

# RESPONDING INTERNATIONALLY TO A RESOURCE CRISIS: INTERPRETING THE GATT ARTICLE XX(J) SHORT SUPPLY EXCEPTION

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## I. INTRODUCTION

After World War II, the European Recovery Plan (more commonly referred to as the “Marshall Plan”) was implemented.<sup>1</sup> Its purpose was to revitalize countries ravaged by the war and, more specifically, provide much needed capital to resuscitate their economies.<sup>2</sup> Part of the Marshall Plan required the United States to enact an export licensing system that favored countries participating in it.<sup>3</sup> Czechoslovakia—a CONTRACTING PARTY of the General Agreement on Trade and Tariffs (“GATT”), but not a participant in the Marshall Plan—objected, arguing that this scheme violated the Article XI prohibition on quantitative restrictions.<sup>4</sup> In its defense, the United States argued, *inter alia*, that the Article XX short supply exception allowed such an export regime.<sup>5</sup> A Working Party was convened to adjudicate this complaint, and it issued an opinion instructing the CONTRACTING PARTIES to consult accordingly.<sup>6</sup>

Since the issuance of this report, no CONTRACTING PARTY or subsequent World Trade Organization (“WTO”) Member has attempted to justify a deviation from a GATT obligation by the Article XX short supply exception. This may very well change, and the most likely industry in which it will occur is agriculture.

Over the past few years, demand for agricultural products has increased dramatically.<sup>7</sup> The developing behemoths of China and India have an expanding middle class that now has the ability to purchase more food, particularly meat

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1. Economic Cooperation Act of 1948, ch. 169, 62 Stat. 137.

2. See MICHAEL J. HOGAN, *THE MARSHALL PLAN: AMERICA, BRITAIN, AND THE RECONSTRUCTION OF WESTERN EUROPE, 1947–1952*, at 54–87 (1987) (explaining the negotiation process and resulting policy compromise necessary to structure the Marshall Plan); see generally JOHN GIMBEL, *THE ORIGINS OF THE MARSHALL PLAN* (1976) (comprehensively detailing the negotiation process and challenges in implementing the Marshall Plan).

3. Economic Cooperation Act § 117; See, e.g., 1 *WORLD TRADE ORG., GATT ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE* 594 (6th ed. 1995).

4. 1 *WORLD TRADE ORG.*, *supra* note 3; see also Reply of Zdenek Augenthaler, Head of the Czechoslovak Delegation, to John W. Evans, Vice-Chairman of the USA Delegation, GATT/CP.3/39 (Jun. 8, 1949), [www.wto.org/gatt\\_docs/English/SULPDF/90320198.pdf](http://www.wto.org/gatt_docs/English/SULPDF/90320198.pdf); see generally *Poland: Carnations*, *TIME*, Feb. 9, 1948, available at <http://www.time.com/time/magazine/article/0,9171,855998,00.html> (explaining the situation analogous to Czechoslovakia’s wherein Russia offered Poland financial incentives to not participate in the Marshall Plan).

5. 1 *WORLD TRADE ORG.*, *supra* note 3; see also Reply of John W. Evans, Vice Chairman of the U.S. Delegation, to Zdenek Augenthaler, Head of the Czechoslovak Delegation, GATT/CP.3/38 (Jun. 2, 1949), [www.wto.org/gatt\\_docs/English/SULPDF/90320196.pdf](http://www.wto.org/gatt_docs/English/SULPDF/90320196.pdf).

6. See *Report of Working Party “D” on Quantitative Restrictions*, GATT/CP.4/33 (Mar. 28, 1950), available at [www.wto.org/gatt\\_docs/English/SULPDF/90320408.pdf](http://www.wto.org/gatt_docs/English/SULPDF/90320408.pdf) [hereinafter *Working Party*].

7. *The New Face of Hunger*, *THE ECONOMIST*, April 19, 2008, at 32.

that inefficiently requires significantly more grain to feed animals.<sup>8</sup> A large portion of grain is also diverted away from its traditional usage as food by converting it into fuel.<sup>9</sup> Vietnam recently announced that it would decrease rice exports by eleven per cent.<sup>10</sup> India banned exports of all rice, except basmati, altogether.<sup>11</sup> Argentina has placed an export tariff on soybeans and other crops to decrease exports.<sup>12</sup> Richer countries, particularly those with limited production capability due to little natural resources, have begun to buy massive amounts of farmland in poor countries to provide for their population if they are facing shortages.<sup>13</sup> Articulating concern with such a prospect, the Lahore High Court recently demanded a study to be conducted on the potential problems with foreign ownership of farmland.<sup>14</sup> The court reasoned that not only was this trend redolent of colonialist practices of the East India Company, it may very well deprive poor Pakistanis of the ability to afford food.<sup>15</sup> These examples, and many others, are stoking fears that the world is facing a food crisis.<sup>16</sup>

As the credit crisis took hold in 2008, attention paid to the looming resource crisis by policy-makers and analysts was diverted. However, such lack of attention should not be equated with the absence of a problem. In the face of a credit crisis, investment in agricultural research and development is one of the first areas to have its funding slashed by governments, international organiza-

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8. *Cheap No More*, THE ECONOMIST, Dec. 8, 2007, at 81.

9. *Id.* at 81-82.

10. Alan Beattie, *Rush to Restrict Trade in Basic Foods*, FINANCIAL TIMES, April 1, 2008, available at [http://us.ft.com/ftgateway/superpage.ft?news\\_id=fto040120081418306570](http://us.ft.com/ftgateway/superpage.ft?news_id=fto040120081418306570).

11. *Id.*

12. *The Kirchners v. the Farmers*, THE ECONOMIST, March 29, 2008, at 49.

13. See Press Release, Ministry of Foreign Affairs of Japan, Promoting Responsible International Investment in Agriculture: Roundtable Concurrent with the 64th United Nations General Assembly (Sept. 29, 2009), available at <http://www.mofa.go.jp/policy/economy/fishery/agriculture/investment.html> (describing a roundtable discussion where parties from the Food & Agricultural Organization, World Food Programme, and United States Agency for International Development, among others, discussed the growing trend toward foreign ownership of agricultural land); Neil Cook, *Food Security Deals Alarm Ex-WTO Head*, GULF TIMES, Sept. 30, 2009, available at [http://www.gulf-times.com/site/topics/article.asp?cu\\_no=2&item\\_no=317405&version=1&template\\_id=36&parent\\_id=16](http://www.gulf-times.com/site/topics/article.asp?cu_no=2&item_no=317405&version=1&template_id=36&parent_id=16) (quoting former World Trade Organization Director-General Mike Moore criticizing richer countries buying land in developing countries in an attempt to ensure their food security).

14. *Sale of Agricultural Land to Foreign Investors: LHC Calls Report from Federal Gov't*, DAILY TIMES, Sept. 15, 2009, available at [http://www.dailytimes.com.pk/default.asp?page=2009\09\15\story\\_15-9-2009\\_pg13\\_4](http://www.dailytimes.com.pk/default.asp?page=2009\09\15\story_15-9-2009_pg13_4).

15. *See id.*

16. *See, e.g.*, Paul Krugman, *Grains Gone Wild*, N.Y. TIMES, April 7, 2008, available at <http://www.nytimes.com/2008/04/07/opinion/07krugman.html>.

tions, and corporations.<sup>17</sup> However, it is precisely this type of investment that is the most successful at avoiding a food crisis, poverty, and malnourishment.<sup>18</sup> Commentators have prognosticated that “[i]f global economic annual growth falls by 2-3 percentage points below recent years’ figure of about 5%, and agricultural investment declines in parallel by 20%—a realistic scenario—this would result in cereal prices 30% above what is expected without a recession by 2020.”<sup>19</sup> This increase would leave sixteen million more children malnourished.<sup>20</sup> The unpredictability of future agricultural research funding creates a perilous situation for the most vulnerable, which is further complicated by wealthier countries or regions protecting their own in times of need.

