

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

DISPUTE SETTLEMENT

WORLD TRADE ORGANIZATION

3.5 GATT 1994



UNITED NATIONS
New York and Geneva, 2003

NOTE

The Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of forty modules.

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WHAT YOU WILL LEARN

The GATT 1947 is at the very source of the current WTO system. Its basic principles applicable to trade in goods have been incorporated into other WTO agreements dealing with other areas of trade, such as trade in services and trade in intellectual property products and, it also provided the very first dispute settlement provisions upon which the WTO dispute settlement system is built. Although the GATT 1994 is only one of the numerous WTO “goods” agreements, its importance in the history of the GATT/WTO is undisputable. This Module provides an overview of the obligations relating to trade in goods in the GATT 1994.

The first Section of this Module defines the GATT 1994 and its constituent elements. The first Section also circumscribes the scope of application of the GATT 1994, and examines its relationship with other WTO agreements.

The second Section discusses the cornerstone of the entire multilateral trading system, the principle of non-discrimination in the GATT 1994, and explores its two facets: the most-favoured-nation treatment obligation and the national treatment obligation.

The third Section addresses the market access barriers to trade in goods and presents the obligations relating to the publication and administration of trade regulations.

The fourth Section deals with the exceptions to the disciplines of the GATT 1994, namely, the general exceptions, the security exceptions, and the exceptions for the purposes of applying safeguard measures, balance-of-payments restrictions, and for the purpose of carrying out regional trade agreements.

Finally, the Fifth Section analyses the position of developing country Members under the GATT 1994.

1. GATT 1994: TRADE IN GOODS

After completing this Section, the reader will be able to:

- define the GATT 1994 and its scope of application;
- list the constituent elements of the GATT 1994;
- explain the relationship between the GATT 1994 and other WTO agreements.

1.1 What Does “GATT” Mean?

GATT

The acronym “GATT” stands for the “General Agreement on Tariffs and Trade”. It is an agreement between States aiming at eliminating discrimination and reducing tariffs and other trade barriers with respect to trade in goods.

Trade in Goods

The GATT was originally, and is still today, only concerned with trade in goods, although its main principles now also apply to trade in services, and intellectual property rights as dealt with respectively by the *General Agreement on Trade in Services* and the *TRIPS Agreement*. The GATT is a WTO agreement that deals exclusively with trade in goods, but it is not the only one. All the agreements listed in Annex 1A to the *Marrakesh Agreement Establishing the World Trade Organization* (hereinafter the “*WTO Agreement*”) concern particular aspects or sectors of trade in goods.

The WTO “Goods ” Agreements

The so-called WTO “goods agreements” in Annex 1A to the *WTO Agreement* consist of ¹:

WTO Agreement

ANNEX 1

ANNEX 1A: Multilateral Agreements on Trade in Goods

GATT 1994

Agreement on Agriculture

Agreement on the Application of Sanitary and Phytosanitary Measures

Agreement on Textiles and Clothing

Agreement on Technical Barriers to Trade

Agreement on Trade-Related Investment Measures

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (also known as the Anti-Dumping Agreement)

Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (also known as the Agreement on Customs Valuation)



¹ Please refer to Module 3.1, Section 1.1. Several of these agreements are dealt with in separate Modules of this course.

Agreement on Preshipment Inspection
Agreement on Rules of Origin
Agreement on Import Licensing Procedures
Agreement on Subsidies and Countervailing Measures
Agreement on Safeguards

GATT 1947

The GATT was concluded in 1947 and is now referred to as the GATT 1947. The GATT 1947 was last amended, last in 1965. Later on, additional disciplines were agreed to in side agreements, such as the Tokyo Round agreements, which did not amend the GATT 1947 as such, but only bound the GATT Contracting Parties that became a party to these side agreements.² The GATT 1947 was terminated in 1996. However, the provisions of the GATT 1947 as well as all legal instruments concluded under the GATT 1947 are integrated into the GATT 1994, subject to clarifications brought about by Understandings which also form integral parts of the GATT 1994.

Terminology

The acronym “GATT” is sometimes confusingly used to describe a number of different things. It is sometimes referred to as the “GATT disciplines”, or “GATT disputes”, to mean the current WTO obligations or disputes relating to trade in goods. However, it may also be referred to as the “GATT” to mean the old multilateral trading system and/or Secretariat preceding the WTO. In this Module, “GATT” only means the current obligations under the GATT 1994.

1.2 Scope of Application of the GATT 1994

A WTO agreement

The GATT 1994 is one of the multilateral agreements annexed to the *WTO Agreement*. It is an international treaty binding upon all WTO Members.

Scope of Application

The GATT 1994 is only concerned with trade in goods. The GATT 1994 aims at further liberalizing trade in goods through the reduction of tariffs and other trade barriers and eliminating discrimination.

GATT 1994 vs. GATS

In *EC – Bananas III*, the question arose whether the *General Agreement on Trade in Services* (hereinafter the “GATS”) and the GATT 1994 were mutually exclusive agreements. The Appellate Body said:

... The GATS was not intended to deal with the same subject matter as the GATT 1994. The GATS was intended to deal with a subject matter not covered by the GATT 1994, that is, with trade in services. Thus, the GATS applies to the supply of services. It provides, inter alia, for both MFN treatment and national treatment for services and service suppliers. Given the respective scope of application of the two agreements, they may or may not overlap, depending on the nature of the measures at issue. Certain measures could be

² For more information on the history of the GATT, please refer to Module 3.1, Section 1.1.

found to fall exclusively within the scope of the GATT 1994, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis.³

1.3 Structure of the GATT 1994

Constituent Elements

The GATT 1994 is a bizarre agreement. It “assembles” legal provisions from different sources. It consists of the provisions of the GATT 1947, of legal instruments concluded under the GATT 1947, of Understandings concluded during the Uruguay Round on the interpretation of the provision of the GATT 1947, and of the Marrakesh Protocol of Tariff Concessions.

AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

ANNEX 1

ANNEX 1A: Multilateral Agreements on Trade in Goods

GATT 1994:

- ***Provisions of the GATT 1947***
- ***Provisions of Legal Instruments concluded under the GATT 1947:***
 - *protocols and certifications relating to tariff concessions;*
 - *protocols of accession;*
 - *waivers granted under Article XXV of the GATT 1947 and still in force on the date of entry into force;*
 - *other decisions of the CONTRACTING PARTIES to the GATT 1947.*
- ***Understandings concluded during the Uruguay Round on the interpretation of certain provisions of the GATT 1947***
- ***Marrakesh Protocol to the GATT 1994***

³ Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas (“EC – Bananas III”), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 221.

The GATT 1994 incorporates *as is* the provisions of the GATT 1947, and yet, it clarifies the nature and extent of some obligations set out in the GATT 1947 through the so-called “Understandings” and other legal instruments, including “other decisions” of the Contracting Parties to the GATT, which also form part of the GATT 1994. Furthermore, it changes the wording to be used when referring to the provisions of the GATT 1947. For instance, the phrase “Contracting Parties” in the GATT 1947 is now deemed to read “Members”. In particular, the “Explanatory Notes” of Paragraph 2 stipulate:

2. Explanatory Notes

- (a) *The references to “contracting party” in the provisions of GATT 1994 shall be deemed to read “Member”. The references to “less-developed contracting party” and “developed contracting party” shall be deemed to read “developing country Member” and “developed country Member”. The references to “Executive Secretary” shall be deemed to read “Director-General of the WTO”.*

1.4 Provisions of the GATT 1994

Para. 1(a)
GATT 1994

Paragraph 1(a) of the language incorporating the GATT 1994 into the *WTO Agreement* provides that:

1. The General Agreement on Tariffs and Trade 1994 (“GATT 1994”) shall consist of :

- (a) *the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (excluding the Protocol of Provisional Application), as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement; ...*

The provisions of the GATT 1947, now the provisions of the GATT 1994, consist of 38 articles – numbered in roman digits – which are split up into four “parts”.

Part I

Part I of the GATT 1994 contains Articles I, enshrining the most-favoured-nation treatment obligation, and Article II, setting out the obligations applicable to the Schedules of Concessions of each WTO Member.

Part II

Part II of the GATT 1994 comprises Articles III through XXIII. Article III establishes the national treatment obligation. Articles IV to Article XIX cover mainly non-tariff measures, such as unfair trade practices (dumping and export subsidies), quantitative restrictions, restrictions for balance-of-payments reasons, state-trading enterprises, government assistance to economic development, and emergency safeguards measures. In addition, this Part also

deals with numerous technical issues relating to the application of border measures. Articles XX and XXI deal with the possible exceptions to the GATT 1994, namely the general exceptions and those for security reasons. Articles XXII and XXIII provide for dispute settlement procedures, which are further elaborated in the *Understanding on the Principles Governing the Settlement of Disputes* (hereinafter the “DSU”).

Part III

Part III of the GATT 1994 consists of Article XXIV through Article XXXV. Article XXIV concerns mainly customs unions and free trade areas and the responsibility of Members for the acts of their regional and local governments. Articles XXVIII and XXVIII(bis) deal with the negotiation and renegotiation of tariff concessions.

Part IV

Finally, Part IV of the GATT 1994 is entitled “*Trade and Development*” and aims to increase trade opportunities for developing country Members in various ways.

Other Provisions

The provisions that deal with the entry into force, accession, amendments, withdrawal, non-application and joint action are no longer valid because they have been superseded by the relevant provisions of the *WTO Agreement*.

1.5 Legal Instruments Adopted under the GATT 1947

Para. 1(b) GATT 1994

Paragraph 1(b) of the language incorporating the GATT 1994 into the *WTO Agreement* provides the following:

1. *The General Agreement on Tariffs and Trade 1994 (“GATT 1994”) shall consist of:*

...

- (b) *the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement:*
 - (i) *protocols and certifications relating to tariff concessions;*
 - (ii) *protocols of accession (excluding the provisions (a) concerning provisional application and withdrawal of provisional application and (b) providing that Part II of GATT 1947 shall be applied provisionally to the fullest extent not inconsistent with legislation existing on the date of the Protocol);*
 - (iii) *decisions on waivers granted under Article XXV of GATT 1947 and still in force on the date of entry into force of the WTO Agreement;*
 - (iv) *other decisions of the CONTRACTING PARTIES to GATT 1947; ...*

The effect of incorporating by reference the provisions of these legal instruments into the GATT 1994 is to maintain their prior status under the GATT 1947,

and to bind all WTO Members.

In *US – FSC*, the Appellate Body said: :

... The inclusion of these “legal instruments” in the GATT 1994 recognizes that the legal character of the rights and obligations of the contracting parties under the GATT 1994 is not fully reflected by the text of the GATT 1994 because those rights and obligations are conditioned by the “protocols”, “decisions” and other “legal instruments” to which paragraph 1(b) refers.⁴

In *Japan – Alcoholic Beverages II*, the Appellate Body stated that not every decision of the Contracting Parties to the GATT 1947 constituted an “other decision” within the meaning of paragraph 1(b)(iv) of the language incorporating the GATT 1994 into the WTO Agreement.⁵ In that case, the Appellate Body concluded that adopted panel reports do not constitute such “other decisions”.⁶ In *US – FSC*, the Appellate Body confirmed the Panel’s finding that “other decisions” did not include a Council action adopting a panel report as a result of the parties’ agreement.⁷

1.6 Understandings and the Marrakesh Protocol

Paras. 1(c) and 1(d) GATT 1994

Paragraphs 1(c) and 1(d) of the language incorporating the GATT 1994 into the WTO Agreement provide:

1. The General Agreement on Tariffs and Trade 1994 (“GATT 1994”) shall consist of:

...

(c) the Understandings set forth below:

- (i) Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994;*
- (ii) Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994;*
- (iii) Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994;*

⁴ Appellate Body Report, United States – Tax Treatment for “Foreign Sales Corporations” (“US – FSC”), WT/DS108/AB/R, adopted 20 March 2000, para. 107.

⁵ Appellate Body Report, Japan – Taxes on Alcoholic Beverages (“Japan – Alcoholic Beverages II”), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, pp. 12-15. See also Appellate Body Report, US – FSC, para. 108.

⁶ Appellate Body Report, Japan – Alcoholic Beverages II, pp. 12-15. See also Appellate Body Report, US – FSC, para. 108. The Appellate Body reasoned that adopted panel reports “are not binding, except with respect to resolving the particular dispute between the parties to that dispute”. The Appellate Body finally said that the decision to adopt a panel report was not intended by the GATT 1947 Contracting Parties to “constitute a definitive interpretation of the relevant provisions of GATT 1947.”

⁷ See also Appellate Body Report, US – FSC, paras. 22 and 114. The reasoning of the Appellate Body is set out in paragraphs 107 to 113.

- (iv) *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994;*
 - (v) *Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994;*
 - (vi) *Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994; and*
- (d) *the Marrakesh Protocol to GATT 1994.*

Understandings

The six Understandings are legal documents which have been concluded during the Uruguay Round with a view to clarifying some obligations set out in the GATT 1947. They concern six particular GATT provisions, namely, the ones relating to the schedules of concessions, state-trading enterprises, balance-of-payments exceptions, regional trade agreements, waivers and the withdrawal of concessions.

Some of these Understandings aim to introduce further “transparency” obligations, while others seek to refine terms or paragraphs of the concerned GATT article. For instance, the *Understanding on Article II:1(b)* requires that the nature and level of any “other duties or charges” levied on bound tariff items, as referred to in that provision, be recorded in the Schedules of Concessions annexed to GATT 1994 against the tariff item to which they apply. The *Understanding on Article XVII* (on state trading enterprises) sets out notification procedures and provides for subsequent reviews. The *Understanding on Balance-of-Payments Provisions* essentially aims to clarify the existing obligations under the provisions of the GATT 1994, but it also provides for transparency measures and consultation requirements. The *Understanding on Article XXIV* regarding regional trade agreements clarifies some of the subparagraphs to Article XXIV. The *Understanding on Waivers* sets out the elements to include in the request for a waiver and explains when and how it is possible to challenge the application of a waiver by a Member. Finally, the *Understanding on Article XXVIII* (concession withdrawal) defines the phrase “principal supplying interest” of Article XXVIII of the GATT 1994.

Marrakesh Protocol

With respect to the Marrakesh Protocol to the GATT 1994, it is the legal instrument that incorporates the Schedules of Concessions and Commitments on Goods negotiated under the Uruguay Round into the GATT 1994. It confirms their authenticity and sets out their implementation modalities.

1.7 The Relationship Between the GATT 1994 and Other WTO Agreements

The provisions of the GATT 1994 apply to a disputed measure even where the provisions of other WTO agreements are applicable, to the extent that the provisions of the GATT 1994 do not conflict with any of the provisions of the other applicable WTO agreements. In other words, if there is no conflict, the measure at issue should be examined against all the relevant provisions of the

different WTO agreements, including the GATT 1994.

The Appellate Body defined the term “conflict” in *Guatemala – Cement I*.⁸ There is a conflict when adherence to one provision will lead to a violation of another provision. Following the terms of the Appellate Body, an interpreter must identify an inconsistency or a difference between the provisions examined before determining which one of the provisions will prevail.⁹

In the event of a conflict, and to the extent of that conflict, the GATT 1994 never prevails. The other WTO agreements on trade in goods contained in Annex 1A to the *WTO Agreement* always prevail over the GATT 1994. Moreover, the *WTO Agreement* always prevails over any of the multilateral trade agreements, including the GATT 1994 and all the other agreements on trade in goods included in Annex 1A to the *WTO Agreement*.

1.7.1 The Relationship Between the GATT 1994 and the *WTO Agreement*

Article XVI:3 WTO

The relationship between the GATT 1994 and the *WTO Agreement* is regulated by Article XVI:3 of the *WTO Agreement*, which provides:

In the event of a conflict between a provision of th[e WTO] Agreement and a provision of any of the Multilateral Trade Agreements, the provision of th[e WTO] Agreement shall prevail to the extent of the conflict.

1.7.2 The Relationship Between the GATT 1994 and Other Agreements in Annex 1A to the *WTO Agreement*

General Interpretative Note to Annex 1A

Annex 1A to the *WTO Agreement*, which includes all multilateral agreements on trade in goods, is introduced by a “General interpretative note” giving prevalence to the other agreements on trade in goods over the GATT 1994 in the event of a conflict, and to the extent of that conflict.

General interpretative note to Annex 1A

In the event of a conflict between a provision of the [GATT 1994] and a provision of another agreement in Annex 1A to the [WTO Agreement], the provision of the other agreement shall prevail to the extent of the conflict.

A number of disputes have raised the issue of conflict between the GATT 1994 and other multilateral agreements on trade in goods in Annex 1A to the

⁸ Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico (“Guatemala – Cement I”)*, WT/DS60/AB/R, adopted 25 November 1998, para. 65. Although in that case, the alleged conflicting provisions came from the DSU and the Anti-Dumping Agreement, the Appellate Body’s analysis is relevant to the determination of whether there is a “conflict” between GATT provisions and provisions from other WTO agreements.

⁹ Appellate Body Report, *Guatemala – Cement I*, para. 65.

WTO Agreement.¹⁰ Provided that there is no conflict between the GATT 1994 and the other goods agreement, the measure at issue should be examined against both the provisions of the GATT 1994 and the provisions of the other goods agreement.

1.8 Test Your Understanding

- 1. What is the difference between the GATT 1994 and the GATT 1947? Does the GATT 1994 apply to trade in services?**
- 2. What are the constituent elements of the GATT 1994?**
- 3. How does an interpreter determine whether there is a conflict between the provisions of the GATT 1994 and the provisions of other WTO Agreements? In the event of a conflict between provisions of the GATT 1994 and those of other *WTO Agreements*, which provisions prevail?**

¹⁰ See, for instance, Appellate Body Report, EC – Bananas III, para. 155; Appellate Body Report, Argentina – Safeguard Measures on Imports of Footwear (“Argentina – Footwear (EC)”), WT/DS121/AB/R, adopted 12 January 2000, paras. 81 et 83; and Appellate Body Report, Brazil – Measures Affecting Desiccated Coconut (“Brazil – Desiccated Coconut”), WT/DS22/AB/R, adopted 20 March 1997, p. 16.

2. THE PRINCIPLE OF NON-DISCRIMINATION IN THE GATT 1994

After completing this Section, the reader will be able to:

- explain the non-discrimination principle in international trade law;
- distinguish between the most-favoured-nation treatment obligation and the national treatment obligation;
- identify and compare the elements of the most-favoured-nation treatment obligation and of those national treatment obligations.

2.1 Non-Discrimination: Definition

Non-Discrimination

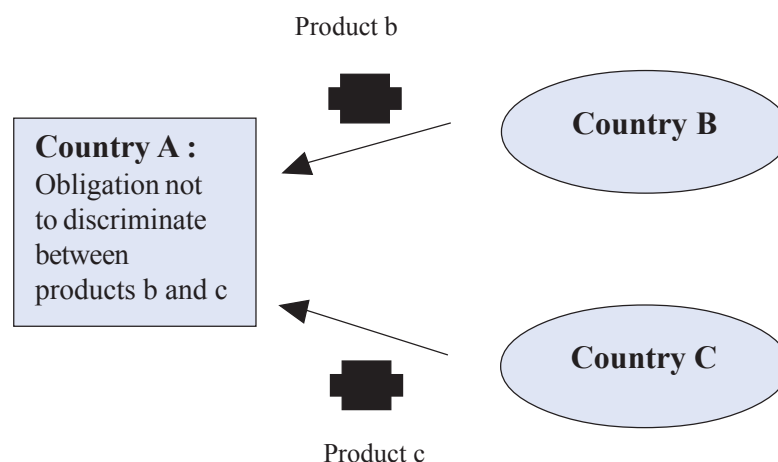
The principle of non-discrimination, or, in other words, the requirement not to treat less favourably all “like” products, irrespective of their origin or whether they are imported or domestic, is the cornerstone of the WTO multilateral trading system. The non-discrimination obligation contributes to ensuring fair and predictable international trade relations.

The principle of non-discrimination in international trade is two-faceted: it consists of the most-favoured-nation treatment obligation and the national treatment obligation.

2.2 Most-Favoured-Nation Treatment Obligation: Article I:1

MFN Treatment Obligation

The most-favoured-nation treatment obligation, widely known as the MFN treatment obligation, requires WTO Members not to discriminate *between* products originating in or destined for different countries. In simple terms, Country A should, for example, treat equally, or not discriminate *between* a product originating in Country B and a “like” product originating in Country C.



Article I:1
GATT 1994

More particularly, Article I:1 of the GATT 1994 provides:

Article I

General Most-Favoured-Nation Treatment

*1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, * any advantage, favour, privilege or immunity granted by any [Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [Members].*

Objective

The objective of the MFN treatment obligation is to ensure equality of opportunity to import from or to export to all WTO Members.

2.3 When is There a Violation of the Most-Favoured-Nation Treatment Obligation?

Three-Tier Test

Article I:1 of the GATT 1994 sets out a three-tier test. In order to determine whether or not there is a violation of the MFN treatment obligation of Article I:1, three questions need to be answered. First, does the measure at issue confer an “advantage” upon the products originating in or destined for the territories of all other Members? Second, are the products concerned “like”? Third, was the advantage at issue granted “immediately and unconditionally” to all like products concerned?

