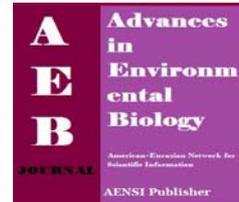




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The National Treatment Principle in Rules and Practices of GATT

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ABSTRACT

Background: In trade matters, national treatment of imported products with respect to internal measures is one of the basic principles of the multilateral trading system created by the General Agreement on Tariffs and Trade (GATT). **Objective:** At least as originally negotiated in 1947, the primary focus of the GATT was on the control and liberalization of border measures restricting international trade in goods. **Results:** A fundamental principle in this respect is that, as a general rule, any border measures designed to give a competitive advantage to domestic products should take the form of customs Tariffs imposed at the border, and that the level of such customs tariffs should be a matter for negotiation and binding in national schedules. **Conclusion:** Within this scheme of things, article III of the GATT ("National Treatment on Internal Taxation and Regulation") plays a critical role since, as its paragraph 1 makes clear, it is designed to ensure that "internal" measures are not applied to imported or domestic products so as to afford protection to domestic production.

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INTRODUCTION

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.

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. The products of the territory of any [Member] imported into the territory of any other [Member] shall be accorded treatment no less favorable 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 other paragraphs of Article III deal with particular measures such as internal quantitative regulations relating to the mixture, processing or use of products in specific amounts; government procurement; subsidies to domestic producers; internal maximum price control measures; and internal quantitative regulations relating to cinematographic films.

Nature of the National Treatment Obligation of Article III of the GATT:

The object and purpose of Article III:

Article III of the GATT prohibits discrimination against imported products. Generally speaking, it prohibits Members from treating imported products less favorably than like domestic products once the imported product has entered the domestic market. In 1958, in Italy – Agricultural Machinery, a dispute concerning an Italian law providing special conditions for the purchase on credit of Italian produced agricultural machinery, the Panel stated with regard to Article III:

That the intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they have been cleared through customs. Otherwise indirect protection could be given[1].

In US – Section 337, the Panel noted:

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The purpose of Article III ... is to ensure that internal measures “not be applied to imported or domestic products so as to afford protection to domestic production” (Article III: 1) [2].

In Japan – Alcoholic Beverages II, the Appellate Body stated with respect to the purpose of the national treatment obligation of Article III:

The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III “is to ensure that internal measures ‘not be applied to imported or domestic products so as to afford protection to domestic production’”. Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. “[T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given” [3].

In Korea – Alcoholic Beverages, the Appellate Body identified the objectives of Article III as ‘avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationships’ [4].

Panels and scholars have affirmed that one of the main purposes of Article III is to guarantee that internal measures of WTO Members do not undermine their commitments regarding tariffs under Article II [3]. Note, however that the Appellate Body stressed in Japan – Alcoholic Beverages II that the purpose of Article III is broader.

The Appellate Body stated:

The broad purpose of Article III of avoiding protectionism must be remembered when considering the relationship between Article III and other provisions of the WTO Agreement. Although the protection of negotiated tariff concessions is certainly one purpose of Article III, the statement in Paragraph 6.13 of the Panel Report that ‘one of the main purposes of Article III is to guarantee that WTO Members will not undermine through internal measures their commitments under Article II’ should not be overemphasized. The sheltering scope of Article III is not limited to products that are the subject of tariff concessions under Article II.

The Article III national treatment obligation is a general prohibition on the use of internal taxes and other internal regulatory measures so as to afford protection to domestic production. This obligation clearly extends also to products not bound under Article II. This is confirmed by the negotiating history of Article III [5].

Internal measures versus border measures:

Article III only applies to internal measures, not to border measures. Other GATT provisions, such as Articles II, on tariff concessions, and XI, on quantitative restrictions, apply to border measures. Since Articles III, and Articles II and XI provide for very different rules, it is important to determine whether a measure is an internal or a border measure. It is not always easy to distinguish an internal measure from a border measure when the measure is applied to imported products at the time or point of importation. The Ad Article III Note clarifies:

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

It follows that if the import of a product is barred at the border because that product fails, for example, to meet a public health or consumer safety requirement that applies equally to domestic products, consistency of this import ban with the GATT is to be examined under Article III, not under Article XI [4].

In EC – Asbestos, the Panel examined the question as to whether Article III applies also when there is no ‘domestic product’ due to a general ban on a particular product. Canada argued that ‘as France neither produces nor mines asbestos fibers on its territory, the ban on manufacturing, processing, selling and domestic marketing is, in practical terms, equivalent to a ban on importing chrysotile asbestos fiber’, and would therefore fall within the scope of Article XI:1. The Panel stated, however, that ‘the fact that France no longer produces asbestos or asbestos containing products does not suffice to make the Decree [banning these products] a measure falling under Article XI:1’ since, as the Panel pointed out, ‘[t]he cessation of French production is the consequence of the Decree and not the reverse’ [6].

Articles III: 1, III: 2 and III:4:

As stated above and as explicitly noted by the Appellate Body in Japan – Alcoholic Beverages II, Article III: 1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production. According to the Appellate Body in Japan – Alcoholic Beverages II:

This general principle informs the rest of Article III. 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 [7].

The general principle that internal measures should not be applied so as to afford protection to domestic production is elaborated on in Article III: 2 with regard to internal taxation and in Article III:4 with regard to internal regulation. In Article III:2, two non-discrimination obligations can be distinguished: one obligation set out in the first sentence of Article III:2 relating to internal taxation of 'like products' and the other obligation set out in the second sentence of Article III:2 relating to internal taxation of 'directly competitive or substitutable products'. The sections below will discuss:

- The constituent elements of Article III: 2, first sentence;
- The constituent elements of Article III: 2, second sentence; and,
- The constituent elements of Article III: 4.

