Winter, 2020
Vol. XII, No. 2

Trade, Law *and* Development

ISSN: 0976 - 2329
eISSN: 0975 - 3346

TL &D

Trade, Law *and* Development

Vol. 12, No. 2 2020

Published by

The Registrar, National Law University, Jodhpur
ISSN : 0976-2329 | eISSN : 0975-3346

Trade, Law *and* Development

Delroy S. Beckford, *National Treatment in the WTO: Abandoning Regulatory Purpose or Reinvigorating It?*
12(2) TRADE L. & DEV. 656 (2020)

NATIONAL TREATMENT IN THE WTO: ABANDONING REGULATORY PURPOSE OR REINVIGORATING IT?

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Regulatory purpose has featured prominently in the interpretation of World Trade Organization (WTO) provisions to demarcate appropriately the zone between multilateral adjudication and regulatory autonomy. This is no less so in respect of the interpretation of Article III of GATT 1994.
An extreme view is that regulatory purpose has been shelved under the abandonment of the 'aims and effects' test and that there is now little room for any margin of appreciation for measures that would otherwise be permissible, whereby a WTO Member invokes a non-protectionist intent for a measure that may nonetheless result in protection of domestic industry. We argue that regulatory purpose has not been abandoned in the interpretation of Article III of GATT 1994, by examining the Appellate Body's interpretation of the provision with respect to fiscal measures under Article III:2, first and second sentence, and non-fiscal measures under Article III:4. We conclude that although the interpretation of Article III: 2, first sentence, measures suggest that a strict liability approach is endorsed by the Appellate Body, the interpretation of Article III:2, second sentence, and Article III:4, provide a greater margin of appreciation for WTO Members.

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I. INTRODUCTION

Article III of the General Agreement on Tariffs and Trade 1994 (GATT) addresses the national treatment principle and includes both fiscal and non-fiscal measures.[1] Article III:2, first sentence, and Article III:2, second sentence, govern fiscal measures; the first dealing with like goods in terms of identical goods and the other covering directly competitive or substitutable goods. On the other hand, Article III:4 covers non-fiscal measures and the manner in which such measures may run afoul of the national treatment principle.

This article examines the role of regulatory purpose in Article III decisions and whether there is any clearly articulated standard for discerning when there is a breach of Article III.

In this article, we conceptualise regulatory purpose as including an understanding of the reason behind a measure, whether that reason be protectionist or non-protectionist, and being determined by the application of an objective and subjective test on the basis that an exclusive reliance on any one test for this purpose would not be conclusive.

It cannot be gainsaid that every legislation has its underlying purpose and to that extent regulatory purpose is already embedded in legislation.

In our context, regulatory purpose is conceived as a recognition of the particular underlying purpose reflected in the legislation in terms of its treatment of the national treatment principle, that is, whether the purpose of the measure is 'so as to afford protection to domestic production' and the means by which this is determined.

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[1] General Agreement on Tariffs and Trade art. III, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT].

Our approach is to examine the jurisprudence on Article III, under the various provisions covering fiscal and non-fiscal measures, but without necessarily relying on statements or holdings from the Panel or the Appellate Body as being conclusive on the matter. The latter is premised on the understanding that often an adjudicative tribunal's holdings or statements may be inconsistent with what it is actually doing.

From this perspective, we may pose an initial question: is regulatory purpose abandoned as seen from the rejection of the 'aims and effects' test, or have Panels and the Appellate Body found other ways to achieve the same result as the 'aims and effects' test? To what extent is regulatory purpose given effect in the Appellate Body's interpretation of Article III?

We note at the outset, that some scholars tend to the view that the Appellate Body's express rejection of the 'aims and effects' test means that it is no longer interested in regulatory distinctions based on the purpose of the regulation because legislative intent or the evidence often relied on to determine the same is not factored into the analysis.[2]

To see this, the Appellate Body has noted, for example, that the intent of the legislators is irrelevant to the question of legislative purpose, and further that the trade effects of a measure are unimportant in determining if there is a breach of Article III, so that a measure can be found to be in breach of Article III as protectionist, even if there is no detrimental trade effect between the imported and domestic goods.[3]

Other scholars have suggested that there is a 'resurrection' of the 'aims and effects' test and that the regulatory purpose enquiry has returned with a renewed vigour.[4]

However, resort to the design, architecture and revealing structure of a measure may be seen as an effects test when there is differential impact between imported and domestic goods with respect to whether the equality of competitive opportunities between both goods is affected.[5]

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[2] This can be observed from the Appellate Body's own statement in *Japan — Alcoholic Beverages II*, whereby it discounted the importance of legislative intent as a basis for ascertaining whether Article III measures have a protective purpose. *See* Appellate Body Report, *Japan — Taxes on Alcoholic Beverages II*, at 27, WTO Doc. WT/DS8/AB/R (adopted Nov. 1, 1996) [hereinafter Appellate Body Report, *Japan — Alcoholic Beverages II*].

[3] *Id.*

[4] *See, e.g.,* Michael Ming Du, *The Rise of National Regulatory Autonomy in the GATT/WTO Regime*, 14(3) J. INT'L ECON. L. 639 (2011) [hereinafter Ming Du].

[5] There is, of course, no effects test in the sense of there being any actual trade effects within the domestic market. A trade effects test has consistently been held not to be necessary or sufficient for a breach of Article III. *See, e.g.*, Report of the Panel, *United States*

The enquiry of the relevance of regulatory purpose is also important to determine if any such justification is warranted under any of the applicable provisions of Article III, since as the Panel noted and the Appellate Body upheld in *Brazil — Taxation*,[6] a measure may be inconsistent with two or more provisions of Article III at the same time. The Panel observed the following:

> It is well established that a single measure can be inconsistent with two or more provisions of Article III at the same time. This is because multiple features of a single measure may operate simultaneously. In such a situation, different aspects of the same measure could be considered to be covered by the disciplines of either or both Article III:2 and III:4.[7]

If this is the case, then a measure that is capable of breaching several provisions under Article III may require different approaches by a complaining member in satisfying the burden of proof for breach of a provision that requires proof of a protective purpose as opposed to a provision that does not require a protective purpose to be demonstrated if, for example, the provision operates on the basis of a strict liability standard.[8]

Our approach is to examine whether and how regulatory purpose may be gleaned from the case law, beginning with a discussion of the 'aims and effects' test, then the Appellate Body's mechanism for determining that question, and finally whether it has succeeded in doing so or whether it has not addressed the question.

