Cours 1 – The Law and practice of the WTO

* 1919 : Peace Treaty of Versailles

As a member of the treaty economic delegation, Keynes participated to the Versailles peace treaty negociations. According to him the main reason for the WWI was too much protectionnism and inegality in trade.

And wrote the Economic consequences of the Peace, in which he criticizes the Versailles Peace Treaty and in this very book he says there will be another war as the treaty isolates too much Germany. And a few years later, war started and now the economists agree on the fact the reasons of the war were too much protectionnism and inegality in trade.

So after the WWII , UK and US realized that without an open, transparent and non discriminatory system, a long lasting peace was not possible.

* August 1941 : the Atlantic Charter

A very important at the time but our system today was already contained in that

Principle 4 : economic pillar of peace : both the UK and the US said that

* + « the endeavor to further the enjoyment by all nations, great or small, victor or vainquish, of access an equal terms to trade and the raw materials that would be needed to recover from the war »
  + Idea that the new system would have to be non discriminatory => major idea : to have a non discriminatory system
* 1944 : Bretton Woods
  + Development pillar : developpement of the World Bank “international bank for reconstruction and development”
  + Monetary supervision with the establishment of the IMF
  + However States were unable to agree in Bretton Woods on an institution that would be charge of trade : the third pillar of a stable international system

Without a working economic system, peace cannot remain.

* November 1945:
  + US: leading force
  + Very soon after the establishment of the UN, a very document was circulated within the ECOSOC (Economic and social council of the UN)
    - “proposals for expansion of world trade and employment”
      * for the first time a state came with a proposal to do two things :
        + multilateral trade rules: before that the rules were bilateral, explaining the discrimination
        + and need to have an institution to supervise to watch compliance for these multilateral rules
    - When the proposals were circulated in ECOSOC: they decided to prepare a negotiation committee to negotiate how to formulate international rules and to establish an institution that would control the compliance
    - But the US are not always patient, so while the negotiations were going on, they invited 33 states and offered to negotiate tariffs “droit de douanes”
      * In 1946, all the states accepted the invitation (except USSR) and joined in Geneva
        + From that day they decided to agree through successful rounds of negotiation: the practice was launch at that time
        + At the end, in October 1947, they realized they had no insurance of the commitment of the participating states: need to be certain that all would apply them in a non discriminatory way to all the states

That is why they decided to formally agree and ensure compliance to tariff cuts they created the GATT

* + - * The GATT was born on 30 October 1947: they had another great idea : the GATT should entry into force asap
        + Therefore they decided that from January 1948: the GATT would start have effects even not ratified.

“provisional entry into force”

* + But at the same time, the UN was still working and they decided to convene a conference in La Havanne in Cuba
    - The Havanna conference on trade and employment (conformely to the US proposal on trade and employment) on November 1947 (so a month after the GATT)
    - This conference was pioneer because at the end the states concluded the International Trade Organisation Charter ITO March 1948
      * Therefore on paper the ITO was created (it was supposed to be the first multi trade organization ever)
        + The conference was therefore a success as they created an organization
        + But the Havanna charter never entered into force and faded away (“tombé en desuetude”) because the US decided to oppose to the ITO charter as some congressman thought it was not liberal enough
        + And therefore the other states refused to ratified
        + The ITO was therefore born dead
  + However, it was not the end of the system as the GATT was enforced and already producing legal effects : the GATT, which was supposed to be an additional protocol to the charter, survived by accident, because there was nothing the GATT became the epicenter.
    - States said they could not go back on nothing: they had realized something was necessary to insure a minimum of liberalism
      * Provisional agreement that survived for more that 47 years
        + Only trade can put state to accept legal situation like that
        + The GATT was just a secretariat facilitating the meeting of the GATT contracting parties
  + The GATT was a club of 23 states with quite homogeneous trade and economic power : “birth of the GATT Club”
    - And in the club they continued to have rounds of discussion
      * 1949 Geneva
      * 1931 Annecy
      * 1950’s
      * 1960/61 : Dillon Round
  + The 60’s were a turning point in the history :
    - Starting from the 60’s things started to change, to be more complicated in the club “complexity in the club” because of the change of paradigm at three levels:
      * A political change of paradigm
        + Until the beginning of the system, the US were the leading force
        + But at the end of the 50’s : conclusion of the Rome Treaty establishing the European Community

Europe is a new political club within the club with different objectives and visions that the US

* + - * + Also Japan was back on its feet
        + The US started to have competitors with different agendas
      * A sociological change of paradigm
        + Until the Dillon Round, never more than 26 states involved in the trade negotiations in the club
        + But then in the 60’s : it’s the decade of decolonization : new states acceding to sovereignty : and one of the main manifestation of statehood is to join the club

But these states were developing states : “underdeveloped”

These was going to change the old picture of the club as the previous members of the club were quite homogeneous

Poor states wanted to join but they could not have the same agendas

Therefore the things became more complicated

* + - * A technical/economic change of paradigm
        + The main objective was tariffs when created but then in the 60s the problem was technical barriers to trade
        + Tariffs were no longer the problem but states were using different obstacles to obstruct importation

Ex: new sanitary regulations “non tariff measures”

* + - * + Vicious measures that are not transparent : states disguised them in order to restrict international trade
    - So it was not surprising that the big round held from 1964 to 1967 “the round Kennedy” : the duration of the round is already a change before it was only a year and with the Kennedy round we reach 3 years and also it is the only round that did not come to an end
      * Part 4 of the GATT: the new states said they wanted to be referred to so they added a soft part : “the part 4”
    - They started to have more disputes and realized that even though the GATT was better than nothing it was not working so well
    - 1973: the Tokyo Round: it lasted 6 years from 1973 to 1979, 102 states were participating, but at the end the very idea of multilateral trade was in danger
      * “the worse round ever” : they were unable to find any agreement and decided to implement the Tokyo “codes”
      * The Tokyo round threatened the very idea of multilateralism as the fundamental idea was non discrimination and the Tokyo implemented fragmentation in the club as the states were deciding whether they wanted or not to implement the rules
        + The “GATT à la carte”
        + You had a fragmented system in a club which was to be based on legal predictability, transparency,… but with the GATT à la carte it was no longer clear who was bound by what
        + Threatened the very idea of multilateralism: the GATT à la carte could allowed a discriminatory system

It became a power based system

The US decided on the sanction: unilateralism

* + - * + It became a power based system where the powerful were imposing their views: could lead nations to war
    - They decided to go for the long of the last chance: save or not save and it will lead to something new as the GATT was no longer working
  + In 1986 they launched the Uruguay Round: the round of the last chance “biggest negotiation round”: on loads of subjects with a new dispute settlement system and a new international organization.
    - They found a deal: Dunkan saved the conference
    - 15th april 1994: they concluded the Marrakech Agreements: the World Trade Organization was born at that date
  + Since January 1995 the WTO entered: most achieved model of multeralism
    - They needed to have a deal on everything or no deal at all: “un pari fou”

The only requirement:

* bring the documents
* open book exam: case studies and a QCM: 70%
* active participation : 30%

Cours 2 – The WTO as an institution

1. **Identify the objectives of the organization:**

* negative picture on that organization
* When you want to identify the objectives of the WTO: need to check at the Preamble of the agreement establishing the WTO.
  + Very important agreement
* The Preamble should not be underestimated: object and purpose of a treaty
  + “in accordance with the objectives of sustainable development”
    - development that uses at the same time: economic employment, social development and environmental protection
      * first treaty with an explicit reference to sustainable development
        + the WTO is not about free trade, anti environmental protection…
  + Free trade? No!
    - Free trade concerns do not prevail other other concerns
      * Importance of the words
        + Les mots, Sartres
* In 1997, judges at the WTO said the Preamble adds “ color, texture, color and shading to the interpretation of the rights and obligations contained in the WTO agreement”
  + Ordonnance, éclaire et nuance
* The US bringing protected turtles by restricting the shrimp fishing:
  + And if refuse to use these methods, the products with this shrimps would not cross the US frontier
    - Violation of the GATT?
    - Article 20G: allows a WTO member to restrict importation
      * At that time: exhaustible natural resources did not comprehend biological resources
        + But, since 1947, something had changed

The WTO make an explicit reference to sustainable development

So in order to decide regarding exhaustible resources: need to refer to the international law of sustainable development and look into it to determine what is its treatment of biological resources

Convention on maritime resources of the UN: protection of the maritime resources

Washington CITS: and in the convention, 3 annexes with list of species that are endangered.