Test of Consistency with Article III: 2, first sentence, of the GATT:

Article III:2, first sentence, states:

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.

This provision sets out a two-tier test of consistency of internal taxation.

In Canada – Periodicals, the Appellate Body found:

[T]here are two questions which need to be answered to determine whether there is a violation of Article III:2 of the GATT: (a) whether imported and domestic products are like products; and (b) whether the imported products are taxed in excess of the domestic products. If the answers to both questions are affirmative, there is a violation of Article III:2, first sentence [8].

In brief, the two-tier test of consistency of internal taxation with Article III:2, first sentence, thus requires the examination of:

- Whether the imported and domestic products are like products;
- And,
- Whether the imported products are taxed in excess of the domestic products.

Recall that Article III:1 provides that internal taxation must not be applied so as to afford protection to domestic production. However, according to the Appellate Body in Japan – Alcoholic Beverages II, the presence of a protective application need not be established separately from the specific requirements of Article III:2, first sentence. The Appellate Body stated:

Article III:1 informs Article III:2, first sentence, by establishing that if imported products are taxed in excess of like domestic products, then that tax measure is inconsistent with Article III. Article III:2, first sentence does not refer specifically to Article III:1. There is no specific invocation in this first sentence of the general principle in Article III:1 that admonishes Members of the WTO not to apply measures so as to afford protection. This omission must have some meaning. We believe the meaning is simply that the presence of a protective application need not be established separately from the specific requirements that are included in the first sentence in order to show that a tax measure is inconsistent with the general principle set out in the first sentence. However, this does not mean that the general principle of Article III: 1 does not apply to this sentence. To the contrary, we believe the first sentence of Article III: 2 is, in effect, an application of this general principle [9].

'Internal tax ...':

Article III: 2, first sentence concerns 'internal taxes and other charges of any kind' which are applied 'directly or indirectly' on products. Examples of such internal taxes on products are value added taxes (VAT), sales taxes and excise duties. Income taxes or import duties are not covered since they are not internal taxes on products. The words 'applied directly or indirectly on products' should be understood to mean 'applied on or in connection with products'. It has been suggested that a tax applied 'indirectly' is a tax applied, not on a product as such, but on the processing of the product [10].

In US – Tobacco, the Panel examined the question of whether penalty provisions under US law, consisting of a non-refundable marketing assessment and a requirement to purchase additional quantities of domestic burley and flue-cured tobacco could be qualified as 'internal taxes or other charges of any kind' within the meaning of Article III:2, first sentence. The Panel stated:

It was thus the Panel's understanding that the U.S. Government treated these [Domestic Marketing Assessment] provisions as penalty provisions for the enforcement of a domestic content requirement for tobacco, not as separate fiscal measures, and that such interpretation corresponded to the ordinary meaning of the terms used in the relevant statute and proposed rules. Further, it appeared that these penalty provisions had no separate *raison d'être* in the absence of the underlying domestic content requirement. The above factors

suggested to the Panel that it would not be appropriate to analyze the penalty provisions separately from the underlying domestic content requirement [11].

According to the Panel in US – Tobacco, a penalty provision for the enforcement of a domestic law is not an ‘internal tax or charge of any kind’ within the meaning of Article III: 2, first sentence.

Note that the regulatory objective pursued by the tax measure is of no relevance to the question of whether the measure is an internal tax within the meaning of Article III: 2 and the consistency of that measure with the national treatment requirement. In Japan – Alcoholic Beverages II, the Appellate Body stated that Members may pursue, through their tax measures, any given policy objective provided they do so in compliance with Article III: 2. In Argentina – Hides and Leather, the Panel rejected Argentina’s contention that the tax legislation at issue in that case was designed to achieve efficient tax administration and collection and as such did not fall under Article III: 2. The Panel stated:

We agree that Members are free, within the outer bounds defined by such provisions as Article III: 2, to administer and collect internal taxes as they see fit. However, if, as here, such “tax administration” measures take the form of an internal charge and are applied to products, those measures must, in our view, be in conformity with Article III:2. There is nothing in the provisions of Article III:2 to suggest a different conclusion. If it were accepted that “tax administration” measures are categorically excluded from the ambit of Article III:2, this would create a potential for abuse and circumvention of the obligations contained in Article III:2 [12].

In US – Malt Beverages, a measure preventing imported products from being sold in a manner that would enable them to avoid taxation was considered to be a measure within the scope of Article III:2, first sentence, because it assigned a higher tax rate to the imported products [13].

‘Like products’:

Similar to the concept of ‘like products’ in Article I:1 of the GATT, the concept of ‘like products’ in Article III:2, first sentence, is not defined in the GATT. The GATT does not give any guidance as to the characteristics of products that must be taken into account in determining ‘likeness’ either. There are, however, a considerable number of GATT and WTO dispute settlement reports that shed light on the meaning of the concept of ‘like products’ in Article III:2, first sentence.

Under the Japanese tax system at issue in Japan – Alcoholic Beverages II, the internal tax imposed on domestic shochu was the same as that imposed on imported shochu; the higher tax imposed on imported vodka was also imposed on domestic vodka. Identical products (not considering brand differences) were thus taxed identically. However, the question was whether shochu and vodka should be considered to be ‘like products’. If shochu and vodka were found to be ‘like’, vodka could not be taxed in excess of shochu. The Appellate Body in Japan – Alcoholic Beverages II addressed the scope of the concept of ‘like products’ within the meaning of Article III:2, first sentence. The Appellate Body first stated that this concept should be interpreted narrowly because of the existence of the concept of ‘directly competitive or substitutable products’ used in the second sentence of Article III: 2. The Appellate Body ruled:

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 [14].

