		(GUZZLER) (FFS)	20035	N
MERCEDES BENZ	300SL	181/ 6	FI	A5 - 2	21.5		(GUZZLER) (FFS)	20040	N
MERCEDES BENZ	300SL	181/ 6	FI	M5 - 1	21.0		(GUZZLER) (FFS)	20040	N
MERCEDES BENZ	300SE	195/ 6	FI	A5 - 2	19.5		(GUZZLER) (FFS)	20050	N
MERCEDES BENZ	400SEL	256/ 8	FI	A4 - 1	18.7		(GUZZLER) (FFS)	20060	N
MERCEDES BENZ	500E	303/ 8	FI	A4 - 1	20.8		(GUZZLER) (FFS)	20065	N
MERCEDES BENZ	500SEL	303/ 8	FI	A4 - 1	17.4		(GUZZLER) (FFS)	20065	N
MERCEDES BENZ	500SEC	303/ 8	FI	A4 - 1	17.4		(GUZZLER) (FFS)	20065	N
MERCEDES BENZ	500SL	303/ 8	FI	A4 - 1	20.8		(GUZZLER) (FFS)	20065	N
MERCEDES BENZ	600SEL/SEC	385/12	FI	A4 - 1	15.5		(GUZZLER) (FFS)	20070	N
MERCEDES BENZ	600SL	385/12	FI	A4 - 1	17.2		(GUZZLER) (FFS)	20070	N
EXECUTIVE COAC	PRESIDENT 6800-F	350/ 8	FI	L4 - 2	17.8		(GUZZLER) (FFS)	20702	N
EXECUTIVE COAC	PRESIDENT 6000-F	350/ 8	FI	L4 - 2	18.5		(GUZZLER) (FFS)	20702	N
EXECUTIVE COAC	EMBASSY 68-F	350/ 8	FI	L4 - 2	17.8		(GUZZLER) (FFS)	20702	N
EXECUTIVE COAC	EMBASSY 60-F	350/ 8	FI	L4 - 2	18.5		(GUZZLER) (FFS)	20702	N
EXECUTIVE COAC	SILVERHAWK 68-F	350/ 8	FI	L4 - 2	18.5		(GUZZLER) (FFS)	20702	N
EXECUTIVE COAC	SILVERHAWK 60-F	350/ 8	FI	L4 - 2	18.6		(GUZZLER) (FFS)	20702	N
EXECUTIVE COAC	PRESIDENT 6800-G	350/ 8	FI	L4 - 2	17.8		(GUZZLER) (FFS)	20702	N
EXECUTIVE COAC	PRESIDENT 6000-G	350/ 8	FI	L4 - 2	18.5		(GUZZLER) (FFS)	20702	N
EXECUTIVE COAC	EMBASSY 68-G	350/ 8	FI	L4 - 2	17.8		(GUZZLER) (FFS)	20702	N
EXECUTIVE COAC	EMBASSY 60-G	350/ 8	FI	L4 - 2	18.5		(GUZZLER) (FFS)	20702	N
EXECUTIVE COAC	SILVERHAWK 68-G	350/ 8	FI	L4 - 2	18.5		(GUZZLER) (FFS)	20702	N
EXECUTIVE COAC	SILVERHAWK 60-G	350/ 8	FI	L4 - 2	18.6		(GUZZLER) (FFS)	20702	N
FERRARI	FERRARI 512 TR	302/12	FI	M5 - 2	14.6		(GUZZLER) (FFS)	22015	N
FERRARI	FERRARI 348 TB/TS	208/ 8	FI	M5 - 2	17.6		(GUZZLER) (FFS)	22020	N
FERRARI	FERRARI 348 TB/TS	208/ 8	FI	M5 - 1	17.1		(GUZZLER) (FFS)	22021	N
FERRARI	FERRARI MONDIAL T/CABRIOLET	208/ 8	FI	M5 - 2	16.8		(GUZZLER) (FFS)	22026	N
FERRARI	FERRARI MONDIAL T/CABRIOLET	208/ 8	FI	S5 - 2	16.4		(GUZZLER) (FFS)	22026	N
FEDERAL COACH	FEDERAL CADILLAC 85J	350/ 8	FI	L4 - 2	17.5		(GUZZLER) (FFS)	22703	N
FEDERAL COACH	FEDERAL CADILLAC WINDSOR	350/ 8	FI	L4 - 2	18.5		(GUZZLER) (FFS)	22703	N
FEDERAL COACH	FEDERAL CADILLAC EAGLE	350/ 8	FI	L4 - 2	18.5		(GUZZLER) (FFS)	22703	N
FEDERAL COACH	FEDERAL CADILLAC SIX-DOOR	350/ 8	FI	L4 - 2	18.5		(GUZZLER) (FFS)	22703	N
FEDERAL COACH	FEDERAL CADILLAC 24E	350/ 8	FI	L4 - 2	18.5		(GUZZLER) (FFS)	22703	N
FEDERAL COACH	FEDERAL CADILLAC FORMAL	350/ 8	FI	L4 - 2	18.6		(GUZZLER) (FFS)	22703	N
FEDERAL COACH	FEDERAL CADILLAC CORP. 16	350/ 8	FI	L4 - 2	18.6		(GUZZLER) (FFS)	22703	N
FEDERAL COACH	FEDERAL CADILLAC 24	350/ 8	FI	L4 - 2	18.5		(GUZZLER) (FFS)	22703	N
FEDERAL COACH	FEDERAL LINCOLN 85J	281/ 8	FI	L4 - 4	20.5		(GUZZLER) (FFS)	22704	N
FEDERAL COACH	FEDERAL LINCOLN EAGLE/WINDSR	281/ 8	FI	L4 - 4	20.5		(GUZZLER) (FFS)	22704	N
FEDERAL COACH	FEDERAL LINCOLN 24E	281/ 8	FI	L4 - 4	20.5		(GUZZLER) (FFS)	22704	N