An inside Marine turtles are included

So in modern international law: exhaustible resources reference has be read in an evolutionary manner

* + The US won on that: natural resources: guided by the explicit reference in the preamble. If there was nothing in the Preamble, they would not have read that.
    - New legal interpretation of the system thanks to the Preamble
      * It has real legal implication in the system
        + The WTO does not prevent the members to implement a certain level of sanitary protection: not possible to use the WTO as an explanation, it’s a manipulation of the law
* A treaty starts from the title:
  + Be very careful of the preamble as well
  + Preambles of treaties often don’t contain obligations, nor objectives
    - But in the context of the WTO, important example of an institution who’s message is in the constitution
      * They conscientiously added the objective of sustainable development
      * The US lost the case because they came with an unilateral perspective
        + “Restrictions déguisées au commerce”
* Treaties need to be read as a whole: the Preamble often contains the objectives of the treaties
  + Until today, nobody has contested the importance of the Preamble of the WTO
  + The preamble reflexes the ratio legis of the system
    - You can never do something in the system
    - The WTO is an organization
* Need to know what can or cannot be done in the system

1. **The functions of the WTO**

How multilateral is the WTO:

* the vision of the US
  + the multilateral trading system
    - the main objective of the club is multilateralism
      * put a system of multilateral surveillance
* La raison d’être of the system is to establish a system of multilateral surveillance
  + Subject to multilateralism: constant surveillance
    - WTO: most advanced model of multilateralism
    - Article 3 of the WTO: “facilitates”
  + Issues for the entire system: multilateralism
* Article 3.2: forum of negotiations -> negotiations shall be conducted within the walls of the WTO
  + Every member of the WTO shall have the right to participate and to be part
    - In the UN things are not that multilateral
  + In the WTO impossible to isolate one member
    - Enforcement: when you have strong multilateralism, enforcement follows
    - The model of multilateralism in terms of supervision is unique I the system
* Article 3.3: event dispute settlement is managed multilaterally
  + Dispute settlement is used to build multilateralism

1. **The decision making process, Article 9**

* decision making progress: consensus
  + consensus: when nobody agrees
  + They don’t want to abandon that practice: never a single time they proceeded to a vote
    - If no consensus they should go for a vote, but no state has ever tried to go for a vote
      * They like consensus because each has a veto power
* Everybody is happy to decide though consensus
  + But does it make sense today with more that 150 members to base decision making on consensus?
    - Allows the weaker countries to veto the decisions
    - Allows the powerful states to block a direction
  + The WTO: an organization which adopt the least number of decisions
* Consensus: no objection in the room, while unanimity is a voting room.
* WTO: trade, so generally taken seriously
  + One state, one vote (if they decide to vote)
    - The voting power is not function to your shares or your contributions
  + The European Union is a member as such: EU as exclusive competence on trade, so the EU member
    - Each delegate of the countries, but they vote as one country

1. **Institutions**

* The ministerial conference: body deciding of the policy
  + Ministers of trades or delegates
    - Meets every two years
      * Now in “safer states”
  + General Counsel: decision making body between ministerial conferences
    - Trade delegate or ministers are seating there
      * Decision is made
    - General can have two different aspects: general counsel when broad but it can become two other institutions:

1. Trade policy review body:
   * + when discussing a new policy
2. Dispute settlement body:
   * + Most powerful adjudication mechanism in the system Article 3.3:
     + Dispute control
   * GATT Council
   * GATS Council
   * TRIPS Council (intellectual property)
     + And under each of these councils: subcommittees

Cours 3 – The legal structure/architecture of the WTO

Objective of the system: multilateral system of surveillance

* Make sure everything is control multilaterally: raison d’être du system
  + Impossible escape for the members: negotiations, decisions…
* Integrated system of law: not possible to have multilateralism if several agreements
* The multilateralism is not only the one of the system but also a legal multilateralism
* In the context of the WTO, since will to ensure multilateralism, make sure to have an integrated system of law.

The Legal structure of the WTO: only one agreement to implement this multilateralism

* There is only ONE WTO agreement: no “s”

At the very top: institutional agreement: at the very top of the system

All the other agreements are just annexes to this agreement.

Even if it is true that there are several agreements in the systems, they are annexes.

* **The structure of the WTO**
* **Institutional agreement**
* **Annexe 1**:
  + **GATT** 1994, international agreement trade in goods
    - GATT 1947 incorporated
    - New Rules negociated during the Uruguay Rounds
    - Decisions and practices adopted during the GATT 1947 era
      * Legally wrong to speak about GATT 1994
      * *Cf. p 8 Textbook*
  + **GATS**: services
  + Intellectual property, **TRIPS**: trade related intellectual property rights
    - TRIPS agreements: limitation for some developing countries to get medicines.
  + In the 80/90’s: trade limited to trade and goods, so with the conference, expansion to services and intellectual property during the Uruguay Round.
* **Annex 2:** **DSU**, Dispute Settlement Understanding, the “jewel of the system”
* **Annex 3:** **TPRM**: Trade policy review mechanism council: mechanism implementing transparency in the system.
  + States have to expose the measures and the organ gives the state its opinion.
  + Sort of a second chance for a state which want to implement an illegal measure to think it twice
    - Not a real organ with rules, but implement transparency
  + Multilateral control: ex ante multilateral control: allows WTO’s members to start controlling at the very beginning a measure before any dispute occurs and actually in order to prevent disputes
* **Annex 4**: survival of the Tokyo “**à la carte**”, Plurilateral trade agreements: not binding for all WTO members, only for the one who have accepted to be bind by them.
  + Four agreement before 2000
    - Bovine meat agreement
    - On dairy products
    - Government procurement (marches publics)
    - Civil Aircraft
  + **Today only**: on government procurement and Civil Aircraft.
    - Idea as well that more countries like China should be bound by those two agreements but cannot be forced on these countries as it is “pluralism” and not multilateralism.

**Single undertaking**: The WTO Agreement (the Marakech agreement): take it all or leave it from the institutional agreement, the Annex 1, 2 and 3.

International Public Law: Reservation: technic that allows a state of taking or excluding a provision in a treaty

* Here it is a single undertaking, no reservation is possible, in principle take it all or leave it all.
* Integrated system of law

Does it still make sense? Today, with more than 100 states… In the Doha round, certain aspects of the negotiation were successful, but as the acceptation must be on everything, could not go further.

The WTO agreement: but inside, there is a set of agreements: therefore, might be some contradictions.