We conclude, upon an examination of the jurisprudence of Article III, that the Appellate Body is at all times engaging in a purpose inquiry which it does expressly

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— *Taxes on Petroleum and Certain Imported Substances*, L/6175 (June 17, 1987), GATT BISD (34th Supp.), at 136, 158 (1987) [hereinafter Report of the Panel, *US — Superfund*]; *See also* Report of the Panel, *Japan — Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, L/6216 (Nov. 10, 1987), GATT BISD (34th Supp.), at 83, 114 (1987) [hereinafter Report of the Panel, *Japan — Alcoholic Beverages I*]; *See also* Report of the Panel, *United States — Measures Affecting Alcoholic and Malt Beverages*, ¶ 5.6, DS23/R (June 19, 1992) GATT BISD (39th Supp.) at 206 (1992) [hereinafter Report of the Panel, *US — Malt Beverages*] ("…In accordance with previous panel reports adopted by the CONTRACTING PARTIES, the Panel considered that Article III:2 protects competitive conditions between imported and domestic products but does not protect expectations on export volume … ").

[6] Appellate Body Report, *Brazil — Certain Measures Concerning Taxation and Charges*, ¶ 5.53, WTO Doc. WT/DS472/AB/R (adopted Jan. 11, 2019) [hereinafter Appellate Body Report, *Brazil — Taxation*].

[7] Panel Report, *Brazil — Certain Measures Concerning Taxation and Charges*, ¶ 7.34, WTO Doc. WT/DS472/R (adopted Jan. 11, 2019) [hereinafter Panel Report, *Brazil — Taxation*].

[8] Article III:2, first sentence, arguably operates as a strict liability provision because it is breached, if the imported good is taxed in excess of the like domestic good.

or impliedly, depending on the provision of Article III being interpreted and relies on several tests for this determination, with the exception being its treatment of Article III:2, first sentence, whereby, despite the Appellate Body's contention to the contrary that, Article III:1 already informs that provision, no attempt is made to consider the possibility of a non-protectionist purpose when identical goods are involved and there is a tax differential as against the imported goods when compared to the domestic goods under the challenged measure.

In this regard, the article proceeds first from an understanding of the 'aims and effects' test and its implications for regulatory purpose in Part II. Subsequently, Part III examines Article III:2, first sentence, followed by Part IV, which deals with an examination of Article III:2, second sentence. Part V of the present article then goes on to deal with Article III:4, covering non-fiscal measures. Part VI then elucidates the differences existing between Article III and Article XX, which deals with the general exceptions that can be used by states to impose restrictions on trade. Lastly, Part VII of the article concludes by summarising the findings that regulatory purpose still plays an important role in examining the validity of any measure under Article III.

II. AIMS AND EFFECTS TEST

The 'aims and effects' test stated that regulatory distinctions based on a non-protective purpose to imported and domestic goods meant that the goods were not like goods and therefore there was no breach of Article III. When applied, the 'aims and effects' test meant that regulatory purpose became the pivotal basis for determining if imported and domestic goods are like goods.[9]

Its formulation and application were counter-intuitive because it sought to determine likeness in accordance with regulatory purpose as opposed to determining likeness by other factors, typically employed for this purpose, and then to find out if differential treatment indicates protective intent.

Thus, in order to afford regulatory autonomy, the products would be found to be dissimilar based on regulatory distinctions, thereby implicating the existence of a different regulatory purpose other than protectionism.

As the Panel noted in the *Malt Beverages* case that:

> The purpose of Article III is thus not to prevent contracting parties from using their fiscal and regulatory powers for purposes other than to afford protection to domestic production. Specifically, the purpose

[9] Report of the Panel, *US — Malt Beverages*, *supra* note 5; Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test*, 32(3) INT'L LAWYER 619, 626-27 (1998).

> of Article III is not to prevent contracting parties from differentiating between different product categories for policy purposes unrelated to the protection of domestic production. The Panel considered that the limited purpose of Article III has to be taken into account in interpreting the term 'like products' in this Article. Consequently, in determining whether two products subject to different treatment are like products [or not], it is necessary to consider whether such product differentiation is being made so as to afford protection to domestic production.[10]

The rejection of the test is captured in the Appellate Body's report in *Japan — Alcoholic Beverages II* in the following terms:

> If the measure is applied to imported or domestic products so as to afford protection to domestic production, then it does not matter that there may not have been any desire to engage in protection in the minds of the legislators or the regulators who imposed the measure. It is irrelevant that protectionism was not an intended objective if the particular tax measure in question is nevertheless, to echo Article III:1, 'applied to imported or domestic products so as to afford protection to domestic production'.[11]

As a further indication of rejection of the 'aim and effects test', the Appellate Body noted that the policy purpose of a tax measure (the 'aim' of a measure) was not relevant for the purpose of Article III:2, first sentence:

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

[10] Report of the Panel, *US — Malt Beverages, supra* note 5, ¶ 5.25.
[11] Appellate Body Report, *Japan — Alcoholic Beverages II*, *supra* note 2, at 27-28.

> the domestic like products, then the measure is inconsistent with Article III:2, first sentence.[12]

Although an express ditching of the 'aims and effects' test is often seen as the result of this statement, the Appellate Body's further statement on how to determine if a measure is 'so as to afford protection to domestic production' indicates that it was more concerned with the challenge of ascertaining purpose from traditional positions of construction, whereby reliance is often placed on the preamble of the legislation. This indication can be problematic as there may be a disconnect between the expressed non-protectionist intent and the manner of application of the legislation, or there may be several objectives identified, which could pose a challenge as to which one should prevail to cull out the existence of a protectionist intent.

The Appellate Body made it clear that the aim of the measure or 'implied aim' is not abandoned, which can be seen from the following statement:

> We believe that it is possible to examine objectively the underlying criteria used in a particular tax measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic products. Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure.[13]

The Appellate Body's position is, therefore, that the protectionist intent is to be determined by another course of action – by looking at the design and structure of the tax measure in question. This substitutes an objective test of intent for a subjective test on the question of protectionism.

An issue may arise due to this blanket description of the test being applied, as an objective or subjective test, since the Appellate Body has noted that Article III:2, first sentence, already includes Article III:1 and there is no requirement of a separate determination of whether a tax measure is 'so as to afford protection to domestic industry', if the imported good is taxed in excess of the domestic good.

As per this view on the operation of the provision, there is no objective test or any test being employed, if taxing 'in excess of' is sufficient for, or synonymous with, a finding of protective application, because the test is then reducible to the amount of the tax differential.

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[12] *Id.* at 18-19.
[13] *Id.* at 29.

Further, since the amount of the tax differential is a separate question from whether the tax measure is 'so as to afford protection to domestic industry', regulatory purpose is subsumed under an arithmetic.

As discussed below, with respect to Article III:2, second sentence, and Article III:4, regulatory purpose is not abandoned, and it can be said that both subjective and objective tests are employed in this endeavour.