Subsequently, the Appellate Body expressly agreed with the basic approach for determining ‘likeness’ set out in the 1970 Report of the Working Party on Border Tax Adjustments [15]. This Working Party found:

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 [16].

This basic approach was followed in almost all adopted GATT panel reports after Border Tax Adjustments involving a GATT provision in which the concept of ‘like products’ was used [17]. According to the Appellate Body in Japan – Alcoholic Beverages II, this approach should be helpful in identifying on a case-by-case basis the range of ‘like products’ that fall within the limits of Article III:2, first sentence of the GATT. However, the Appellate Body added:

Yet this approach will be most helpful if decision makers keep ever in mind how narrow the range of “like products” in Article III:2, first sentence is meant to be as opposed to the range of “like” products contemplated in some other provisions of the GATT and other Multilateral Trade Agreements of the WTO Agreement. In applying the criteria cited in Border Tax Adjustments to the facts of any particular case, and in considering other criteria that may also be relevant in certain cases, panels can only apply their best judgement in determining

whether in fact products are “like”. This will always involve an unavoidable element of individual, discretionary judgment [18].

The criteria listed in the Border Tax Adjustments Report did not include the tariff classification of the products concerned. Yet tariff classification has been used as a criterion for determining ‘like products’ in several panel reports [19]. The Appellate Body acknowledged in Japan – Alcoholic Beverages II that uniform classification in tariff nomenclatures based on the Harmonized System can be of help in determining ‘likeness’ but cautioned against the use of tariff bindings since there are sometimes very broad bindings that do not necessarily indicate similarity of the products covered by those bindings. Rather, tariff bindings represent the results of trade concessions negotiated among WTO Members [20].

In US – Malt Beverages, the Panel held that national legislation giving special tax exemptions to products of small firms (whether domestic or foreign) would constitute discrimination against imports from a larger foreign firm and therefore infringe Article III because its products would be treated less favorably than the like products of a small domestic firm [21]. The fact that products were produced by small or large firms was irrelevant in the determination of ‘likenesses’.

Taxes ‘in excess of’:

Pursuant to Article III:2, first sentence, internal taxes on imported products should not be ‘in excess of’ the internal taxes applied to ‘like’ domestic products. In Japan – Alcoholic Beverages II, the Appellate Body established a strict benchmark for the ‘in excess of’ requirement. The Appellate Body ruled:

Even the smallest amount of “excess” is too much. The prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a ‘trade effects test’ nor is it qualified by a de minimis standard [22].

On the absence of a ‘trade effects test’, the Appellate Body stated in the same case, Japan – Alcoholic Beverages II:

... 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 [23]. [Emphasis added]

With respect to the absence of a de minimis standard, note that the Panel in US – Superfund had already ruled in 1987:

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, first sentence [24].

In Argentina – Hides and Leather, the Panel rejected Argentina’s argument that the tax burden differential between imported and domestic products would only exist for a thirty-day period and therefore was de minimis [25]. Furthermore, 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 [26].

In the same case, the Panel also emphasized that Article III:2, first sentence, requires a comparison of actual tax burdens rather than merely of nominal tax burdens. While it is the actual tax burden on the ‘like products’ which must be examined, it should be noted that the Panel in EEC – Animal Feed Proteins ruled that an internal regulation which merely exposed imported products to a risk of discrimination constituted, by itself, a form of discrimination and therefore less favourable treatment within the meaning of Article III [27].

A Member which applies higher taxes on imported products in some situations but ‘balances’ this by applying lower taxes on the imported products in other situations also acts inconsistently with the national treatment obligation of Article III:2, first sentence.

Consistency with Article III: 2, second sentence of the GATT:

The second sentence of Article III: 2 states:

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 above, the relevant leading principle set forth in Article III:1 is that internal taxes and other internal charges: should not be applied to imported or domestic products so as to afford protection to domestic production.

Furthermore, the Ad Article III Note provides with respect to Article III: 2:

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.

The relationship between the first and the second sentence of Article III: 2 were addressed by the Appellate Body in Canada – Periodicals, a dispute concerning, inter alia, the Canadian excise tax on magazines. The Appellate Body considered:

there are two questions which need to be answered to determine whether there is a violation of [the first sentence of] Article III:2 of the GATT: (a) whether imported and domestic products are like products; and (b) whether the imported products are taxed in excess of the domestic products. If the answers to both questions are affirmative, there is a violation of Article III: 2, first sentence. If the answer to one question is negative, there is a need to examine further whether the measure is consistent with Article III:2, second sentence [28].

As the Appellate Body stated in Japan – Alcoholic Beverages II and again, in Canada – Periodicals, Article III: 2, second sentence, contemplates a ‘broader category of products’ than Article III: 2, first sentence [29]. Furthermore, Article III: 2, second sentence sets out a different test of inconsistency.

In Japan – Alcoholic Beverages II, the Appellate Body stated:

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 and 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 [30].

In brief, the test of consistency of internal taxation with Article III: 2, second sentence thus requires an examination of:

- Whether the imported and domestic products are directly competitive or substitutable;
- Whether these products are not similarly taxed; and
- Whether the dissimilar taxation is applied so as to afford protection to domestic production.

However, before this test of consistency of internal taxation can be applied, it must be established that the measure at issue is an ‘internal tax or other internal charge’ within the meaning of Article III: 2, second sentence.