This Article does not seek to challenge or prove the assertion that the world’s natural resources are in peril. Rather, it evaluates a particular legal response that may be justified as an exceptional measure if there is a crisis. If such a circumstance occurs, WTO Members can legally deviate from their GATT obligations via the Article XX(j) short supply exception. In an effort to clarify when the use of this exception is justified and to pinpoint difficult interpretational issues within it, this Article comprehensively considers the history and development of the short supply exception, the economic conditions when short supply occurs, and the legitimate circumstances when a WTO Member may evoke this provision to derogate from its GATT commitments.

## II. HISTORY OF THE SHORT SUPPLY EXCEPTION

Upon signing a treaty, a country agrees to conform its present and future policies to the requirements of that treaty.<sup>21</sup> It is bound by the international customary rule of *pacta sunt servanda* to perform the treaty in good faith.<sup>22</sup> However, it would be imprudent for any country to commit itself to treaty obligations that do not account for extraordinary circumstances that would disable a country from adequately protecting its national interests.

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17. See, e.g., Shenggen Fan et al., *Investment, Subsidies, and Pro-Poor Growth in Rural India*, 39 AGRIC. ECON. 163, 163-64 (2008).

18. *Id.* at 169.

19. Joachim Von Braun, *The Food Crisis Isn't Over*, 456 NATURE 701, 701 (2008); see generally TODD BENSON ET AL., INT’L FOOD POLICY RESEARCH INST., GLOBAL FOOD CRISES: MONITORING AND ASSESSING IMPACT TO INFORM POLICY RESPONSES (2008), available at <http://www.ifpri.org/publication/global-food-crises> (discussing lack of food crisis information available and the need for improvement to initiate action).

20. Von Braun, *supra* note 19.

21. E.g., Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 8 I.L.M. 679 [hereinafter Vienna Convention].

22. *Id.* art. 26.

In the aftermath of World War II, such extraordinary circumstances were commonplace and given due consideration when drafting the charter to the International Trade Organization.<sup>23</sup> At the London Preparatory Committee meeting in 1946, “The Preparatory Committee agreed that during a post-war transitional period it should be permissible to use [quantitative] restrictions to achieve the equitable distribution of products in short supply, the orderly maintenance of war-time price control by countries undergoing shortages as a result of the war, and the orderly liquidation of temporary surpluses of government-owned stocks.”<sup>24</sup> In the following year, the Geneva Preparatory Committee expanded the potential use of these exceptions by considering it a general exception to all GATT obligations and, hence, moving it to Article XX.<sup>25</sup> In full, it was as follows:

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:

. . . .

II. (a) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with any multilateral arrangements directed to an equitable international distribution of such products or, in the absence of such arrangements, with the principle that all contracting parties are entitled to an equitable share of the international supply of such products; (b) essential to the control of prices by a contracting party undergoing shortages subsequent to the war; or (c) essential to the orderly liquidation of temporary surpluses of stocks owned or controlled by the government of any contracting party or of industries developed in any territory of any contracting party owing to the exigencies of the war which it would be uneconomic to maintain in normal conditions; *Provided* that such measures shall not be instituted by any contracting party except after consultation with other interested contracting parties with a view to appropriate international action.<sup>26</sup>

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23. 1 WORLD TRADE ORG., *supra* note 3, at 3, 592.

24. *Id.* at 4, 592 (quoting Report of the First Session of the London Preparatory Committee of the United Nations Conference on Trade and Employment, Oct. 15-Nov. 26, 1946, *London Report*, ¶ III.C.1(b), U.N. Doc. EPCT/33).

25. *Id.* at 593.

26. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF THE GATT* 746 n.1, 839 (1969) (quoting 55 U.N.T.S. 194, 264).

Article XX, Part II also included a sunset provision.<sup>27</sup> Prior to its expiration on January 1, 1951, the CONTRACTING PARTIES voted to extend it to remain in effect until 1953.<sup>28</sup> In 1953, it was once again extended to remain in force until 1955.<sup>29</sup> In 1955, it was extended and substantially changed, but the text of the short supply exception was not modified.<sup>30</sup> That subsection was simply relabeled as (j) and included in the Article XX list, and the final two subsections under Part II concerning price controls and liquidation of surpluses after World War II were eliminated.<sup>31</sup> As one CONTRACTING PARTY opined, a shortfall of this modification was the fact that while Part II was intended to except certain situations likely to arise because of the war, it was also applicable in the case of a natural catastrophe.<sup>32</sup> The Working Party ultimately decided that other provisions could cover such a situation though, so subsections (b) and (c) were officially eliminated.<sup>33</sup>

Since the modification of Part II in 1955, there have not been any alterations.<sup>34</sup> Within the 1955 text, there was a five-year sunset provision.<sup>35</sup> It was renewed and extended by the same terms until 1970.<sup>36</sup> In 1970, paragraph (j) was retained by recommendation of the CONTRACTING PARTIES without an expiration date.<sup>37</sup> Then, in 1994 the Uruguay Round incorporated Article XX subsection (j) into the General Agreement of Tariffs and Trade 1994 (“GATT 1994”) through section 1(a)—which remains in effect today.<sup>38</sup>

### III. ECONOMIC CONDITIONS OR WHEN IS SUPPLY SHORT?

The mere term “short supply” has a decidedly economic connotation, but what are the actual conditions when such a phenomenon is likely to occur? A brief detour into economics will help to identify situations when it may arise and,

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27. *Id.* at 746.

28. *Id.*

29. *Id.*

30. *Id.* at 746, 840.

31. *Id.*

32. *Id.* at 747.

33. *Id.*

34. *See id.* at 746-47, 840.

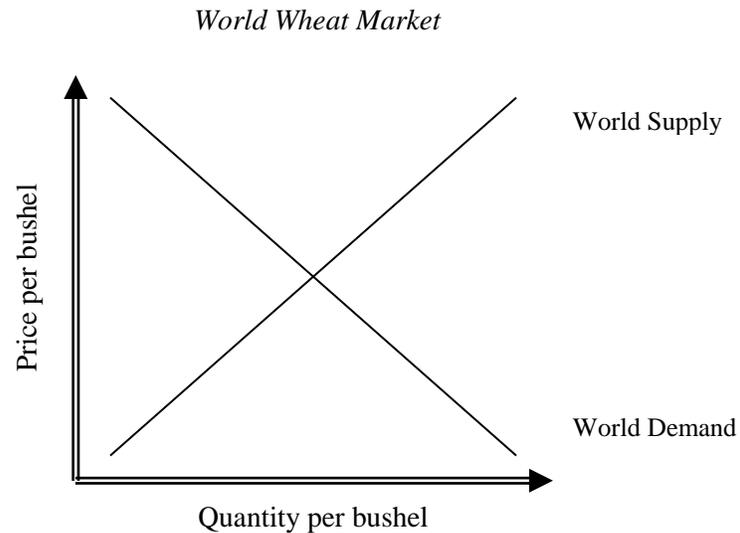
35. *Id.*

36. RAJ BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS AND TRADE 551 (2005).

37. 1 WORLD TRADE ORG., *supra* note 3, at 594-95.

38. General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A [hereinafter GATT 1994], *reprinted in* RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE 221 (3d ed. Supp. 2008).

as a result, clarify legal analysis. Article XX(j) provides an exception to obligations when there is either a general or local short supply of products.<sup>39</sup> Consider the following graph demonstrating the world supply and demand for wheat.



The vertical axis measures the price of wheat per bushel. The horizontal axis measures the quantity of wheat produced in bushels. The upward sloping line is the supply curve. The supply curve represents, in this illustration, the production decisions of individual wheat farmers with varying degrees of profitability. While some farmers have a productive enough enterprise to be profitable selling wheat at \$3 per bushel, others farmers may not be able to turn a profit at this price. However, if the price increases, then it is more likely that more wheat farmers will be able to compete. The supply curve communicates this simple, intuitive insight: the higher the price of wheat, the greater the output of wheat.