III. ARTICLE III:2, FIRST SENTENCE

Article III:2, first sentence,[14] focuses on identical goods and provides that when the imported good is taxed in excess of the domestic good, there is a breach of this provision. As the Appellate Body noted in *Japan — Alcoholic Beverages II*, the smallest amount of excess results in a breach of the provision.[15]

This signifies a strict liability standard whereby no margin of appreciation is permitted for regulatory distinctions manifested in differential taxation that could be based on a legitimate regulatory purpose. The position taken is that once the goods are identical, there could be no legitimate regulatory purpose for differential taxation to influence consumption.

There is, therefore, no recognition of regulatory purpose under Article III:2, first sentence, if there is a difference in taxation between imported and domestic goods. If the regulatory distinction is based on health or environmental issues, for example, an additional environmental tax on the imported good, not packaged in a biodegradable fashion; or an additional amount on a domestic sales tax imposed on the imported good to account for the costs of disposal of non-biodegradable material, the recourse is to Article XX,[16] unless the applicable health and environmental concerns take the imported product outside the realm of like products with respect to the domestic product.

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[14] GATT, *supra* note 1, at art. III:2 (first sentence).

[15] Appellate Body Report, *Japan — Alcoholic Beverages II*, *supra* note 2, at 23. Here, the Appellate Body established a strict approach on the question of the meaning of 'in excess of' under Article III:2, first sentence, in the following manner:

> The only remaining issue under Article III:2, first sentence, is whether the taxes on imported products are 'in excess of' those on like domestic products. If so, then the Member that has imposed the tax is not in compliance with Article III. Even the smallest amount of 'excess' is too much. The prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a 'trade effects test' nor is it qualified by a *de minimis* standard.

[16] GATT, *supra* note 1, at art. XX (Article XX of GATT 1994 covers the applicable exceptions for breaches of the core GATT obligations such as national treatment and MFN).

Even then, a negligible tax differential may not affect competitive conditions between the imported and the domestic product even if they are identical products, and therefore, in this instance the measure may not be capable of protecting domestic production. The jurisprudence of the Appellate Body on Article III: 2, first sentence, does not account for this possibility.

For example, in *Japan — Alcoholic Beverages II*, the Appellate Body addressed the relevance of the trade effects of measures falling under the scope of Article III:2, first sentence, in the following manner:

> [I]t is irrelevant that 'the trade effects' of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.[17]

The Appellate Body reiterated this approach in *Canada — Periodicals*, noting that "It is a well-established principle that the trade effects of a difference in tax treatment between [identical] imported and domestic products do not have to be demonstrated for a measure to be found to be inconsistent with Article III."[18]

Since the decision in *Japan — Alcoholic Beverages II*, the Appellate Body has seen it fit to continue with the position that there is no justification for differential taxation with respect to identical domestic and imported goods, but the conclusion that the regulatory distinction is serving a protectionist purpose.[19]

According to this view, regulatory purpose is not taken into account or is abandoned, or is assumed to be protectionist if there are regulatory distinctions between the imported and domestic like goods manifested in tax differentials.

In the previous decision of *Brazil — Taxation*, whereby the challenged measures were tax reductions and exemptions related to costs that companies incurred to fulfil the requirements of the programme, the Panel discounted regulatory purpose in the following terms:

> For the Panel, a tax incentive cannot be justified as offsetting a cost imposed through regulation, public policy or otherwise. The WTO-

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[17] Appellate Body Report, *Japan — Alcoholic Beverages II*, *supra* note 2, at 16.

[18] Appellate Body Report, *Canada — Certain Measures Concerning Periodicals*, at 18, WTO Doc. WT/DS31/R (adopted July 30, 1997) [hereinafter Appellate Body Report, *Canada — Periodicals*].

[19] There is no subsequent decision from the Appellate Body, at the time of writing, disturbing the jurisprudence that any tax differential between imported and domestic goods, with respect to identical goods, indicates protectionist intent.

> consistency of a tax is assessed on the basis of its applied level, which must be non-discriminatory, but otherwise WTO Members are free to choose the type of taxation they wish and they are free to calculate as they wish the components of such taxes — the WTO rules on taxes are limited to prohibiting their discriminatory application. Furthermore, in light of the legal standard under Article III:2, first sentence, the Panel considers that a finding on the WTO-consistency of the measure is not based on any consideration of the rationale or justification for the measure. The justification for a [WTO-inconsistent] tax treatment can be assessed in the context of the general exceptions of Article XX of the GATT.[20]

The Appellate Body in *Brazil — Taxation* agreed with the Panel's reasoning, that policy reasons and considerations can be assessed, for example, in the context of Article XX to justify inconsistencies, and do not belong to an Article III:2, first sentence, analysis.[21]

> What then is one to make of the Appellate Body's statement that Article III:2, first sentence, is informed by Article III:1, which relates to a purpose enquiry? If its absence from Article III:2, first sentence, as opposed to being expressly included in Article III:2, second sentence, is to carry some meaning other than that regulatory purpose is irrelevant, then there would be no need for its specific inclusion in the second sentence.[22]

For Article III:2, first sentence, therefore, the purpose of the measure is not important despite the Appellate Body's position that Article III:1 informs Article III:2, first sentence.[23] On this view, regulatory purpose can only be said to have been abandoned from the analysis to the extent that the 'aims and effects' test has been or could be applied to tax differentials between identical goods.

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[20] Panel Report, *Brazil — Taxation*, *supra* note 7, ¶ 7.153.

[21] Appellate Body Report, *Brazil — Taxation*, *supra* note 6, ¶ 5.27.

[22] This position is seemingly at variance with the negotiating history of the national treatment obligation with respect to origin-neutral measures under Article III:2 and Article III:4. *See, e.g.*, Weihuan Zhou, *The Role of Regulatory Purpose under Article III:2 and 4 –Toward Consistency between Negotiating History and WTO Jurisprudence*, 11(1) WORLD TRADE REV. 81, 100-102 (2012).

[23] If the negotiating history of the national treatment obligation is to be resorted to this would clearly not be the view to adopt, but, as often observed, the Appellate Body usually does not resort to the negotiating history of a provision in its construction, since the negotiating history is merely seen as a supplementary means of interpretation. *See, e.g.*, Enrico Partiti, *The Appellate Body Report in US — Tuna II and Its Impact on Eco-Labelling and Standardization*, 40(1) LEGAL ISSUES ECON. INTEGRATION 73, 79 (2013).

Neither the *Malt Beverages* case nor the *Superfund* case,[24] where the 'aims and effects' test was used concerns identical goods, though the Panels in those cases expressed a general principle that applied to all the provisions of Article III.

On the other hand, if Article III:1 informs the rest of Article III as the Appellate Body has noted, it would be the basis of the purpose enquiry and would be satisfied once there is taxation of the imported like good in excess of the domestic good.

