Attack Outline

1. Market Analysis: what is economic background, from grocer’s perspective?
   * How does the market work? What are the incentives?
   * What effect does this have on the buying habits of the consumer? The costs?
   * Who wants this measure? Who supports it? (tied to who gains?)
   * As a result of the measure, who wins? Who looses?
   * What rationale could be behind this? What is the policy trying to achieve in the market?
2. What is observational standpoint? What will serve long-term interests of client (esp. if a gov’t – repealing a discriminatory tax, or ignoring pleas of industry group producing harmful products)?
3. Who has which burdens?
   * LAN case: P has burden of proving that D violated agreement
   * EU Hormones: General rule – complaining party must establish a prima facie case of inconsistency w/a provision of the SPS before the burden of showing consistency w/that provision shifts to the defending party
   * Japan Apples: it is a well settled principle that the complaining party must “establish a prima facie case of inconsistency w/a particular provision of the SPS; this does not imply that the complaining party is responsible for providing proof of all facts raised in relation to the issue of determining whether a measure is consistent w/a given provision of a covered agreement
   * Japan Lumber: 5.10, contracting party which claims to be prejudiced by such practice bears the burden of establishing that such tariff arrangement has been diverted from its normal purpose so as to become a means of discrimination in international trade.
4. Is there an RTA involved?
   * Analyze under XXIV
5. What agreement are we under?
   * GATT
     + Is it about a good (as opposed to a service)?
     + Note that something can fit into both TBT/SPS and GATT
   * TBT
     + Annex 1.1 – “technical regulation”: document which lays down product characteristics or the related processes and production methods, including the applicable administrative provisions, w/which compliance is mandatory; may also include or deal exclusively w/terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method
     + Asbestos: proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole
       - Technical regulation – a “document” must “lay down” – set forth, stipulate or provide – “product characteristics” (i.e., terminology, symbols, packaging, marking or labeling requirements)
       - Compliance w/the product characteristics laid down in the document must be mandatory
       - Product characteristics may be prescribed or imposed in either a positive or a negative form; the legal result is the same
       - Must be applicable to an identifiable product, or group of products; otherwise, enforcement would practicably be impossible; this does not mean that it must apply to named, identified or specified products; nothing in the text of the Agreement suggests that products need be expressly identified
     + EC Sardines: reframes Asbestos as a three part test
       - must apply to identifiable product or group of products
       - must law down characteristics of the product
       - compliance must be mandatory
     + BUT, Art 1.5: The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures.
   * SPS
     + Art 1.1: This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement.
     + Annex A.1: Sanitary or phytosanitary measure - Any measure applied:
       - (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
       - (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
       - (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
       - (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.
       - Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labeling requirements directly related to food safety.
   * GATS
     + this is easy: it'll be about a service

GATT

1. By understanding the marketplace, you're going to understand who is being affected by the measure, and how
   * is the measure discriminating between different partners? Art. I MFN
   * is the measure discriminating between domestic and imported goods using taxes or regulations? Art. III NT
   * is the measure a quota? Art. IX QR
     + BUT, note that Ad Note III prevents ECJ interpretation
2. Is measure origin-neutral?
   * If measure is facially discriminatory, depending on observational standpoint, can skip analysis and move to justification
3. MFN
   * NOTE: discrimination between domestic and foreign goods using tariffs is acceptable
   * Japan Lumber framework para 5.10
     + P must prove tariff has discriminatory purpose (a “means of discrimination”)
       - is it a like product?
         * Have moved away from Spanish Coffee two-step analysis; BUT likeness is still relevant
         * Tariffs should not alter the decisions of customers as between different trading partners
         * analysis is based on end-use, similar needs of the consumer
       - is there discriminatory treatment as between trading partners
     + is there a legitimate domestic interest?
       - Lumber Par 5.9: must be shown that there is a rational basis for the alleged legitimate domestic interest
         * protectionist interest: protecting domestic production
         * trade-negotiation interest
     + Note: proving intention and legitimacy (rational basis) often overlaps, but this is only a probative matter. It is possible that the importing state can show a rational basis for imposing differential tariffs, bur that the complaining state can nevertheless show that the importing state acted with discriminatory intent
4. NT
   * taxation
     + are the products like?
       - Japanese Sochu criteria for likeness articulated by Panel approved by AB
         * Physical characteristics

Content

What are made of? Look at raw materials.

Use of additives and appearance. Interested in what the consumer sees.

Manufacturing process

health risks (Asbestos)

but note: W didn't like how this was applied in Asbestos

* + - * + End Uses

What are they used for?

When serve same need, this will add to definition of likeness.

* + - * + Tariff classifications
      * If not like, are they in direct competition or substitutable?
        + Similar consumer end-uses, as illustrated by cross-price elasticity of demand

What if substitutable products were not in competition with each other?

What about latent demand? Where competitive relationship may develop over time, but not be present at point of introduction of product to marketplace? Where products could objectively be in competition but aren’t?

Where there is a large difference due to distortion of competitive relationship, it is hard to extrapolate. Where there is a large amount of learning involved about the product, difficult to rely on market data since data would undervalue degree of competition. In this case, may have to rely on other markets.

* + - * + AB seems to say while panel called these decisions arbitrary, should be “discretionary decision made in considering various characteristics of products in individual cases.” Best judgment decision. Case by case basis.
    - If products are like, then Art. III.2 sentence 1 applies
      * the products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or the internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products
        + Goes to effect and not intention: that is, you have a violation once the effect is established in spite of whatever may be the intention of the makers of the law/policy.
    - If products are in direct competition, then Art. III.2 sentence 2 applies
      * moreover, no contracting party 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 (chapeau)
      * Less favorable treatment: Are taxes dissimilar? – this is larger than the de minimis level for like products.
      * Are taxes so as to afford protection in the economic sense?
        + Look at the design and architecture of the tax rather than the subjective intent of the legislatures; Ad valorum is almost a safe harbor
        + You don’t look at the purpose of the legislation, you only look at the economic trade distortion of trade. Doesn’t matter if regulation is origin- neutral facially; only effects of regulation or tax matter.
        + This focuses on effects, not on intent, so it is objective approach. Even if intent were to afford protection, if it didn’t have that effect it wouldn’t fail test.
  + Regulation III.4
    - like products for III.4 should cover the whole range of products included in III.2; so however far III.2.2 extends, III.4 should cover it.
    - Must be provided treatment “no less favorable”
      * note: differential treatment could be required provide “no less favorable” treatment; think peeability

1. Article XX
   * start with offending measure that must be justified (quant restriction, violation of III4, etc.);
     + a prima facie violation; the way to think about law of prohibition: unless there is a justification, there is a violation
     + so we go to art XX
   * Q1: is the justification within a legitimate policy? (XX a-j)
     + Although, in theory, Art XX is a closed list, it is diff to find a policy that won't fit in
     + tendency is to allow for liberal/permissive/progressive reading of text (ex. expansion of “exhaustible natural resources can also mean “living nat resources”)
   * Q2: Chapeau; is there a lesser restrictive measure?
     + Note: Chapeau is also where we handle “as applied” situations (US Gasoline)
     + Rationale: if there is lesser restrictive measure, and state is insisting on more restrictive, conclusion is that this is actually a disguised restriction or arbitrary discrimination
     + Note: arbitrary discrimination and disguised restriction are to be read together
     + this is a sort of “constructive intention” test; we assume intention where there's a LRM; BUT, Weiler does not think we should introduce intention explicitly (it's not in the text, it muddies the water, etc.)
     + Brazil Tires
       - LRM must be reasonable; can't be appreciably more expensive, burdensome
       - LRM is based on *risk level*; it's not a LRM if it doesn't achieve the desired risk level
         * BUT see Thai Cigarettes
       - doctrinally, can rely on qualitative measure of desired effectiveness, not quantitiative
   * Q3: even if it is less restrictive measure, does is it justified in terms of restriction on trade?
     + This isn't something Panel is “supposed” to be doing; usually, Panels do not do this explicitly (Except in Korea Beef); so there's a “schizophrenia” bc Panel will repeat mantra that “every state can set own risk level” but will then goes ahead and evaluates risk level
     + Here, Panel determines whether the risk level is acceptable when compared to how extent it restricts trade
     + we see that Panels always step beyond two steps and engage in substantive proportionality, but do so only in order to stamp out egregious restrictions, discrimination, etc.
     + so there is a fairly high level of deference to states

TBT

* EC Sardines: TBT applies to existing regulations, in force before TBT came into effect
* 2.1: MFN and NT
* 2.2: LRM
  + tech regulation shall not be more trade-restrictive than necessary to fulfill a legitimate objective
  + enumerated legitimate objectives: national security, consumer protection (prevention of deceptive practices), protection of human health or safety, animal or plant life or health, or the environment
    - but list is explicitly left open
* 2.4: Harmonization
  + “where relevant international standards exist, or their completion is imminent, members *shall* use them... as a basis for their technical regulation”
    - EC Hormones, cited in EC Sardines: “as a basis for” means “not in contradiction to”
    - TBT Annex 1: Standards
      * Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.
      * Explanatory note
        + The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.
  + Exception: where international standards would be ineffective or inappropriate
* 2.5: Safe Harbor
  + if tech reg is prepared, adopted or applied or legitimate objective from 2.2, and is in accordance with international standards, then it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.
* 2.7: Equivalence
  + must give “positive consideration” to regulations of other members
* 2.8: Equivalence
  + where appropriate, shall specify regulations in terms of performance
* 2.9: Notice and Comment
* 2.10: Emergency

SPS

* Appropriate level of sanitary or phytosanitary protection - The level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory. (Annex 1)
* Art 2
  + 2.2: SPS measures can be applied, but only to the extent necessary to protect and only based on scientific evidence
    - 5.7 is the exception
  + 2.3: MFN, NT
  + 2.4: Safe harbor
    - when measures conform to SPS, then they will be presumed to be in accordance with XXB of GATT
* Art 3: Harmonization
  + “Based on” (3.1) means “not in contradiction to” EC Hormones
  + Art. 3.1 allows Members to adopt measures based on an existing standard but w/o a presumption of consistency
  + Art. 3.2 allows Members to adopt measures that conform to an existing standard and has a presumption of consistency
  + Art. 3.3 allows Members to adopt measures that exceed a level of protection provided by int'l standards, if
    - there is scientific justification, or based on the member's risk assessment under Art. 5
    - Art. 3.3, second sentence, requires that all measures which result in a higher level of protection be not inconsistent w/any other provision of the SPS, which textually includes Art. 5; moreover, the footnote in Art. 3.3 indicates that the risk assessment required by Art. 5.1 and defined in Annex A.4 would apply
    - AB is aware that this finding tends to suggest that the distinction made in Article 3.3 b/t two situations may have very limited effects and may, to that extent, be more apparent than real
* Art 4: Equivalence
  + 3.1 members *shall* accept SPS measures of other members as equivalent, *if* the other members objectively demonstrate that they reach the appropriate risk level
* Art 5: Risk Assessment
  + 5.1: SPS measures must be based on a risk assessment
    - Annex 1: Risk assessment - The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.
    - Art. 2.2 informs Art. 5.1 – the elements that define the basic obligation set out in Art. 2.2 impart meaning to Art. 5.1
    - “Based on” (EC Hormones)
      * Procedural requirement – “based on” does not require a procedural minimum of “taking into account”; instead, an observable, objective situation should persist b/t the SPS measure and a risk assessment; an SPS measures can be based on a risk assessment carried out by a third party (provides a way for developing countries to have access to adequate risk assessment)
        + AB is suggesting that there should not be a subjective assessment done by a defending party; on the contrary, there should be a rational relationship (objective) b/t the measure taken and the risk assessment; this is folded into the substantive requirement
      * Substantive requirement – there should be a rational relationship b/t the measure and the risk assessment; Member-states can base their risk assessment on divergent views (this is problematic since there is no way, currently, to determine if a scientific standard is real scientific evidence)
      * Process (Japan Apples)
        + Three requirements – (1) identify and (2) evaluate the likelihood of risk (3) according to the SPS measures which might be applied
        + The obligation to conduct an assessment of “risk” is not satisfied merely by a general discussion of the disease sought to be avoided by the imposition of an SPS measure; when discussing the risk specified in the risk assessment, the harm concerned (i.e., fire blight) as well as to the precise agent that may possibly cause the harm (i.e., the carrier of the disease) and alternative measures that might be utilized must be discussed
  + 5.5: Consistency of levels of protection and resulting discrimination or disguised restriction on international trade
    - There are three elements to Article 5.5, which are cumulative in nature
      * First – adoption of different appropriate levels of sanitary protection in different situations
      * Second – the distinction is “arbitrary or unjustifiable”
      * Third – the distinction results in “discrimination or a disguised restriction on international trade”
  + 5.6: LRM
    - 3.2 is an exception/safe harbor from this provision
  + 5.7: Precautionary Principle
    - where there isn't enough evidence, members may provisionally adopt a measure on the basis of *available* information
      * Art. 5.1 sets out the key discipline – “Members shall ensure that their SPS measures are based on an assessment... of the risks to life or health”; this discipline informs the other provisions of Art. 5
      * Requirement – there must be insufficient scientific evidence; the evaluation must be carried out, not in the abstract, but in the light of a particular inquiry – Art. 5.7, second sentence, which refers to a “more objective assessment of risks” suggests a link or relationship to the obligation to perform a risk assessment under Art. 5.1; the question is whether the relevant evidence, be it “general” or “specific”, is sufficient to permit the evaluation of the likelihood of the risk (Japan Apples)
      * Unresolved uncertainty – application of Art. 5.7 is triggered not by the existence of scientific uncertainty, but rather by the insufficiency of scientific evidence; insufficient scientific evidence and scientific uncertainty are not interchangeable (Japan Apples)
    - BUT, have to keep trying to get more info

North South Divide

* TBT/SBS: international standard-setting
  + could privilege northern countries; they get to set int'l standards, they also have ability to justify own standards and rationales for deviation
  + counter: art 12 addresses developing countries (special and differential treatment)
* dumping+CV measures
  + means to address comparative advantage of developing countries
  + BUT, this is changing
* thai cigarettes
  + labeling is a large administrative cost which the Thai gv't may be less able to bear
    - same with mkting campaign, public health campaign, taxes
    - so LRMs may discourage the policy
* Comparative advantage in lawyering; there are more lawyers in US, EU, etc.
* bargaining power when tariff bindings are made
  + basically, this is just two or three big countries bargaining and evryone else tags along
  + counter: this can also be an advantage to developing countries
* DSU
  + Antigua examlple; of Antigua withdraws trade concessions, the US and EU don't care
* tariffs favor norther countries
  + so there are still higher tariffs on things for which the developing countries have a CA, but things or which northern coutnries have CA have low tariffs

To what extent does WTO preserve/undermine autonomy

* preserve
  + GATS: members decide what to open up
* undermine
  + Korea Beef
    - there's balancing here which compromises ability of state to set risk levels (step 3)
  + Apples
    - risk wasn't severe enough to justify extreme measures; risk can't be proven \*\* check this\*\*
  + GATS
    - US Gambling: there's concern here that the AB ruling (you have to justify any reg that has a quantitiative impact, or something like that )
  + in SBS/TBT
    - there's no inquiry on intent; so if there's dispirate impact
    - “appropriate” leaves room for panel investigation
  + TBT
    - in Sardines, when AB is reviewing determination of something (P 290) why are they setting the standard of risk for the EC?
  + thai cigarettes and LRM in general
    - labeling is a large administrative cost which the Thai gv't may be less able to bear
      * same with mkting campaign, public health campaign, taxes
      * so LRMs may discourage the policy
  + Art 20 may limit possible justifications
    - counter: AB will engage in a progressive reading
  + exceptions to SBS
    - no ethical or moral justification clause

Art XX and TBT/SPS

* JW thinks that you can fail TBT/SPS and still be ok under Art XX
  + makes sense if you think that the XX exceptions should be generally applicable
  + TBT/SPS include discrimination articles, so it makes no sense that you could discriminate under GATT, but not TBT/SPS
  + SPS has very narrow set of exceptions
* problems
  + the inter alia in TBT 2.2 suggests that it includes all Art XX exceptions
  + the Chapeau test seems geared towards finding discrimination

Full Outline

1. Weiler's Method
   1. Read text, look for questions, gaps
   2. turn to case
      1. First, understand the commercial issues.
         1. You have to understand the commercial (not economic) issues to understand the legal issues; who wants to get benefits, who are afraid to lose
      2. Be a legal realist.
         1. “the law is what the court says what the law is, not what I think what the law ought to be”; you have to be able to predict what the court “will” decide not what the court ought to decide.
         2. Therefore, you have to understand “why the court decide the way it is, and what their understanding of what the law is is”
      3. When we read the AB decision, review the decisions in 3 critical factors.
         1. (1) I have a view of what the law should be, did the court take it?
            1. Do do not lose your critical view, try to find the flaw or weakness in the decisions.
         2. (2) Try to understand why they did that? (legal realism)
            1. If you are accustomed to the hermeneutics sensibility of the court, you will be able to know what drew them to do that, and finally better prediction will be possible.
            2. the courts have very different hemonoitic sensibility, you should be accustomed
         3. (3) your own conscientious
            1. We, as human beings, are dealing with the real questions influencing the real people in the real world. How would these consequences influence?
   3. A lesson on the economic analysis of law:
      1. according to the economic analysis of law, the law should be efficient: when there is a dispute, the 2 parties will bring a suit. the efficiency aimed for is an efficient resolution.
         1. The outcome will be that one party is better off and the other worse off.
         2. This outcome is better than both parties being worse off.
         3. the optimal solution is when both are better off.
      2. the economic analysis of law can be similar to legal realism: why will I think the court will deicide this way rather than the other.(different than learning what the law is …)
         1. the realist thinks: even though i think the law is x, i think the court will decide something else.
         2. realist does not mean relativist, judges are not machines.
         3. the last step as a legal realist: i will try to influence courts: understanding that their are so many things that shape the legal outcome especially when their are margins of discretions and the law is vague.
2. Syntax and Grammar of International Trade Law
   1. Background
      1. Tools for affecting the inflow/outflow of goods
         1. tariffs: reduced demand for goods by raising price; protectionism; provide government income; more transparent than quotas
         2. quotas: quantifies the number of products which maybe imported; limits possible marketshare; impact is to cut off trade and increase consumption of the competing products; can have perverse result of increasing price of quotaed product due to low supply/high demand
         3. standards: functional equivalent of a zero quota (zero quota on cars w/out airbags)
         4. subsidies: allow domestic goods to be priced lower; give competitive advantage to domestic products; states may reciprocate with “anti-susidies”
         5. taxation (exchange controls, currency values, monetary policy, custom duties, and direct taxation): decrease demand, regularly used to discriminate against particular products
      2. levels o integration
         1. free for all (no trade regulation)
         2. Constitutional provisions – MFN & Nat. Treatment
            1. MFN: horizontal integration; no discrimination as between trading partners, BUT could discriminate between imports and domestic
            2. NT: vertical integration; no discrimination as between imports and domestic
         3. Ad hoc liberalization – where WTO is
         4. FTA – NAFTA
         5. Customs Union
         6. common market
   2. rationales for supporting free trade
      1. efficiency
         1. competition forces every undertaking in every sector to look carefully at issues of costs
         2. creates greater competition, but also increases inter-economy competition
      2. comparative advantage
         1. Definition
            1. The principle of “comparative advantage” says that countries prosper first by taking advantage of their assets in order to concentrate on what they can produce best, and then by trading these products for products that other countries produce best.