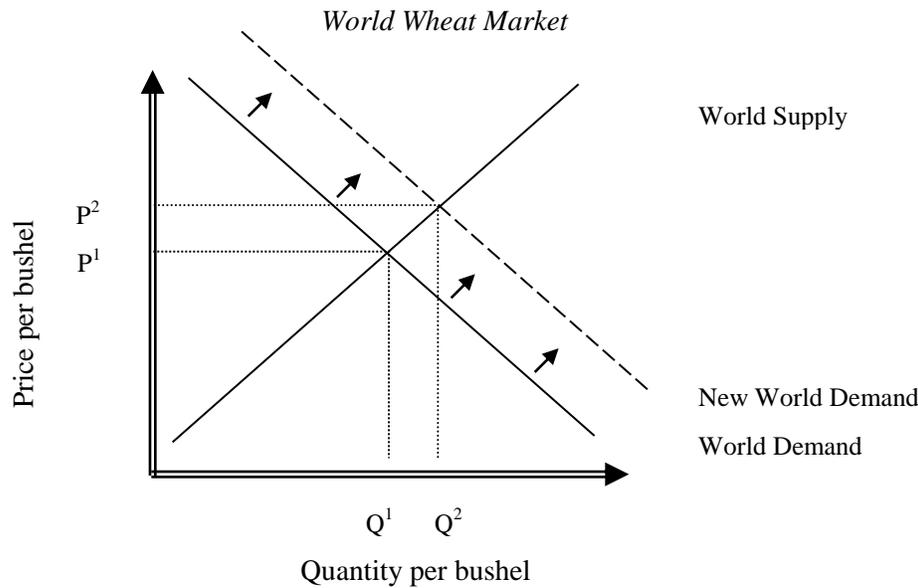
However, the world price for wheat and how much is produced will reflect how much wheat is demanded by the world market. The supply curve must be measured against the demand curve (*i.e.*, supply in terms of demand, and de-

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39. *Id.* (incorporating General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, amended by GATT B.I.S.D. (5th Supp.) art. XX(j), at 24 (1957), reprinted in RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE 113 (3d ed. Supp. 2008) [hereinafter GATT 1947]).

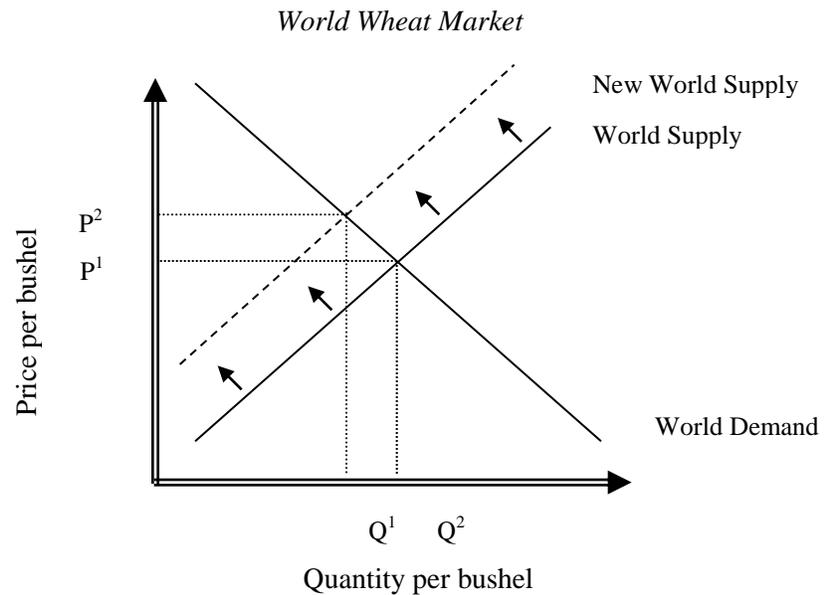
mand in terms of supply), so the price of wheat will be equal to the total demand for the wheat. This area of equilibrium will be located at the intersection of the supply and demand curves where the supply is equal to the amount demanded.

While an equilibrium concept is undoubtedly helpful in explaining the long-term movement of the economy, Article XX(j) was drafted with exceptional circumstances in mind. Starting with the assumption that for the vast majority of time the world wheat demand and supply are in equilibrium, consider what happens under two abnormal circumstances: when there is a sudden jump in demand or when there is an abrupt decline in supply. Consider the first—an increase in demand:



If there is a sudden surge in demand, the quantity or supply required to satisfy it increases from  $Q^1$  to  $Q^2$ . The price will, as a result, increase from  $P^1$  to  $P^2$ . Eventually the wheat market will self-adjust, returning to equilibrium either by a decrease in demand, an increase in supply, or a combination of both. But in the interim period before a new equilibrium is reached, wheat is in general short supply.

Now consider graphically the second possibility that exists when there is an abrupt decline in supply:



In this case, the world supply has decreased. The amount of wheat has been reduced from  $Q^2$  to  $Q^1$ . When this occurs, there will be a subsequent increase in price from  $P^1$  to  $P^2$ . In the short-term, there will be consumers who could just afford the price of wheat at the equilibrium price,  $P^1$ , but cannot afford wheat at  $P^2$ .

But Article XX(j) considers local short supply, as well as general short supply.<sup>40</sup> While there may be interpretational difficulties regarding when short supply conditions intended to be covered under the provision have been reached, this does not alter the economic conditions in which it exists. The above illustrations regarding the world wheat market are also applicable to a local market.

Is a local shortage in supply likely? One may question if local short supply remains meaningful in such an interconnected world. Despite interconnectedness, most inter-country trading occurs between countries in close proximity to each other.<sup>41</sup> As a helpful heuristic device, economists have analogized the likelihood of trade to Newton's Universal Law of Gravitation.<sup>42</sup> They argue that the

40. *Id.*

41. *See, e.g.*, BETH V. YARBROUGH & ROBERT M. YARBROUGH, *THE WORLD ECONOMY: INTERNATIONAL TRADE* 137 (7th ed. 2006).

42. *See, e.g., id.*

probability of trade between two countries, and the actuality that they do trade with each other, may be approximated by considering the overall size of the economies divided by the sum of trade barriers between these two countries.<sup>43</sup> This causal relationship may be expressed more formally by the following equation, where  $T_{ij}$  is total volume of trade between countries  $i$  and  $j$ ,  $GDP_i$  and  $GDP_j$  indicate the sizes of these countries' economies, and  $B$  is a barrier to trade.

$$T_{ij} = \frac{(GDP_i)(GDP_j)}{B}$$

A trade barrier in this instance is given its most expansive interpretation. Tariffs, quotas, and other legal instruments that policymakers craft to impede trade are certainly trade barriers.<sup>44</sup> However, and perhaps more importantly, "natural" difficulties, like the distance between countries, whether the country is landlocked, or lack of a common language, are also considered to be barriers to trade.<sup>45</sup> The proliferation of free trade agreements, particularly regional ones like the North American Free Trade Agreement or the Closer Economic Relationship between Australia and New Zealand, certainly supports this model's proposition.

The pervasively regional flavor of international trade makes local short supply a vitally important concept. For instance, the 2008 drought in Australia severely reduced its wheat output.<sup>46</sup> If New Zealand sourced its wheat needs almost entirely from Australia, but that supplier was suddenly unable to fulfill its demand, it must buy wheat elsewhere. If the world supply of wheat was unable to satisfy this additional demand, New Zealand could legitimately argue that it is experiencing short supply.

#### IV. INTERPRETING SHORT SUPPLY

The short supply exception has only been the subject of a complaint or defense in a GATT or WTO proceeding once.<sup>47</sup> Although helpful in clarifying an element of what is now Article XX(j), that proceeding did not comprehensively consider most elements in subsection (j) or the *chapeau* of Article XX.<sup>48</sup> As a

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43. See Int'l Monetary Fund, World Economic Outlook 121-127 (2002), available at <http://www.imf.org/external/pubs/ft/weo/2002/02/pdf/chapter3.pdf>.

44. *Id.* at 122.

45. *Id.*

46. Nick Bryant, *Australia's Food Bowl Lies Empty*, BBC NEWS, March 11, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7289194.stm>.

47. See *Working Party*, *supra* note 6.

48. See *id.*

result, there is a dearth of sources available to assist WTO Members contemplating whether their situation and policy response complies with the exception.