IV. ARTICLE III:2, SECOND SENTENCE

In the case of Article III:2, second sentence, the position is relatively clear as to whether regulatory purpose is to be taken into account. This provision concerns goods which are directly competitive or substitutable, where there is dissimilar taxation between the imported and the domestic goods. The provision, including Ad Article III:2, reads as follows:

> 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 other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. 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.*
>
> A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.[25]

Some margin of appreciation is permitted regarding the determination of dissimilar taxation and it is within this zone that it may be said that regulatory purpose is addressed — if not explicitly, then indirectly.

To be clear, the Appellate Body does not say that it is dealing with the issue of regulatory purpose in deciding whether there is dissimilar taxation. In cautioning against blurring the distinction between a determination of dissimilar taxation and the regulatory purpose of 'so as to afford protection to domestic industry', the Appellate Body noted the following:

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[24] Report of the Panel, *US — Superfund*, *supra* note 5, at 158.
[25] GATT, *supra* note 1, at art. III:2, Ad art. III:2.

> [T]he Panel erred in blurring the distinction between [the issue of dissimilar taxation] and the entirely separate issue of whether the tax measure in question was applied 'so as to afford protection'. Again, these are separate issues that must be addressed individually. If 'directly competitive or substitutable products' are not 'not similarly taxed', then there is neither need nor justification under Article III:2, second sentence, for inquiring further as to whether the tax has been applied 'so as to afford protection'. But if such products are 'not similarly taxed', a further inquiry must necessarily be made.[26]

However, the Appellate Body has also made it clear that the amount of dissimilar taxation may itself be the basis for a determination that the measure is so as to afford protection. In *Japan — Alcoholic Beverages II*, the Appellate Body stated as follows:

> The very magnitude of the dissimilar taxation in a particular case may be evidence of such a protective application, as the Panel rightly concluded in this case. Most often, there will be other factors to be considered as well. In conducting this inquiry, panels should give full consideration to all the relevant facts and all the relevant circumstances in any given case … The dissimilar taxation must be more than *de minimis*. It may be so much more that it will be clear from that very differential that the dissimilar taxation was applied 'so as to afford protection'. In some cases, that may be enough to show a violation. In this case, the Panel concluded that it was enough. Yet in other cases, there may be other factors that will be just as relevant or more relevant to demonstrating that the dissimilar taxation at issue was applied 'so as to afford protection'. In any case, the three issues that must be addressed in determining whether there is such a violation [— first, whether the goods are directly competitive or substitutable; second, whether they are not similarly taxed; and third, whether the measure has been taken so as to afford protection to domestic goods —] must be addressed clearly and separately in each case and on a case-by-case basis. And, in every case, a careful objective analysis, must be done of each and all relevant facts and all the relevant circumstances in order to determine 'the existence of protective taxation'.[27]

Firstly, this gives rise to the view that the margin of appreciation on the question of the *de minimis* threshold for dissimilar taxation relates to a purpose enquiry. Unlike Article III:2, first sentence, an objective test and a subjective test are

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[26] Appellate Body Report, *Japan — Alcoholic Beverages II*, *supra* note 2, at 27.
[27] *Id.* at 29-31. For a brief understanding of the three issues, see *Id.* at 24.

employed on this issue, whereby the *de minimis* threshold represents a bright line rule on the question of 'so as to afford protection', but its subjective features are manifested in no clear guideline being laid down as to what would constitute the *de minimis* threshold – which is to be analysed on a case-by-case basis.

Secondly, the requirement that a separate determination has to be made regarding whether the tax measure is 'so as to afford protection' under Article III:2, second sentence, which specifically mentions Article III:1, supports another clear basis for the view that a purpose inquiry is to be embarked upon under this provision.

In *Japan — Alcoholic Beverages II*, the Appellate Body described the distinction between the first and second sentences of Article III:2 as "[T]he second sentence of Article III:2 provides for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products that are not 'like products' as contemplated by the first sentence … [.]"[28]

This clearly demonstrates that regulatory purpose is to be taken into account expressly under Article III:2, second sentence. Yet, the Appellate Body seems to also be saying that the means for determining regulatory purpose need not be the intent of the legislators.

It has stated, for example, in respect of Article III:2, second sentence, the following:

> This third inquiry under Article III:2, second sentence ['so as to afford protection'], must determine whether 'directly competitive or substitutable products' are 'not similarly taxed' in a way that affords protection. This is not an issue of intent. It is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent. If the measure is applied to imported or domestic products so as to afford protection to domestic production, then it does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who imposed the measure. It is irrelevant that protectionism was not an intended objective, if the particular tax measure in question is nevertheless, to echo Article III:1, 'applied to imported or domestic products so as to afford protection to domestic production'. This is an issue of how the measure in question is applied.[29]

[28] *Id. at* 19.
[29] *Id.* at 27-28.

This would seem to indicate that the Appellate Body is disregarding regulatory purpose and focusing on the application of the measure. However, it is more to the point to suggest that the Appellate Body is eschewing a purpose inquiry based on intent and instead, substituting it with a test based on the manner in which the measure is applied and imputing purpose from the application of the measure. This means, of course, that a measure can be found to be in violation of Article III even if there was no protective intent.

Fault may not be attributable to the Appellate Body for this approach, as here it is substituting an objective test for a subjective test in determining the purpose of the measure. This is because there are often conflicting positions on the weight to be given to the statements of the legislators in a given piece of legislation, where there are other factors, apart from protectionism, that explain the promulgation of the legislation outlining the measure.

It seems, however, that the Panels and the Appellate Body are more inclined towards taking regulatory purpose into account where there is evidence that the regulatory purpose is protective and to disregard evidence to the contrary where it is inconsistent with the design and structure of the measure which tends to showcase a protective application.

Consider, for example, the Appellate Body's treatment of the legislative history of the Excise Tax at issue in *Canada — Periodicals*. Having found that, "the magnitude of the dissimilar taxation between imported split-run periodicals and domestic non-split-run periodicals is beyond excessive, indeed, it is prohibitive … [T]here is also ample evidence that the very design and structure of the measure is such as to afford protection to domestic periodicals",[30] the Appellate Body then examined the statements of the representatives of the Canadian executive about the policy objectives of the part of the Excise Tax Act at issue.

The Appellate Body noted the following regarding the legislative history and statements from the Executive:

> The Canadian policy which led to the enactment of Part V.1 of the Excise Tax Act had its origins in the Task Force Report. It is clear from reading the Task Force Report that the design and structure of Part V.1 of the Excise Tax Act are to prevent the establishment of split-run periodicals in Canada, thereby ensuring that Canadian advertising revenues flow to Canadian magazines. Madame Monique Landry, Minister Designate of Canadian Heritage at the time the Task Force Report was released, issued the following statement summarizing the Government of Canada's policy objectives for the Canadian periodical industry: 'The Government reaffirms its

[30] Appellate Body Report, *Canada — Periodicals*, *supra* note 18, at 32.

