

**WTO Law Moot Court Competition 2002**  
**Some remarks for the judges**

The clash of free trade interests on the one side and environmental conservation interests on the other is one of the defining issues of international relations and politics today. Behind the immediate interests of industry and environmentalists, there is a host of burning issues, including the scope of national sovereignty in the 21<sup>st</sup> century, and the question whether and how international (trade) relations should become more rule based. The challenge for the participants in this competition was to “legalize” broader policy arguments and to present them in the framework prescribed by substantive WTO law and by the rules on dispute settlement. Case briefs and oral presentations that get lost in what would seem fair in international relations or the “emerging right to life” of whales, would not seem to reach this target.

**Arguments on behalf of the applicant Avalon and on behalf of the respondent Bohemia**

1) Violation of Article XI GATT

A will argue first and foremost that the import ban on tuna is a violation of Art. XI (1). An import ban is a classic quantitative restriction, notably an import quota of zero. A will also argue that the violation is not justified under Art. XI (2), of which only sub c) may merit brief discussion.

B should probably concede the violation of Art. XI and focus on justifications.

2) Violation of Article XIII GATT

A will argue that the application of the import ban only against tuna from Avalon is also a violation of Art. XIII (1). Under this article, if a country does apply a quantitative restriction on imports, for example claiming a justification under Art. XI (2), it is obliged to apply the same rules for all of its trading partners, i.e. to spread the burden out to all suppliers.

In the present case, A will claim that B is not applying an import ban against all of its tuna suppliers and not even against other nations also engaged in whaling (Japan, Russia, Norway).

B will argue that the provisions of Art. XIII are not suitable for the case at hand since they essentially address market problems in the importing country. If a country imposes trade restrictions in order to protect its domestic industry from import competition, it may be fair to impose a rule that the restrictions must be applied evenly against all import competition, regardless where it comes from. However, in the present case there is no threat to the survival of whales originating from other tuna producing companies and countries (with the possible exception of Japan, Russia, and Norway). With regard to the latter three countries, B would have a difficult stand under Art. XIII. An argument that there is no tuna imported from companies in Japan and the other two countries that are also engaged in whaling should be rejected since the facts are deliberately open in this regard.

3) Violation of Article I GATT

With pretty much the same arguments as under 2), A will also claim a violation of the Most Favoured Nation Clause. Under Art. I, the contracting parties to the GATT = Members of the

WTO have to treat all the other members equally. Concretely, every single member is entitled to the most favourable treatment afforded to any other member. In the present case, A will claim that B is allowing importation of tuna from certain other member states and that this more favourable treatment should be extended to the tuna from A.

B might argue that tuna from companies that are engaged in whaling is not a like product to tuna from companies that are not engaged in whaling. However, this is not a strong argument since the concept of like product in the GATT essentially asks whether the two products are competing for the same customers. That would clearly be the case, since there is no argument being made that the tuna from Avalon as such is bad tuna or even different from other tuna. The arguments are solely directed at *other* commercial activities of the tuna producing companies.

Ultimately, B should rather concede the violation and focus on the justifications.

#### 4) Violation of Article II GATT

The case for a violation of Art. II is much more difficult to make. The article makes reference to the concession schedules which are country specific and attached to the main agreement. In the concession schedules, the different member states primarily determine the rate of import duties that will be applied to a given product to all beneficiaries of MFN status. A typical violation of Art. II would be the charging of an import duty in excess of the rate fixed in the relevant schedule. In the present case, however, B is not charging a higher duty for tuna but is simply not allowing any importation of such tuna from A. Counsel on behalf of A could only argue that the total ban violates the spirit of Article II - an interest safeguarded by Art. XI, however - or that it distorts the balance of concessions made by the parties to the dispute - an interest which is probably better safeguarded by Art. XXIII. Reference to Art. II was included in the fact sheet in order to see whether the teams could make some sense of it and/or come up with a creative argument.