2.3.1 *Has an “advantage” been conferred upon imported or exported products?*

The MFN treatment obligation concerns any advantage granted by any Member to any product originating in or destined for any other country through a variety of measures. The obligation to provide MFN treatment is not confined to tariffs. Article I:1 of the GATT 1994 enumerates measures by which an “advantage” can be conferred upon the products of a country. They include:

- tariffs and charges of any kind imposed in connection with importation and exportation;
- the method of levying tariffs and such charges;
- rules and formalities in connection with importation and exportation;
- internal taxes and charges on imported goods;
- internal laws, regulations and requirements affecting sales.

“any other country”

It is important to emphasize that the MFN treatment obligation not only takes into consideration advantages conferred upon products originating in or destined for WTO Members, but also advantages granted to “any other country”. Therefore, if a WTO Member grants an advantage to products originating in or destined for a non-Member, the Member is compelled to grant the same advantage to all other WTO Members.

“advantage”

A broad definition is usually given to the term “advantage”, and Article I:1 of the GATT 1994 covers a wide variety of measures.¹¹ In particular, it includes the rules and formalities applicable to countervailing duties, and those applicable to the revocation of countervailing duty orders as they constitute “rules and formalities imposed in connection with importation”, within the meaning of Article I:1.¹² Merchandise processing fees are considered to be “charges imposed on or in connection with importation”, within the meaning of Article I:1.¹³ Regulations making the suspension of an import levy conditional on the production of a certificate of authenticity also fall under Article I:1.¹⁴

EC – Bananas III

In *EC – Bananas III*, the European Communities maintained the so-called “activity function rules” which imposed requirements on importers of bananas from certain countries to qualify for tariff quotas that differed from those imposed on importers of bananas from other countries. The Panel found that the procedural and administrative requirements of the “activity function rules” for importing third-country and non-traditional ACP bananas differed from and went significantly beyond those required for importing traditional ACP bananas.¹⁵ The Appellate Body, relying on the Panel’s factual analysis, concluded that the European Communities had acted inconsistently with Article I:1 of the GATT 1994 through its “activity function rules” because they conferred an advantage upon bananas imported from a group of States (ACP States), and not upon bananas imported from other WTO Members, within the meaning of Article I:1.¹⁶

Canada – Autos

In *Canada – Autos*, Canada maintained an import duty exemption on imports of motor vehicles granted to manufacturers of motor vehicles which met certain requirements related to their production of motor vehicles in Canada. The Appellate Body emphasized that:

Article I:1 requires that ‘any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product

¹¹ See Panel Report, United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil (“US – Non Rubber Footwear”), adopted 19 June 1992, BISD 39S/128, para. 6.9; Appellate Body Report, EC – Bananas III, para. 206.

¹² Panel Report, US – Non Rubber Footwear, para. 6.8.

¹³ Panel Report, United States – Customs User Fee (“US – Customs User Fee”), adopted 2 February 1988, BISD 35S/245, para. 122.

¹⁴ Panel Report, European Economic Communities – Imports of Beef from Canada (“EEC – Beef from Canada”), adopted 10 March 1981, BISD 28S/92, paras. 4.2 and 4.3.

¹⁵ Appellate Body Report, EC – Bananas III, para. 206.

¹⁶ Appellate Body Report, EC – Bananas III, para. 206.

originating in or destined for the territories of all other Members.’ (emphasis added) The words of Article I:1 refer not to some advantages granted ‘with respect to’ the subjects that fall within the defined scope of the Article, but to ‘any advantage’; not to some products, but to ‘any product’; and not to like products from some other Members, but to like products originating in or destined for ‘all other’ Members.¹⁷

2.3.2 Are the products “like”?

Article I:1 of the GATT 1994 provides that an advantage granted to a product originating in or destined for any other country shall be accorded to other “like products” originating in or destined for the territories of all other WTO Members.

The MFN treatment obligation only applies to “like products”. Discrimination between imported products is prohibited only if the products at issue are “like”. Accordingly, products that are not “like” may be treated differently.

Like Products

The concept of “like products” is also found in numerous other articles of the GATT 1994, namely, Articles II:2(a), III:2, III:4, VI:1(a), IX:1, XI:2(c), XIII:1, XVI:4 and XIX:1. However, the concept of “like products” is not defined anywhere in the GATT 1994. The meaning of this concept has been examined in a number of GATT and WTO reports. It is generally accepted though that the concept of “like products” has different meanings depending on the context in which it is found. In *Japan – Alcoholic Beverages II*, the Appellate Body compared the concept of “likeness” to an accordion:

The accordion of ‘likeness’ stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term ‘like’ is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.¹⁸

Criteria

In *Spain – Unroasted Coffee*, the issue before the Panel was whether different types of unroasted coffee were “like” within the meaning of Article I:1 of the GATT 1994. The Panel considered the characteristics of the products, their end-use and tariff regimes of other Members.¹⁹

The Panel examined all arguments that had been advanced during the proceedings for the justification of a different tariff treatment for various groups and types of unroasted coffee. It noted that these arguments mainly

¹⁷ Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry* (“Canada – Autos”), WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 79.

¹⁸ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 21.

¹⁹ Panel Report, *Spain – Tariff Treatment of Unroasted Coffee* (“Spain – Unroasted Coffee”), adopted 11 June 1981, BISD 28S/102, para. 4.11.

related to organoleptic differences resulting from geographical factors, cultivation methods, the processing of the bean, and the genetic factor. The Panel did not consider that such differences were sufficient reason to allow for a different tariff treatment. It pointed out that it was not unusual in the case of agricultural products that the taste and aroma of the end-product would differ because of one or several of the above-mentioned factors.

The Panel furthermore found relevant to its examination of the matter that unroasted coffee was mainly, if not exclusively, sold in the form of blends, combining various types of coffee, and that coffee in its end-use, was universally regarded as a well-defined and single product intended for drinking.

The Panel noted that no other contracting party applied its tariff regime in respect of unroasted, non-decaffeinated coffee in such a way that different types of coffee were subject to different tariff rates.

In the light of the foregoing, the Panel concluded that unroasted, non decaffeinated coffee beans listed in the Spanish Customs Tariff ... should be considered as “like products” within the meaning of Article I:1.²⁰

Finally, Article I:1 applies also to products that are not subject to a tariff binding.²¹

2.3.3 Was the advantage accorded “immediately and unconditionally”?

Article I:1 of the GATT 1994 requires that any advantage granted by a WTO Member to any country must be accorded “immediately and unconditionally” to all other WTO Members. This means that once a WTO Member has granted an advantage to a country, it cannot impose conditions on other WTO Members for them to benefit from that same advantage. The WTO Member must extend the benefit of the advantage to all WTO Members unconditionally.

In *US – Non-Rubber Footwear*, the Panel explained:

The Panel ... considered that Article I:1 does not permit balancing more favourable treatment under some procedure against less favourable treatment under others. If such a balancing were accepted, it would entitle a contracting party to derogate from the most-favoured-nation obligation in one case, in respect of one contracting party, on the ground that it accords more favourable treatment in some other case in respect of another contracting party. In the view of the Panel, such an interpretation of the most-favoured-nation obligation of Article I:1 would defeat the very purpose underlying the unconditionality of that obligation.²²

In *Indonesia – Autos*, the Panel found that under the Indonesia car programmes, customs duty and tax benefits were conditional on achieving a

²⁰ Panel Report, *Spain – Unroasted Coffee*, paras. 4.11 ff.

²¹ Panel Report, *Spain – Unroasted Coffee*, para. 4.3.

²² Panel Report, *US – Non-Rubber Footwear*, para. 6.11.

certain local content value for the finished car. The Panel concluded that these conditions were inconsistent with the provisions of Article I:1 which provides that tax and customs duty advantages accorded to products of one Member (in that case, on products from the Republic of Korea) be accorded to imported like products from other Members “immediately and unconditionally”.²³

In *Canada – Autos*, the Appellate Body found:

*The measure maintained by Canada accords the import duty exemption to certain motor vehicles entering Canada from certain countries. These privileged motor vehicles are imported by a limited number of designated manufacturers who are required to meet certain performance conditions. In practice, this measure does not accord the same import duty exemption immediately and unconditionally to like motor vehicles of all other Members, as required under Article I:1 of the GATT 1994. The advantage of the import duty exemption is accorded to some motor vehicles originating in certain countries without being accorded to like motor vehicles from all other Members. Accordingly, we find that this measure is not consistent with Canada’s obligations under Article I:1 of the GATT 1994.*²⁴

In *US – Certain EC Products*, the United States increased the bonding requirements on certain products imported from the European Communities in order to secure the payment of additional import duties to be imposed in retaliation for the EC banana import regime. The Panel found that the additional bonding requirements violated the most-favoured-nation treatment obligation of Article I:1 of GATT 1994, as it was applicable only to imports from the European Communities, although identical products from other WTO Members were not the subject of such an additional bonding requirements. The Panel explained further, that the regulatory distinction (whether an additional bonding requirement is needed) was not based on any characteristic of the product but depended exclusively on the origin of the product and targeted exclusively some imports from the European Communities.²⁵

2.4 National Treatment Obligation: Article III

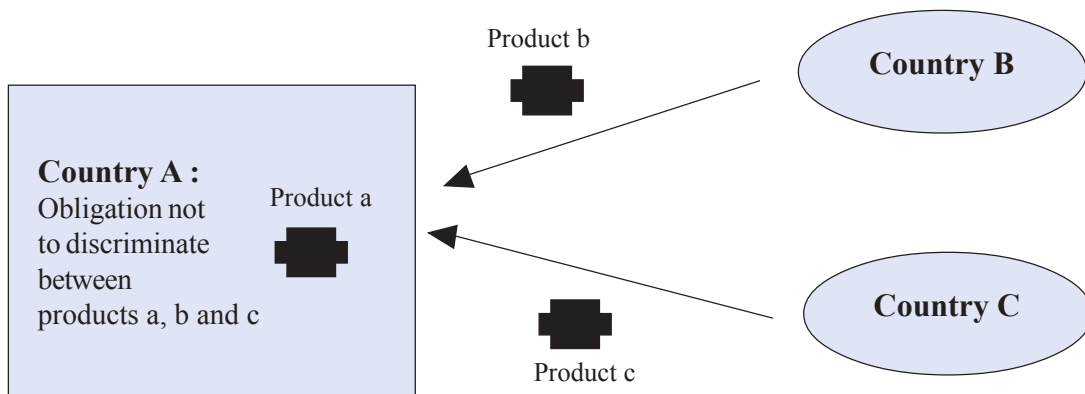
NT Obligation

The national treatment obligation, commonly referred to as the NT obligation, requires WTO Members not to discriminate *against* imported products once the imported products have entered the domestic market. In other words, Country A should not treat products imported from Country B or C less favourably than its own “like” domestic products.

²³ Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry* (“*Indonesia – Autos*”), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1, 2, 3, and 4, adopted 23 July 1998, DSR 1998:VI, 2201, paras. 14.145-14.146.

²⁴ Appellate Body Report, *Canada – Autos*, para. 85.

²⁵ Panel Report, *United States – Certain EC Products* (“*US – Certain EC Products*”), WT/DS165/R, adopted 17 July 2000, as modified by the Appellate Body Report, WT/DS165/AB/R, para. 6.54.



Article III
GATT 1994

Article III of the GATT 1994 provides, in relevant part:

Article III*

National Treatment on Internal Taxation and Regulation

1. *The [Members] recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.**
2. *The products of the territory of any [Member] imported into the territory of any other [Member] shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no [Member] shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.**
- ...
4. *The products of the territory of any [Member] imported into the territory of any other [Member] shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.*

Purpose

Article III of the GATT 1994 prohibits discrimination between domestic and like imported products through the use of various internal measures enumerated in Article III:1, namely,

... internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, →

transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, ...

The purpose of Article III:1 is to ensure that such internal measures should “not be applied to imported or domestic products so as to afford protection to domestic production (Article III:1)”.²⁶

Japan – Alcoholic Beverages II

In *Japan – Alcoholic Beverages II*, the Appellate Body emphasized that the broad and fundamental purpose of Article III is to avoid protectionism and that toward this end,

*... Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products.*²⁷

Korea – Alcoholic Beverages

Moreover, in *Korea – Alcoholic Beverages*, the Appellate Body went on to explain further, that Article III aims at:

*...avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationships.*²⁸

Scope of Article III

The Appellate Body also made clear that Article III of the GATT 1994, like Article I, is not limited to products that are the subject of tariff concessions under Article II of the GATT 1994.²⁹ However, Article III of the GATT 1994 is only concerned with internal measures and not border measures.

Internal Measures vs. Border Measures

Article III only concerns internal measures while other GATT provisions deal specifically with border measures, such as Article II on tariff concessions and Article XI on quantitative restrictions. When the measure is applied at the time or point of entry into the importing country, it may be difficult to distinguish border measures from internal measures. *Ad* Article III Note specifies:

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

²⁶ Article III:1 of the GATT 1994 and Panel Report, US – Section 337, para. 5.10.

²⁷ Appellate Body Report, Japan – Alcoholic Beverages II, p. 16. See also Appellate Body Report, Korea – Taxes on Alcoholic Beverages (“Korea – Alcoholic Beverages”), WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, para. 119; Appellate Body Report, Chile – Taxes on Alcoholic Beverages (“Chile – Alcoholic Beverages”), WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, para. 67; Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (“EC – Asbestos”), WT/DS135/AB/R, adopted 5 April 2001, para. 97 and Panel Report, Indonesia – Autos, para. 14.108.

²⁸ Appellate Body Report, Korea – Alcoholic Beverages, para. 120.

²⁹ Appellate Body Report, Japan – Alcoholic Beverages II, pp. 16-17.

requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

For example, a ban on a product at the border for failure to meet public health standards would fall under Article III, and not Article XI, in spite of the fact that Article XI concerns specifically quantitative restrictions including total import bans. However, there can also be violations of both Articles III and XI in one single set of facts.³⁰

**Articles III:2 and III:4
GATT 1994**

The general principle on non-discrimination in Article III:1 informs the rest of Article III. The following paragraphs of Article III set out specific non-discrimination obligations. Article III:2 of the GATT 1994 specifically concerns internal taxation, while Article III:4 deals with internal regulations. A further distinction needs to be drawn. In Article III:2, the non-discrimination obligation regarding internal taxation applies not only to “like products” (first sentence), but also to “directly competitive or substitutable products” (second sentence). In contrast, the non-discrimination obligation regarding internal regulations in Article III:4 applies only to “like products”.

**Article III:1
GATT 1994**

The relationship between Articles III:1, III:2 and III:4 of the GATT 1994 has been examined by the Appellate Body. Article III:1 provides the general principle that internal measures should not be applied so as to afford protection to domestic production. In *Japan – Alcoholic Beverages II*, the Appellate Body clarified that the function of this “general principle” is to “inform[] the rest of Article III”. The Appellate Body went on to state:

The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of the words actually used in the texts of those other paragraphs.³¹

The Sections below examine more closely the obligations contained in Articles III:2, first sentence, Article III:2, second sentence and, Article III:4 of the GATT 1994.

2.5 When is There a Violation of the National Treatment Obligation, under Article III:2, first sentence?

**Article III:2,
first sentence,
GATT 1994**

Article III:2, first sentence, reads:

The products of the territory of any [Member] imported into the territory of any other [Member] shall not be subject, directly or indirectly, to internal

³⁰ Panel Report, *India – Measures Affecting the Automotive Sector* (“India – Autos”), WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, para. 8.1.

³¹ Appellate Body Report, *Japan – Alcoholic Beverages II*, p.18.

taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

Two-Tier Test

As stated earlier, Article III:2 concerns only “internal tax or other internal charge of any kind”. Once the measure at issue is an “internal tax or other internal charge of any kind”, Article III:2, first sentence, sets out a two-tier test, which means that two questions need to be answered to determine whether there is a violation of Article III:2, first sentence:

- (1) Whether imported and domestic products are “like products”; and
- (2) Whether the imported products are taxed in excess of the domestic products.³²

No Separate Finding under Article III:1

The Appellate Body found that it is not necessary to establish a protective application of the internal taxation measure, pursuant to Article III:1, separately from the specific elements or requirements of Article III:2, first sentence.³³ As the Appellate Body explained, this does not mean that the general principle against protectionism in Article III:1 does not apply to Article III:2, first sentence, but that Article III:2 is, in effect, an application of the general principle against protectionism.³⁴ The Panel clarified in *Argentina – Hides and Leather* that whenever imported products from one Member’s territory are subject to taxes in excess of those applied to the like domestic products in the territory of another Member, this is deemed to “afford protection to domestic production” within the meaning of Article III:1.³⁵

2.5.1 Have internal taxes been applied?

Internal Taxes

Article III:2, first sentence, concerns only “internal taxes and other charges of any kind” which are applied “directly or indirectly” on products. Internal taxes on products such as value added taxes (VAT), sales taxes and excise duties are covered by Article III:2, first sentence. However, income taxes or import duties are not covered by Article III:2, first sentence, since they do not constitute internal taxes on products. Whether internal taxes are “applied directly or indirectly” on products should be understood to mean whether these taxes were applied “on or in connection with” products. The term “charges” denotes a “pecuniary burden” or a “liability to pay money laid on a person”.³⁶

Penalty provisions coupled with a domestic content requirement may be qualified as “internal taxes or other charges of any kind” within the meaning

³² As reflected in the Panel and the Appellate Body reports in *Canada – Periodicals*, p. 20.

³³ See Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 18-19.

³⁴ See Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 18-19.

³⁵ Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather (“Argentina – Hides and Leather”)*, WT/DS155/R and Corr.1, adopted 16 February 2001, para. 11.137.

³⁶ *The New Shorter Oxford English Dictionary, Vol. I, Oxford (1993), p. 374.*

of Article III:2, first sentence.³⁷ Security deposits are not fiscal measures if they are enforced for a purchase requirement.³⁸ Border tax adjustments are fiscal measures by which the exporting country waives or reimburses taxes and the importing country imposes taxes in accordance with the destination principle. They enable exported products to be relieved of some or all of the tax charged in the exporting country in respect of similar domestic products sold to consumers on the home market. They also enable imported products sold to consumers to be charged with some or all of the tax charged in the importing country in respect of similar domestic products. Such border tax adjustments fall within the scope of application of Article III:2.³⁹

No Aim and Effect Test

The aim pursued by the government imposing the tax measure is not relevant in determining whether the measure constitutes an internal tax within the meaning of Article III:2. In *Japan – Alcoholic Beverages II*, the Appellate Body stated that Members may pursue any given policy objective through their tax measures, provided that they do so in compliance with Article III:2.

Tax Administration Measures

In *Argentina – Hides and Leather*, Argentina required the pre-payment of certain taxes on the importation of goods. The Panel found that such “pre-payment” constituted a mechanism for the collection of the taxes which also provided for the imposition of charges.⁴⁰ The Panel concluded that the tax measure was not designed to achieve efficient tax administration and collection, but rather took the form of an “internal charge” applied to products and therefore, fell within the scope of Article III:2, first sentence. Therefore, “tax administration” measures are not systematically excluded from Article III:2. They must be examined closely.⁴¹

2.5.2 Are the imported and domestic products “like”?

“Like Products”

The national treatment obligation under Article III:2, first sentence, only applies to “like products”. The concept of “like products” is not defined anywhere in the GATT 1994, and it does not contain any guidance as to the characteristics that must be considered in determining “likeness”. However, numerous GATT and WTO dispute settlement reports have examined and applied the concept of “like products” in Article III:2, first sentence.

Japan – Alcoholic Beverages II

In *Japan – Alcoholic Beverages II*, the Appellate Body examined in detail the scope of the concept of “like products” within the meaning of Article III:2, first sentence. The issue was whether shochu and vodka could be considered to be “like products”. The Appellate Body opted for a narrow interpretation of the concept of “like products” in the first sentence of Article III:2:

³⁷ Panel Report, *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco*, (“US – Tobacco”), adopted 4 October 1994, DS44/R, para. 82.

³⁸ Panel Report, *EEC Measures on Animal Feed Proteins* (“EEC – Animal Feed Proteins”), adopted 14 March 1978, BISD 25S/49, para. 4.4.

³⁹ See Report of the Working Party, *Border Tax Adjustment*, adopted 2 December 1970, BISD 18S/97.

⁴⁰ Panel Report, *Argentina – Hides and Leather*, para. 11.143.

⁴¹ Panel Report, *Argentina – Hides and Leather*, para. 11.144.

Because the second sentence of Article III:2 provides for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products that are not “like products” as contemplated by the first sentence, we agree with the Panel that the first sentence of Article III:2 must be construed narrowly so as not to condemn measures that its strict terms are not meant to condemn. Consequently, we agree with the Panel also that the definition of ‘like products’ in Article III:2, first sentence, should be construed narrowly.⁴²

The Appellate Body also confirmed the basic approach for determining “likeness” set out in the 1970 Report of the Working Party on *Border Tax Adjustments*.

