INTERNATIONAL TRADE LAW
THROUGH THE CASES

J.H.H. Weiler
NYU School of Law

Julian Arato
University of Michigan Law School

Sungjoon Cho
Chicago-Kent College of Law

Kathleen Claussen
Georgetown University Law Center

Unit V: Non-Tariff Barriers (GATT Art. XI)

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Supplementary Reading

For a complete overview with respect to the law on quantitative restrictions under the GATT we suggest the following reading:

Raj Bhala, Modern GATT Law. A Treatise on the General Agreement on Tariffs and Trade, 2013, 1213-1279.

Pieter van den Bosche, The Law and Policy of the World Trade Organization, 2013, 479-542.

John H. Jackson et al., Legal Problems of International Economic Relation, 6th ed. 2013, 453-475.

John H. Jackson, The World Trading System, 2nd ed. 1997, 153-155.

Guiding Questions

What is the relevance of the determination whether a measure falls under Art. III or Art. IX GATT? What are the consequences for the law of justification of each determination respectively? Are there any significant differences, in particular considering the existence of Article XX (General Exceptions)?

Could one defend a different relationship between GATT Articles XI and III such that any measure preventing the market access of foreign goods falls under Article XI, even if it applies indistinctly to imports and domestic goods? (If familiar, compare with the free movement of goods under the EC Treaty – Articles 25, 28, 30, 90 EC.)

1. Legal Text

Article XI* GATT

General Elimination of Quantitative Restrictions

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

Article III* GATT

National Treatment on Internal Taxation and Regulation

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, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*
(…)

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

(…)

2. Relationship between Art. III and Art. XI

WTO, Analytical Index: Guide to GATT Law and Practice (Vol. I) (1995))

(…) The 1984 Panel Report on "Canada - Administration of the Foreign Investment Review Act" notes that

> "The Panel shares the view of Canada that the General Agreement distinguishes between measures affecting the 'importation' of products, which are regulated in Article XI:1, and those affecting 'imported products', which are dealt with in Article III. If Article XI:1 were interpreted broadly to cover also internal requirements, Article III would be partly superfluous. Moreover, the exceptions to Article XI:1, in particular those contained in Article XI:2, would also apply to internal requirements restricting imports, which would be contrary to the basic aim of Article III. The Panel did not find, either in the drafting history of the General Agreement or in previous cases examined by the CONTRACTING PARTIES, any evidence justifying such an interpretation of Article XI. For these reasons, the Panel, noting that purchase undertakings do not prevent the importation of goods as such, reached the conclusion that they are not inconsistent with Article XI:1".

The 1987 Panel Report on "United States - Taxes on Petroleum and Certain Imported Substances" provides that

> "The general prohibition of quantitative restrictions under Article XI .... and the national treatment obligation of Article III ... have essentially the same rationale, namely to protect expectations of the contracting parties as to the competitive relationship between their products and those of other contracting parties. Both articles are not only to protect current trade but also create the predictability needed to plan future trade".

A series of three cases in 1988 and 1992 examined the application of Articles III and XI to regulations affecting imported alcoholic beverages in Canada and the United States. The 1988 Panel Report on "Canada -Import, Distribution and Sale of Alcoholic Drinks by Provincial Marketing Agencies" provides that

> "The Panel ... concluded that the practices concerning listing/delisting requirements and the availability of points of sale which discriminate against imported alcoholic beverages were restrictions made effective through state-trading operations contrary to Article XI:1....

"The Panel then examined the contention of the European Communities that the practices complained of were contrary to Article III. The Panel noted that Canada did not consider Article III to be relevant to this case, arguing that the Interpretative Note to Articles XI, XII, XIII, XIV and XVIII made it clear that provisions other than Article XVII applied to state-trading enterprises by specific reference only. The Panel considered that it was not necessary to decide in this particular case whether the practices complained of were contrary to Article III.4 because it had already found that they were inconsistent with Article XI. However, the Panel saw great force in the argument that Article III:4 was also applicable to state-trading enterprises at least when the monopoly of the importation and monopoly of the distribution in the domestic markets were combined, as was the case of the provincial liquor boards in Canada. This interpretation was confirmed e contrario by the wording of Article III:8(a)".

The 1992 Panel Report on "Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies" examined a United States claim that the practice of the liquor boards of Ontario to limit listing of imported beer to the six-pack size while according listings in different package sizes to domestic beer was inconsistent with the General Agreement.

"... The Panel noted that this package-size requirement, though implemented as a listing requirement, was in fact a requirement that did not affect the importation of beer as such but rather its offering for sale in certain liquor-board outlets. The Panel therefore considered that this requirement fell under Article III:4 of the General Agreement, which required, inrer alia, that contracting parties accord to imported products '... treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal ... offering for sale ...'. The Panel found that the imposition of the six-pack configuration requirement on imported beer but not on domestic beer was inconsistent with that provision."

With respect to restrictions imposed by provincial liquor authorities on access for imported beer to points of sale (with respect to which Canada invoked the Protocol of Provisional Application):

"The Panel which had examined in 1988 the practices of the Canadian liquor boards had analysed the restrictions on access to points of sale under Articles III:4 and XI:1 of the General Agreement. While that Panel had found these restrictions to be inconsistent with Canada's obligations under Article XI:I, it had also pointed out that it 'saw great force in the argument that Article III.4 was also applicable to

> State-trading enterprises at least when the monopoly of the importation and monopoly of the distribution in the domestic markets were combined, as was the case of the provincial liquor boards in Canada'. The present Panel, noting that Canada now considered Article III:4 to be applicable to practices of the liquor boards, examined this issue again.... The Panel found that, by allowing the access of domestic beer to points of sale not available to imported beer, Canada accorded domestic beer competitive opportunities denied to imported beer. For these reasons the present Panel saw great force in the argument that the restrictions on access to points of sale were covered by Article III:4. However, the Panel considered that it was not necessary to decide whether the restrictions fell under Article XI:I or Article III:4 because Canada was not invoking an exception to the General Agreement applicable only to measures taken under Article XI:1 (such as the exceptions in Articles XI:2 and XII) and the question of whether the restrictions violated Article III.4 or Article XI:1 of the General Agreement was therefore of no practical consequence in the present case".

The Panel also examined minimum prices maintained for beer in certain provinces of Canada.

> "The Panel first examined whether the minimum prices fell under Article XI:1 or Article III:4. The Panel noted that according to the Note Ad Article III a regulation is subject to the provisions of Article III if it 'applies to an imported product and to the like domestic product' even if it is 'enforced in case of the imported product at the time or point of importation'. The Panel found that, as the minimum prices were applied to both imported and domestic beer, they fell, according to this Note under Article III."

The 1992 Panel on "United States - Measures Affecting Alcoholic and Malt Beverages" examined the listing requirements of state-operated liquor stores in certain US states:

> "Having regard to the past panel decisions and the record in the instant case, the present Panel was of the view that the listing and delisting practices here at issue do not affect importation as such into the United States and should be examined under Article III.4. The Panel further noted that the issue is not whether the practices in the various states affect the right of importation as such, in that they clearly apply to both domestic (out-of-state) and imported wines; rather, the issue is whether the listing and delisting practices accord less favourable treatment -- in terms of competitive opportunities -- to imported wine than that accorded to the like domestic product. Consequently, the Panel decided to analyze the state listing and delisting practices as internal measures under Article III:4".

The 1991 Panel Report on "United States - Restrictions on Imports of Tuna," which has not been adopted, examined the relationship between Articles III and XI, and found that the restrictions at issue were governed not by Article III but by Article XI.

> "The Panel noted that Mexico had argued that the measures prohibiting imports of certain yellowfin tuna and yellowfin tuna products from Mexico imposed by the United States were quantitative restrictions on importation under Article XI, while the United States had argued that these measures were internal regulations enforced at the time or point of importation under Article III:4 and the Note Ad Article III, namely that the prohibition of imports of tuna and tuna products from Mexico constituted an enforcement of the regulations of the MMPA relating to the harvesting of domestic tuna.
>
> "The Panel examined the distinction between quantitative restrictions on importation and internal measures applied at the time or point of importation, and noted the following. While restrictions on importation are prohibited by Article XI:1, contracting parties are permitted by Article III:4 and the Note Ad Article III to impose an internal regulation on products imported from other contracting parties provided that it: does not discriminate between products of other countries in violation of the most-favoured-nation principle of Article I:l; is not applied so as to afford protection to domestic production, in violation of the national treatment principle of Article III:1; and accords to imported products treatment no less favourable than that accorded to like products of national origin, consistent with Article III.4. ...
>
> "... The Panel noted that the MMPA regulates the domestic harvesting of yellowfin tuna to reduce the incidental taking of dolphin, but that these regulations could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product. Therefore, the Panel found that the import prohibition on certain yellowfin tuna and certain yellowfin tuna products of Mexico and the provisions of the MMPA under which it is imposed did not constitute internal regulations covered by the Note Ad Article Ill.

In this connection see also the unadopted panel report of 1994 on "United States - Restrictions on Imports of Tuna".

* * *

3. U.S. – Tuna/Dolphin

The two Tuna/Dolphin disputes, the first of which is reprinted below in excerpts, started the confrontation between the GATT (WTO) and interests of environmental protection. The following excerpts are confined to the question of which GATT regime applies to rules governing production methods rather than characteristics of products themselves: Art. III or Art. XI. Although this report was never adopted and the question remains contentious today, the panel's approach appears to be the majority opinion. Reflect on the benefits and disadvantages of the panel's distinction from a policy perspective.

Which GATT discipline ought to apply to national rules governing production methods (not product characteristics) of both imports and domestic goods: Article III or Article XI?

To what extent does the application of such rules to imports constitute an extraterritorial exercise of governmental authority?

3 September 1991

UNITED STATES - RESTRICTIONS ON IMPORTS OF TUNA

Report of the Panel[1] (DS21/R - 39S/155)

(…)

2. FACTUAL ASPECTS

Purse-seine fishing of tuna

2.1 The last three decades have seen the deployment of tuna fishing technology based on the "purse- seine" net in many areas of the world. A fishing vessel using this technique locates a school of fish and sends out a motorboat (a "seine skiff") to hold one end of the purse-seine net. The vessel motors around the perimeter of the school of fish, unfurling the net and encircling the fish, and the seine skiff then attaches its end of the net to the fishing vessel. The fishing vessel then purses the net by winching in a cable at the bottom edge of the net, and draws in the top cables of the net to gather its entire contents.

2.2 Studies monitoring direct and indirect catch levels have shown that fish and dolphins are found together in a number of areas around the world and that this may lead to incidental taking of dolphins during fishing operations.[7] In the Eastern Tropical Pacific Ocean (ETP), a particular association between dolphins and tuna has long been observed, such that fishermen locate schools of underwater tuna by finding and chasing dolphins on the ocean surface and intentionally encircling them with nets to catch the tuna underneath. This type of association has not been observed in other areas of the world; consequently, intentional encirclement of dolphins with purse-seine nets is used as a tuna fishing technique only in the Eastern Tropical Pacific Ocean. When dolphins and tuna together have been surrounded by purse-seine nets, it is possible to reduce or eliminate the catch of dolphins through using certain procedures.