#### 5) Article XXIII Nullification or Impairment

Art. XXIII is not only the traditional key opening the door to dispute settlement procedures. It also safeguards the balance of trading concessions which is supposedly the result of the negotiations of the concession schedules and their subsequent amendment in the various trade rounds. Concretely, the provision is based on the notion that each member of the WTO makes a variety of promises (fixing its tariffs at certain levels, which are usually lower than those applied before, and giving up the possibility of increasing these tariffs except in certain specific cases, such as against dumped imports) that can be translated into a monetary value of trading concessions (for example, if a A imports 10.000 bicycles from B per year at a price of 100\$ each and reduces the tariff on these bicycles from 10% to 5%, that concession has a value of 50.000\$) and that these promises are made in order to receive an equivalent amount/value of trade concessions from the other side. If one member subsequently “nullifies or impairs” the trading opportunities promised to another member, the essential balance becomes distorted, since trade flows from A to B will decrease, while trade flows from B to A will continue at the same level. Therefore, Art. XXIII provides a right to the member who claims to be the victim of a nullification or impairment to demand an “adjustment” of the mutual concessions. In principle, such an adjustment can take one of several forms: a) the trade restriction which is claimed by A to cause the nullification or impairment is terminated by B, the country that introduced it before - trade continues at the previous high level and with the same goods; b) B continues to apply the trade restriction on the

goods in question but provides additional trading opportunities with respect to other goods from the complaining member A that have an equivalent value (additional concessions on motorcycles make up for impairment of bicycle imports) - trade continues at the previous high level but in part with different goods; c) B continues to apply the trade restriction and A suspends, by way of retaliation, some of its own trading concessions on goods from B, of approximately equal value - trade continues at a lower level but one that is also in balance again.

Part of the attraction of Art. XXIII lies in the fact that it allows the members to raise a nullification or impairment complaint not only if the measure by the other side is in violation of the rules but even if it is a lawful measure (so-called non-violation complaint). The rationale is that there are not only the trading rules to be followed but there is also a balance of trading opportunities to be maintained.

In the present case, A would argue that the import ban falls under Art. XXIII (1) a) because it is a failure to carry out obligations such as the ones under Art. XI. In the alternative, however, A can argue that the ban in any case distorts the balance of trading concessions even if it should be justifiable.

Again, B has not much to reply, in particular to a non-violation complaint, and should focus on justifying the measures even if they are held to be in breach of certain obligations protected by the GATT.

#### 6) Justifications Under GATT

Since the GATT itself foresees a number of exceptions, i.e. situations in which the rules can be set aside for a certain product for a time, A would also have to address certain possible justifications B could conceivably rely on.

##### a) Article XII Safeguarding the Balance of Payments

This exception is so obviously not applicable that it must be held against a team if even a brief reference is made to Art. XII.

##### b) Article XIX Emergency Action

Again, this exception is obviously not applicable. Art. XIX allows temporary measures against a so-called "surge of imports" that give domestic competitors time to adjust to the sharply increased competition from abroad.

##### c) Article XXI Security Exceptions

This is another article with a very specific scope - national security in the military sense - that is obviously not relevant to the case at hand.

##### d) Article XX General Exceptions

Art. XX, by contrast, contains two passages of relevance to the present case. First of all, sub b)

allows “measures ... necessary to protect human, animal or plant life or health”. Secondly, sub g) allows “measures ... relating to the conservation of exhaustible natural resources”.

After the establishment of the articles which may be violated by the import ban, the discussion whether or not the ban can be justified under Art. XX is the other main task for the teams.

#### *i) Life or Health*

Before entering into a discussion of Art. XX b), the teams might raise the question whether the SPS Agreement should be applied as *lex specialis* with priority over the more general provisions of Art. XX.

However, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) is not applicable in this context. On its face, this agreement provides rules for the application of measure designed to “human, animal or plant life or health”. Nevertheless, it is clear from the definition of a sanitary or phytosanitary measure in Annex A of the SPS that measures are covered only if they are designed to protect these values “within the territory of the Member” who is applying the measures. The SPS Agreement would apply, for example, if B would restrict the importation of the tuna because a certain small number of the cans of tuna had been found to contain dangerous contaminants. However, since the whaling does not constitute a risk for “human, animal or plant life or health” in B, the SPS Agreement is not applicable.