... the interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a “similar” product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is “similar”: the product’s end-uses in a given market; consumers’ tastes and habits, which change from country to country; the product’s properties, nature and quality’.⁴³

Although acknowledging the helpfulness of this approach in *Japan – Alcoholic Beverages II*, the Appellate Body emphasized that the range of “like products” in Article III:2, first sentence, is meant to be narrower than the range of products contemplated in some other provisions of the GATT 1994 and other Multilateral Trade Agreements of the WTO Agreement.⁴⁴ The Appellate Body also stated that determining whether products are “like” always involves “an unavoidable element of individual, discretionary judgement”.⁴⁵ The Appellate Body said further that “[n]o one approach to exercising judgement will be appropriate for all cases. The criteria in *Border Tax Adjustments* should be examined, but there can be no one precise and absolute definition of what is “like”.⁴⁶

No Aim and Effect Test

Two Panel Reports attempted to introduce the aim and effect test in assessing the likeness of products by ruling that in determining whether two products subject to different treatment are like products, it is necessary to consider whether the product differentiation at issue was being made “so as to afford protection to domestic production”.⁴⁷ This approach was explicitly rejected in 1996 by the Panel in *Japan – Alcoholic Beverages II*,⁴⁸ and the Appellate

⁴²Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 19-20.

⁴³Report of the Working Party, *Border Tax Adjustments*, para. 18 and Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 19-20.

⁴⁴Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 19-20.

⁴⁵Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 19-20.

⁴⁶Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 19-20.

⁴⁷See Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages* (“*US – Malt Beverages*”), adopted 19 June 1992, BISD 39S/206, paras.5.25 and 5.26 and the unadopted Panel Report, *United States – Taxes on Automobiles*, (“*US – Automobile Taxes*”), circulated 11 October 1994, DS31/R, paras. 5.8 ff.

⁴⁸See Panel Report, *Japan – Taxes on Alcoholic Beverages* (“*Japan – Alcoholic Beverages II*”), WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by the Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125.

Body also implicitly confirmed the Panel's rejection of the aim and effect test.⁴⁹

In *Japan – Alcoholic Beverages*, the Panel concluded that shochu and vodka were “like” on the basis of the following reasoning:

**Example of Likeness
Analysis**

... The Panel noted that vodka and shochu shared most physical characteristics. In the Panel's view, except for filtration, there is virtual identity in the definition of the two products. The Panel noted that a difference in the physical characteristic of alcoholic strength of two products did not preclude a finding of likeness especially since alcoholic beverages are often drunk in diluted form. The Panel then noted that essentially the same conclusion had been reached in the 1987 Panel Report, which

“... agreed with the arguments submitted to it by the European Communities, Finland and the United States that Japanese shochu (Group A) and vodka could be considered as ‘like’ products in terms of Article III:2 because they were both white/clean spirits, made of similar raw materials, and the end-uses were virtually identical”.

Following its independent consideration of the factors mentioned in the 1987 Panel Report, the Panel agreed with this statement. ... [The Panel] noted that (i) vodka and shochu were currently classified in the same heading in the Japanese tariffs, (although under the new Harmonized System (HS) Classification that entered into force on 1 January 1996 and that Japan plans to implement, shochu appears under tariff heading 2208.90 and vodka under tariff heading 2208.60); and (ii) vodka and shochu were covered by the same Japanese tariff binding at the time of its negotiation. Of the products at issue in this case, only shochu and vodka have the same tariff applied to them in the Japanese tariff schedule (see Annex 1). The Panel noted that, with respect to vodka, Japan offered no further convincing evidence that the conclusion reached by the 1987 Panel Report was wrong, not even that there had been a change in consumers' preferences in this respect. ... Consequently, in light of the conclusion of the 1987 Panel Report and of its independent consideration of the issue, the Panel concluded that vodka and shochu are like products. In the Panel's view, only vodka could be considered as like product to shochu since, apart from commonality of end-uses, it shared with shochu most physical characteristics. Definitionally, the only difference is in the media used for filtration. Substantial noticeable differences in physical characteristics exist between the rest of the alcoholic beverages at dispute and shochu that would disqualify them from being regarded as like products. More specifically, the use of additives would disqualify liqueurs, gin and genever; the use of ingredients would disqualify rum; lastly, appearance (arising from manufacturing processes) would disqualify whisky and brandy.....⁵⁰

**Tariff classification
and tariff bindings**

On the use of tariff classification to determine “likeness”, the Appellate Body in the appeal in *Japan – Alcoholic Beverages II* explained that a uniform tariff classification of products can be relevant in determining what are “like products”, if sufficiently detailed. Uniform classification in tariff nomenclatures based on the Harmonized System (the “HS”) was recognized in GATT 1947

⁴⁹ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16.

⁵⁰ Panel Report, *Japan – Alcoholic Beverages II*, para. 6.23.

practice as providing a useful basis for confirming “likeness” in products. However, as regards tariff bindings, the Appellate Body cautioned:

[T]here is a major difference between tariff classification nomenclature and tariff bindings or concessions made by Members of the WTO under Article II of the GATT 1994. There are risks in using tariff bindings that are too broad as a measure of product “likeness”. Many of the least-developed country Members of the WTO submitted schedules of concessions and commitments as annexes to the GATT 1994 for the first time as required by Article XI of the WTO Agreement. Many of these least-developed countries, as well as other developing countries, have bindings in their schedules which include broad ranges of products that cut across several different HS tariff headings. For example, many of these countries have very broad uniform bindings on non-agricultural products. This does not necessarily indicate similarity of the products covered by a binding. Rather, it represents the results of trade concessions negotiated among Members of the WTO.

It is true that there are numerous tariff bindings which are in fact extremely precise with regard to product description and which, therefore, can provide significant guidance as to the identification of “like products”. Clearly enough, these determinations need to be made on a case-by-case basis. However, tariff bindings that include a wide range of products are not a reliable criterion for determining or confirming product “likeness” under Article III:2.⁵¹

2.5.3 Are the imported products taxed “in excess of” the domestic products?

Article III:2, first sentence, provides that internal taxes on imported products should not be “in excess of” the internal taxes applied to “like” domestic products.

No Threshold

In *Japan – Alcoholic Beverages II*, the Appellate Body ruled that “[e]ven the smallest amount in excess is too much”.⁵² The Appellate Body added that Article III:2, first sentence, does not require to apply a “trade effects test”, nor does it stipulate a *de minimis* standard.⁵³

Equal Competitive Relationship

With regard to the absence of a “trade effects test”, the Appellate Body stated:

... it is irrelevant that the “trade effects” of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.

On the absence of a *de minimis* standard, the Panel found in *US – Superfund* :

⁵¹ Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 21-22.

⁵² Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 23.

⁵³ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 23.

**No de minimis
standard**

The rate of tax applied to the imported products is 3.5 cents per barrel higher than the rate applied to the like domestic products. ... The tax on petroleum is ... inconsistent with the United States' obligations under Article III:2.⁵⁴

In *Argentina – Hides and Leather*, the Panel rejected the argument that the tax burden differential between imported and domestic products would only exist for a 30-day period and therefore was *de minimis*.⁵⁵ In that case, the dispute concerned the Argentine tax collection system which required the prepayment of taxes with respect to all import transactions but only with respect to internal sales made by certain taxable persons, the so-called “*agentes de percepción*”. The Panel ruled that the identity and circumstances of the persons involved in sales transactions could not serve as a justification for tax burden differentials.⁵⁶ The Panel also maintained that Article III:2, first sentence, requires a comparison of actual tax burdens. Recalling the purpose of Article III:2, first sentence, which is to ensure equality of competitive conditions between imported and like domestic products, the Panel explained that this Article is concerned with the economic impact on the competitive opportunities of imported and like domestic products, and not with taxes or charges as such or the policy purposes pursued with them.⁵⁷ Therefore, in the view of the Panel, tax burdens imposed on the taxed products should be the object of comparison.⁵⁸ The Panel stated:

... Were it otherwise, Members could easily evade its disciplines. Thus, even where imported and like domestic products are subject to identical tax rates, the actual tax burden can still be heavier on imported products. This could be the case, for instance, where different methods of computing tax bases lead to a greater actual tax burden for imported products.⁵⁹

It should be noted that the Panel in *EEC – Animal Feed Proteins* ruled that an internal regulation which merely exposes imported products to a risk of discrimination constitutes, by itself, a form of discrimination within the meaning of Article III⁶⁰.

In *Argentina – Hides and Leather*, the Panel also ruled that Article III:2, first sentence, does not permit Members to balance more favourable tax treatment of imported products in some instances against less favourable tax treatments of imported products in other instances.⁶¹

Finally, in *Indonesia – Autos*, the Panel found that differences in taxes which are based only upon the nationality of producers or the origin of the party and

⁵⁴Panel Report, *United States – Taxes on Petroleum and Certain Imported Products*, (“US – Superfund”), adopted 17 June 1987, BISD 34S/136, para. 5.1.1.

⁵⁵Panel Report, *Argentina – Hides and Leather*, para. 11.245.

⁵⁶Panel Report, *Argentina – Hides and Leather*, para. 11.220.

⁵⁷Panel Report, *Argentina – Hides and Leather*, para. 11.182.

⁵⁸Panel Report, *Argentina – Hides and Leather*, para. 11.182.

⁵⁹Panel Report, *Argentina – Hides and Leather*, para. 11.183.

⁶⁰Panel Report, *EEC – Animal Feed Proteins*, paras. 5.57, 5.60 and 5.76.

⁶¹Panel Report, *Argentina – Hides and Leather*, para. 11.260.

components contained in the products are inconsistent with the national treatment obligation in Article III:2, first sentence.

2.6 When is There a Violation of the National Treatment Obligation, under Article III:2, second sentence?

Article III:2, second sentence, reads:

**Article III :2, second sentence,
GATT 1994**

Moreover, no [Member] shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

As discussed earlier, Article III:1 sets out the general principle that internal taxes and other internal charges:

...should not be applied to imported or domestic products so as to afford protection to domestic production.

Moreover, the *Ad Article III Note* provides that:

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

Order of Analysis

Article III:2, second sentence, can only be resorted to if the measure at issue is not inconsistent with Article III:2, first sentence. Therefore, one must always apply first the test under Article III:2, first sentence. If the answer to one question is negative, then there is a need to examine further whether the measure is consistent with Article III:2, second sentence.⁶² The Appellate Body stated on two occasions that Article III:2, second sentence, contemplates a “broader category of products” than Article III:2, first sentence.⁶³

Three-Tier Test

As stated earlier, Article III:2 concerns only “internal tax or other internal charge of any kind”. Once the measure at issue is an “internal tax or other internal charge of any kind”, and after it has been determined that it is not inconsistent with the first sentence of Article III, the second sentence of Article III sets out a different test. It is a three-tier test, which means that three questions need to be answered to determine whether there is a violation of Article III:2, second sentence. In *Japan – Alcoholic Beverages*, the Appellate Body stated:

⁶² Appellate Body Report, *Canada – Certain Measures Concerning Periodicals* (“Canada – Periodicals”), WT/DS31/AB/R, adopted 30 July 1997, , pp. 22-23.

⁶³ Appellate Body Report, *Japan – Alcoholic beverages II*, p. 25; Appellate Body Report, *Canada – Periodicals*, p. 19.

Unlike that of Article III:2, first sentence, the language of Article III:2, second sentence, specifically invokes Article III:1. The significance of this distinction lies in the fact that whereas Article III:1 acts implicitly in addressing the two issues that must be considered in applying the first sentence, it acts explicitly as an entirely separate issue that must be addressed along with two other issues that are raised in applying the second sentence. Giving full meaning to the text and to its context, three separate issues must be addressed to determine whether an internal tax measure is inconsistent with Article III:2, second sentence. These three issues are whether:

- (1) *the imported products and the domestic products are ‘directly competitive or substitutable products’ which are in competition with each other;*
- (2) *the directly competitive or substitutable imported and domestic products are ‘not similarly taxed’; and*
- (3) *the dissimilar taxation of the directly competitive or substitutable imported domestic products is ‘applied ... so as to afford protection to domestic production’.*

Again, these are three separate issues. Each must be established separately by the complainant for a panel to find that a tax measure imposed by a Member of the WTO is inconsistent with Article III:2, second sentence.⁶⁴

2.6.1 Have internal taxes been applied ?

Both Articles III:2, first and second sentence, concern “internal taxes or other internal charges”. This phrase has been interpreted consistently notwithstanding its position in the first or second sentence of Article III. Section 2.5.1 above includes discussion of this phrase.

2.6.2 Are the imported and domestic products “directly competitive or substitutable”?

“directly competitive or substitutable”

The national treatment obligation in Article III:2, second sentence, applies to “directly competitive or substitutable products”, which is a broader category than “like products” in Article III:2, first sentence.

No perfect substitutability

In *Canada – Periodicals*, the Appellate Body ruled that products do not have to be perfectly substitutable in order to be “directly competitive or substitutable”, because a case of “perfect substitutability” would fall under Article III:2, first sentence.⁶⁵

First and second sentence of Article III:2

On the relationship between the concept of “like products” of Article III:2, first sentence, and the concept of “directly competitive or substitutable products” of Article III:2, second sentence, the Appellate Body stated:

⁶⁴ *Appellate Body Report, Japan – Alcoholic Beverages II*, p.24. See also *Appellate Body Report, Canada – Periodicals*, pp. 24-25, and *Appellate Body Report, Chile – Alcoholic Beverages*, para. 47.

⁶⁵ *Appellate Body Report, Canada – Periodicals*, p. 28.

“Like” products are a subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products, whereas not all ‘directly competitive or substitutable’ products are “like”. The notion of like products must be construed narrowly but the category of directly competitive or substitutable products is broader. While perfectly substitutable products fall within Article III:2, first sentence, imperfectly substitutable products can be assessed under Article III:2, second sentence.⁶⁶

Korea – Alcoholic Beverages

In *Korea – Alcoholic Beverages*, the Appellate Body stated that it considers products to be “directly competitive or substitutable” when they are interchangeable or if they offer alternative ways of satisfying a particular need or taste.⁶⁷ The Appellate Body also said that in examining whether products are “directly competitive or substitutable”, an analysis of *latent* as well as *extant* demand is required, since “competition in the market place is a dynamic, evolving process”.⁶⁸ Furthermore, the Appellate Body reminded that past panels had acknowledged that consumer behaviour could be influenced by protectionist internal taxation, and concluded that it may be highly relevant to examine latent demand.⁶⁹

Criteria

As for the factors to be taken into account in establishing whether products are “directly competitive or substitutable”, they include, in addition to their physical characteristics, common end-use and tariff classifications, the nature of the compared products and the competitive conditions in the relevant market.⁷⁰

Korea – Alcoholic Beverages

In *Korea – Alcoholic Beverages*, the Appellate Body considered an examination of the competitive conditions in the market, and the cross-price elasticity of demand in that market, as a means for establishing whether products are “directly competitive or substitutable”.⁷¹ Cross-price elasticity studies attempt to predict the change in demand that would result from a change in the price of a product following, *inter alia*, from a change in the relative tax burdens on domestic and imported products.⁷² However, the Appellate Body carefully clarified that cross-price elasticity of demand for products is not the decisive criterion in determining whether these products are “directly competitive or substitutable”.⁷³ The Appellate Body supported the Panel’s emphasis on the “quality” or “nature” of competition rather than the “quantitative overlap of competition”.⁷⁴ The Appellate Body also shared the Panel’s reluctance to rely on quantitative analyses of competitive relationship. In its view, an approach that focuses solely on the quantitative overlap of competition would, in essence, result in making the cross-price elasticity the

⁶⁶Appellate Body Report, *Korea – Alcoholic Beverages*, para. 118.

⁶⁷Appellate Body Report, *Korea – Alcoholic Beverages*, para. 114-116.

⁶⁸Appellate Body Report, *Korea – Alcoholic Beverages*, para. 120.

⁶⁹Appellate Body Report, *Korea – Alcoholic Beverages*, para. 120.

⁷⁰See Appellate Body Report in *Japan – Alcoholic Beverages II*, p. 24.

⁷¹Appellate Body Report, *Korea – Alcoholic Beverages*, para. 121.

⁷²See Appellate Body Report, *Korea – Alcoholic Beverages*, para. 121.

⁷³Appellate Body Report, *Korea – Alcoholic Beverages*, para. 134.

⁷⁴Appellate Body Report, *Korea – Alcoholic Beverages*, para. 134.

decisive criterion in deciding whether products are “directly competitive or substitutable”.⁷⁵

The Appellate Body considered, in *Korea – Alcoholic Beverages*, that the market situation in other Members may be taken into consideration in determining whether products are “directly competitive or substitutable”. The market situation in other Members is particularly relevant when demand on that market has been influenced by regulatory barriers to trade or to competition, on the condition that the other market display characteristics similar to the market at issue. As the Appellate Body stated, the determination of whether products are “directly competitive or substitutable” can only be determined on a case-by-case basis, taking account of all relevant facts.⁷⁶

In examining whether products are “directly competitive or substitutable”, it is not always necessary to examine products on an item-by-item basis. Products can be grouped together for the purpose of this examination. However, as the Appellate Body said, whether and to what extent products can be grouped is a matter to be decided on a case-by-case basis.⁷⁷

2.6.3 Are the imported and domestic products “not similarly taxed”?

de minimis Standard

In order to determine whether there is a violation of Article III:2, second sentence, it must also be found that the products at issue are “not similarly taxed”. As opposed to Article III:2, first sentence, which provides that even the slightest tax difference suffices for a finding of WTO-inconsistency, Article III:2, second sentence, provides that the tax differential has to be more than *de minimis* in order to support a conclusion that the internal tax imposed on imported products is WTO-inconsistent.

Japan – Alcoholic Beverages

As the Appellate Body said in *Japan – Alcoholic Beverages II* :

To interpret ‘in excess of’ and ‘not similarly taxed’ identically would deny any distinction between the first and second sentences of Article III:2. Thus, in any given case, there may be some amount of taxation on imported products that may well be ‘in excess of’ the tax on domestic ‘like products’ but may not be so much as to compel a conclusion that ‘directly competitive or substitutable’ imported and domestic products are ‘not similarly taxed’ for the purposes of the Ad Article to Article III:2, second sentence. In other words, there may be an amount of excess taxation that may well be more of a burden on imported products than on domestic ‘directly competitive or substitutable products’ but may nevertheless not be enough to justify a conclusion that such products are ‘not similarly taxed’ for the purposes of Article III:2, second sentence. We agree with the Panel that this amount of differential taxation must be more than de minimis to be deemed ‘not similarly taxed’ in any given case. And,

⁷⁵ Appellate Body Report, *Korea – Alcoholic Beverages*, para. 134.

⁷⁶ Appellate Body Report, *Korea – Alcoholic Beverages*, para. 137.

⁷⁷ Appellate Body Report, *Korea – Alcoholic Beverages*, paras. 143-144.

like the Panel, we believe that whether any particular differential amount of taxation is de minimis or is not de minimis must, here too, be determined on a case-by-case basis. Thus, to be ‘not similarly taxed’, the tax burden on imported products must be heavier than on ‘directly competitive or substitutable’ domestic products, and that burden must be more than de minimis in any given case.⁷⁸

In the event that only some imported products are similarly taxed as compared with the domestic products, while other imported products are taxed similarly, the Appellate Body found that such dissimilar taxation of even some imported products as compared to directly competitive and substitutable domestic products is inconsistent with Article III:2, second sentence.⁷⁹

2.6.4 *Is the internal tax measure applied “so as to afford protection to domestic production”?*

Separate Examination

The last requirement of the test under Article III:2, second sentence, is whether the internal taxes are applied “so as to afford protection to domestic production”. The Appellate Body specified that this requirement is separate from the requirement of “not similarly taxed”, and that accordingly, it must be examined separately. Therefore, if imported and domestic products are “not similarly taxed”, then a further inquiry must be made in order to determine whether the tax measure has been taken “so as to afford protection to domestic production”.⁸⁰

Result not intention Intention Result

As the Appellate Body said, the examination of whether the tax measure was applied “so as to afford protection to domestic production” does not require to examine the actual intent of the legislator or regulator to engage in some form of protectionism.⁸¹ It is the result of the application of a measure that matters under Article III:2, second sentence.⁸²

In particular, the element “so as to afford protection to domestic production”, requires a comprehensive and objective analysis of the structure and application of the measure at issue on domestic as compared to imported products.⁸³ The underlying criteria used in a particular tax measure, its structure, and its overall application may ascertain whether it is applied in a way that affords protection to domestic production.⁸⁴ Even if the aim of the same measure as such may not be easily found, the protective application of a tax measure may often be discerned “from the design, the architecture and the revealing structure of a measure”.⁸⁵

⁷⁸ Appellate Body Report, Japan – Alcoholic Beverages II, pp. 26-27.

⁷⁹ Appellate Body Report, Canada – Periodicals, pp. 25-29.

⁸⁰ Appellate Body Report, Japan Alcoholic Beverages II, p. 27.

⁸¹ Appellate Body Report, Japan – Alcoholic Beverages II, pp. 29-30.

⁸² See Appellate Body Report, Japan – Alcoholic Beverages II, pp. 29-30. It should be noted however, that the Appellate Body seemed to give some importance to statements made by the representatives of the Canadian Government about the policy objectives of the tax measure at issue. See Appellate Body Report, Japan – Alcoholic Beverages II, footnote 20.