‘Internal taxes ...’:

As is the case with Article III:2, first sentence, Article III:2, second sentence is also concerned with ‘internal taxes or other internal charges’. For a discussion on the meaning and the scope of these concepts, recall the discussion above in the section dealing with Article III: 2, first sentence. With regard to this constituent element there is no differences between the first and second sentence of Article III: 2.

‘Directly competitive or substitutable products’:

The national treatment obligation of Article III: 2, second sentence applies to ‘directly competitive or substitutable products’. In Canada – Periodicals, the Appellate Body ruled that to be ‘directly competitive or substitutable’ within the meaning of Article III:2, second sentence, products do not – contrary to what Canada had argued – have to be perfectly substitutable. The Appellate Body noted:

A case of perfect substitutability would fall within Article III:2, first sentence, while we are examining the broader prohibition of the second sentence [31].

With regard to 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 in Korea – Alcoholic Beverages:

“Like” products is 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 [32].

As to the meaning of the concept of ‘directly competitive or substitutable products’, the Appellate Body stated in Korea – Alcoholic Beverages:

The term “directly competitive or substitutable” describes a particular type of relationship between two products, one imported and the other domestic. It is evident from the wording of the term that the essence of that relationship is that the products are in competition. This much is clear both from the word “competitive” which means “characterized by competition”, and from the word “substitutable” which means “able to be substituted”.

The context of the competitive relationship is necessarily the marketplace since this is the forum where consumers choose between different products. Competition in the market place is a dynamic, evolving process. Accordingly, the wording of the term “directly competitive or substitutable” implies that the competitive relationship between products is not to be analyzed exclusively by reference to current consumer preferences. In our view, the word “substitutable” indicates that the requisite relationship may exist between products that are not, at a given moment, considered by consumers to be substitutes but which are, nonetheless, capable of being substituted for one another [33].

The Appellate Body also noted:

... according to the ordinary meaning of the term, products are competitive or substitutable when they are interchangeable or if they offer, as the Panel noted, “alternative ways of satisfying a particular need or taste”. Particularly in a market where there are regulatory barriers to trade or to competition, there may well be latent demand. The words “competitive or substitutable” are qualified in the Ad Article by the term “directly”. In the context of Article III: 2, second sentence, the word “directly” suggests a degree of proximity in the competitive relationship between the domestic and the imported products. The word “direct” does not, however, prevent a panel from considering both latent and extant demand [34].

In brief, the Appellate Body considers products to be ‘directly competitive or substitutable’ when they are interchangeable, in that they offer alternative ways of satisfying a particular need or taste. The Appellate Body also considers 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’. With respect to the factors to be taken into account in establishing whether products are ‘directly competitive or substitutable’, the Appellate Body, in Japan – Alcoholic Beverages II, agreed with the Panel in that case that these factors 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 [35].

The Appellate Body held:

The GATT is a commercial agreement, and the WTO is concerned, after all, with markets. It does not seem inappropriate to look at competition in the relevant markets as one among a number of means of identifying the broader category of products that might be described as “directly competitive or substitutable”.

Nor does it seem inappropriate to examine elasticity of substitution as one means of examining those relevant markets. The Panel did not say that cross-price elasticity of demand is “the decisive criterion” for determining whether products are “directly competitive or substitutable” [35].

The Appellate Body thus considered an examination of the competitive conditions in the market, and, in particular, the cross-price elasticity of demand in that market as a means of establishing whether products are ‘directly competitive or substitutable’.

‘Not similarly taxed’:

The next element or requirement of the test under Article III:2, second sentence is whether the products at issue are ‘not similarly taxed’. While under Article III:2, first sentence, even the slightest tax differential leads to the conclusion that the internal tax imposed on imported products is inconsistent with the national treatment obligation, under Article III:2, second sentence, the tax differential has to be more than de minimis to support a conclusion that the internal tax imposed on imported products is WTO- inconsistent. In Japan – Alcoholic Beverages II, the Appellate Body explained:

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, 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 [36].

The ‘not similarly taxed’ requirement is met even if only some imported products are not taxed similarly to domestic products, while other imported products are taxed similarly. The Appellate Body stated in Canada – Periodicals that: dissimilar taxation of even some imported products as compared to directly competitive or substitutable domestic products is inconsistent with the provisions of the second sentence of Article III:2 [37].

Consistency with the National Treatment Obligation of Article III:4 of the GATT:

The national treatment obligation of Article III of the GATT does not only concern internal taxation dealt with in Article III:2. Article III also concerns internal regulation, dealt with primarily in Article III:4. Article III:4 states in relevant part:

The products of the territory of any [Member] imported into the territory of any other [Member] shall be accorded treatment no less favorable 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.

This provision sets out a three-tier test for the consistency of internal regulation. In *Korea – Various Measures on Beef*, the Appellate Body stated:

For a violation of Article III:4 to be established, three elements must be satisfied: that the imported and domestic products at issue are “like products”; that the measure at issue is a “law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use”; and that the imported products are accorded “less favorable” treatment than that accorded to like domestic products [38].

In other words, the three-tier test of consistency of internal regulation with Article III:4 thus requires the examination of whether:

- The measure at issue is a law, regulation or requirement covered by Article III:4;
- The imported and domestic products are like products; and,
- The imported products are accorded less favorable treatment.

In *EC – Bananas III*, the Appellate Body, in its examination of the constituent elements of Article III: 4, ruled with regard to the phrase ‘so as afford protection to domestic production’ of Article III:1, as follows:

Article III: 4 does not specifically refer to Article III:1. Therefore, a determination of whether there has been a violation of Article III:4 does not require a separate consideration of whether a measure “afford[s] protection to domestic production” [39].