Marine Mammal Protection Act of the United States (Measures on imports from Mexico)

2.3 The Marine Mammal Protection Act of 1972, as revised (MMPA)[8], requires a general prohibition of "taking" (harassment, hunting, capture, killing or attempt thereof) and importation into the United States of marine mammals, except where an exception is explicitly authorized. Its stated goal is that the incidental kill or serious injury of marine mammals in the course of commercial fishing be reduced to insignificant levels approaching zero. The MMPA contains special provisions applicable to tuna caught in the ETP, (…) These provisions govern the taking of marine mammals incidental to harvesting of yellowfin tuna in the ETP, as well as importation of yellowfin tuna and tuna products harvested in the ETP. (…)

2.4 Section 101(a)(2) of the MMPA authorizes limited incidental taking of marine mammals by United States fishermen in the course of commercial fishing pursuant to a permit issued by NMFS, in conformity with and governed by certain statutory criteria in sections 103 and 104 and implementing regulations.[10] Only one such permit has been issued, to the American Tuna-boat Association, covering all domestic tuna fishing operations in the ETP. Under the general permit issued to this Association, no more than 20,500 dolphins may be incidentally killed or injured each year by the United States fleet fishing in the ETP. (…)

2.7 On 28 August 1990, the United States Government imposed an embargo, pursuant to a court order, on imports of commercial yellowfin tuna and yellowfin tuna products harvested with purse-seine nets in the ETP until the Secretary of Commerce made positive findings based on documentary evidence of compliance with the MMPA standards. This action affected Mexico, Venezuela, Vanuatu, Panama and Ecuador. On 7 September this measure was removed for Mexico, Venezuela and Vanuatu, pursuant to positive Commerce Department findings; also, Panama and Ecuador later prohibited their fleets from setting on dolphin and were exempted from the embargo. On 10 October 1990, the United States Government, pursuant to court order, imposed an embargo on imports of such tuna from Mexico until the Secretary made a positive finding based on documentary evidence that the percentage of Eastern spinner dolphins killed by the Mexican fleet over the course of an entire fishing season did not exceed 15 per cent of dolphins killed by it in that period. An appeals court ordered on 14 November 1990 that the embargo be stayed, but when it lifted the stay on 22 February 1991, the embargo on imports of such tuna from Mexico went into effect.[12]

(…)

3. MAIN ARGUMENTS

(…)

Marine Mammal Protection Act (Measures on imports from Mexico)

Article XI

3.10 Mexico stated that section 101(a)(2) of the MMPA, the relevant provisions of the corresponding regulations and the United States prohibition on imports of yellowfin tuna and yellowfin tuna products from Mexico were contrary to Article XI of the General Agreement, (…)

3.11 The United States said that these measures were not covered by Article XI but were laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of yellowfin tuna harvested in the ETP with purse-seine nets, and fully consistent with Article III; these measures were in turn enforced at the time or point of importation and were "subject to Article III" under the Note Ad Article III. (…)

(…)

5. FINDINGS

(…)

B. Prohibition of imports of certain yellowfin tuna and certain yellowfin tuna products from Mexico

Categorization as internal regulations (Article III) or quantitative restrictions (Article XI)

5.8 The Panel noted that Mexico had argued that the measures prohibiting imports of certain yellowfin tuna and yellowfin tuna products from Mexico imposed by the United States were quantitative restrictions on importation under Article XI, while the United States had argued that these measures were internal regulations enforced at the time or point of importation under Article III:4 and the Note Ad Article III, namely that the prohibition of imports of tuna and tuna products from Mexico constituted an enforcement of the regulations of the MMPA relating to the harvesting of domestic tuna.

5.9 The Panel examined the distinction between quantitative restrictions on importation and internal measures applied at the time or point of importation, and noted the following. While restrictions on importation are prohibited by Article XI:1, contracting parties are permitted by Article III:4 and the Note Ad Article III to impose an internal regulation on products imported from other contracting parties provided that it: does not discriminate between products of other countries in violation of the most- favoured-nation principle of Article I:1; is not applied so as to afford protection to domestic production, in violation of the national treatment principle of Article III:1; and accords to imported products treatment no less favourable than that accorded to like products of national origin, consistent with Article III:4. The relevant text of Article III:4 provides:

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use".

The Note Ad Article III provides that:

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

internal charge, or a law, regulation or requirement of the kind referred to in [Article III:1], and is accordingly subject to the provisions of Article III".

5.10 The Panel noted that the United States had claimed that the direct import embargo on certain yellowfin tuna and certain yellowfin tuna products of Mexico constituted an enforcement at the time or point of importation of the requirements of the MMPA that yellowfin tuna in the ETP be harvested with fishing techniques designed to reduce the incidental taking of dolphins. The MMPA did not regulate tuna products as such, and in particular did not regulate the sale of tuna or tuna products. Nor did it prescribe fishing techniques that could have an effect on tuna as a product. This raised in the Panel's view the question of whether the tuna harvesting regulations could be regarded as a measure that "applies to" imported and domestic tuna within the meaning of the Note Ad Article III and consequently as a measure which the United States could enforce consistently with that Note in the case of imported tuna at the time or point of importation. The Panel examined this question in detail and found the following.

5.11 The text of Article III:1 refers to the application to imported or domestic products of "laws, regulations and requirements affecting the internal sale.... of products" and "internal quantitative regulations requiring the mixture, processing or use of products"; it sets forth the principle that such regulations on products not be applied so as to afford protection to domestic production. Article III:4 refers solely to laws, regulations and requirements affecting the internal sale, etc. of products. This suggests that Article III covers only measures affecting products as such. Furthermore, the text of the Note Ad Article III refers to a measure "which applies to an imported product and the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation". This suggests that this Note covers only measures applied to imported products that are of the same nature as those applied to the domestic products, such as a prohibition on importation of a product which enforces at the border an internal sales prohibition applied to both imported and like domestic products.

(…)

5.14 The Panel concluded from the above considerations that the Note Ad Article III covers only those measures that are applied to the product as such. The Panel noted that the MMPA regulates the domestic harvesting of yellowfin tuna to reduce the incidental taking of dolphin, but that these regulations could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product. Therefore, the Panel found that the import prohibition on certain yellowfin tuna and certain yellowfin tuna products of Mexico and the provisions of the MMPA under which it is imposed did not constitute internal regulations covered by the Note Ad Article III.

(…)

Articles XI (…)

5.17 The Panel noted that the United States had, as mandated by the MMPA, announced and implemented a prohibition on imports of yellowfin tuna and yellowfin tuna products caught by vessels of Mexico with purse-seine nets in the ETP. The Panel further noted that under United States customs law, fish caught by a vessel registered in a country was deemed to originate in that country, and that this prohibition therefore applied to imports of products of Mexico.

5.18 The Panel noted that under the General Agreement, quantitative restrictions on imports are forbidden by Article XI:1, the relevant part of which reads:

> "No prohibitions or restrictions .... whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party ...".

The Panel therefore found that the direct import prohibition on certain yellowfin tuna and certain yellowfin tuna products from Mexico and the provisions of the MMPA under which it is imposed were inconsistent with Article XI:1. The United States did not present to the Panel any arguments to support a different legal conclusion regarding Article XI.

(…)

4. Thai Cigarettes (1990)

This report has been harshly criticized as "pro-trade" biased. Is the panel's perspective on the "least trade restrictive" measure plausible?

Is the panel's rejection of the WHO's opinion justified and legitimate? Would a panel or the Appellate Body give the same reasoning and conclusion had the case been brought under the dispute settlement system of the WTO?

Did the panel adequately take into consideration the fact that Thailand was a "developing" country when it considered an advertisement ban as a less trade restrictive measure?

Summary of Facts

From: WTO Committee on Trade and Environment (CTE) Summary (WT/CTE/W/203)

Parties

Complainant: United States.

Respondent: Thailand.

Third Parties: The European Communities.

(…)

Main Facts

Under Section 27 of the 1966 Tobacco Act, Thailand prohibited the importation of cigarettes and other tobacco preparations, but authorized the sale of domestic cigarettes; moreover, cigarettes were subject to an excise tax, a business tax and a municipal tax. The United States complained that the import restrictions were inconsistent with Article XI:1, and considered that they were not justified by Article XI:2(c)(i), nor by Article XX(b). The United States also requested the panel to find that the internal taxes were inconsistent with Article III:2.

Thailand argued, *inter alia*, that the import restrictions were justified under Article XX(b) because the government had adopted measures which could only be effective if cigarette imports were prohibited and because chemicals and other additives contained in US cigarettes might make them more harmful than Thai cigarettes. Since the health consequences of the opening of cigarette markets constituted one of the major justifications for Thailand's cigarette import régime, Thailand requested the panel to consult with experts from the World Health Organization (WHO). On the basis of a memorandum of understanding between the parties, the panel asked the WHO to present its conclusions on technical aspects of the case, such as the health effects of cigarette use and consumption.

The WHO indicated that there were sharp differences between cigarettes manufactured in developing countries such as Thailand and those available in developed countries, which used additives and flavourings.[1] Moreover, locally grown tobacco leaf was harsher and smoked with less facility than the American blended tobacco used in international brands. These differences

[1] *Ibid.*, para. 52.

were of public health concern because they made smoking western cigarettes very easy for groups who might not otherwise smoke, such as women and adolescents, and created the false illusion among many smokers that these brands were safer than the native ones which consumers were quitting. However, the WHO could not provide any scientific evidence that cigarettes with additives were less or more harmful to health than cigarettes without.

(…)

Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, Panel Report, DS10/R - 37S/200, 7 November 1990

Chairman: Mr. Rudolf Ramsauer, Members: Mr. Pekka Huhtaniemi, Mr. Adrian Macey

http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm

(…)

II. FACTUAL ASPECTS

A. Restrictions on imports

6. Under Section 27 of the Tobacco Act, 1966, the importation or exportation of tobacco seeds, tobacco plants, tobacco leaves, plug tobacco, shredded tobacco and tobacco is prohibited except by licence of the Director-General of the Excise Department or a competent officer authorized by him. Section 4 of the said Act defines tobacco as "cigarettes, cigars, other tobacco rolled for smoking, prepared shredded tobacco including chewing tobacco". Licences have only been granted to the Thai Tobacco Monopoly, which has imported cigarettes on only three occasions since 1966, namely in 1968-70, 1976 and 1980.