According to the principle of comparative advantage, countries A and B still stand to benefit from trading with each other even if A is better than B at making everything, both automobiles and bread.

If A is much more superior at making automobiles and only slightly superior at making bread, then A should still invest resources in what it does best — producing automobiles — and export the product to B. B should still invest in what it does best — making bread — and export that product to A, even if it is not as efficient as A.

Both would still benefit from the trade. A country does not have to be best at anything to gain from trade.

Liberal trade policies — policies that allow the unrestricted flow of goods and services — multiply the rewards that result from producing the best products, with the best design, at the best price.

* + - * 1. Example

England can produce cloth with 100 workers and wine with 120 workers, Portugal cloth with 90 workers and wine with 80 workers. Portugal enjoys an absolute advantage of England wrt to both products – it can produce given qty with fewer labor inputs.

Trade is still mutually advantageous, assuming full employment, since if England exports cloth (100 laborers) for wine (80 laborers), England is still saving the 20 workers it would have had to spend more for wine production. Portugal is then gaining cloth for the work of 80 laborers (the amount of wine purchased) instead of 90 laborers.

* + - 1. Characteristics
         1. Comparative Advantage is not static

Experience shows that competitiveness can also shift between whole countries. A country that may have enjoyed an advantage because of lower labour costs or because it had good supplies of some natural resources, could also become uncompetitive in some goods or services as its economy develops. However, with the stimulus of an open economy, the country can move on to become competitive in some other goods or services.

This is normally a gradual process. When the trading system is allowed to operate without the constraints of protectionism, firms are encouraged to adapt gradually and in a relatively painless way.

They can focus on new products, find a new “niche” in their current area or expand into new areas.

* + - * 1. Impact of protectionism

The alternative is protection against competition from imports, and perpetual government subsidies. That leads to bloated, inefficient companies supplying consumers with outdated, unattractive products.

Imposes greater costs on consumers; Consumers pay more for the products they would have otherwise gotten for less via trade, and there's a ripple effect as the higher priced raw materials affect the prices of other products

* + - * 1. Private economic actors still gain

Broadens contract opportunity set available to private economic actors, so parties with different specialized skills or resources are able to reap gains from differential advantages and disadv

* + 1. Two fallacies
       1. There is no correlation between free trade and a Thatcherism view of the world – the United States and Europe cheat more or less to the same degree.
          1. What you do with free trade is to enhance total gains, but how you divide the gain (welfare socialist state or laissez faire) is up to you.
          2. By buying into free trade, you are not adopting one economic model.
       2. It’s not a zero sum game- a trade deficit with a certain competitor does not mean that one party is worse off. The more trade there is, the better both parties are.
    2. Why is protectionism so popular?
       1. Pain of free trade is concentrated, but benefits are diffuse
       2. tariffs are “easier” than raising taxes
       3. it feels like we're standing up for ourselves
       4. free trade can place real downward pressure on gains in workplace rights, standards, environment, etc.
    3. Free trade arguments push, eventually, towards the Common Market
       1. if you think of traded goods as raw materials, as inputs, then you can also think of labor as an input; the lack of mobility of labor is similar to protectionism
       2. the logic of free trade is to allow the most efficient producer make a given product; in order for this to be the case, we need all four factors of production to be liberalized (goods, services, workers, capital)
       3. a further advantage of the Common Market is that it allows for harmonization of regulatory structures
    4. Regulatory structures
       1. regulatory structures, regulation are a reflection of society (societies that place lower value on the environment will have lower environmental standards, etc.)
       2. can be thought of as a comparative advantage
          1. so, a society that doesn't want/need three weeks paid vacation has an advantage over one that does
          2. in a common market, there is often an opportunity to harmonize, not a requirement to do so
       3. But in some areas, it makes sense to harmonize
          1. where there are externalities (UK pollution blowing into Denmark and Sweden)
          2. human rights concerns
    5. reasons for maintaining trade restrictions
       1. strategic self-sufficiency; some industries should be protected (e.g. rice in Japan) so that in times of war, etc. they will not be cut off
       2. certain markets can only accommodate a few producers (Airbus, Boeing)
       3. some industries are connected with a way of life (fishing villages, etc.)
    6. Empirical facts
       1. if we exclude very undeveloped countries, we find that every developing country has benefited from free trade; free trade does not promise to make you rich, but it does make you richer
       2. Cheating
          1. most countries cheat on free trade
          2. Democracies cheat more than non-democracies, prob because of elections and the need to save jobs
  1. Arguments against Free Trade
     1. Sociological costs
        1. Ex-post adjustment problems
           1. Losing what you had always hurts more than benefits gained. Groups that feel pain will be more vocal than groups than receive benefits. This creates an incentive to cheat.
           2. This is the problem of “ex-post adjustment” or “compensation” always accompanying the free trade debate. In other words, without due care for “losers” that free trade definitely creates the merit of free trade cannot but be undermined.More extremely, one might conceive a situation in which the social cost for such adjustment as a whole exceeds gains from trade.
           3. Benefits may be dispersed while pain may be concentrated. Certain industries may get burdened more than others.
        2. Certain products are not accepted because they are immoral – Denmark’s comparative advantage might be pornography and Columbia’s are narcotics. They are restricted even though free trade adds to prosperity of all.
     2. Economic and Political Arguments.
        1. Less radical critique – even if the premises of free trade are accepted, there are situations within that premise that would justify not trading freely.
           1. Overriding values and morality

Different regulatory regimes in terms of safety – whether side air bags are required or just front air bags. There can be overriding values in society in terms of what it wants to see in its marketplace.

* + - * 1. Strategic assets such as military trade, or rice for Japan.

The Japanese have rice as their staple food and the do not want to be dependent on the rest of the world for their staple food.

National air carriers are the same thing – a matter of national pride.

* + - * 1. Infant Industries – protecting an industry so that it reaches maturity.

In the US, 90% of businesses fail because they don’t have enough working capital – they are going to run without making money for a while. It takes time to advertise and build up a customer base.

The problem with protecting infant industries is that they tend to want to continue the protection.

Products or services that can only support 2 or 3 producers because of the huge capital expenditures involved in making the product – the entry barriers are very high.

* + - 1. More radical critique – challenging underlying premises of the free trade rationale – can undermine social justice and compromises them – race to the bottom and social or environmental dumping argument.
         1. Race to the bottom – social and environmental dumping

Regime of fair trade encourages lowering of labor standards and environmental standards – creates a “race to the bottom” b/c these countries will capture investment by lowering standards to have lower regulatory costs by fewer social rights for workers and lower environmental regulations.

Dumping socially and undesirable labor practices on other countries – providing an incentive to lower or not develop standards.

* + - * 1. Externalities not taken into account – environmental effects of certain behavior on other countries.

When communal goods are at stake – transboundary clean air, clean water – the full value of taking using those goods is not internalized.

One party can gain advantage by consuming communal property or goods and externalize the effects on the rest of us.

* + - * 1. Way of life critique – it doesn’t make sense for the US to have a fishing industry along the Eastern coast of the US.

Free trade argument says not to protect jobs – just making fish more expensive. But we value as part of our human, social, and cultural landscape the fact that there will be fishing villages along the coast. So society is willing to pay a price for that – paying someone for eliminating their jobs will not truly reflect the value of this way of life to us.

There is no way to adequately value this. One of the fundamental assumptions of free trade is that efficiency and increasing wealth should trump all other considerations. But there may be other considerations and spiritual or emotional values that cannot be accurately measured against efficiency and wealth. Why is this not reflected in free trade? There is no articulate voice – no organization or corporation – to represent this viewpoint. We have bought into the fact that to be richer is an unqualified good – that there is no debate around this point, but this is not necessarily true.

Getting richer is not necessarily better – living a spiritual is valued more than being rich.

* + - * 1. Unfair trade argument

The playing field is not level – quotas are eliminated, but other countries can get away with much lower production costs.

Usually free trade is about goods, but to some extent free trade is about services. Free trade does not extend into all factors of production – labor and environment cannot be imported into the country. A true level playing field means that labor, capital, and services are freely moving as well as goods.

Free movement of goods in an environment that is regulated differently is not level. There are other factors of production – labor, environmental regulations – and if regulations are different in those areas, one country can never be as efficient as the other because of differing costs.

Nonequal trading partners can unfairly wield market advantage

Classical Ricardian model presumes that trading partners are “equal” in light of economic power and market influence, and hence a perfect competition.

However, if one country is big enough to play its price-maker status by the “exploitative intervention” (Deardorff and Stern, 1987) at the expense of other states, the rest of the world loses more than the tariff-levying country.

Relies on existence of hegemonic power

A variation of such realism is the so-called “hegemonic stability theory” argued by Charles Kindleberger. He maintains that because free trade is a public good, it has a political prerequisite: the existence of a hegemonic power.

From such perspective, free trade is more likely within than across political-military alliances.

Developing countries argue that they have been marginalized from the center of global trade and that the benefits – gains from trade in a global level – have not been distributed fairly.

Developing countries used to receive various trade preferences (e.g., GSPs or waivers) instead of negotiating with developed countries on an equal footing.

The flip side of this long-standing phenomenon is that developing countries have not been allowed to fully benefit from those sectors such as textiles or agriculture in which they traditionally enjoy large degree of comparative advantages vis-a-vis developed countries. Such sectors have been heavily protected in developed countries mainly by domestic political reasons.

* + - * 1. Threatening Cultural Autonomy

Some critics argue that cultural values are seen as threatened by the homogenizing effects of economic imperialism masquerading as free trade.

1. Regionalism versus Globalism
   1. problems with regionalism/FTAreas
      1. they distort trade
         1. Comparative advantage means that we should privilege the people who are the most efficient producers. You should be buying your products from the most efficient producer. By bringing tariffs/barriers for FTA members below where they are for the most efficient producer, member states may not trade with the most efficient source of a good
         2. What happens with the free trade area agreement is that it might be that China is a more efficient producer than Mexico, but because they have tariffs at 10% and they eliminated the tariffs in Mexico, we’re buying Mexican products because in the marketplace they would be cheaper, because they don’t attract the duty. But absent duty you would be buying the Chinese ones. So, you’re not buying from the most efficient. So, it’s not good for you, it’s not good for Mexico, it’s not good for China.
      2. Inconsistent with NT and MFN
   2. Why was Article 24 negotiated? Why are RTAs allowed?
      1. Trade creating
         1. Some economists claim that when look on aggregate to amount of trade in a world that exists in world that allows FTAs will be more than a world that doesn’t allow FTAs
         2. aggregate welfare grows
      2. Domino effect of free trade
         1. countries will get use to the discipline of free trade
         2. will squeeze out special interests
         3. spill over
      3. Political stability benefits, etc.
         1. habit of cooperation
      4. Bargaining power on the world trade arena
         1. in the Uruguay round most countries negotiated individually
         2. when came to negotiating rules – inequitable
   3. Why are RTAs being created?
      1. Tariffs are dropping under the WTO, so the main source of conflict between WTO/RTAs is disappearing; BUT, at the same time the main source of advantage is disappearing
      2. RTAs may ameliorate the asymmetry of benefit and pain associated with free trade
      3. creation of RTA may help states undermine special interest capture; form of corporate welfare will change (tax-breaks instead of tariffs)
      4. WTO may make countries more amenable to RTAs, rather than the other way around
      5. RTA committee is ineffective
      6. RTAs create alternative dispute settlement fora
   4. Background
      1. QR and Customs Unions procedure
         1. onus is on the complaining state to show the violation (per usual), but the burden is very light; all India had to show was the imposition of QR
      2. QR requirements in the GATT
         1. preexisting QR were grandfathered in, but those were supposed to be phased out by 2005
         2. Customs Union Qrs
            1. a CU has a common external tariff
            2. benefits for FTAs only extend to those products which originate within the FTA
            3. Rules of origin still count, even in a CU
      3. Overview of RTAs and the WTO
         1. Custom Unions and free trade area agreements would seem to violate equal treatment principle (non-discrimination) as defined in Article I of the GATT, Art II of the GATS, and elsewhere
            1. BUT, Art XXIV allows regional trading arrangements to be set up as a special exemption, provided certain strict criteria are met; in particular, the arrangements should help trade flow more freely among countries withing the group without barriers being raised on trade with the outside world

in if a FTA or CU is created, duties and other trade barriers should be reduced or removed on substantially all sectors in the group; non-members should not find trade w/the group any more restrictive than before

* + - * 1. Art V of the GATS provides for economic integration agreements in services for RTAs
  1. India - Turkey (Textiles) case (Unit II pp. 13-61)
     1. Facts
        1. Turkey wants to join EC, joins customs union with EC
        2. EC has qualitative restrictions on textiles towards rest of the world; to join CU with EC, need to have Common External Tariff
           1. it's reasonable to have CET because definition of CU
           2. CU is defined by Common External Tariff (CET); Every product enters into FC (free circulation).
        3. India says that illegal because it violates article 11, BUT India bringing case because they want to get through Turkey into the EC
        4. Panel: Article 24 cannot ever excuse quantitative restrictions
     2. AB decision
        1. there are certain conditions where you may derogate from Article XI; can do so if necessary for the formation of CU or FTA
           1. this is because Chapeau in Art. 24 suggests that you’re allowed to have FTA/CU.
           2. BUT, an FTA cannot excuse the WTO prohibition on quantitative restrictions
        2. Problems with AB Decision:
           1. Appellate body says:You could use rules of origin to prevent deflection of Indian textile coming into turkey.
           2. BUT requiring origin certificate for 40% of the trade you continue to trade in FTA and not CU. You’re suggesting to exclude 40% from the benefit of CU.

1. The Most-Favored Nation Principle
   1. Legal Texts
      1. “With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.” Art I of GATT
      2. Article XII
         1. Article XIII expressly requires that even in administering quotas, a member state shall treat countries on a MFN basis; this provision has strong bite since it requires a MFN-based structure for initiating any quota. In other words, no member can establish a quota unless it is based on the MFN principle
      3. Article XIX (Escape Clause: Safeguard)
         1. it has been controversial whether Art XIX can allow for escape from obligations of Art I and XIII, thus allow a safeguard measure on a selective basis among member states. Although one GATT '47 panel held that safeguard measures must be consistent with Art XIII, the debate is unsettled
         2. if one insists on the same rationale found in Art XIII (a second-best approach), Art XIX should also respect MFN principle. Yet, political aspects of safeguard decisions and legal constraints embedded in this provision often make it difficult to use; states thus avoid this provision, use AD and voluntary export restraints instead.
      4. DSU Art 22.1 (Compensation)
         1. Art 22.1 stipulates that “compensation shall be consistent with the covered agreements...” Thus Art I is included.
   2. Definitions
      1. Bound tariffs are those tariffs at which a country – particularly in the World Trade Organization (WTO) context – has agreed to not increase the rate of duty beyond. Once a rate has been bound, it can only be raised if all affected parties are suitably compensated.
      2. Applied tariffs are those that are actually applied by the country concerned. It may be the bound rate, but frequently is not.
      3. Unbound tariffs are items for which countries have not yet established an upper limit for tariffs.
      4. Distinction between formal and de facto discrimination
         1. Spain may argue there is no formal, direct discrimination ‐ we do not draw any distinction between coffee coming from Brazil, Kenya or any other countries, origin‐neutral regime as long as they are the same kind of coffee. But we draw distinction just between different coffees.
         2. BUT, even if there is no formal discrimination, it might still be violating the MFN. The Panel’s hearing the case means that the WTO cares about the indirect, informal discrimination.
         3. e.g. the requirement of 6’ height to be a policemen regardless of gender – But most pool of the people who are over 6’ are men, therefore, it is a de facto discrimination against women. It would amount to gender discrimination.
   3. Spanish Coffee Case (Unit IV. pp. )
      1. Facts (Try to understand the market condition first.)
         1. Coffee is a important product in Spain. It affects 2% of the inflation in Spain, big impact on rate of inflation. Brazil is a big exporter of coffee to Spain. There are different types of coffee, particularly in this case, mild and unwashed Arabica, Robusta, other not‐mild. Brazil is the big exporter of Unwashed Arabica and Robusta. Until 1980, the mild and unwashed Arabica was competing. After 1980, two milds have 0% duty, on the other hand, unwashed Arabica and Robusta are subject to 7% tariff. Brazil complained that it violated the MFN clause of GATT.
         2. Spain argues that it is an origin-neutral regime, so formally it is non-discriminatory.
            1. distinction is between types of coffee.
            2. BUT, law of the GATT is not interested only on direct discrimination: the fact that you are not formally discriminating does not mean that you are not discriminating. If the effect of the law is to single out Brazilian coffee, you might still violate MFN.
      2. Panel Decision (Note: this predates AB)
         1. Weiler: the Spanish Coffee decision is a “terribly reasoned” decision
         2. First step: have to decide whether or not the different types of coffee are “like products”.
            1. Aristotelian distinction: treat the like in a like manner; treat the unlike in an unlike manner; if you treat the like in an unlike manner, you discriminate; if you treat the unlike in a like manner, you discriminate.
            2. Example: at the racetrack, you must put weight in the pockets of the jockeys to place them in the same conditions because it is a race between horses.
         3. What are the criteria for “likeness”?
            1. purpose of the MFN: states are not allowed to discriminate among trading partners; The different tariff should not affect the decisions of the consumers.

