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In practice, the Appellate Body concluded – after analysing design, architecture and structure of a domestic taxation system in order to determine the effects of its application to domestic and imported products – that "the very magnitude of the dissimilar taxation … may be evidence of such protective application"[154]. Hence, (even objectified) legislative purpose does not matter at all. With regard to (objective) trade effects, there are cases where they do not play a major role, and NT appears to be violated merely because of the high tax difference between most domestic and most imported products.[155] The fact that the high tax predominantly hit domestic products and that the absolute volume of imports (which were hit by the allegedly protective tax burden) was small, did not outweigh the other factors, all the more since a finding that a measure did not offer protection to domestic products could result from the measure's past protection of domestic production.[156] For determining an inconsistency with the NT requirement of Article III:2 second sentence it suffices that only some imported products are taxed considerably higher than domestic directly competitive or substitutable ones, while other imported ones are taxed similarly.[157] **118**

In other cases, however, where the tax difference was still substantial, but not as high, trade effects and maybe even legislative intents finally could become relevant. The larger the tax differential, the higher is the likelihood of finding protectionism[158], and in the cases in which there was a considerable difference in tax burden between imports and domestic goods, this difference might have been used as a "proxy for intent".[159] In the *Mexico Sweetener* case the panel determined a violation of Article III:2, second sentence on two grounds: First, the considerably higher tax burden on certain sweeteners mostly affected imported sweeteners as opposed to domestic products.[160] Second, "[t]he magnitude of the tax differential between imported and domestic products, resulting from the application of the soft drink tax and the distribution tax, is additional evidence of the protective effect of the measure on Mexican domestic production of sugar".[161] Here, effect plays a limited role, in particular in cases of *de facto* discrimination[162] where **119**

[154] Appellate Body, WT/DS8, 10, 11/AB/R, para 67 – *Japan – Taxes on Alcoholic Beverages*; WT/DS75, 84/AB/R, para 149–150 – *Korea – Taxes on Alcoholic Beverages*. See also Appellate Body, WT/DS87, 110/AB/R, para 66 – *Chile – Taxes on Alcoholic Beverages*; Appellate Body, WT/DS31/AB/R, para 97 – *Canada – Certain Measures Concerning Periodicals*.

[155] Appellate Body, WT/DS87, 110/AB/R, para 66 – *Chile – Taxes on Alcoholic Beverages*: "In practice, therefore, the New Chilean System will operate largely as if there were only two tax brackets: the first applying a rate of 27 per cent *ad valorem* which ends at the point at which most domestic beverages, by volume, are found, and the second applying a rate of 47 per cent *ad valorem* which begins at the point at which most imports, by volume, are found." See also the appraisal of the Chile – Taxes on Alcoholic Beverages case by Mavroidis, *Trade in Goods* (1st Edition, 2007), 226, 233 who blamed the Appellate Body to have reduced the required protectionism test, necessary in cases of de facto discrimination, to a "mere comparison between two tax regimes, irrespective of considerations such as how is the tax burden apportioned across foreign and domestic players".

[156] Appellate Body, WT/DS87, 110/AB/R, para 67 et seq – *Chile – Taxes on Alcoholic Beverages*.

[157] See Appellate Body, WT/DS31/AB/R, para 94 – *Canada – Certain Measures Concerning Periodicals*; van den Bossche and Zdouc, *The Law and Policy of the WTO* (4th Edition, 2017), 374.

[158] Mavroidis, *Trade in Goods* (2nd Edition, 2012), 270 et seq. See also Grossmann, Horn and Mavroidis, 'Legal and Economic Principles of World Trade Law: National treatment'(2012) *IFN Working Paper* No 917, 85: "if a tax differential is more than *de minimis* but less than *substantial*, then an inconsistency with Article III.2 GATT can be established only through recourse to other factors as well".

[159] See Mavroidis, *Trade in Goods* (2nd Edition, 2012), 273, 306: trade effects are an imperfect proxy for intent.

[160] See Panel, WT/DS308/R, para 8.86 – *Mexico – Tax Measures on Soft Drinks and other Beverages*.

[161] Panel, WT/DS308/R, para 8.87 – *Mexico – Tax Measures on Soft Drinks and other Beverages*.