B. Internal Taxes

7. Cigarettes are subject to the payment of an excise tax, a business tax and a municipal tax.

(…)

III. MAIN ARGUMENTS

(…)

B. Article XI:1

16. The United States argued that since 1966 Thailand had implemented an import licensing régime for cigarettes which was inconsistent with Article XI. The Thai Tobacco Monopoly had imported cigarettes on only three occasions and the Government refused to consider import licence applications from any other entity. (…)

C. Exceptions to Article XI:1

(…)

(ii) Article XX(b)

21. Thailand contended that the prohibition on imports of cigarettes was justified by the objective of public health policy which it was pursuing, namely to reduce the consumption of tobacco which was harmful to health. It was therefore covered by Article XX (b). The production and consumption of tobacco undermined the objectives set out in the Preamble of the General Agreement which were: to raise the standard of living, ensure full employment and a large and steadily growing volume of real income and effective demand, develop the full use of the resources of the world and expand the production and exchange of goods. Instead, smoking lowered the standard of living, increased sickness and thereby led to billions of dollars being spent every year on medical costs, which reduced real income and prevented an efficient use being made of resources, human and natural. The production of tobacco had not altogether been prohibited in Thailand because this might have led to production and consumption of narcotic drugs having effects even more harmful than tobacco, such as opium, marijuana and kratom (a plant with fragrant yellow flowers and intoxicating leaves). Historically, the manufacturing of cigarettes in Thailand had been aimed at providing a legal substitute for narcotic products which were themselves outlawed. Cigarette production in Thailand was a state-monopoly under the Tobacco Act, because the government felt the need to have total control over such a product which, even though legal, could be extremely harmful to health. A main objective of the Act was to ensure that cigarettes were produced in a quantity just sufficient to satisfy domestic demand, without increasing such demand. While a certain quantity of foreign cigarettes was smuggled into Thailand, this was unlikely to be done without the manufacturers' consent, since prior to the total ban on cigarette advertising which had been implemented on 10 February 1989, foreign cigarette manufacturers had advertised on Thai television, in mass circulation newspapers and on billboards. Indirect advertising had also taken place and the logos of cigarette manufacturers had appeared on clothing and many other non-tobacco products.

22. The United States noted the intent of the drafters of the General Agreement that measures which a contracting party seeks to justify under the provisions of Article XX(b) should reflect similar domestic safeguards. The drafting history of Article XX(b) indicated that the language in the preamble to Article XX stating that measures not be disguised restrictions on international trade had this meaning in the context of Article XX(b). The United States further noted that safeguards comparable to an import prohibition did not exist with respect to domestic cigarettes.

23. The United States noted that a recent panel[1] had found that a contracting party could not justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is also available to it. It had also found that in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions. The United States considered that Thailand, like other contracting parties, could pursue the objective of seeking to prevent the increase in the number of smokers without imposing a ban on imports. The experience of other countries had shown that decreases in the level of smoking resulted from diminished demand achieved through education and the recognition of the effects of smoking rather than restraints on the availability of cigarettes. Moreover, the United States considered that

[1] Panel report on "United States - Section 337 of the Tariff Act of 1930", paragraph 5.26 (L/6439).

Thailand, like other contracting parties, could pursue the objective of seeking to prevent the increase in the number of smokers without imposing a ban on imports. The experience of other countries had shown that decreases in the level of smoking resulted from diminished demand achieved through education and the recognition of the effects of smoking rather than restraints on the availability of cigarettes. Moreover, the United States considered that Thailand could not argue that the ban on imports was necessary to protect human life or health since domestic production, sales and exports of cigarettes and tobacco remained at high levels. (…)

24. Thailand replied that the exception contained in Article XX(b) reflected the recognition that public health protection is a basic responsibility of governments. With the support of non-governmental organizations, the Thai government had taken action to control smoking by, inter alia:

- adopting a comprehensive national programme for the control of tobacco use;

- establishing a body, the National Committee for Control of Tobacco Use (NCCTU), to implement the national programme;

- imposing a total ban on direct and indirect advertising of cigarettes in all media, legally enforced under the authority of the Consumer Protection Act;

- informing the general public about the dangers of smoking;

- requiring the printing of seven rotatory health warnings on the packages of cigarettes, in accordance with the Consumer Protection Act;

- prohibiting smoking in all public transport, health establishments and other public places;

- improving data collection on smoking and health;

- promoting research on smoking and health.

25. Most recently, on 6 March 1990, the Thai Cabinet had decided to attack the problem of smoking on both the supply and demand sides by instructing the relevant authorities to:

- reduce the production of cigarettes on a continuous basis;

- reduce the area where tobacco is grown;

- set aside funds to be used by the NCCTU in its anti-smoking campaign;

- encourage academic institutions in their role of expressing or reflecting public opinion on cigarette smoking;

- prohibit exports of cigarettes.

26. According to Thailand, the smoking rate among the Thai population over 10 years of age declined from 30.1 per cent in 1976 to 27.8 per cent in 1981, 26.4 per cent in 1986 and 25 per cent in 1988. In addition per capita consumption of tobacco declined at a rate of 2.2 per cent a

year between 1974-76 and 1984-86. Aggregate consumption had increased at an average annual rate of 1.1 per cent in 1984-86 but this was largely accountable to increase in population and a higher standard of living which had encouraged smokers, particularly in rural areas, to switch from self-rolled cigarettes and traditional tobacco products to manufactured cigarettes. At the same time, while total cigarette production in Thailand was still growing, the annual growth rate had fallen from 2.8 per cent to 2.72 per cent in recent years.

27. Thailand argued that while competition had desirable effects in international trade in goods, this did not apply to cigarettes. Governments in many countries, including the United States and Thailand, tried to discourage or control tobacco and cigarette consumption. Competition would lead to the use of better marketing techniques (including advertising), a wider availability of cigarettes, a possible reduction of their prices, and perhaps improvements in their quality. This might have the undesirable effect of leading to an increase in total consumption, especially among women and the young, which would run contrary to public health objectives. Some American cigarettes were specifically targeted at women of whom only 3.5 per cent smoked in Thailand compared to 30 per cent in Western countries. A recent report of the Council on Scientific Affairs of the American Medical Association stated that at a time when cigarette smoking is falling in developed nations, it is increasing in Africa, Latin America and Asia as tobacco companies seek new markets. According to this report, the United States leads the world in tobacco exports, and its cigarette exports to Asia had increased by 75 per cent in 1988 alone. Since the health consequences of the opening of cigarette markets constituted one of the major justifications for Thailand's cigarette import régime, Thailand deemed it necessary that the panel consult with experts from the World Health Organization (WHO) on recent experience in countries which had been made to open their markets for cigarettes. This showed that once a market was opened, the United States cigarette industry would exert great efforts to force governments to accept terms and conditions which undermined public health and governments were left with no effective tool to carry out public health policies. Advertising bans were circumvented and modern marketing techniques were used to boost sales. Hence, Thailand was of the view that an import ban was the only measure which could protect public health. Any other measure which allowed imports in any amounts would not be effective.

28. Thailand also argued that cigarettes manufactured in the United States may be more harmful than Thai cigarettes because of unknown chemicals placed by the United States cigarette companies in their cigarettes, partly to compensate for lower tar and nicotine levels. United States cigarette companies also used other additives which increased the health risks of smoking. One such additive was cocoa, which according to one study increased the risk of cancer. Others included deer tongue, ethyl butyrate, linayle acetate, isoamyl acetate, 2,3,5 trimethyl and pyrazine. According to the United States Surgeon-General's 1984 report, "a characterization of the chemical composition and adverse biological potential of these additives is urgently required, but is currently impossible because cigarette companies are not required to reveal what additives they employ in the manufacture of tobacco" (USDHHS, 1984). According to Thailand, some United States cigarettes contained nicotine which was extracted from tobacco leaf, resprayed back into the leaf as part of a process called "reconstituting" the tobacco. Re-adding nicotine in chemical form to tobacco leaf may make United States cigarettes different from Thai cigarettes in the strict sense of the word and make them more addictive, since it could make inhalation easier and absorption of nicotine by the bloodstream and the brain more efficient.

29. The United States replied that the health hazards of smoking had been the subject of extensive documentation in a number of countries. The existence of such hazards was not the real issue in this dispute. The United States did not believe that Thailand had established that its import

ban served the purpose of protecting public health or that such a measure was necessary to accomplish that purpose. The Thai Tobacco Monopoly produced at least 15 brands of cigarettes appealing to all types of consumers. It had consciously attempted to imitate "American blend" cigarettes, clearly in response to perceived consumer demand. These "American-style" brands were among the Monopoly's best sellers. Its distribution system was both extensive and well-established at the wholesale and retail levels. Few barriers were imposed to entry into the retail cigarette business. Currently, Thailand had over 40,000 licensed cigarette retailers. The marketing techniques of the Thai Tobacco Monopoly were as effective as those of American manufacturers. No decision had been adopted by the Thai Cabinet to reduce cigarette production until 6 March 1990, i.e. after the United States had requested the establishment of the panel. In the past, the Thai Tobacco Monopoly had ignored earlier Cabinet decisions. For example, it had not implemented the six labelling requirements mentioned by Thailand and was negotiating with the government to weaken two of them. Moreover, three major expansion plans had been initiated by the Thai Tobacco Monopoly between July 1987 and January 1990, despite government policy, and new orders had been placed for machinery which would enable the Monopoly to increase its production by 10 billion cigarettes in 1991. While the Ministry of Agriculture had been instructed in January 1988 to formulate a plan for reducing tobacco acreage, this was not relevant to the object of the dispute which was cigarettes. Furthermore, Thailand had not presented any information on a concrete plan to decrease acreage and Thai statistics showed, if anything, that tobacco acreage increased, rather than decreased, in the 1988/1989 season.

30. According to the United States, the reasons identified by Thailand for the increasing consumption of cigarettes, namely a switch from traditional tobacco products to manufactured cigarettes were of declining importance as the economic situation of Thailand changed. Increased availability would lead to increased consumption if there was demand that was not currently satisfied. Thus, as had happened in other Asian markets which had recently liberalized import policies, opening the Thai market would lead to a shift in consumption from the Thai Tobacco Monopoly cigarettes to imported products, rather than to an increase in total demand. If the real issue was over advertising and concern over the creation of new customers and new demand, that problem should be addressed directly and not through a GATT-inconsistent import prohibition. The United States could not accept the view that the import ban on cigarettes was justified because of the lack of an alternative tool to carry out public health policy effectively. Any measures that could be taken in pursuance of such objectives should be taken on a national treatment basis.

31. The United States denied that its cigarettes raised special health concerns. Indeed, the Thai government had recognized that United States and other foreign cigarettes were less harmful than Thai cigarettes because of their significantly lower tar and nicotine content. Cigarettes exported from the United States were the same product as the ones sold in the United States. Their ingredients had been disclosed to the Department of Health and Human Services since 1985, in pursuance of the Federal Cigarette Labelling Act. That Department had raised no issue with any of the items on the list of ingredients that had been reported each year. None of the other countries, such as the United Kingdom, France and the Federal Republic of Germany, which also required disclosure of ingredients, had raised problems with ingredients in United States cigarettes. Thailand, however, had no regulations or restrictions on ingredients or flavourings used in cigarettes. The United States noted that the Thai Government admitted that the Thai Tobacco Monopoly used additives in its cigarettes. With respect to the ingredients that the Thai Government cited as raising health concerns, the United States noted that the US cigarette industry, unlike the Thai Tobacco Monopoly, did not use deer tongue, also known as coumarin. The Thai Tobacco Monopoly also purchased cocoa which it used as flavouring and which was on the list of approved ingredients of every country that maintained one. It was also a substance

frequently consumed as food or beverage. 2,3,5 trimethyl was a flavoured aroma ingredient commonly used in food products and approved by the US Food and Drug Administration. Reconstituted tobacco had less nicotine than full leaf tobacco and the Thai Tobacco Monopoly intended to use this technique in the future. According to independent studies, tar and nicotine levels in Thai cigarettes were higher than in foreign cigarettes illegally imported into Thailand. While it was true that United States cigarette exports to Asia had increased in recent years, this increase, which was due to the dismantling of monopolies in several countries, had been from a zero base which explained the high percentage increase in exports.