⁸³ Appellate Body Report, Japan Alcoholic Beverages II, p. 29.

⁸⁴ Appellate Body Report, Japan Alcoholic Beverages II, p. 29. See also Appellate Body Report, Chile – Alcoholic Beverages.

This means that if the lower brackets of a tax measure cover almost exclusively domestic products, while the higher brackets cover almost exclusively imported products, the tax measure may be deemed to be applied so as to afford protection to domestic production. Such an analysis does not require the examination of the subjective intent of the legislator or regulator, but rather the criteria, the structure and the overall application of the tax measure.

2.7 When is There a Violation of the National Treatment Obligation, under Article III:4?

The national treatment obligation of Article III concerns internal laws and regulations as well as internal taxation. Article III:4 deals specifically with internal laws and regulations.

Article III:4 reads:

Article III :4 GATT 1994

4. *The products of the territory of any [Member] imported into the territory of any other [Member] shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.*

Three-Tier Test

In order to determine whether there is a violation of Article III:4, three questions need to be answered:

- (1) whether the measure at issue is a “law, regulation or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution or use”;
- (2) whether the imported and domestic products at issue are “like products”;
- (3) whether the imported products are accorded “less favourable” treatment than that accorded to like domestic products.⁸⁶

No Separate Examination under Article III:1

It should be noted that Article III:4 does not make any specific reference to the element of “so as to afford protection to domestic production” in Article III:1. Therefore, Article III:4, like Article III:2, first sentence, does not require a separate examination of whether the measure at issue is applied “so as to afford protection to domestic production”.⁸⁷

⁸⁵ *Appellate Body Report, Japan Alcoholic Beverages II, p. 27. See also Appellate Body Report, Chile – Alcoholic Beverages.*

⁸⁶ *See Appellate Body Report, Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (“Korea – Beef”), WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, para. 133.*

⁸⁷ *See Appellate Body Report, EC – Bananas III, para. 216.*

However, Article III:1 and the element of “so as to afford protection to domestic production” provide “particular contextual significance in interpreting Article III:4, as it sets forth the ‘general principle’ pursued by that provision”.⁸⁸

2.7.1 *Have laws, regulations or requirements affecting the sale and use of products been applied?*

Covered Measures

Article III:4 applies to “all laws, regulations and requirements affecting [the] internal sale, offering for sale, purchase, transportation, distribution or use[of products]”. In general terms, the national treatment obligation of Article III:4 concerns regulation affecting the sale and use of products.

“affecting”

The scope of application of Article III:4 has been interpreted broadly. The use of the term “affecting” has been interpreted to mean that Article III:4 should cover not only laws and regulations which directly govern the conditions of sale or purchase but also any laws and regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal markets.⁸⁹

Procedural Laws and Regulations

Moreover, it has been found that Article III:4 covers *procedural* laws, regulations and requirements as well as *substantive* laws, regulations and requirements. The Panel in *US – Section 337* explained that enforcement procedures cannot be separated from the substantive provisions they serve to enforce.⁹⁰ The Panel also said that if procedural provisions of internal law were not covered by Article III:4, WTO Members could escape the national treatment obligation by enforcing consistent substantive law through inconsistent procedures less favourable to imported products than to like national products.⁹¹

GATT case law has further refined the scope of application of Article III:4. For example, it specified that Article III:4 applies to minimum price requirements applicable to domestic and imported beer⁹², to limitations on points of sale for imported alcoholic beverages⁹³, to the practice to limit listing of imported beer to six-pack size⁹⁴, to the requirement that imported beer and wine be sold only through in-state wholesalers or other middlemen⁹⁵, to a ban on all cigarette advertising⁹⁶, to additional marking requirements such as an obligation to add the name of the producer or the place of origin or the formula

⁸⁸ *Appellate Body Report, EC – Asbestos, para. 93.*

⁸⁹ *Panel Report, Italian Discrimination Against Imported Agricultural Machinery (“Italian Agricultural Machinery”), adopted 23 October 1958, BISD 7S/60, para. 12.*

⁹⁰ *Panel Report, United States – Section 337 of the Tariff Act of 1930 (“US – Section 337”), adopted 7 November 1989, BISD 36S/345, para. 5.10.*

⁹¹ *Panel Report, US – Section 337, para. 5.10.*

⁹² *Panel Report, Canada – Import Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies (“Canada – Provincial Marketing Agencies (1992)”), adopted 18 February 1992, BISD 39S/27, para.5.30.*

⁹³ *Panel Report, Canada – Provincial Marketing Agencies (1992), para. 4.26.*

⁹⁴ *Panel Report, Canada – Provincial Marketing Agencies (1992), para. 5.4.*

⁹⁵ *Panel Report, US – Malt Beverages, para. 5.32.*

⁹⁶ *Panel Report, Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes (“Thailand – Cigarettes”), adopted 7 November 1990, BISD 37S/200, para. 77.*

of the product⁹⁷ and, to practices concerning internal transportation of beer.⁹⁸

WTO reports also defined the scope of application of Article III:4. For instance, the Appellate Body agreed with the Panel that Article III:4 was applicable to the European Communities' import licensing requirements at issue in *EC – Bananas III*. The Appellate Body ruled:

At issue in this appeal is not whether any import licensing requirement, as such, is within the scope of Article III:4, but whether the EC procedures and requirements for the distribution of import licenses for imported bananas among eligible operators within the European Communities are within the scope of this provision. ... These rules go far beyond the mere import licence requirements needed to administer the tariff quota for third-country and non-traditional ACP bananas or Lomé Convention requirements for the importation of bananas. These rules are intended, among other things, to cross-subsidize distributors of EC (and ACP) bananas and to ensure that EC banana ripeners obtain a share of the quota rents. As such, these rules affect 'the internal sale, offering for sale, purchase, ...' within the meaning of Article III:4, and therefore fall within the scope of this provision⁹⁹

In *Canada – Autos*, the Panel used a broad interpretation of the term “affecting” by referring to measures which have an effect on imported goods. The Panel ruled that a measure can be considered to be a measure affecting the internal sale or use of imported products even if it is not shown that under current circumstances the measure has an impact on the decisions of private parties to buy imported products.¹⁰⁰

“requirements”

Article III:4 also covers “requirements” which may apply to isolated cases. Although most cases dealing with Article III:4 concern laws and regulations, Article III:4 covers “requirements” which may apply to isolated cases only. However, it should be noted that both measures that apply across-the-board and measures that apply to isolated cases only are covered by Article III:4.¹⁰¹ Furthermore, a “requirement” within the meaning of Article III:4 does not necessarily need to be imposed by government. Action by a private party can constitute a “requirement” under the purview of Article III:4, insofar as there is a nexus between that action and the action of a government such that the government must be held responsible for that action.¹⁰² For instance, in *Canada – Autos*, the Panel had to decide whether commitments undertaken by Canadian motor vehicle manufacturers in letters addressed to the Canadian Government to increase Canadian value added in the production of motor vehicles, qualified as “requirements” under Article III:4. The Panel said:

⁹⁷ *Working Party Report, Certificates of Origin, Marks of Origin, Consular Formalities, adopted 17 November 1956, BISD 5S/102, para. 13.*

⁹⁸ *Panel Report, Canada – Provincial Marketing Agencies (1992), para. 5.12; and Panel Report, US – Malt beverages, para. 5.50.*

⁹⁹ *Appellate Body Report, EC – Bananas III, para. 220*

¹⁰⁰ *See Panel Report, Canada – Autos, paras. 10.80 and 10.84.*

¹⁰¹ *See Panel Report, Canada – Administration of the Foreign Investment Review Act (“Canada – FIRA”), adopted 7 February 1984, BISD 30S/140, para. 5.5.*

¹⁰² *See Panel Report, Canada – Autos, paras. 10.80 and 10.84.*

We do not believe that such a nexus can exist only if a government makes undertakings of private parties legally enforceable, as in the situation considered by the Panel on Canada – FIRA, or if a government conditions the grant of an advantage on undertakings made by private parties, as in the situation considered by the Panel on EEC – Parts and Components. We note in this respect that the word ‘requirement’ has been defined to mean ‘1. The action of requiring something; a request. 2. A thing required or needed, a want, a need. Also the action or an instance of needing or wanting something. 3. Something called for or demanded; a condition which must be complied with.’ The word ‘requirements’ in its ordinary meaning and in light of its context in Article III:4 clearly implies government action involving a demand, request or the imposition of a condition but in our view this term does not carry a particular connotation with respect to the legal form in which such government action is taken. In this respect, we consider that, in applying the concept of “requirements” in Article III:4 to situations involving actions by private parties, it is necessary to take into account that there is a broad variety of forms of government action that can be effective in influencing the conduct of private parties.¹⁰³

2.7.2 Are the imported and domestic products “like”?

“Like Products”

The non-discrimination obligation in Article III:4 applies only to “like products”, as in Articles I:1 and III:2, first sentence, both discussed above.

EC – Asbestos

The Appellate Body examined thoroughly the meaning of the concept of “like products” in Article III:4 in *EC – Asbestos*. The Appellate Body reminded that the concept of “like products” in Article III:2, first sentence, is to be construed “narrowly”.¹⁰⁴ However, the Appellate Body was of the opinion that the concept of “like products” in Article III:4 does not suggest a similarly narrow reading of “like” essentially because Article III:2 distinguishes “like products” from “competitive and substitutable products”, while Article III:4 is only concerned with “like products”. Thus, the Appellate Body concluded that given the textual difference between Articles III:2 and III:4, the “accordion” of “likeness” stretches in a different manner in Article III:4.¹⁰⁵

Article III:1

As regards the effect of the “general principle” against protectionism in Article III:1 on the interpretation of Article III:4, the Appellate Body said that:

...[I]n endeavouring to ensure “equality of competitive conditions”, the “general principle” in Article III seeks to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the marketplace, between the domestic and imported products involved, “so as to afford protection to domestic production.”¹⁰⁶

¹⁰³ Panel Report, *Canada – Autos*, paras. 10.106-10.107.

¹⁰⁴ See Appellate Body Report, *EC – Asbestos*, para. 95. See Appellate Body Report, *Japan Alcoholic Beverages II*, pp. 19-20 and Appellate Body Report, *Canada – Periodicals*, pp. 20-23.

¹⁰⁵ Appellate Body Report, *EC – Asbestos*, paras. 94-96.

¹⁰⁶ Appellate Body Report, *EC – Asbestos*, para. 98.

The Appellate Body went on to state:

As products that are in a competitive relationship in the marketplace could be affected through treatment of imports “less favourable” than the treatment accorded to domestic products, it follows that the word “like” in Article III:4 is to be interpreted to apply to products that are in such a competitive relationship. Thus, a determination of “likeness” under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products.

... [W]e [] conclude that the product scope of Article III:4, although broader than the first sentence of Article III:2, is certainly not broader than the combined product scope of the two sentences of Article III:2 of the GATT 1994. We recognize that, by interpreting the term “like products” in Article III:4 in this way, we give that provision a relatively broad product scope – although no broader than the product scope of Article III:2.¹⁰⁷

Criteria

The Appellate Body in *EC – Asbestos* also enumerated criteria to be taken into account to determine whether products are “like” within the meaning of Article III:4. The Appellate Body said:

As in Article III:2, in this determination, “[n]o one approach ... will be appropriate for all cases.” Rather, an assessment utilizing “an unavoidable element of individual, discretionary judgement” has to be made on a case-by-case basis. The Report of the Working Party on Border Tax Adjustments outlined an approach for analyzing “likeness” that has been followed and developed since by several panels and the Appellate Body. This approach has, in the main, consisted of employing four general criteria in analyzing “likeness”: (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers’ tastes and habits – more comprehensively termed consumers’ perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products. We note that these four criteria comprise four categories of “characteristics” that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.¹⁰⁸

Not an Exhaustive List

However, it should be noted that this list is by no means exhaustive. These criteria are meant to be “simply tools to assist in the task of sorting and examining the relevant evidence”.¹⁰⁹ This means that all pertinent evidence should always be examined, and not only evidence related to any of these criteria. In *EC – Asbestos*, the Appellate Body disagreed with the Panel’s refusal to consider the health risks posed by asbestos in its determination of

¹⁰⁷ Appellate Body Report, *EC – Asbestos*, paras. 97-100.

¹⁰⁸ Appellate Body Report, *EC – Asbestos*, para. 101.

¹⁰⁹ Appellate Body Report, *EC – Asbestos*, para. 102.

“likeness”. The Appellate Body said:

...neither the text of Article III:4 nor the practice of panels and the Appellate Body suggest that any evidence should be excluded a priori from a panel’s examination of “likeness”. Moreover, as we have said, in examining the “likeness” of products, panels must evaluate all of the relevant evidence. We are very much of the view that evidence relating to the health risks associated with a product may be pertinent in an examination of “likeness” under Article III:4 of the GATT 1994. We do not, however, consider that the evidence relating to the health risks associated with chrysotile asbestos fibres need be examined under a separate criterion, because we believe that this evidence can be evaluated under the existing criteria of physical properties, and of consumers’ tastes and habits,¹¹⁰

Carcinogenicity or toxicity

Therefore, the Appellate Body concluded that the physical properties of chrysotile asbestos fibres include their carcinogenicity or toxicity, and this aspect must be considered in determining “likeness” under Article III:4. The Appellate Body also said that “evidence relating to health risks may be relevant in assessing the *competitive relationship in the market place* between allegedly ‘like’ products”.¹¹¹

As for the end-uses and consumer’s habits, the Appellate Body stated in *EC – Asbestos* :

Evidence of this type is of particular importance under Article III of the GATT 1994, precisely because that provision is concerned with competitive relationships in the marketplace. If there is – or could be – no competitive relationship between products, a Member cannot intervene, through internal taxation or regulation, to protect domestic production. Thus, evidence about the extent to which products can serve the same end-uses, and the extent to which consumers are – or would be – willing to choose one product instead of another to perform those end-uses, is highly relevant evidence in assessing the “likeness” of those products under Article III:4 of the GATT 1994.

We consider this to be especially so in cases where the evidence relating to properties establishes that the products at issue are physically quite different. In such cases, in order to overcome this indication that products are not “like”, a higher burden is placed on complaining Members to establish that, despite the pronounced physical differences, there is a competitive relationship between the products such that all of the evidence, taken together, demonstrates that the products are “like” under Article III:4 of the GATT 1994.¹¹²

As regards the element of consumers’ tastes and habits, the Appellate Body said that they are highly relevant with respect to asbestos fibres or substitutes, even where commercial parties, such as manufacturers, are involved, since

¹¹⁰ Appellate Body Report, *EC – Asbestos*, para. 113.

¹¹¹ Appellate Body Report, *EC – Asbestos*, para. 115. It should be noted that one Appellate Body Member wrote a “concurring opinion” on this issue in which he disagreed with the two other Members of the Division that the competitive relationship is decisive in the determination of “likeness” of products under Article III:4.

¹¹² Appellate Body Report, *EC – Asbestos*, paras. 117-118.

the health risks associated with asbestos fibres may well influence their decision to use them or not.¹¹³

Although the concept of “like products” in *EC – Asbestos* was interpreted broadly, it is not so broad to include chrysotile asbestos fibers and substitutes as “like products”.

US – Gasolinea

In *US – Gasoline*, the Panel found that chemically-identical imported and domestic gasoline were “like products” because “chemically-imported and domestic gasoline by definition have exactly the same physical characteristics, end-uses, tariff classification and are perfectly substitutable”.¹¹⁴ The Panel did not examine the aim and effect of the regulatory distinction in determining “likeness”.

US – Tuna

Finally, the Panel in the unadopted report on *US – Tuna* found that differences in process and production methods of products are not relevant in determining “likeness”:

*Article III:4 calls for a comparison of the treatment of imported tuna as a product with that of domestic tuna as a product. Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product. Article III:4 therefore obliges the United States to accord treatment to Mexican tuna no less favourable than that accorded to United States tuna, whether or not the incidental taking of dolphins by Mexican vessels corresponded to that of United States vessels.*¹¹⁵

This approach has attracted some criticism from scholars and environmentalists.¹¹⁶

2.7.3 Was the treatment less favourable?

In order to determine whether the measure at issue is inconsistent with Article III:4, not only must it distinguish between “like products”, it has also to accord “less favourable treatment” to the like imported product than it accords to the group of like domestic products.

In *US – Section 337*, the Panel interpreted “treatment no less favourable” to require “effective equality of competitive opportunities”. Panels and the

¹¹³ Appellate Body Report, *EC – Asbestos*, para. 122.

¹¹⁴ Panel Report, *United States – Standards for Reformulated and Conventional Gasoline* (“*US – Gasoline*”), WT/DS2/R, adopted 20 May 1996, as modified by the Appellate Body Report, WT/DS2/AB/R, DSR 1996:I, 29, para. 6.17.

¹¹⁵ Unadopted Panel Report, *United States – Restrictions on Imports of Tuna* (“*US – Tuna/Dolphin*”), circulated 3 September 1991, BISD 39S/155, para. 5.15.

¹¹⁶ For a discussion of the product-process distinction, please refer to Robert E. Hudec, “Chapter 12: The Product-Process Doctrine in the GATT/WTO Jurisprudence” in Marco Bronckers and Reinhard Quick, *New Directions in International Economic Law: Essays in Honour of John H. Jackson*, *Kluwer Law International*, 2000, pp.187-218; and Robert Howse and Donald Regan, “The Product/Process Distinction – An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy”, *European Journal of International Law*, Vol. 11, No. 2, 2000, pp. 249-289.

Appellate Body have consistently used this approach in later GATT and WTO reports.¹¹⁷

In *US - Gasoline*, the Panel found that the measure at issue accorded to imported gasoline less favourable treatment than to domestic gasoline on the basis that sellers of domestic gasoline were authorized to use an individual baseline, while sellers of imported gasoline had to use the more onerous statutory baseline.¹¹⁸

Formal Difference in Treatment

In *Korea – Beef*, the dispute concerned a dual retail distribution system for the sale of beef under which imported beef was *inter alia* to be sold in specialized stores selling only imported beef or in separate sections of supermarkets. The Appellate Body found that such a measure was inconsistent with the Republic of Korea's obligations under Article III:4 of the GATT 1994. The Appellate Body emphasized that a formal difference in treatment between domestic and imported products is neither necessary nor sufficient for a violation of Article III:4. Different treatment of imported products in a formal manner does not necessarily constitute less favourable treatment. Conversely, absence of formal difference in treatment does not necessarily mean that there is no less favourable treatment. As the Appellate Body stated in that case:

We observe ... that Article III:4 requires only that a measure accord treatment to imported products that is "no less favourable" than that accorded to like domestic products. A measure that provides treatment to imported products that is different from that accorded to like domestic products is not necessarily inconsistent with Article III:4, as long as the treatment provided by the measure is "no less favourable". According "treatment no less favourable" means, as we have previously said, according conditions of competition no less favourable to the imported product than to the like domestic product. ...

Whether or not imported products are treated 'less favourably' than like domestic products should be assessed instead by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products.¹¹⁹

No Balancing Allowed

In *US – Gasoline*, the Panel explained that "[the] wording [of Article III:4] does not allow less favourable treatment dependent on the characteristics of the producer and the nature of the data held by it".¹²⁰ The Panel also rejected the argument made by the United States that the regulation at issue treated

¹¹⁷ See, *inter alia*, Panel Report, Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies ("Canada – Provincial Liquor Boards (US)"), adopted 18 February 1992, BISD 39S/27, paras. 5.12-5.14 and 5.30-5.31; Panel Report, US - Malt Beverages, para. 5.30; Panel Report, US - Gasoline, para. 6.10; Panel Report, Canada – Periodicals, p. 75; Panel Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaint by the United States ("EC – Bananas III (US)"), WT/DS27/R/USA, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 943, paras. 7.179-7.180; and Panel Report, Japan – Measures Affecting Consumer Photographic Film and Paper ("Japan – Film"), WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179, para. 10.379.

¹¹⁸ See Panel Report, US – Gasoline, para. 6.10.

¹¹⁹ Appellate Body Report, Korea – Beef, paras. 135-137.