The consumers’ decision to buy a product should based on the perception or quality, etc. The consumers should not be influenced by the way the importing country treats the goods from different trading partners.

e.g., if there is jam and nails, and the importing country put high tariff on nails, it has no effect on the consumer’s choice on buying jam. When the product meets the similar needs of the consumer, such products is like‐products.

* + - * 1. Criterion: the products meet similar needs; it's based on end-use

In the eyes of the panel, it’s almost an empirical proposition

When the product meets similar needs of the consumer;

E.g. bar of soap v. liquid soap: they meet similar needs of the consumer; they are substitutable. Even though you may prefer the liquid soap, you may decide to buy the bar of soap if there’s an important tariff imposed on liquid soap which increases its price.

The more substitutable the products are, the more “like” they are.

* + - 1. Application
         1. No other country makes these distinctions between unwashed and mild.
         2. Nature of the product: “organoleptic” qualities. They could be relevant but they are not sufficiently different in this case to be relevant.
         3. Spain argues non-discriminatory intention; the state used to control the price of coffee but that now the coffee market is privatized. Since there is a greater demand for mild coffees, Spain wants to drive down the price by imposing duties on other forms of coffee. The panel does not state if this is relevant or not.
      2. Ruling
         1. no obligation under the GATT to follow any particular system for classifying goods; contracting party may introduce new tariff distinctions
         2. BUT, Art I requires that the same tariff treatment be applied to all “like products”
         3. Organoleptic differences are not enough to make products unlike
    1. Problems
       1. states are allowed to discriminate between foreign and domestic imports
          1. The fact that states are allowed to have tariffs implies that they are allowed to discriminate between imported and domestic goods; The purpose of tariffs is protectionist. Protectionism is legit under Article 1

It is only when an FTA has been established that tariffs can no longer be used to protect domestic goods vis-à-vis goods imported from member-states of the FTA.

* + - * 1. The problem with the Spanish Coffee end-use test is that it does not permit the use of tariffs in the interest of protecting domestic products

It fails to distinguish between this form of permissible differentiation, and discrimination among different exporters (i.e. different tariffs are placed on substitutable goods imported from different states); The latter is not allowed pursuant to the MFN principle

* + - 1. Panel incorrectly applies its own test
         1. organoleptic distinctions matter for some consumer products; they can be the basis on which consumers make a buying decision
         2. so if we're actually interested in end-use and consumer behavior, then we have to take organoleptic distinctions into account
  1. Japan – Lumber case (Unit IV pp. 53-55)
     1. If the Panel had followed the approach in Spanish Coffee, it would have reasoned as follows:
        1. What is the end-use of dimension lumber?
        2. Are there any other lumbers imported into Japan which are substitutable for dimension lumber (i.e. have the same end-use)?
        3. Are these other lumbers subject to different tariffs?
     2. Japan Lumber follows a different approach
        1. para 5.10 of the decision: “Tariff differentiation being basically a legitimate means of trade policy, a contracting party which claims to be prejudiced by such practice bears the burden of establishing that such tariff arrangement has been diverted from its normal purpose so as to become a means of discrimination in international trade. Such complaints have to be examined in considering simultaneously the internal protection interest involved in a given tariff specification, as well as its actual or potential influence on the pattern of imports from different extraneous sources.”
           1. Two elements for defending state:

legitimate state interest

intended to pursue legitimate interest, not to discriminate

* + - * 1. allows states to claim that even if different tariffs are applied to imported products with the same end-use (having a disparate impact among exporting states) they protect a legitimate interest.
      1. How do you prove an intention to discriminate among exporters?
         1. It must be shown that there was a diversion from “normal”, objective tariff categories to single-out a particular imported product.
      2. What constitutes a legitimate use of tariffs?
         1. See par 5.9 of the decision: It must be shown that there is a rational basis for the alleged legitimate domestic interest. This includes (but is not limited to):

a protectionist interest – i.e. protecting domestic production

A trade-negotiations interest

* + - 1. Proving intention and legitimacy (rational basis) often overlaps, but this is only a probative matter. It is possible that the importing state can show a rational basis for imposing differential tariffs, but that the complaining state can nevertheless show that the importing state acted with discriminatory intent.

1. Tariffs and Customs Law
   1. LAN case (Unit IV pp. 9-24)
      1. Facts
         1. USA exports PC’s with multimedia capability and LAN equipment to the EU. The EU classifies them as telecom equipment and not as ADP’s. Telecom equipment has a higher tariff than ADP’s. USA says that they have been classified as ADP’s before and also says that they had an agreement (a tariff schedule) with EU that LAN equipment is ADP and not telecom equipment. EU responded that it was not even discussed during the negotiations.
         2. Panel decision: the US had a legitimate expectation based on the previous practice of the trade of those products since it wasn’t negotiated.
      2. AB Conclusion
         1. As a matter of law, case does not turn on legitimate expectations; turns on empirical, not subjective expectations.
         2. The Plaintiff has the burden of proof to prove a violation of the agreement – that there was an agreement to rate LANs at ADP.
            1. US met burden of proof by showing that tariff changed.
         3. Because there was no consistent state practice, there was no common intent or objective agreement.
            1. US couldn’t meet burden of proof for clarification just by producing evidence of unilateral legitimate expectations.
      3. What is the correct interpretation in law where the parties were silent on an issue? If silence means confirming the status quo, and the status quo is inconsistent, then what to do? What was the actual situation?
         1. Weiler: The US could have argued that the status quo should have been the actual trading status quo rather than the legal status quo.
            1. The commercial reality should be taken as what the parties agreed to, since the EU knew how the negotiations proceeded – that the US would only negotiate those things about which there were complaints or changes.
         2. Interpretation in light of object and purpose of GATT
            1. With a CU under GATT, and in light of Turkey textiles, it is more reasonable to believe that rates would stay the same or be lowered – adopt the lowest rate of the EU.

Shouldn’t they have to prove that violation of GATT for CU requires necessity defense?

Could be a lower tolerance for QRs than for binding of tariffs.

Maybe Ireland and UK were big markets b/c they were back-door cheap tariff entrances to the EU.

* + - * 1. If you’re going to have a true CU, then the tariff should be the lowest one.

The US could not have been expected to think that different countries in the customs union would have different tariffs – they could reasonably believe that what they were actually paying was the CU tariff.

Purpose of the CU should be to lower barriers to trade overall.

1. National Treatment (Taxation and Regulation)
   1. Trade law puts tax (III.2) and regulation (III.4) together.
      1. both affect the marketplace in terms of consumption and consumer preference.
         1. Both affect the price of the product; regulation imposes higher costs on manufacturers, producers, etc.
         2. taxation minimizes the need for enforcement, provides revenue
         3. taxation causes less political turmoil; regulation can be unpopular
         4. e.g. Country A wishes to discourage smoking. It could do so via either taxation or direct regulation.
            1. Regulation via taxation also generates revenue. Policymakers have tradeoff between dis-incentivizing use of a product (via a high tax) and making money (making sure the tax is not so high that no one engages in activity)
         5. problems with taxation:
            1. This is regressive. It hits the poor more than the rich. All consumption taxes are regressive. So the regulation (A) will not change the behavior of the rich and (B) is unfair to the poor.
            2. We could instead have a direct regulation that would apply to all.
         6. Problems with regulation:
            1. It is paternalistic. The government is telling people what is better for them.
            2. Revenue is lost
      2. Trade law leaves the state with tax and regulatory autonomy.
         1. But you have to do it in a way that does not discriminate in favor of domestic production.
         2. There are some areas in WTO where this breaks down
   2. Taxation
      1. Legal Texts
         1. Article III.1: Chapeau
            1. “The contracting parties 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, an 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.”

interpretation of III.1: “so as to afford protection” is unclear; could mean intention or effect

* + - 1. Ad Note III: Par 1
         1. internal taxes imposed by local governments and authorities of contracting parties are subject to the provisions of the final paragraph of Art XXIV; states must take “reasonable measures” to ensure observance of Art III
      2. Article III.2
         1. (first sentence) the products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or the internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products

What is required is to show is that the domestic product and the imports are like products, and if you can show that the imported one was subject to taxation in excess of the domestic product you have a violation.

This goes to effect and not intention: that is, you have a violation once the effect is established in spite of whatever may be the intention of the makers of the law/policy.

* + - * 1. (second sentence) moreover, no contracting party 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

covers products that are not like products but are in direct competition with each other.

Where the products are directly in competition you are not allowed to treat them in a way that is contrary to the chapeau; treat them in a way that affords protection to domestic production.

You are allowed to tax them in excess if it does not afford protection.

* + - * 1. reason for difference

Makes it easier for courts and complainants! where demonstrated that products are “like”, protectionism can be presumed

different legal consequences of respective sentences

III‐2‐1: demonstrate that “like” and “excess”, case is made for complainant

III‐2‐2: complainant will have to show that different taxation affords protection

where products are highly substitutable and thus “like” (even a small price difference shifts consumer to other product), protectionism is presumed; but where cross‐price elasticity is lower and products are not like but nonetheless in competition with each other, protectionism must be demonstrated (“so as to afford domestic protection” in III‐2‐2) – burden on the plaintiff!! in the latter case, therefore, there may be a difference in taxation which is not protectionist and therefore allowed

* + - 1. Ad Note III: Para 2
         1. a tax conforming to the requirements of the first sentence of paragraph 2 (meaning that the products are not “like”) would be considered to be inconsistent w/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

interpretation: Para 2: in cases where sentence 1 (“like products”) does not apply, sentence 2 kicks in for products that are either in direct competition with each other or are substitutable: cannot tax “so as to afford protection to domestic production”

* + 1. CPE
       1. Definition
          1. When products are very similar, consumer choice will be determined entirely by price, especially if bought in bulk.
          2. Measuring cross-price elasticity is done by determining how much a price change will determine a shift in demand between two products – what difference in price will cause consumers to choose the different product.
          3. Example: Cornflakes and Cornflakees

Exactly the same product, except for the price. $1.00 v. $1.01

you will buy the one that costs 1.00 because if you buy a lot then the penny will make a difference.

* + - * 1. Measurement of cross-price elasticity: Hard soap and liquid soap

X likes hard soap. Y likes liquid soap. They put both in supermarket and they cost the same. 50% prefer hard soap and 50% prefer liquid soap.

Then they raise the price. As they raise the price of the liquid, they see consumers shifting to the hard soap. This is how you measure cross elasticity.

* + - 1. Use
         1. Likeness – has cross-price elasticity, except for new products, where it isn’t a good gage.

CPE doesn’t exactly measure the substitutability. Measures how consumers perceive the substitutability between products.

Govt has already had a chance to shape preference with tax like in wine and beer tax. Or if the products are new to the market. The consumer has not yet learned about it and do not yet know that it is a substitutable product.

* + - * 1. Competitive or substitutable – cross-price elasticity dealt with

Economoids say that we should measure cPE and if there is an appreciable CPE then the products are in competition with each other

* + - * 1. When is CPE useful (high probative value) and when isn’t it useful?

When it registers a high degree of substitutability then it is useful

Few false positives. When show high degree of substitutability always probative.

When it registers low elasticity then it might be that there is a problem of a false negative.

When shows low degree of perception of substitutability can find another market where perceptions are different and show that they are substitutable.

* + - 1. Problems with CPE
         1. Problem – current price shapes perception, so subjective CPE is difficult

First problem in which high tax shapes perception is a real problem since people won’t be able to show in CPE that they would see them as like products but for the tax of which we are testing the validity.

As a matter of lawyering, you could go to another marketplace to show that it is CPE…

Or we have to resort to the concept of objective substitutability.

* + - * 1. New products- more difficult.

Ex. butter v. olive oil, and 1 day margarine on market. Not saying its like butter or olive oil, but sufficiently like ito meeting similar need that are in direct competition.

1st day margarine on market, would score low cross elasticity, bc uninformed, uneducated consumers would avoid and would be perceived as different product.

Do same test in 1 yr, and perceived as being like. Price elasticity measures perception of substitutability in eyes of consumer.

* + - * 1. Ex. British beer v. Italian wine cooler.

British using price elasticity to show are different products.

Lose case bc court says price elasticity tests based on consumer preferences and these have been shaped in part by high taxes.

Tax are attacking is what shaped perception. Italians are right in saying both are low alcoholic thirst-quenching beverages. If objectively come to conclusion that 2 products meet same need, then to tax them in diff way would violate Article III.

* + - * 1. Subjective v. objective consumer perception.

New products, esp. taste-related.

Important to open markets in non-discriminatory fashion to products local market not accustomed to, which is why say in direct competition OR substitutable.

* + - 1. Is WTO designed to protect actual competition or potential competition?
         1. If we write about the problematic nature of CPE test when it registers low cross elasticity.

Subjective substitutability (perceptions of consumers)

Objective substitutability (these products are substitutable because they serve the same function and do the same thing) but we should not treat these products as NOT substitutable under 3.2…

* + - * 1. You could say that one of purposes of WTO is to allow countries to export new products to other countries.

Because they don’t have that product, they should not be able to put in a high tariff even though objectively it is an objectively substitutable product… the country should have a chance to let consumers learn their products without high tariffs.

* + - * 1. On the other hand, you could say that this is patronizing and saying that consumers don’t know what is substitutable.

Treating goods as like products when they are not proven to be is a restriction on my sovereignty. You are not letting us legislate according to our culture.

In competition, the proof of the pudding is the marketplace, if the products are not competitive in the existing marketplace, why should we be forced to treat them the same.

* + - 1. Example of price ratio
         1. Facts

Imagine two products (Scotch whiskey and American Bourbon) in pretax prices.

Whiskey costs 1 dollar, bourbon costs 50 cents.

* + - * 1. Can’t distort competitive relationship

I don’t care how much you tax spirits in order to discourage people from drinking too much… that isn’t my business.

But if you are going to tax spirits at a different rate, your tax can’t distort the relationship between products that are in competition.

* + - * 1. Tax regime

If you impose a tax on the price (100%) Bourbon after tax will cost 1 dollar and whiskey will cost 2 dollars. Competitive relationship has not been distorted. That is why the least distorting way is by a percentage of the price (ad valorum tax).

Now if you impose a different tax on whiskey and bourbon so that whiskey costs 3$ AND Bourbon costs 1 dollar, there is a distortion in the competitive relation… whiskey now costs 3 times as much as bourbon…

* + - * 1. Price reflects the total commercial attractiveness of the product.
        2. Ex. Liquid soap (1.01) v. bar soap (1.00), might still pick liquid soap even if bit pricier bc prefer liquid soap. However, if went up to 1.20, might pick bar soap bc not willing to pay 20%.

Price elasticity, by inverting this number can show degree of substitutability btw 2 products. Have to decide what degree will qualify as “like” under Art III:2 sentence one vs. Art. III:2 Sentence 2.

Similar to antitrust, when determining if is monopoly. Q: Are fruit and bananas substitutable enough? Is relevant market fruit or bananas? If bananas are unique product, could argue United (Chiquita) has monopoly.

* + - 1. Tax/price ratio
         1. How do you create the tax/price ratio?

Do you take all of the various products and then weight them – take an average or mean price?

Would you only compare high end products with high end products?

What about alcohol %? Volume? Does that come into play?

* + - 1. Discriminatory in practice, if not on its face
         1. What happens if the population does not have more than 7 dollars to spend on Alcohol? Same can happen with cars you can price a segment of purchases out of the market. Even if on its face it is not discriminatory, will discriminate in practice…never seen in practice.
         2. Countries do not have to tax ad valorem. They can tax by liter or however. By looking at the tax on alcoholic content, I won’t see the effect that it will have on the competitive relationship in the market (have to analyze prices to know if it is discriminatory to importers) … you may see that it does NOT effect competitive relationship. Might even favor import because of the tax.
    1. Japanese Shochu II case
       1. Facts
          1. Japan had a special tax regime for alcohol that had different tax rates according to the different categories. Under the Japan Liquor Tax Law, the criterion for taxation was the alcoholic strength. The problem arose because Shochu was taxed at a lower rate while spirits of higher alcoholic strength were taxed at an unusually and disproportionately high rate.
       2. AB
          1. criteria for likeness articulated by Panel approved by AB

Content: Essentially same physical characteristics (Panel 6.22, p. 20)

Alcohol levels. What are made of? Potato v. cereal. Look at raw materials.

Use of additives and appearance. Interested in what the consumer sees.

Manufacturing process

What are they used for?; End uses

When serve same need, this will add to definition of likeness.

Tariff classifications.