32. Thailand replied that it had never recognized that foreign cigarettes were less harmful than Thai cigarettes. Even though their tar and nicotine contents might be lower, they were more addictive than Thai cigarettes because smokers tended to consume a higher number of low tar and nicotine cigarettes, in order to obtain the amount of nicotine to which they were used. Artificial flavourings and other ingredients were added to low tar/nicotine cigarettes to compensate for the milder taste of such cigarettes. Thailand, like the United States, had regulations on ingredients and flavourings. The Thai Tobacco Monopoly was required by a Cabinet resolution of February 1990 to disclose the ingredients of its cigarettes to the Ministry of Public Health. This Ministry had requested the Ministry of Finance, which supervised the Thai Tobacco Monopoly to instruct it to reduce or eliminate three of the ingredients which were considered particularly dangerous to health. Some of these, such as cocoa could be harmless when eaten or drunk, but could be carcinogenic when burned. While it was true that the list of additives to American cigarettes had been submitted to the Department of Health and Human Services since 1985, only a consolidated list of additives which was used by six manufacturers was submitted by these manufacturers, without identifying the brand (or brands) of cigarettes containing particular additives and without indicating the amount of each additive used. Thus, the nature of the information given to the Department of Health and Human Services limited the ability to conduct a thorough analysis of the potential health risks of additives. Canada had passed legislation requiring all cigarette manufacturers to disclose the additives they used, and as a result one leading United States manufacturer had withdrawn several of its brands from the Canadian market. Moreover, Thailand did not agree that cigarettes exported from the United States were the same product as those sold on the domestic market. Recent studies had shown that some foreign cigarettes sold in Asia contained a higher tar level than the same brands sold in Australia, Europe or the United States.

33. Thailand recognized that consumption of cigarettes had continued to rise in Thailand, in spite of the efforts by the government with the support of non-governmental organizations, because such campaigns took a long time to produce effects, as had been seen in the United States where consumption had continued to rise until 1981, even though the first anti-smoking campaign had been initiated in 1965. Thailand denied that the objective of its policy was to protect domestic production of cigarettes. No new factory had been built in the last 12 years and a number of plans to expand existing capacity had been rejected by the government. Any machinery installed in existing factories was only replacing equipment whose life-span had expired. While it was true that the Thai Tobacco Monopoly had delayed implementing the health warnings required by the Cabinet, and had tried to weaken two of them, it could not ignore cabinet resolutions and would have to enforce the warnings. Health considerations overrode any other policy objectives of the government. Thus, the Ministry of Finance had estimated that the importation of cigarettes would yield an extra revenue of baht 800 million (about US$30 million) per year which was a substantial sum for a developing country. However, the government had decided to forego this sum in deference to public health considerations.

34. Since May 1989 Thailand had resisted bilateral pressures, under Section 301 of the US Trade Act, to open its market for cigarettes, and faced the imminent threat of retaliation against Thai exports to the United States, valued at US$166 million. Even though exports were the linchpin of Thailand's economic success, such considerations had given way to health concerns. In the course of these bilateral pressures, the United States had made it clear that its objectives were not limited to market opening and national treatment on internal taxation but covered other areas, such as a unilateral reduction of Thailand's import duty on cigarettes to zero, a low specific rate of excise tax on cigarettes (which when converted to an ad valorem basis, would work to the advantage of higher-value American cigarettes) and the right for manufacturers of foreign cigarettes to advertise and conduct point-of-sale promotion even though such a right was denied to manufacturers of domestically-produced cigarettes. Thailand therefore sought from the Panel a recommendation as to whether Thailand was required by GATT provisions to grant such concessions to the United States. Such a recommendation was necessary to protect the credibility of the multilateral dispute settlement mechanism. Thailand also sought from the Panel confirmation of its understanding that, in the event of its market for cigarettes being opened, its obligations with regard to the pricing, distribution, advertising, promotion and labelling of cigarettes were limited to providing national treatment for foreign cigarettes.

35. In the view of the United States, there was a marginal benefit to be gained from smoking low tar and nicotine cigarettes, rather than high tar and nicotine cigarettes. With respect to tobacco additives, it considered that there was no evidence that these additives had any adverse effects and referred the panel to the findings of the American Health Foundation which were annexed to the WHO submission. Moreover, Thailand's import prohibition had always affected all cigarettes and not simply those containing additives, many of which such as menthol were also used by the Thai Tobacco Monopoly. United States cigarette manufacturers complied with the labelling and disclosure requirements of United States law. Apart from cigarettes sold in countries where local content requirements resulted in United States companies manufacturing locally for domestic consumption through licensees, and in consequent variations in tar and nicotine levels, all other cigarettes exported from the United States were identical to the product sold on the domestic market. Unless Thailand amended the Tobacco Act of 1966 to eliminate the monopoly on the manufacture of cigarettes, foreign firms would have to supply the Thai market through imports. In the case of Canada, only 1 per cent of the market had been held by United States cigarette manufacturers prior to the introduction of a reporting requirement for additives. That did not change after the implementation of the requirement as much of US manufacturing and sales were effected through Canadian licensees. Some firms had expressed concern about the protection of their trade secrets and had considered that the size of the market did not justify continuing their export effort, especially as each Canadian province had enacted individual requirements thus atomizing the market. The United States denied that it was seeking anything other than the application of national treatment in measures taken by Thailand to control the consumption of cigarettes and objected to the Panel making recommendations on issues not raised by it, as these issues were outside the terms of reference of the Panel.

(…)

V. Submission by the WHO

50. On the basis of the Memorandum of Understanding between the parties (see paragraph 3 above) and in pursuance of Thailand's request (paragraph 27 above), the Panel asked the World Health Organization (WHO) to present its conclusions on technical aspects of the case, such as the

health effects of cigarette use and consumption, and on related issues for which the WHO was competent.

51. In submissions to the Panel which were generally supported by Thailand, representatives of the WHO explained that one of the best known effects of smoking was lung cancer but that pulmonary and cardiovascular diseases were also attributable to it, as were increased risks of miscarriage, still-births or reductions in birth weights. Many other health problems had also been linked with smoking. Cigarette smoking had been shown to be the leading cause of preventable death and disease in developed nations. As far as Thailand was concerned, smoking-related cancer was not as high as in many other developing countries and was relatively low in comparison to more affluent countries. However, an increase in cigarette smoking would lead to an increase in mortality due to lung cancer and hypertension, which was already rising because of the increase in cigarette consumption which had occurred 10 to 20 years ago.

52. According to the representatives of the WHO, cigarette smoking was declining in industrialized nations at a rate of 1.1 per cent a year, but rising in developing countries by 2.1 per cent a year. Smoking prevalence was high among males in developing countries, but low among women and children. There were sharp differences between the cigarettes manufactured in developing countries such as Thailand and those available in developed countries. In Thailand like in other developing countries, the market was dominated by a state-owned monopoly which promoted smoking minimally, in the absence of competition. Locally grown tobacco leaf was harsher and smoked with less facility than the American blended tobacco used in international brands. Locally-produced cigarettes were unlike those manufactured in western countries in that sophisticated manufacturing techniques such as the use of additives and flavourings, or the downward adjustment of tar and nicotine were not generally available, or were primitive in comparison to the techniques used by the multinational tobacco companies. These differences were of public health concern because they made smoking western cigarettes very easy for groups who might not otherwise smoke, such as women and adolescents, and create the false illusion among many smokers that these brands were safer than the native ones which consumers were quitting. In Thailand, half of the tobacco crop was consumed in the form of hand-rolled cigars or cigarettes which yielded large amounts of nicotine and tar and were popular among the elderly. However, their use was fading as old people died. There was no indication that young women turned to manufactured cigarettes instead of the self-made ones which their elders had smoked. Approximately half of all tobacco was used in the manufacturing of cigarettes by the government-owned monopoly which had produced 30.4 billion cigarettes in 1987. An additional 1.5 billion cigarettes had been smuggled into the country the same year, and foreign cigarette companies had advertised these allegedly imported cigarettes on television and billboards despite the administrative ban on advertising which had been in effect prior to the legislative ban. Current adult smoking rates were 67 per cent for males and 6 per cent for females. The male rate had declined by 6 per cent since 1981. Adult per capita consumption had also declined from 1,100 cigarettes per person in the late 1970s to 900 in 1985. The per capita rate was far lower than in the United States where it stood at 3,200 per person per year. A major factor in the recent decline in per capita consumption of cigarettes in Thailand had been the adoption of recommended WHO smoking control policies by the small but growing Thai tobacco control programme which had recently secured passage of a law prohibiting all forms of tobacco advertising, including a ban on events sponsorship and forceful warning labels on packages. A number of events and numerous educational programmes had been held in Thailand on "World No Tobacco Day" by the Thai Anti-Smoking Group which had been critical of the Thai Government's support of tobacco and had acted independently of the Government. If the multinational tobacco companies entered the market, the poorly-financed public health programmes would be unable to compete with the

marketing budgets of these companies, as had been the case in other Asian countries whose markets had been opened. As a result, cigarette consumption and, in turn, death and disease attributable to smoking would increase.

53. The representatives of the WHO stated that the use of additives in American cigarettes had increased greatly during the 1970s with the introduction of low-yield cigarettes. They were used to restore the lost flavour of the cigarette brought about by the reduction in tar and nicotine. The US Surgeon-General reports had concluded that the lowering of tar and nicotine had only a marginal benefit in contrast to quitting. Smokers of low-yield cigarettes had been found to increase their consumption or to inhale more deeply. The health effects of cigarette additives were being analysed by the US Department of Health and Human Services which considered this task to be "enormously complex and expensive". Serious concerns about the presence in cigarettes of certain additives had been raised by the American Health Foundation which acted as a consultant to the Department of Health and Human Services on this issue. However, there was no scientific evidence that one type of cigarette was more harmful to health than another.

54. According to the WHO representatives, another major difference between manufacturers of American cigarettes and of Thai cigarettes was that the former designed special brands aimed at the female market. These cigarettes contained a much lower tar and nicotine level, thus making it easier for women to inhale the smoke. Some were also made to appeal to women by the addition of perfume or were made long and slender to suggest that smoking would result in thinness.

