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under Article III:4 of the GATT: A Critical Analysis of
the Jurisprudence of the WTO Appellate Body

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Abstract

Article III:4 of the GATT requires the Members of the WTO to accord imported products treatment no less favourable than that accorded to like domestic products. Article 2.1 of the TBT Agreement imposes the same obligation in respect of technical regulations. In a series of cases, the Appellate Body has ruled in essence that imported and domestic products are 'like products' within the meaning of Article III:4 of the GATT if they directly compete in the market and that the imported product is accorded 'less favourable treatment' within the meaning of that provision if it is accorded less favourable competitive opportunities.

Regulations that distinguish between different types of products and accord one of them less favourable treatment are typically adopted precisely because the market does not make the distinction that the regulator considers necessary. Many, if not most, regulations are thus likely to be inconsistent with Article III:4 according to the Appellate Body's jurisprudence. The ten policy goals listed in Article XX of the GATT do not comprise all legitimate policy goals that Members pursue through measures covered by Article III. There is consequently a range of perfectly legitimate internal regulations that are not applied so as to afford protection but are nevertheless not justifiable under Article XX. This includes all regulations that distinguish between competing products for the purpose of harmonising standards, improving the efficiency of production, reducing transaction costs for consumers or preventing deceptive practices. They distinguish between groups of competing products, treat one group less favourably than the other and serve a purpose not listed in Article XX. The Appellate Body's market-oriented approach renders all of them inconsistent with Article III:4 and gives Article XX a function that it cannot fulfil.

Keywords

Article III of the GATT, national treatment, like products, aims-and-effects test, no less favourable treatment, Article 2.1 of the TBT Agreement, Article XX of the GATT.

Introduction*

Professor Matsushita is an expert in both domestic and international economic law and has written impressive papers touching upon the potential conflicts between the two. As a member of the WTO Appellate Body he was involved in a number of appeals that touched upon the right of the Members of the WTO to impose internal measures affecting the sale of domestic and imported products. After Professor Matsushita's departure from the Appellate Body in March 2000, the Appellate Body issued a number of rulings defining the scope of the regulatory autonomy of Members under the national-treatment provisions of the General Agreement on Tariffs and Trade 1994 (GATT) and the Agreement on Technical Barriers to Trade (TBT Agreement). Given Professor Matsushita's interest in the relationship between international trade law and domestic regulations I would like to contribute to this Liber Amicorum a brief analysis of these rulings.

Article III:4 of GATT requires the Members of the WTO to accord imported products treatment no less favourable than that accorded to like domestic products. Article 2.1 of the TBT Agreement imposes the same obligation in respect of technical regulations. In a series of cases, the Appellate Body has ruled in essence that imported and domestic products are 'like products' within the meaning of Article III:4 of the GATT if they directly compete in the market and that the imported product is accorded 'less favourable treatment' within the meaning of that provision if it is accorded less favourable competitive opportunities.¹

In *EC – Asbestos* the Appellate Body explained:

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.²

Regulations that distinguish between different types of products and accord one of them less favourable treatment are typically adopted precisely because the market does not make the distinction that the regulator considers necessary. For instance, if a government prohibits the use of garbage bags that cannot be easily incinerated, it presumably does so because the public purchasing such bags does not take into account how difficult it is to dispose of them. In practice, many, if not most, regulations are consequently applied to competing products and prohibit the placing on the market of one of them. Many, if not most, regulations are thus likely to be inconsistent with Article III:4 according to the Appellate Body's jurisprudence.

This is a surprising result because, according to Article III:1, the scope of application of the whole of Article III is confined to regulations applied 'so as to afford protection'. In the view of the Appellate Body, Article III:4 itself is an expression of the principle set forth in Article III:1. It argues that, 'if there is "less favourable treatment" of the group of "like" imported products, there is,

* *Frieder Roessler*, Formerly Director of the Legal Affairs Division of the GATT (1989-1994), Visiting Professor at the Georgetown University Law Center (1995 -1998) and Executive Director of the Advisory Centre on WTO Law (2001-2013). This paper was prepared for a Liber Amicorum for Prof. Mitsuo Matsushita edited by Julien Chaisse and Tsai-Yu Lin.

¹ For a detailed review of this case law see Frieder Roessler, 'Beyond the Ostensible — A Tribute to Professor Robert Hudec's Insights on the Determination of the Likeness of Products Under the National Treatment Provisions of the General Agreement on Tariffs and Trade' (2003) 37(4) *J World Trade* 771.

² Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products* (EC – Asbestos), WT/DS135/AB/R, 12 March 2001, para 99.

conversely, “protection” of the group of “like” domestic products.³ However, Article III:1 does not refer to measures whose application protects domestic production. It refers to measure applied ‘so as to’ protect domestic production. ‘So as to’ means ‘with the aim and effect’. The objective of Article III:1 is therefore achieved only with an interpretation of Article III:4 that takes into account not only the effect of the regulatory distinction but also its aim. Put differently, Article III is not intended to apply to all regulations that have a, possibly incidental, protective effect; it applies only to regulations that are aimed to produce such effects.

The GATT Panel in *US – Malt Beverages* explained the pitfalls of likeness determinations that fail to take into account the aim of the regulatory distinction as follows:

The purpose of Article III is not to prevent contracting parties from differentiating between different product categories for policy purposes unrelated to the protection of domestic production. . . . Once products are designated as like products, a regulatory differentiation, e.g. for standardization or environmental purposes, becomes inconsistent with Article III even if the regulation is not ‘applied . . . so as to afford protection to domestic production’. In the view of the panel, it is therefore imperative that the like product determination in the context of Article III be made in such a way that it does not unnecessarily infringe upon the regulatory authority and domestic policy options of contracting parties. . . . Consequently, in determining whether two products subject to different treatment are like products, it is necessary to consider whether such product differentiation is being made ‘so as to afford protection’.⁴

Some regulations making product distinctions for legitimate purposes might be justifiable under one of the public policy exceptions set out in Article XX of the GATT. However, the ten policy goals listed in Article XX do not comprise the immense realm of legitimate policy goals pursued through internal regulations. The policy goals listed in Article XX are largely identical to the policy goals listed in the general exceptions clause of the 1929 League of Nations Convention on the Abolition of Import and Export Prohibitions Restrictions.⁵ Article XX was thus drafted with policy objectives in mind that can only be realised by discriminating between products as to their origin or destination, in particular policy goals that can only be achieved through import or export restrictions. Thus, the protection of human health can require import restriction on products carrying diseases. That policy goal is included in both the League of Nations convention and Article XX. Conversely, the harmonisation of technical standards does not require measures discriminating between products as to their origin or destination. That policy goal is included in neither the League of Nations convention nor Article XX. In any case, given the brief, exhaustive list of policy purposes included in Article XX it is obvious that the drafters had never intended this provision to be the sole legal basis for justifying internal regulations that distinguish between groups of products competing in the domestic market solely on the basis of their physical characteristics and accord one of them less favourable treatment.

Contrary to a common misconception, Article XX is thus not a list of important societal values of the Members of the WTO, and the ten policy goals listed in this provision do not comprise all legitimate policy goals that Members pursue through measures covered by Article III. The drafters of the GATT therefore obviously assumed that the legitimacy of a distinction between products with different physical characteristics would be taken into account under Article III, and that a need to invoke Article XX would arise only in respect of internal regulations that distinguished between products as to their origin or destination. The drafters of the TBT Agreement similarly assumed that technical regulations that distinguish products with different characteristics for legitimate policy

³ *ibid* para 100.

⁴ Report of the Panel, *United States — Measures Affecting Alcoholic and Malt Beverages* (US – Malt Beverages), GATT B.I.S.D. (39th Supp), 19 June 1992, 293-94. I explained the rationale for this ruling further in Frieder Roessler, ‘Diverging Domestic Policies and Multilateral Trade Integration’ in Jagdish N. Bhagwati and Robert E. Hudec (eds), *Fair Trade and Harmonization: Prerequisites for Free Trade? Volume 2: Legal Analysis* (MIT Press 1996) 21-56.

⁵ Article 4 1929 League of Nations Convention on the Abolition of Import and Export Prohibitions Restrictions

reasons would not be found to violate that Agreement's national-treatment requirement because they did not include any public policy exception similar to Article XX in that Agreement.

There is thus a range of perfectly legitimate internal regulations that are not applied 'so as to afford protection' but are nevertheless not justifiable under Article XX. This includes all regulations that distinguish between competing products for the purpose of harmonising standards, improving the efficiency of production, reducing transaction costs for consumers or preventing deceptive practices.⁶ The Appellate Body's market-oriented approach renders all of them inconsistent with Article III:4, makes Article III:1 inoperative in the context of Article III:4 and gives Article XX a function that it cannot fulfil. If transposed to Article 2.1 of the TBT Agreement, the consequences are even more far-reaching because of the lack of a public policy exception.