* + - * 1. criteria for likeness for products not like but in direct competition or substitutable

Similar consumer end used as illustrated by cross elasticity of demand

Difference in degree. Products caught by 2nd sentence “less like” but still in direct competition. Purpose still to prevent state from distorting competition. When still have sufficient substitutability to be in competition, will be caught by second sentence.

AB seems to say while panel called these decisions arbitrary, should be “discretionary decision made in considering various characteristics of products in individual cases.” Best judgment decision. Case by case basis.

* + - * 1. So,

Under III:2:1, if they are like products, small tax difference will have a big competitive effect (due to high degree of substitutability), so there is a presumption of protective intent. Don’t have to ask about violation.

Under III:2:2, on the other hand, if small tax difference, still need to show the tax has an adverse effect and prove protective intent.

One theory, then, about difference b/w III:2:1 and III:2:1 is that the former concerns effect and III:2:2 concerns aim.

* + - 1. Case note, Willie, “Fiscal Sovereignty and the AB's approach to Article III:2”
         1. the most important question was not whether the tax discriminated against imported liquors under III:2, rather, it was how to design a test for Art III:2 that does not encroach on the fiscal sovereignty of the Contractive parties

the Panel and AB used a test that restricts fiscal sovereignty by not including analysis of whether a tax scheme is made w/the purpose of protectionism

* + - * 1. rationale for the aim-and-effect test

fiscal sovereignty: governments frequently distinguish between products for non-trade policy reasons (social policy, etc.) which manifest in fiscal policies of the state; an infinite number of non-trade fiscal policies can distort the market and affect trade; should all be struck down as discriminatory?

Product differentiation: allows for governments to distinguish between products for the purpose of non-trade fiscal policies; governments should be able to make these distinctions to follow policy choices; using aim-and-effect will allow gov't to make distinctions between products base on small characteristics w/out the risk of an over-inclusive “likeness” or “directly competitive” inquiry

* + - * 1. Art III.4 (prohibition on discriminatory regulation) includes and evaluation of the aim of the regulation as part of its test; articles III.2 and III.4 should produce the same result; harmonization would allow governments to choose freely between taxation and regulation, mroeover, the likeness test for III.4 is broader than III.2 and would catch more violations than the latter
        2. Art XX: the Panel's test allows for a state to defend its tax measure under Art XX, but this constrains the parties in to the narrow III.2 test; Art XX should only apply to violations based on origin-specific measures, as opposed to the origin-neutral measures III.2 is intended to circumscribe
    1. Three methodologies
       1. Method 1: Appellate body reasoning in Japanese shochu – the objective approach
          1. Objectives

Members retain fiscal and regulatory autonomy, they may impose taxation or adopt regulation as an expression of their specific socio-economic preferences, which may different from country to country.

Violation of National Treatment takes place when their tax or regulatory regimes distort competition between imported and domestic products in favor of the latter.

Japanese Shochu – Article III obliges members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products...Article III protects expectations not of any particular trade volume but rather of the equal competitive relationships between imported and domestic products.

When products are in direct competition, any excess tax would have a much greater affect on distorting competitive relationship.

Amount of excess tax – does it have to be large enough to afford protection, even between products that are only partially in competition with each other?

Less favorable treatment is a necessary and sufficient requirement for measure to afford protection.

Would almost always be subjected to least-restrictive measure test b/c of XX requirement that if objective can be achieved in manner less burdensome to trade.

* + - * 1. Sentence 1:

Step 1: If like products

Physical characteristics

End-uses

Tariff classifications

Step 2: If in excess – de minimis

* + - * 1. Sentence 2:

Step 1: If in direct competition with each other or substitutable – must be appreciable, not de minimis, competitive relationship

Similar consumer end-uses, as illustrated by cross-price elasticity of demand

What if substitutable products were not in competition with each other?

What about latent demand? Where competitive relationship may develop over time, but not be present at point of introduction of product to marketplace? Where products could objectively be in competition but aren’t?

Where there is a large difference due to distortion of competitive relationship, it is hard to extrapolate.

Where there is a large amount of learning involved about the product, difficult to rely on market data since data would undervalue degree of competition. In this case, may have to rely on other markets.

Step 2: Less favorable treatment

Are taxes dissimilar – this is larger than the de minimis level for like products.

Step 3: Are taxes so as to afford protection in the economic sense

Look at the design and architecture of the tax rather than the subjective intent of the legislatures.

You don’t look at the purpose of the legislation, you only look at the economic trade distortion of trade. Doesn’t matter if regulation is origin-neutral facially; only effects of regulation or tax matter.

This focuses on effects, not on intent, so it is objective approach. Even if intent were to afford protection, if it didn’t have that effect it wouldn’t fail test.

Any failures would then have to be justified under XX if they were for social or env reasons.

* + - 1. Method 2: American method: Also called effects and purpose approach
         1. Objectives

Any advantage given by origin-neutral regulation to domestic production must have been applied with that purpose to be illegal.

Could be seen as adding mens rea test to regulatory process.

Constructive purpose

US developed a weaker approach in Shochu – failure of importing country to provide plausible explanation of measure producing disparate impact would create presumption of bad purpose.

Under this test, EC Asbestos would never have reached XX.

Least restrictive measure test is folded into Article III – selection of non-least-restrictive measure would not need to be justified unless presumption of bad purpose were triggered.

* + - * 1. Step 1: Decide whether the products are caught by the discipline – substitutability, in competition.

Same comparison done for likeness and substitutability/competition as in Method I.

But could determine likeness and competitiveness of products by evaluating whether the D gov’t categorized the products so as to afford protection.

Obligations of III:2 should be read in light of III:1, which forms part of the context of III:2.

* + - * 1. Step 2: Less favorable treatment

Look whether there is a difference in taxation – if there is an affect on the marketplace.

Does not take into account rationale for differential treatment.

* + - * 1. Step 3: Proof of affording protection – whether it was put in place to afford protection – look at purpose or intent of legislation rather than just effects.

The country has to come up with a rational interpretation of why there is a different burden of tax and it is not there to provide protection – the tax has to be origin-neutral.

Look not at the effect – disparate impact, but at the purpose. Generally only non-economic justifications will satisfy this, as well as Article XX – in that way they are the same.

* + - 1. Method 3: Alternative comparator
         1. Objectives

Implicit comparator under Methods I & II is market functionality of products.

Reflective of substitutability, competition, consumer preference.

Products are alike and subject to Nat’l treatment b/c they compete with each other in eyes of consumer.

* + - * 1. Step 1: Like products determination - State could challenge comparator and change the comparator to reflect the purpose of the gov’t regulation

Ecological efficiency in Italian recycled engine case

Carcinogenic effect or health risk of product in case of asbestos

* + - * 1. Step 2: Less favorable treatment

Still uses effects of measure on competitive relationship of like products, but like products as determined by relevant comparator

* + - * 1. Step 3: So as to afford protection

When like imported product is treated less favorably.

* + - * 1. Adjudication

Adjudicator has to then decide whether State has made convincing argument concerning choice of comparator.

Similar to Method II – has to rule on purpose behind regulatory scheme.

Adjudicator can still find discrimination if, by reference to categories created by alternative comparator, imported products are treated less favorably than domestic.

* + - 1. What are the differences in the methodologies?
         1. Differing burdens of proof, but in the end similar burden in prima facie case has to be made out

Method 1 – Plaintiff country has to show that products are like or that they are in competition. Then the burden of proof is on the defending country to justify using Article XX

Method 2 – Plaintiff has burden of proof to show likeness and less favorable treatment, and that tax is “so as to afford protection” (bad purpose). Then it is just for the D to rebut the P’s claim that it is protectionist.

This would run into problems of proof – how would P have information about the subjective intent of D’s legislature?

But in practice once less favorable treatment was established, there would be a presumption of protectionist purpose, unless like in XX, D state did not justify practice with legitimate purpose.

Method 3 – P has to show that comparator chosen by state for regulation is a sham – unjustified.

* + - * 1. Limitations on justifications allowed would differ

Method 1 – justifications limited to those enumerated in Article XX. But WTO has interpreted XX broadly – e.g. expanding natural resources to include living creatures and not just minerals.

Method 2 – any policy that a country has which is not aimed at protecting domestic production is allowed. Not limited in scope to Article XX – just looks for a reasonable plausible policy.

What policies do the Americans have in mind?

Production mechanisms – not allowing child labor, environmental hazards, things which are not explicitly allowed under Article XX. Turtle shrimp allowed for restrictions, provided they were least restrictive and were non-discriminatory.

Federalism concerns – to not impinge upon state’s rights to tax. But not likely – b/c the US would not want the reciprocal treatment.

Luxury tax – US wants ability to impose luxury taxes on yachts and sports cars, fur coats, jewelry above certain prices.

* + - * 1. Imposition of least restrictive measure

Method 1 requires least restrictive measure

Method 2 only requires examination of the legislative policy, b/c could be justified w/o XX.

* + - * 1. US wants fiscal sovereignty to impose their own policy, but Weiler didn’t agree.
      1. What are the objections to Method II and Method III?
         1. Creates legitimacy problems for panels and AB

AB relies heavily on plain and ordinary meaning of words – indication of anxiety by new body in new adjudicatory setting.

More comfortable when anchored in explicit text of XX than in more abstract legitimation process outside of Article III

But don’t rulings like asbestos create more legitimacy problems? When declaring ban on asbestos as violation of national treatment?

* + - * 1. Linkage to XX enhances multilateral dimension of WTO, whereas other Methods enhances autonomy, sovereignty unilateral dimension of the agreement.

Many cases D belongs to powerful developed country

More objective elements of Method I shields panel from having to evaluate and contest their subjective assertions of purpose.

North/South divide

method 1 is more multilateral – using the justifications that were negotiated as part of the bargain. The bargain is that anytime products are in competition when it favors domestic production, you have a duty to justify it.

Method 2 is more unilateral – reframes bargain to say that the only thing promised not to do would be to adopt measures favorable to domestic production.

* + - * 1. It does not require a value judgment at the level of the comparator

Only relevant comparator is competitive relationship in marketplace

It is difficult to deduce intent – what counts as evidence of intention?

Health reasons depend on your perspective...The panel is not the ministry of health. They don’t want to make that final decision on risk, since gov’ts and people have different tolerances of risk. People are willing to pay different amounts for risk. International tribunals do not want to be put in this position.

* + - * 1. GATT norms are addressed to regulators who were responsible for implementing protectionist regimes

Objective regime used precisely for naming and shaming effect – serve as a means of habituating national regulators to take regime of non-discrimination seriously

* + - * 1. It would make Article XX obsolete – it would seem to be redundant. It would be subverting the intent if the drafters, since the obviously intended it to mean something – the parties only wanted these specific exceptions.

The US would then say that Article XX would still remain relevant, since it would apply to tariffs and all other Articles of GATT, like Article XI – it is a general derogation for any border measures.

Still relevant for Article III when there is a non-origin-neutral purposefully discriminatory measure.

* + - * 1. Tariffs and taxes would then be treated differently, with XX applying to tariffs and not taxes.
        2. Destroys the differences between first and second sentences, since as to afford protection would then apply to both, and both would then have the same threshold applied to them.
      1. What are the Advantages of Method II & III?
         1. Naming and shaming

It is wrong to deal with case of state which adopts orign neutral measure for totally legitimate purpose, but which has coincidental effect of giving an advantage to domestic production, as a violation of non-dscrimination provision requiring justification.

Even if the result is the same, there is value in having cases dealt with in a correct normative context and not diluting notion of discrimination with activities which are not discriminatory.

* + - * 1. Truth- based argument

There can be no discussion of discrimination which does not imply, in some way and at some level, examination of purpose and agreed comparator.

Discuss legitimacy of comparators and legitimacy of purpose of legis which presumes difference.

How you describe things has a certain importance for the integrity of the process.

Makes us aware that what comparator you use will determine whether there is discrimination and determine the boundaries of that discrimination.

Deep structure of discourse in AB asbestos ruling is more about allowing states regulatory freedom to treat carcinogenic and non-carcinogenic products differently w/o being branded a violator of national treatment.

* + - * 1. Political identity

Method I establishes normative hierarchy where default norm is liberalized trade and for competing norms to prevail, they have to be justified. A question of constitutional identity – the way a society wants to understand its internal hierarchy of values.

Method II and III reverse that – the default value of autonomy of political and moral identity which requires justification only if purposefully abused.

* + - * 1. Consistency

Doesn’t this mean that products where the risks are well-known (affecting consumer tastes, habits, and competitive relationship) will not be caught by GATT III.2 as being like, whereas equally dangerous products where the risks are less well-known will be caught?

Could France tax the asbestos product simply higher w/o being caught since the AB determined that they were not in competition with each other? This would not be a health matter, but could be justified under AB reasons.

* 1. Regulation
     1. Legal Texts
        1. Art III.1 still applies
        2. Art III.4
           1. the products of the territory of any contracting party imported into the territory of any other contracting party 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

“like products”

Art. III (2) separates the products in two categories: the narrow like products and the more broad category of directly competitive or substitutable products.

like products in III (4) should cover all the range of products that is concerned by Arts. III(2) sentences 1 and 2. However far III(2)-2 extends, like products of Art.III (4) will be concerned, it has to be the same as a matter of coherent legal reading.

Four step analysis

First step: look at an origin-neutral regulation producing disparate impact

Second step: try to understand the market; ask who is complaining? Who is the buyer? Who is selling?

Third step: go through method 1

Fourth step: justify under Art. 20 (public health)

* + - 1. Art XX
         1. subject to the requirement that such measures are not applied in a measure that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures...
    1. Asbestos case (Unit VI pp. 52- 99)
       1. France (the EC) appeals despite having won
          1. argues that Art.III(4) was not violated, thus there was no need to justify the measure under Art. XX. AB agrees

EU wanted to defend itself against “name and shame”, argued “it’s a measure of public health”.

* + - * 1. AB methodology

There is an almost explicit rejection of the effect-aims test by the Appellate Body

AB actually applies Method I, BUT when analyzing consumer preferences they include health risks; Panel erred because it failed to incorporate these criteria

* + - 1. In Weiler’s view the lower Panel did the correct analysis by looking at functionality of products – they were substitutable served the same functions; just because one product was carcinogenic doesn’t mean that people wouldn’t have used it – this is why France had to ban it
    1. Korean-Beef case (Unit VI pp. 100-116)
       1. Looking at market place
          1. In Korea, Korean beef is perceived to be better than imported beef; This makes Korean beef more expensive; Creates a temptation to cheat – which is easy because it’s hard to distinguish between different beef; If the public stops believing that Korean beef is better, they would move to foreign beef or Korean beef would have to lower its profit margin
          2. legitimate Gov't interest in protecting a misbegotten public belief?

Gov't’s argument: if the public believes that domestic beef is different for the imported one, it means that the fraud that potentially happens is real (although the foreign beef is actually the same or even better).

Counter: Was the perception generated by the Government itself? Even if it was not generated by the Gov't – products are actually, objectively substitutable, therefore the measure is entrenching the wrong perceptions to the detriment of the free market. We can argue that the Government is not permitted to do so.

* + - * 1. Measure makes it harder for the consumer to try the new product; has to walk to another shop. in a subtle way it is like the “Buy American” campaign.
      1. Legal Analysis:
         1. Is the measure origin neutral? It is not – different regulation for imports. So every difference in treatment should be discriminatory. But: sometimes an unlike measure might mean equal treatment (e.g. vaccine for rabies – not required from animals, imported from the UK, because they do not have this disease there). Conclusion: not an origin neutral case, but you cannot say that every diverse treatment means discrimination.
         2. Here, there is an adverse impact, so measure must be justified

start with offending measure that must be justified (quant restriction, violation of III4, etc.);

a prima facie violation; the way to think about law of prohibition: unless there is a justification, there is a violation

so we go to art XX

Q1: is the justification within a legitimate policy?

Although, in theory, Art XX is a closed list, it is diff to find a policy that won't fit in

tendency is to allow for liberal/permissive/progressive reading of text (ex. expansion of “exhaustible natural resources can also mean “living nat resources”)

Q2: is there a lesser restrictive measure?

Rationale: if there is lesser restrictive measure, and state is insisting on more restrictive, conclusion is that this is actually a disguised restriction or arbitrary discrimination

Note: arbitrary discrimination and disguised restriction are to be read together

this is a sort of “constructive intention” test; we assume intention where there's a LRM; BUT, Weiler does not think we should introduce intention explicitly (it's not in the text, it muddies the water, etc.)

Q3: even if it is less restrictive measure, does is it justified in terms of restriction on trade?

This isn't something Panel is “supposed” to be doing; usually, Panels do not do this explicitly (Except in Korea Beef); so there's a “schizophrenia” bc Panel will repeat mantra that “every state can set own risk level” but will then goes ahead and evaluates risk level

Here, Panel determines whether the risk level is acceptable when compared to how extent it restricts trade

we see that Panels always step beyond two steps and engage in substantive proportionality, but do so only in order to stamp out egregious restrictions, discrimination, etc.

so there is a fairly high level of deference to states

doctrinal rules:

although Panel says they do not do substantive proportional review, the standard is “no egregious restrictions” and “de minimus improvements in risk will be thought of as no improvement”

Courts tends to be more or less respectful of different kinds of interests:

They will be very respectful of prohibitions motivated by cultural values (no gambling, no prostitution that shows genitals etc.), just so long as they're not discriminatory

In contrast, if its for commercial fairness, the court loves labeling.

Health is somewhere in the middle. There is always the question: if most states consider this product is okay for health, why would you be different? On the other hand, they are open to arguments that we are different for X, Y and Z reason.