In order to accurately flesh out the substantive requirements of the short supply exception, its text must be interpreted. When interpreting a treaty it “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>49</sup> In fact, in *United States–Reformulated Gas* the WTO Appellate Body argues that interpreting text in accordance with its original meaning is so ingrained into treaty interpretation that it is now customary international law.<sup>50</sup> WTO Panels and the Appellate Body are bound to abide by this canon of construction, because it ensures both the stability and predictability of the multilateral trading system.<sup>51</sup>

If a Member evokes a policy in violation of a GATT obligation and uses the Article XX(j) as a justification, the Panel or Appellate Body will consider two issues *in seriatim*.<sup>52</sup> First, it shall be determined whether the measure by the Member substantively complies with the requirements in subsection (j).<sup>53</sup> If so, then compliance with the *chapeau* of Article XX is considered.<sup>54</sup> Only if a measure passes both steps is the measure justified under the short supply exception.

#### A. *Applying the Requirements of Paragraph (j)*

The first step in determining whether a measure may be justified under the short supply exception is to evaluate whether it satisfies the requirements contained in paragraph (j).<sup>55</sup> When interpreting those elements and applying them to a specific measure, how the measure itself is applied is of no concern

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49. Appellate Body Report, *United States–Standards for Reformulated and Conventional Gasoline*, at 15, WT/DS2/AB/R (Apr. 29, 1996), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds2\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds2_e.htm) [hereinafter *United States–Reformulated Gas*].

50. *United States–Reformulated Gas*, *supra* note 49.

51. WTO Understanding on Rules and Procedures Governing the Settlement of Disputes art. III, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, reprinted in RAJ BHALA, *INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE* 559 (3d ed. Supp. 2008).

52. *United States–Reformulated Gas*, *supra* note 49, at 20; Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 118, WT/DS58/AB/R (Oct. 12, 1998), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds58\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm) [hereinafter *United States–Shrimp*]; Appellate Body Report, *Brazil–Measures Affecting Imports of Retreaded Tyres*, ¶ 139, WT/DS332/AB/R (Dec. 3, 2007), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds332\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm) [hereinafter *Brazil–Tyres*].

53. *E.g.*, *United States–Reformulated Gas*, *supra* note 49, at 20.

54. *Id.*

55. *Id.*

under that part of the analysis. The effect of the measure based on how it is applied is scrutinized under the *chapeau*, which is only considered after paragraph (j) has been satisfied.<sup>56</sup> Rather, in this step, the general structure and design of the measure is scrutinized in relationship to the policy goal it purports to serve.<sup>57</sup> The Article XX(j) short supply exception in whole is as follows:

[A measure shall be] essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of this Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist.<sup>58</sup>

In this section of the Article, each of the elements contained in this exception will be given due attention.

### 1. *Essential To*

“Essential to” dictates a level of relatedness between a measure and the statutorily mandated purpose of obtaining products in short supply. The importance of this term, as a result, cannot be overstated. However, this term is unique in at least two important respects. No Panel or Appellate Body has ever contemplated this connection, because no Article XX(j) complaint defense has ever been evaluated. The United States defended the Marshall Plan export licenses by arguing that they complied with the short supply exception, but whether this measure was essential to the distribution of products was not considered.<sup>59</sup>

Additionally, no other Article XX paragraph requires that a measure is essential to the end contained in that paragraph.<sup>60</sup> Out of the ten enumerated exceptions in Article XX, there are seven relational terms: necessary,<sup>61</sup> relating to,<sup>62</sup> imposed for the protection of,<sup>63</sup> in pursuance of,<sup>64</sup> involving,<sup>65</sup> and essential to.<sup>66</sup>

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56. *Id.*

57. *See, e.g., United States–Shrimp, supra* note 52, ¶¶ 125, 137.

58. GATT 1994, *supra* note 38, § 1(a) (incorporating GATT 1947, *supra* note 39, art. XX(j)).

59. *See Working Party, supra* note 6.

60. GATT 1994, *supra* note 38, § 1(a) (incorporating GATT 1947, *supra* note 39, art. XX(i)). Paragraph (i) of Article XX does include the term “essential,” but it is used in a different context; namely, it refers to export restrictions to preserve essential quantities during certain political times rather than the measure being relationally essential to what it seeks to accomplish. *Id.*

61. *Id.* (incorporating GATT 1947, *supra* note 39, art. XX(a), (b), (d)).

62. *Id.* (incorporating GATT 1947, *supra* note 39, art. XX(c), (e), (g)).

63. *Id.* (incorporating GATT 1947, *supra* note 39, art. XX(f)).

64. *Id.* (incorporating GATT 1947, *supra* note 39, art. XX(h)).

Comparatively, it is clear that the drafters did not intend the same level of relationship as in other provisions because of the difference in this key term. Even the Appellate Body opined that “[i]t does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the stated interest or policy sought to be promoted or realized.”<sup>67</sup>

While there may be no unitary test, the interpretation of these terms must not be made in isolation. That is, if the original meaning of “necessary” intimates a closer relationship than “relating to”, these two terms must be interpreted accordingly. When considering the relationship required by “necessary”, the Appellate Body has reasoned that “‘necessary’ refers . . . to a range of degrees of necessity. At one end of this continuum lies ‘necessary’ understood as ‘indispensable’; at the other end, is ‘necessary’ taken to mean as ‘making a contribution to.’”<sup>68</sup> The difficult task is determining where on the continuum each term lies. However, if the terms can be established based on their former usage, then a relatively accurate approximation can be surmised for those that have not been the focus of a GATT dispute. If the two previously mentioned terms (*i.e.*, necessary and relating to) have been accurately interpreted, “necessary” can also be interpreted by extension of its relationship to these two terms.

“Relating to” had been interpreted to mean “primarily aimed at” until *United States–Shrimp*.<sup>69</sup> In this case, the test for this phrase was modified to require a “rational connection” between a measure and the particular end sought under the claimed exception.<sup>70</sup> Crucial to determining whether there is a rational connection are the means of the measure compared to the ends.<sup>71</sup> Fit is a key issue—that is, “the measure [must] . . . not [be] disproportionately wide in its scope and reach in relation to the policy objective.”<sup>72</sup>

“Necessary” is a higher standard of scrutiny than merely showing a rational connection.<sup>73</sup> The threshold question, however, is no different. The first step in the analysis is to determine if there is a rational connection “of ends and

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65. *Id.* (incorporating GATT 1947, *supra* note 39, art. XX(i)).

66. *Id.* (incorporating GATT 1947, *supra* note 39, art. XX(j)).

67. *United States–Reformulated Gas*, *supra* note 49, at 16.

68. *Brazil–Tyres*, *supra* note 52, ¶ 141 (quoting Appellate Body Report, *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 161, WT/DS161/AB/R (Dec. 11, 2000)).

69. PETROS C. MAVROIDIS, THE GENERAL AGREEMENT ON TARIFFS AND TRADE: A COMMENTARY 195-96 (2005).

70. *Id.* at 196.

71. *United States–Shrimp*, *supra* note 52, ¶ 141.

72. *Id.*

73. *Brazil–Tires*, *supra* note 52, ¶ 141.

means between the objective pursued and the measure at issue.”<sup>74</sup> If a rational connection has been established, the next issue is whether the measure materially contributes to the achievement of the measure’s objective.<sup>75</sup> If the first two steps have been satisfied, the next step is to determine if there is a reasonably available, less trade-restrictive alternative.<sup>76</sup> If there is, the measure typically fails this step.<sup>77</sup> If a measure passes all three of these steps, it is necessary to its intended end.

The task now is to determine where essential fits on the continuum of relatedness. General usage clearly indicates that a measure “essential to” an end has a higher level of relatedness than “related to.” Hence, the proper interpretation of “essential to” requires more than a mere rational connection between the measure and the objective. “Essential to” has, however, a lesser level than “necessary to.” The original meaning of essential is extremely important, while necessary intimates that the measure is required to be done if an objective is to be achieved.<sup>78</sup>

Having located “essential to” on the relatedness continuum, its legal test must be formulated. First, the threshold requirement that there is a rational connection must be satisfied similar to the higher relatedness standard of “necessary to.” Essential would also require that the measure materially contributes to the achievement of the objective as do measures that are necessary. However, a short supply exception will likely not fail the “essential to” test if a reasonably available, less trade-restrictive alternative is available. The dramatic circumstances that people affected by short supply could potentially face, and the primary responsibility of their government to address it, should entail greater deference than under the “necessary to” analysis. Under such circumstances, the measure should easily be found to be extremely important to accomplishing the intended end of protecting interests, which would outweigh the restrictiveness of the trade policy.