1993 FUEL ECONOMY GUIDE GAS GUZZLERS
GUZZLER STD 22.5

16:06:32 05-26-93

MANUFACTURER	MODEL	CID/CYL	FSYS	TRANS-DD	COMB MPG(1)	PROJECTED SALES (2)	ENGINE DESCRIPTORS	INDEX	EXEMPT CODE
FEDERAL COACH	FEDERAL LINCOLN EATON O/D	281/ 8	FI	L4 - 4	20.9		(GUZZLER) (FFS)	22704	N
FEDERAL COACH	FEDERAL LINCOLN CORP.SIXTEEN	281/ 8	FI	L4 - 4	21.5		(GUZZLER) (FFS)	22704	N
FEDERAL COACH	FEDERAL LINCOLN 24	281/ 8	FI	L4 - 4	20.9		(GUZZLER) (FFS)	22704	N
G & K AUTOMOTI	FERRARI TESTEROSSA	302/12	FI	M5 - 1	13.8		(GUZZLER) (FFS)	25101	N
G & K AUTOMOTI	735 I LUXURY	209/ 6	FI	A4 - 1	16.6		(GUZZLER) (FFS)	25103	N
G & K AUTOMOTI	BMW735I	209/ 6	FI	A4 - 1	16.6		(GUZZLER) (FFS)	25103	N
G & K AUTOMOTI	BMW730I	209/ 6	FI	A4 - 1	16.6		(GUZZLER) (FFS)	25103	N
G & K AUTOMOTI	BMW 535I	209/ 6	FI	A4 - 1	16.6		(GUZZLER) (FFS)	25103	N
G & K AUTOMOTI	BMW 635I	209/ 6	FI	A4 - 1	16.6		(GUZZLER) (FFS)	25103	N
G & K AUTOMOTI	1991 500 SL	304/ 8	FI	A4 - 1	17.3		(GUZZLER) (FFS)	25104	N
G & K AUTOMOTI	PORSCHE CARRERA 4	220/ 6	FI	M5 - 1	18.9		(GUZZLER) (FFS)	25105	N
G & K AUTOMOTI	PORSCHE CARRERA 2	220/ 6	FI	M5 - 1	18.9		(GUZZLER) (FFS)	25105	N
G & K AUTOMOTI	1990 300 TE	181/ 6	FI	A4 - 1	18.0		(GUZZLER) (FFS)	25106	N
G & K AUTOMOTI	1990 300 SL 2 VALVE	181/ 6	FI	A4 - 1	18.0		(GUZZLER) (FFS)	25106	N
G & K AUTOMOTI	1990 300 E	181/ 6	FI	A4 - 1	18.0		(GUZZLER) (FFS)	25106	N
G & K AUTOMOTI	1990 300 CE	181/ 6	FI	A4 - 1	18.0		(GUZZLER) (FFS)	25106	N
G & K AUTOMOTI	1990 260 E	181/ 6	FI	A4 - 1	18.0		(GUZZLER) (FFS)	25106	N
G & K AUTOMOTI	1990 260 TE	181/ 6	FI	A4 - 1	18.0		(GUZZLER) (FFS)	25106	N
G & K AUTOMOTI	1990 260 CE	181/ 6	FI	A4 - 1	18.0		(GUZZLER) (FFS)	25106	N
G & K AUTOMOTI	500SL MERC BENZ	304/ 8	FI	A4 - 1	17.3		(GUZZLER) (FFS)	25107	N
G & K AUTOMOTI	300SL MERC BENZ	181/ 6	FI	A4 - 1	19.8		(GUZZLER) (FFS)	25108	N
VECTOR AEROMOT	VECTOR W8	365/ 8	FI	A3 - 1	10.1		(GUZZLER) (FFS,TRBO)(MPFI)	25301	N
ICI-INTERNATIO	MERCEDES BENZ 600 SEL	365/12	FI	A4 - 1	14.5		(GUZZLER) (FFS)	28607	N
JAGUAR CARS IN	JAGUAR XJS COUPE	243/ 6	FI	M5 - 2	20.0		(GUZZLER) (FFS)	30591	N
JAGUAR CARS IN	JAGUAR XJS CONVERTIBLE	243/ 6	FI	M5 - 2	19.9		(GUZZLER) (FFS)	30593	N
JAGUAR CARS IN	XJRS COUPE	366/12	FI	A3 - 1	15.6		(GUZZLER) (FFS) (MPFI)	30594	N