1. General Exceptions
   1. Background
      1. interpretation
         1. must read exceptions a-j in light of the Chapeau, but also in relation to modern technology/conditions
         2. in the chapeau, a distinction is made between “arbitrary” and “unjustified” and “disguised restriction to trade”
            1. arbitrary/unjustified: if we want to really fixate on the text, we can try to find a differentiation between “unjustified” and “arbitrary” but not much turns on this distinction
            2. disguised restriction on trade: Weiler thinks this is really a way that you might do LRM analysis; the reason drafters used arbitrary and unjustified as well as disguised is bc a measure might not explicitly make a difference between domestic and imported product but might do so in effect (so it's nondiscriminatory on its face but do so in operation)
         3. XX(a) and (b) differ from (f) and (g) textually; the former have word “necessary”
            1. if you focus on this word, there is a strong case that, for (a) and (b), you have a higher burden; measure must be “necessary”
            2. there's no way you can not have a least restrictive measure for any one of these things; it cannot be the case that a state can enact a wildly trade-restrictive measure under (f) or (g)
            3. here, LRM is brought in using the chapeau; so look at the chapeau which bans “disguised restriction to trade” and bc there is a LRM, measure x is a “disguised restriction”
            4. But, this creates a doctrinal problem: why did they use different words in XX(a) and (b) than in (f) and (g)? Weiler doesn't seem to think there's a “real” answer...
      2. XX drafted in 1947, and list of exceptions has not changed; creates problems
         1. will be outdated, because public policy doesn't mean the same thing now as in 1947, so there will be pressure to update it through judicial interpretation, in order to update it for current sensibilities.
         2. There might be a lack of consistency between earlier and later interpretation
         3. Danger is that under the pressure of dynamic interpretation, the exceptions eviscerate the rules; the exceptions are broadened too much.
         4. Weiler thinks there is a way of circumventing the issue: by focusing on the chapeau.
            1. Really what we are trying to do is to stop an abuse of the general exceptions clause.
            2. An abuse is to pretend you are doing it for public policy reasons, but in fact you are doing it for protectionist reasons.
      3. The strategy that has developed: what they are mostly concerned about is stopping abuses. As long as they are convinced that this isn‟t a protectionist measure, then they will permit the exception
         1. If there is a legitimate public policy, we shouldn't be concerned
         2. a legit public policy is a public policy with non-protectionist intent
         3. As long as we are strict throughout the decades in trying to stiff out abuse of Art. XX, we can be more relaxed when it comes to provision, and achieve the best of both worlds.
      4. Panels and AB follow the 2(3) step process from Korean-Bee
   2. Thai Cigarettes
      1. Facts
         1. Thailand prohibits the import of foreign cigarettes; cites health concerns
         2. violates art XI (outright prohibition of imports), so no need to show discrimination
         3. US brings case under GATT
      2. Panel Ruling
         1. claims that you can achieve same objective using Art III consistent measure, such as ban on advertising or increase in price
         2. this is problematic; GATT does not tell country what level of risk to set, only that the cannot enforce that level in a discriminatory manner and must do so in the least trade restrictive way
   3. US Gasoline
      1. Facts
         1. 1990 amendment to the Clean Air Act results in the Gasoline Rule on the composition and emissions effects of gas
         2. EPA regulation provided for different sets of baseline standards, depending, partially, on where the gas was refined
      2. AB ruling (rules against US)
         1. Chapeau covers how measure is applied, in addition to measure itself; so chapeau is used for prevention of abuse of exceptions in XX
         2. US had more than one alternative course of action; failure to explore alternative means and disregard of costs imposed on foreign refiners constituted unjustifiable discrimination
      3. critique
         1. words actually used in XX (“necessary” vs. “relating to”) imply that members did not intend to require same degree of relationship between the measure and the policy sought to be promoted; AB runs the two together to some degree
         2. AB uses chapeau as a sort of good faith test
            1. clear rom chapeau that it's supposed to be an independent legal test
            2. BUT AB imports the LRM, which seems like it could be more suitably used in “necessary” test
   4. Brazil Tyres case (Unit VII pp. 58-168)
      1. Facts
         1. Brazil bans the import of retreaded tyres. Under the measure, retreaded tyres can be made within Brazil, but not imported. Clear inconsistency with Art XI. Necessary to attempt to justify the measure under Art XX.

Brazil argues health risk of retreaded tyres: Retreaded tyres have a shorter lifespan than new tyres. Discarded tyres pose a serious health risk as a breeding ground for mosquitoes and noxious fumes through burning. Retreaded tyres cannot be retreaded. Even if hypothetically a retreaded tyre had the same life as a new tyre, once it is finished, it must be thrown away.

* + - 1. the Market: In Europe, people don‟t like to buy retreads; for this reason they‟re fobbed off on the developing world. For Brazil, there‟s an economy of scale where it comes to developing retreads. As such, the domestic industry has an interest in preventing the import of cheap, excellent retreads.
    1. Legal Analysis
       1. measure is clearly discriminatory, so need to find justification
          1. Is this is a health measure or a protectionist measure

Two groups are benefited by the measure: Brazilian retreaders and new tyre manufactures. If you cannot import retreads, it pushes people to buy domestic retreaded tyres (that are cheaper)

Brazil still allows imports of used tyres. This is probative as used tyres can be retreaded domestically, but give no health benefit over and above imported retreaded tyres (same life-span). Also, not every used tyre gets retreaded. Whiff of protectionism.

BUT, note that the original measure banned used tyre imports. Brazil was stopped from preventing used tyre imports by injunctions in domestic courts

* + - * 1. Brazil‟s declared standard of risk: to reduce tyre waste to the maximum possible. The importation of used tyres seems to run against this. Does not result in the least amount of tyres in the countryside.
      1. Alternative measures
         1. If the alternate measure is not appreciably more expensive (and gives the same results), suggests protectionism and abuse of Article XX.
         2. If it is appreciably more expensive, there is no abuse of article XX. The reason for not applying the mechanism isn‟t protectionism; it‟s the very fact that the alternate measure is appreciably more expensive. To force a country to adopt a more expensive measure would be to interfere with the allocation of resources in that country.
         3. This approach allows countries to determine their policies so long as they are acting in good faith. Policy of deference. Consider as a counter-example example Japan‟s failure to adopt an ad valorem tax in Japan – Alcoholic Beverages – suggested bad faith.
      2. Quantification
         1. an unresolved issue; the ruling of the AB resolves the issue doctrinally, but not conceptually
         2. EU: we have to try and measure the impact this ban will have on the amount of cast-off tires on Brazil
         3. Panel: no, Brazil can do qualitative analysis (ex. “surely, if you ban importation of retreaded tires, there will be fewer cast-off tires because...”)
         4. under qualitative, we don't say exactly how much this improves the risk; this can be defended on principle; “we're going for the maximum degree possible, whatever that may be; we're not going to accept 10%...” then say “provided that te measure we're adopting is not de minumus/negligible, then what we're doing is kosher.”
         5. Problems with qualitative:

we need at least some quantification to make sure that measure isn't negligible

we need quantification in order to determine whether there are LRMs which achieve the same result; for an alternative to be credible, it has to achieve the same result, but we can't know if it will unless we know what the result actually is; no “yardstick”

1. Quantitative Restrictions and Measures Equivalent to Quantitative Restrictions
   1. Background
      1. Legal text
         1. prohibits any restrictions (other than duties, taxes, or other charges) made effective through quotas, import or export licenses, or other measures on imports or exports
         2. the provisions or para 1 do not extend to the following
            1. export prohibitions/restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party
            2. import/export restrictions necessary to the application of standards or regulations
            3. import restrictions on agricultural or fisheries products for the enforcement of governmental measures:

to restrict quantities of the like domestic product, or its direct substitute , permitted to be marketed or produced, or

to remove a temporary surplus of the like domestic product, or its direct substitute, by making it available to certain domestic consumers free of charge or at prices below market level, or

to restrict the quantities permitted to be produced of any animal product that is directly dependent, wholly or mainly, on the imported commodity (necessary to the domestic product)

* + - 1. Article IX is not about discrimination
         1. as opposed to Art I, III; although it is a border measure and only effects imports, a quota is prohibited even if there is no domestic product
    1. this is one area where there's a HUGE difference between law of the GATT and European Common Mkt.
       1. Euro Ct. of Justice interpreted Common Mkt anti QR provision to mean “explicit quant restriction and any internal restriction which restricted trade”
          1. so, they interpreted quota on cars and internal requirements which had effect of “zero-quota on x” as both falling under Art XI
          2. take a quota on the number of cars that may be imported versus a requirement that all cars have side airbags. Could interpret the later as though it were a “quota of zero on cars without side airbags.” So, any regulation can be attacked under art XI equivalent bc any regulation, to some extent, has a restrictive effect on trade
       2. Ad Note to Art III specifically states that in the GATT, the interpretation used by the EU cannot be applied
       3. legal consequences between the two interpretations
          1. under art III, you must show discrimination; so, under EU, for the side-airbag requirement case, you do not need to show discrimination, but under GATT this would fall under Art III and must only be justified if it is shown to be discriminatory
          2. potential for challenges in the EU is thus almost infinite; almost any regulation can lead to challenges; this is not the case under the GATT

Under GATS, there is the equivalent of Art III and XI, BUT, there's no Ad Note III; so, theres the issue a contrari

could argue that for GATS, because there is no Ad Note III, the reasoning should track the EU method

* + 1. What argues in favor of EU position vs. GATT Ad Note III position
       1. first argument
          1. one implicit purpose of the system is to expose consumers in one country to products from another; by doing so, we create wealth, etc.; we want “trade comity”

if I allow your product to come in subject to some conditions (labels, not sold to minors, etc.); but a ban is an extreme version of this- it's preventing the importation of a product that trades freely in an other country; this requires a justification both to consumers and to the exporting country; we have to say why this product which considered safe in an other country is not permitted

Art XX allows for this explanation

* + - 1. second argument
         1. one goal of WTO is to make barriers more transparent; there's a lot of regulation which is well intentioned, but excessive;
         2. often, the exclusion of an imported product is due to excessive regulation, BUT, we won't get to examine whether the regulation, itself, is excessive if everything turns on discrimination; we will never get to examine irrational but non-discriminatory measures; we can think of Art XX as checking the rationality of a regulation
    1. most cases all under one of two cases
       1. either the exporting state realizes that the regulation is rational and will be justified under art XX, or the regulation is patently irrational and will be altered by the importer voluntarily after a consultation
       2. so no avalanche of cases
    2. so why was Ad Note III added, if it's such bad law?
       1. When GATT was adopted, there was “protocol of provisional application” which grandfathered all preexisting quotas; this meant that Art XI meant all new quotas were banned
       2. so drafters were worried that too much would be grandfathered in; Ad Note III prevents openly discriminatory regulations from being grandfathered in as they would have been if the EU method plus the Protocol of Provisional App were used

1. Technical Barriers to Trade (TBT)
   1. Background
      1. shift in focus of trade regulation
         1. from barriers at the border to those within borders
         2. due to growth of health, safety, consumer protection, etc. regulations over past 30 yrs
         3. TBT is not about discrimination; aims to prohibit unnecessary regulations
            1. “Unnecessary” obstacles: even if they are not discriminatory they can create unnecessary obstacles to trade.
            2. Differences between 2.1 and 2.2:

2.1: is about discrimination and national treatment.

2.2: with the view to or with the effect of: is not about discrimination. They have agreed that they will subject to scrutiny their regulation even if it is not discriminatory, it is closer to step 3. Most important word: inter alia: among others, is not an exhaustive list.

* + 1. problems
       1. pro-regulatory interests say that lax health, safety regulation in countries of origin constitute implicit/unfair subsidy to producers which should be neutralized by countervailing duties or regulatory harmonization-up
          1. BUT, differing standards could be a comparative advantage (willingness to accept poor environmental quality as an advantage)
          2. comparative advantage is both exogenously and endogenously created, shaped by government policies
       2. race to the bottom
          1. lax standards in other countries will lead to relaxation of standards in others to maintain competition
    2. Relation between TBT and GATT
       1. GATT measures that bear on TBT-related measures
          1. Art III.4: requirement of national treatment for like products
          2. Art XI QRs
          3. Art. XX exceptions
       2. If it is a TBT measure it is assessed in relation to TBT
       3. if it is TBT compliant, is automatically Article III.4 compliant, BUT, if it is article III.4 is not necessarily TBT compliant
  1. TBT agreement
     1. preamble of TBT
        1. purpose: seeks to encourage the development of international standards and conformity assessment systems w/the caveat that they do not create unnecessary obstacles to international trade
           1. developing countries: recognizes that int'l standardization can facilitate the transfer of tech from developed to developing countries and that the former should assist the latter in their endeavors to develop acceptable TBT measures
     2. Article 2.9: Duty to notify
     3. Article 2.7: Mutual recognition of other countries’ regulations
        1. Equivalence is the logical consequence of the least restrictive measure doctrine. This seems to be a legal requirement – a logical deduction of least restrictive measure.
        2. What 2.7 does is that you have to give positive consideration, but you are not obliged to consider it.
        3. You could say that this is inconsistent with general rule of justification.
        4. Generally, the only exception for this is when the administrative costs are very high – e.g. the rabies vaccination case in the UK.
        5. This seems to be regressive...
     4. Article 2.8: Write regulations in terms of performance rather than design or description
     5. Article 2.11: Prompt publication of regulations
     6. Article 6: Mutual recognition of conformity requirements. Make it easier for state to prove that state’s requirements conform with importing state’s requirements.
     7. Article 2.4: Members shall use international standards, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems. Legal consequences:
        1. Do national regulation based on international standards.
           1. Appellate body says that based on means it cannot contradict the international standard.
        2. If it is based on international standard, then there is a legal presumption created that your measure is ok.
           1. This shifts the burden of proof.
           2. There would then be a high onus of proof on the complainant.
           3. Gives legal teeth and great incentive to adopt standard.
     8. Article 2.6: Members are required to participate in the process of setting international standards.
     9. Article 2.1 can be used instead of 3.4 of GATT. Reiterates commitment to MFN and nat’l treatment.
     10. Article 2.2: Not about discrimination, more about lessening unnecessary obstacles to trade.
         1. Risks non-fulfillment would make
            1. What does it mean, taking into account the risks non-fulfillment would make?
            2. Is it more about assessing what level of risk a standard achieves rather than the actual technical regulations?
            3. Think about what level of compliance you really intend to achieve. If the risk of noncompliance is not high (e.g. doesn’t cause death, only small headache or nausea), then possibly labeling could be enough (labeling is never 100% b/c some people can’t read).
         2. Is this in conflict with 2.7?
            1. Breaks down the wall – eliminates unnecessary obstacles. A generation of policy makers may take 2.2 into account prior to enacting regulations. This is more about the change in process rather than a sharp legal tooth.
            2. There is a sub-community of lawyers who have to defend trade cases and those lawyers may talk more to regulators about if they are sure they want to defend the regulation – do we need this level of regulation? Is it reasonable?
         3. List of permissible legislative objectives
            1. Includes list of open-ended permissible legitimate objectives that include protection of human health or safety, animal or plant life or health, or the environment, security of nation.
         4. Relevant elements of consideration
            1. Available scientific and technical information
            2. Relevant processing technology or intend end-uses of products
            3. Significant departure from Tuna-Dolphin where processing/production methods held not to be relevant to product differentiation
  2. Principles
     1. Avoidance of unnecessary obstacles to trade – TBTs generally result from the preparation, adoption and application of different technical regulations and conformity assessment procedures; states are obligated to accord national treatment and MFN in their application (non-discrimination)
        1. The TBT Agreement takes into account the existence of legitimate divergences of taste, income, geographical and other factors b/t countries
        2. Preamble accords a high degree of flexibility in preparation, adoption and application of national technical regulations by including the governmental objectives of the protection of human, animal and plant life or health; protection of the environment; prevention of deceptive practices; quality, technical harmonization, and trade facilitation; also includes national security requirements
        3. Article 2.2 – regulatory flexibility is limited; technical regulations must not be prepared, adopted or applied w/a view to, or w/the effect of, creating unnecessary obstacles to trade; unnecessary obstacles to trade can result when (i) a regulation is more restrictive than necessary to achieve a given policy objective, or (ii) when it does not fulfill a legitimate objective
        4. Article 2.3 – TBT Agreement suggests that states only apply regulations and standards that are temporal in nature; the Agreement recognizes that changed circumstances should be probative
     2. Non-discrimination and National Treatment – includes the GATT's MFN and national treatment obligations; Article 2.1 states – “in respect of their technical regulations, products imported from the territory of any Member be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country”
        1. TBT is not about protectionism – it deals w/non-discrimination in the context of legitimate policy objectives in Article 2.1, but shifts the paradigm to the international trading regime in Article 2.2
     3. Harmonization – Preamble and Article 2.4 – encourages harmonization by empowering standardization bodies and requiring that Members base their regulations on their standards; basing a technical regulation or standard on an international standard creates a legal presumption that the measure is acceptable, as long as there is a legitimate objective (Article 2.5)
        1. Harmonization may increase consumer welfare by increasing competition; though, it presupposes that harmonization does not stifle innovation; must consider the impact on innovation
        2. For developing economies, TBT eases impact of certain provisions whose full application would not be compatible w/particular development, financial and trade needs; in addition, there is a push to preserve indigenous technologies and production methods/processes – Article 12.4
     4. Equivalence – Article 2.7 – complementary approach to technical harmonization; recognizes that one state’s technical regulations may fulfill the same policy objectives even if through different means; this acts as a means of avoiding outright harmonization and possible chilling effects on innovation
        1. Equivalence is problematic b/c it should be implicit in the doctrine of “least restrictive measure”; the provision can be regressive by allowing a party to give only cursory review of the exporter’s standard regardless of whether or not the administrative cost of measuring that standard is prohibitive (even if in the same ballpark, the importer must only give satisfactory review)
        2. Article 2.8 – technical regulations should be drafted in terms of a product’s process and production methods rather than its characteristics per se (language used in a technical regulation can be specific or more general, the latter will facilitate the adoption of equivalent standards)
     5. Mutual recognition – Article 6 – one of the main difficulties exporters face is the cost of multiple testing or certification of products; these costs would be drastically reduced if a product could be tested once and be accepted in all markets; countries would have to agree to accept the results of one another’s conformity assessment procedures, regardless of differences in procedures
        1. Article 6.1 – recognizes that prior consultations, and a high degree of confidence in certification bodies, may be necessary to reach a mutually satisfactory understanding regarding the competence of the conformity assessment bodies
        2. Article 6.3 – strongly encourages WTO Members to enter into negotiations for mutual acceptance of conformity assessment results
     6. Transparency – transparency is ensured through the TBT Committee; allows consultation on matters relating to the operation of the TBT or a Member’s stated objectives; Members are required to notify when two conditions apply:
        1. Articles 2.9 – technical regulation – a) whenever a relevant international standard or recommendation does not exist, or the technical content of a proposed or adopted technical regulation or procedure is not in accordance w/the technical content of relevant international standards or guides of recommendations; and b) if the technical regulation may have a significant effect on the trade of other Members
        2. Article 5.6 – conformity assessment procedure – a) whenever a relevant guide or recommendation issued by an international standardizing body does not exist, or the technical content of a proposed conformity assessment procedure is not in accordance w/relevant guides and recommendations issued by an international standardizing body; and b) if the conformity assessment procedure may have a significant effect on the trade of other Members
     7. Technical assistance – Article 11 – any Member, especially developing country, can request technical assistance from other Members or the WTO Secretariat, on terms and conditions to be agreed by the Members concerned; can include, among others, preparation of technical regulations, establishment of national standardizing bodies, participation in international standardizing bodies and the steps to be taken to gain access to regional international conformity assessment systems
  3. Asbestos case
     1. Issue: Applicability of the TBT Agreement:
        1. Annex 1.1 – “technical regulation”: document which lays down product characteristics or the related processes and production methods, including the applicable administrative provisions, w/which compliance is mandatory; may also include or deal exclusively w/terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method
     2. Report of the Appellate Body
        1. Issue: whether the Panel erred in its interpretation of the term “technical regulation” in Annex 1.1 of the TBT Agreement in finding that “the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products” does not constitute a “technical regulation”
        2. Panel should have examined the Decree as a single, unified measure; consideration of the prohibitions should not have been carried out separately from the exceptions; furthermore, the Panel erred in its interpretation of a “technical regulation” to exclude a general prohibition
        3. Analysis: reverses the two-stage interpretive approach; proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole; the scope and generality of the prohibitions can only be understood in light of the exceptions, albeit for a limited period
           1. Technical regulation – a “document” must “lay down” – set forth, stipulate or provide – “product characteristics” (i.e., terminology, symbols, packaging, marking or labeling requirements)
           2. Compliance w/the product characteristics laid down in the document must be mandatory
           3. Product characteristics may be prescribed or imposed in either a positive or a negative form; the legal result is the same: the document lays down certain binding characteristics for products, in one case affirmatively, and in the other by negative implication
           4. Must be applicable to an identifiable product, or group of products; otherwise, enforcement would practicably be impossible; this does not mean that it must apply to named, identified or specified products; nothing in the text of the Agreement suggests that products need be expressly identified
     3. AB found that the measure is a document which “lays down product characteristics… including the applicable administrative provisions, w/which compliance is mandatory”
        1. However, the AB emphasized that not all internal measures covered by GATT Article III:4 are, necessarily, “technical regulations” under the TBT Agreement
        2. TBT Agreement imposes obligations that seem to be different from, and additional to, the obligations imposed under the GATT 1994; cannot determine Canada’s TBT claims
  4. EC Sardines case (Unit VIII pp. 50-84)
     1. Facts:
        1. Directive by EC on labeling of sardines products
        2. if Peru cannot label product as sardines, it will be disadvantaged in the marketplace
        3. EC is arguing regulation is for consumer protection (think Korea – Beef)
     2. Legal analysis
        1. Scheme is origin neutral; it could have disparate impact, but there isn't enough info on the market
        2. Which agreement?
           1. Could be TBT; directive is a regulation
           2. BUT, it could probably be brought under Art III.4
     3. labeling v. Naming
        1. Labeling: emphasis on consumer protection
        2. Naming: emphasis on cultural identity/integrity of language
        3. Better chance for succeeding based on cultural identity argument – if Panel thinks the regulation is not protectionist, than more deference to the state
     4. Art 2.4, TBT and “based on”
        1. When reading Art 2.4, domestic regulation should be based on international standard
        2. There are two fundamentally different ways of understanding “based on”
           1. Procedure: When drafting domestic measure, starting point is international standard; What you start with matters, not where you end up
        3. Substantive/Material: There needs to be only some degree of correspondence with the international standard, meaning, the regulation does not have to conform, but it cannot contradict the international standard (in between); Where you end up matters, not where you started
        4. Procedure better addresses mischief: Starting point is international standard; It forces a state to consider why it is deviating from the international standard and increases transparency