¹²⁰ Panel Report, US – Gasoline, para. 6.11.

imported products “equally overall” and was therefore consistent with Article III:2. The Panel noted that this argument amounted to claiming that less favourable treatment of particular imported products in some instances could be offset or balanced by more favourable treatment of particular products in others.¹²¹ However, under Articles I:1, III:2 and III:4, such “balancing” is not admissible.¹²²

In GATT and WTO case law, a wide variety of measures have been found inconsistent with the national treatment obligation of Article III:2, apart from the measures at issue in *US – Section 337*, *Korea – Beef* and *US – Gasoline*. They include minimum price requirements,¹²³ regulations concerning internal transportation,¹²⁴ the allocation system for tariff quota for bananas,¹²⁵ and the Canadian Value Added requirements in the automobile industry.¹²⁶

2.8 Test Your Understanding

1. **What are the two elements of the non-discrimination principle in international trade law? What is the difference between the most-favoured-nation treatment obligation and the national treatment obligation?**
2. **What is the objective of the most-favoured-nation treatment obligation? When is there a violation of the most-favoured-nation treatment obligation? Is the concept of “advantage” limited to internal taxes, laws, regulations and requirements? Is the concept of “like products” interpreted consistently in the different provisions of the GATT 1994? What are the criteria to determine whether two products are “like” within the meaning of Article I:1 of the GATT 1994? Once a WTO Member has granted an advantage to a country, can it impose conditions on other WTO Members for them to benefit from that same advantage?**
3. **What is the objective of the national treatment obligation? Is the national treatment obligation limited to products subject to tariff concessions under Article II of the GATT 1994? Does Article II apply to internal measures only?**
4. **When is there a violation of Article III, first sentence? Can tax administration measures qualify as “internal taxes or charges” within the meaning of this Article? How does one assess whether products are “like” within the meaning of Article III:2, first sentence? What is the minimum amount of the internal tax or charge for which the imported products are considered to be taxed “in excess of” the domestic products? Does Article III:2, first sentence, require a separate examination of whether the measure**

¹²¹ Panel Report, *US – Gasoline*, para. 6.14.

¹²² See Panel Report, *US – Section 337*, para. 6.14.

¹²³ See Panel Report, *Canada – Provincial Marketing Agencies*.

¹²⁴ See Panel Report, *US – Malt Beverages*.

¹²⁵ See Appellate Body Report, *EC – Bananas III*.

¹²⁶ See Appellate Body Report, *Canada – Autos*.

at issue is applied “so as to afford protection to domestic production”?

5. When can an interpreter consider Article III:2, second sentence? When is there a violation of Article III:2, second sentence? How does the concept of “directly competitive or substitutable” differ from the concept of “like products”? What is the minimum amount of the internal tax or charge for which the imported and domestic products are considered to be “not similarly taxed”? Does Article III:2, second sentence, require a separate examination of whether the measure at issue is applied “so as to afford protection to domestic production”?
6. When is there a violation of Article III:4? What types of measures does Article III:4 apply to? How different is the concept of “like products” interpreted in Article III:4 as compared with other GATT provisions? What criteria need be taken into consideration in determining whether products are “like” under Article III:4? Does Article III:4 require a separate examination of whether the measure at issue is applied “so as to afford protection to domestic production”?

3. THE MARKET ACCESS PRINCIPLE IN THE GATT 1994

After completing this Section, the reader will be able to:

- identify market access barriers;
- distinguish between tariffs, quantitative restrictions, other duties and financial charges and other non-tariff barriers;
- list the obligations relating to publication and administration of trade regulations.

3.1 Market Access Barriers: Definition

Market Access

It is of utmost importance for traders to know whether and under which conditions their products have access to the markets of other countries. Market access for goods can be impeded or restricted in various ways.

Market Access Barriers

Barriers to market access include tariffs (also referred to as customs duties), quantitative restrictions (including quotas), other duties and financial charges, and other non-tariff measures, such as customs procedures, technical regulations, and sanitary and phytosanitary measures. It is noteworthy that the other non-tariff measures may include internal measures, while tariffs, other duties and financial charges and quantitative restrictions specifically concern border measures.

Rules on Market Access

The GATT 1994 and other multilateral trade agreements provide for different rules for these different barriers. With regard to the applicable rules, this Section covers only the GATT 1994, but it should be noted that nearly all of the WTO Agreements embrace disciplines regarding barriers to market access.¹²⁷ In particular, this Section examines the rules on tariffs and tariff concessions, the rules on quantitative restrictions, the rules on other duties and financial charges, the rules on other tariff barriers, and finally, the rules on publication and administration of trade regulations.

3.2 Tariffs

Tariffs

Tariffs or customs duties¹²⁸ are financial charges imposed on goods at the time of and/or because of their importation. Market access is conditional upon the payment of these customs duties. Customs duties are either specific (amount based on weight, volume, etc.), or *ad valorem* (an amount based on value). *Ad valorem* customs duties have become most common.

No general prohibition

Tariffs or customs duties are not prohibited under the GATT 1994. This is in sharp contrast with the general prohibition on quantitative restrictions in Article

¹²⁷ See, for instance, the Agreement on Agriculture and the Agreement on Textiles and Clothing.

¹²⁸ The GATT 1994 uses both terms indistinctively.

XI of the GATT 1994. Tariffs represent the only instrument of protection generally allowed by the GATT 1994. WTO/GATT law has a clear preference for customs duties.

Article XXVIII bis
GATT 1994

Article XXVIII bis of the GATT 1994 encourages and calls upon WTO Members to negotiate the reduction of tariffs:

Article XXVIII bis

Tariff Negotiations

1. *The [Members] recognize that customs duties often constitute serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports and in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities, and conducted with due regard to the objectives of this Agreement and the varying needs of individual [Members], are of great importance to the expansion of international trade. The [Members] may therefore sponsor such negotiations from time to time.*
2. (a) *Negotiations under this Article may be carried out on a selective product-by-product basis or by the application of such multilateral procedures as may be accepted by the contracting parties concerned. Such negotiations may be directed towards the reduction of duties, the binding of duties at then existing levels or undertakings that individual duties or the average duties on specified categories of products shall not exceed specified levels. The binding against increase of low duties or of duty-free treatment shall, in principle, be recognized as a concession equivalent in value to the reduction of high duties.*
3. (b) *The [Members] recognize that in general the success of multilateral negotiations would depend on the participation of all [Members] which conduct a substantial proportion of their external trade with one another.*
4. 3. *Negotiations shall be conducted on a basis which affords adequate opportunity to take into account:*
 - (a) *the needs of individual [Members] and individual industries;*
 - (b) *the needs of [developing country Members] for a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes; and*
 - (c) *all other relevant circumstances, including the fiscal,* developmental, strategic and other needs of the contracting parties concerned.*

Rounds of Negotiation

Under the GATT 1947, these negotiations on the reduction of tariffs or customs duties have taken place in the context of eight successive “Rounds”. The first five of these Rounds (Geneva, Annecy, Torquay, Geneva, Dillon) were exclusively dedicated to the negotiation of tariff or customs duties reduction. The latter three rounds (Kennedy, Tokyo and Uruguay) had an increasingly broader agenda although tariff reduction negotiations remained important.¹²⁹

Results of Rounds

These eight rounds of negotiations have been very successful in reducing tariffs or customs duties. In the late forties, the average duty on industrial products imposed by developing countries was around 40 per cent *ad valorem*. As a result of the Uruguay Round and the previous Rounds, the average duty is as low as 3.9 per cent. Many products now have 0 per cent duty. Economists commonly consider a customs duty below 5 per cent to be a nuisance rather than a barrier. Nevertheless, in very competitive markets, or in trade between neighbouring countries, a low/very low duty may still constitute a barrier. Furthermore, many developing countries still have very high customs duties and developed countries have high duties on specific groups of products, such as agricultural products and textiles.

MFN

Tariff negotiations are conducted on a bilateral basis but any reduction in customs duties country A will agree to in its negotiations with country B will also benefit all other Members. This is the result of the GATT non-discrimination obligations, more particularly, the most-favoured-nation treatment obligation which is covered in Section 2. As a result of the most-favoured-nation treatment obligation, negotiations on the reduction of customs duties are, however, considerably complicated because country A will be unwilling to give other countries the benefit of its tariff reduction without getting something in return. It is therefore likely to delay its deal with country B until it has been able to get something in return from other countries. The obligation to extend any bilateral concession to all WTO Members leads members to negotiate tariff reductions on a multilateral basis.¹³⁰

Reciprocity and Non-Reciprocity

The principle of “reciprocity” is central to trade negotiations and renegotiations. It means that during rounds of negotiations for tariff reduction, each country will make equivalent tariff concessions. It is for each government to assess the economic benefits and advantages of proposed concessions. However, it should be noted that the concept of reciprocity does not apply to developing country Members in their trade negotiations with developed country Members. This is covered in Section 5. Developing country Members, in the course of their trade negotiations, should not be expected to make tariff concessions inconsistent with their individual development, financial and trade needs.

Tariffs and Agricultural Products

The successive rounds of negotiations have succeeded in reducing progressively the level of tariff protection in many WTO Members. Tariff negotiations in relation to agricultural products will remain of great importance, since in that field, all non-tariff barriers have been eliminated and substituted by tariffs at very high levels in many cases.

¹²⁹ For a detailed study of each of the rounds, please refer to Anwarul Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO*, Cambridge University Press, 2001, Chapter II: “Tariff Conferences and Rounds of Multilateral Trade Negotiations”, pp. 25-78, and for practices and procedures in renegotiations, refer to Chapter IV, pp. 83-110.

¹³⁰ See John H. Jackson, *The Jurisprudence of GATT and the WTO*, Cambridge University Press, 2000, p. 59 in Chapter 5: “Equality and discrimination in international economic law: the General Agreement on Tariffs and Trade”, pp. 57-68.

Tariff Concessions

The results of the negotiations, that is, the tariff “concessions”, are set out in each Member’s “Schedule of Concessions on Goods”. Article II of the GATT 1994 provides for obligations regarding these concessions.¹³¹

Tariff Renegotiations

It is possible for Members to modify or withdraw tariff concessions after negotiation under some specific conditions. It is commonly referred to as tariff renegotiations. Article XXVIII of the GATT 1994 governs the renegotiation of tariff concessions. Modification or withdrawal of tariff concessions is only possible with Members with which the concession was initially negotiated and with Members which have a principal supplying interest. Consultations also have to be held with Members which have a substantial interest in such concessions. The Member seeking modification or withdrawal of tariff concessions is expected to give compensatory concessions on other products. If the Members do not reach an agreement, the concerned Members have the right to withdraw substantially equivalent concessions initially negotiated with the Member making the changes.¹³²

3.2.1 Tariff Concessions in Schedules

Tariff Concessions

One of the main objectives of the GATT 1994 is to reduce tariffs. As seen above, the result of tariff negotiations is that WTO Members commit themselves to a ceiling on the level of customs duties that can be applied on certain products. In doing so, WTO Members “bind” tariffs for these products. The bound tariffs constitute “tariff concessions”. This is done in the so-called “Schedules of Concessions on Goods”.

Schedules of Concessions

Every Member of the WTO is bound by a “Schedule of Concessions on Goods” which forms an integral part of the GATT 1994. Each schedule incorporates all the concessions made by the Member concerned in the Uruguay Round and earlier negotiations.

Articles II :1 GATT 1994

Articles II:1(a) and II:1(b) of the GATT 1994 provide rules regarding the concessions set out in the schedules of concession and read:

Article II

Schedules of Concessions

- I. (a) *Each [Member] shall accord to the commerce of the other [Members] treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.*
- (b) *The products described in Part I of the Schedule relating to any [Member], which are the products of territories of other [Members], shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set*



¹³¹ Please refer to section 3.2.1 of this Module.

¹³² For more information on tariff renegotiations, please refer to Anwarul Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO*, Cambridge University Press, 2001, pp. 11-18.

forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

Article II:1(a) stipulates that Members shall accord to the commerce of other Members treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement. Article II:1(b), first sentence, provides that products described in Part I of the Schedule of any Member shall on importation be exempt from ordinary customs duties in excess of those set forth and provided in the Schedule. This means that products may not be subjected to customs duties above the tariff concessions or bindings.

Argentina – Textiles and Apparel

In *Argentina – Textiles and Apparel*, the Appellate Body found that the application of a type of duty different from the type provided for in a Member’s Schedule was inconsistent with Article II:1(b), first sentence, of the GATT 1994, to the extent that it resulted in ordinary customs duties being levied in excess of those provided for in that Member’s Schedule.¹³³

“other duties and charges”

All taxes levied on imports in addition to the tariffs which are not in conformity with Article VIII of the GATT 1994 on “fees and formalities” (See Section 3.4) are considered to be “other duties and charges” within the meaning of Article II:1(b) of the GATT 1994 which stipulates that the products mentioned in the schedules of concessions “shall be exempt from other duties and charges of any kind imposed in excess of those imposed at the time a concession was granted”.

Understanding on Article II:1(b)

The Understanding on the Interpretation of Article II:1(b) of the GATT 1994 requires that the nature and level of any “other duties or charges” levied on bound tariff items as of 15 April 1994 be recorded in the Schedules of concessions annexed to GATT 1994. Any “duties and charges” not accorded in that way had to be eliminated.

3.2.2 Interpreting Tariff Concessions

The rules for interpreting tariff concessions have been examined by the Appellate Body in *EC – Computer Equipment*.

Common Intention of the Parties

As the Appellate Body found in *EC – Computer Equipment*, the rules to be applied in interpreting the meaning of a concession are the general rules of interpretation set out in the *Vienna Convention on the Law of Treaties*, with

¹³³ Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* (“*Argentina – Textiles and Apparel*”), WT/DS56/AB/R and Corr.1, adopted 22 April 1998, , para. 55.

a view to ascertaining the common intention of the parties.¹³⁴ In that regard, the Appellate Body also made clear that the common intentions cannot be ascertained on the basis of the subjective and unilaterally determined “expectations” of one of the parties to a treaty.¹³⁵ Similarly, the Appellate Body found that the practice of only one of the parties may be relevant, but it is of more limited value than the practice of all parties.¹³⁶ The Appellate Body added that the Harmonized System, including its explanatory notes, and decisions of the World Customs Organization (the “WCO”) can be relevant in interpreting tariff concessions in Schedule LXXX.¹³⁷ The Appellate Body said that the practice of a WTO Member during the Uruguay Round may constitute “circumstances of the conclusion” of the *WTO Agreement* and may be used as a supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention*.¹³⁸ Finally, the Appellate Body ruled that consistent prior classification practice may often be significant, but that inconsistent classification practice cannot be relevant in interpreting the meaning of a tariff concession.¹³⁹

3.2.3 Onus of Clarifying Tariff Concessions

Clarification of Concessions

As the Appellate Body said in *EC – Computer Equipment*, the onus of clarifying the scope and definition of tariff concessions during negotiations is not merely incumbent upon the Member that is making the concession, it is a task for all interested parties:

... Tariff negotiations are a process of reciprocal demands and concessions, of “give and take”. It is only normal that importing Members define their offers (and their ensuing obligations) in terms which suit their needs. On the other hand, exporting Members have to ensure that their corresponding rights are described in such a manner in the Schedules of importing Members that their export interests, as agreed in the negotiations, are guaranteed. There was a special arrangement made for this in the Uruguay Round. For this purpose, a process of verification of tariff schedules took place from 15 February through 25 March 1994, which allowed Uruguay Round participants to check and control, through consultations with their negotiating partners, the scope and definition of tariff concessions. Indeed, the fact that Members’ Schedules are an integral part of the GATT 1994 indicates that, while each Schedule represents the tariff commitments made by one Member, they represent a common agreement among all Members. For the reasons stated above, we conclude that the Panel erred in finding that “the United States was not required to clarify the scope of the European Communities’ tariff concessions on LAN equipment”. We consider that any clarification of the scope of tariff concessions that may be required during the negotiations is a task for all interested parties.¹⁴⁰

¹³⁴ Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment* (“*EC – Computer Equipment*”), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, para. 84.

¹³⁵ Appellate Body Report, *EC – Computer Equipment*, para. 84.

¹³⁶ Appellate Body Report, *EC – Computer Equipment*, para. 93.

¹³⁷ Appellate Body Report, *EC – Computer Equipment*, paras. 89-90.

¹³⁸ Appellate Body Report, *EC – Computer Equipment*, para. 92.

¹³⁹ Appellate Body Report, *EC – Computer Equipment*, para. 95.

¹⁴⁰ Appellate Body Report, *EC – Computer Equipment*, paras. 109-110.

3.2.4 Tariff Concessions and the GATT 1994

The relationship between tariff concessions and the GATT 1994 has been explored in some cases, and the uniform rule that emerged from each of these cases is as follows: a Member may yield or waive some of its own rights and grant benefits to other Members, but that it cannot unilaterally diminish its own obligations.¹⁴¹

EC – Poultry

More particularly, in *EC – Poultry*, the Appellate Body said:

In United States - Restrictions on Imports of Sugar, the panel stated that Article II of the GATT permits contracting parties to incorporate into their Schedules acts yielding rights under the GATT, but not acts diminishing obligations under that Agreement. In our view, this is particularly so with respect to the principle of non-discrimination in Articles I and XIII of the GATT 1994. In EC - Bananas, we confirmed the principle that a Member may yield rights but not diminish its obligations and concluded that it is equally valid for the market access concessions and commitments for agricultural products contained in the Schedules annexed to the GATT 1994.44 The ordinary meaning of the term “concessions” suggests that a Member may yield or waive some of its own rights and grant benefits to other Members, but that it cannot unilaterally diminish its own obligations. This interpretation is confirmed by paragraph 3 of the Marrakesh Protocol, which provides:

The implementation of the concessions and commitments contained in the schedules annexed to this Protocol shall, upon request, be subject to multilateral examination by the Members. This would be without prejudice to the rights and obligations of Members under Agreements in Annex IA of the WTO Agreement. (emphasis added)

Therefore, the concessions contained in Schedule LXXX pertaining to the tariff-rate quota for frozen poultry meat must be consistent with Articles I and XIII of the GATT 1994.¹⁴²

3.3 Quantitative Restrictions

Quantitative Restrictions

Quantitative restrictions (QRs) are measures which prohibit or restrict the quantity of a product that may be imported. A typical example of quantitative restrictions would be a measure allowing the importation of 10,000 widgets only. This quantitative restriction is also referred to as a quota.

Tariff Quota

A tariff quota, however, is not a quota and is not considered to be a quantitative restriction. A tariff quota is a quantity which can be imported at a certain duty. For example, a Member may allow the importation of 5,000 widgets at 10 per cent *ad valorem* and any widgets imported above this quantity at 20 per cent *ad valorem*. Tariff quotas are not quantitative restrictions since they do not prohibit or restrict importation. They only subject imports to varying duties.

¹⁴¹ See Panel Report, *United States – Restrictions on Importation of Sugar*, (“US – Sugar Headnote”), adopted 22 June 1989, BISD 36S/331, para. 5.2; Appellate Body Report, *EC – Bananas III*, paras. 154-155; and Appellate Body Report, *EC – Poultry*, para. 98.

3.3.1 General Prohibition of Quantitative Restrictions

Article XI
GATT 1994

The GATT 1994 sets out a general prohibition of quantitative restrictions. One of the main objectives of the GATT 1994 is to protect the domestic industry with tariffs only. Article XI:1 of the GATT 1994 provides:

Article XI*

General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any [Member] on the importation of any product of the territory of any other [Member] or on the exportation or sale for export of any product destined for the territory of any other [Member].

The only permitted restrictions on trade are duties, taxes and other charges, and not prohibitions, quotas or licensing. This general rule is not without exceptions, as will be seen in the Section below.

3.3.2 Exceptions to the General Prohibition

Exceptions

Quantitative restrictions may be temporarily applied to prevent critical shortages of foodstuffs, to apply standards for commodities or to any agricultural or fisheries products.¹⁴³

QRs in Other WTO Agreements

Some other WTO Agreements contain provisions which govern the “phase-out of quantitative restrictions in their own area of concern. This is illustrated in Module 3.11 on textiles and clothing for instance.

Other Exceptions

There are other exceptions to the general prohibition of quantitative restrictions. The GATT 1994 itself, in Articles XII, XVIII, XIX, XX and XXI, contain exceptions, for example, for balance-of-payments reasons, in emergency safeguard action, or for the protection of public health and national security. These exceptions are examined in Section 4.

3.3.3 Administration of Quantitative Restrictions

Article XIII
GATT 1994

The GATT 1994 provides that quantitative restrictions, such as import bans, for example, when applied, should be administered on a non-discriminatory basis. Therefore, quantitative restrictions, when applied, should apply to all trading partners equally. This is the so-called “similarly restricted” rule. Article XIII:1 of the GATT 1994 stipulates:

¹⁴² Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products* (“EC – Poultry”), WT/DS69/AB/R, adopted 23 July 1998, paras. 98-99.

¹⁴³ Article XI:2 of the GATT 1994.

Article XIII*

Non-discriminatory Administration of Quantitative Restrictions

1. *No prohibition or restriction shall be applied by any [Member] on the importation of any product of the territory of any other [Member] or on the exportation of any product destined for the territory of any other [Member], unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.*

Article XIII :2
GATT 1994

In applying quantitative restrictions, Members should also aim at a distribution of trade approaching as closely as possible the shares which various supplying countries would have obtained in the absence of the restrictions.

Article XIII :4
GATT 1994

Moreover, the GATT 1994 provides that, in the event that negotiations on the allocation of quota shares are unsuccessful, allocation of quotas among supplying countries should be made on the basis of their respective proportion of trade during a previous representative period.¹⁴⁴

On the non-discrimination obligation of Article XIII of the GATT 1994, the Appellate Body stressed in *EC – Bananas III* that the essence of the non-discrimination obligations is that all like products be treated equally, irrespective of their origin. Accordingly, in that case, the non-discrimination provisions applied to all imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons. The Appellate Body explained that if a Member could avoid the application of the non-discrimination provisions to the imports of like products from a different Member by choosing a different legal basis for imposing import restrictions, the Member could then very easily circumvent the non-discrimination provisions of the GATT 1994 if these provisions apply only within regulatory regimes established by that Member.¹⁴⁵

3.4 Other Duties and Financial Charges

Article II :1(b)
GATT 1994

Article II:1(b), second sentence, of the GATT 1994, provides:

The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

¹⁴⁴ Article XIII:4 of the GATT 1994.

