INTRODUCTION

When Article XX(g) was drafted, the term “natural resource” was interpreted as referring to a “raw material” or “mineral.” “Exhaustible natural resources” were considered to be stock resources, such as metals, in contrast to “renewable” resources, such as animals, plants, soil, and water.¹

Over time, the term has been broadened to include several other resources, both living and non-living. Several General Agreement on Tariffs and Trade (GATT) panels that interpreted Article XX(g) have centered their consideration on the question as to what constitutes an “exhaustible natural resource,” concluding, for example, that tuna, salmon, and herring stocks, and petroleum are included in that term. Similarly, in the Shrimp-Turtle case,² the World Trade Organization (WTO) Appellate Body concluded that sea turtles constitute “exhaustible natural resources” for the purposes of Article XX(g). It expressly mentioned that measures to conserve exhaustible natural resources, whether living or non-living, may fall within Article XX(g) in line with the principle of effectiveness in treaty interpretation.

In the Reformulated Gasoline case,³ Venezuela considered that clean air was a “condition” of air that was renewable rather than a resource that was exhaustible, such as petroleum or coal. It claimed that there was no textual basis for expanding the scope of Article XX(g) to cover renewable “conditions” of resources as opposed to exhaustible natural resources. The United States maintained that air was undoubtedly a natural resource.

that could be exhausted if it was rendered unfit for human, animal, or plant consumption, and referred to prior panel decisions where it was recognized that fish were an “exhaustible natural resource” since their populations could be depleted or rendered extinct.

The WTO panel considered that clean air is a resource and is exhaustible, since it could be depleted. It did not consider decisive the fact that the depleted resource was defined with respect to its qualities. In addition, the fact that air was renewable was not considered a valid objection. In line with an earlier report⁴ in which a GATT panel had accepted that renewable stocks of salmon could constitute an exhaustible natural resource, the WTO panel found that a policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX(g).

The evolution of GATT and WTO jurisprudence is most significant. The framers of GATT originally intended only minerals to be considered exhaustible natural resources. This term has been broadened to include other natural resources, both living and non-living. The ensuing expansion will avail the necessary protection to all resources in the global international trade arena.

BACKGROUND

Before dealing specifically with the reports of the panel and the Appellate Body in the Reformulated Gasoline case, this article will briefly examine several related issues, including the theory behind the concept of “exhaustible natural resources,” air pollution’s adverse effects, the legislation in the United States meant to protect this natural resource, and the origins of the term “exhaustible natural resources” within Article XX(g) of the General Agreement.

Exhaustible Natural Resources

What can be considered an exhaustible natural resource? Resources are defined as any material that, when extracted, has economic value.⁵ The term “living resources” refers to the ability to reproduce and propagate itself that animals and plants have.⁶

It can be considered that all natural resources are exhaustible, since all are capable, in theory, of being depleted. Living resources can be destroyed, or reduced in number to such an extent that species’ viability is negated. Non-living resources can be exploited until they are depleted.

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⁴ Canada—Measures Affecting Exports of Unprocessed Herring and Salmon, B.I.S.D. 35S/98, para. 4.6.