The next question will be whether Art. XX itself should be interpreted in the same way, i.e. allowing only measures taken by a member for the protection of life or health of humans, animals or plants *within its own jurisdiction*. Arguably, this is an open question. What would seem clear is the right of a member to protect these interests if they are endangered within its own jurisdiction, i.e. of the life and health of humans, animals and plants that come under its jurisdiction under the territoriality and under the personality principle. At the same time, it would seem clear that a member is not entitled to adopt trade restrictive measure in violation of other articles of the GATT for the protection of the life and health of humans, animals and plants that are entirely within the jurisdiction of one or more other members. The open question would be whether such measures may be adopted for the protection of animals or plants that are part of the common heritage of mankind, for example whales on the high seas, dolphins, etc. B could argue that Art. XX does indeed permit such measures, however, this would be somewhat *de lege ferenda*, i.e. an expansion of the existing body of case law on the issue.

#### *ii) Exhaustible Natural Resources*

In light of the Shrimp-Turtle Case (WT/DS58/AB/R, Report of the Appellate Body adopted on 6 November 1998), it seems clear that whales can be considered exhaustible natural resources. B could argue that it is entitled to adopt trade restrictive measures to protect the whales, at least if they are sometimes found in the territorial waters of the member taking the measures, here B. The Appellate Body specifically noted the migratory life style of the sea turtles, which would also apply to whales. What we do not know is whether all whale species in question travel at least sometimes to the territorial waters of B. If not, the case for B is weakened, since the Appellate Body, in the Shrimp Turtle Case, specifically left it open whether or not a “jurisdictional limitation” should be applied for Art. XX g), i.e. whether a member could be prevented from adopting measures for the protection of exhaustible natural resources that were never found

within its own jurisdiction. This will have to be argued - controversially - by the teams.

### *iii) Proportionality Test*

On the basis of case-law of the DSB it seems clear that a measure, which is in violation of provisions of the GATT, can only be justified under Art. XX if it not only fits prima facie under one of the clauses in that article. It also has to pass a proportionality test. This test can be broken down into three elements: a) the measure has to be *suitable* to pursue the interest it is supposedly pursuing, i.e. it has to be at the very least a step in the right direction; b) the measure must be *necessary*, i.e. there is no less restrictive measure readily available that would promote the protected interest in a similar way; and c) the measure has to be *proportionate* in the strict sense, i.e. there must be a reasonable relationship between the risk to the protected interest and the trade restriction. As a rule of thumb it can be said that a serious trade restriction like an import ban will only be permitted if there is a significant risk. For example, a food containing a certain additive can be banned if either the risk to those consuming it is grave (serious illness or death), even if the probability is small (only few people having a certain allergy), or if the probability is very high (many will get ill), even though the risk as such is small (a minor stomach ache).

A will argue that the import ban may be suitable to force the companies to give up whaling but is not necessary. Alternative measures could be certain labelling requirements (such as a seal of “whale-friendly tuna” for other tuna), which would allow the consumers to make an informed choice. A would further argue that the ban is not proportionate since there is no proof that the whaling activities will in fact lead to the extinction of certain species of whales.

B will argue that the import ban is suitable and necessary. Alternative measures are either not readily available or not comparably effective. With regard to proportionality, the question is really about who bears the burden of scientific uncertainty. In this respect, B will make a claim to its national sovereignty, i.e. it will claim that in the face of scientific uncertainty, it must be for each country to determine whether it considers a certain risk - such as global warming or the extinction of whales - to be sufficiently proven or not.

### *iv) Chapeau*

Last but not least, Art. XX requires that measures adopted under its exceptions are “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination”. Such an accusation could be made by A if, for example, Japan was doing much more whaling than A but there were no measures by B against Japan, or if B itself was contributing to the decline of the whale populations in other ways (e.g. by oil exploration in essential breeding waters). However, the fact sheet does not contain indications to that effect.

## 7) Justifications Outside of GATT/WTO Law

At some point, either as part of the discussion under Art. XX or as a separate item, the teams have to address the rights and obligations of the parties under the CITES Convention and under the 1946 Whaling Convention, and their relationship to the provisions of the GATT and WTO.