* The single undertaking system implies that lawyers should always start with a presumption of non-conflict
  + EU/Canada Inuit case
* Need to try first an harmonious meaning: need to give effet utile.
  + Every single provisions needs to be meaningful.
* Harmonious reading, presumption of non conflict of the different rules contain in the agreement.
  + It’s not because two agreements appear to be contradictory or to go in two different directions, that they are contradictory:
    - US Scotland Up land case: cotton market
      * US has been subsidizing production of cotton
      * Subsidies to producers who use US products: African producers could not afford this material
    - Brazil brought the case: they were also affected by the US
      * Africa did not go because at the time US was giving money to some African states
    - Cotton: agricultural product: govern on the agreement of agriculture: local content subsidies: give on the condition to use local products
      * Only prohibits export subsidies: not possible to give subsidies to the producers to export, but local content subsidies are allowed
    - But the judge at the WTO said: single undertaking, so need to have an harmonious reading, the judge told the US that the agreement on subsidies prohibited local subsidies: even if the agreement on agriculture is silent, as the agreement on subsidies forbid these subsidies, then the subsidies are prohibited
      * Creative and courageous position of the judge
        + The message that the judge was sending to the is was to say that the WTO is an integrated system of laws: treaty shopping is not possible
        + The notion of single undertaking is concrete
  + Conflicts: two provisions or agreements are mutually exclusive and cannot be reconciled
    - When situation of conflict: **3 hypothesis of conflict**
      * *Between the constitutional agreement and any of the annexes’ agreements*
        + Institutional agreement v GATT: which should prevail?

The institutional agreement prevails: special rule in the Institutional agreement stating that if conflict between the institutional agreement and one of the Annex: the institutional agreement prevail

Article 16 of the Institutional agreement

* + - * *Between a general agreement in an annex and another agreement contained of the same annex?*

Ex: GATT 1994 and agreement on subsidies?

If there is no special rules, it’s lex specialis

Lex specialis lex generates

The more specific agreement would prevail

The agreements are generally developing elements contained of the GATT

* + - * *Conflict between two elements contained in the same agreement within the same annex?* 
        + Ex: agreement on agriculture and agreement on textiles

Which sector of the market is being affected by the measure?

When looking at the measure need to determine, what element is being affected

Ex: tee shirts produced with cotton coming from distinguished place: even if the government is doing that under the textile umbrella, it is the agricultural sector that is affected

Allows to determine which agreement is targeted

The measure targets the tee shirt, not the process of production: should we look at the production process?

Ex of the bottle of water produced in compliance with labor provisions and the other with child labor

Should we not look more often on the process?

The WTO: want to look on the economic side of things

The process of production as such is not enough for discrimination from the WTO’s point of view

WTO and non trade value

Cours 4 – The dispute settlement system

The WTO Dispute settlement system

* During the GATT Era: club
  + In the club, allergy to dispute settlement: to any adjudicatory elements or words
    - Even the word “dispute could not be found
      * **GATT, Art XXII “Consultation”**

1. Each contracting party shall accord **sympathetic consideration to**, and shall afford adequate opportunity for consultation regarding, **such representations as may be made by another contracting party** with respect to any matter affecting the operation of this Agreement.

2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

* + - * + Accorder de la sympathie: sympathetic consideration

Consultation: more formal approach to dispute settlement, very specific word

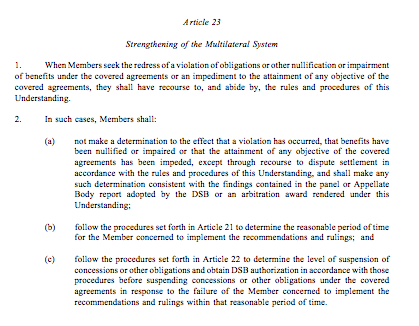
* + When disagreement: **working party group**
    - First parties developed in the 50’s: parties asked to sit down and solve the dispute
    - Not effective because people were sitting and writing a report
  + Then **panels** were implemented: “groupes spéciaux” (not arbitration)
    - Panels were created to solve the disputes: looked like arbitration, but never did that
    - At the beginning were playing the game: writing reports
      * Reports: nothing adjudicatory
    - For the panel to be establish: need for consensus
      * As the establishment of the panel was a decision: need consensus
        + Consensus: when nobody objects in the room
      * In the GATT era: when a country wanted a panel to discuss something and settle the dispute, the party who would have lost would have objected:
        + Everything was coming back to the contracting parties: against the adjudicatory aspect: so could not defend their case when they had one

The loosing parties were objecting: lost of panel reports have never been adopted

* + - * + Panel were too weak

GATT was a power based system because of the weakness of the dispute settlement system

* In the Uruguay round: dispute settlement was therefore one of the important subject tackled: strong and efficient dispute settlement system
  + - First time that dispute resolution was used to strengthen, to foster, multilateralism
      * New vision because traditionally dispute settlement is perceive
  + The WTO Dispute Settlement system: **WTO Convention Art 23 :**



**The WTO DSS Characteristics**:

* First characteristic: **compulsory dimension** of the WTO Dispute Settlement System: “shall”
  + No possible to bring the conflict somewhere else, it has to be brought under the WTO settlement system.
  + Compulsory character.
    - The principle in the International system is facultative.
* Second character: **automaticity:** WTO DSS is automatic
  + Makane: greatest legal invention of the 21st Century
    - Under the GATT: the dispute settlement system was ruled by consensus
      * They came out with negative consensus or reverse consensus
        + Everybody objects

To have the dispute resolution not to happen you have to have everybody to disagree: including you

Non-sense

* + - * It is the same regarding the adoption of the report: not to adopt it, you need now a reverse consensus
        + And therefore, the winning party can have the report only by not objecting to it
* Third: **exclusive character:** c’est le seul qui peut appliquer WTO
  + When members seek redress of a violation,… or an impediment of the covered agreement (single undertaking): exclusive
    - Whenever what is at stake is an agreement that is within the single undertaking, then the WTO has the exclusive competence
* Fourth: it is also a **specialized jurisdiction**, specialized system that just settle dispute with regards to the WTO law as it is what as been negotiated
  + Can only deal with WTO laws
    - Covered agreement: the only body of law that can be applied is WTO: it is a constitutional mandate
      * Application is not interpretation
    - It is not because a dispute has a trade aspect that it is covered by the WTO: there is a constitutional limit: it is the law
      * However: possible to interpret WTO law by referring to non WTO law
        + Shrimp/turtles
    - US Gasoline Case, p.15 of the French report: “*the WTO agreement cannot be read in clinical isolation of the rest of public international law*”
      * “*L’accord sur l’OMC ne peut êyre lu en isolation Clinique du reste du droit international public*”
        + it does not mean that you apply non WTO law in the system
* Strengthen the multilateral system
* In the new system it is therefore not possible to proceed to unilateral determination whether or not a member is complying with the law: no more possibility to apply sanctions
  + Multilateral surveillance
* This is the implications of the caracteristics: no more unilateralism in the system, no matter who you are
  + (reference to the US who present itself as a judge at the beginning)

**The scope of the WTO Dispute Settlement System**:

* they made everything to make sure there would be any excuse to get out: broad spectrum
* They came out with three types of complains contain in **WTO Art 23**:
  + ***Type 1: Violation complains***
    - “*When members seek the redress of a violation of obligations*”
    - First type of complains
      * “inconsistency” or “inconsistent actions” rather than violations or breaches
  + ***Type 2: Non-violation complains***
    - “*or as a nullification or impairment of the benefits*”
    - Annulation ou reduction d’avanatges
      * Once you will be in the Club, you will get advantages: the law is there so your advantages are not impaired. And the members accept you because you give them concessions.
        + The club is about advantages and concessions.
      * Example: Canada protecting Maple Syrup and Bulgaria Yoghurt
        + Reduction of the taxation: but subsidize the Canadian producers

Then Bulgaria is able to use the WTO

This in order to prevent the state to act unilaterally

* + ***Type 3: Situation complaint***
    - “*Or the impediment to the attainment of any objective*”
      * Preamble: “Objective and sustainable development”
        + Even if the complain of a member is about an objective, the member has to complain

There is no room left for unilateralism

* + - * Never happened, never used: it has been implemented to make sure no violation of the multilateralism occur
* No matter the action you want to use: you will need to go to the Dispute Settlement System
  + New type of disputes on the law that is still a bit blurry
    - Ex: Marshall Island and Nuclear proliferation
    - Ex: Chile and Bolivia

**The procedure in front of the dispute settlement system**

How do you settle a dispute in the WTO?