JAGUAR CARS IN	XJRS CONVERTIBLE	366/12	FI	A3 - 1	15.4		(GUZZLER) (FFS) (MPFI)	30595	N
J.K. MOTORS,IN	MERC.BENZ 260E	159/ 6	FI	M4 - 1	21.4		(GUZZLER) (FFS)	31401	N
J.K. MOTORS,IN	PORSCHE 928 S4	302/ 8	FI	A4 - 1	20.0		(GUZZLER) (FFS)	31402	N
J.K. MOTORS,IN	TESTAROSSA	302/12	FI	M5 - 1	13.7		(GUZZLER) (FFS)	31404	N
J.K. MOTORS,IN	230E MERC BENZ	122/ 4	FI	A4 - 1	22.4		(GUZZLER) (FFS)	31405	N
J.K. MOTORS,IN	190E 2.3 MERC BENZ	122/ 4	FI	A4 - 1	22.4		(GUZZLER) (FFS)	31405	N
J.K. MOTORS,IN	MERC BENZ 300SEL	181/ 6	FI	A4 - 1	19.7		(GUZZLER) (FFS)	31408	N
J.K. MOTORS,IN	MERC BENZ 300SE	181/ 6	FI	A4 - 1	19.7		(GUZZLER) (FFS)	31408	N
J.K. MOTORS,IN	MERC BENZ 300TE	181/ 6	FI	A4 - 1	19.7		(GUZZLER) (FFS)	31408	N
J.K. MOTORS,IN	MERC BENZ 300E	181/ 6	FI	A4 - 1	19.7		(GUZZLER) (FFS)	31408	N
J.K. MOTORS,IN	MERC BENZ 300CE	181/ 6	FI	A4 - 1	19.7		(GUZZLER) (FFS)	31408	N
J.K. MOTORS,IN	300SL	181/ 6	FI	A4 - 1	19.7		(GUZZLER) (FFS)	31408	N
J.K. MOTORS,IN	BMW735IL	209/ 6	FI	A4 - 1	17.8		(GUZZLER) (FFS)	31407	N
J.K. MOTORS,IN	BMW735I	209/ 6	FI	A4 - 1	17.8		(GUZZLER) (FFS)	31407	N
J.K. MOTORS,IN	BMW635CSI	209/ 6	FI	A4 - 1	17.8		(GUZZLER) (FFS)	31407	N
J.K. MOTORS,IN	BMW635LG	209/ 6	FI	A4 - 1	17.8		(GUZZLER) (FFS)	31407	N
J.K. MOTORS,IN	BMW635I	209/ 6	FI	A4 - 1	17.8		(GUZZLER) (FFS)	31407	N
J.K. MOTORS,IN	TESTAROSSA	302/12	FI	M5 - 1	14.1		(GUZZLER) (FFS)	31408	N
NISSAN	04S FULL-ACTIVE SUSPENSION	274/ 8	FI	L4 - 4	19.8		(GUZZLER) (FFS)	38041	N
PORSCHE	911 CARRERA 4/2	220/ 6	FI	M5 - 2	20.8		(GUZZLER) (FFS)	42020	N
PORSCHE	911 CARRERA 4/2	220/ 6	FI	S4 - 2	22.0		(GUZZLER) (FFS)	42020	N
PORSCHE	911 CARRERA 4/2	220/ 6	FI	M5 - 2	20.8		(GUZZLER) (FFS)	42020	N
PORSCHE	911 CARRERA 4/2	220/ 6	FI	S4 - 2	22.0		(GUZZLER) (FFS)	42020	N
PORSCHE	928 GTS	329/ 8	FI	L4 - 1	19.2		(GUZZLER) (FFS)	42050	N
PORSCHE	928 GTS	329/ 8	FI	M5 - 1	17.2		(GUZZLER) (FFS)	42050	N
ROLLS-ROYCE MO	CORNICHE IV	412/ 8	FI	L4 - 2	14.0		(GUZZLER) (FFS) (MPFI)	44001	N
ROLLS-ROYCE MO	SILVER SPIRIT II/SILVER SPUR	412/ 8	FI	L4 - 2	14.0		(GUZZLER) (FFS) (MPFI)	44001	N
ROLLS-ROYCE MO	SILVER SPUR II MPW TOURING L	412/ 8	FI	L4 - 2	13.7		(GUZZLER) (FFS) (MPFI)	44001	N