As the Appellate Body found in *EC – Asbestos*, Article III: 1, nevertheless, has ‘particular contextual significance in interpreting Article III:4, as it sets forth the “general principle” pursued by that provision’ [40].

‘Laws, regulations and requirements ...’:

Article III: 4 concerns ‘all laws, regulations and requirements affecting [the] internal sale, offering for sale, purchase, transportation, distribution or use [of products]’. Broadly speaking, the national treatment obligation of Article III:4 applies to regulations affecting the sale and use of products.

According to GATT case law, Article III:4 applies, inter alia, to:

- Minimum price requirements applicable to domestic and imported beer; [41].
- Limitations on points of sale for imported alcoholic beverages; [42].
- The practice of limiting listing of imported beer to the six-pack size; [43].
- The requirement that imported beer and wine be sold only through in-State wholesalers or other middlemen; [44].
- A ban on all cigarette advertising; [45].
- Additional marking requirements such as an obligation to add the name of the producer or the place of origin or the formula of the product; [46].
- practices concerning internal transportation of beer; [47]. and,
- Trade-related investment measures [48].

While, to date, most cases involving Article III:4 concerned generally applicable ‘laws’ and ‘regulations’, Article III:4 also covers ‘requirements’ which may apply to isolated cases only. Article III:4 covers both measures that apply across the board and measures that apply in isolated cases only.

The question has arisen whether a ‘requirement’ within the meaning of Article III:4 necessarily needs to be a government imposed requirement, or whether an action by a private party can constitute a ‘requirement’ to which Article III:4 applies. In *Canada – Autos*, the Panel examined commitments by Canadian car manufacturers to increase the value added to cars in their Canadian plants. These commitments were communicated in letters addressed to the Canadian Government. The Panel qualified these commitments as ‘requirements’ subject to Article III: 4 [49].

In brief, private action can be a ‘requirement’ within the meaning of Article III:4 if, and only if, there is such a nexus, i.e., a close link between that action and the action of a government, that the government must be held responsible for that private action.

‘Like products’:

As with Articles I:1 and III:2, first sentence, both discussed above, the non-discrimination obligation of Article III:4 only applies to ‘like products’. The Appellate Body considered the meaning of the concept of ‘like products’ in *EC – Asbestos*. In its Report in that case, the Appellate Body first

noted that the concept of 'like products' was also used in Article III:2, first sentence, and that in previous Reports, it had held that the scope of 'like products' was to be construed 'narrowly' in that provision [50].

The Appellate Body then examined whether this interpretation of 'like products' in Article III:2 could be taken to suggest a similarly narrow reading of 'like products' in Article III:4, since both provisions form part of the same Article. The Appellate Body reasoned as follows:

we observe that, although the obligations in Articles III:2 and III:4 both apply to "like products", the text of Article III:2 differs in one important respect from the text of Article III:4. Article III: 2 contain two separate sentences, each imposing distinct obligations: the first lays down obligations in respect of "like products", while the second lays down obligations in respect of "directly competitive or substitutable" products. By contrast, Article III:4 applies only to "like products" and does not include a provision equivalent to the second sentence of Article III:2 [51].

The Appellate Body considered that this textual difference between Article III: 2 and Article III:4 had considerable implications for the meaning of the concept of 'like products' in these two provisions. The Appellate Body recalled:

In Japan – Alcoholic Beverages, we concluded, in construing Article III:2, that the two separate obligations in the two sentences of Article III:2 must be interpreted in a harmonious manner that gives meaning to both sentences in that provision. We observed there that the interpretation of one of the sentences necessarily affects the interpretation of the other. Thus, the scope of the term "like products" in the first sentence of Article III:2 affects, and is affected by, the scope of the phrase "directly competitive or substitutable" products in the second sentence of that provision. We said in Japan – Alcoholic Beverages:

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 [52].

4.3. 'Treatment no less favorable'

The fact that a measure distinguishes between 'like products' does not suffice to conclude that this measure is inconsistent with Article III:4. As the Appellate Body noted in EC – Asbestos:

There is a second element that must be established before a measure can be held to be inconsistent with Article III:4. [...] A complaining Member must still establish that the measure accords to the group of "like" imported products "less favorable treatment" than it accords to the group of "like" domestic products.

The Panel in US – Section 337 explained the 'treatment no less favorable' element of the Article III:4 test in clear terms, noting that:

the "no less favorable" treatment requirement set out in Article III:4, is unqualified. These words are to be found throughout the General Agreement and later Agreements negotiated in the GATT framework as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given either to other foreign products, under the most favored nation standard, or to domestic products, under the national treatment standard of Article III. The words "treatment no less favorable" in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis". [Emphasis added] [53].

Methodology:

The Panel in US – Section 337 thus clearly interpreted 'treatment no less favorable' as requiring 'effective equality of competitive opportunities'. In later GATT and WTO reports, panels and the Appellate Body have consistently interpreted 'treatment no less favorable' in the same way. [54].

In US – Gasoline, a dispute concerning legislation designed to prevent and control air pollution, the Panel found that the measure at issue afforded less favorable treatment to imported gasoline than to domestic gasoline because, for domestic refiners of gasoline, an individual baseline (representing the quality of gasoline produced by that refiner in 1990) was established while, for importers of gasoline, the more onerous statutory baseline applied. The Panel observed *inter alia*:

This resulted in less favorable treatment to the imported product, as illustrated by the case of a batch of imported gasoline which was chemically-identical to a batch of domestic gasoline that met its refiner's individual baseline, but not the statutory baseline levels. In this case, sale of the imported batch of gasoline on the first day of an annual period would require the importer over the rest of the period to sell on the whole cleaner gasoline in order to remain in conformity with the Gasoline Rule. On the other hand, sale of the chemically-identical batch of domestic gasoline on the first day of an annual period would not require a domestic refiner to sell on the whole cleaner gasoline over the period in order to remain in conformity with the Gasoline Rule [55].