1. Sanitary and Phytosanitary Measures (SPS)
   1. SPS Agreement Preamble
      1. Purpose – reaffirms that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade
         1. SPS regime is intended to improve the human health, animal health and phytosanitary situation in all Members by establishing a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of SPS measures in order to minimize their negative effects on trade
         2. International standards, guidelines and recommendations can further harmonize SPS measures b/t Members, w/o requiring Members to change their appropriate level of protection of human, animal or plant life or health, by utilizing the following established standardizing bodies:
            1. The Codex Alimentarius Commission, the International Office of Epizootics, and the relevant organizations operating w/in the framework of the International Plant Protection Convention
         3. The SPS is meant to elaborate on the rules for the application of the provisions of GATT 1994 which relate to the use of SPS measures, in particular the provisions of Article XX(b)
   2. General Description
      1. SPS Agreement allows countries to set their own standards, based on science, and to apply those standards only to the extent necessary to protect human, animal or plant life or health and should not arbitrarily or unjustifiably discriminate b/t countries where identical or similar conditions prevail
      2. Like the TBT Agreement, the discipline is not based on discrimination, the central concept of GATT; this means that the complaining party does not have to do an analysis of “like” product or that there is a competitive advantage given to domestic products or that there was a protectionist intent or effect
      3. SPS is similar to and elaborates on GATT Article XX – Annex A gives definitions for SPS measures to include those applied…
         1. To protect human or animal life from risks arising from additives, contaminants, toxins or disease-causing organisms in their food
         2. To protect human life from plant- or animal-carried diseases
         3. To protect animal or plant life from pests, diseases, or disease-causing organisms;
         4. To prevent or limit other damage to a country from the entry, establishment or spread of pests
         5. For the purpose of these definitions, “animal” includes fish and wild fauna; “plant” includes forests and wild flora; “pests” include weeds; and “contaminants” include pesticide and veterinary drug residues and extraneous matter
      4. Article 2.2 – Members shall ensure that any SPS measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained w/o sufficient scientific evidence, except as provided for in Article 5.7 (precautionary principle)
         1. Problems – there may be different viewpoints in scientific opinion, the level of sufficient evidence, the burden of proof (complaining party has to show that the measure is not bolstered by sufficient evidence, but this is not a heavy burden as we see in Hormones)
      5. Article 5.1 – requires that states take a risk assessment, but it does not require that the assessment is taken before a measure is enacted or the assessment is taken by the state itself; this can be considered a procedural requirement or a substantive requirement (see the Panel’s analysis); the assessment does not need to be limited to health risks
      6. Article 5.5 – w/the objective of achieving consistency in the application of the concept of appropriate level of SPS protection against risks to human, animal or plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on trade
         1. Appropriate level of SPS protection – refers to the level of protection deemed appropriate by the Member establishing a SPS measure to protect human, animal or plant life or health w/in its territory; note: many Members otherwise refer to this concept as the “acceptable level of risk”
            1. There must be a level of consistency b/t the assessment and the actual standards applied; AB is more circumspect of this requirement, noting that there may be exceptions
         2. Risk assessment vs. risk management – former refers to scientific evidence of risks; the latter refers to the policy decision to accept a certain level of risk; the Panel accepts that there can be different results taken in considering these two functions of policy decision; the AB disputes the textual basis of distinguishing a risk management stage under the SPS Agreement
            1. Is it realistic to divorce risk management from risk assessment? – the AB later determines that it is necessary to determine risk assessment outside the laboratory, is this contradictory?
            2. Problem – risk assessment is costly (must have scientists and tools available to do the assessment)
      7. Article 5.7 – incorporates the precautionary principle
         1. In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt SPS measures on the basis of available pertinent information; in such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the SPS measure accordingly w/in a reasonable period of time
         2. Pertinent information – less stringent than the 3.2 and 3.3 requirements; sort of a provisional precautionary principle
      8. Article 3 – requirement that harmonization is an end-goal to international standards; 3.1 – suggests that states should base their SPS measures on international standards; 3.2 – gives measures that conform w/international standards a presumption of consistency w/the SPS Agreement; 3.3 – measures that are more stringent than international measures must be based on scientific justification or be in accordance w/Article 5 (risk assessment)
         1. See AB Report for the interpretation of “based on” in Articles 3.1 and 3.3 ◊ 3.3 is not an exception to the general rule of 3.1 and 3.2
      9. Article 4.1 – Equivalence – Members shall accept the SPS measures of other Members as equivalent, even if these differ, if the exporter objectively demonstrates to the importer that its measures achieve the importer’s appropriate level of SPS protection ◊ “proceduralization” – facilitates the process of harmonization by institutionalizing the discipline of equivalence
         1. In the TBT, equivalence is not a requirement – this is damaging to the doctrinal point that equivalence is written in as an aspiration rather than a requirement; the TBT can get around this by analogizing to equivalence in the SPS Agreement and GATT Article III
      10. Rationale – SPS Agreement allows countries to use different standards and different methods of inspecting products; under the SPS, the pressure to conform to international standards is stronger; even in the absence of international standards, there must be a scientific rationale behind the national standard (not only must a state show that there is a legitimate purpose for the measure, it must also show a scientific basis for taking the action)
   3. How do you know if a measure is SPS or TBT?
      1. The scope of the two agreements are different; the TBT Agreement covers all technical regulations, voluntary standards and the procedures to ensure that these are met, except when these are sanitary or phytosanitary measures as defined by the SPS Agreement; it is thus the type of measure which determines whether it is covered by the TBT Agreement, but the purpose of the measure which is relevant in determining whether a measure is subject to the SPS Agreement
      2. Measures for environmental protection (other than as defined above), to protect consumer interests, or for the welfare of animals are not covered by the SPS Agreement; these concerns are addressed by other WTO agreements (i.e., the TBT Agreement or Article XX of GATT 1994)
   4. North/South Dynamic:
      1. Can only maintain an SPS measure if there is 1) scientific evidence that backs up a 2) risk assessment
         1. Developed countries dominate the setting of standards and have more means to challenge a standard if they want “out” ◊ AB approach in Hormones was more amenable to the Global South in that it invites developing countries to use assessment done by outside sources and has a less stringent requirement for compliance ◊ read Japan – Apples for an analysis of this point
         2. Article 5.5 is intended to sniff out protectionism, but consistency may be difficult to achieve, especially since regulations may be passed in segments of an industry before another segment (political hurdles to passing regulation); strict consistency may force a race to the bottom; consistency may be good for developing countries in that they will have a lower threshold to conquer
      2. Equivalence
         1. Positives for the Global South – equivalence, in a world of poor access to developed economies, allows developing countries to use one standard/measure that can be exported to the various markets in the world; this lowers the cost of production and lowers “sovereignty costs” (the standard/measure of a particular country may be more cost-prohibitive than another [i.e., Turtle-Shrimp])
            1. W/o equivalence, developing countries would lose small markets b/c there would be a lower incentive to go for those markets (i.e., going after the U.S. and EC might force a country to not sell to Chile b/c of the artificially increased costs)
            2. May also increase costs to the exporter’s domestic consumers through increase cost to domestic producer; may increase cost to consumers of small markets b/c the producer that fills the gap will be more expensive by definition; this is especially so for SPS b/c the economies of the Global South are predominantly in agriculture
         2. Downside for the Global South – it is still quite difficult to prove equivalence; very often the situation will be that the standards in the Global North are more stringent; there is no cost-sharing system that would allow developing countries to adequately defend or challenge standards/measures
            1. Market effect – equivalence might not have an affect on the market b/c there is no certification process; in the EC, they decided to push for harmonizing standards, which are written in a way to reflect equivalence; these standards have to be certified (along w/the standard setting bodies and laboratories) b/c countries distrust others to be forthright

Such a certification procedure would be difficult to implement globally

Who dominates the standard setting bodies? – industry may force through standards that are beneficial to business; in Europe, industry has not been as capable of “capturing” these bodies

* + - * 1. International standards usually reflect developed countries’ experiences; when standard-setting laboratories (who actually perform the scientific analysis) put together their recommendations, it reflects Northern processes; the standard setting bodies (who are the governmental level and may include NGOs) may give some influence to developing economies, but this may not reflect the interests of the Global South (though there are still benefits to there being a single standard)
    1. Cultural genocide – standards set by Northern consumers (the end buyers) may create a global harmonization but at the expense of cultural diversity…
  1. Hormone Beef Case
     1. Background
        1. The EC was concerned w/the possibility of that the use of growth hormones in American and Canadian cattle would have carcinogenic effects; the hormones consisted of natural and synthetic hormones; for one hormone in particular (MGA) there was insufficient scientific information regarding its possible links to health risks (it was a new synthetic hormone)
     2. AB Report
        1. Issue (a) – Allocation of the burden of proof under the SPS Agreement – reverses the Panel
           1. Decision not to conform to a particular measure w/an international standard does not authorize imposition of a generalized burden of proof, which may, more often than not, amount to a penalty
           2. Articles 3.1 and 3.3 do not describe a “general rule–exception” relationship; they are qualitatively different than GATT Articles I, III and XX
           3. General rule – complaining party must establish a prima facie case of inconsistency w/a provision of the SPS before the burden of showing consistency w/that provision shifts to the defending party
        2. The relevance of the Precautionary Principle in the Interpretation of the SPS
           1. Panel did not make any definitive finding w/regard to the status of the precautionary principle in international law; at least outside the field of international environmental law, the precautionary principle still awaits authoritative formulation; no need to assume that Art. 5.7 exhausts the relevance of a precautionary principle; agrees w/the Panel that the precautionary principle does not override the provisions of Articles 5.1 and 5.2
        3. The interpretation of Articles 3.1 and 3.3 of the SPS Agreement
           1. The meaning of “based on” as used in Article 3.1 of the SPS Agreement:

Disagrees w/the Panel that “based on” is the same as “conform to” – a measure that conforms to a standard is based on that standard; but a measure based on the same standard might not conform to that standard; to read Art. 3.1 as requiring Members to harmonize their SPS measures by conforming those measures w/international standards is, in effect, to vest such international standards (which may be recommendatory in form and nature) w/obligatory force and effect

This improper construction leads to the conclusion that the rest of the analysis is flawed

* + - * 1. Relationship b/t Articles 3.1, 3.2 and 3.3 of the SPS Agreement:

Disagrees w/the Panel’s interpretation of Arts. 3.1 and 3.2 as a “general rule” and Art. 3.3 as the “exception”; Art. 3.1 allows Members to adopt measures based on an existing standard but w/o a presumption of consistency; Art. 3.2 allows Members to adopt measures that conform to an existing standard and has a presumption of consistency; Art. 3.3 allows Members to adopt measures that exceed a level of protection implicit in and not based on the existing standard

* + - * 1. Requirements of Article 3.3 of the SPS Agreement:

EC argues that its SPS measures are covered by the first of the two situations covered by Art. 3.3 (scientific justification); accordingly, the requirement of a risk assessment under Art. 5.1 does not apply; it is emphasized that the EC measures have satisfied the Art. 2.2 requirements

Finds that Art. 3.3, second sentence, requires that all measures which result in a higher level of protection be not inconsistent w/any other provision of the SPS, which textually includes Art. 5; moreover, the footnote in Art. 3.3 indicates that the risk assessment required by Art. 5.1 and defined in Annex A.4 would apply

AB is aware that this finding tends to suggest that the distinction made in Article 3.3 b/t two situations may have very limited effects and may, to that extent, be more apparent than real

* + - 1. Articles 5.1 and 5.2 of the SPS Agreement: basing SPS measures on a risk assessment
         1. Preliminary issue: Art. 2.2 informs Art. 5.1 – the elements that define the basic obligation set out in Art. 2.2 impart meaning to Art. 5.1; the Panel’s distinction b/t risk assessment (scientific examination) and risk management (policy exercise) has no textual basis

Annex A.4 – Treaty definition of risk assessment: the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs

* + - * 1. Procedural requirement – “based on” does not require a procedural minimum of “taking into account”; instead, an observable, objective situation should persist b/t the SPS measure and a risk assessment; an SPS measures can be based on a risk assessment carried out by a third party (provides a way for developing countries to have access to adequate risk assessment)

AB is suggesting that there should not be a subjective assessment done by a defending party; on the contrary, there should be a rational relationship (objective) b/t the measure taken and the risk assessment ◊ this is folded into the substantive requirement

* + - * 1. Substantive requirement – there should be a rational relationship b/t the measure and the risk assessment; Member-states can base their risk assessment on divergent views (this is problematic since there is no way, currently, to determine if a scientific standard is real scientific evidence)

Determined that the EC failed to provide an assessment of the potential adverse effects related to non-compliance w/“good practice” in administering hormones and problems associated w/the use of such hormones (real world risks can be used as well)

* + - 1. Article 5.5 of the SPS Agreement: Consistency of levels of protection and resulting discrimination or disguised restriction on international trade
         1. There are three elements to Article 5.5, which are cumulative in nature

First – adoption of different appropriate levels of sanitary protection in different situations

Second – the distinction is “arbitrary or unjustifiable”