55. The WHO representatives stated that the experience in Latin America and Asia showed that the opening of closed cigarette markets dominated by a state tobacco monopoly resulted in an increase in smoking. Multinational tobacco companies had routinely circumvented national restrictions on advertising through indirect advertising and a variety of other techniques. However, one country outside Latin America and Asia had recently taken action to ban the utilization in advertising of brand imagery linked to tobacco products. Particularly concerned by the threats posed by advertising, the member states of WHO had adopted in May 1990, resolution WHO 43.16 which urged all member states:

> "to consider including in their tobacco control strategies plans for legislation or other effective measures at the appropriate government level providing for:
>
> ...
>
> (c) progressive restrictions and concerted actions to eliminate eventually all direct and indirect advertising, promotion and sponsorship concerning tobacco;"

56. The representatives of the WHO stated that their organization had convened in 1982 an Expert Committee on "Smoking Control Strategies in Developing Countries" which had made a number of recommendations designed to reduce smoking. In particular, this Committee, many of whose recommendations had already been adopted in Thailand, had recommended to developing countries that all advertising and promotion of tobacco products be prohibited, including through the sponsorship of sporting events, that where tobacco is a commercial crop, its rôle be reduced in the economy through alternative use of land and labour for which the assistance of organizations within the UN system, such as FAO and the World Bank, would be sought. The same Committee had recommended to developed countries, inter alia, that any action possible be taken to curb activities aimed at promoting and selling tobacco products and that any exported tobacco products conform to

standards obtaining in the exporting country in terms of health warnings, emissions and product information.

57. The representatives of WHO also stated that policies which raised the price of cigarettes, for instance through taxation, could result in a reduction in smoking. Studies showed that price elasticities were higher for younger smokers than for dependent ones. A recent study carried out in a developing country indicated that the price elasticity of smoking was higher in developing countries than in developed ones, thus making measures which raise the price of cigarettes, such as excise taxes, effective public health policy tools in such countries.

58. Responding to the submission of the WHO, the United States did not take issue with its statements regarding the effect of cigarette use or consumption on human health because this was within the WHO's area of recognized expertise. However, the United States took issue with some of the conclusions drawn by the WHO on the effect of lifting the import ban on cigarettes in Thailand as well as with the factual basis for these conclusions. The United States did not consider that the WHO was specially competent to address the "health consequences of the opening of the market for cigarettes" as requested by Thailand, but urged the Panel to limit the issues presented to the WHO to those aspects referred to in the Memorandum of Understanding between the parties (see paragraph 3 above).

59. On the question of additives contained in American cigarettes, the United States noted that the American Health Foundation had stated that for the great majority of agents in the list of tobacco additives contained in the 1988 report of the Independent Scientific Committee on Smoking and Health, they had no knowledge of adverse health effects. Nevertheless, some of the agents aroused concern.

60. The United States disagreed with the assertion that Thai cigarettes were unlike western cigarettes. In the view of the United States, the Thai Tobacco Monopoly had used additives and flavourings for some time and had imitated United States cigarettes with the help of imports of United States tobacco. While the equipment presently used by the Thai Tobacco Monopoly was not very modern, some of the machinery being purchased would permit the reconstitution of tobacco and the use of other modern cigarette manufacturing techniques. Neither did the United States agree with the view that prior to the imposition of the total ban on cigarette advertising, foreign companies had been advertising smuggled cigarettes. Some of the actions complained of could have been instances of trademark infringements or marketing of legitimate goods. Moreover, the Thai Tobacco Monopoly had been advertising its cigarettes during the period when the administrative ban had been in force. The United States noted that Thailand cited the figure of 3.5 per cent for the smoking rate among women whereas the WHO reported the figure of 6 per cent. While such statistics did not appear reliable, what seemed certain was that the level of production of cigarettes in Thailand was rising at a large and steady pace.

61. As to the effect of the lifting of restrictions on imports in other Asian countries, the United States considered that in these countries such restrictions as may have been implemented had not been effective in decreasing the level of consumption. In one of these countries consumption had declined after the cigarette market had been opened and had been accompanied by a shift in consumption from domestic to foreign cigarettes. In another country, the growth rate of consumption had slowed down after the market had been opened while in the third, consumption had not changed in the 18 months which had passed since the market had been opened. Comparisons between one of these countries and in particular Thailand were not appropriate because of developmental and cultural differences. It was therefore not accurate to draw the

conclusion on the basis of the experience of these countries, that smoking among Thai women would increase as a result of opening of the Thai market.

62. The United States also stated that the 1989 Report of the United States Surgeon General had concluded that there was no scientifically rigorous study available to the public that provided a definitive answer to the basic question of whether advertising and promotion increase the level of tobacco consumption and that the extent of the influence of advertising and promotion on the level of smoking was unknown and possibly unknowable. ("Surgeon General, Reducing the Health Consequences of Smoking" 512-12(1989).) Even if it were accepted that advertising had an effect on the level of consumption of cigarettes, restrictions on advertising and fiscal measures to affect the price of cigarettes were available to control the level of consumption. Such measures could be applied on the basis of national treatment and thus provide a GATT consistent measure of addressing the problem. The United States could not share the view that the Thai government and the anti-smoking lobby would not be able to resist the efforts of the foreign cigarette interests to permit the marketing practices that they opposed.

VI. FINDINGS

(…)

B. Restrictions on the Importation of Cigarettes

(i) Article XI:1

67. The Panel, noting that Thailand had not granted licences for the importation of cigarettes during the past 10 years, found that Thailand had acted inconsistently with Article XI:1, the relevant part of which reads:

> "No prohibitions or restrictions ... made effective through ... import licences ... shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party ...".

(…)

(iii) Article XX(b)

72. The Panel proceeded to examine whether Thai import measures affecting cigarettes, while contrary to Article XI:1, were justified by Article XX(b), which states in part:

> "... nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> ...
>
> (b) necessary to protect human ... life or health".

73. The Panel then defined the issues which arose under this provision. In agreement with the parties to the dispute and the expert from the WHO, the Panel accepted that smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b). The Panel noted that this provision clearly

allowed contracting parties to give priority to human health over trade liberalization; however, for a measure to be covered by Article XX(b) it had to be "necessary".

74. The Panel noted that a previous panel had discussed the meaning of the term "necessary" in the context of Article XX(d), which provides an exemption for measures which are "necessary to secure compliance with laws or regulations which are not inconsistent" with the provisions of the General Agreement. The panel had stated that

> "a contracting party cannot justify a measure inconsistent with other GATT provisions as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."(emphasis supplied)[2]

[2]Report of the panel on "United States - Section 337 of the Tariff Act of 1930" (L/6439, paragraph 5.26, adopted on 7 November 1989).

The Panel could see no reason why under Article XX the meaning of the term "necessary" under paragraph (d) should not be the same as in paragraph (b). In both paragraphs the same term was used and the same objective intended: to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable. The fact that paragraph (d) applies to inconsistencies resulting from the enforcement of GATT-consistent laws and regulations while paragraph (b) applies to those resulting from health-related policies therefore did not justify a different interpretation of the term "necessary".

75. The Panel concluded from the above that the import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives. The Panel noted that contracting parties may, in accordance with Article III:4 of the General Agreement, impose laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of imported products provided they do not thereby accord treatment to imported products less favourable than that accorded to "like" products of national origin. The United States argued that Thailand could achieve its public health objectives through internal measures consistent with Article III:4 and that the inconsistency with Article XI:1 could therefore not be considered to be "necessary" within the meaning of Article XX(b). The Panel proceeded to examine this issue in detail.

76. The Panel noted that the principal health objectives advanced by Thailand to justify its import restrictions were to protect the public from harmful ingredients in imported cigarettes, and to reduce the consumption of cigarettes in Thailand. The measures could thus be seen as intended to ensure the quality and reduce the quantity of cigarettes sold in Thailand.

77. The Panel then examined whether the Thai concerns about the quality of cigarettes consumed in Thailand could be met with measures consistent, or less inconsistent, with the General Agreement. It noted that other countries had introduced strict, non-discriminatory labelling and ingredient disclosure regulations which allowed governments to control, and the public to be

informed of, the content of cigarettes. A non-discriminatory regulation implemented on a national treatment basis in accordance with Article III:4 requiring complete disclosure of ingredients, coupled with a ban on unhealthy substances, would be an alternative consistent with the General Agreement. The Panel considered that Thailand could reasonably be expected to take such measures to address the quality-related policy objectives it now pursues through an import ban on all cigarettes whatever their ingredients.

78. The Panel then considered whether Thai concerns about the quantity of cigarettes consumed in Thailand could be met by measures reasonably available to it and consistent, or less inconsistent, with the General Agreement. The Panel first examined how Thailand might reduce the demand for cigarettes in a manner consistent with the General Agreement. The Panel noted the view expressed by the WHO that the demand for cigarettes, in particular the initial demand for cigarettes by the young, was influenced by cigarette advertisements and that bans on advertisement could therefore curb such demand. At the Forty-third World Health Assembly a resolution was approved stating that the WHO is:

> "Encouraged by ... recent information demonstrating the effectiveness of tobacco control strategies, and in particular ... comprehensive legislative bans and other restrictive measures to effectively control the direct and the indirect advertising, promotion and sponsorship of tobacco".[1]

[1]Forty-third World Health Assembly, Fourteenth plenary meeting, Agenda Item 10, 17 May 1990 (A43/VR/14; WHA43.16).

The resolution goes on to urge all member states of the WHO

> "to consider including in their tobacco control strategies plans for legislation or other effective measures at the appropriate government level providing for:
>
> ...
>
> (c) progressive restrictions and concerted actions to eliminate eventually all direct and indirect advertising, promotion and sponsorship concerning tobacco"[1]

A ban on the advertisement of cigarettes of both domestic and foreign origin would normally meet the requirements of Article III:4. It might be argued that such a general ban on all cigarette advertising would create unequal competitive opportunities between the existing Thai supplier of cigarettes and new, foreign suppliers and was therefore contrary to Article III:4.[2] Even if this argument were accepted, such an inconsistency would have to be regarded as unavoidable and therefore necessary within the meaning of Article XX(b) because additional advertising rights would risk stimulating demand for cigarettes. The Panel noted that Thailand had already implemented some non-discriminatory controls on demand, including information programmes, bans on direct and indirect advertising, warnings on cigarette packs, and bans on smoking in certain public places.

79. The Panel then examined how Thailand might restrict the supply of cigarettes in a manner consistent with the General Agreement. The Panel noted that contracting parties may maintain governmental monopolies, such as the Thai Tobacco Monopoly, on the importation and domestic sale of products.[3] The Thai Government may use this monopoly to regulate the overall supply of cigarettes, their prices and their retail availability provided it thereby does not accord imported cigarettes less favourable treatment than domestic cigarettes or act inconsistently with any commitments assumed under its Schedule of Concessions.[4] As to the pricing of cigarettes, the

Panel noted that the Forty-third World Health Assembly, in its resolution cited above, stated that it was:

> "Encouraged by ... recent information demonstrating the effectiveness of tobacco control strategies, and in particular ... policies to achieve progressive increases in the real price of tobacco."

It accordingly urged all member states

> "to consider including in their tobacco control strategies plans for ... progressive financial measures aimed at discouraging the use of tobacco"[5]

For these reasons the Panel could not accept the argument of Thailand that competition between imported and domestic cigarettes would necessarily lead to an increase in the total sales of cigarettes and that Thailand therefore had no option but to prohibit cigarette imports.