Recalling the ruling of the Panel in US – Section 337 that the words ‘treatment no less favorable’ in paragraph 4 call for effective equality of opportunities for imported products, the Panel in US – Gasoline thus concluded:

Results:

since, under the baseline establishment methods, imported gasoline was effectively prevented from benefiting from as favorable sales conditions as were afforded domestic gasoline by an individual baseline tied to the producer of a product, imported gasoline was treated less favorably than domestic gasoline [56].

Although in EC – Asbestos the Appellate Body was not called upon to examine the ‘no less favorable treatment’ finding of the Panel, the Appellate Body noted:

The term “less favorable treatment” expresses the general principle, in Article III:1, that internal regulations “should not be applied ... so as to afford protection to domestic production”. If there is “less favorable treatment” of the group of “like” imported products, there is, conversely, “protection” of the group of “like” domestic products [57]. In Korea – Various Measures on Beef, a dispute concerning 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 stressed that the formal difference in treatment between domestic and imported products is neither necessary nor sufficient for a violation of Article III:4. Formally different treatment of imported products did not necessarily constitute less favorable treatment while the absence of formal difference in treatment did not necessarily mean that there was no less favorable treatment [58]. The Appellate Body in Korea – Various Measures on Beef stated:

We observe ... that Article III:4 requires only that a measure accord treatment to imported products that is “no less favorable” 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 favorable”. According “treatment no less favorable” means, as we have previously said, according conditions of competition no less favorable to the imported product than to the like domestic product.

This interpretation, which focuses on the conditions of competition between imported and domestic like products, implies that a measure according formally different treatment to imported products does not per se, that is, necessarily, violate Article III:4 [59].

On the one hand, contracting parties may apply to imported products different formal legal requirements if doing so would accord imported products more favorable treatment. On the other hand, it also has to be recognized that there may be cases where the application of formally identical legal provisions would in practice accord less favorable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in fact no less favorable.

For these reasons, the mere fact that imported products are subject under Section 337 to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4 [60]. [Emphasis added] From this, the Appellate Body concluded in Korea – Various Measures on Beef:

A formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not imported products are treated “less favorably” 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 [61].

In US – Gasoline, the Panel rejected the US argument that the requirements of Article III: 4 were met because imported gasoline was treated similarly to domestic gasoline from similarly situated domestic parties [61]. The Panel pointed out, inter alia, that ‘[the] wording [of Article III:4] does not allow less favorable treatment dependent on the characteristics of the producer ...’ [62].

In US – Gasoline, the Panel also rejected the US contention that the regulation at issue treated imported products ‘equally overall’ and was therefore not inconsistent with Article III: 4 [62]. The Panel noted that:

... the argument that on average the treatment provided was equivalent amounted to arguing that less favorable treatment in one instance could be offset provided that there was correspondingly more favorable treatment in another. This amounted to claiming that less favorable treatment of particular imported products in some instances would be balanced by more favorable treatment of particular products in others [63].

Under Article III:4, as under Articles I:1 and III:2, ‘balancing’ less favorable treatment by more favorable treatment does not ‘excuse’ the less favorable treatment [64].

GATT and WTO panels and the Appellate Body have found a wide variety of measures inconsistent with the national treatment obligation of Article III:4. In addition to the measures at issue in US – Section 337, Korea – Various Measures on Beef and US – Gasoline, all discussed above, measures found to be inconsistent include:

- Minimum price requirements (Canada – Provincial Liquor Boards (US));
- a general ban on all cigarette advertisement (Thailand – Cigarettes); and,
- Regulations concerning internal transportation (US – Malt Beverages).

With respect to minimum price requirements, it deserves to be noted that the Panel in Canada – Provincial Liquor Boards (US) ruled in 1992:

Minimum prices applied equally to imported and domestic beer did not necessarily accord equal conditions of competition to imported and domestic beer. Whenever they prevented imported beer from being supplied at a price lower than that of domestic beer, they accorded in fact treatment to imported beer less favorable than that accorded to domestic beer: when they were set at the level at which domestic brewers supplied beer – as was presently the case in New Brunswick and Newfoundland – they did not change the competitive opportunities accorded to domestic beer but did affect the competitive opportunities of imported beer which could otherwise be supplied below the minimum price [65].

With respect to a general ban on all cigarette advertising, the Panel in Thailand – Cigarettes argued:

It might be argued that such a general ban on all cigarette advertising would create unequal competitive opportunities between the existing Thai supplier of cigarettes and new, foreign suppliers and was therefore contrary to Article III: 4 [66].

The Panel in US – Malt Beverages found:

the requirement for imported beer and wine to be transported by common carrier, whereas domestic in-state beer and wine is not so required, may result in additional charges to transport these imported products and therefore prevent imported products from competing on an equal footing with domestic like products [72].

Discussion and Conclusion:

International agreements on tariffs are meaningless, unless supported by some form of discipline on the use of internal measures. In all major trade agreements, this discipline is provided by National Treatment provisions. The essential mechanism of National Treatment is to make internal instruments blunter tools for protectionism. The purpose of this paper has been to highlight some fundamental aspects of the national treatment obligation in the GATT, as it applies to internal taxation. The starting point of the formal analysis was the case law interpretation of Art.III as requiring a strict application of National Treatment, which effectively rules out any differential taxation to the disadvantage of imported products.