Third – the distinction results in “discrimination or a disguised restriction on international trade”

* + - * 1. First Test – disagrees w/the Panel's conclusions that differences in levels of protection in respect of added hormones in treated meat and in respect of naturally-occurring hormones in food is arbitrary and unjustifiable; to the contrary, the AB considers that there is a fundamental distinction b/t added hormones (natural or synthetic) and naturally-occurring hormones in meat and other foods
        2. Second Test – disagrees w/the Panel in that the second requirement (“arbitrary or unjustifiable”) should be read together w/the third requirement (“discrimination or a disguised restriction on international trade”); SPS Art. 5.5 should not be read as is the chapeau of GATT Article XX (see Turtle-Shrimp and Gasoline); Art. 5.5; GATT Art. XX

A parallel cannot be drawn b/t Japan – Alcoholic Beverage to Art. 5.5 (an inference drawn from the sheer size of a tax differential in GATT III:2, second sentence, cannot be analogized to an arbitrary or unjustifiable difference in levels of protection against risks resulting in discrimination or a disguised restriction on international trade); the degree of difference in the levels of protection is only one factor which may cumulatively lead to the conclusion that discrimination or a disguised restriction on international trade in fact results from the application of a measure

* + - * 1. Third Test – disagrees w/the Panel's finding that the “arbitrary or unjustifiable” difference in the EC levels of protection in respect of the hormones at issue, on the one hand, and in respect of hormones used in pork, on the other hand, “result in discrimination or a disguised restriction on international trade”; reverses the conclusion that the EC acted inconsistently w/Art. 5.5
  1. Japan – Apples
     1. Background
        1. U.S. complained of Japan’s maintenance of quarantine restrictions on apples, which was said to be necessary to protect against introduction of fire blight; the complaint included:
        2. The prohibition of imported apples from orchards in which any fire blight was detected
        3. The requirement that export orchards be inspected three times yearly for the presence of fire blight
        4. The disqualification of any orchard from exporting to Japan should fire blight be detected w/in a 500 meter buffer zone surrounding such orchard
     2. AB Report
        1. Issues:
           1. Whether the Panel erred in finding that Japan’s SPS measure is “maintained w/o sufficient scientific evidence” and is therefore inconsistent w/Japan’s obligations under Article 2.2 of the SPS
           2. Whether the Panel erred in finding that Japan’s SPS measure is not a provisional measure under Article 5.7 b/c the measure was not imposed in respect of a situation where “relevant scientific evidence is insufficient” (interpretation of the applicability of Art. 5.7 was too narrow and too rigid)
           3. Whether the Panel erred in finding that Japan’s SPS measure was not based on a risk assessment, as defined in Annex A and as required by Article 5.1
     3. Article 2.2 of the SPS Agreement
        1. Burden of proof – it is a well settled principle that the complaining party must “establish a prima facie case of inconsistency w/a particular provision of the SPS; this does not imply that the complaining party is responsible for providing proof of all facts raised in relation to the issue of determining whether a measure is consistent w/a given provision of a covered agreement
        2. Upheld the conclusion that Japan’s measure was maintained “w/o sufficient scientific evidence” w/in the meaning of Art. 2.2 b/c it maintains a measure that is “clearly disproportionate” to the risk
     4. Article 5.7 of the SPS Agreement
        1. Art. 5.1 sets out the key discipline – “Members shall ensure that their SPS measures are based on an assessment… of the risks to life or health”; this discipline informs the other provisions of Art. 5
           1. Requirement – there must be insufficient scientific evidence; the evaluation must be carried out, not in the abstract, but in the light of a particular inquiry – Art. 5.7, second sentence, which refers to a “more objective assessment of risks” (suggests a link or relationship to the obligation to perform a risk assessment under Art. 5.1); the question is whether the relevant evidence, be it “general” or “specific”, is sufficient to permit the evaluation of the likelihood of the risk
        2. Unresolved uncertainty – application of Art. 5.7 is triggered not by the existence of scientific uncertainty, but rather by the insufficiency of scientific evidence; insufficient scientific evidence and scientific uncertainty are not interchangeable
     5. Article 5.1 of the SPS Agreement:
        1. Three requirements (different than the Panel?) – (1) identify and (2) evaluate the likelihood of risk (3) according to the SPS measures which might be applied
        2. The obligation to conduct an assessment of “risk” is not satisfied merely by a general discussion of the disease sought to be avoided by the imposition of an SPS measure; when discussing the risk specified in the risk assessment, the harm concerned (i.e., fire blight) as well as to the precise agent that may possibly cause the harm (i.e., the carrier of the disease) and alternative measures that might be utilized must be discussed

1. WTO Dispute Settlement and Trade in Services
   1. Background: DSU
      1. New v. Old Dispute Settlement
         1. old GATT (pre-WTO) panel system
            1. a consensus was required to empanel the panel
            2. Then, once the panel created the report, you needed consensus to adopt the report.

Panels used to craft very close decisions because they wanted to make sure some parties weren’t humiliated

made parties more likely to accept the decisions, but they were bad decisions.

* + - 1. New system
         1. Now, we have negative consensus requirement – you need a consensus to NOT adopt the panel report
         2. the panel is not discretionary – you have to appear.
         3. There's an appellate body; if the panels are going to be obligatory then you need a chance to appeal. Relatedly, it’s harder to defy an appellate body than a panel.
         4. You can’t have judges of same nationality of parties to the dispute

You are not interpreting a bilateral agreement between two countries; you’re interpreting a multilateral agreement. The viewpoints of the two parties to the dispute may not be best for the rest of the parties to the agreement. This would result in a heavy European and American influence on the law of the WTO.

* + - * 1. This evolution means more disputes and tougher disputes. Lawyers push towards dispute settlement.
        2. Now, panels try to write big, well-thought-out opinions. Their fear isn’t being not adopted by states; they’re afraid of being overturned on appeal. Decisions now are very different.
    1. DSU
       1. General outline of DSU Procedure
          1. Panel/AB
          2. Compliance Panel: Did the US comply?
          3. Antigua countermeasure

Dispute as to the extent of loss/ countermeasures

Ability to take countermeasures in other areas

* + - * 1. US renounces commitment

Extraordinary measure

Only done in regard to EU entries previously

Compensation to other trading partners by granting commitments

Example: DHL concessions for the US market

* + - 1. the hormones case and Dispute Settlement
         1. WTO provides for compulsory dispute settlement

when they ban beef with hormones, the SPS is violated

obligation on EU is to allow beef with hormones to come in. They refuse.

So US and Canada can adopt counter-measures.

system allows for withdrawal of concessions as a counter-measure – adding restrictions on trade the other way. Since it has to be proportionate, US/Canada will have to calculate the damage.

this still bad

First, this means a reduction in trade.

Second, individuals and specific industries pay the price for everybody else. Both importers and exporters.

Finally, small and developing countries with lots of exports may be less likely to be able to take enforcement measures. They don’t have sanction leverage like US/CAN/EU. This is a serious systemic problem.

Some solutions

First, we could award damages instead of the right to withdraw concessions. If the EU refuses to allow import of beef with hormones worth $1B, instead of allowing US to withdraw concessions to the tune of $1B, we can just say: pay $1B. Money compensation could solve a lot. It wouldn’t arbitrarily impose sanctions on individuals, would offset economic interests harmed by violation, and wouldn’t further reduce trade. Still, they could refuse to pay – but that would be very extreme. Countries are sometimes willing to face the music.

could tell the EU that THEY have to offer US alternative concessions. They have to, for example, reduce tariffs to US to the tune of $1B.

* 1. Background: GATTS
     1. Under GATT/WTO, a country can be in full compliance, but have zero quotas and 1000% tariffs; Under GATS, a country can decide to not offer any commitments and entirely preclude entire service sectors from liberalization
        1. Horizontal discipline
        2. MFN “multilateralizes” bilateral concessions
           1. N.B.: enormous practical advantage of having 10-20 countries negotiate concessions and then spread them via MFN “on the margins”
     2. Art. I GATS
        1. Definitions of four modes of services in Art. I:2 GATS:
           1. Cross-border supply: from one MS into another MS
           2. Consumption abroad: in territory of one MS by a consumer of another MS
           3. Supply by service supplier from one MS through a commercial presence in another MS
           4. Supply by service supplier from one MS through presence of natural persons from one MS in the territory of another MS
     3. Basic disciplines
        1. Art. XVI GATS “Market Access”
           1. covers discriminatory and non-discriminatory market access barriers

Hence, it is not a horizontal national treatment provision

Instead, its goal is maintaining the commitment against abusive circumvention; you can't make a liberalization commitment and then restrict

because liberalization is quid pro quo, you can't renege once you've committed

claim would be: you promised to liberalize this sector, but you're not doing so

* + - * 1. AB and Panel relied on Art. XVI GATS in the GAMBLING DISPUTE
        2. Central message: although MS committed to liberalize, it failed to actually do so
      1. Art. XVII GATS “National Treatment”
         1. Art. XVII GATS targets discrimination in a sector which a MS promised to liberalize
         2. Art. XVII GATS is the equivalent of Art. III GATT
      2. Art. XIV GATS “General Exceptions”
         1. Is the equivalent to Art. XX GATT
  1. US Gambling Case (Unit XI pp. 13-175)
     1. AB Stage
        1. Bare bones of case
           1. US decide they’re going to ban internet gambling

Grocer reason: why do they want to do that?

Social ill – particularly for internet gambling

addiction: with internet, people can gamble continuously

Children could have access

More difficult to monitor money laundering

Tax revenues would argue against banning internet gambling

JW thinks that, in good faith, the US did not believe it made commitments on internet gambling

BUT, US law allows for internet gambling for off-track betting on horse races and internet gambling is rife in the US

* + - * 1. Publicly traded internet gambling companies set up in Antigua, file complaints against US under Art 16

Art. XVI: 2 (a) GATS

2(a) Stipulates that there's a violation if limitation of number of service suppliers in one of three forms; US practice amounts to zero quota

Art. XVI: 2 (c) GATS

Limitations to total number of service operations/on the total quantity of service expressed in terms of designated numerical units in the form of quotas

* + - * 1. US response

focuses on arguing that there was no commitment under Art 16; but basically forgets to argue Art 14.

If the US had not allowed domestic internet gambling, they probably would have won under Art 14; but the fact that they do allow some (domestic) internet gambling undermines their claims under 14

“Art. XVI:2(a),(c) GATS both require measures in the form of numerical quotas”

Not measures having the effect of numerical quotas

There is no numerical expression in the domestic laws in the form of quota

If the question was whether a total ban amounts to a zero quota, the answer is yes

* + - 1. AB
         1. Burden of Proof : AB says – US made a very good prima facie defense under Art. 14; It’s up to the claimant to rebut that
         2. Antigua did not suggest a reasonable alternative, but US fails because there was legal internet gambling

therefore, if no findings of internet gambling in US (horse racing), then US would easily win under Art. 14

* + - * 1. Major difficulty in the case

the AB bases it's ruling on Art 16; the US regulations are quotas

BUT, ‘how to draw the line b/n quantitative and qualitative measures’

We want to ban quotas, etc.

But don’t want to tell a state that they are forbidden from regulating their own industry, that every form of regulation must be justified under Art. 14

GATT – you’re welcome to send us goods, but you’re subject to our restrictions

Any nat’l treatment distinctions – THOSE must be justified under GATT Art. XX, but otherwise internal regulation is ok

Here, Panel, AB are implying that every regulation that has a quantitative impact violates Art. 16, must be justified under Art. 14

Difficult to think of any regulation that doesn’t have a quantitative impact

* + - * 1. Possible solutions

Keck Case (ECJ)

Weiler’s interpretation – he thinks the best In the realm of goods, what Euro Crt of Justice says:

If you have a regulation, even if it has a quantitative impact o It will not be considered as a quantitative restriction under Art. 11

That’s a regulation, not a quantitative restriction

UNLESS, if effect is to totally exclude product from market (not just to reduce the market), then it will be caught and will have to be justified

What counts as ‘regulation’ under ECJ:

Shops must close on Sunday

There are Sunday specific products: eg. do it yourself products

As a result, if can’t buy on Sunday – less DIY goods will be sold

If you ban smoking in public places – reduces the amt of cigarettes sold

US could have argued that category is “gambling” not “internet gambling”

you can gamble, you just can’t do it over the internet

US: why are we violating 16(2)(a), (c) – not a total restriction, just limiting a certain mode of delivery

Impact on total amt of services is not measurable, so this meets Keck test

* + - * 1. bottom line: having found that the United States gave its commitment, the US could have regulated internet gambling under public morals, public health, etc.

But they failed in there defense because they discriminated.

The Appellate Body found that the Horse Racing Act found that it allowed internet gambling for horseracing. So they fail on the Chapeau.

* + 1. Post-AB
       1. What options did the US have in order to comply with the report?
          1. Option 1:

Close the horse gambling loophole.

Prosecute even-handedly: Even if it had not been proven that the US was prosecuting unevenly, the US would have to do that from a rule of law standpoint.

* + - * 1. Option 2:

Offer operators of internet horse racing gambling to move to the US and obey by its regulations; they could still be foreign-held.

But: operators want to operate from abroad, because they prefer low-regulation jurisdictions.

* + - * 1. Option 3:

Accept that there is an exception for internet horse racing gambling and open that business to foreign operators.

Even-handed prosecution of all other internet gambling operators.

* + - 1. Let’s say US has done none of the above, and now we have to quantify the sanctions.
         1. US would want to say that the extent of the non-compliance is not to allow internet horse gambling. And that was accepted.

US: The damage is that operators from Antigua were not able to offer internet gambling for horse racing.

* + - * 1. Antigua: Accepted this. But being allowed to offer internet horse racing gambling is a phyrric victory. That is a very small market. Poker is much more important.
        2. Compare to GATT.

Example: US prohibits sale of alcohol, with the exception of Kentucky Bourbon.

What would be the remedy against this GATT violation?

Allow importers to sell Kentucky Burbon?

No, allow sale of like products (Whiskey, Vodka etc...). Cf. Shochu case: Japan could not defend itself by claiming that everyone could import Shochu.

Transfer this to gambling:

The products that are really damaged are the competing products, i.e. those competing with horse racing bets, not those foreign operators offering horse racing bets, because there is a natural local advantage for this.

The question depends on the delimitation of the market. Here: The relevant market is internet gambling! Antigua operators are competing for those players that don’t want to travel to Las Vegas etc. in order to gamble, whatever game it may be. Whatever is in competition with internet horse racing bets should be allowed.

This is the argument the lawyers for Antigua should have advance.

Nevertheless, Antigua failed to do so and only received a ridiculously small amount. Thus, it effectively lost the case.

1. Trade Remedies
   1. Trade Remedies
      1. Generally, two types
         1. Antidumping
         2. Subsidies
      2. This is a matter of administrative domestic law, domestic regulation; BUT, WTO supervises and checks whether each WTO member country is not abusing its authority power
         1. Domestic producers are trigger of state action through the WTO; They ask their own governments to do something, governments will conclude if there is or not a unfair practice, and raising the need to correct the situation
         2. usually states are not allowed to raised tariffs, but under the trade remedies, the distortion of the market its permitted, since it is not defined as a distortion
            1. according to Professor Prof. Cho, it can be a distortion of trade, especially in antidumping measures.
   2. Anti-dumping
      1. Introduction
         1. From a policy standpoint, antidumping as a trade remedy is a protectionist measure. It has no economic or legal justification. Hence we need to settle with the lesser evil: the WTO regulation on antidumping.
            1. Dump maximizes profits for the dumper, increases the market share of the “dumpers”
            2. At a domestic level, price changes or discriminations are usual (sales, outlets)

they may raise antitrust (competition law) concerns; could be predatory, etc.

But this is based on intent

* + - * 1. in international trade, the intent requirement is not necessary.

Cho argues this is due to protectionism; antidumping rules exist because dumping harms the domestic producers; therefore the conclusion seems to be that there is not a plausible justification for antidumping

Is protective of domestic producers, and may undermine the very principles of free trade, such as comparative advantage.

Dumping may be better for consumers, since products will be cheaper, and also will create more jobs in developing countries, etc.

* + - 1. The WTO does not pass judgment as to whether dumping is good or bad. Instead it disciplines procedural aspects.
      2. Why is this?
         1. Some WTO Members happen to “love” antidumping. The WTO is not a purely democratic institution, its decisions are mostly taken by consensus. This consensus is reached through negotiations. Accordingly, negotiating skills and power dynamics are not absent from the process.
         2. These countries use antidumping to protect local and domestic interests.
         3. Hence, it is not politically feasible to end antidumping, but it is necessary to discipline its use or exercise by domestic authorities.
         4. Conclusion: Antidumping rules seek to address the worst abuses related to dumping, that is why most rules are procedural.
      3. Origins of Antidumping: Canada (1907) Antidumping became a useful tool for industrialized countries. It became a “darling” for these countries. It was popular during the 1970s, 1980s and 1990s.
         1. Political Reasons

Relative decline in manufacturing in industrialized countries –There is a transformation from manufacturing to services in developed countries. Since there is a decline in manufacturing, developing countries became a threat to these sectors in decline.

There are new competitors to the old agricultural and manufacturing providers in the developed countries. Antidumping seeks to protect these sectors.II. Antidumping Cases

Technical Reasons: There is a change regarding the modalities of trade barriers

Tariff barriers were enemy number one for the GATT. Tariffs are slashed.

Accordingly, governments have to create new instruments for protectionism (administrative barriers). Antidumping is a new form of protectionist barrier.