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[1]Forty-third World Health Assembly, Fourteenth plenary meeting, Agenda Item 10, 17 May 1990 (A43/VR/14; WHA43.16).

[2]On the requirement of equal competitive opportunities, see the Report of the panel on "United States - Section 337 of the Tariff Act of 1930" (L/6439, paragraph 5.26, adopted on 7 November 1989).

[3]Cf. Articles III:4, XVII and XX(d).

[4]Cf. Articles III:2 and 4 and II:4.

[5]Forty-third World Health Assembly, Fourteenth plenary meeting, Agenda Item 10, 17 May 1990 (A43/VR/14; WHA43.16).

80. The Panel then examined further the resolutions of the WHO on smoking which the WHO made available. It noted that the health measures recommended by the WHO in these resolutions were non-discriminatory and concerned all, not just imported, cigarettes. The Panel also examined the Report of the WHO Expert Committee on Smoking Control Strategies in Developing Countries. The Panel observed that a common consequence of import restrictions was the promotion of domestic production and the fostering of interests in the maintenance of that production and that the WHO Expert Committee had made the following recommendation relevant in this respect:

> "Where tobacco is already a commercial crop every effort should be made to reduce its role in the national economy, and to investigate alternative uses of land and labour. The existence of a tobacco industry of any kind should not be permitted to interfere with the implementation of educational and other measures to control smoking."[1]

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

(…)

5. Japan – Trade in Semi-Conductors

http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm

Under the GATT 1947, contracting parties often preferred to conclude so-called Voluntary Export Restraints (VERs) to protect a domestic industry against imports rather than to adopt safeguards under GATT Art. XIX. Many of these agreements were voluntary only in a formal sense. The following dispute gives a good illustration of the desired and undesired economic effects of VERs on the participating and third countries. Another interesting aspect of the case is the GATT relevance of governmental versus private action.

VERs are now prohibited by Article 11 of the Agreement on Safeguards.

24 March 1988

JAPAN - TRADE IN SEMI-CONDUCTORS

Report of the Panel adopted on 4 May 1988
(L/6309 - 35S/116)

(…)

II. BACKGROUND

A. Developments leading to the Japan/US Arrangement in Semi-conductor trade

10. The United States and Japan are the largest producers and exporters of semi-conductors. The United States was the largest producer during the 1970' s, but Japan became increasingly important as both a producer and exporter of semi-conductor products at the beginning of the 1980' s. In 1981, its exports exceeded those of the United States for the first time. In February 1983, the United States' industry began to express concerns to the Government of the United States about the lack of access of non-Japanese companies to the Japanese market and possible unfair trade practices of Japanese companies in the US market.

11. On 14 June 1985, the United States Semi-conductor Industry Association filed a petition under Section 301 of the Trade Act of 1974 against the Government of Japan, alleging that Japan was restricting access to the domestic semi-conductor market for United States producers. This industry-wide action was followed by several complaints brought under the anti-dumping law. On 24 June 1985, an anti-dumping petition concerning 64K DRAMs from Japan was filed by Micron Technology Inc. Also, on 30 September 1985, a petition concerning the alleged dumping of EPROMs from Japan was filed by Intel Corporation, Advanced Micro-Devices, Inc. and by National Semi-conductor Corporation. Finally, on 6 December 1985 the United Sates Department of Commerce initiated an anti-dumping investigation to determine whether DRAMs of 256K and above from Japan were sold at less than fair value. Protracted

negotiations between the governments of Japan and the United States led to the conclusion of a bilateral agreement in September 1986.

12. On 2 September 1986, Japan and the United States formally concluded an Arrangement concerning Trade in Semi-Conductor Products (hereinafter called "the Arrangement") which was subsequently notified to the GATT on 6 November 1986 in document L/6076. The Arrangement was linked to the suspension of anti-dumping procedures initiated in the United States against imports of certain categories of Japanese semi-conductors and to the suspension of the Section 301 proceedings on access to the Japanese market for US-made semi-conductors.

B. Main provisions of the Arrangement

(…)

14. The second main section of the Arrangement contains three sub-sections dealing with prevention of dumping. (…) This sub-section also provides that if any monitored product is being sold or exported at prices less than company-specific fair value, the Government of the United States may request immediate consultations . Based on monitoring and/or consultation , the Government of Japan will take appropriate actions available under laws and regulations in Japan to prevent such exports to the United States. The third sub-section relates to monitoring of third-country markets. It is stated that both governments recognize the need to prevent dumping in accordance with relevant provisions of the GATT and encourage respective industries to conform with the above principles. It is also stated that in order to prevent dumping, the Government of Japan will monitor, as appropriate, cost and export prices on the products exported by Japanese semi-conductor firms from Japan to certain markets.[2]

(…)

VII. FINDINGS

96. The Panel understood the complaint of the EEC to be that:

- the measures applied by the Japanese Government to exports of semi-conductors at prices below company-specific costs to certain third countries to implement its Arrangement concerning Trade in Semi-Conductor Products with the United States, restricted exports of semi-conductors and therefore contravened Article[] (…) XI;

(…)

A. The Third Country Market Monitoring

99. The Panel considered the following facts as central to its examination of this part of the EEC's complaint. After having concluded the Arrangement with the United States concerning Trade in Semi-Conductors, the Japanese Government:

- requested Japanese producers and exporters of semi-conductors covered by the Arrangement not to export semi-conductors at prices below company-specific costs;

- collected data on company and product-specific costs from producers; introduced a statutory requirement, reinforced by penal servitude not exceeding six months or a fine not exceeding ¥200,000, for exporters of semi-conductors to report data on export prices;

- systematically monitored company and product-specific cost and export price data on semi-conductors which were sold for export to certain contracting parties other than the United States;

- instituted quarterly supply and demand forecasts and communicated to manufacturers its concern about the need to accommodate their production levels to the forecasts as compiled by MITI.

(…)

102. The Panel understood the main contentions of the parties to the dispute on the consistency of the measures set out in paragraph 99 with Article XI:1 of the General Agreement to be the following. The EEC considered that such measures constituted restrictions on the sale for export of semi-conductors at prices below company-specific costs through measures other than duties, taxes or charges within the meaning of Article XI:1. Japan contended that there were no governmental measures limiting the right of Japanese producers and exporters to export semi-conductors at any price they wished. The Government's measures to avoid sales at dumping prices were not legally binding and therefore did not fall under Article XI:1. Exports were limited by private enterprises in their own self-interest and such private action was outside the purview of Article XI:1.

103. As for the export approval system, the EEC did not ask the Panel to examine the COCOM export controls as such but the delays in the issuing of export licences resulting from the monitoring of costs and export prices. The EEC considered that these delays constituted restrictions on exportation made effective through export licences within the meaning of Article XI:1. Japan maintained that the delays in the granting of export licences resulting from the monitoring of costs and export prices had occurred for purely administrative reasons and did not constitute restrictions within the meaning of Article XI:1, since no export licence had ever been denied for reasons related to export pricing.

104. The Panel examined the parties' contentions in the light of Article XI:1, the relevant part of which stated that:

> "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas …, export licences or other measures, shall be instituted or maintained by any contracting party … on the exportation or sale for export of any product destined for the territory of any other contracting party".

The Panel noted that this wording was comprehensive: it applied to all measures instituted or maintained by a contracting party prohibiting or restricting the importation, exportation or sale for export of products other than measures that take the form of duties, taxes or other charges.

(…)

106. The Panel then examined the contention of the Japanese Government that the measures complained of were not restrictions within the meaning of Article XI:1 because they were not legally binding or mandatory. In this respect the Panel noted that Article XI:1, unlike other provisions of the General Agreement, did not refer to laws or regulations but more broadly to measures. This wording indicated clearly that any measure instituted or maintained by a contracting party which restricted the exportation or sale for export of products was covered by this provision, irrespective of the legal status of the measure.

107. Having reached this finding on the basis of the wording and purpose of the provision, the Panel looked for precedents that might be of further assistance to it on this point. It noted that the CONTRACTING PARTIES had addressed a case relating to the interpretation of Article XI:2(c) in the report of the Panel on "Japan - Restrictions on Imports of Certain Agricultural Products" (L/6253). Under Article XI:2(c), import restrictions might be imposed if they were necessary to the enforcement of "governmental measures" restricting domestic supplies. The complaining party argued in the earlier panel proceedings that some of the measures which Japan had described as governmental measures were in fact "only an appeal for private measures to be taken voluntarily by private parties" and could therefore not justify the import restrictions. Japan replied that "to the extent that governmental measures were effective, it was irrelevant whether or not the measures were mandatory and statutory", that the governmental measures "were effectively enforced by detailed directives and instructions to local governments and/or farmers' organizations" and that "such centralised and mutually collaborative structure of policy implementation was the crux of government enforcement in Japan" (L/6253, paragraph 29). The Panel which examined that case had noted that "the practice of 'administrative guidance' played an important rôle" in the enforcement of the Japanese supply restrictions, that this practice was "a traditional tool of Japanese government policy based on consensus and peer pressure" and that administrative guidance in the special circumstances prevailing in Japan could therefore be regarded as a governmental measure enforcing supply restrictions. The Panel recognized the differences between Article XI:1 and Article XI:2(c) and the fact that the previous case was not the same in all respects as the case before it, but noted that the earlier case supported its finding that it was not necessarily the legal status of the measure which was decisive in determining whether or not it fell under Article XI:1.

(…)

109. In order to determine this, the Panel considered that it needed to be satisfied on two essential criteria. First, there were reasonable grounds to believe that sufficient incentives or disincentives existed for non-mandatory measures to take effect. Second, the operation of the measures to restrict export of semi-conductors at prices below company-specific costs was essentially dependent on Government action or intervention. The Panel considered each of these two criteria in turn. The Panel considered that if these two criteria were met, the measures would be operating in a manner equivalent to mandatory requirements such that the difference between the measures and mandatory requirements was only one of form and not of substance, and that there could be therefore no doubt that they fell within the range of measures covered by Article XI.1.

(…)

117. All these factors led the Panel to conclude that an administrative structure had been created

by the Government of Japan which operated to exert maximum possible pressure on the private sector to cease exporting at prices below company-specific costs. This was exercised through such measures as repeated direct requests by MITI, combined with the statutory requirement for exporters to submit information on export prices, the systematic monitoring of company and product-specific costs and export prices and the institution of the supply and demand forecasts mechanism and its utilization in a manner to directly influence the behaviour of private companies. These measures operated furthermore to facilitate strong peer pressure to comply with requests by MITI and at the same time to foster a climate of uncertainty as to the circumstances under which their exports could take place. The Panel considered that the complex of measures exhibited the rationale as well as the essential elements of a formal system of export control. The only distinction in this case was the absence of formal legally binding obligations in respect of exportation or sale for export of semi-conductors. However, the Panel concluded that this amounted to a difference in form rather than substance because the measures were operated in a manner equivalent to mandatory requirements. The Panel concluded that the complex of measures constituted a coherent system restricting the sale for export of monitored semi-conductors at prices below company-specific costs to markets other that the United States, inconsistent with Article XI.1.