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74. *Id.* ¶ 145.

75. *Id.* ¶ 152.

76. *Id.* ¶ 156.

77. *But see id.* ¶¶ 176-83. The Appellate Body in *Brazil–Tyres* indicated its willingness to potentially allow a measure as passing this strict necessity scrutiny even when it is not the least trade restrictive alternative. *Id.* More specifically, in evaluating whether an import ban on retreaded tires was necessary, the Appellate Body hinted that although an import ban is the most trade restrictive policy, it must be balanced against the interests protected, in this case public health and environmental protection. *Id.*

78. Compare 5 THE OXFORD ENGLISH DICTIONARY 401 (2d ed. 1989) [hereinafter OXFORD DICTIONARY], with 10 OXFORD DICTIONARY, at 275; see also *Brazil–Tires*, *supra* note 52, ¶ 141 (recognizing that varying definitions of necessity range from “indispensable” to “making a contribution to”).

## 2. *Acquisition or Distribution*

Both “acquisition” and “distribution” have a clearly transactional connotation. Acquisition refers to the purchase or obtaining of a product.<sup>79</sup> Distribution intimates the act or process of supplying products.<sup>80</sup> This requirement, however, must not be read void of context. GATT obligations concern how governmental policies may impinge on the free flow of commerce between Members. Hence, it is the effects from acquisition or distribution of a Member’s measure that are of concern, not the individual choices of a company regarding where to sell or purchase.

While some policies (*e.g.*, an export tariff) clearly seem to be focused on the distribution of products, other policies are not as clear. Consider the violation of an Article III national treatment obligation. If a domestic policy extends preferable treatment to domestically produced goods and thereby leads to their increased consumption in a manner that satisfies short supply, does such a policy concern acquisition? Or more generally, is a policy that may not be squarely directed at acquisition or distribution, but has an effect which achieves that end, acceptable? Inquiring into the remoteness of a measure does not seem to be the primary concern. Provided that the measure is essential to acquisition or distribution, the remoteness of the measure is immaterial. All that matters is a factual determination of the measure’s effectiveness in acquiring or distributing materials in short supply. More indirect policies will meet tougher scrutiny though under the *chapeau* as to whether the measure results in unjustifiable or arbitrary discrimination or is a disguised restriction on international trade.<sup>81</sup> But ultimately, if the drafters had intended to exclude measures with a remote effect, “acquisition or distribution” would have been modified by an adjective such as “direct.”

An example that is particularly applicable to whether a measure concerns acquisition or distribution is a policy that a net exporter of a product may employ to restrict its outflow to other countries. Argentina recently imposed an increased export tax on soybeans.<sup>82</sup> With the current surge in agricultural prices, this tax prohibited some Argentines from participating in the international soybean market.<sup>83</sup> This demonstrates how an export tariff, which requires farmers and corporations to pay up front to export, yields a greater domestic supply and thereby decreases domestic price. However, is this really a measure that concerns acqui-

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79. See 1 OXFORD DICTIONARY, *supra* note 78, at 115.

80. See 4 OXFORD DICTIONARY, *supra* note 78, at 868.

81. GATT 1994, *supra* note 38, § 1(a) (incorporating GATT 1947, *supra* note 39, art. XX).

82. *The Kirchners v. the Farmers*, *supra* note 12.

83. See, *e.g.*, *id.*

sition or distribution? Likely, yes. Restricting exports of a product surely affects distribution. It effectively prevents the outflow of soybeans to the world market. While such a measure may confront tougher scrutiny on other Article XX(j) elements like “essential to,” the “equitable principle,” and the *chapeau*, it nevertheless complies with this requirement.

Additionally, a measure may not need to be directed at remedying the effects of short supply in the Member state that enacted it. In the Marshall Plan, the U.S. enacted an export licensing system to remedy short supply in European countries.<sup>84</sup> In the Panel report, this element was assumed in the analysis.<sup>85</sup> The Panel’s tacit approval is nevertheless justified upon scrutiny of the text. Paragraph (j) does not specify to whom the measure must apply. Restricting its application to acquiring products by the Member propagating the measure inserts an unintended limitation into the text.

### 3. *Of Products*

A “product” is a broad term intended to encompass all manner of goods.<sup>86</sup> For instance, Article II tariff bindings apply to all products.<sup>87</sup> And if a good is a product, then it is listed on the Harmonized Tariff Schedule (“HTS”), which was originally drafted and maintained by the World Customs Organization.<sup>88</sup> The HTS categorizes over 9,000 products for the purpose of the consistent tariff administration.<sup>89</sup> Provided that the Member invoking paragraph (j) has a tariff schedule that includes the product that is in short supply, it satisfies this element.

Two important observations should be noted about this broad interpretation. First, “product” refers to a wider expanse of goods than just foodstuffs. While the paradigm example of short supply seems to almost always be agricultural goods, the reach of this paragraph extends much farther. Second, services are excluded from products. A service is intangible in the sense that it is not a

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84. Economic Cooperation Act of 1948, ch. 169, § 117(d), 62 Stat. 137.

85. See *Working Party*, *supra* note 6.

86. See 12 OXFORD DICTIONARY, *supra* note 78, at 565.

87. GATT 1994, *supra* note 38, § 1(a) (incorporating GATT 1947, *supra* note 39, art. II, § 1(b)-(c)).

88. E.g., Foreign Agric. Serv., USDA, The Harmonized Tariff Schedule of the United States (Mar. 29, 2010), <http://www.fas.usda.gov/itp/us-tariff-sch.asp>; see generally General Rules of Interpretation for the Harmonized Tariff Schedule, reprinted in RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE 685-86 (3d ed. Supp. 2008) (detailing the general rules of interpretation for classifying goods in the tariff schedule).

89. See U.S. Int’l Trade Comm’n, HTS Online Reference Tool, <http://hts.usitc.gov/>.

physically tradable thing.<sup>90</sup> While this definition may be nebulous, if the thing in question is not on the HTS but is on a service schedule, then it must not be a “product.” To further solidify this point, the General Agreement on Trade in Services resulting from the Uruguay Round does not have a short supply exception.<sup>91</sup> Thus, the drafters’ intent is clear: measures derogating from a WTO obligation due to services in short supply are not excepted as they are for products.

#### 4. *General or Local Short Supply*

Supply is short when demand cannot be fulfilled.<sup>92</sup> Given the text of the exception, it is clear the drafters indicated that there were two sorts of exceptional circumstances that are relevant to determining when there is short supply: when it is either general or local.<sup>93</sup> But when is short supply general in character? The ordinary meaning of general is that it affects all or most people, or in this case countries.<sup>94</sup> Thus, general short supply occurs when a lot or most countries cannot satisfy their demand for a product.

It is important to note the drafter’s choice of terminology. They settled upon “general” and not “global” short supply. If global would have been used, the entire world would have had to be in short supply in order to legitimately invoke the exception.<sup>95</sup> However, that seems like a highly unlikely scenario and, as a result, would severely limit its applicability. Guinea, for instance, has large untapped reserves of bauxite.<sup>96</sup> If the rest of the world is in need of bauxite, and Guinea produces an amount exceeding its domestic demand, the existence of this lone surplus would be insufficient to rebut a finding of *general* short supply.

Interpreting what “local” means in this context presents greater problems. Starting with the term’s ordinary meaning, the Oxford English Dictionary defines local as relating to a particular region.<sup>97</sup> As was the case with “general,” it is important to note an obvious term that the drafters did not use: national. The most likely scenario in which there may be a local short supply is when a

90. See 15 OXFORD DICTIONARY, *supra* note 78, at 34.

91. See General Agreement on Trade in Services art. XIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1125, *reprinted in* RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE 500 (3d ed. Supp. 2008).