> commitment to protect the economic foundations of the Canadian periodical industry, which is a vital element of Canadian cultural expression. To achieve this objective, the Government will continue to use policy instruments that encourage the flow of advertising revenues to Canadian magazines and discourage the establishment of split-run or "Canadian" regional editions with advertising aimed at the Canadian market. We are committed to ensuring that Canadians have access to Canadian ideas and information through genuinely Canadian magazines, while not restricting the sale of foreign magazines in Canada.'
>
> … During the debate of Bill C-103, An Act to Amend the Excise Tax Act and the Income Tax Act, the Minister of Canadian Heritage, the Honourable Michel Dupuy, stated the following: '… the reality of the situation is that we must protect ourselves against split-runs coming from foreign countries and, in particular, from the United States.'[31]

A similar approach was taken in *Korea — Alcoholic Beverages*, whereby the Appellate Body held, after noting that the design and structure of the tax measure was so as to afford protection, because the tax operates such that the lower tax brackets almost exclusively cover domestic production, and the higher tax brackets almost exclusively cover imported products, that: "[i]n such circumstances, the reasons given by Korea as to why the tax is structured in a particular way do not call into question the conclusion that the measures are applied 'so as to afford protection to domestic production'."[32]

Another instance of the same can be found in *Mexico — Taxes on Soft Drinks*, where the Panel noted that:

> …[H]owever, the declared intention of legislators and regulators of the Member adopting the measure should not be totally disregarded, particularly when the explicit objective of the measure is that of affording protection to domestic production. Indeed, the Appellate Body has confirmed that statements made by government representatives of a Member, admitting to the protective intent of a measure, may be relevant as part of a number of considerations in

[31] *Id.* at 30-32.

[32] Appellate Body Report*, Korea — Taxes on Alcoholic Beverages*, ¶ 150, WTO Doc. WT/DS75/AB/R (adopted Feb. 17, 1999) [hereinafter Appellate Body Report, *Korea — Alcoholic Beverages*].

> reaching the conclusion that a measure is applied so as to afford protection to domestic production.[33]

In the case of Article III:2, second sentence measures, therefore, an approach to determining regulatory purpose can be observed in the margin of appreciation with respect to dissimilar taxation coupled with the design, architecture, and revealing nature of the measure; combining both an objective and a subjective test, the latter being used to demonstrate protective intent consistent with the 'aims' portion of an 'aims and effects' test.

V. ARTICLE III:4

It cannot be gainsaid that the prohibition against protectionism in Article III applies to fiscal as well as non-fiscal measures, as understood through the interpretation — with respect to the latter — of the terms of Article III:4.[34] In *Japan — Alcoholic Beverages II*, for example, the Appellate Body noted:

> "Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production. This general principle informs the rest of Article III. The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 *and in the other paragraphs of Article III*, while respecting, and not diminishing in any way, the meaning of the words actually used in the texts of those other paragraphs. In short, Article III:1 constitutes part of the context of Article III:2, in the same way that it constitutes part of the context of each of the other paragraphs in Article III. Any other reading of Article III would have the effect of rendering the words of Article III:1 meaningless, thereby violating the fundamental principle of effectiveness in treaty interpretation. Consistent with this principle of effectiveness, and with the textual differences in the two sentences, we believe that Article III:1 informs the first sentence and the second sentence of Article III:2 in different ways."[35]

Further, that Article III:1 applies to Article III:4 is the statement made expressly by the Appellate Body in the following terms:

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[33] Panel Report, *Mexico — Taxes Measures on Soft Drinks and Other Beverages*, ¶ 8.91 (*see also* ¶ 8.92-8.94), WTO Doc. WT/DS308/AB/R (adopted Mar. 24, 2006) [hereinafter Panel Report, *Mexico — Taxes on Soft Drinks*].

[34] GATT, *supra* note 1, at art. III:4.

[35] Appellate Body Report, *Japan — Alcoholic Beverages II*, *supra* note 2, at 18 (emphasis added).

> …[H]owever, both of these paragraphs of Article III constitute specific expressions of the overarching, 'general principle', set forth in Article III:1 of the GATT 1994. As we have previously said, the 'general principle' set forth in Article III:1 'informs' the rest of Article III and acts 'as a guide to understanding and interpreting the specific obligations contained' in the other paragraphs of Article III, including paragraph 4. Thus, in our view, Article III:1 has particular contextual significance in interpreting Article III:4, as it sets forth the 'general principle' pursued by that provision. Accordingly, in interpreting the term 'like products' in Article III:4, we must turn, first, to the 'general principle' in Article III:1, rather than to the term 'like products' in Article III:2.[36]

This raises the question of whether the 'less favourable treatment' standard in Article III:4 is to be equated with 'so as to afford protection to domestic production' standard in Article III:1, that is, whether a finding of less favourable treatment means that the measure in issue breaches the general principle articulated in Article III:1.

This would seem to be the case as there is no need for a separate determination on the question of 'so as to afford protection' similar to the situation under Article III:2, first sentence, where the excess tax on imported goods vis-a-vis domestic goods is sufficient for a finding of a breach of that provision.

Further support for this position is found in *EC — Bananas III*, where the Appellate Body reviewed the Panel's finding that the European Council's (EC's) allocation method of tariff quota for bananas was inconsistent with Article III:4. The Appellate Body considered that an independent consideration of the phrase 'so as to afford protection to domestic production' is not necessary under Article III:4, noting that: "Article III:4 does not specifically refer to Article III:1. Therefore, a determination of whether there has been a violation of Article III:4 does not require a separate consideration of whether a measure 'afford[s] protection to domestic production'."[37]

Additionally, in *EC — Asbestos*, the Appellate Body clarified that 'less favourable treatment' equates to 'so as to afford protection to domestic industry', by stating that:

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[36] Appellate Body Report, *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 93, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001) [hereinafter Appellate Body Report, *EC — Asbestos*].

[37] Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas III*, ¶ 216, WTO Doc. WT/DS27/AB/R (adopted Sep. 25, 1997) [hereinafter Appellate Body Report *EC — Bananas III*].