* Three main phases
  + ***Phase 1: Pre compliance phase***
  + ***Phase 2: the compliance phase as such***
  + ***Phase 3: the post-compliance***
* Compliance is part as such of the dispute settlement procedure: it is part of the process
  + Another example of the advance of the WTO system
* Generally compliance is not part of the international system
  + Here it is integrated in the dispute settlement system

**Shrimp Turtles: §1.21 to 1.34**

**US-Shrimps**

**EC-Biotech**

**China- Rare eatb**

**Japan-apples**

**EU-bananas**

**Australia-Salmon**

Cours 5 – The dispute settlement system

* Three main phases:
  + ***Phase 1: Pre compliance phase***:
    - To determine whether or not there is consistency with the WTO law
      * “Consistency” not to say violation
    - Consistency or inconsistency is going to be determined
    - **First step:** **consultation Art 4 of the DSU**
      * In the WTO DSS: consultation is compulsory, there is no dispute as long as there is no consultation
        + The wording “consultation” is derogatory to International law
        + Derogatory to international law: no need to have negotiations
        + In investment arbitration: cooling off period, that is not compulsory de facto
      * In WTO you cannot proceed with the DSS in you don’t proceed to consultation and respect the deadline : you have 2 months of consultations
        + If after 2 months no amicable settlement, then you can go ahead
        + Obligation to consultation and to exhaust consultation

No obligation for the responding state not to participate,

* + - * Moreover, when you request consultation, your request needs to be send to the other country and to all the DSB members: Dispute settlement body
        + Not regular in International Law: not the case in the CIJ
        + In the WTO website: the request of consultation is not only public but also distributed to all the other states:

In the WTO you can have multiparty proceedings

To ensure multilateral control of the dfispute (other element of multilateralism)

* + - * *Consultation: condition sine qua non*
      * If no mutually agreed solution after 60 days, then you can move to the second step
    - **Second step: request for the establishment of a panel** **Art 6 of the DSU**
      * Request to the DSB to establish a panel:
        + **Article 6.1**: negative consensus: it won’t be establish only if all the members refuse
      * The panel decides on law and on facts: it does not only decide on the basis of the law but also proceeds to an assessment of the facts
        + Often economic disputes with factual information : influence on the **composition of the panel**:

**Art 8.1 of the DSU**: government officials, people who have been representing the government in trade, … focus on people who know about trade policy

Not lawyers

They don’t want to see it as pure litigation, however, in almost every panel there is a lawyer because it has become very legal

However the wording translates the spirit of the WTO

Also the panelist cannot have the nationality of the disputing parties

It guaranties impartiality

On the contrary at the ICJ, if there is no judge of your nationality, then you have the right to appoint a judge of your nationality

Not good for the good administration of the justice: la bonne administration de la justice

Often : Suisse and New Zealand people

Each party can appoint a panelist and then they agree on the president, and if disagreement the DSB appoint it

Regarding developing countries ? The WTO follows the list made by the UN

Which is a country: in the economic system they are not developing countries anymore

* + - * The panels has 3 to 6 months to issue its report
        + Diplomatic language “report”

However the disputes are becoming more and more complex

EC-Biotech case: 2 or 3 years to issue the report because many scientific complexities

90 days is therefore the principle but it can takes more time

this is one of the weakness of the system : they thought it would go fast but it does not

* + - * Once the report is issued it has to be adopted by the DSB
        + Without adoption the report is not binding

Continuity of the gap heritage

The report will be adopted unless consensus not to adopt it

Usualy one state will want the report as it won something

The adoption is actually de facto automatic as because of the reverse consensus principle, the report will be adopted

* + - **Third step: Appellate Art 17 “Appellate review” of the DSU** 
      * If one of the party is not happy with the report: they have introduced the possibility to make an appeal before “Appellate body”
        + *Organe d’appel de l’OMC*
        + Panels are ad hoc, just constituted for a case, the Appellate body is a sort of permanent court
      * The US wanted the Appellate body: makes it more acceptable
        + Retrospectively: the Appellate body would have not been accepted if the parties knew what it was going to become
        + Raison d’être of the Appellate body: the US was opposed to negative consensus, therefore, they asked to have the chance to make an appeal if they lose in front of the panel: chance to argue again in front of an appellate body

That is why “after thought” according to an author

* + - * Appellate body has only a mandate to reevaluate the interpretation of law:
        + The facts are examined as established by the panel, cannot be examined “*de novo*”

Except if there is an evidence that the panel has exceeded its powers

* + - * + The limitation of the Appellate body of question of law is very important:

**Art 17.3 of the DSB**: “expertise in law”

Difference in the language with the Article 8 on the panels “trade diplomats” and in the Appellate body: “expertise in law”

New balance operating in the WTO settlement system

* + - * + The Appellate body has an adjudicatory approach, and, the panel has a diplomatic approach

Appointed for 4 years renewable once : an appellate member cannot stay more than 4 years: good administration of the justice

(counter example of the CIJ and the Japanese judge)

the Appellate body has 3 months to render its report

The report need to be adopted by the DSB

And it will be adopted because of the negative consensus

* + ***Phase 2: the compliance phase as such***
    - Compliance is an integral part: need to make sure that the state comply
      * What is wanted in the system is that the state act in accordance with the law
      * Not complying is bad for the entire system
    - **Article 21 of the DSU** contain the main provision for compliance
      * En principe : “**prompt compliance**”
        + principle: obligation to promptly comply: immediate compliance

“should not even think”

need to withdraw your measure “promptly”

* + - * However in many cases, it might be impracticable for the loosing state to promptly comply: **Article 21.3 of the DSU**
        + And when it is impracticable: the member state can benefit from a “reasonable period of time to comply”

“*délai raisonnable de mise en oeuvre*”

* + - * + How do you determine the reasonable period of time?

**First option** **21.3a of the DSU**: the loosing party propose a reasonable period of time

If the winning party believe it is not reasonable: not negative consensus anymore: it is positive consensus

Therefore the winning state can object

Therefore : the way of deciding is still consensus : therefore only need to object if the period of time is not reasonable

**Second option** **21.3b of the DSU**: a mutual agreement between the parties over the reasonable period of time

Most of the time they don’t agree

**Third option** **21.3c of the DSU**:

Dispute about compliance can also be a subject of dispute: that is why considered as an amazing dispute settlement system: to determine reasonable period of time to comply

They go under an arbitration under the **Art 21.3c**: it is one member of the Appellate body who issues a decision regarding the reasonable period of time:

They called it “arbitration” because another idea, but the idea was not to have an arbitration in the system

Parenthesis: multistate disputes

it is possible to have multi party complains, however, you need to require consultation from day 1

It is possible also to be a third party in a dispute Art 10: they don’t have to request consultations: the party will give his legal point of view: it is another example of multilateralism: give others the chance to share their views : “every member who has a substantial interest”: can enter, however, de facto : never checked

Amicus curiae ? not possible, but it happened once in EC-Sardines : Marocco submitted an amicus brief and the DSB said it was possible, but usually it is only open to non-state actors

Usually it goes from 3 months to 15 months: very rare that they go beyond

* + - * + Then they have the discretion to comply, however if they don’t: dispute on whether or not the loosing state has complied
    - And this dispute has a solution in **Article 21.5 DSU**: dispute on how to comply : whether the state has complied
      * A panel is going to be establish to determine whether or not the loosing party complied or not: usually it is the same panel, they tried to bring back the first panel who knows the case:
        + This panel has 3 months to comply, and if one of the party is not happy,

They can make an appeal again

* + - * + One of the criticism: if now we add all the delays : can be beyond 2 years : and in some country can kill some branches
        + If the Appellate body days they not have complied: then post compliance phase
      * Ex: Shrimp/Turtles: the US won on the fact turtles were exhaustive resources, however, as it was clear the US was targeting some countries:
        + Not able to reach an agreement

Malaysia brought a case: but if obligation to negotiate, no obligation to conclude: the US has complied with the compliance phase: as the US cooperated in good faith

The US lost at the pre-compliance case, but won at the compliance phase.