92. See *supra* Part III.

93. GATT 1994, *supra* note 38, § 1(a) (incorporating GATT 1947, *supra* note 39, art. XX(j)).

94. 6 OXFORD DICTIONARY, *supra* note 78, at 429.

95. *Id.* at 475.

96. U.S. GEOLOGICAL SURVEY, U.S. DEP’T OF INTERIOR, MINERAL COMMODITY SUMMARIES 33 (2008), available at <http://minerals.usgs.gov/minerals/pubs/mcs/2008/mcs2008.pdf>.

97. 8 OXFORD DICTIONARY, *supra* note 78, at 1077.

geographical group of nations—*e.g.*, Persian Gulf countries—is all suffering from short supply. The more difficult question seems to be whether a locale that is national or sub-national also qualifies. On one hand, this interpretation could markedly increase the number of circumstances in which measures violating GATT obligations could be justified. The risk, though, is that by interpreting Article XX(j) in this manner it is rendered less exceptional, potentially undercutting the effectiveness of fundamental principles such as non-discrimination and reciprocity. On the other hand, a country ought to be able to deviate from GATT obligations if it is legitimately experiencing short supply. After all, each country has an obligation to its citizens first and foremost. Local could have been intended to allow Members the freedom to enact national measures when a sub-national region is experiencing short supply.

The text of Article XX(j), other GATT provisions, and drafting history provides no useful insight into the intended scope of “local.” Without any such indication to the contrary, it seems illogical to conclude that national or sub-national is not local. Perhaps a Panel or the Appellate Body would apply a common canon of construction that interprets GATT obligations broadly and exceptions narrowly. If that happened, then national or sub-national may not be local. Until such a decision has been issued, however, there is no justifiable reason to conclude otherwise.

5. *Any Such Measures Shall be Consistent with the Principle That All CONTRACTING PARTIES Are Entitled to an Equitable Share of the International Supply of Such Products*

The normative commitment of this proviso is inescapable. Not only did the drafters label this requirement as a “principle,” they also require compliance with concepts like “entitlement” and “equitable share.” While it may be tempting to consult insights from moral and political philosophy to guide this clause’s interpretation, they may only be considered if the text itself is equivocal or inconclusive.<sup>98</sup> And even if that is the case, philosophical insights are relevant only to the extent that they adhere to the drafter’s purpose or objective of the entire treaty.<sup>99</sup>

A textual analysis of such an overtly normative clause runs into a potential complication from the outset. The obligation to whom the principle is owed extends only to CONTRACTING PARTIES, which is to say, WTO Members.<sup>100</sup> It

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98. *United States–Shrimp*, *supra* note 52, ¶ 114.

99. *See id.*

100. GATT 1994, *supra* note 38, § 1(a) (incorporating GATT 1947, *supra* note 39, art. XX(j)).

may seem logically indefensible to parse the world into Members and non-Members and, based on that classification, determine who must be afforded equitable treatment. After all, countries that are Members of the WTO are, on the whole, considerably better off than those that are not Members. Does it not make more sense to extend this treatment to all countries, regardless of WTO Member status?

Perhaps this is true, but there are at least four arguments for applying this Members-only principle, notwithstanding this objection. First, that interpretation relies on a misreading of the text. In effect, it interprets “all” as “only” when there is no indication of such an exclusive intent. Second, this delineation is required by the text. Parties to a treaty, and adjudicative bodies applying that treaty, are required to apply the original meaning of the text.<sup>101</sup> Failing to adhere to this commitment would violate good faith.<sup>102</sup> Third, the Article XX *chapeau* prohibits arbitrary and unjustifiable discrimination and disguised restrictions on international trade that extends to all countries regardless of WTO membership.<sup>103</sup> While the *chapeau* may only indirectly and incompletely extend such treatment to non-Members, it would likely prohibit at least egregiously inequitable measures. Fourth, there is a justifiable policy reason for limiting this commitment to WTO Members. Although self-serving, this delineation serves the legitimate policy interest of maintaining the multilateral trading system. If a measure could satisfy paragraph (j) without any regard to the effect it may have on other Members, it may provide an incentive not to comply with GATT obligations. After all, if a Member could enact a measure that denies another Member its equitable share of goods, it may very well incite a tit-for-tat reaction from the affected Member. A member-driven organization like the WTO may not survive an internal conflict of this sort if every country could retaliate unchecked.

If a country is “entitled to” a product, then it has a just claim to that product.<sup>104</sup> This term is quantitative rather than qualitative in reference to a particular product though. If considering this proviso, the product has already been selected by satisfying the first clause of paragraph (j). Rather, “entitled” concerns the amount of the product the country should get in relation to other Members. Fortunately, the quantum is specified as an equitable share of the international supply.<sup>105</sup>

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101. See, e.g., *United States–Shrimp*, *supra* note 52, ¶ 114.

102. See Vienna Convention, *supra* note 21, art. 26.

103. GATT 1994, *supra* note 38, § 1(a) (incorporating GATT 1947, *supra* note 39, art. XX).

104. See 5 OXFORD DICTIONARY, *supra* note 78, at 300.

105. GATT 1994, *supra* note 38, § 1(a) (incorporating GATT 1947, *supra* note 39, art. XX(j)).

But what is an “equitable share?” This term is etymologically derived from “equal,”<sup>106</sup> but it would be a stretch to conceive of it as meaning that each Member has a right to receive an equal portion of the concerned product. There are two reasons why this is so. First, being entitled intimates only that each Member has the opportunity to receive its portion, not that it actually does receive that portion. Second, not all Members have the same population size. If rice, for instance, is the product in general short supply, it would not be equitable for each Member to have the opportunity to purchase an equal amount of rice. Rather, the amount a Member should have the opportunity to purchase is weighted by its population size. But this proportion is not fixed merely by dividing the international supply of rice by the total population of Members, and then ensuring that each Member has the opportunity to purchase its per capita share. If so, only individuals in Member countries would be entitled to a portion of the entire global supply of rice. After all, if all Members could argue that they were entitled to their share in such a manner, non-Members would have no opportunity to obtain any of these goods. Fortunately, the natural interpretation of this clause provides a more reasonable alternative. Since it contemplates the “international supply,” the equitable share for a country of a certain size should correspond with the total number of countries that need portions of the total product available.<sup>107</sup> It would be an act of interpretational bad faith to determine that Members are cumulatively entitled to the international supply of any product.

The more difficult interpretational issue concerns whether each individual is entitled to a strictly equal share of a product. The previous illustration assumes that it does, but developed countries, for instance, consume much greater quantities of products than least developed countries. Is it correct to use the current, differential consumption rates of countries combined with its population size to determine the equitable share to which each country is entitled? China consumes half of the world’s cement, a third of its steel, and over a quarter of its aluminum, but it only comprises approximately a fifth of the world’s population.<sup>108</sup> If any of these products were in short supply, would China then be entitled to this skewed proportion just because it is equivalent to its current consumption rate?

To this question the text of the exception provides no answer. The Panel Report regarding United States export licensing and the Marshall Plan, however, offer two helpful insights. First, a Member is not afforded deference in determin-

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106. See 5 OXFORD DICTIONARY, *supra* note 78, at 346.

107. GATT 1994, *supra* note 38, § 1(a) (incorporating GATT 1947, *supra* note 39, art. XX(j)).

108. Edward McBride, *A Ravenous Dragon*, THE ECONOMIST, March 15, 2008, at 64.

ing what an equitable distribution is.<sup>109</sup> While greater deference may have been warranted if the exception only applied to the acquisition of products, including distribution in the exception rebuts that position. Deference regarding distribution is not warranted because it is not primarily in the interest of the distributor that a policy is being enacted. Second, the Panel rebutted the United States' claim that an equitable distribution must be consistent with the consequences of an agreement between two CONTRACTING PARTIES.<sup>110</sup> It held that mere compliance with an inter-governmental agreement regarding distribution does not entail that the distribution itself is equitable.<sup>111</sup> Accordingly, the mere fact a country consumes more than its population-adjusted proportion of the international supply, fails to prove that it is entitled to that consumption.