* + 1. Cho: Antidumping is protectionism. Why is it legalized?
       1. Because producers interest and lobbyist from importing countries have enough political leverage over their governments.
       2. Usually the issues of antidumping come from the discrepancies of the “northern” countries versus the “southern”, this is, developed versus developing.
       3. Almost all products to which antidumping applies, comes out of intensive labor in developing countries.
       4. Some will say that antidumping promotes competition. But the actual result is all the opposite. Antidumping measures can produce international cartelization. The tariffs or regulations are intended to increase the cost, the price, in fact, to fix the price to the higher domestic price.
       5. All of this is promoted by the government and constitutes legal cartelization.
    2. Cases
       1. large number of AD cases; Many consider that this is an example of judicial activism, since what it is not solved through negotiations is solved by the courts.
       2. These cases reflect how the tribunals try to prevent the abuse of power by antidumping authorities by applying basic procedural principles.
       3. The WTO Anti-dumping Agreement provides for:
          1. More detailed rules for calculating the amount of dumping.
          2. More detailed procedures for initiating and conducting anti-dumping.
          3. Investigations, rules on the implementation and duration of antidumping measures
          4. Particular standards for dispute settlement panels.
       4. These rules seek to discipline the representative stages of anti-dumping measures.
       5. There are three Representative Stages in Antidumping cases
          1. Application from petitioners (Government receives the application)
          2. The Government has to decide whether to initiate the measure
          3. “Make up your mind”: The Government makes the decision and implements the measure.
       6. Legal Framework
          1. In Antidumping, the difference between home market prices and the export price is called the dumping margin

If the dumping margin is 0, there is no dumping

When it is not, the government is allowed to take measures to make this margin equal to 0, like raising tariffs. Governments have huge discretion in this matter.

* + - * 1. Where there is no market demand for the product, the comparison is made taking into consideration not only the difference referred above, but third country prices and constructed value.

All of this calculations and measures with the purpose of making the dumping margin 0, are extremely unilateral, extremely discretional.

complications arise from the fluctuating markets

* + - * 1. injury requirement it is extremely important, since connects the dumping margin to an actual damage

otherwise, the dumping margins existing could be used as an excuse for bad management decisions or other causes in the reduction of their market shares.

In the US, injury is and dumping margins are calculated by two different agencies, the ITC and the DOC

* + - * 1. Much of this information is obtained from producers; this can be problematic when producers are small companies, located in developing countries, etc.
        2. Likeness

injuries caused need to be addressed under the “like products” criteria

Is important to ask if the injuries are made to like industries.

The chemical composition of the products seems to be irrelevant, what needs to be taken into consideration in determining “like products” is the market and consumer choice.

* + - 1. Case: Mexico- HCFS
         1. Facts

United States sues Mexico, over Mexico's antidumping measures on High fructose corn syrup (HFCS). Mexico's Cane Sugar and Sugar Beat producers are threatened because sugar and HFCS are substitutes, or “like” products. HFCS producers lobbied the U.S. government to bring a complaint against Mexico because their exports are suddenly blocked by the anti-dumping measure.

The U.S. argues that there was not sufficient evidence that could justify Mexico’s decision to impose the measure.

US Claim: The procedures the Mexican government followed are not consistent with the Anti-dumping Agreement.

Mexico’s: Mexico says they have done nothing wrong, and point to the antidumping code provisions.

For Mexico, it is an operative position. Mexico has the discretion to find that there is adequate information. It is the Government’s unilateral call to decide if there is sufficient information.

* + - * 1. Panel

Regarding the level of information in the acceptance stage and the initiation stage, Panel sided with Mexico. It found that Mexico has discretion, and that the information used was good enough. (See Paras. 7.93 and 7.95 of the Panel Decision); There is no need to provide significant and detailed information. All you need is adequate amount of information in this stage.

Regarding the final determination stage, Panel sided with the U.S. Mexico needed detailed information where it proved that the export of HFCS fromthe US is causing harm to Mexico’s sugar industry

* 1. Subsidies
     1. Intro
        1. What is wrong with subsidies? In times of need governments should take care of people.
           1. Not all governments can afford subsidies.
           2. From a domestic policy standpoint, some subsidies are good, since they may try to target a public good.
           3. Other subsidies target certain group of industries just to lower prices. Therefore they distort competitive relationship. From the global marketplace, subsidies distort the market.
     2. Subsidies and Countervailing Measures Agreement:
        1. Definition of a Subsidy o Financial contribution/ Benefit plus Specificity (Articles 1 and 2 of the SCM Agreement).
        2. Financial Contribution
           1. A Financial contribution is made by a government or public body (“any entity that possesses, exercises or is vested with governmental authority”)
        3. Modalities of Financial Contributions
           1. A direct transfer of funds (grants, loans, an equity infusion) or potential direct transfers of funds or liabilities (loan guarantees)
           2. Government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)
           3. A government provides goods or services other than general infrastructure, or purchase goods.
           4. A government makes payments to a funding mechanism, or entrusts or directs a private body.
           5. Any form of income or price support
        4. Specificity
           1. Focus in the law (de iure eligibility)

Specific to an enterprise or industry or to a group of enterprises and industries

Specific to an enterprise or industry or group of enterprises or industries.

Explicitly limits access to a subsidy to certain enterprises

Use of a subsidy program by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises.

* + - * 1. Besides the law, it is important to look the outcome of certain laws. What if certain law establishes a subsidy that is supposed to be applied on a general basis but it is only being received by a certain industry? Then it is also specific (de facto eligibility).
        2. Regardless of the appearance, if the consequence is a specific contribution or benefit it is specific. (In this case it is an ex-post analysis)
    1. Why should we discipline certain (not all) subsidies?
       1. history: GATT 1947 Disciplines
          1. Subsidies were not the number one enemy: Parties focused on tariffs.
          2. The only response which a State could take was a Countervailing Duties (Article VI:3)
          3. Export subsidies: Notification: Consultation (Article XVI) (No Teeth)
          4. Non-Violation Claims (Article xxiii:2(b))
       2. 1994 WTO Traffic Light System
          1. Red (prohibited subsidy)

Export subsidy (it is the worst because it is contingent on export)

Countervailing duties with material injury (threat); should withdraw immediately.

* + - * 1. Yellow (Actionable subsidies)

Adverse effects: Affected Party should demonstrate adverse effects (Injuries/Nullification or Impairment/serious prejudice)

Serious Prejudice: It relates to export displacement in a third country. (See below)

* + - * 1. Green Light (Non Actionable Subsidies)

Research and Development

Terminated (As of January 1, 2000)

* + - * 1. Who can sue whom? Ways to challenge subsidies:

1. Country X subsidizes company A and injures Company B in Country Y (Importing country).

2. Country Y may countervail country X’s subsidization. Then, country X may sue country Y’s countervailing measures.

3. Country Y may also sue country X to the WTO (export subsidy or adverse effects), even if there is no injury in Country Y’s domestic industry. How?

Imagine that private companies from Countries X and Y export to Country Z. The subsidy that Country X is giving to its domestic industry may allow that industry to sell at a cheaper price in country Z. Hence, the subsidy does cause country Y’s exporters to lose market share in Country Z. Affected Party must prove export displacement in Country Z.

Under this last scenario there is serious prejudice.

Example: Auto Bailout by the US Government

Why is this bailout not challenged as a subsidy by the European Union?

A party needs to prove injury (This is hard because there are not many US cars in Europe)

What about serious prejudice? Yes. If you demonstrate serious prejudice in a third market then you can challenge the measure. However, it is hard that the European Union would challenge the measure. Why is this hard? Because European countries subsidize their own car companies.

Example: GATT Article III:8 (B) – In subsidies you are not supposed to think national treatment. This does not prevent that you provide subsidies to producers in the domestic markets.

Example: In case the government gives money to consumers but not to producers? If it goes to consumers, then it is not a subsidy. It is a national treatment violation.

* + 1. Case: Airbus – Boeing Dispute
       1. EU gives a “Launch Aid” to its airspace industry.– Is this an Export (Prohibited) Subsidy? The US challenges the measure.
       2. EU: Because of the unique nature of this industry, this aid is a common market practice.
       3. The U.S. Position: No. This is a whole program aimed at helping the industry. The US argues that the program in its entirety is a subsidy.
       4. The EU tries to slice it down.
       5. The Panel sided with the U.S.

1. North American Free Trade Area (NAFTA)
   1. Background
      1. During the age of colonization
         1. The colonizing country (say, England) “took over” the colonized (say, Ghana) to exploit the latter‟s natural resources. England installed its own subjects in Ghana, instituted a framework that allowed long-term exploitation of resources (e.g., a 99-year lease to extract oil/gas and sell it on the world market), and remitted its earnings to the home country.
      2. During decolonization:
         1. When Ghana gained its independence (by revolution, agreement or any other means), the 99-year lease was still in effect. The government of the newly independent state wanted to get rid of English corporate/colonial interests in the country and regain control over domestic resources. How? Expropriation
            1. Requirements of a valid expropriation:

In the US Constitution, (1) it must be for a public purpose, (2) compensation must be paid, and (3) compensation must be “just” (i.e., equal to fair market value)

BUT, payment equal to FMV is too expensive.

Ghana argues that (previous) taking by England was not in accordance with international law because the English government did not pay Ghana the fair market value of the right to extract over oil and gas. Consequently, the FMV standard should not apply.

Ghana‟s proposal: it suffices that the payment is “adequate under the circumstances”.

The subtext being – “We have no money because you took our money/resources. So what is “adequate” now is really close to zero.”

* + 1. Hence the North-South debate. Countries coming out of colonization (the South) took the position that industrialized nations (the North) should not be in the business of staying in places they colonized. [“political and economic self- determination”]
       1. other aspects of the North-South debate:
          1. National Treatment - 'like products, like treatment'

US firms transferred assembly line jobs to Mexico to take advantage of low wages and more lenient environmental and labor regulations. American managers moved to Mexico to oversee operations; parts were sent to Mexico; Mexican workers put together/assemble the product; but the profits were sent back to the US.

Mexico did not like this, as this might create “dependent development” (i.e., development that is contingent on the continuous physical presence of American companies).

Ways to address this dilemma:

Require local partners, local presence.

Impose a time floor (e.g., American companies must maintain their business in Mexico for at least 10 years [to avoid the situation of Americans packing their bags and transferring their assembly lines to yet another country with cheaper wages])

Impose a limit on the number of workers that the American companies can bring in for certain (managerial) positions (to facilitate transfer of know-how to local managers)

Impose “performance requirements” as a precondition to access to Mexico‟s labor market (e.g., force the transfer of patent rights to local partner)

Hence national treatment issues arise; American companies/investors are subjected to conditions from which domestic investors are exempted.

* + - * 1. Dispute Resolution

Calvo doctrine: the so-called Calvo clause in public contracts; if foreign company does business in the host jurisdiction, exclusive jurisdiction is with the latter (developing country).

South: We decide what the rules are, and we litigate in our own courts. No international tribunal or foreign court should interfere with a domestic judge‟s exclusive competence to apply national law.

North: Domestic tribunals cannot be trusted to hear investment cases. Neutral international decision-makers operating outside of the judicial system of the host country should be empowered to give redress to foreign investors aggrieved by a breach of the applicable international substantive rules.

The North and South could not agree on a multilateral treaty addressing these issues, and the battlefield shifted to the bilateral and trilateral field. Lo and behold, these BITs and trilateral treaties adopted the position of the North.

Asymmetry of bargaining power

North to South: You must agree to this BIT or we cut off aid and other concessions...

Also: The countries from the South need capital for economic development. Capital-exporting countries (the North) therefore have the upper hand.

This was against the backdrop of the Cold War. Other countries had to choose with whom to ally themselves: US or the USSR?

* 1. NAFTA Articles 1101-1110
     1. Art 1102 – national treatment obligation as to establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition. There must be no discrimination that would give preference to domestic investors. Note that performance requirements are separately banned under Article 1106.
     2. Definitions of 'investor' and 'investment' – these terms are defined broadly as to include an “equity security of an enterprise”, i.e., shares.
        1. Illustration: Canadian firm wants to export asbestos to New York, and sets up a domestic subsidiary in NYC to take care of distribution. The NYC subsidiary is subjected to arbitrary treatment by the government. Does the Canadian company have recourse under the NAFTA against the US? – Yes, it is considered an “investor” who has an “investment” (that is, shares of stock) in the US.
           1. Note: NAFTA dispute resolution is open to private parties, for violations (of treaty provisions) by any agency of government. (The central government acts as a guarantor of state action.) Thus, disputes that we've seen under trade law can be subject to private party action (vs. WTO system where it‟s State vs. State, and factors exogenous to the dispute dictate whether a case is to be brought or not, i.e., fear of retaliation, comity, diplomacy, and whether the private party has enough political backing to convince his State to bring a case).
           2. Arbitrated at ICSID – private arbitrators.
     3. Art 1105 - Minimum Standard of Treatment, guarantees of fair and equitable treatment and full protection and security
        1. Illustration: Loewen case:
           1. Civil law suit in Mississippi. “Colorful” trial – judge allowed inflammatory “evidence”/peripheral information (with no relation to the case, but attacked the person of Loewen) that resulted in an extremely largest jury award for damages. The plaintiff could not appeal to the US Supreme Court because the appeals bond (a percentage of the jury award) was prohibitively expensive.
           2. Hence the fair and equitable treatment claim under the NAFTA, anchored on –

denial of justice, and

the amount of damages was so disproportionate to actual damages, as to be tantamount to a due process violation

* + - * 1. Loewen, however, lost the NAFTA case on procedural grounds.
    1. Art 1110 - Expropriation – no Party may expropriate investments (or take measures “tantamount to expropriation), except for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and on payment of compensation. Compensation must be equivalent to fair market value, plus interest at a commercially reasonable rate.
       1. “Measures tantamount to expropriation”: regulatory takings
       2. The key question to ask is: how far did the government go in interfering with reasonable investment-backed expectations?
  1. Cases
     1. Thunderbird v. Mexico (2006)
        1. Facts:
           1. Mexico passed legislation banning gaming machines, Thunderbird argued that machines required skill and were not gaming machines per se and requested an advance ruling
           2. Mexican law states that cannot have a game of chance but of skill, Thunderbird argues that its game is a game of skill
           3. Thunderbird’s application left out some information regarding the nature of its games
           4. Mexican government issued an advance ruling approving the introduction of Thunderbird’s machines in Mexico

The ruling suggests that the ambiguity in the law is going to be resolved in a certain way

* + - * 1. The ruling is revisited under a new president and reversed

As a result of the reversal, plaintiff no longer has authorization to have its machines in Mexico

* + - 1. Issues:
         1. If advanced rulings are not respected, questionable what their value is, however, equally questionable whether they form insurance policies freezing the state of the law
         2. Does the investor carry the risk of investing in a country where the circumstances could change?
         3. When does a ruling expire? It will not last forever...
         4. What factors to look at?

Equality of treatment and opportunity, corruption, stability, legal certainty (security of the law in Europe), reasonable return on investment (opportunity to obtain it)

* + - 1. Holding:
         1. 2:1 decision holding that because the investor did not disclose all relevant information about its games, it is not entitled to protection
         2. Majority: even if the application of Thunderbird was faulty because it left out information, it was up to the administrator to set the level of difficulty, as a result there were no reasonable expectations
         3. Difference between majority and dissent: the majority adopts the view that an investor has to take a chance with the administration and carry any risk involved, whereas the dissent holds that the investor is entitled to some level of reliance
      2. Important to remember:
         1. The factors that a court will look at are: Equality of treatment and opportunity, corruption, stability, legal certainty (security of the law in Europe), reasonable return on investment (opportunity to obtain it) v. sovereignty of state to legislate
         2. Legal realist argument: Sovereignty weighs in the basket because arbitrators will think twice about awarding damages against government
         3. The question a court will ask is whether the ruling is arbitrary in the context of the political economy of the state
    1. Mondev International v. United States (2002)
       1. Facts:
          1. Mondev was a Canadian company that owned a Massachusetts limited partnership (“LPA”). LPA was part of a commercial real estate development contract with the City of Boston and a municipal agency. A dispute arose in relation to the development contract, LPA sued in Massachusetts state courts and prevailed before a jury. The trial judge rendered a judgment notwithstanding the verdict with respect to the municipal agency on statutory immunity grounds. LPA lost its subsequent challenges and brought a Chapter 11 challenge.
          2. Mondev sued for breach of FET when city of Boston withdrew concessions to Mondev
       2. Issues:
          1. Whether the statutory immunity granted to the municipal agency amounts to a breach of Art. 1105(1)?
       3. Holding:
          1. sovereign immunity law was in existence when the concession contract was entered into
          2. as long as cannot find an arbitrary action, difficult to prove
          3. extension of limited immunity from suit to statutory authority for interference with contractual relations does not amount to breach of Art. 1105(1)
          4. in general: international standard trumps national law; if national law below the international standard, foreign investors will be granted treatment under international standards
    2. Loewen v. United States (2003)
       1. Facts:
          1. Loewen, a Canadian investor, was sued by a US company in the courts of Mississippi. A USD 500 million verdict was issued against Loewen. The bond was so extraordinarily high that Loewen could not afford to appeal the decision and had to agree to a settlement for USD 50 million.
       2. Loewen’s claim:
          1. denial of justice
          2. violation of minimum standard of fairness
          3. due process violation
       3. US Defenses:
          1. no standing under NAFTA
          2. fair trial under US standards
          3. sovereignty of state of Mississippi
       4. Holding:
          1. Loewen had no standing under NAFTA
          2. in order to have violation of Art. 1005, requires violation of minimum standard under international law
          3. tribunal did not want to interfere in national court decisions although agreed that a violation of FET
       5. Analysis:
          1. strong endorsement of customary international law principles on due process, access to appeals, and freedom from punitive damages etc.
          2. generally a pro‐investor decision regardless of jurisdictional dismissal
          3. In a case of national treatment, no requirement of exhaustion of local remedies
          4. Can one argue breach of due process when one has not exhausted the available means of appeal?

Yes and no – generally no, but in this specific case yes because of the pressure put on the party