* + - **Art 21.6 of the DSU** allows any WTO member to raise issues of compliance: whether or not party to the dispute, but any WTO member: another example of multilateralism
      * The possibility for any WTO member to raise a question of compliance in front of the DSB: not only the 2 disputing parties,
      * If the Appellate Body decides the Party is not complying, then go to the post compliance phase
  + ***Phase 3: the post-compliance***
    - **Art 22 of the DSU** applicable provisions for the post compliance phase with two options:
      * **The first option is compensation**: possibility to negotiate a compensation
        + It means that you are going to reduce some trade advantages on some of its products, it is not about paying money to the other state, it is about making trade concession to the other state

However, it does not work because before giving compensation you need an agreement with the wining state: not agreeing, because the winning state generally wants you to stop the measure because destruction of one of the branch of production in its country

Second reason for compensation not being so much use is that it is supposed to be temporary

* + - * **The second option is suspension of concessions:** (sanctions, countermeasures…): most of the time when the second party is stubborn, (not using the word sanctions).
        + You entered in the club to get concessions
        + Therefore, if you don’t comply with the law, going to suspend the concessions

Need for an authorization from the DSB to suspend the concessions

Negative consensus: authorize unless consensus not to authorize it

* + - * + Everything is made for the loosing party to go for compliance Art 22§6 of the DSB
        + Last kind of dispute under the DSB: if the loosing party disagree on the appropriate level of suspension on concession, they can go for arbitration under art 22.6 but only to determine the appropriate level of suspension of concessions and obligations

And it is the first panel that exists

Dispute until the very end of the process: dispute procedure to make sure everything is controlled multilaterally

Most exhaustive system of dispute resolution in today’s international system

Not perfect: too long, no provisional measures/…but in terms of coverage: the most complete

* + - * + Suspension of concessions and obligations:

Annex 1: goods, services and IP

If not compelling in the goods, therefore they can target IP:

Cross retaliation: it is possible to target another sector.

Ex: Ecuador and the EU because the EU forget about cross retaliation, so when Ecuador threatened the EU to suspend concessions on IP, EU reacted immediately

**Regional dispute settlement system**

* Trade agreement: today qualified as the“Spaghetti ball” of free trade agreemen
  + Trade agreement: Area in which you liberalize trade, the most famous one is the Nafta, the Mercosur,…
* When negotiating the GATT: it was agreed to leave space to state to implement regional trade liberalization, because they thought at some point it would be generalized to te world
  + However, they never thought dispute settlement mechanism would be incorporated in these agreements
    - Most of them they have the same rules as the WTO
    - Today the problem: some states try to escape the WTO DS system by bringing their dispute in the regional dispute settlement system
    - Not possible: the rule ART XXX is that if you have a dispute with another member, need to settle it within the WTO system
  + Dangerous for the states
    - Ex: Mexico Soft Drinks - Case No.7 in the course reader:
      * Provision in the NAFTA that guarantees that each NAFTA member will have access to the market of other NAFTA member states: “market access”
        + Mexico produces a lot of sugar from sugar cane, and, wanted to export to the US
        + However, the US produces high fructose sugar
        + But the sugar coming from Mexico is cheaper and better for health
        + Mexico tried to negotiate, US refused
        + So Mexico went into the NAFTA commission to obtain a panel, but the US objected because they knew they were going to loose.
        + So Mexico answered with countermeasures : higher taxes on US soft drinks

Then the US ran at the WTO to ask for consultation: violation of the GATT claiming Mexico cannot treat less favorably imported treaties compared to domestic products

“slap in the face of Mexico”: they won because, the only defense of Mexico was saying that WTO had no jurisdiction as it was under NAFTA

WTO: the US invoked violation of WTO, and therefore, under **Art 23 of DSU**: not only obligaton of the dispute to submit its dispute to the WTO, but also a right for every WTO member to have its dispute being settled in the WTO

* + - * + the EU is an exception: as it has exclusive jurisdiction
  + However, the WTO is not likely to escape the Art 23
  + Furthermore, Mexico Soft Drink Case §54: “mindful of the precise cup of Mexico... could exist that would preclude a panel from ruling on the merits of a case”
    - Sometimes there might be some legal impediments that might preclude a panel to examine the merits of a case: in certain cases, and for instance, the “existence of an exclusion clause”
      * To roads: you cannot go back once you chose a road “fork in the road”
        + If you choose NAFTA you stay in NAFTA, if you choose WTO, you stay in WTO if there is an excluding clause
    - Appellate body: if same parties and same dispute: might be an impediment
      * In the Mexico case, same parties but different disputes$
  + Therefore they opened the door when they say there might be some impediments, some limits to Article 23 of the DSU
    - Sofwood lumber: particular wood in Canada, Canadian government provides subsidies for the production of this wood, which therefore had an impact on US producers
      * Sofwood lumber: they took the agreement that they would not refer to the DSB but to arbitrators at the LCIA: pure violation of the multilateral agreement

Cours 6 – The principles

The fundamental principle of the GATT

The main principles that govern International Trade Law

* The principle of non discrimination: “*raison d’être du système*”:
  + Objective that is in **the Preamble**

“*Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations*,”

* + Important to understand what is non-discrimination and what kind of non-discrimination:
    - Both discrimination against origin and destination of product is prohibited
    - Two types of discrimination are prohibited:
      * First, *discrimination de jure*: discrimination in law, that is to say when the law itself organizes discrimination
        + The discrimination is organized by the law

The best example is the Case called Korea Beef: imported beef could only be sold in specialized store or in very isolated section of the supermarket

But most of the time, states are more vicious and go for the second type

* + - * Secondly, *discrimination de facto*: discrimination in facts.
        + The best example is Japan alcohol case

Imported alcohol will be subject to taxes to 7% taxes, Japanese strong alcohol will be also submitted to 7% VAT, and imported Shoshu will be subject to 4% VAT and Japanese Shoshu will also be subject to 4% VAT

But there is discrimination, but, when when actually looking at the market: the reality is that there is only exported alcohol and Japanese Shoshu.

Need to be a trade operator in the Japanese market to understand that the policy is actually affecting the foreign importers

“charité bien ordonnée”

Exam : three types of question

* theoretical question in one page: for u what are the main aspects of multilaterslism ? is WTO really compulsory ?
* Case study: on procedures
* Multipled choice: “true or false” and justification in two lines : (is WTO anti sustainable development”

Cours 7 – The principles

The Gatt : brn by accident and survived by accident.

In the 70’s: failure of the Tokyo round : weaknesses

Birth of the WTO at the Uruguay round

WTO: multilateralism : in functions and in decision main procedings and the legal structures: single undertaking => everybody bound by the same obligations and have the rights

Dispute settlement: first time it was used to strengthen multilateralism. Multilateralism of surveillance, scope, caracteristics,…the most advanced model of multilateralism in today’s institutional system

The GATT/WTO principles: because those principles were already contained in GATT 1947. Even these principles are a manifestation of multilateralism.