6. *Any Such Measures, which are Inconsistent with the Other Provisions of this Agreement Shall Be Discontinued as Soon as the Conditions Giving Rise to Them Have Ceased to Exist*

The temporary nature of the short supply exception is clearly articulated in the final clause.<sup>112</sup> Codifying the requirement that the protective measure be lifted as soon as the conditions giving rise to it cease to exist ensures that it is. This final requirement is unequivocal for two reasons. First, a Member is not afforded a phase-out period in which it may more gradually eliminate the measure. Rather, it must be rescinded full-stop as soon as the cause of the short supply no longer exists. Second, the final clause does not delineate between the types of obligations that may be justifiably violated under the exception. Rather, any violation to any obligation requires an immediate withdrawal.

B. *Complying with the Chapeau of Article XX*

If it has been determined that a policy contrary to a GATT obligation is justified under paragraph (j), the next step is to ascertain if the manner the policy is implemented qualifies under the *chapeau*.<sup>113</sup> In general, the effect to be prevented is the abuse of the exceptions enumerated in the subsequent paragraphs.<sup>114</sup> That is, a Member should not design a facially neutral measure that qualifies un-

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109. See *Working Party*, *supra* note 6, at 3.

110. *Id.*

111. *Id.*

112. GATT 1994, *supra* note 38, § 1(a) (incorporating GATT 1947, *supra* note 39, art. XX(j)).

113. *E.g.*, *United States–Reformulated Gas*, *supra* note 49, at 20.

114. GATT 1994, *supra* note 38, § 1(a) (incorporating GATT 1947, *supra* note 39, art. XX).

der an exception, but actually functions to disguise an otherwise illegal purpose. Therefore, to legitimately invoke a subsection exception under Article XX, the *chapeau* must also be satisfied.<sup>115</sup> This goal is stated as follows:

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 [of the type specified in the subsequent paragraphs of Article XX].<sup>116</sup>

Extending the analysis in *US–Shrimp*, the Appellate Body in *Brazil–Tyres* recently explained that applying the *chapeau* requires an application of the principle of *abus de droit*.<sup>117</sup> “[This principle] prohibits the abusive exercise of a state’s rights and enjoins that whenever the assertion of a right impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.”<sup>118</sup> As a result, the task before the Panel or Appellate Body reviewing an Article XX exception is somewhat unique when compared to most other cases. That is, outcomes of deliberations do not rest upon an interpretation of the original meaning of some WTO obligation, nor upon assessing whether a Member has failed to comply with it. Rather, a delicate balancing is required.

On the one hand, a Member is afforded the opportunity to invoke a substantive exception under Article XX if they are faced with an applicable situation. On the other hand, the invocation of this exception is tempered with the commitment to respect the treaty rights of other Members. After all, a Member only invokes an exception if it has violated a substantive GATT obligation. Analogizing to the economics examples *supra* Part III, the Panel or Appellate Body attempts to balance the costs and benefits of a measure in equilibrium between the Member acting under an exception and the Members to whom an obligation has been impaired.<sup>119</sup> However, this task is not a static one amongst the Article XX exceptions, or even across multiple interpretations of the same exception. “The location of the line of equilibrium . . . is not fixed and unchanging; the

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115. *United States–Shrimp*, *supra* note 52, ¶ 157.

116. GATT 1994, *supra* note 38, § 1(a) (incorporating GATT 1947, *supra* note 39, art. XX).

117. *Brazil–Tyres*, *supra* note 52, ¶ 224 (quoting *United States–Shrimp*, *supra* note 52, ¶ 158).

118. *Id.* (quoting BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 125 (Stevens & Sons, Ltd. 1953)) (internal citation omitted).

119. *United States–Shrimp*, *supra* note 52, ¶ 159, *acq.* *Brazil–Tyres*, *supra* note 52, ¶ 224.

line moves as the kind and shape of the measures at stake vary and as the facts making up specific cases differ.”<sup>120</sup>

Substantively, the Appellate Body performs such balancing via an application of a two-prong test.<sup>121</sup> First, did the invocation of an exception result in “arbitrary or unjustifiable discrimination between countries where the same conditions prevail?”<sup>122</sup> Second, does the measure enacted to achieve the end of the country, as justified by an Article XX exception, constitute “a disguised restriction on international trade?”<sup>123</sup> An affirmative response to either of these fails to satisfy the *chapeau*.<sup>124</sup>

#### 1. *Arbitrary or Unjustifiable Discrimination Between Countries Where the Same Conditions Prevail*

Discrimination, in its most basic form, concerns the differential treatment of Members.<sup>125</sup> The difficulty in applying this prong of the *chapeau* is in determining the sort of discrimination upon which to focus. If the Panel or Appellate Body is evaluating *chapeau* compliance, there must have already been a GATT obligation that was breached.<sup>126</sup> If the obligation breached is a non-discrimination obligation, as contained in Articles I and III for instance, a measure taking that action has already been designated as discriminatory.<sup>127</sup> However, the prior discriminatory finding does not entail failure of the *chapeau*. Conflating such a prior finding with analysis under the *chapeau* would render Article XX inutile. After all, the *chapeau* does not articulate a prophylactic ban on all discrimination—only discrimination that is arbitrary or unjustifiable. Thus, a prior discriminatory finding is relevant, insofar as it answers the threshold question that a GATT violation has occurred, but the further question the *chapeau* requires is whether the discriminatory effect of the measure was either arbitrary or unjustifiable.<sup>128</sup>

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120. *Id.*

121. GATT 1994, *supra* note 38, § 1(a) (incorporating GATT 1947, *supra* note 39, art. XX).

122. *Id.*

123. *Id.*

124. *Id.*

125. See 4 OXFORD DICTIONARY, *supra* note 78, at 758.

126. *United States–Reformulated Gas*, *supra* note 49, at 20 (detailing the two-part test for Article XX exceptions).

127. See, e.g., GATT 1994, *supra* note 38, § 1(a) (incorporating GATT 1947, *supra* note 39, art. I, III).

128. *Id.* (incorporating GATT 1947, *supra* note 39, art. XX).

Of primary importance to this inquiry is the rationale offered for the discrimination.<sup>129</sup> A difficulty, however, emerges almost immediately when applying the first prong. What is the difference between arbitrary and unjustifiable? If there is a difference, is that difference meaningful? And, how is this difference manifested in the application of this prong? The Appellate Body, when applying the first prong, does not always diligently separate instances of discrimination that are arbitrary from those that are unjustifiable and vice versa. This happens in one of two ways. Sometimes the Appellate Body from the outset expressly conflates arbitrary and unjustifiable.<sup>130</sup> Other times, however, a three-prong test is announced but does not remain distinct in its application.<sup>131</sup> Here, they will be treated distinctly in an effort to tease out the differences intimated in the text. Often the applied difference between arbitrary and unjustifiable may be miniscule, if any at all, and a measure can be both arbitrary and unjustifiable, but that is not necessarily always the case.

a. *Arbitrary Discrimination*

An act is arbitrary if it is based on a random choice.<sup>132</sup> If the explanation for the discrimination bears no relationship to accomplishing the elimination of short supply, it is arbitrary.<sup>133</sup> That is, if the discriminatory effect of a measure cannot be explained in any cogent manner with the rationale of eliminating short supply, it fails the *chapeau*. In *United States–Shrimp*, imported shrimp caught on vessels without an extruding device for turtles ensnared in nets were banned.<sup>134</sup> All foreign shrimpers seeking entry were required to obtain prior certification that they were using this device.<sup>135</sup> Under the *chapeau*, the Appellate Body reasoned, *inter alia*, that certification resulted in arbitrary discrimination because it was neither transparent nor predictable.<sup>136</sup>

Applied in the context of short supply, it is not difficult to imagine how a measure's discriminatory effect may be arbitrary. Suppose a net exporter of soybeans supplies a majority of the world market. If soybeans were used in a new industrial application that dramatically and suddenly increased world demand, a great number of individuals and businesses of the exporting country may not be able to afford them given the rise in price that would necessarily result from the

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129. See *Brazil–Tyres*, *supra* note 52, ¶ 225.