1993 FUEL ECONOMY GUIDE GAS GUZZLERS
GUZZLER STD 22.5

16:06:32 05-26-93

MANUFACTURER	MODEL	CID/CYL	FSYS	TRANS-OD	COMB MPG(1)	PROJECTED SALES (2)	ENGINE DESCRIPTORS	INDEX	EXEMPT CODE
ROLLS-ROYCE MO	BENTLEY BROOKLANDS/BRKLNDS L	412/ 8	FI	L4 - 2	14.0		(GUZZLER) (FFS) (MPFI)	44001	N
ROLLS-ROYCE MO	BENTLEY CONTINENTAL	412/ 8	FI	L4 - 2	14.0		(GUZZLER) (FFS) (MPFI)	44001	N
ROLLS-ROYCE MO	BENTLEY TURBO R/TURBO R(LWB)	412/ 8	FI	L4 - 2	14.7		(GUZZLER) (FFS,TRBO)(MPFI)	44008	N
ROLLS-ROYCE MO	BENTLEY CONTINENTAL R	412/ 8	FI	L4 - 2	14.7		(GUZZLER) (FFS,TRBO)(MPFI)	44008	N
AUDI	V8	255/ 8	FI	L4 - 2	19.2		(GUZZLER) (FFS)	64011	N
LAMBORGHINI	D8132/DIABLO	348/12	FI	M5 - 2	12.9		(GUZZLER) (FFS) (MPFI)	69101	N