* **The All-Mighty principle of the system is the principle of non-discrimination.**

Cant have a multilateral system when discrimination.

Non-discrimination: must important principle

Preamble as the benchmark to interpret the WTO: non-discriminatory treatment.

The essence of non-discrimination: like products shall be treated equally, irrespective of their origin and destination.

Non discrimination is not only about origin, but also on the basis of the destination : Jurisprudence.

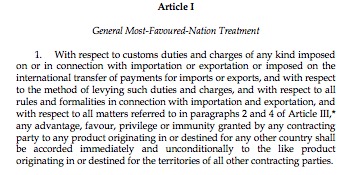
Two types of discrimination targeted in the system :

* + *Discrimination de jure*: when the state clearly enacts regulation on the basis of the destination:
    - Korea Beef Case: imported beed could only be sold only in specific shops or in isolated parts of supermarkets, to be distant from local Korean beef.
    - But too visible, so not really used by states
  + *Discrimination de facto:* origin neutral discrimination
    - Japan alcoholic beverages: Shoshu

Boycott: when states comply with resolution of the UN Security Council: states are not responsible. However, if the boycott is legally organized unilaterally by a state: possible to challenge it.

**The principle of non-discrimination is based on two pillars**:

* **the general MFN**: general most favoured nation treatment
  + Corner stone of the GATT: the GATT starts with the MFN in its article 1.
    - Its purpose is it prohibit discrimination **between** countries



* + If A gives an advantage to B, then the advantage is extended to C and D.
    - If a WTO member gives an advantage to another WTO member, it will me automatically extended to any other WTO members.
    - Unconditional MFN
      * Before, the GATT era, all the treaties comprehended
      * In the investment regim you have conditional : BITs: if investment between US and China, and no MFN clause in the contract, then Chinese investors won’t have the right to claim the advantages given to another country like France.
      * If there is an MFN clause it means that Chinese investors can require the same advantages as third country
        + MFN: if you give an advantage to a country, you need to give it to a third country
      * If there is no MFN clause: no possibility to require the same advantages
      * MFN conditional: can only be referred to if contained in the contract
  + In the GATT: unconditional: MFN is automatic when becoming a member, no need to have an MFN in each
    - Before the GATT 1947, the MFN was always conditional and therefore it allowed states to have discriminatory relations
      * In Investment regime: today you can only apply MFN to states who have agreed to it: conditional
      * Investment regime : bilateral system, whereas WTO is multilateral system
  + The MFN is only unconditional in the GATT system
    - All the previous treaties of the state are superseded by the WTO
  + When you give the advantage to the product of a WTO member, you need to extend it to all like-products in the system. Like products: bananas are not apples. Non discrimination in the system targets like product. (exam: make sure it is like products)
  + If a WTO member, gives “any advantage, any favor, any privilege, any immunity…given by a WTO member to another WTO member will be extended automatically to any products of all other WTO member”
  + A, a WTO member, gives straight advantages to a product coming from a non WTO member: the WTO member will still have the right to claim the same advantage: “any advantage given to any other country”: therefore if a non WTO member benefits from an advantage, WTO members can claim the same advantage
  + But on the contrary, if a non WTO member gives an advantage to a WTO member, then the other WTO members won’t benefit from MFN : MFN is conditional and the other WTO members can only claim this advantage if they have a contract with the said non WTO member providing for MFN
    - What is the test to determine whether there is consistency or not with the MFN clause?
      * **Three steps “ tier”:**
        + **You need to proof there is an advantage, no violation of MFN**

What is an advantage? An advantage: reduction of custom duties, internal taxes such as VAT, subsidies, regulations affecting, law can be an advantage such as laws affecting the distribution, the use of the commercialization of a product…

Pure regulation can affect the sale or the use of product can create an advantage because creates a distinction : ex ecologically produced

* + - * + **You need to proof that the products are like**:

Likeness means that the products are identical or similar.

* + - * + **You need to show that the advantage was granted automatically and without condition**:

You have granted the advantage automatically and without condition

Any delay is a violation of the MFN clause

Automatic and without condition : principle

Ex: Belgium adopted an regulation providing for tax exemptions for states having the same familiar allowances: Belgium was found to be in violation because it had put a condition to the application

* + - **However, there are three main exceptions to the MFN principle**:
      * Regional agreement GATT Article XXIV: Derogations to the MFN: no need to extend the privileges because organized and authorized exceptions
        + The drafter of the GATT: hard to have multilateral liberalization : therefore, important to allow regional liberalization to foster liberalization and then at some point universal liberalization : bottom up approach
        + In GATT XXIV : two types of agreement that are foreseen

Free trade agreement: FTA

First type of agreement accepted and foreseen under this article of the GATT

The best example is the first one: NAFTA US, Mexico and Canada. It is the first free trade area, it was established in 1993: free movement of goods, services, people, capital…no barriers whatsoever: nor tariff barriers, neither nontariff barriers. Outside of the NAFTA area, maintenance of the tariffs f each country. Vis à vis the rest of the world, each member of the Free trade area keeps its barriers

Custom unions: *union douanière*

Second type of regional agreement: the most achieved model of custom union being the EU. Mercosur wants to be as well as ASEAN…

A custom union is: inside of the union : free movement of capital, goods, people, services… same as in the FTA, but the main difference between the Custom Union and the FTA is that all the members of the custom union have an ECT: external common tariffs

Therefore, if an extern country cants to export a good to the territory of any member: the same tariff will be applied.

* + - * The second exception: is the **enabling clause**
        + DIFFERENTIAL AND MORE FAVOURABLE TREATMENT RECIPROCITY AND FULLER PARTICIPATION OF DEVELOPING COUNTRIES, Decision of 28 November 1979
        + Developing countries should not be forced to the same measures as developed countries.

Developing countries claimed for special and differentiated treatment :

Codification: the **GATT Acquis**

Decision of November 1979: decision incorporated in the new GATT: contained in the new GATT

GATT 1947 also an example of codification

Development is an objective of the WTO: (questions in the exam)

The enabling clause : a develop WTO member can give trade preferences => developing into a member

Trade preferences mean either tariff preferential treatment (traitement tarifaire préférentiel: reduction droits de douanes) but it is also non tariff preferential treatment

Ex: Russian and regulations for Pesticides not applicied to developing countries: non tariff preferential treatment

If the US gives an advantage to a developing countries: the developed countries does not need to give the advantage to another developed WTO countries:

The enabling clause is based on the GSP: Generalized system of preferences: French gov adopts a law and does not apply tariffs on some products from some poor countires : states gives trade preferences to countries

Until 2011 the enabling clause: enabling a derogation to MFN for developing states but not MFN to developed states: the derogation was accepted between developed countries, but must extend it to all developing countries

In the US gave trade preferences to developing countries: must extend it to all developing countries

Cf Footnote 3 : As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD18S/24).

Not discriminatory for the non developing countries

The EU came with a “GSP+”: some developing countries deserve more than others: privileges to some developing countries only based on some

18 countries would benefit from certain privileges

India challenged the legality of the privilege: you cannot make a difference between developing

European Communities General system of preferences GSP: jurisprudence

Panel was constituted; panel found violation, the Appeal body overturned what the panel said: possible to differentiate developing countries based on some criteria

Possible for the EU to do so, but the EU did not do it rightly: possible to discriminate if you define in advance the criteria applied:

For instance: if GDP is above a certain amount (China, India, Brasil out), countries who have regulations against drugs… you set forth a list a criteria, and all the countries that fall within the basket will benefit of the privileges

Possible to discriminate as long as you set forth a list of criteria, and, all the developing countries that fall within the criteria, will benefit from

The reason: rich country don’t want to give preferences to all the developing states

Question : why didn’t they adopt a new definition of developing states?