¹⁴⁵ Appellate Body Report, *EC – Bananas III*, para. 190.

This provision stipulates that with regard to products on which there is a tariff concession, no other duties and financial charges may be imposed in excess of those imposed in 1948 or at any moment of accession to the GATT or WTO or provided for in mandatory legislation in force at either date. The *Understanding on the Interpretation of Article II:1(b)* provides for an obligation to record all other duties and charges in the WTO Member's Schedule. Only when properly recorded can "other duties and charges" be imposed.

Article II :2(c)
GATT 1994

However, Article II:2(c) of the GATT 1994 provides for an exception allowing the imposition of certain fees or other charges:

Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

...

fees or other charges commensurate with the cost of services rendered.

Article VIII:1(a)
GATT 1994

Article VIII:1(a) of the GATT 1994 provides that all fees and charges (other than tariffs) imposed on or in connection with import or export shall be limited to the approximate cost of services rendered, and shall not constitute indirect protection of domestic products or taxation for fiscal purposes. The Members also recognize the need for reducing the number and diversity of fees and charges.¹⁴⁶

3.5 Other Non-Tariff Barriers

This is a very broad category. Many non-tariff barriers apply to domestic and imported products. They include customs procedures, technical regulations, sanitary and phytosanitary measures, charges equivalent to an internal tax, anti-dumping and countervailing duties and fees and charges for services actually rendered. Additional information on some of the other non-tariff barriers is included in Section 3.4 above, Module 3.9 on sanitary and phytosanitary measures and, Module 3.10 on technical barriers to trade.

There are no general rules in WTO law on other non-tariff barriers but there are rules on specific barriers. For example, as regards customs formalities Article VIII: (c) of the GATT 1994 stipulates that Members recognize the need to minimize the incidence and complexity of import and export formalities and, for decreasing and simplifying import and export documentation requirements.

Many non-tariff measures fall under provisions in Part II of the GATT 1994 (Articles III to Article XXIII of the GATT 1994). These Articles cover national treatment in relation to internal taxation and regulations, screen quotas for cinema films, freedom of transit, anti-dumping and countervailing duties, valuation for customs purposes, fees and formalities, marks of origin,

¹⁴⁶ Article VIII:1(b) of the GATT 1994.

quantitative restrictions, subsidies, restrictions imposed for balance-of-payments reasons and government assistance to economic development. Further provisions in Part II deal with general security exceptions and with consultations and complaints.

Many other WTO Agreements address non-tariff barriers, namely the *TRIMS Agreement*, the *Agreement on Preshipment Inspection*, the *Agreement on Government Procurement*, and the *TRIPS Agreement*.

3.6 Publication and Administration of Trade Regulations

Article X of the GATT 1994 enunciates two general principles. First, trade laws and regulations may not be enforced before official publication. Second, trade laws and regulations shall be administered in a uniform, impartial and reasonable manner.

3.6.1 *Enforcement Only After Official Publication of Laws and Regulations*

All laws and regulations, judicial decisions and administrative rulings, etc. affecting imports and exports should be published. They may not be enforced before official publication.

In particular, Articles X:1 and X:2 provide:

Articles X:1 and 2
GATT 1994

Article X

Publication and Administration of Trade Regulations

1. *Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any [Member], pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any [Member] and the government or governmental agency of any other [Member] shall also be published. The provisions of this paragraph shall not require any Member to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.*
2. *No measure of general application taken by any [Member] effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefore, shall be enforced before such measure has been officially published.*

3.6.2 *Uniform, Impartial and Reasonable Administration of Laws and Regulations*

Administration of laws and regulations relating to trade shall be uniform, impartial and reasonable. Independent judicial, arbitral or administrative instances should be instituted for recourse for prompt review and correction of action inconsistent with this principle.

Article X:3 GATT 1994

Article X:3 of the GATT 1994 provides:

3. (a) *Each [Member] shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.*
- (b) *Each [Member] shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; Provided that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.*
- (c) *The provisions of subparagraph (b) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a [Member] on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any [Member] employing such procedures shall, upon request, furnish the [Members] with full information thereon in order that they may determine whether such procedures conform to the requirements of this subparagraph.*

3.7 Test Your Understanding

1. **What types of measures may impede or restrict market access for goods?**
2. **Does the GATT 1994 prohibit tariffs? How are tariff negotiations and renegotiations conducted? How does the principle of reciprocity apply to tariff negotiations? What are “schedules of concessions”? What is the relationship between tariff concessions and the GATT 1994?**
3. **Does the GATT 1994 prohibit quantitative restrictions?**

- 4. Does the GATT 1994 prohibit “other duties and [financial] charges”?**
- 5. What are the other non-tariff barriers?**
- 6. What are the obligations relating to publication and administration of trade regulations?**

4. EXCEPTIONS TO THE DISCIPLINES IN THE GATT 1994

After completing this Section, the reader will be able to:

- List the possible exceptions to the disciplines in the GATT 1994;
- differentiate between the elements of the specific exceptions contained in Article XX of the GATT 1994;
- enumerate the possible exceptions for security reasons;
- identify the conditions under which Members of a regional trade agreement may derogate from GATT disciplines;
- appreciate situations where balance-of-payment restrictions may be applied and to explain the applicable rules.

4.1 What Are the General Exceptions to the GATT 1994?

The GATT 1994 allows WTO Members to derogate from the GATT disciplines in order to protect societal values under some specific conditions.

Article XX GATT 1994

Article XX of the GATT 1994 provides, in relevant part :

Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) *necessary to protect public morals;*
- (b) *necessary to protect human, animal or plant life or health;*
- ...
- (d) *necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;*
- (e) *relating to the products of prison labour;*
- (f) *imposed for the protection of national treasures of artistic, historic or archaeological value;*
- (g) *relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;*
- ...

Beginning of the Analysis

Before examining whether a measure can be justified under the exceptions of Article XX, it is necessary to determine whether that measure is inconsistent with any of the provisions of the GATT 1994. If the measure at issue is not inconsistent with any of the GATT provisions, there is no need for justification under Article XX.

Balance

On the relationship between Article XX and other GATT provisions, the Appellate Body said in *US – Gasoline* that some form of balancing is necessary: the provisions of Article XX “may not be read so expansively as seriously to subvert the purpose and object” of other GATT provisions. Nor may other provisions of the GATT 1994 “be given so broad a reach as effectively to emasculate” the provisions of Article XX and the policies and interests it embodies.¹⁴⁷ The Appellate Body concluded that the relationship between the “general exceptions” of Article XX should be examined on a case-by-case basis, “by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose”.¹⁴⁸

Two-Tier Test

The general approach to determine whether the measure at issue constitutes a valid exception under Article XX is captured in the following two-tier test:

- 1) Does the measure at issue come under one of the specific exceptions?
- 2) Does the measure at issue satisfy the requirements of the chapeau of Article XX?¹⁴⁹

Order of Analysis

The order of analysis is important and is to be respected. As the Appellate Body said in *US – Shrimp*:

The sequence of steps indicated above in the analysis of a claim of justification under Article XX reflects, not inadvertence or random choice, but rather the fundamental structure and logic of Article XX. ...

The task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all, where the interpreter (like the Panel in this case) has not first identified and examined the specific exception threatened with abuse. ... What is appropriately characterized as ‘arbitrary discrimination’ or “unjustifiable discrimination”, or as a “disguised restriction on international trade” in respect of one category of measures, need not be so with respect to another group or type of measures. The standard of “arbitrary discrimination”, for example, under the chapeau may be different for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labour.¹⁵⁰

¹⁴⁷ Appellate Body Report, *US – Gasoline*, p. 16-17.

¹⁴⁸ Appellate Body Report, *US – Gasoline*, p. 16-17.

¹⁴⁹ Appellate Body Report, *US – Gasoline*, p. 22.

¹⁵⁰ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (“*US – Shrimp*”), WT/DS58/AB/R, adopted 6 November 1998, paras. 119-120.

The following Sections will examine the elements that need to be satisfied in order to justify otherwise GATT inconsistent measures under each specific exception of Article XX and under the chapeau of Article XX itself.

4.1.1 *Types of Measures Enumerated in Article XX*

Many specific exceptions are enshrined in Article XX, paragraphs (a) to (j) for measures otherwise inconsistent with provisions of the GATT 1994. These exceptions acknowledge that Members are entitled to adopt and implement legitimate governmental policies which may conflict with trade liberalization. Such governmental policies may aim to protect legitimate societal values and interests such as human, animal and plant life or health, exhaustible natural resources, national treasures of artistic, historic or archaeological value and public morals.

For the purposes of this Course solely the specific exceptions which have already been considered carefully in different GATT and WTO reports, namely the specific exceptions provided for in Articles XX(b), XX(d), and XX(g), are going to be addressed.

4.1.1.1 *Measures Necessary to Protect Human, Animal or Plant Life or Health*

Article XX(b) of the GATT 1994

Article XX(b) reads:

... nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

(b) necessary to protect human, animal or plant life or health;

Two-Tier test

Article XX(b) sets out a two-tier test to determine whether a measure is justified under that provision, before examining whether it also satisfies the elements of the chapeau of Article XX. The party invoking Article XX(b) has to establish:

- 1) that the policy in respect of the measures for which the provision was invoked falls within the range of policies designed to protect human, animal or plant life or health;
- 2) that the inconsistent measures for which the exception is being invoked are necessary to fulfil the policy objective.¹⁵¹

Public Health and Environmental Policies

The first element of the test concerns public health policies as well as environmental policies. This condition is relatively easy to fulfil. For example, in *Thailand – Cigarettes*, Thailand sought to justify its import restrictions on cigarettes by saying that it aimed to protect the public from harmful ingredients in imported cigarettes, and to reduce consumption of cigarettes in Thailand. The Panel acknowledged that smoking constituted a serious risk to human

¹⁵¹See Panel Report, *US – Gasoline*, para. 6.20.

health and, that consequently, measures designed to reduce consumption of cigarettes fell within the range of policies considered under Article XX(b).¹⁵² In *EC – Asbestos*, France imposed a ban on chrysotile-cement products and invoked Article XX(b) by claiming that such products posed risks to human life and health.¹⁵³

“Necessity” Element

The second element - the “necessity” requirement - is more difficult to establish. The Panel in *Thailand – Cigarettes*, established that a measure is “necessary” within the meaning of Article XX(b) only when there are no alternative measures consistent with the GATT, or less inconsistent with it, which the defending Member could reasonably be expected to employ to achieve its objective.¹⁵⁴ In the light of this standard, the Panel in *Thailand – Cigarettes*, conducted the following assessment of the “necessity” of Thailand’s import restrictions allegedly designed to protect public health:

The Panel then examined whether the Thai concerns about the quality of cigarettes consumed in Thailand could be met with measures consistent, or less inconsistent, with the General Agreement. It noted that other countries had introduced strict, non-discriminatory labelling and ingredient disclosure regulations which allowed governments to control, and the public to be informed of, the content of cigarettes. A non-discriminatory regulation implemented on a national treatment basis in accordance with Article III:4 requiring complete disclosure of ingredients, coupled with a ban on unhealthy substances, would be an alternative consistent with the General Agreement. The Panel considered that Thailand could reasonably be expected to take such measures to address the quality-related policy objectives it now pursues through an import ban on all cigarettes whatever their ingredients.

The Panel then considered whether Thai concerns about the quantity of cigarettes consumed in Thailand could be met by measures reasonably available to it and consistent, or less inconsistent, with the General Agreement. A ban on the advertisement of cigarettes of both domestic and foreign origin would normally meet the requirements of Article III:4 [or] would have to be regarded as unavoidable and therefore necessary within the meaning of Article XX(b) because additional advertising rights would risk stimulating demand for cigarettes. ...

In sum, the Panel considered that there were various measures consistent with the General Agreement which were reasonably available to Thailand to control the quality and quantity of cigarettes smoked and which, taken together, could achieve the health policy goals that the Thai government pursues by restricting the importation of cigarettes inconsistently with Article XI:1. The Panel found therefore that Thailand’s practice of permitting the sale of domestic cigarettes while not permitting the importation of foreign cigarettes was an inconsistency with the General Agreement not ‘necessary’ within the meaning of Article XX(b).¹⁵⁵

¹⁵² Panel Report, *Thailand – Cigarettes*, para. 73.

¹⁵³ See Appellate Body Report, *EC – Asbestos*, paras. 162.

¹⁵⁴ Panel Report, *Thailand – Cigarettes*, paras. 74-75.

¹⁵⁵ Panel Report, *Thailand – Cigarettes*, paras. 73-81.

In the unadopted Report in *United States – Tuna/Dolphin*, the Panel conducted the following assessment to determine whether the prohibition of yellowfin tuna caught with techniques that are harmful to dolphins could be justified under Article XX(b).

The Panel considered that the United States' measures, even if Article XX(b) were interpreted to permit extrajurisdictional protection of life and health, would not meet the requirement of necessity set out in that provision. The United States had not demonstrated to the Panel – as required of the party invoking an Article XX exception – that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas. Moreover, even assuming that an import prohibition were the only resort reasonably available to the United States, the particular measure chosen by the United States could in the Panel's view not be considered to be necessary within the meaning of Article XX(b). The United States linked the maximum incidental dolphin taking rate which Mexico had to meet during a particular period in order to be able to export tuna to the United States to the taking rate actually recorded for United States fishermen during the same period. Consequently, the Mexican authorities could not know whether, at a given point of time, their policies conformed to the United States' dolphin protection standards. The Panel considered that a limitation on trade based on such unpredictable conditions could not be regarded as necessary to protect the health or life of dolphins.¹⁵⁶

In *US – Gasoline*, the Panel emphasized that Article XX(b) does not require to assess whether the policy objective is “necessary”, but whether the disputed measure is “necessary” to achieve the policy objective at issue.¹⁵⁷

Level of Protection

In *EC – Asbestos*, the dispute between Canada and the European Communities concerned the French ban on asbestos and asbestos products. The Appellate Body ruled that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation.¹⁵⁸ This means that other WTO Members cannot challenge the level of protection selected by the defending Member, but only argue that the disputed measure is not “necessary” to achieve that level of protection.

Reasonably Available GATT Consistent Alternatives

In *EC – Asbestos*, the Appellate Body further refined the “necessity” test used first in *Thailand – Cigarettes*, which provided that there should be no GATT consistent, or no less GATT inconsistent, alternative method, to the disputed measure that the Member could be reasonably expected to employ. In that case, Canada argued that “controlled use” constituted a reasonably available alternative to the French import ban on asbestos. Canada argued that an alternative measure can only be excluded as “reasonably available” if implementation of that measure is “impossible”. Relying on its interpretation

¹⁵⁶ Panel Report, *US – Tuna/Dolphin*, paras. 5.25-5.28.

¹⁵⁷ Panel Report, *US – Gasoline*, para. 6.22.

of “necessity” in Article XX(d) in *Korea – Beef*, the Appellate Body said that one aspect of the “weighing and balancing process ... comprehended in the determination of whether a WTO-consistent alternative measure” is *reasonably available* is the extent to which the alternative measure “contributes to the realization of the end pursued”¹⁵⁹; and that “[t]he more vital or important [the] common interests or values” pursued, the easier it would be to establish that the disputed measures are “necessary” to achieve those ends.¹⁶⁰ The Appellate Body then concluded:

In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree. The remaining question, then, is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition. ...

In our view, France could not reasonably be expected to employ any alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to “halt”. Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection. On the basis of the scientific evidence before it, the Panel found that, in general, the efficacy of “controlled use” remains to be demonstrated. Moreover, even in cases where “controlled use” practices are applied “with greater certainty”, the scientific evidence suggests that the level of exposure can, in some circumstances, still be high enough for there to be a “significant residual risk of developing asbestos-related diseases.” The Panel found too that the efficacy of “controlled use” is particularly doubtful for the building industry and for DIY enthusiasts, which are the most important users of cement-based products containing chrysotile asbestos. Given these factual findings by the Panel, we believe that “controlled use” would not allow France to achieve its chosen level of health protection by halting the spread of asbestos-related health risks. “Controlled use” would, thus, not be an alternative measure that would achieve the end sought by France.¹⁶¹

Standard of Proof

As regards the standard of proof in justifying an otherwise GATT inconsistent measure under Article XX(b), the Appellate Body said in *EC – Asbestos*, that a Member may rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion. The Appellate Body stated:

A Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion. Therefore, a panel need not, necessarily, reach a decision under Article XX(b) of the GATT 1994 on the basis of the “preponderant” weight of the evidence.¹⁶²

¹⁵⁸ Appellate Body Report, *EC – Asbestos*, para. 168.

¹⁵⁹ Appellate Body Report, *Korea – Beef*, paras. 166 and 163.

¹⁶⁰ Appellate Body Report, *Korea – Beef*, para. 162.

¹⁶¹ Appellate Body Report, *EC – Asbestos*, para. 174.

¹⁶² Appellate Body Report, *EC – Asbestos*, para. 178.

4.1.1.2 Measures under Article XX(d)

Article XX(d) GATT 1994

Article XX(d) provides :

... nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

- (d) *necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;*

...

Two-Tier Test

Two questions need to be answered in order to determine whether otherwise GATT-inconsistent measures can be provisionally justified under Article XX(d), before determining whether the measures also satisfy the requirements under the chapeau of Article XX. The burden of demonstrating that these two elements are met lies with the Member invoking Article XX(d) as a justification.¹⁶³

- (1) The measure must be one designed to “secure compliance” with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994.
- (2) The measure must be “necessary” to secure such compliance.¹⁶⁴

First Element

As for the first element, that is, “secur[ing] compliance with [GATT-]consistent laws and regulations”, the Panel in *US – Gasoline* stated:

*... maintenance of discrimination between imported and domestic gasoline contrary to Article III:4 under the baseline establishment methods did not ‘secure compliance’ with the baseline system. These methods were not an enforcement mechanism. They were simply rules for determining the individual baselines. As such, they were not the type of measures with which Article XX(d) was concerned.*¹⁶⁵

“Necessity” Element

As for the second element, that is, the “necessity” test, the Appellate Body in *Korea – Beef* said:

In sum, determination of whether a measure, which is not ‘indispensable’, may nevertheless be ‘necessary’ within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure

¹⁶³ Appellate Body Report, *Korea – Beef*, para. 157.

¹⁶⁴ See Appellate Body Report, *Korea – Beef*, para. 157.

¹⁶⁵ Panel Report, *US – Gasoline*, para. 6.33.

to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.¹⁶⁶

4.1.1.3 Measures Relating to the Conservation of Exhaustible Natural Resources

Article XX(g) of the GATT 1994

Article XX(g) provides:

... nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

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

Three-Tier Test

Three questions need to be answered under Article XX(g) to assess whether the disputed measure is provisionally justified under Article XX, before determining whether it also satisfies the elements of the chapeau of Article XX;

- whether the measure relates to *conservation of exhaustible natural resources*;
- whether the measure *relates to* conservation of exhaustible natural resources;
- whether the measure is made effective in conjunction with restrictions on domestic production or consumption.

“conservation of exhaustible natural resources”

The element of “conservation of exhaustible natural resources” includes both non-living and living species. The Appellate Body adopted an “evolutionary” interpretation of Article XX(g):

... We do not believe that ‘exhaustible’ natural resources and ‘renewable’ natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, ‘renewable’, are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as ‘finite’ as petroleum, iron ore and other non-living resources.

The words of Article XX(g), ‘exhaustible natural resources’, were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the



¹⁶⁶ Appellate Body Report, Korea – Beef, para. 164.

importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the WTO Agreement — which informs not only the GATT 1994, but also the other covered agreements — explicitly acknowledges ‘the objective of sustainable development ...’: ...

From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term ‘natural resources’ in Article XX(g) is not ‘static’ in its content or reference but is rather ‘by definition, evolutionary’. It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources. ... Moreover, two adopted GATT 1947 panel reports previously found fish to be an ‘exhaustible natural resource’ within the meaning of Article XX(g).¹⁶⁷

In *US – Gasoline*, the United States sought to ensure that pollution from gasoline combustion did not exceed 1990 levels and that pollutants in major population centres be reduced.¹⁶⁸ The Appellate Body found that the objective of the measure fell within the ambit of Article XX(g), but that it did not satisfy the requirements of the chapeau of Article XX. In *US – Shrimp*, the United States aimed to protect sea turtles by banning imports of shrimps caught with nets which were harmful to sea turtles.¹⁶⁹ Again, the Appellate Body found that the objective of the measure fell within the scope of Article XX(g), but also found that the measure ultimately failed to fulfil the requirement of the chapeau of Article XX.