118. The Panel then reverted to the issue raised by the EEC concerning the delays of up to three months in the issuing of export licences that had resulted from the monitoring of costs and export prices of semi-conductors destined for contracting parties other than the United States. It examined whether the measures taken by Japan constituted restrictions on exportation or sale for export within the meaning of Article XI:1. It noted that the CONTRACTING PARTIES had found in a previous case that automatic licensing did not constitute a restriction within the meaning of Article XI:1 and that an import licence issued on the fifth working day following the day on which the licence application was lodged could be deemed to have been automatically granted (BISD 25S/95). The Panel recognized that the above applied to import licences but it considered that the standard applicable to import licences should, by analogy, be applied also to export licences because it saw no reason that would justify the application of a different standard. The Panel therefore found that export licensing practices by Japan, leading to delays of up to three months in the issuing of licences for semi-conductors destined for contracting parties other than the United States, had been non-automatic and constituted restrictions on the exportation of such products inconsistent with Article XI:1.

(…)

6. The Concept of Non-Tariff Barrier (NTB)

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Multilateral Approaches to Market Access Negotiations Countries

No: TPRD-98-02

Sam Laird
World Trade Organization

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Keywords: WTO, market access, trade negotiations, tariffs, non-tariff measures.

JEL codes: [F13]

Abstract: Market access negotiations in merchandise trade at the multilateral level cover tariffs and non-tariff measures (NTMs). While tariffs have been substantially reduced in earlier rounds, they remain high in certain areas and further reductions involve a number of complex technical issues. Some formulae approaches, not used in the Uruguay Round, seem more favourable to developing countries. Elimination or phased reductions of NTMs in agriculture is one of the main areas for further market access negotiations in trade in goods. However, most NTMs are now the subject to negotiations on the rules under which they may be applied, e.g. in the areas of contingency protection and technical barriers to trade.

(…)

III. Non-tariff measures

A Issues

59. In the context of market access negotiations, non-tariff measures mainly refer to import restraints as well as production and export subsidies. (Export restraints, also NTMs, are not discussed here). Within these broad categories, there is a large variety of NTMs and they have many different effects.[2] These include price and quantity effects on trade and production, as well

[2] For a detailed discussion, see Laird and Yeats (1990). UNCTAD uses a classification of over 100 such measures - including tariffs with a discretionary or variable component

as on consumption, revenue, employment, and welfare effects. These occur both in the country applying them as well as in other countries, directly and indirectly affected by them. NTMs may overlap with tariffs and are often used with other reinforcing NTMs, e.g., domestic price support schemes need to be supported with import measures and any resulting surpluses need subsidies to be exported.

60. NTMs are difficult to quantify, costly to administer, costly to consumers, costly to exporters (in terms of lost trade), inefficient ways of creating jobs, lack transparency, are inherently discriminatory, and are most intensively used against developing countries and transition economies. They also drive a wedge between world prices and domestic prices, so that domestic firms are relatively unaffected by price trends on world markets and have little incentive to adopt new technologies or modern business practices. Domestic prices are often determined by the degree competition, or the lack thereof, in the home market.

61. The Uruguay Round made considerable headway in eliminating or reducing the use of NTMs, as well as in setting guidelines for the use of those which are still allowed. An overview of pre- and post Uruguay Round NTMs by broad type and sectoral coverage in Canada, the European Communities, Japan and the United States is given in Tables 5 and 6. The two outstanding features of these tables are the elimination of NTMs in agriculture, principally through tariffication, and the continued application of export restraints in the area of textiles and clothing. However, the tables look at import measures only and do not capture the importance of domestic supports and export subsidies in the area of agriculture.

62. For developing countries, the most important areas where changes took place in relation to market access were in relation to the use of voluntary export restraints (VERs), the start of the phase-out of restraints under the WTO Agreement on Textiles and Clothing, and the breakthroughs reflected in the WTO Agreement on Agriculture. These approaches are indicative of the techniques of negotiation for improved market access for products covered by NTMs.

63. For example, it was decided to prohibit explicitly the use of voluntary export (quantitative) restraints (VERs) in industry (other than textiles and clothing) and agriculture, and the remaining VERs are to be eliminated by the end of 1999. Apart from the fact that they covered more trade than other measure, VERs, used instead of Article XIX safeguards, had become a threat to the credibility of the GATT system, the prohibition under Article XI being ignored by all major GATT contracting parties. This prohibition on VERs was achieved at the expense of some "flexibility" being introduced into the application of safeguards, allowing discrimination among suppliers in exceptional circumstances. However, even when VERs are eliminated there will remain voluntary export price restraints (VEPRs), which often occur as a negotiated outcome of anti-dumping cases. Given the equivalence between these measures (with exporters capturing the rents in both cases), it is inconsistent economically that one be banned while the other be condoned. This issue could usefully be addressed in future negotiations.

64. For more than 40 years the developing countries' single most important export, textiles and clothing, were restricted on a discriminatory basis under the MFA and the earlier Short- and Long-term Cotton Textiles Agreements. These restraints are now being progressively phased out under the WTO Agreement on Textiles and Clothing. There are mixed feelings among developing countries about the MFA elimination for two reasons. Constrained exporters must be expected to loose some of quota rents afforded by the MFA, but the country-specific quota system also provided a form of protection for less efficient exporters against the more efficient to

whom quotas could not be transferred. (There have already been reports of Bangladesh loosing out to China in some areas).

65. Subject to special safeguards, the phase-out of the MFA and the gradual integration of the textiles and clothing sector within the normal WTO rules is being effected over a 10 year period under the supervision of a Textiles Monitoring Body (TMB). A minimum of 16 per cent of total 1990 volume of imports covered by the MFA were due to be integrated into the WTO in 1995. At least another 17 per cent of the value of 1990 imports will be integrated following the third year of the phase-out period. An additional minimum of 18 per cent will follow after the seventh year, while the remaining 41 per cent will be brought under WTO rules at the very end of the phase-out period. Each phase-out is intended to include products from four different groups: tops and yarn, fabrics, made-up textiles, and clothing.

66. Quota restrictions are being expanded by the amount of the prevailing quota growth rates plus 16 per cent annually for the first three years. A further expansion of 25 per cent will take place in the subsequent four years, and an additional 27 per cent in the final three years. These annual growth rates may be adjusted if it is found that member countries are not complying with their obligations.

67. In the Major Review of the Implementation of the Agreement on Textiles and Clothing in the First Stage of the Integration Process, held in February 1998, a number of concerns were raised, including the back-loading of the integration process (holding off the more difficult adjustments till last), the exceptionally large number of safeguard measures in use, more restrictive use of rules of origin by the United States, tariff increases, the introduction of specific rates, minimum import pricing regimes, labelling and certification requirements, the maintenance of balance of payments provisions affecting textiles and clothing, export visa requirements, as well as the double jeopardy arising from the application of anti-dumping measures to products covered by the agreement.

68. The WTO Agreement on Agriculture, one of the main achievements of the Uruguay Round, brought the agricultural sector under more transparent rules and sets the stage for a progressive liberalization of trade in the sector. Among the main achievements were (i) tariffication (or elimination) of NTMs based on 1986-88 prices, the full binding of the new tariffs by developed and developing countries and phased tariff reductions, (ii) reductions in the level of domestic support measures (except for “green box” and *de minimis* amounts), and (iii) reductions in outlays on export subsidies and the volume of subsidized exports. The main exceptions to tariffication were rice and, for developing countries, some staple foods, where minimum access commitments apply. Special safeguards (increased duties) can be triggered by increased import volumes or price reductions (by comparison with average 1986-88 prices expressed in domestic currency). There is also a "peace" clause, intended to constrain the use of anti-subsidy actions until 2003.

69. Apart from these specific areas covered by the market access negotiations in the Uruguay Round, a number of important NTMs were covered in rules negotiations. These include contingency protection (safeguards, anti-dumping, countervailing), technical barriers (including sanitary and phytosanitary measures), TRIPS, TRIMs, import licensing, state trading and rules of origin. These are covered by other papers at the conference.

70. One important area of rules relates to the use of subsidies, which are covered by the WTO Agreement on Subsidies and Countervailing Measures (SCM) and the Agreement on Agriculture. These rules distinguish between domestic and export subsidies and provide for differential treatment of agriculture and manufactured products. Some subsidies, notably export subsidies, are prohibited, while others are “actionable” or “non-actionable”, whether in the WTO or through countervailing actions. There are notification requirements for all specific subsidies, i.e.,

subsidies that are targeted to particular enterprises, industries or regions, as well as for export subsidies and import-substitution subsidies. The WTO Agreement on Agriculture also prohibits the use of export subsidies, except in conjunction with product-specific reduction commitments, and defines the conditions under which certain types of domestic subsidies ("green box", "blue box" or "S&D box") are exempt from reduction commitments. In this area, the emphasis on de-linking of supports from production was an important new approach to rural incomes.

71. WTO rules on NTMs were extended in the Uruguay Round to cover trade-related investment measures (TRIMs). In particular, the TRIMs Agreement prohibits measures that (i) require particular levels of local sourcing by an enterprise (i.e., local content requirements); (ii) restrict the volume or value of imports which an enterprise can buy or use to the volume or value of products it exports (i.e., trade balancing requirements); (iii) restrict the volume of imports to the amount of foreign exchange inflows attributable to an enterprise; and (iv) restrict the export by an enterprise of products, whether specified in terms of the particular type, volume or value of products or of a proportion of volume or value of local production.

72. Among the most important TRIMs in practice are the local content and trade-balancing requirements, which are extensively used in developing country automotive industries. Developing countries which notified their TRIMs are allowed to maintain them until the end of 1999, when they are to be dismantled. The abolition of TRIMs will promote a more neutral trading and investment environment in those countries and a more efficient allocation of scarce resources. The automotive industries in a number of countries are pressing their governments to seek an extension of the period in which to adjust to the new trading environment, but since the Uruguay Round WTO members have been much more reluctant to grant waivers to the main rules.

(…)

Optional Reading : Comparative Law – The European Community

Legal Text

Article 25 (formerly Art. 12)

Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.

Article 28 EC (formerly Art. 30)

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 30 EC (formerly Art. 36)

The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Article 90 (formerly Art. 95)

No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

Dassonville

This was the first judgment in which the European Court of Justice gave an abstract definition of the term "measure having an equivalent effect" in Art. 28 (ex Art. 30). Consider the difference to the WTO's predominant discrimination approach and the political situation as well as the policy implications that may have supported such a broad scope of "measure having an equivalent effect" in the mid-seventies.

Judgment:

Procureur du Roi v Benoit and Gustave Dassonville

Case 8/74

Court of Justice

11 July 1974

[1974] ECR. 837, [1974] 2 C.M.L.R. 436

Facts:

[In Belgium, the recognition of designations of origin was subject to a declaration by the Belgian Government. In addition, Belgian law prohibited the importation of spirits bearing a recognized designation of origin unless they were accompanied by a document certifying their right to such a designation. The Belgian government had officially recognized "Scotch Whisky" as a designation of origin.