Political choice

The criteria can be changed the way the state want

States don’t want to give preferential treatment

The WTO does not have its own list of criteria: they use the UN list of criteria: the list of criteria does not use trade > but they cannot have their

The enabling clause enable developing country to give advantages to another developing country without having to extend it to the rich one of the system

* + - * The last exception: in 1999 a Waiver was adopted (waiver: when the General council adopt a derogation in the system)
        + A developing country member can give preferential trade treatment (tariff or non tariff) to “least developed countries”
        + The 1999 waiver allows countries like China to give preferential treatment to least developed countries: General System of Preference

Derogation to MFN as these developing countries can decide not to extend the preferential treatment to developed countries as well as the other developing countries

BRICS: not developing countries when it comes to trade

Onctad: (?) broader mandate than WTO so don’t

**This system of definition create lot of inequality in the system**

**(cours suivant)**

* **The second pillar is national treatment: Article 3: most complicated but the most important article as well**
  + 70% of the dispute is based on national treatment
  + **The objective of national treatment is prohibition of discrimination against country**
    - Difference of the discrimination between and against: MFN privileged treatment differentiating between two states: prohibition of external discrimination, whereas prohibition of discrimination against is a discrimination against a state: internal discrimination
  + Internal discrimination: not being treated as local product: issue of national treatment : It is very technical
  + National treatment: Article 3 of the GATT: §1 the objective of the national treatment rule: to prevent protectionism : “states need to take measures to make sure that they don’t adopt behavior or measure so as to afford protection to domestic production”
  + Raison d’être du national treatment
  + You can never win a case if you don’t prove protectionism
    - Samsung: China, Blackberry: US
    - China adopts a taxation policy in China in order to treat more favorably the producers of Samsung: you need to prove that China is affording pro
    - When there is a distortion of opportunities, of equal opportunities of competition in a given market: for instance you need to proof that after the taxation law in China, the market shares are impacted
    - **Differential treatment does not necessary mean violation of national treatment: need to prove the protectionism: des opportunités égales de competitions sur un marché**
    - You will need to proof that the new difference is going to distort the opportunities on the market
    - And therefore if after two years, the shares of the markets have not changed
    - Don’t see differentiated treatment and conclude violation of national treatment
  + **How do you win or loose a national treatment case? How do you prove consistency or inconsistency?** 
    - There are two tests of national treatment under article 3 => You have two avenues
    - Example: Australia wants to adopt a policy that would be more favorable to Australian wine : **the government can use two things to do so** : (exam)
      * **Internal taxation III§2**:
        + let’s apply different taxation policy to Australia wine and imported wine for instance sales tax or VAT or income tax
        + Then the test of national treatment is **article III §2**: you will have to refer to article III§2 and apply
      * **Internal regulation (no taxation) III§4**
        + Affecting the sale, the distribution and the use of the product : for instance say that the Australian wine is ecologically produced, therefore, the wines produced without the ecological production, then these wines will need to get labels at the border : you will have to refer to **article III§4**
    - If Australia has decided to adopt an internal taxation

Article III

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.\*

* + - **If you want to prove Australia is acting inconsistently with article III§2 you need to stop on the two sentences of article III:**
      * **First that there is inconsistency with Article III§2 first sentence: two things to prove > very squeezed and minimal approach to likeness : therefore physically similar**
        + **First need to prove that the products are like products**: that French wine, Italian wine, Chilean wine and Argentinian wine are **like products** to Australian wine : imported wine is like Australian wine

You need to prove likeness: how do you do?

Japan Alcoholic beverages, Report of the Appellate Body: comparison “accordéon de la similarité se rapproche et s’étire”

The accordion of likeness stretches and squeezes in different places as different provisions of the WTO agreement are applied”

Therefore likeness is everywhere, but sometimes the system stretches to encompass several things and sometimes it squeezes to avoid one thing

The **criteria of likeness were formulated in 1970** in the report of the working party on order tax adjustment : rapport du groupe de travail sur les ajustements fiscaux aux frontiers > criteria determining the acces 4 criteria

**First criterion: the product properties, qualities and nature**

**Second: the end users = les utilisateurs finaux**

**Third: Consumers’ taste and habits = les gouts et habitudes des consommateurs**

**Fourth: the tariff classification of product: classement tarrifaire (the World Customs Organisation: classification of product based on the harmonized system)**

**The article is squeezing: need to look at physical criterias**

Need to prove they are physically similar: if you can’t prove physical similarities, you will probably under Article III§2 first sentence

* + - * + **[Second sentence: Tax applied in excess]**
      * **Second: if you cannot prove they are like product under article III§2, you go to article III§2 sentence: If you cannot prove under III§2 first sentence that the products are like products, you can use III§2 second sentence: you can try to prove they are directly competitive and substitutable : the two products are interchangeable and allow to satisfy the same needs, and therefore we can consider them as like products:**
        + Criterion 2 and criterion 3

First when consumers want to drink wine, they want to drink wine: directly competitive

Japanese alcoholic beverages: you realize that when a citizen go to a supermarket, if cannot find Soshu would have bought another alcohol

* + - * + Competitive relationship: even if not similar, the fact that same end users and same consumers’ tastes : likeness
* **Need to prove first physical similarities, and if cannot prove it, then you prove products are directly competitive and substitutable**

Seventy percent of the disputes in the system regards national treatment: what is important is to keep in mind article III§1: no measure so as to afford protection to domestic provision : prevent protectionism

Need to first identify the trade measure at stake: if it is an internal taxation measure, then apply the test under article III§2, and if no taxation, apply III§4

If the measure is internal taxation measure: two phases:

* Whether it is affecting like products under Article III§2 first sentence,
* And what is like products: accordion of likeness: “stretches and squeezes”: and when its art III§2 the accordion squeezes: like products on the basis of their physical similarities
  + the main criteria is the criteria of the physical similarities on III§2 1srt sentence
* It does not mean the test is over if you cant prove they are similarities, under Art III§2 second sentence, they are directly competitive or substitutable products : the products are interchangeable or allow to satisfy the same needs
* Then, when it comes to the second sentence, the accordion stretches : need to check end users and customers habits

If the measure is an internal regulation measure: it does not imply any taxation: then the test is under article III§4:

* first need to prove there is a regulation affecting the sales, distribution or use of products
  + Need to prove the regulation implies a requirement: obligations to do something impacting the sales, distribution or use of products (if it is soft law or a declaration of general policy it is not a regulation)
* Then you have to prove the products are like products :
  + Article III§2 first sentence: like products, however Article III§2 second sentence extension of like products,
  + Need to have a vision of likeness that has to be broader than III§2 but which will not go beyond the scope
  + Article III§4: just one sentence, but it would be just one sentence, it would be dangerous to let the state think they can protect products that are not physical similar:
  + Likeness under III§4 it goes beyond physical similarities, but it cannot beyond the gathered scope of III§2 first and second sentence: it encompasses both but not beyond

In Article III§2: first sentence saying “like products”, but it has to be interpreted strictly because it cannot mean the same thing as in the second sentence, the vision of likeness has to be squeezed in the first sentence, therefore extension with the second sentence to products interchangeable

However in III§4: only one sentence, but as we want to prohibit protectionism: if only the interpretation of Art III§2 first sentence, cannot be interpreted such as squeezing the accordion: the objective being preventing protectionism: need to have a stretch approach to likeness under III§4 will go beyond physical III§2 first sentence, but less than III§2 second sentence: a synthesis of the two criteria contained