> The term 'less favourable treatment' expresses the general principle, in Article III:1, that internal regulations 'should not be applied … so as to afford protection to domestic production'. If there is 'less favourable treatment' of the group of 'like' imported products, there is, conversely, 'protection' of the group of 'like' domestic products.[38]

It may be recalled that in *Japan — Alcoholic Beverages II*, the Appellate Body noted that the absence of Article III:1 from the text of Article III:2, first sentence, does not mean that it fails to inform the interpretation of that provision, and that this general principle must be given effect without there having to be a separate determination on the issue of 'so as to afford protection'.[39]

This clear exposition of the relationship between Article III:1 and Article III:2, first sentence, is not given similar clarity by the Appellate Body in *EC — Asbestos* on the relationship between Article III:1 and Article III:4, regarding a finding of less favourable treatment, and on the question of the separate determination of regulatory purpose.[40]

However, in *EC — Seal Products*, the Appellate Body noted that Article III:4 is an expression of Article III:1 so that regulatory purpose is already taken into account in the 'less favourable treatment' standard without the need for a separate determination on that question.[41]

It would seem, therefore, that for Article III:4, regulatory purpose is equated with the standard of 'less favourable treatment' for a breach of that provision. The 'less favourable treatment' standard is not expressly informed by the 'so as to afford protection to domestic production' standard in Article III:1, requiring a separate determination on regulatory purpose to be made as in the case of Article III:2, second sentence. And yet, the whole purpose of Article III is to prohibit discrimination that disfavours like imported over like domestic goods.

We may also observe that regulatory purpose can be discerned from the manner in which a measure is applied as against the existence of the measure in and of itself.[42] If it is applied so as to disfavour imported goods, as can be seen from the detrimental impact of trade as between imported and domestic goods, then this

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[38] Appellate Body Report, *EC — Asbestos, supra* note 36, ¶ 100.

[39] Appellate Body Report, *Japan — Alcoholic Beverages II, supra* note 2, at 17.

[40] Appellate Body Report, *EC — Asbestos, supra* note 36, ¶ 93.

[41] Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.115, WTO Doc. WT/DS400/AB/R (adopted June 16, 2014) [hereinafter Appellate Body Report, *EC — Seal Products*].

[42] For an argument supporting that objective evidence by itself may be sufficient, but that all evidence — subjective and objective — must be 'carefully evaluated'; *see, e.g.*, Robert Howse & D.H. Regan, *The Product/Process Distinction — An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy,* 11 EUR. J. INT'L L. 249, 265 (2000).

may be sufficient to constitute a breach of Article III:4.[43] However, because the detrimental impact may have nothing to do with protectionism, this approach arguably resembles strict liability whereby detrimental trade impact is the sole evidentiary basis for liability.

One way in which the Appellate Body guards against this outcome is by employing the 'genuine relationship test', whereby the differential impact between imported and domestic goods must be shown to have arisen from a non-origin neutral measure.[44] A second approach is to view the detrimental impact on imported goods as being related to factors other than the measure, a so-called 'causation test'.[45] Thus, in *EC — Seal Products*, the Appellate Body discounted any finding of less favourable treatment, if the detrimental impact on the imported goods resulted from private choices.[46]

Moreover, consumer preferences — if relied upon as a significant factor to determine likeness of goods — may lead to products being treated differently based on actual or perceived differences regarding health and environmental concerns.[47] Resultantly, there would be no less favourable treatment, as the products under investigation would not be seen as 'like' products.[48]

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[43] This has often led to the view that the Appellate Body is here employing a strict liability test, whereby detrimental impact is equated with protective intent or purpose. *See, e.g.*, Robert Howse et al., *Sealing the Deal: the WTO Appellate Body's Report in EC — Seal Products*, 18(12) AM. SOC'Y INT'L L.: INSIGHTS (June 4, 2014), https://www.asil.org/insights/volume/18/issue/12/sealing-deal-wto%E2%80%99s-appellate-body-report-ec-%E2%80%93-seal-products.

[44] Appellate Body Report, *Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines*, ¶ 134, WTO Doc. WT/DS371/AB/R (adopted July 25, 2011) [hereinafter Appellate Body Report, *Thailand — Cigarettes*]; Appellate Body Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 96, WTO Doc. WT/DS302/AB/R (adopted May 19, 2005) [hereinafter Appellate Body Report, *Dominican Republic — Cigarettes*].

[45] Weihuan Zhou, *US — Clove Cigarettes and US — Tuna II (Mexico): Implications for the Role of Regulatory Purpose under Article III: 4 of the GATT*, 15(4) J. INT'L. ECON. L. 1075, 1115 (2012).

[46] Appellate Body Report, *EC — Seal Products*, *supra* note 41, ¶ 5.336.

[47] This is on the understanding that consumer preference factor significantly in the question of whether goods are 'like' without necessarily discounting the weight to other factors under the criteria to determine likeness in the Border Tax Adjustments Report. Importantly, this was the approach taken by the Appellate Body in Appellate Body Report, *EC — Asbestos, supra* note 36.

[48] *See Id.* ¶ 117. The Appellate Body noted the significance of consumer preferences as a significant factor in the following manner:

> Before examining the Panel's findings under the second and third criteria, we note that these two criteria involve certain of the key elements relating to the competitive relationship between products: first, the extent to which

In *EC — Asbestos*, the Appellate Body visited the idea that health effects of products can be taken into account in determining likeness.[49] What weight is to be given to this factor is unclear, with the Appellate Body reducing its guidance to the usual *mantra* that each case must be decided on its own facts, as against adopting a mechanical approach for guidance in future cases.

Importantly, the case laws fail to provide a definition of 'less favourable treatment'.[50] They only provide certain examples of 'less favourable treatment' and the analytical framework for its determination.[51] For instance, the Appellate body stated that the design, structure and expected operation of the measure are relevant;[52] whereas, a possibility that an adverse impact on competitive conditions would materialise is not decisive and is neither a necessary nor a sufficient condition for breach of the provision.[53] However, the existence of an origin-based *de jure* discrimination is a good indication that there is less favourable treatment.[54]

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

[49] *Id.* ¶ 109.

[50] *See* Report of the Panel, *United States — Section 337 of the Tariff Act of 1930*, ¶ 5.11, L/6439 (Nov. 7, 1989) GATT BISD (36th Supp.), at 345 (1989). Some general guidance is provided which is not sufficient, thus, the GATT panel in *US — Section 337 Tariff Act* stated:

> [The term 'treatment no less favourable'] clearly sets a minimum permissible standard as a basis. On the one hand, contracting parties may apply to imported products different formal legal requirements if doing so would accord imported products more favourable treatment. On the other hand, there may be cases where application of formally identical legal provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in fact no less favourable.

[51] Appellate Body Report, *Thailand — Cigarettes*, *supra* note 44, ¶ 130.

[52] *Id.* ¶ 133.