130. See, e.g., *id.* ¶ 227.

131. See, e.g., *United States–Shrimp*, *supra* note 52, ¶ 120.

132. 1 OXFORD DICTIONARY, *supra* note 78, at 602.

133. See *Brazil–Tyres*, *supra* note 52, ¶ 246.

134. See *United States–Shrimp*, *supra* note 52, ¶ 138.

135. See *id.* ¶ 139-40.

136. *Id.* ¶ 180.

increased demand. If the government of that country imposed an export licensing scheme that drastically reduced exports in a way that was not transparent or predictable to international purchasers, then such a scheme is likely arbitrary.

b. *Unjustifiable Discrimination*

An act is unjustifiable if the reasons given for implementing it cannot be shown to be right or reasonable.<sup>137</sup> Proposing a rationale for a measure with a discriminatory effect that is contrary to its stated end, *i.e.*, to remedy short supply, is unjustifiable.<sup>138</sup> Again, *United States–Shrimp* contains a clear example. Not all countries that exported shrimp to the United States were treated similarly. Some were required to comply immediately and obtain a turtle extruder device, while others were granted a phase-in period.<sup>139</sup> The difference in treatment is not *per se* unjustifiable. If a justifiable reason for the difference could have been articulated for this delineation that was consistent with the stated end of conservation of natural resources, it may likely have passed this step. As long as the offending Member fails to provide a coherent reason for the discriminatory treatment, the measure under consideration will be declared unjustifiable.

c. *Where the Same Conditions Prevail*

The final consideration needed to satisfy this prong limits the scope of inquiry only to arbitrary or unjustifiable discrimination between countries where the same conditions prevail. But to which countries is this limitation referring? Is a country that is a net exporter of a product subject to the same conditions as a net importer of the same product? Must at least one of the countries considered be the country acting to cure its short supply?

One interpretational issue is starkly clear. The drafters could not have intended to limit the applicability of this factor by the mere classifications of net importers or net exporters of a product. If that was the case, a net exporter of food could unilaterally restrict exports by enacting a prohibitively high export tariff under the cover of the short supply exception, thereby depriving foreign consumers of that product any chance to purchase that good or, in the best case, forcing them to purchase it at an increased cost. Disastrous consequences to multilateral trade and, more importantly, the wellbeing of individuals in net importing countries could be threatened. If rice was in global short supply, and all net exporters of rice unilaterally enacted export restrictions, it is conceivable that

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137. 19 OXFORD DICTIONARY, *supra* note 78, at 90.

138. See *Brazil–Tyres*, *supra* note 52, ¶ 246.

139. *United States–Shrimp*, *supra* note 52, ¶ 173.

only select individuals residing in a net importing country could purchase any more than an inadequate amount. Furthermore, interpreting this section as referring to a country's status as a net importer or exporter has been rejected.<sup>140</sup> In *United States–Reformulated Gas*, the Appellate Body reasoned that there is no textual support for delineating based on this ground.<sup>141</sup>

The more difficult interpretational issue is whether the remote effect of a measure by one country can result in discrimination between two or more other countries where the same conditions prevail. Reconsider the scenario previously discussed in which a net exporter of rice enacts a prohibitively expensive export tariff. If that occurs, then the price of rice for the rest of the world will increase due to the contraction in supply.

Perhaps the most intuitive way to analyze this clause is to refer back to the analysis of subsection (j)—whether general or local short supply exists—to fix the scope of the countries' comparison.<sup>142</sup> After all, the crucial conditions giving rise to a dispute regarding the legitimate use of this exception are those involving short supply. With this reference point informing what the relevant conditions are, it is possible to make a more case-specific and, therefore, responsive analysis under this prong of the *chapeau*. If the product is in general short supply, any other country generally afflicted by the short supply may be considered when inquiring whether the measure is arbitrarily or unjustifiably discriminatory.

This approach, however, is not without objection. The strongest contrary argument would be if a measure was enacted that was essential to the acquisition or distribution of a product in local short supply. In that situation, the relevant countries where the conditions exist are also those afflicted by the same local short supply. Suppose that there is a regional short supply for some product in the Horn of Africa. If that was the case and a measure arbitrarily or unjustifiably discriminated against Yemen (which is likely because of its close proximity across the narrow Gulf of Aden), it would pass this prong of the *chapeau* because supply would not be in short local order. Allowing the local region to define the scope of the *chapeau* analysis enables Members to manipulate who may be considered in short supply, thereby excluding inquiry into other Members to which the exceptional policy response may discriminate unjustifiably or arbitrarily.

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140. *United States–Reformulated Gas*, *supra* note 49, at 21-22.

141. *Id.*

142. GATT 1994, *supra* note 38, § 1(a) (incorporating GATT 1947, *supra* note 39, art. XX(j)).

## 2. *Constituting a Disguised Restriction on International Trade*

As is the case with the first step of the provision, the analytical treatment of this prong is not always kept distinct.<sup>143</sup> Members are not without a judicial template, however, as the Panel's report from *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* provides a thorough consideration of this prong.<sup>144</sup> It observes that the key language in this section is not "restriction" since any measure considered under Article XX is, by definition, a restriction, since it negates, impairs, or nullifies a GATT obligation.<sup>145</sup> Rather, the key analysis in this step of scrutiny focuses on whether a restriction is *disguised*.<sup>146</sup> Importantly, the Appellate Body notes that the offending Member must have intended to conceal a trade-restrictive objective with what appears to be a reasonably exceptional measure.<sup>147</sup> In order to determine the intent behind the measure's enactment, the design, architecture and revealing structure of a measure is considered.<sup>148</sup>

But how may a measure essential to preserving the supply of a product for its citizens be concealed? One way that this may be considered is when the offending Member is defending a measure abrogating national treatment with an Article III exception.<sup>149</sup> This obligation, in general, requires an imported good after entry to be treated the same as domestically produced goods.<sup>150</sup> Suppose that a Member almost entirely produces food that is not made from genetically modified organisms (GMOs) but requires that a label be affixed to food sold within its borders containing any GMOs. If non-GMO food is in short supply, and the effect of the label increases its domestic demand of the limited amount produced in the country, thereby decreasing its exportation, a Member may seek to justify this action based on subsection (j). Assuming that it does violate Article III and passes the technical requirements of the short supply exception, it must now satisfy the *chapeau*. However, this measure would likely encounter problems as a disguised restriction on trade. If the design and purpose of the labeling requirements was to restrict the export of non-GMO food, innocuously classifying this as a "labeling" requirement does not inform other Members of its

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143. See, e.g., *United States—Reformulated Gas*, *supra* note 49, at 23.

144. Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, § 8.236, WT/DS135/R (Sept. 18, 2000).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. GATT 1994, *supra* note 38, § 1(a) (incorporating GATT 1947, *supra* note 39, art. III).

150. *Id.*

intention. If it was determined that labeling in this instance was a pretext for protectionism, it is a disguised restriction.

Seemingly, failure of the chapeau as a disguised restriction is clearer than determining if it is arbitrary or unjustifiable discrimination. In this circumstance, there is likely to be an incongruity in explanation at the inception of the measure, and later, when defending the measure. If a measure was initially justified for one reason, but then later that justification morphs into a rationale satisfying the technical requirements of subsection (j), it seems to provide an impetus to more carefully consider whether this second prong has been satisfied.

## V. CONCLUSION

Permitting Members to derogate from GATT obligations can only be done in exceptional circumstances. One such circumstance is the Article XX(j) short supply exception. Plodding through the text of the exception, its drafting history, and germane Appellate Body decisions clarifies interpretational issues and identifies ambiguities. Only time will tell if the short supply exception will be the focus of a Panel or Appellate Body ruling. However, that time may come soon. As demonstrated here, a reasonably certain interpretation of the majority of elements employed in any judicial scrutiny of Article XX is clear. Members must conform their policies to these interpretations or risk the adverse consequence resulting from an unfavorable ruling. On more ambiguous issues, like what is local short supply or the equitable principle, Members have greater opportunities to propose novel arguments to justify their policies. It is clear, however, that despite these uncertainties, the Article XX(j) short supply exception provides a powerful tool for Members to protect their national interests in the face of a resource crisis.