Gustave Dassonville, a wholesaler doing business in France, and his son, Benoit Dassonville, who managed a branch of the business in Belgium, imported into Belgium from France some "Johnnie Walker" and "Vat 69" "Scotch Whisky." Since France had not required a certificate of origin for "Scotch Whisky," the Dassonvilles did not have a certificate from British authorities. In expectation of importing the whiskey into Belgium, the Dassonvilles attached printed labels with the words "British Customs Certificate of Origin," and added in a hand-written note the number and date of the French excise bond, which was all that was required by French rules.

The Belgian authorities considered the documents insufficient and brought action against the Dassonvilles for violations of Belgian law charging them, among other things, with the failure to have the appropriate documents. The two exclusive importers of "Johnnie Walker" and "Vat 69" also brought a civil action.

The Tribunal de Premiere Instance de Bruxelles requested a preliminary ruling pursuant to Article 177 of the EEC Treaty:]

Decision

1. By Judgment of 11 January 1974, received at the Registry of the Court on 8 February 1974, the Tribunal de Premiere Instance of Brussels referred, under Article 177 of the EEC Treaty, two questions on the interpretation of Articles 30, 31, 32, 33, 36 and 85 of the EEC Treaty, relating to the requirement of an official document issued by the government of the exporting country for products bearing a designation of origin.

2. By the first question it is asked whether a national provision prohibiting the import of goods bearing a designation of origin where such goods are not accompanied by an official document issued by the government of the exporting country certifying their right to such designation constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.

3. This question was raised within the context of criminal proceedings instituted in Belgium against traders who duly acquired a consignment of Scotch whisky in free circulation in France and imported it into Belgium without being in possession of a certificate of origin from the British customs authorities, thereby infringing Belgian rules.

4. It emerges from the file and from the oral proceedings that a trader, wishing to import into Belgium Scotch whisky which is already in free circulation in France, can obtain such a certificate only with great difficulty, unlike the importer who imports directly from the producer country.

5. All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.

6. In the absence of a Community system guaranteeing for consumers the authenticity of a product's designation of origin, if a Member States takes measures to prevent unfair practices in this connection, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals.

7. Even without having to examine whether or not such measures are covered by Article 36, they must not, in any case, by virtue of the principle expressed in the second sentence of that Article, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

8. That may be the case with formalities, required by a Member State for the purpose of proving the origin of a product, which only direct importers are really in a position to satisfy without facing serious difficulties.

9. Consequently, the requirement by a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty.

Cassis de Dijon

In this judgment the European Court of Justice applies Art. 28 (ex Art. 30) to a measure which applies indistinctly to imports and domestic products by significantly qualifying the Dassonville formula. Under the Cassis-doctrine, the free movement of goods imposes broadly applicable substantive requirements on national socio-economic measures. Consider to what extent this approach makes harmonization unnecessary.

Judgment:

1. Must the concept of measures having an effect equivalent to quantitative restrictions on imports contained in Article 30 of the EEC Treaty be understood as meaning that the fixing of a minimum wine-spirit content for potable spirits laid down in the German Branntweinmonopolgesetz, the result of which is that traditional products of other Member States whose wine-spirits content is below the fixed limit cannot be put into circulation in the Federal Republic of Germany, also comes within this concept?

(...)

6. The national court is thereby asking for assistance in the matter of interpretation in order to enable it to assess whether the requirement of a minimum alcohol content may be covered either by the prohibition on all measures having an effect equivalent to quantitative restrictions in trade between Member States contained in Article 30 of the Treaty or by the prohibition on all discrimination regarding the conditions under which goods are procured and marketed between nationals of Member States within the meaning of Article 37.

8. In the absence of common rules relating to the production and marketing of alcohol -- a proposal for a regulation submitted to the Council by the Commission on 7 December 1976 [citation omitted] not yet having received the Council's approval -- it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory.

   Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer.

9. The Government of the Federal Republic of Germany, intervening in the proceedings, put forward various arguments which, in its view, justify the application of provisions relating to the minimum alcohol content of alcoholic beverages, adducing considerations relating on the one hand to the protection of public health and on the other to the protection of the consumer against unfair commercial practices.

10. As regards the protection of public health the German Government states that the purpose of the fixing of minimum alcohol contents by national legislation is to avoid the

proliferation of alcoholic beverages on the national market, in particular alcoholic beverages with a low alcohol content, since, in its view, such products may more easily induce a tolerance towards alcohol than more highly alcoholic beverages.

11. Such considerations are not decisive since the consumer can obtain on the market an extremely wide range of weakly or moderately alcoholic products and furthermore a large proportion of alcoholic beverages with a high alcohol content freely sold on the German market is generally consumed in a diluted form.

12. The German Government also claims that the fixing of a lower limit for the alcohol content of certain liqueurs is designed to protect the consumer against unfair practices on the part of producers and distributors of alcoholic beverages.

This argument is based on the consideration that the lowering of the alcohol content secures a competitive advantage in relation to beverages with a higher alcohol content, since alcohol constitutes by far the most expensive constituent of beverages by reason of the high rate of tax to which it is subject.

Furthermore, according to the German Government, to allow alcoholic products into free circulation wherever, as regards their alcohol content, they comply with the rules laid down in the country of production would have the effect of imposing as a common standard within the Community the lowest alcohol content permitted in any of the Member States, and even of rendering any requirements in this field inoperative since a lower limit of this nature is foreign to the rules of several Member States.

13. As the Commission rightly observed, the fixing of limits in relation to the alcohol content of beverages may lead to the standardization of products placed on the market and of their designations, in the interests of a greater transparency of commercial transactions and offers for sale to the public.

However, this line of argument cannot be taken so far as to regard the mandatory fixing of minimum alcohol contents as being an essential guarantee of the fairness of commercial transactions, since it is a simple matter to ensure that suitable information is conveyed to the purchaser by requiring the display of an indication of origin and of the alcohol content on the packaging of products.

14. It is clear from the foregoing that the requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community.

In practice, the principle effect of requirements of this nature is to promote alcoholic beverages having a high alcohol content by excluding from the national market products of other Member States which do not answer that description.

It therefore appears that the unilateral requirement imposed by the rules of a Member State of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with the provisions of Article 30 of the Treaty.

There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules.

15. Consequently, the first question should be answered to the effect that the concept of "measures having an effect equivalent to quantitative restrictions on imports" contained in Article 30 of the Treaty is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State also falls within the prohibition laid down in that provision where the importation of alcoholic beverages lawfully produced and marketed in another Member State is concerned.

(…)

Keck

The Keck judgment is one of the very few instances in which the Court of Justice expressly departed from its prior jurisprudence and as a single legal incident generated a vast amount of literature. In view of an increasingly frequent recourse to Art. 28 (ex Art. 30), paras. 16 and 17 of this judgment reintroduce a discrimination requirement with respect to certain kinds of national measures. Reflect on the situations in which such discrimination could exist.

Judgment:

Criminal Proceedings against Keck & Mithouard

Joined Cases C-267 and268/91

Court of Justice

24 November 1993

[1993] ECR I-6097

DECISION:

1 By two judgments of 27 June 1991, received at the Court on 16 October 1991, the Tribunal de Grande Instance, Strasbourg, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of the rules of the Treaty concerning competition and freedom of movement within the Community.

2 Those questions were raised in connection with criminal proceedings brought against Mr. Keck and Mr. Mithouard, who are being prosecuted for reselling products in an unaltered state at prices lower than their actual purchase price ('resale at a loss'), contrary to Article 1 of French law no 63-628 of 2 July 1963, as amended by Article 32 of order no 86-1243 of 1 December 1986.

3 In their defense Mr. Keck and Mr. Mithouard contended that a general prohibition on resale at a loss, as laid down by those provisions, is incompatible with Article 30 of the Treaty and with the principles of the free movement of persons, services, capital and free competition within the Community.

4 The Tribunal de Grande Instance, taking the view that it required an interpretation of certain provisions of Community law, stayed both sets of proceedings and referred the following question to the Court for a preliminary ruling:

'is the prohibition in France of resale at a loss under Article 32 of order no 86-1243 of 1 December 1986 compatible with the principles of the free movement of goods, services and capital, free competition in the common market and non-discrimination on grounds of nationality laid down in the Treaty of 25 march 1957 establishing the EEC, and more particularly in Articles 3 and 7 thereof, since the French legislation is liable to distort competition:

(a) firstly, because it makes only resale at a loss an offence and exempts from the scope of the prohibition the manufacturer, who is free to sell on the market the product which he manufactures, processes or improves, even very slightly, at a price lower than his cost price;

(b) secondly, in that it distorts competition, especially in frontier zones, between the various traders on the basis of their nationality and place of establishment?'

5 Reference is made to the report for the hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

6 It should be noted at the outset that the provisions of the Treaty relating to free movement of persons, services and capital within the Community have no bearing on a general prohibition of resale at a loss, which is concerned with the marketing of goods. Those provisions are therefore of no relevance to the issue in the main proceedings.

7 Next, as regards the principle of non-discrimination laid down in Article 7 of the Treaty, it appears from the orders for reference that the national Court questions the compatibility with that provision of the prohibition of resale at a loss, in that undertakings subject to it may be placed at a disadvantage vis-a-vis competitors in Member States where resale at a loss is permitted.

8 However, the fact that undertakings selling in different Member States are subject to different legislative provisions, some prohibiting and some permitting resale at a loss, does not constitute discrimination for the purposes of Article 7 of the Treaty. The national legislation at issue in the main proceedings applies to any sales activity carried out within the national territory, regardless of the nationality of those engaged in it (see the judgment in case 308/86 Ministère public v Lambert [1988] ECR 4369).

9 Finally, it appears from the question submitted for a preliminary ruling that the national Court seeks guidance as to the possible anti-competitive effects of the rules in question by reference exclusively to the foundations of the Community set out in Article 3 of the Treaty, without however making specific reference to any of the implementing rules of the Treaty in the field of competition.

10 In these circumstances, having regard to the written and oral argument presented to the Court, and with a view to giving a useful reply to the referring Court, the appropriate course is to look at the prohibition of resale at a loss from the perspective of the free movement of goods.

11 By virtue of Article 30, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. The Court has consistently held that any measure which is capable of directly or indirectly, actually or potentially, hindering intra-Community trade constitutes a measure having equivalent effect to a quantitative restriction.

12 National legislation imposing a general prohibition on resale at a loss is not designed to regulate trade in goods between Member States.

13 Such legislation may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States, in so far as it deprives traders of a method of sales promotion. But the question remains whether such a possibility is sufficient to characterize

the legislation in question as a measure having equivalent effect to a quantitative restriction on imports.

14 In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter.

15 It is established by the case-law beginning with 'Cassis de Dijon' (case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein [1979] ECR 649) that, in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.

16 By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment (case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

17 Provided that those conditions are fulfilled, the application of such rules to the sale of products from another member state meeting the requirements laid down by that state is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty.

18 Accordingly, the reply to be given to the national Court is that Article 30 of the EEC Treaty is to be interpreted as not applying to legislation of a member state imposing a general prohibition on resale at a loss.