[53] *Id.*

[54] *Id.* ¶ 133 (What is not taken into account in this example offered by the Appellate Body is that origin based *de jure* regulatory distinctions need not be protectionist if such

The Appellate Body also stated that, there must be a genuine relationship between the measure and its impact on competitive opportunities to conclude that a less favourable treatment is being accorded.[55]

While formal distinctions between imported and domestically produced goods are not sufficient, so too is the case regarding non-formal distinctions, giving rise to uncertainty as to when and under what circumstances 'less favourable treatment' may be said to have occurred.[56] Distinctions in competitive opportunity between imported and domestic goods, or a lack of equality of competitive opportunity between those goods, is often cited as the basis of an affirmative finding of less favourable treatment.[57]

This is independent of the trade effects of the particular measure, as *Korea — Beef* aptly demonstrates, wherein the Appellate Body noted that the quota for beef was often met and that the measure did not affect usage of the quota, but that Article III is not necessarily concerned with trade volumes as such; rather whether the competitive opportunity of the imported good is affected vis-à-vis the domestic good.[58]

A similar position was taken by the Appellate Body in *US — Clove Cigarettes*, that the trade effects are not sufficient, while noting that, "[the] regulatory concerns underlying a measure may be relevant to a 'likeness' analysis under Article III:4 of

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distinctions are pursuing a legitimate non-protectionist goal as in the case of health or environment concerns that specifically relate to a WTO Member's lax policies in this regard and where, in the case of Article XX jurisprudence, at any rate, a WTO Member presumably has much regulatory autonomy in determining its level of protection). On the significance placed by the Appellate Body on a WTO Member's right to determine its appropriate level of protection, *see e.g.*, Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, ¶ 210, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007) [hereinafter Appellate Body Report, *Brazil — Retreaded Tyres*]. The Appellate Body noted the following:

> In this respect, *the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context*. Another key element of the analysis of the necessity of a measure under Article XX(b) is the contribution it brings to the achievement of its objective. To be characterised as necessary, a measure does not have to be indispensable, [h]owever, its contribution to the achievement of the objective must be material … (emphasis added).

[55] Appellate Body Report, *Thailand — Cigarettes*, *supra* note 44, ¶ 134.

[56] Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 137-38, WTO Doc. WT/DS161/AB/R (adopted Jan. 10, 2001) [hereinafter Appellate Body Report, *Korea — Various Measures on Beef*].

[57] *Id.* ¶ 631.

[58] *Id.* ¶ 143-148.

the GATT 1994 to the extent they have an impact on the competitive relationship between and among the products concerned."[59]

For Article III:4, therefore, the 'less favourable treatment' standard is regarded as coterminous with the 'so as to afford protection' standard while recognising that the trade effects of a measure are not conclusive on the question of 'less favourable treatment' and, by extension, on the question of whether the measure is 'so as to afford protection' in the purpose enquiry.

VI. RELATIONSHIP WITH ARTICLE XX

One view discouraging an interpretation of Article III expressly factoring a regulatory purpose test as opposed to a 'disparate impact test' is that it blurs the distinction between Article III and Article XX,[60] rendering the latter provision inutile, or does not demonstrate any clear demarcation in the division of labour as envisaged between Article III and Article XX.[61]

This position is less than convincing because it fails to take into account how treaty provisions should be interpreted, that is, not on the basis of a mere strict textualist approach but to factor the teleological nuances of a provision as well.[62]

Second, Article XX has a closed list of regulatory purposes,[63] that is not intended to be the only list governing regulatory purpose under Article III, for were that the

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[59] Appellate Body Report*, United States — Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 119, WTO Doc. WT/DS406/AB/R (adopted Apr. 24, 2012) [hereinafter Appellate Body Report, *US — Clove Cigarettes*].

[60] GATT, *supra* note 1, at art. XX (Article XX of GATT 1994 provides exceptions for breaches of GATT obligations whereby they are necessary or relate to particular legitimate objectives such as protection of animal or plant life or health concerns).

[61] *See, e.g.*, Michael Ming Du, *Treatment No Less Favourable and the Future of National Treatment Obligation in GATT Article III:4 after EC-Seal Products*, 15(1) WORLD TRADE REV.151, 154-55 (2016) (arguing that the Appellate Body's interpretation of less favourable treatment in Article III:4 deprives Article III:1 of any meaning, but that the disparate impact test resorted by the Appellate Body is preferable to an expansive foray into regulatory purpose justifications that are more properly addressed under Article XX of GATT).

[62] *See, e.g.*, ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 212 (2007) (arguing that, "… it is generally the case that a specific telos is conferred on each and every provision").

[63] For this view, *see, e.g.*, Ming Du, *supra* note 4, at 671. By contrast, this is not to suggest that the Appellate Body in an appropriate case may not offer a liberal interpretation of the listed exceptions in Article XX to accommodate emerging regulatory distinctions that may not be seen as protectionist in light of contemporary normative developments. *See, e.g.,* Joost Pauwelyn, *The Public Morals Exception after Seals — How to Keep it under Check?*, INT'L ECON. L. & POL'Y BLOG (May 27, 2014),

case then resort to Article XX to justify an Article III inconsistent measure would be superfluous.[64] In other words, Article III contemplates regulatory distinctions that are non-protectionist even if the imported and domestic products are like.

Third, there is no provision for a necessity test, nor a weighing and balancing test, in adopting a justificatory regulatory purpose under Article III, as exists for Article XX with respect to necessary measures.[65] A breach of Article III:4 results in the measure being sent for examination under Article XX, which deals with the issue of necessity or whether the measure relates to one of the identified objectives in Article XX.

As the Appellate Body noted in *Thailand — Cigarettes (Philippines)*:

> [W]hen Article XX(d) is invoked to justify an inconsistency with Article III:4, what must be shown to be 'necessary' is the treatment giving rise to the finding of less favourable treatment. Thus, when less favourable treatment is found based on differences in the regulation of imports and of like domestic products, the analysis of an Article XX(d) defence should focus on whether those regulatory differences are 'necessary' to secure compliance with 'laws or regulations' that are not GATT inconsistent.[66]

Fourth, there is no requirement of a Chapeau test for a justificatory regulatory purpose under Article III as exists for Article XX. The Chapeau under Article XX prohibits the adoption of an excepted measure that results into an arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international goods and, therefore, requires some level or an additional layer of discrimination to be proved. A clash of division of labour is, therefore, unlikely in accordance with Article III which takes an interpretation favouring regulatory purpose.

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http://worldtradelaw.typepad.com/ielpblog/2014/05/the-public-morals-exception-after-seals-how-to-keep-itin-check.html.

[64] This position is on the understanding that while the closed list of exceptions in Article XX of GATT 1994 does provide a justification for breach of Article III, regulatory distinctions unconnected with the closed list of exceptions would not be satisfied under Article XX of GATT 1994 unless an expansionary construction of the provision is performed, which would be labelled as judicial activism if done by the judicial organ of the WTO. *See, e.g.*, Lothar Ehring, *De Facto Discrimination in World Trade Law: National and Most Favoured Nation Treatment-or Equal Treatment?*, 36(5) J. WORLD TRADE L. 921, 944 (2002) (arguing that culture, consumer protection beyond life and health, and socio-economic policies in general are not covered under the closed list in Article XX of GATT 1994).