“relates to”

To satisfy the second element which requires that the measure “relate” to conservation of exhaustible natural resources, the measure at issue must be “primarily aimed at conservation”.¹⁷⁰

In *US – Shrimp*, the Appellate Body added that, not only must the measure be “primarily aimed at conservation”, its relationship with the environmental policy must be “observably a close and a real one”. Applying the standards to the facts of the case, the Appellate Body said:

In its general design and structure, therefore, Section 609 is not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality of sea turtles. Focusing on the design of the measure here at stake, it appears to us that Section 609, cum implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The

¹⁶⁷ Appellate Body Report, *US – Shrimp*, paras. 128-131.

¹⁶⁸ See Appellate Body Report, *US – Gasoline*. The Appellate Body found that the United States “gasoline” measure fell within the terms of Article XX(g), but the Appellate Body concluded that it did not satisfy the requirements of the chapeau of Article XX of the GATT 1994.

¹⁶⁹ See Appellate Body Report, *US – Shrimp*: The Appellate Body found that the United States measure fell within the terms of Article XX(g), but the Appellate Body concluded that it did not satisfy the requirements of the chapeau of Article XX of the GATT 1994.

¹⁷⁰ Panel Report, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon* (“Canada – Herring and Salmon”), adopted 22 March 1988, BISD 35S/98, paras. 4.4-4.6.

*means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one*¹⁷¹

“even-handedness”

Finally, as regards the third element of the test under Article XX(g) which requires that the measures be made effective in conjunction with restrictions on domestic production or consumption, the Appellate Body explained in *US – Gasoline* that this is a requirement of “even-handedness” in the imposition of restrictions on imported and domestic products, in the name of conservation.¹⁷² The Appellate Body applied that standard to the case as follows:

*In the present appeal, the baseline establishment rules affect both domestic gasoline and imported gasoline, providing for - generally speaking - individual baselines for domestic refiners and blenders and statutory baselines for importers. Thus, restrictions on the consumption or depletion of clean air by regulating the domestic production of ‘dirty’ gasoline are established jointly with corresponding restrictions with respect to imported gasoline. ...*¹⁷³

4.1.2 Requirements of the Chapeau of Article XX

Article XX sets out a two-tier test to determine whether a measure otherwise GATT inconsistent can be justified. It requires first, that the measure meets the elements of a particular exception, and second, that the same measure meets the requirements of the chapeau of Article XX.

Chapeau of Article XX

With regard to measures provisionally justified under one of the specific exceptions of Article XX, the chapeau of Article XX provides:

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...

Objective

As regards the objective of the chapeau of Article XX, the Appellate Body in *US – Gasoline* ruled that the chapeau addresses not so much the measure at issue, but rather the manner in which that measure is applied, and that its purpose and object is to prevent abuse of the exceptions of Article XX that would result in defeating and frustrating the objectives of the GATT 1994.¹⁷⁴

¹⁷¹ Appellate Body Report, *US – Shrimp*, para. 141.

¹⁷² Appellate Body Report, *US – Gasoline*, pp. 20-22.

¹⁷³ Appellate Body Report, *US – Gasoline*, pp. 20-22.

¹⁷⁴ Appellate Body Report, *US – Gasoline*, pp. 20-22.

Further, in *US – Shrimp*, the Appellate Body explained that the chapeau of Article XX is an emanation of the general principle of good faith in international law.¹⁷⁵

4.1.2.1 Arbitrary or Unjustifiable Discrimination

Discrimination

The application of measures sought to be exempted from the GATT disciplines through Article XX must not constitute “discrimination” that is “arbitrary” and “unjustifiable”. In other words, if the discrimination is not arbitrary or unjustifiable, it may be authorized pursuant to the chapeau of Article XX. In that sense, the concept of “discrimination” under Article XX differs from that in the other provisions of the GATT.¹⁷⁶

In order to determine whether the application of measures at issue constitute arbitrary or unjustifiable discrimination, three elements must be satisfied:

- the application of the measure must result in discrimination;
- the discrimination must be arbitrary or unjustifiable in character;
- the discrimination must occur between countries where the same conditions prevail.¹⁷⁷

As regards the third element, it should be noted that such discrimination could occur not only between different exporting Members, but also between exporting Members and the importing Member concerned.¹⁷⁸

In *US – Gasoline*, the Appellate Body reasoned as follows:

We have above located two omissions on the part of the United States: to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners; and to count the costs for foreign refiners that would result from the imposition of statutory baselines. In our view, these two omissions go well beyond what was necessary for the Panel to determine that a violation of Article III:4 had occurred in the first place. The resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable. In the light of the foregoing, our conclusion is that the baseline establishment rules in the Gasoline Rule, in their application, constitute ‘unjustifiable discrimination’ and a ‘disguised restriction on international trade.’ We hold, in sum, that the baseline establishment rules, although within the terms of Article XX(g), are not entitled to the justifying protection afforded by Article XX as a whole.¹⁷⁹

¹⁷⁵Appellate Body Report, *US – Shrimp*, paras. 156-159.

¹⁷⁶See Appellate Body Report, *US – Gasoline*, pp. 23-24. See also Appellate Body Report, *US – Shrimp*, para. 150.

¹⁷⁷Appellate Body Report, *US – Shrimp*, para. 150.

¹⁷⁸Appellate Body Report, *US – Gasoline*, pp. 23-24.

¹⁷⁹Appellate Body Report, *US – Gasoline*, pp. 28-29.

In applying the three-tier test described above, the Appellate Body made the following observations and conclusions in *US – Shrimp*:

... It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to “require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member’s territory, without taking into consideration different conditions which may occur in the territories of those other Members.

... We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.

... Section 609, in its application, imposes a single, rigid and unbending requirement that countries applying for certification ...adopt a comprehensive regulatory program that is essentially the same as the United States’ program, without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries. Furthermore, there is little or no flexibility in how officials make the determination for certification pursuant to these provisions. In our view, this rigidity and inflexibility also constitute “arbitrary discrimination” within the meaning of the chapeau.¹⁸⁰

4.1.2.2 Disguised Restriction on International Trade

Relationship Between the Two Elements of the Chapeau of Article XX

As for the requirement that the measure does not constitute a “disguised restriction on international trade” to benefit from the Article XX exceptions, and as regards its relationship with the requirement that the measure not be either “arbitrary and unjustifiable discrimination”, the Appellate Body explained the following in *US – Gasoline*:

“Arbitrary discrimination”, “unjustifiable discrimination” and “disguised restriction” on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that “disguised restriction” includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of “disguised restriction.” We consider that “disguised restriction”, whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to ‘arbitrary or unjustifiable discrimination’, may also be taken into account in determining the presence of a ‘disguised restriction’ on international trade. The

¹⁸⁰ Appellate Body Report, *US – Shrimp*, paras. 164-165, 177.

*fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.*¹⁸¹

4.2 What are the Security Exceptions?

The “security exceptions” allow Members to take measures which depart from GATT disciplines to achieve “security” objectives, within the meaning of Article XXI.¹⁸²

Article XXI GATT 1994

Article XXI of the GATT 1994 provides:

Article XXI

Security Exceptions

Nothing in this Agreement shall be construed

- (a) *to require any [Member] to furnish any information the disclosure of which it considers contrary to its essential security interests; or*
- (b) *to prevent any [Member] from taking any action which it considers necessary for the protection of its essential security interests*
 - (i) *relating to fissionable materials or the materials from which they are derived;*
 - (ii) *relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;*
 - (iii) *taken in time of war or other emergency in international relations; or*
- (c) *to prevent any [Member] from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security*

4.2.1 National Security Exceptions

Articles XXI(a) and XXI(b) GATT 1994

Articles XXI(a) and XXI(b) of the GATT 1994 provide:

Article XXI

Security Exceptions

Nothing in this Agreement shall be construed

- (a) *to require any [Member] to furnish any information the disclosure*

¹⁸¹ Appellate Body Report, US – Gasoline, p. 25.

¹⁸² It is noteworthy that Article XIVbis of the GATS and Article 73 of the TRIPS Agreement contain provisions similar to Article XXI of the GATT 1994.

- of which it considers contrary to its essential security interests; or*
- (b) *to prevent any [Member] from taking any action which it considers necessary for the protection of its essential security interests*
- (i) *relating to fissionable materials or the materials from which they are derived;*
- (ii) *relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;*
- (iii) *taken in time of war or other emergency in international relations; ...*

Article XXI(a) empowers Members with the right to refuse the disclosure of information based on security grounds. Article XXI(b) entitles Members to “take any action”, such as unilateral embargoes, subject to the criteria contained in paragraphs (i) to (iii). In practice, this Article has been rarely invoked.

4.2.2 Actions Under the United Nations Charter for the Maintenance of International Peace and Security

Article XXI(c)
GATT 1994

Article XXI(c) of the GATT 1994 provides:

Article XXI
Security Exceptions

Nothing in this Agreement shall be construed

...

(c) *to prevent any [Member] from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.*

Economic Sanctions

Article XXI(c) allows Members to take security measures which may affect international trade relations insofar as such measures are required by the Security Council acting under the United Nations Charter for the maintenance of international peace and security. By virtue of Article 25 of the United Nations Charter, the Members of the United Nations have no other choice but to accept and carry out the decisions of the Security Council regarding international peace and security. Such measures may include economic sanctions.¹⁸³ Broadly speaking, Article XXI(c) simply acknowledges the supremacy of the United Nations Charter over other international agreements in the event of a conflict, as stipulated in Article 103 of the United Nations Charter.

In practice, this means that Members are not in breach of their GATT obligations

¹⁸³See Article 41 of the United Nations Charter.

if they implement economic sanctions imposed by the Security Council of the United Nations, as it has been the case in the 1980s when economic sanctions were taken against South Africa to protest against the apartheid regime. Members usually note their recourse to UN sanctions when notifying their import licensing system.¹⁸⁴

4.3 Safeguard Measures

It is possible for Members to derogate from the GATT disciplines if, as a result of unforeseen developments and of the effect of GATT obligations, including tariff concessions, any product is being imported in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products. Under strict conditions, the Member may then suspend the GATT obligation in whole or in part or withdraw or modify the concession, to the extent and for such time as may be necessary to prevent or remedy such injury.

Article XIX of the GATT 1994 and the *Agreement on Safeguards* regulate the use of this exception. Module 3.8 examines this exception to GATT obligations in detail.

4.4 Regional Integration

The GATT 1994 allows some derogations under certain strict conditions in order for groups of WTO Members to achieve closer integration of their economies through voluntary agreements known as “regional trade agreements” establishing “customs unions” or “free trade areas”.¹⁸⁵

Applicable Standards

The cornerstone of the WTO Agreement is the principle of non-discrimination. The most-favoured-nation treatment obligation requires WTO Members to grant unconditionally to each other’s products any benefit affecting customs duties, charges, rules and procedures that they give to products originating or destined for any other country. In contrast, parties to regional trade agreements offer each other more favourable treatment in trade than to other WTO Members. The WTO allows such derogation to the non-discrimination principle for regional trade agreements provided that they conform to certain criteria set out in:

- Article XXIV of the GATT 1994, to be read in conjunction with the *Understanding on the Interpretation of Article XXIV of the GATT 1994*, which both provide rules for customs unions and free trade areas as regards trade in goods;
- the 1979 GATT Decision of Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the so-called “Enabling Clause”) which concerns

¹⁸⁴ *GATT Analytical Index, Art. XXI, 6th ed., 1995, p. 605.*

¹⁸⁵ *Article XXIV:4, first sentence, of the GATT 1994.*

Article XXIV:4
GATT 1994

preferences in trade in goods granted between developing countries.

The basic principle in Article XXIV:4 of the GATT 1994 is that the purpose of free trade areas or customs unions should be to facilitate trade between the constituent territories and not to raise barriers to the trade of non-constituent territories.¹⁸⁶

Article XXIV:8
GATT 1994

Customs unions and free trade areas are defined in Article XXIV:8 which states:

8. *For the purposes of this Agreement:*

- (a) *A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that*
 - (i) *duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,*
 - (ii) *subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;*
- (b) *A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.*

In essence, the duties and other restrictive regulations of commerce are to be eliminated with respect to “substantially all the trade” between the members of a customs union or a free trade area. As for customs unions, there is the additional requirement that its members should apply “substantially the same duties and other regulations of commerce” to trade with non-members, and will thus have a common commercial policy including a common external tariff.

Article XXIV :5
GATT 1994

The conditions applicable for a regional trade agreement to benefit from a derogation from the GATT disciplines are contained in Article XXIV:5 of the GATT 1994. Article XXIV:5(a) stipulates that the duties and other regulations of commerce imposed on non- members at the formation of the free trade area or, an interim agreement leading to a free trade area should not be higher or more restrictive than those existing prior to its formation. As for a customs union or an interim agreement leading to a customs union, Article XXIV:5(b) provides that the duties and other regulations of commerce can not on the whole be higher or more restrictive than the general incidence of the duties

¹⁸⁶Article XXIV:4, second sentence, of the GATT 1994.

and other regulations of commerce applied before its establishment.

As regards the tariffs imposed on third parties, the *Understanding on the Interpretation of Article XXIV of the GATT 1994* states that the level of protection should be compared on the basis of an overall assessment of the weighted average of the applied tariffs prior to, and at, the institution of the customs union or the interim agreement leading to the customs union.

Article XXIV:5(c) provides that an interim agreement must include a plan and a schedule for the formation of a customs union or a free trade area within “a reasonable length of time”. This reasonable period of time should not exceed 10 years except in exceptional circumstances.¹⁸⁷

Finally, as regards tariff renegotiation, Article XXIV:6 obliges Members that propose to increase any bound rate in the context of the formation of a customs union, to follow the normal procedures for tariff renegotiation set out in Article XXVIII of the GATT 1994. The Understanding brings further clarifications on this issue.

Free trade areas and customs unions are reviewed by the WTO to determine their compatibility with the WTO Agreements. The Understanding also modifies the review procedure for customs unions and free trade areas. Since 1996, the Committee on Regional Trade Agreements is in charge of these issues.

4.5 Balance-of-Payments Restrictions

WTO Members are entitled to restrict the quantity or value of merchandise permitted to be imported, by imposing quantitative restrictions, in order to safeguard their external financial positions and their balance-of-payments. The relevant provisions of the GATT 1994 are contained in Articles XII and XVIII. Article XII of the GATT 1994 is applicable to all WTO Members. A separate provision, Article XVIII, deals with restrictions for balance-of-payments purposes in relation to developing countries (please refer to Section 5.1).

Article XII **GATT 1994**

Pursuant to Article XII, the Member applying balance-of-payments measures must be aiming to “safeguard [its] external financial position and ensure a level of reserves adequate for the implementation of its programme of economic development” and it must need to “restore equilibrium on a sound and lasting basis. The objective of Article XII is to “avoid the uneconomic employment of resources”. Article XII, second paragraph, provides that import restrictions “shall not exceed those necessary (i) to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves” or “(ii)... in the case of a [Member] with very low monetary reserves, to achieve a reasonable rate of increase in its reserves”. Article XII requires Members to relax progressively the restrictions as conditions get better and eliminate them when conditions no longer justify such maintenance. Finally, Article XII sets out notification and consultations requirements with Members maintaining balance-of-payments

¹⁸⁷ Understanding on the Interpretation of Article XXIV of the GATT 1994, para. 3.

**1979 Tokyo
Declaration**

restrictions.

The 1979 Tokyo Declaration on Trade Measures Taken for Balance-of-Payments Purposes provides that all trade measures taken for balance-of-payments purposes, and not only quantitative restrictions, fall under the notification and consultation requirements. This Declaration also added conditions for the application of balance-of-payments measures. First, preference should be given to GATT-consistent measures which have “the least disruptive effect on trade”. Second, the simultaneous application of more than one trade measure for balance-of-payments purposes should be avoided. Third, “whenever practicable, [Members] shall publicly announce a time schedule for the removal of the measures”. It also clarifies that measures should not be taken for the purpose of protecting a particular industry or sector.

**Understanding on
Balance-of-Payments
Provisions**

The *Understanding on Balance-of-Payments Provisions of the GATT 1994* incorporates some of the principles of the Tokyo Declaration and, *inter alia*, encourages the adoption of “price-based measures” such as import surcharges, import deposit requirements, or other equivalent trade measures with an impact on the price of imported goods.

In practice, most developed countries have not used trade measures for balance-of-payments purposes. Measures to deal with balance-of-payments problems have mostly been price-based. It is generally agreed that restrictive trade measures are generally inefficient means to maintain or restore the balance of payments.

4.6 Test Your Understanding

1. **What are the possible exceptions to the disciplines in the GATT 1994?**
2. **What is the objective of Article XX? When can one resort to Article XX of the GATT 1994? What are the specific exceptions in Article XX?**
3. **What are the constituent elements of Article XX(b)? Do Members have the right to determine the level of protection of health that they consider appropriate in a given situation, pursuant to Article XX(b)? What is the standard of proof applicable to Members invoking specific exception of Article XX(b) to justify an otherwise GATT inconsistent measure?**
4. **What are the constituent elements of Article XX(d)?**
5. **What are the constituent elements of Article XX(g)? Does the element “conservation of exhaustible natural resources” in Article XX(g) include both non-living and living species? Does the measure have to be “necessary” for the conservation of exhaustible natural resources to qualify for the application of Article XX(g)? What are**

the requirements of the chapeau of Article XX?

- 6. What are the requirements of the chapeau of Article XX?**
- 7. What are the security exceptions?**
- 8. Under what conditions is it possible for WTO Members to derogate from the most-favoured-nation treatment obligation for the purpose of creating customs unions or free trade areas with a view to facilitating trade between the constituent territories? How are “customs unions” and “free trade areas” defined in the GATT 1994?**
- 9. Under what conditions is it possible for WTO Members to apply**

otherwise prohibited quantitative restrictions in order to safeguard their external financial positions and balance of payments?

5. DEVELOPING COUNTRY MEMBERS IN THE GATT 1994

After completing this Section, the reader will be able to:

- **identify the conditions under which balance-of-payments restrictions are available to developing country Members;**
- **explain how developing country Members can promote the establishment of a particular “infant” industry;**
- **enumerate the special and differential rules contained in Part IV of the GATT 1994 for the benefit of developing country Members;**
- **explain the non-reciprocity principle applicable to developing country Members in the course of their trade negotiations with developed country Members;**
- **identify the conditions under which developing country Members may establish trade “arrangements”.**

The WTO agreements, and the GATT 1994 in particular, provide a certain degree of flexibility to developing country Members in the use of economic and commercial policy instruments which are not available, or available on less favourable terms, to developed country Members. The GATT 1994 essentially aims to increase trade opportunities for developing country Members in various ways. The GATT 1994 allows developing country Members to take balance-of-payments measures, to provide governmental assistance to promote an infant industry with a view to raising the general standard of living of its people, and to protect themselves from full reciprocity in trade negotiations among developed and developing country Members.

This Section is only concerned with measures favourable to developing country Members in the GATT 1994. Module 3.1 and the modules dealing with specific Agreements provide comprehensive overview of all kinds of benefits afforded to developing country Members in various WTO agreements.

The WTO system splits up its membership into four groups of Members: the developed country Members, the developing country Members, the least developed country Members and the transitional economies. Moreover, another group of Members was acknowledged at the Geneva Ministerial Conference, namely, “certain small economies” within the overall group of developing countries.¹⁸⁸ The “least developed” countries identified by the

¹⁸⁸The Ministerial Declaration of the Geneva Conference states, *inter alia*, that the “We remain deeply concerned over the marginalization of the least-developed countries and certain small economies and recognize the urgent need to address this issue which has been compounded by chronic foreign debt problems facing many of them”. See also *Business Guide to the World Trading System*, 2nd ed., International Trade Centre / Commonwealth Secretariat, 1999, pp. 13-14.

United Nations system are also treated as such under the WTO system. However, there are no precise criteria for identifying the remaining groups. The “developing country Members” are the ones which are self-elected as such. Central and Eastern European countries and the former Soviet Union, which are currently liberalizing their markets, are treated as transitional economies. The remaining Member countries are considered to be developed country Members.¹⁸⁹

5.1 Balance-of-Payments Restrictions

Section B of Article XVIII GATT 1994

Article XVIII of the GATT 1994 is entitled “Government Assistance to Economic Development”. It allows developing country Members “to take protective or other measures affecting imports” in order to implement their programmes and policies of economic development. Section B concerns balance-of-payments restrictions, examined in this Section. Sections A, C and D deal with the infant industry exception, examined in the following Section.

Section B of Article XVIII of the GATT 1994 entitles developing country members to impose quantitative restrictions on imports to control the general level of imports in order to safeguard their external financial positions and to ensure a level of reserves adequate for the implementation of their programmes of economic development. The balance-of-payments exception is also available to developed country Members under Article XII of the GATT 1994, but under less favourable terms.

Section B of Article XVIII refers to the need to “safeguard the [Member’s] external financial position and ensure a level of reserves adequate for the implementation of its programme of economic development” and to the need to “restore equilibrium on a sound and lasting basis”.¹⁹⁰ Section B of Article XVIII aims to “assur[e] an economic employment of production resources”, while Article XII on the balance-of-payments exception available to developed country Members refers to the objective of “avoiding the uneconomic employment of resources”.