In *Japan – Alcoholic Beverages*, the United States appealed the finding of the panel that likeness can be determined purely on the basis of physical characteristics, consumer uses and tariff classification without considering whether the regulatory distinctions are made so as to afford protection to domestic production. The United States suggested that the Appellate Body follow instead the 'aims-and-effects' approach adopted by the GATT panel in *US – Malt Beverages*.⁷ The Appellate Body reacted with complete silence. There is in its legal analysis not a word evaluating the United States' argument.

In *EC – Bananas* the Appellate Body sharply rejected an initiative of the panel to inquire into the purpose of the measure at issue before finding it inconsistent with Article III:4. It ruled that '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"'.⁸ It is true that Article III:2 distinguishes between internal charges on 'like' and directly competitive products and refers to Article III:1 only in respect of the latter while Article III:4 makes no distinction between 'like' and directly competitive products and contains no explicit reference to Article III:1. However, the lack of reference to Article III:1 in Article III:4 cannot be decisive because Article III:1 unambiguously defines the object and purpose of the whole of Article III and therefore also implicitly addresses the issue of likeness under Article III:4.

In *EC – Asbestos* there was another attempt to make the Appellate Body change its approach to likeness determinations, this time by the EU. The EU explained:

If non-commercial considerations may only be considered at the Article XX stage of the analysis, then the list of policy purposes for which regulators may distinguish between products is unduly limited to the categories listed in Article XX.⁹

Again, there was absolutely no evaluation of the EU's arguments reflected in the Appellate Body's report. One member of the Division wrote in a separate opinion: 'The necessity or appropriateness of adopting a "fundamentally" economic interpretation of the "likeness" of products under Article III:4 of the GATT 1994 does not appear to me to be free from substantial doubt . . .'.¹⁰ However, the member did not explain whether these doubts were related to the problems to which the EU had alerted the Division.

⁶ Article XX(d) of the GATT mentions 'regulations . . . relating to . . . the prevention of deceptive practices'. However, this provision can only be invoked to justify measure to secure compliance with such regulations, not the regulations themselves.

⁷ *US – Malt Beverages* (n 4) 206.

⁸ Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997, paras 215-16.

⁹ *EC – Asbestos* (n 2) para 37

¹⁰ *ibid* para 154.

And so two important Members of WTO asked the Appellate Body to refrain from adopting an interpretation of Article III:4 that, in their view, unduly curtails their regulatory autonomy and the Appellate Body does not evaluate their concerns with one word. And a panel's concern about this interpretation is dismissed by the Appellate Body without any substantive evaluation of the issue. I said to myself that, one day, a perfectly legitimate regulation will be before the Appellate Body that does not fall under one of the sub-paragraphs of Article XX and the Appellate Body will then be forced to either declare it illegal or change its jurisprudence. Or a case will arise under the national treatment provisions of the TBT Agreement that will put the Appellate Body before the same choice.

This happened sooner than I thought. In the *US – Clove Cigarettes* case the panel found that the interpretation of Article 2.1 of the *TBT Agreement* should not be approached primarily from a competition-oriented perspective, but that the weighing of the evidence relating to the 'likeness' criteria should be influenced by the fact that the regulation at issue had the purpose of regulating flavoured cigarettes for public health reasons.¹¹ The Appellate Body did not budge, insisting that an interpretation of the concept of 'likeness' under the TBT Agreement must also be based on the competitive relationship between and among the products. However, it did not exclude a consideration of the policy purpose of the regulation altogether. It ruled that:

the context and object and purpose of the *TBT Agreement* weigh in favour of reading the 'treatment no less favourable' requirement of Article 2.1 as prohibiting both *de jure* and *de facto* discrimination against imported products, while at the same time permitting detrimental impact on competitive opportunities for imports that stems exclusively from legitimate regulatory distinctions.¹²

If a panel has to examine whether the purpose of the regulatory distinction is legitimate, does it not have to examine its aim? And if it must examine its impact on imported products, does it not also have to examine its effect? Did the Appellate Body not introduce into Article 2.1 the 'aims-and-effects' test in disguise? I believe it did and I presume there was a sigh of relief among the Members of the WTO.

I found it somewhat strange that the Appellate Body concluded that the place to conduct the inquiry into the purpose and effect of the regulatory distinction was not the concept of likeness but the concept of no-less-favourable treatment. Whether two products that are not identical should nevertheless be considered to be alike depends on the relevance of the differences between them and that, in turn, varies with the purpose and consequence of the regulatory distinction between them. The likeness determination therefore seems to be the natural place to take the legitimacy and the impact of the regulatory distinction into account. Moreover, both under GATT and WTO jurisprudence, the approach to likeness varied over the years while the assessment of the treatment of products has consistently been limited to an assessment of the competitive opportunities accorded to them. That approach was originally adopted in 1958 by the GATT panel in *Italy – Agricultural Machinery*¹³ and had since then been followed, without exception or variation, by all GATT and WTO panels and the Appellate Body in respect of all agreements. The Appellate Body thus preserved the consistency of its jurisprudence on likeness at the expense of changing the well-established jurisprudence on no-less-favourable treatment.