[65] *See, e.g.*, Appellate Body Report, *Chile — Taxes on Alcoholic Beverages*, ¶ 72, WTO Doc. WT/DS87/AB/R (adopted Jan. 12, 2000) [hereinafter Appellate Body Report, *Chile — Alcoholic Beverages*].

[66] Appellate Body Report, *Thailand — Cigarettes*, *supra* note 44, ¶ 177.

Further, in discussing the relationship between Article III:4 and Article XX and interpreting Article XX(g), the Appellate Body in *US — Gasoline* noted the following:

> Article XX(g) and its phrase, 'relating to the conservation of exhaustible natural resources', need to be read in context and in such a manner as to give effect to the purposes and objects of the General Agreement. The context of Article XX(g) includes the provisions of the rest of the General Agreement, including in particular Articles I, III and XI; conversely, the context of Articles I and III and XI includes Article XX. Accordingly, the phrase 'relating to the conservation of exhaustible natural resources' may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies. The relationship between the affirmative commitments set out in, e.g., Articles I, III and XI, and the policies and interests embodied in the 'General Exceptions' listed in Article XX, can be given meaning within the framework of the General Agreement and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose.[67]

Additionally, in *EC — Asbestos*, the Appellate Body after finding that, "carcinogenicity, or toxicity, constitutes … a defining aspect of the physical properties of [the subject products]",[68] disagreed with the Panel's finding that considering the health risks associated with a product under Article III:4 would negate the effect of Article XX(b) and stated that:

> We do not agree with the Panel that considering evidence relating to the health risks associated with a product, under Article III:4, nullifies the effect of Article XX(b) of the GATT 1994. Article XX(b) allows a Member to 'adopt and enforce' a measure, inter alia, necessary to protect human life or health, even though that measure is inconsistent with another provision of the GATT 1994. Article III:4 and Article XX(b) are distinct and independent provisions of the GATT 1994 each to be interpreted on its own. The scope and meaning of Article III:4 should not be broadened or restricted

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[67] Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, at 18, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996) [hereinafter Appellate Body Report, *US — Gasoline*].

[68] Appellate Body Report, *EC — Asbestos*, *supra* note 36, ¶ 114.

> beyond what is required by the normal customary international law rules of treaty interpretation, simply because Article XX(b) exists and may be available to justify measures inconsistent with Article III:4. The fact that an interpretation of Article III:4, under those rules, implies a less frequent recourse to Article XX(b) does not deprive the exception in Article XX(b) of *effet utile*. Article XX(b) would only be deprived of *effet utile* if that provision could not serve to allow a Member to 'adopt and enforce' measures 'necessary to protect human … life or health'. Evaluating evidence relating to the health risks arising from the physical properties of a product does not prevent a measure which is inconsistent with Article III:4 from being justified under Article XX(b). We note, in this regard, that, different inquiries occur under these two very different Articles. Under Article III:4, evidence relating to health risks may be relevant in assessing the competitive relationship in the marketplace between allegedly 'like' products. The same, or similar, evidence serves a different purpose under Article XX(b), namely, that of assessing whether a Member has a sufficient basis for 'adopting or enforcing' a WTO-inconsistent measure on the grounds of human health.[69]

Here, the Appellate Body is recognising that regulatory distinctions based on health may still amount to a breach of Article III:4,[70] but can possibly be saved under Article XX because the evidence to be elicited, even if similar, would serve a different purpose under the Article XX analysis.

Resort to Article XX to justify a measure in breach of Article III, would likely run afoul of that provision either because it fails the least restrictive test in the case of necessary measures or because, in respect of necessary or 'relating to' measures, it amounts to an arbitrary or disguised restriction on international trade in breach of the Chapeau.[71]

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[69] *Id.* ¶ 115.

[70] This may also apply to environmental measures and other measures identified in Article XX that cannot be accommodated under Article III as justifying the regulatory distinction made.

[71] GATT Article XX measures are notoriously hard to justify under the Chapeau test as, at the time of writing, no Article XX measure has been found to have escaped condemnation under the Chapeau. *See, e.g.*, Robert Howse, *Managing the Interface between International Trade Law and the Regulatory State: What Lessons Should (and should not) Be Drawn from the Jurisprudence of the United States Dormant Commerce Clause*, *in* REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 142 (Thomas Cottier & Petros C. Mavroidis eds., 2000).

As observed above, the Appellate Body noted in *Thailand — Cigarettes (Philippines)*,[72] in respect of the 'necessity' justification of an Article III:4 measure under Article XX (d) that, it must be shown that the less favourable treatment was in fact necessary.

Bearing in mind that a justified regulatory purpose under Article III is not dependent on a necessity test to be consistent with that provision,[73] Article XX would not lose its utility for measures that cannot be accommodated under Article III. These would be measures that require validity in accordance with the 'necessity' or 'relating to' tests.

VII. CONCLUDING REMARKS

Regulatory purpose has been at the forefront of the Appellate Body's analysis of Article III measures. Despite its early rejection of an 'aims and effects' test, the Appellate Body's jurisprudence has largely pursued the objective of the abandoned test in different forms by resorting to an interpretive scheme providing a margin of appreciation in respect of Article III:2, second sentence measures, on the question of dissimilar taxation; coupled with an examination of the design, architecture and revealing structure of a measure.

On the other hand, it has employed, as a proxy for protective purpose, other means to give effect to Article III:1 including the amount of tax differentials for fiscal measures under Article III.

Nonetheless, there are doubtless lingering questions as to whether the Appellate Body is really engaging in a purpose inquiry if, as in the case of Article III:2, first sentence, and Article III:4, it does not endorse a separate inquiry on the question of 'so as to afford protection' as exists regarding Article III:2, second sentence.

As argued above, the interpretive approach adopted by the Appellate Body reflects different bases for determining purpose which are subsumed within the analysis of the nature of the measure at issue without the need for determining protective intent strictly.

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[72] Appellate Body Report, *Thailand — Cigarettes*, *supra* note 44, ¶ 177.

[73] *See, e.g.*, *Chile — Alcoholic Beverages*, *supra* note 65, ¶ 72. The Appellate Body noted that,

> [W]e agree with Chile that it would be inappropriate, under Article III:2, second sentence of the GATT 1994, to examine whether the tax measure is necessary for achieving its stated objective or purposes … It appears to us that the Panel did no more than try to relate the observable structural features of the measure with its declared purposes, a task that is unavoidable in appraising the application of the measure as protective or not of domestic production.

Here, regulatory purpose is being examined from the design, architecture and structure of the measure. This suggests not an abandoning of the 'aims and effects' test, but rather an abandonment of its counter-intuitive basis for evaluating regulatory purpose and substituting instead an objective criterion on the question of protective purpose, based on the design of the measure coupled with a detrimental impact on competitive opportunities as between the imported and domestic goods.