Article XVIII:9 states that import restrictions shall not exceed those necessary:

- (a) *to forestall the threat of, or to stop, a serious decline in its monetary reserves, or*
- (b) *in the case of a [Member] with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves.*

Section B of Article XVIII allows developing country members to resort to balance-of-payments restrictions under more flexible conditions than those set out in Article XII, available to all WTO Members. Section B of Article XVIII does not require an “imminent” threat and, rather than “very low” level

¹⁸⁹See *Business Guide to the World Trading System*, 2nd ed., International Trade Centre / Commonwealth Secretariat, 1999, pp. 13-14.

¹⁹⁰Article XVIII:9 of the GATT 1994.

of reserves, it refers to “inadequate” level of reserve. The term “adequate” is defined as follows: “adequate for the implementation of its programme of economic development”.

Finally, Article XVIII:11 provides that Members

shall progressively relax any restrictions applied under this Section [i.e., Article XVIII:B] as conditions improve, maintaining them only to the extent necessary under the terms of paragraph 9 of this Article [XVIII] and shall eliminate them when conditions no longer justify their maintenance.

**Understanding on
Balance-of-Payments
Provisions of the GATT
1994**

The *Understanding on Balance-of-Payments Provisions of the GATT 1994* encourages all Members, including the developing country Members, to adopt “price-based measures” such as import surcharges, import deposit requirements, or other equivalent trade measures with an impact on the price of imported goods, as opposed to quantitative restrictions. More precisely, the *Understanding* calls upon all Members to “seek to avoid the imposition of new quantitative restrictions for balance-of-payments purposes unless, because of a critical balance-of-payments situation, price-based measures cannot arrest a sharp deterioration in the external payments position”. The *Understanding* also confirms the commitment of the Members to announce publicly, as soon as possible, time-schedules for the removal of restrictive import measures taken for balance-of-payments purposes.

**Consultations with
The BOP Committee**

Pursuant to Articles XII and Section B of XVIII of the GATT 1994, both developed and developing country Members applying new restrictions or intensifying existing ones are obliged to consult with the Committee on Balance-of-Payments Restrictions (the “BOP Committee”) immediately after taking action or before doing so if prior consultation is practicable.¹⁹¹ A Member that maintains such restrictions is required to consult annually¹⁹² or biennially.¹⁹³ Consultations may also be initiated by a Member adversely affected by the restrictions maintained by another, if they are applied inconsistently with the relevant provisions on balance-of-payments restrictions.¹⁹⁴

**India – Quantitative
Restrictions**

In *India – Quantitative Restrictions*, India maintained quantitative restrictions on the importation of agricultural, textile and industrial products and invoked balance-of-payments justification in accordance with Section B of Article XVIII of the GATT 1994, and notified these quantitative restrictions to the BOP Committee. Following consultations in the BOP Committee, India proposed eliminating its quantitative restrictions over a seven-year period. Some of the Members of the BOP Committee, including the United States, were of the view that India’s balance-of-payments restrictions could be phased out over a

¹⁹¹ Articles XII:4(a) and XVII:12(a) of the GATT 1994.

¹⁹² Article XII:4(b) of the GATT 1994.

¹⁹³ Article XVIII:12(b) of the GATT 1994.

¹⁹⁴ Articles XII:4(d) and XVIII:12(d) of the GATT 1994.

¹⁹⁵ See Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (“*India – Quantitative Restrictions*”), WT/DS90/AB/R, adopted 22 September 1999, para. 2.

shorter period than that proposed by India. As a result, consensus on India's proposal could not be reached.¹⁹⁵ The United States subsequently challenged India's quantitative restrictions before a panel.

The Panel found, *inter alia*, that India did not have inadequate reserves and that there was not a serious decline or a threat of a serious decline in India's monetary reserves, within the meaning of Articles XVIII:9(a) and XVIII:9(b) and, that therefore India could not maintain its balance-of-payments measures.¹⁹⁶ The Panel conducted the following investigation into whether India had inadequate monetary reserves:

...In analyzing India's situation in terms of Article XVIII:9(a), it is important to bear in mind that the issue is whether India was facing or threatened with a serious decline in its monetary reserves. Whether or not a decline of a given size is serious or not must be related to the initial state and adequacy of the reserves. A large decline need not necessarily be a serious one if the reserves are more than adequate. Accordingly, it is appropriate to consider the adequacy of India's reserves for purposes of Article XVIII:9(a), as well as for Article XVIII:9(b).

In this connection, we recall that the IMF reported that India's reserves as of 21 November 1997 were US\$ 25.1 billion and that an adequate level of reserves at that date would have been US\$ 16 billion. While the Reserve Bank of India did not specify a precise level of what would constitute adequacy, it concluded only three months earlier in August 1997 that India's reserves were "well above the thumb rule of reserve adequacy" and although the Bank did not accept that thumb rule as the only measure of adequacy, it also found that "[b]y any criteria, the level of foreign exchange reserves appears comfortable". It also stated that "the reserves would be adequate to withstand both cyclical and unanticipated shocks".

We have also considered the four alternative methods of assessing reserve adequacy cited by India. We note that India concedes that its reserves of US\$25.1 billion would have been adequate under two of the alternatives (a and b). Under a third alternative (d), the reserves of US\$25.1 billion were at the higher end of the range between the minimum (US\$16 billion) and desirable (US\$28 billion) reserve levels. Under the fourth method (c), reserves of US\$27 billion would be considered adequate. While it might be following a prudential approach in suggesting method (c), India does not explain why it would be superior to the IMF method or to the other three Indian alternatives under which reserves could be considered adequate. Moreover, India's alternatives do not seem to be consistent with the approach of the Reserve Bank of India quoted above.

Having weighed the evidence before us, we note that only one of the four methods suggested by India for measuring reserve adequacy supports a finding that India's reserves are inadequate, and even under that method, the issue is a close one (US\$25.1 billion vs. US\$27 billion, or less than 10 per cent difference). Overall, we are of the view that the quality and weight of evidence is strongly in favour of the proposition that India's reserves are not inadequate.

¹⁹⁶ *In particular, this position is supported by the IMF, the Reserve Bank of India. On appeal, the Appellate Body concluded that the Panel had made an objective assessment of the matter before it, and upheld all the Panel's legal findings and interpretations. See Appellate Body Report, India – Quantitative Restrictions, para. 153.*

¹⁹⁷ *Panel Report, India – Quantitative restrictions, paras. 5.73-5.76. The Panel also found that India was not facing a serious decline or threat thereof in its reserves. See Panel Report, India – Quantitative restrictions, paras. 5.77-5.180.*

*and three of the four methods suggested by India. Accordingly, we find that India's reserves were not inadequate as of 18 November 1997.*¹⁹⁷

5.2 Infant Industry

Article XVIII:7 GATT 1994

Sections A, C and D of Article XVIII, , entitled “Government Assistance to Economic Development”, constitute the so-called “infant industry” sections, and allow, under certain conditions, developing country Members to modify or withdraw tariff concessions or, to take other GATT inconsistent measures in order to promote the establishment of a particular industry.

Article XVIII:13 GATT 1994

Pursuant to Article XVIII:7 of the GATT 1994, developing country Members can renegotiate (modify or withdraw) tariff concessions of the GATT 1994 in order to promote the establishment of a particular industry. The developing country Member is required to notify the Members of its intent to renegotiate tariff concessions and must enter into negotiations with the Members that have initial negotiating rights as well as those with substantial interest.

Under Article XVIII:13 of the GATT developing country Members are allowed to take GATT inconsistent measures in order to promote the establishment of a particular industry. Paragraph 13 of Section C reads:

If a Member coming within the scope of paragraph 4 (a) of this Article finds that governmental assistance is required to promote the establishment of a particular industry with a view to raising the general standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section.

In essence, the “provisions and procedures” of this section require the concerned Member to notify the other Members of the special difficulties which it meets in the establishment of a particular industry and to indicate the measures affecting imported goods which it proposes to introduce to alleviate such difficulties.¹⁹⁸

In cases where the product is not subject to a tariff concession, and if other Members do not object or request consultation, then the Member concerned may deviate from the relevant GATT provisions to the extent necessary to apply the proposed measure.¹⁹⁹ If other Members request consultations, the concerned Member must consult with them “as to the purpose of the proposed measure, as to alternative measures which may be available under this GATT, and as to the possible effect of the measure proposed on the commercial and economic interests of other[Members].”²⁰⁰ If, as a result of such consultation,

¹⁹⁸Article XVIII:14 of the GATT 1994.

¹⁹⁹Article XVIII:15 of the GATT 1994.

²⁰⁰Article XVIII:16, first sentence, of the GATT 1994.

the Members agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective outlined in paragraph 13 of this Article, and concur in the proposed measure, the Member concerned can be released from its obligations under the relevant provisions of the GATT 1994 to the extent necessary to apply that measure.²⁰¹ In cases where the measure involves impairment of a tariff concession, prior concurrence of the General Council is necessary, in addition to prior consultation with interested Members. In both situations, adherence to strict time limits is required.

1979 Decision

The 1979 Decision entitled “Safeguard Action for Development Purposes” provides rules for urgent cases and waives the requirements of prior consultation with affected Members, prior concurrence of the General Council and adherence to any time limits, and enables developing country Members to take provisional measures immediately upon notification.²⁰²

In practice, as reported in the GATT Analytical Index, such releases have been granted under Section C of Article XVIII to Cuba, Haiti, India and Sri Lanka. Greece, Indonesia and Malaysia have also notified certain import regulations taken for development purposes under Section C of Article XVIII.²⁰³

5.3 “Trade and Development”(Part IV of the GATT 1994)

Article XXXVI GATT 1994

Part IV of the GATT 1994, which was added to the GATT 1947 in 1965, is entitled *Trade and Development*, and provides special and differential rules for developing country Members.

Article XXXVI sets out the principles and objectives of the GATT 1994 in contributing to the development of developing country Members. They include the raising of standards of living and the progressive development of the economies of all Members, and Article XXXVI emphasizes that the attainment of these objectives is particularly urgent for developing country Members.²⁰⁴ It recognizes that individual and joint action is essential to further the development of the economies of developing country Members and to bring about a rapid advance in the standards of living in these countries.²⁰⁵ It finally notes that the Members may enable developing country Members to use special measures to promote their trade and development.²⁰⁶

Article XXXVI:4 acknowledges the “continued dependence” of many developing country Members on the exportation of a limited range of primary products, and emphasizes that there is need to provide in the largest possible measure more favourable and acceptable conditions of access to world markets for these products. With a view to diversifying the production of developing

²⁰¹ Article XVIII:16, second sentence, of the GATT 1994.

²⁰² See *GATT Analytical Index*, p. 509.

²⁰³ See *GATT Analytical Index*, pp. 508-509.

²⁰⁴ Article XXXVI(a) of the GATT 1994

²⁰⁵ Article XXXVI(d) of the GATT 1994.

²⁰⁶ Article XXXVI(e) of the GATT 1994.

Article XXXVI :8
GATT 1994

country Members, Article XXXVI:5 stresses the need for increased access in the largest possible measure to markets under favourable conditions for processed and manufactured products currently or potentially of particular export interest to developing country Members.

Most importantly, Article XXXVI:8 of Part IV of the GATT 1994 incorporates into WTO law the principle of non-reciprocity in trade negotiations between developed and developing country Members. More particularly, this means that developed country Members must not seek, nor are the developing country Members required to make, concessions that are inconsistent with the latter's development, financial and trade needs. This provision states:

Interpretative Note
Ad Article XXXVI

The developed country Members do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing country Members.

The Interpretative Note *Ad Article XXXVI* states in paragraph 8:

It is understood that the phrase "do not expect reciprocity" means, in accordance with the objectives set forth in this Article, that the [developing country Members] should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments.

...

Enabling Clause

This non-reciprocity principle applies to negotiations as well as to renegotiations of tariff concessions.²⁰⁷

The 1979 Decision on Differential and More Favourable Treatment, widely known as the Enabling Clause, further elaborates on the provisions of Part IV of the GATT 1994.²⁰⁸ The Enabling Clause allows developed country Members to depart from the most-favoured-nation treatment obligation in their trade relations with developing countries and to grant these countries "differential and more favourable treatment". The Enabling Clause states in relevant part:

Notwithstanding the provisions of Article I of the General Agreement, Members may accord differential and more favourable treatment to developing countries, without according such treatment to other Members.

The waiver of the most-favoured-nation treatment obligation under these provisions extends to all developed country Members for the purpose of allowing them to apply preferential tariff treatment to developing country Members only.²⁰⁹ As explained in Module 3.1, most developed country

Members have done so under the Generalized System of Preferences (the ~~For a more detailed explanation of the impact of the concept of non-reciprocity for developing~~ country Members, see Anwarul Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO*, Cambridge University Press, 2001, p. 9 and pp. 56-65.

²⁰⁸ BISD 26S/203.

²⁰⁹ See John H. Jackson, *The Jurisprudence of GATT and the WTO*, Cambridge University Press, 2000, pp. 65-66 in Chapter 5: "Equality and discrimination in international economic law: the General Agreement on Tariffs and Trade", pp. 57-68.

“GSP”), first adopted as a policy by UNCTAD in 1968. Paragraph 6 of the Enabling Clause also sets out special provisions for the least-developed countries:

Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.

Article XXXVII
GATT 1994

Article XXXVII is entitled “Commitments” and suggests measures that developed country Members may take in order to promote development. Pursuant to Article XXXVII:1 WTO Members must “to the fullest extent possible” give high priority to the reduction and elimination of barriers to trade in products currently or potentially of particular export interest to developing country Members and refrain from imposing higher tariff or non-tariff barriers to trade with developing country Members.²¹⁰

Pursuant to Article XXXVII:3, the developed country Members are required to make “every effort” to maintain trade margins at equitable levels when a government determines the resale price of products wholly or mainly produced in developing country Members. The developed country Members are called upon to give “active consideration” to the adoption of other measures favourable to the development of imports from developing country Members. In applying other measures permitted under the GATT 1994, the developed country Members must have “special regard” to the trade interests of developing country Members. Developed country Members must also explore all possibilities of constructive remedies before applying measures that would affect essential interests of developing country Members.

Pursuant to Article XXXVII:4, developing country Members are obliged to take action for the benefit of the trade of other developing country Members “in so far as such action is consistent with their individual present and future development, financial and trade needs taking into account past trade developments as well as the trade interests of [developing country Members] as a whole”.

Article XXXVIII
GATT 1994

Therefore, Article XXXVII articulates responsibilities of both developed country and developing country Members towards other developing country Members, and provides additional arguments to developing country members when negotiating with developed country Members.

²¹⁰ See Module 3.1, Sections 3 and 5.

Article XXXVIII of the GATT 1994 imposes positive obligations on all Members to cooperate with a view to furthering the objectives set out in Article XXXVI. In particular, the Members are required to take action to provide improved and acceptable conditions of access to world markets of primary products of particular interest to developing country Members, by designing measures, for instance, to attain stable, equitable and remunerative prices for exports of such products. The Members are encouraged to collaborate in analysing the development plans and policies of individual developing country Members and in examining trade and aid relationships with a view to devising measures to promote exports from developing country Members. The Members are also required to keep under continuous review the development of world trade with special reference to the rate of growth of the trade of developing country Members and, to make recommendations where appropriate. Furthermore, the Members are called upon to collaborate in seeking feasible methods to expand trade for the purpose of economic development, through international harmonization and adjustment of national policies and regulations, through technical and commercial standards affecting production, transportation and marketing, and through export promotion by the establishment of facilities for the increased flow of trade information and the development of market research. Finally, the Members are required to seek collaboration in matters of trade and development policy with the United Nations and its specialized agency, the United Nations Conference on Trade and Development.

The *WTO Agreement* explicitly provides for a Committee on Trade and Development. This Committee had already been established before the conclusion of the WTO agreement pursuant to Article XXXVIII: 2 (f) of the GATT 1994, but its area of competence broadened with the conclusion of the WTO which include more provisions relating to the special and differential treatment of developing country Members.

Although Article XXXVIII sets out “guidelines” for action, these guidelines are sources of obligations and as such, they have been examined by a GATT Panel which determined that there had been a violation of this Article. In *European Communities – Refunds on Exports of Sugar – Complaint by Brazil*,²¹¹ Brazil argued that by maintaining its sugar subsidy system, which resulted in increased exports and reduced imports, and by refusing to participate in the International Sugar Agreement (the “ISA”), the European Communities had acted inconsistently with Article XXXVIII:1, 2, 2(a) and 2(e).²¹² The Panel considered that Article XXXVIII provides “guidelines” for joint action to further the objectives set forth in Article XXXVI and that Brazil, being a developing country, could expect to enjoy benefits in accordance with these provisions. The Panel concluded by saying that:

²¹¹ Panel Report, *European Communities – Refunds on Exports of Sugar – Complaint by Brazil (“EC – Sugar Exports (Brazil)”), adopted 10 November 1980, BISD 27S/69.*

²¹² Panel Report, *EC – Sugar Exports (Brazil), para.4.30.*

“arrangements”

[T]he increased Community exports of sugar through the use of subsidies in the particular market situation of 1978 and 1979, and where developing country Members had taken steps within the framework of ISA to improve the conditions in the world sugar market, inevitably reduced the effects of the efforts made by these countries. For this time-period and for this particular field, the European Communities had therefore not collaborated jointly with other [Members] to further the principles and objectives set forth in Article XXXVI, in conformity with the guidelines in Article XXXVIII.²¹³

5.4 Regional Integration

The Enabling Clause also provides for differential and more favourable treatment with respect to non-tariff measures and allows developing country Members to enter into regional or global “arrangements” amongst themselves for the mutual reduction or elimination of tariffs and, under certain conditions, non-tariff barriers to trade.²¹⁴ The basic principle is set out in paragraph 3 of the Enabling Clause: the “arrangements” covered by this clause “shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties” for the trade of any other Member. Furthermore, such arrangements “shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis”. These requirements allow the exchange of preferences on a sub-set of products and the partial reduction, rather than elimination, of trade barriers. They do not require that the “arrangements” deal with “substantially all the trade” to justify a derogation from the most-favoured-nation treatment principle, unlike customs unions and free trade areas in Article XXIV of the GATT 1994. Therefore, the provisions applicable to “arrangements” in the Enabling Clause are more flexible than those applicable to “regional trade agreements” in Article XXIV of the GATT 1994 and its Understanding, as discussed in Section 4.4 above.

5.5 Test Your Understanding

- 1. Under what conditions are balance-of-payments restrictions available to developing country Members as compared with other WTO Members?**
- 2. How can developing country Members promote the establishment of an “infant” industry?**
- 3. What are the objectives of Part IV of the GATT 1994? Is the non reciprocity principle applicable to developed country Members in their tariff negotiations with other developed country Members?**
- 4. What are the “commitments” with respect to trade and development?**
- 5. What forms of co-operation does the GATT 1994 envisage to further development?**

²¹³ Panel Report, EC – Sugar Exports (Brazil), para. (h).

²¹⁴ Enabling Clause, paragraph 2(c).

6. Under what conditions may developing country Members establish trade “arrangements”?

6. CASE STUDY

Phobia and the Importation of Wine

Phobia is a developing country Member of the WTO, with a large but inefficient winegrowing industry. Phobia imposes the following *ad valorem* customs duties on wine and beer:

- red wine 50 per cent
- white wine 30 per cent
- beer 20 per cent

Phobia never made a tariff concession on wine but, during the Uruguay Round it bound its customs duties on beer to 25 per cent *ad valorem*.

Furthermore Phobia limits its importation of wine to 50,000 hectolitres and the importation of beer to 100,000 hectolitres a year. Phobia argues that these quantitative restrictions on the importation of wine and beer are necessary to safeguard its balance of payments and to promote the development of its winegrowing industry.

Wine and beer from Nearland, a neighbouring developing country with which Phobia forms a customs union, is exempted from all customs duties and quantitative restrictions.

Wine and beer from Farland, a developed country with which Phobia has strong economic and political links, is also imported into Phobia duty and quota free.

Phobia imposes a sales tax on red wine of 30 per cent, on white wine of 20 per cent and on beer 10 per cent. These sales taxes apply to both imported and domestic products. However, wine produced by micro-wineries is exempt from sales tax.

Phobia imposes a recycling tax of one per cent on imported wine and beer. It does not impose this tax on domestic wine and beer because domestic wine and beer producers participate in a national “can and bottle “ recycling scheme.

Finally, Phobia prohibits the sale of wine in supermarkets. As part of its fight against alcoholism, especially among young people, it requires that wine be sold only in specialized wine shops. Beer and other alcoholic beverages however, may be sold in supermarkets.

Utopia, a developed country Member of the WTO, is the world's largest producer and exporter of red wine. You work as a legal adviser at Utopia's Permanent Mission to the WTO and have been asked to prepare a brief on the GATT consistency of Phobia's rules on the importation, taxation and marketing of wine.

7. FURTHER READING

7.1 Books and Articles

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- Van den Bossche, Peter, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press, forthcoming).
- WTO Secretariat, *Analytical Index: Guide to GATT Law and Practice*, 6th Edition (1995), Volumes 1 and 2.

7.2 Documents and Information

For information on WTO activities, see www.wto.org. Official WTO documents can be obtained by searching on the WTO's online document