Be that as it may, the Appellate Body avoided, under Article 2.1 of the TBT Agreement, the unfortunate consequences of the exclusively market-based approach under Article III:4 of the GATT. The next step, I thought, would be to extend the novel interpretation of the no-less-favourable treatment concept to Article III:4 of the GATT. Then the scope of regulatory autonomy would not be

¹¹ Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (US – Clove Cigarettes), WT/DS406/R, 2 September 2011, para 7.119.

¹² Appellate Body Report, *US – Clove Cigarettes*, WT/DS406/AB/R, 4 April 2012, para 157

¹³ Report of the Panel, *Italian Discrimination against Imported Agricultural Machinery*, L/833 - 7S/60, GATT B.I.S.D. (7th supp), 23 October 1958, 63-64.

narrower under the GATT than under the TBT Agreement. Technical regulations must meet the requirements of both the TBT Agreement and the GATT, and, in respect such regulations, Members are consequently free to invoke their rights under either agreement. It therefore does not make sense to permit under the TBT Agreement regulations imposed for any legitimate policy purpose but permit under the GATT only those serving the few purposes listed in Article XX. If that were the case, Members adversely affected by a technical regulation serving a legitimate purpose not listed in Article XX could obtain a withdrawal of the regulation by invoking their rights under the GATT rather than the TBT Agreement. That would nullify the practical effect of the Appellate Body's interpretation of Article 2.1 of the TBT Agreement, and that would not be permitted by the Appellate Body.

So I thought. But I was to be surprised.

In *EC – Seals Products* the Panel found that the legal standard that the Appellate Body had developed for Article 2.1 of the TBT Agreement did not equally apply to Article III:4 of the GATT. The EU appealed. It explained that this could lead to a situation where, under Article 2.1 of the TBT Agreement, a technical regulation that has a detrimental impact on imports would be permitted if such detrimental impact stems from a legitimate regulatory distinction, while, under the GATT, the same technical regulation would be permitted only if its objective falls within one of the subparagraphs of Article XX. As a consequence, complainants would have a strong incentive not to invoke Article 2.1 of the TBT Agreement and, instead, to bring claims under the GATT, even if the measure at issue qualified as a technical regulation.¹⁴

The Appellate Body responded that the EU perceived a legal imbalance that did not exist. It stated:

under the TBT Agreement, the balance between the desire to avoid creating unnecessary obstacles to international trade under the fifth recital, and the recognition of Members' right to regulate under the sixth recital, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX.¹⁵

It noted, but did not address, the difference in the range of policy goals that may be pursued under the TBT Agreement and the GATT. Instead, it called the practical relevance of that difference into question, stating that:

the European Union has not pointed to any concrete examples of a legitimate objective that could factor into an analysis under Article 2.1 of the TBT Agreement, but would not fall within the scope of Article XX of the GATT 1994.¹⁶

I found this statement surprising. First of all, the EU did provide examples to illustrate its concerns, among them regulations whose objective is to provide origin information to consumers, an objective that clearly falls outside the scope of Article XX.¹⁷ The Appellate Body dealt with such a regulation in *US – COOL* and hence was fully aware of that example. In that case, the complainants invoked both Article 2.1 of the TBT Agreement and Article III:4 of the GATT, and the Panel, having found the measure to be inconsistent with the TBT Agreement, exercised judicial economy with respect to the claims under the GATT. However, suppose the complainants had invoked only their rights under the GATT, then the COOL regulation would have had to be declared to be inconsistent with the GATT

¹⁴ Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (EC – Seals Products), WT/DS400/AB/R, WT/DS401/AB/R, 25 November 2013, para 2.183.

¹⁵ *ibid* para 5.127

¹⁶ *ibid* para 5.128.

¹⁷ European Commission Submission to the WTO, Other Appellant Submission by the European Union in *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, 29 January 2014, para 307. The illustrative list of objectives listed in this submission was not included in the Appellate Body's summary of the EU's arguments.

simply because it distinguishes products competing in the market. This would have been an absurd result.