NOTES

EXEMPT CODES:
N - NONE
1 - UNLOADED GVWR > 8000 LBS.
2 - EMERGENCY VEHICLE
3 - IRS ALTERNATE RATE SCHEDULE
4 - SMALL VOLUME MFR WHO LENGTHENS AN EXISTING AUTOMOBILE

(1) COMBINED MPG IS THE ROUNDED COMBINED MPG VALUE ADJUSTED USING THE TEST PROCEDURE CREDIT EQUATION.
(2) PROJECTED SALES ARE CONFIDENTIAL.

ANNEX E: Summary of CAFE Fines Collected (provided by the National Highway Traffic Safety Administration, U.S. Department of Transportation, 19 July 1993)

SUMMARY OF CAFE FINES COLLECTED

MANUFACTURER	1983	1984	1985	1986	1987
Aston Martin Lagonda Ltd.*			$2 550		
BMW of North America, Inc.					$1 088 895
Callaway Cars, Inc.**					
Jaguar Cars, Inc.*	$57 970	$5 958 020	$8 799 010	$8 040 550	$5 320 135
Fiat Auto S.p.A.					$279 350
Maserati Automobiles of America, Inc.					
Mercedes-Benz of North America, Inc.			$5 509 400	$20 214 700	$20 526 490
PAS**					
Peugeot Motors of America, Inc.				$793 080	$767 600
Porsche Cars North America, Inc.			$1 253 580	$823 440	$948 480
Range-Rover of North America, Inc.					$272 955
Sterling Motor Cars					$2 056 625
Sun International***				$45	
Vector Aeromotive Corp.**					
Volvo Cars of North America					
FINES COLLECTED BY MODEL YEAR	$57 970	$5 958 020	$15 564 540	$29 871 815	$31 260 530

* Now averaged with Ford imports.

** Produced in the U.S.

*** Grey-market importer of Canadian Volvos.

SUMMARY OF CAFE FINES COLLECTED

MANUFACTURER	1988	1989	1990	1991	1992
Aston Martin Lagonda Ltd.*					
BMW of North America, Inc.	$16 411 380	$14 923 580	$14 878 160	$11 249 230	
Callaway Cars, Inc.**			$20 400		
Jaguar Cars, Inc.*	$5 582 070	$6 311 895			
Fiat Auto S.p.A.	$897 260	$670 120	$705 220	$796 575	$466 750
Maserati Automobiles of America, Inc.			$120 000		
Mercedes-Benz of North America, Inc.	$18 295 455	$20 415 045	$17 556 105	$19 169 540	
PAS**		$294 500			
Peugeot Motors of America, Inc.	$482 280	$487 800	$72 500	$192 660	
Porsche Cars North America, Inc.	$1 048 905	$1 875 125	$2 033 770		
Range-Rover of North America, Inc.	$553 980	$778 140	$656 370		
Sterling Motor Cars	$1 248 120	$588 195	$162 000		
Sun International***					
Vector Aeromotive Corp.**				$1 740	
Volvo Cars of North America		$1 036 115	$12 244 440	$7 768 420	
FINES COLLECTED BY MODEL YEAR	$44 519 450	$47 380 515	$48 448 965	$39 178 165	$466 750

* Now averaged with Ford imports.

** Produced in the U.S.

*** Grey-market importer of Canadian Volvos.

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