* what are the criteria that are going to prevail ?
  + under three four what is going to prevail is (i) the physical caracteristics but since it has to stretch and take into account the competitive relationship the second prevailing criteria will be (ii) constumers and habits
    - Ex of the Asbestos case: PCG fibres in France
    - And Canada was saying that France was treating less favorably French cement (as French and Canadian cement were containing derivative fibers) : Art III:
      * Art III : the appellate body said that like products were going beyond III§2 first sentence, but it could not go beyond the III§2 second sentence: synthesis
        + Need to look at the nature and the extent
        + Physical properties and customers’ taste and habits

They said both were derivative but the French one killed whereas the other did not kill

Therefore the appellate body said they were not like products

In the middle of the analysis: dissenting opinion saying that when a product is not dangerous and the other is, the analysis should not go further: but the WTO want to pursue the economic analysis

* + - Mot of the time the products are not that similar: but when you go to customers’ tastes and habits are like products
      * Balance test
      * Ex: Biotechnology case: the EU applies different regulations to the genetically modified organism and natural food was the same: very hard
        + Countries are totally against and other that are more balance in the EU market : the WTO could not decide the GMO

What the states want is to protect their domestic industry

* + - * Ex: US Clove cigarettes vs the menthol cigarettes
        + Also then tried to to defend the foreign cigarettes were dangerous for health
    - Trade law: trade criteria : if you go to the shop and cannot buy the less dangerous cigarettes, most of people will still get cigarettes
      * However, when discussing some markets, the WTO takes into account the very market and the customers
      * The nature and extent of a competitive market : both cigarettes and its regarding the extent of the competitive market that it becomes complicated (III§4)

Two other principles are important in the system:

Is the prohibition of the protection of domestic production absolute?

Can we consider that the protection of domestic production is always absolute?

Every state has the right to determine its level of custom duties: you apply high tariffs. Therefore you are sure t

The GATT does not oblige WTO members and if you want to prevent competition in a transparent and unchallengeable manner: you apply high tariffs.

**Third principle: Consolidation of duties Article II of the GATT**

And when you diminish the tariffs you cannot increase them again.

The system want the tariffs to disappear eventually, therefore if a state decrease its tariffs not possible to increase them.

Rumor of the system: not possible, however it is

Also as a government you want to make sure that another country will accept your goods

Bargaining power

There are two types of duties:

* Ad valorem duty is a duty based on the value, a percentage of the value of the product
* Specific duties: not based on the value but on the quantity, it is very rare.

**The last principle: Article XI of the GATT “prohibition of quantitative restrictions”**

A WTO member does not have the right to impose quantitative restrictions

* If Chile exports only 1 ton of rice to Japan: quantitative restriction
* But also possible “import ban” : total prohibition of import
  + If the prohibition just targets one state: violation of MFN and of the prohibition of quantitative restrictions
* If you are restricting export from your territory : restrictions
* Export licenses are also prohibited

Cours 10

When you are in the system, the only thing you can do is free trade.

This is where possible to disagree with a lot of negotiator and specialist.

There is no explicit objective of free trade: Preamble you find the main objective of free trade. Legally speaking is totally speaking to say the WTO is about free trade. The main objective WTO has to seek is sustainable development.

Sustainable development: balance between environmental, social and economic development.

WTO has the right to achieve non-trade value: sustainable development is not limited to trade; there is the social development and the environmental protection. They do have the right to achieve non-trade values to fulfill or pursue non trade objective. The social protection is guarantying the right to education.

With the view of raison the standards living: it is an objective value of the WTO.

Idée recue: si vous entrez dans le système pas possible de poursuivre d’autres objectifs.

Free trade is not the only objective of the WTO.

The Preamble adds texture and color.

The agreement on the application on sanitary and phytosanitary measures

*ASP*: protecting human, animal and vegetable health and life. Show that WTO member can have a non-trade approach.

Everything is done for trade liberalization but at the same time very strong values are protected

The Agreement on technical barriers to trade

*TBT agreement*: protect legitimate objective such as environmental and health protection

To determine the level of health they want to reach: at the level they deem appropriate. Totally wrong to say the WTO prevents protection

Example of France and TBT prohibiting the Canadian cement: sovereign right to determine the level of health on their territory

Same: Article 8 in the TRIPS: Intellectual Property right, preservation of public health

Non-trade legitimate objective are almost everywhere in the system.

Legitimate objective are in the preamble or entire agreement dealing with an objective, however in the GATT and GATS are contained in general exception.

GATT Art XX, which equivalent is contained in GATS art XIV

In 1947 the drafters of the GATT thought that the states could restrict the application of the treaty for environnemental protection: general exceptions

They allow WTO members to violate MFN, to violate National Treatment, art II, art 11, because the member state is pursuing a non-trade provision.

* Art XI: quantity restriction – no sanction because the government is pursuing an objective contain in the general exception
* Article XX : a chapeau and lists
  + Public morals
    - CD
  + Necessary to protect human, animal or plant life or health;
    - Canadian cement
    - Public health exception the most invoked
  + Relating to the products of prison labour
    - Evolutionary interpretation? the intent was to ban any kind of force labor : a WTO member can restrict trade and evoke article XXe) : child labor ?
    - The intent was to prevent force labor, but perhaps in the context the drafters were not only targeting prisoners but also any kind of force labor
      * So far no measure taken by these takes

To protect human rights? More effective to use a and e.

One of the most complicated question: whether WTO Law authorizes a member to discriminate on process and production methods? It is possible to target the PPM

* + Provision g: “*relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption*”
    - Air for instance
    - Elastic/flexible

Non trade values are therefore integrated in the system: however the complicated question is when you have to invoke these exception.

How do you invoke an Article XX exception or justification ?

You have two tests:

* the text of the sub-paragraph(s)
* the test of the chapeau

1) The first step is to prove that you measure is justified under one or several sub paragraphs of art XX: it is the test of necessity : you need to show that your measure is necessary to pursue one of the non trade value

The test of necessity is based on three elements and then balancing process:

* Firstly: importance of the value you want to protect
  + I am pursuing such an important measure that it has to be necessary
  + In WTO law it was recognized that health is value
    - The more important is the value the more easy it will be for you to prove the importance of the value and the necessity to protect it
  + Flexible criteria
* Second criteria: the rational link between the objective criteria and the measure you are pursuing : you need to prove the rational link between your measure and the objective
* Third: you need to prove that there are no alternative reasonable measure to achieve this objective: less trade restrictive than the measure you took
* Processus de sous-pesage: a balancing process: you put all the elements in balance and determine whether the measure is necessary or not replaceable by less restrictive measure
* Once you have proven your measure is necessary, the problems really beginnings

Brazil-tyres: Brazil took measures to ban tyres : Co2 and Dengue Feaver

When the Brazilian government took a measure to prevent the importation of tyres. Uruguay filed a Mercosur case: Mercosur: not possible to apply the measure on Mercosur Country

Brazil complied

And then EU filed a WTO case on tyres

Brazil won on the necessity test, however then second test : Chapeau:

2) The second step is the good faith test – le test du mension contenu dans le chapeau

“*Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures*”

Need to prove it is not an arbitrary decision, unjustifiable, disguised restriction :

* it is this way the US lost shrimp turtles
* there is no flexibility to what you are doing, that is how the US lost
  + it was recognized the measure was necessary

In the Brazil case: ban for everybody, the appellate body said they couldn’t give exemption to Mercosur country: Brazil said they were applying a judgment.

The appellate body asked for the pleadings and said they did not raise any health reasons and therefore Brazil lost for disguised: very dangerous for the appellate body: intrusion

Intellectual Property and Health: one of the major hurdle in health you speak about pharmaceutical patents

* Amendment of the TRIPS: compulsory licensing: possibilité de donner des licenses obligatoires
* Possible to grant the compulsory licensing to poor countries: but a lot of deveopping countries have not voted for the amendment…