A simple glance at the notifications of technical regulations made by Members to the TBT Committee could have provided the Appellate Body with further examples. These notifications include regulations designed to provide consumers with information on the net content of pre-packaged products,¹⁸ to harmonise the technical standards for tractors and the machinery towed by them,¹⁹ and to ensure that consumers are informed of the presence of aromas in wine products.²⁰ All these measures distinguish between groups of competing products, treat one group less favourably than the other and serve a purpose not listed in Article XX. The Appellate Body's refusal to interpret Article III:4 of the GATT in harmony with Article 2.1 of the TBT Agreement makes all of them subject to challenge under the GATT.

The Appellate Body concludes its examination by asserting that:

our interpretation of the legal standards under Articles I:1 and III:4 of the GATT 1994, and Article 2.1 of the TBT Agreement, is based on the text of those provisions, as understood in their context, and in the light of the object and purpose of the agreements in which they appear, as is our mandate. If there is a perceived imbalance in the existing rights and obligations under the TBT Agreement and the GATT 1994, the authority rests with the Members of the WTO to address that imbalance.²¹

This is a most unfortunate statement. The discrepancy in the scope of regulatory autonomy under the TBT Agreement and the GATT is the result of interpretative choices made by the Appellate Body. There is no principle of interpretation that prevents the Appellate Body from addressing this discrepancy by adopting the interpretation proposed by the EU. By ruling otherwise, the current Appellate Body effectively ruled that a future Appellate Body, perhaps composed of different members, that examines the same issue in another case could not adopt a different interpretation because it would be exceeding its mandate. I ask myself whether the Division acted within its mandate under the DSU and in accordance with the Appellate Body's internal collegiality rules when it declared that no interpretation other than the one it adopted to resolve the case before it could be adopted in any future case. Whatever the answer to this question, it was no doubt unwise for the Appellate Body, and hardly in its institutional interest, to cast its own interpretative authority into fetters.

The EU's arguments implied that the Appellate Body, with its exclusively market-based approach to the interpretation of Article III:4, had manoeuvred itself into a dead-end street. The Appellate Body defends itself against that accusation by denying the existence and relevance of the problem and its competence to resolve it. It begins by claiming that the scope of regulatory autonomy was 'in principle' the same under the TBT Agreement and the GATT, which is legally incorrect. It then suggests that the imbalance perceived by the EU would not have any practical relevance, which is factually incorrect. And, finally, it declares that if Members nevertheless perceived an imbalance, only they could address it, which is institutionally untenable. There is no recognition of the problem, no evaluation of different avenues to solve the problem and no ruling on the problem. The reader is left with the impression that the Appellate Body adjudicated in this most unfortunate case not a dispute between the EU and other Members but a conflict between the EU and itself, and that the EU had no fair hearing because the Appellate Body was the judge and the accused at the same time.

¹⁸ Committee on Technical Barriers to Trade, Notification – Mexico, G/TBT/N/MEX/217, 20 September 2011.

¹⁹ Committee on Technical Barriers to Trade, Notification – Ukraine, G/TBT/N/UKR/62, 26 September 2011.

²⁰ Committee on Technical Barriers to Trade, Notification – European Union, G/TBT/N/EEC/404, 20 September 2011.

²¹ EC – Seals Products (n 14) para 5.129.

What will the Appellate Body do if the issue arises again in a future case? Would it then declare a perfectly legitimate domestic regulation to be inconsistent with WTO law merely because it distinguishes between products for reasons not listed in Article XX? That is possible but unlikely. The Appellate Body has the right to change its jurisprudence (and has done so frequently, albeit not explicitly)²² and it is not legally bound by the reasoning supporting earlier rulings. However, in this case, the Appellate Body would not only be expected to explain the need for a change but also why it now considers the new interpretation to be consistent with the accepted principles of interpretation and its mandate. The Appellate Body may therefore seek to avoid the issue. It might, for instance, compensate its narrow interpretation of Article III with an interpretation of the sub-paragraphs of Article XX sufficiently broad to cover all legitimate regulations that come before it. However, Article XX is a general exception that can in principle be invoked in respect of any provision of the GATT. The broadened interpretation could therefore be invoked not only in respect of internal regulations but also in respect of import restrictions, customs tariffs and other measures imposed at the border, and it would therefore have unintended side effects. Correcting the narrow interpretation of Article III through a permissive interpretation of Article XX would therefore weaken the international trade order generally. I therefore hope that the Appellate Body will not follow a path of least resistance but reconsider its interpretation of Article III:4 and harmonise the scope of the Member's regulatory autonomy under the national-treatment provisions of the TBT Agreement and the GATT.

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²² See Frieder Roessler, 'Changes in the Jurisprudence of the WTO Appellate Body during the Past Twenty Years' J Intl Trade Law Poly (forthcoming).