The main observations are the following:

- Despite the rigidity of strict national treatment, it will improve government welfare even in cases where a first-best contract would call for discriminating against imported products, as long as trade negotiators take account of how the tariff agreement affects subsequent tax setting.
- Strict national treatment will not completely eradicate the problem caused by incomplete contracting even under ideal circumstances. In particular, total taxation of both domestic and imported products will be too high under strict national treatment.
- There is an inherent deficiency with strict national treatment as a solution to the incomplete contracting problem in that it shifts the burden of regulating imported products back to trade negotiators who, in practice, are unlikely to have sufficient foresight to fully internalize the implications of a tariff agreement for tax setting.
- The general exceptions clause in Art. XX softens the ambit of strict national treatment, but it is not clear to what degree, since the case law is not well developed on this issue.

REFERENCES

- [1] GATT Panel Report, Italian Agricultural Machinery, 1999, pp: 11.
- [2] GATT Panel Report, US – Section 337, 2001, pp: 5.10.
- [3] Appellate Body Report, Japan – Alcoholic Beverages II, 2008, pp: 109. In a footnote, the Appellate Body refers to GATT Panel Report, US – Section 337, 2001, pp: 5.10 (for the first quote); GATT Panel Report, US – Superfund, 2003, pp: 5.1.9; Panel Report, Japan – Alcoholic Beverages II, 2008, para. 5.5(b); and GATT Panel Report, Italy – Agricultural Machinery, 2008, para. 11 (for the second quote). See also Appellate Body Report, Korea – Alcoholic Beverages, 2007, para. 119; Appellate Body Report, Chile – Alcoholic Beverages, 2008, para. 67; and Appellate Body Report, EC – Asbestos, 2002, para. 97 as well as Panel Report, Indonesia – Autos, 2003, para. 14.108.
- [4] Appellate Body Report, Korea – Alcoholic Beverages, 2007, pp: 120. In Canada – Periodicals, the Appellate Body stated: ‘The fundamental purpose of Article III of the GATT is to ensure equality of competitive conditions between imported and like domestic products’. See Appellate Body Report, Canada – Periodicals, 2001, 8. See also Panel Report, Argentina – Hides and Leather, 2004, para. 11.182.
- [5] Appellate Body Report, Japan – Alcoholic Beverages II, 2008, pp: 110.
- [6] Panel Report, EC – Asbestos, 2002, pp: 8.89 and 8.91.
- [7] Appellate Body Report, Japan – Alcoholic Beverages II, 2008, pp: 111.
- [8] Appellate Body Report, Canada – Periodicals, 2001, pp: 468.
- [9] Appellate Body Report, Japan – Alcoholic Beverages II, 2008, pp: 111-112.
- [10] GATT Analytical Index, 2009, pp: 141.

- [11] GATT Panel Report, US – Tobacco, 2006, pp: 80.
- [12] Panel Report, Argentina – Hides and Leather, 2004, pp: 11.144.
- [13] GATT Panel Report, US – Malt Beverages, 2010, pp: 5.21 and 5.22.
- [14] Appellate Body Report, Japan – Alcoholic Beverages II, 2008, pp: 112-113.
- [15] The Working Party considered the concept of 'like' or 'similar' products as used throughout the GATT.
- [16] Report of the Working Party on Border Tax Adjustments, BISD 18S/97, 2003, pp18.
- [17] GATT Panel Report, Australia – Ammonium Sulphate; GATT Panel Report, EEC – Animal Proteins; GATT Panel Report, Spain – Unroasted Coffee; GATT Panel Report, Japan – Alcoholic Beverages I; and GATT Panel Report, US – Superfund.
- [18] Appellate Body Report, Japan – Alcoholic Beverages II, 2008, 113. The Appellate Body disagreed with the Panel's observation in paragraph 6.22 of the Panel Report that distinguishing between 'like products' and 'directly competitive or substitutable products' under Article III:2 is 'an arbitrary decision'. According to the Appellate Body, it is 'a discretionary decision that must be made in considering the various characteristics of products in individual cases.' (Appellate Body Report, Japan – Alcoholic Beverages II, 2008, 114).
- [19] Note that the tariff classification of the products concerned by other countries was a factor considered by the
- [20] GATT Panel in Spain – Unroasted Coffee. Also the Panel in US - Gasoline referred to the tariff classification in its determination of 'likeness'.
- [21] Appellate Body Report, Japan – Alcoholic Beverages II, 2008, pp: 114-5.
- [22] GATT Panel Report, US – Malt Beverages, 2010, pp: 5.19.
- [23] Appellate Body Report, Japan – Alcoholic Beverages II, 2008, pp: 110.
- [24] GATT Panel Report, US – Superfund, 2003, pp: 5.1.1.
- [25] Panel Report, Argentina – Hides and Leather, 2004, pp: 11.245.
- [26] para. 11.220. See also Panel Report, US – Gasoline, 2001, para. 6.11. As the Panel in Argentina – Hides and Leather noted in a footnote, the disciplines of Article III:2, first sentence, are of course subject to whatever exceptions a Member may justifiably invoke.
- [27] GATT Panel Report, EEC – Animal Feed Proteins, 2008, pp: 141. See also GATT Panel Report, US - Tobacco, 2007, pp: 95-97.
- [28] Appellate Body Report. Canada – Periodicals, 2001, pp: 486.
- [29] Appellate Body Report. Canada – Periodicals, 2001, pp: 470.
- [30] Appellate Body Report, Japan – Alcoholic Beverages II, 2008, pp: 116. This part has been later cited and endorsed by the Appellate Body, in Appellate Body Report, Canada – Periodicals, 2001, 470, and in Appellate Body Report, Chile – Alcoholic Beverages, 2008, para. 47.
- [31] Appellate Body Report, Canada – Periodicals, 2001, pp: 473.
- [32] Appellate Body Report, Korea – Alcoholic Beverages, 2007, pp: 118. In a footnote, the Appellate Body referred to the
- [33] Appellate Body Report, Japan - Alcoholic Beverages II and Appellate Body Report, Canada - Periodicals.
- [34] Appellate Body Report, Korea – Alcoholic Beverages, 2007, pp: 114.
- [35] Appellate Body Report, Korea – Alcoholic Beverages, 2007, pp: 115-116.
- [36] Appellate Body Report, Japan – Alcoholic Beverages II, 2008, pp: 117.
- [37] Appellate Body Report, Japan – Alcoholic Beverages II, 2008, 118. See on the 'de minimis' standard also Appellate Body Report, Canada – Periodicals, 2001, 474; Appellate Body Report, Chile –Alcoholic Beverages, 2009, para. 49; and Panel Report, Indonesia – Autos, 2003, pp: 14.115.
- [38] Appellate Body Report, Canada –Periodicals, pp: 474.
- [39] Appellate Body Report, Korea – Various Measures on Beef, 2006, pp: 133.
- [40] Appellate Body Report, EC – Bananas III, 2000, pp: 216. We note, however, that in Canada – Periodicals, the Panel did examine whether a measure at issue 'afford[ed] protection to domestic production' to determine the consistency of that measure with Article III:4. (para. 5.38).
- [41] Appellate Body Report, EC – Asbestos, 2002, pp: 93.
- [42] GATT Panel Report, Canada – Provincial Liquor Boards (US), 2011, pp: 5.30.
- [43] GATT Panel Report, Canada – Provincial Liquor Boards (EEC), 2011, pp: 4.26.
- [44] GATT Panel Report, Canada – Provincial Liquor Boards (US), 2011, pp: 5.4.
- [45] GATT Panel Report, US – Malt Beverages, 2010, pp: 5.32.
- [46] GATT Panel Report, Thailand – Cigarettes, 2003, pp: 77.
- [47] Working Party Report, Certificates of Origin, Marks of Origin, Consular Formalities, 2005, pp: 13.
- [48] GATT Panel Report, Canada – Provincial Liquor Boards (US), 2011, para. 5.12; and GATT Panel Report, US – Malt Beverages, 2010, pp: 5.50.
- [49] GATT Panel Report, Canada – FIRA, 2009, pp: 5.12 and 6.1.