Under the Whaling Convention, schedules with permitted catches are established and administered

by the International Whaling Commission. The Commission has the power to amend the schedules, i.e. fix the number of permitted catches for different species of whales, and to fix protected and unprotected species, open and closes seasons, open and closed waters, size limits, etc. The limits set by the Commission have been zero for blue whales for quite some time and have more recently become zero for humpback whales and are increasingly low for minke whales. It is pretty clear that 500 permits per year for minke whales would exceed the limits and that A could not grant regular permits for blue and humpback whales at all.

Art. VIII of the Whaling Convention, however, permits any “Contracting Government” to designate a certain number of permitted kills for “purposes of scientific research”. The number of whales so designated and the conditions for the fishermen are to be determined “as the Contracting Government sees fit”. From the side of the international community, the only conditions imposed on the respective governments are to report the number and conditions of catches permitted for scientific purposes and to share the scientific discoveries. Art. VIII is an obvious loophole in the protection system of the Whaling Convention.

In the present case, A will argue that the permits have been granted under Art. VIII and do not violate the obligations placed upon A by the Whaling Convention. B will respond that A is violating at least the spirit, if not the letter of the Convention, since there is no scientific reason for the large number of permits given per year.

Under the CITES Convention, trade in endangered species is restricted. Trade is defined as “export, re-export, import, and introduction from the sea”. The latter is defined as the importation of a specimen obtained from the sea from outside the jurisdiction of the state. For species included in Appendix I of the CITES Convention, i.e. species threatened by extinction, including most species of whales, export and/or introduction from the sea shall only be permitted on a case by case basis after a Scientific Authority of the state in question has confirmed that the specimen was obtained in a lawful manner and that its trade “will not be detrimental to the survival of the species” (Art. III).

In the present case, B will argue that the landing of whales caught on the high seas and the exportation of whale meat to other Asian countries were both violations of the CITES Convention. However, the facts are unclear, whether or not permits had been granted by a Scientific Authority in Avalon. Essentially, the CITES Convention is another example of an international environmental convention that works only in those countries that apply strict standards for its application and enforcement. There is no mechanism for ensuring that the procedure for obtaining a permit from a national Scientific Authority is handled properly and is not too generous, let alone corrupt.

As far as the relationship between these Conventions and WTO law is concerned, the question is essentially one of sequencing. According to Art. 30 of the Vienna Convention on the Law of Treaties, which can be applied to the present case on the basis of its expression of customary international law, i.e. without knowing whether or not A and B are parties to it, the more recent convention prevails over older conventions between the same parties on the same subject matter. The WTO Agreements of 1994 would be the most recent in time but the question is whether they cover “the same subject matter”. This might be argued for the CITES Convention but certainly not for the Whaling Convention.

In any case, neither the Whaling nor the CITES Convention provide for a right to free trade on the one side, or for a right of a country on the other, to restrict access to its markets for the protection of animal life or health or protection of the environment more generally. Thus, it would seem that the law governing the case is primarily the law of the WTO and that the other Conventions could only be used by way of supplementary considerations.

#### 8) Amicus Curiae Briefs from NGOs

According to Art. 13 of the Dispute Settlement Understanding (DSU), panels can “seek information and technical advice” from any source they deem appropriate, including non-governmental organizations. Only unsolicited amicus briefs from sources other than WTO member states are not foreseen in the DSU. Nevertheless, the Appellate Body, in the Shrimp-Turtle Case, ruled that it had the power to accept non-requested submissions from non-parties such as NGOs (WT/DS58/AB/R, paras. 99-110, adopted on 6 November 1998). This decision reversed a panel report that had held that the panels could only seek information but could not accept information that had not been sought. Subsequently, in the Asbestos Case, the Appellate Body drew up procedures for its own decisions whether or not to accept unsolicited briefs (WT/DS135/9, adopted on 8 November 2000).

Even though the decision by the Appellate Body to accept - under certain circumstances - even unsolicited briefs, was criticised by many member states, the question is not about unsolicited briefs in the present case. Art. 13 is quite clear about the power of the panels to request a brief from any source that is deemed appropriate. Therefore, the discussion has to focus on the question, whether it would be “appropriate” to request an opinion from those NGOs that had already been previously involved in the case.

A will argue that it has reason to fear that the opinions of the NGOs in question will be biased against it and, therefore, that they should not be heard. B will reply that the panel would be informed about facts and that A would have an opportunity to respond to any factual allegations made by the NGOs.