- [50] The question of whether actions of private parties can qualify as 'requirements' within the meaning of Article III:4 was previously addressed in GATT Panel Report, Canada – FIRA, 2009, para. 5.4 and Panel Report. GATT EEC – Parts and Components, para. 5.21. The Panel in Canada – Autos explicitly refers to this case law and takes it further. Note that in Canada – FIRA, Canada argued that the purchase undertakings should be considered as private contractual obligations of particular foreign investors vis-à-vis the Canadian government. The Panel felt, however, that even if this was so, private contractual obligations entered into by investors should not adversely affect the rights which Members possess under Article III:4 of the GATT. See GATT Panel Report, Canada – FIRA, 2009, pp: 5.6.
- [51] The Appellate Body referred in a footnote to Appellate Body Report, Japan – Alcoholic Beverages II, 2008, 112 and 113 and Appellate Body Report, Canada – Periodicals, 2001, pp: 473.
- [52] Appellate Body Report, EC – Asbestos, 2002, pp: 94.
- [53] Appellate Body Report, EC – Asbestos, 2002, pp: 95
- [54] GATT Panel Report, US – Section 337, 2001, pp: 5.11.
- [55] GATT Panel Report, Canada – Provincial Liquor Boards (US), 2011, paras. 5.12-5.14 and 5.30-5.31; GATT Panel Report US – Malt Beverages, 2010, para. 5.30; Panel Report, US – Gasoline, 2001, para. 6.10; Panel Report, Canada – Periodicals, 2001, p. 75; Panel Reports, EC – Bananas III, 2000, paras. 7.179-7.180; and Panel Report, Japan – Film, 2005, pp: 10.379.
- [56] Panel Report, US – Gasoline, 2001, pp: 6.10. Ibid., para. 6.10.
- [57] Appellate Body Report, EC – Asbestos, 2002, pp: 100. The Appellate Body did not examine the requirement of 'treatment no less favourable' any further since the Panel's findings on this requirement had not been appealed.
- [58] GATT Panel Report, US – Section 337, 2001, para. 5.11; and Panel Report, US – Gasoline, 2001, pp: 6.25.
- [59] Appellate Body Report, Korea – Various Measures on Beef, 2006, pp: 135-136.
- [60] GATT Panel Report, US – Section 337, 2001, pp: 5.11.
- [61] Appellate Body Report, Korea – Various Measures on Beef, 2006, pp: 137.
- [62] Panel Report, US – Gasoline, 2001, pp: 6.11. The Appellate Body did not address this finding of the Panel.
- [63] Panel Report, US – Gasoline, 2001, pp: 6.14.
- [64] GATT Panel Report, US – Section 337, 2001, pp: 5.14.
- [65] GATT Panel Report, Canada – Provincial Liquor Boards (US), 2011, pp: 5.30.
- [66] GATT Panel Report, Thailand – Cigarettes, 2003, pp: 78. note that such general ban on cigarette advertising was not the measure at issue in this case but a suggested alternative measure of which the Panel considered the GATT consistency. The Panel further stated: 'Even if this argument were accepted, such an inconsistency 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.'
- [67] GATT Panel Report, US – Malt Beverages, 2010, pp: 5.50.