[162] See also panel, WT/DS155/R, para 11.20 – *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*: in case of de facto restrictions, "it is inevitable, as an evidentiary matter, that greater weight attaches to the actual trade impact of a measure".

the less beneficial tax burden, on its face, is not related to the origin of a product, but to its properties (which, however, depend on the country of manufacture). The analysis of trade effects, however, is still not related to actual trade flows, but to the measures' impact on competitive conditions. Hence, not only (actual) trade effects, but potential effects matter, as is the case under Article I:1 and Article III:2, first sentence GATT. The reference to "so as to afford protection" of Article III:1 in Article III:2, second sentence does not require a necessity test (in the sense of an examination of whether the measure is necessary to achieve the objectives)[163] but could be read to incorporate a discriminatory effect test[164] which however must not lose sight of potential trade flows as WTO non-discrimination provisions are applicable irrespective of whether imports are substantial, small or even non-existent.[165]

120 **b) Different Standards of National Treatment and their Responsiveness to Regulatory Intentions.** The looser standard of Article III:2, second sentence GATT (looser, because not every tax differential violates NT) appears well founded in substance because the tax burden is not related to like goods, but to similar (directly competitive and substitutable) goods. Their differences allow for a (nevertheless, limited) difference in fiscal treatment. Both approaches contained in Article III:2, first sentence and in Article III:2, second sentence reflect the principle of equality. Like goods have to be treated strictly equally (see Article III:2, sentence 1), whereas unlike goods may (or even: must) be treated differently (as is acceptable under Article III:2, sentence 2 within its confines "not to afford protection to domestic production").

121 **aa) First Sentence: Formal Non-Discrimination.** In terms of domestic regulatory autonomy, the strict, formal non-discrimination standard in Article III:1 first sentence severely curtails the regulatory choices. Different taxation truly motivated for legitimate reasons is not possible at all (except if one interprets likeness in Article III:2 first sentence in a way that makes room for regulatory distinctions which are held decisive so that similar products are deemed to be unlike, see *infra* on the "aims and effects test") so that – as already mentioned – a strict, formal notion of non-discrimination is applied here which does not allow distinctive treatment for revenue purposes, like the introduction of high tax rates for luxury goods. Provided that luxury goods are like non-luxury goods, a progressive taxation breaches the "not in excess of" requirement.

122 The *Philippines – Distilled Spirits* case exemplifies this since different tax rates for distilled spirits made from certain raw materials and for like distilled spirits made from other raw materials did in the panel's view breach Article III:2, first sentence. Interestingly, however, the panel's judgement based its conclusion not only on the tax rate differences, but added that even though the taxation was origin-neutral as the different taxation was based on the origin neutral criterion whether the spirits were manufactured from designated raw materials or not (so that the lower tax rate could in principle also apply to imported spirits), *de facto* all domestically produced spirits enjoyed the lower tax rate whereas the vast majority of imported spirits were subject to the higher tax rates.[166]

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[163] Appellate Body, WT/DS87, 110/AB/R, para 72 – *Chile – Taxes on Alcoholic Beverages*.

[164] See Davey and Pauwelyn, MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of "Like Product", in Cottier and Mavroidis (eds), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2000), 13 at 39.

[165] See insofar again Roessler, 'Diverging Domestic Policies and Multilateral Trade Integration' in Bhagwati and Hudec (eds), *Fair Trade and Harmonization*, Vol. 2 (1996), 21at 27.

[166] Panel, WT/DS396/R, WT/DS403/R, para 7.89 – *Philippines – Taxes on Distilled Spirits*; the finding of a violation of Article III:1, first sentence GATT was upheld by the Appellate Body, WT/DS396/AB/R, WT/DS403/AB/R, para 174.

This is astonishing for several reasons: First, one could deliberate whether a pure tax rate comparison is not sufficient for determining a violation of Article III:2. In other words: a diagonal test which evidences that at least one imported good is taxed heavier than a like domestic good might not suffice; instead, an asymmetric impact test has to be applied which has to show that most imported goods fall in the higher tax whereas all or at least most of the domestic like goods are taxed lower. Second, might this additional reasoning for the finding of a violation of Article III:2 GATT indicate that if the factual situation was different, the result of the legal assessment would have changed? The facts of the case clearly are a basis for the suspicion that the raw materials chosen by the domestic measure for the application of the lower tax rate specifically were designated in order to favour the domestic production, all the more since even high priced domestic spirits were subject to the low tax rate and some less expensive imported spirits were nevertheless subject to the higher tax[167] which actually contradicts the alleged aim of introducing a luxury tax.[168] Hence one could speculate that the true reason for finding a violation of Article III:2, first sentence GATT was the lack of conviction of the panel that the measure really was motivated by an attempt to introduce a higher, kind of luxury tax rate for expensive distilled spirits (which "accidentally" happened to be the imported ones). If that speculation was true, then it could happen that another measure of progressive taxation of like products with a different taxation structure could be found not to violate Article III:2 despite its detrimental effect on imported goods.[169] This, however, would engender a move from a strictly formal non-discrimination clause to a more material notion of non-discrimination because then inherent justifications for distinctive tax treatment of like products, like taxing more wealthy consumers higher than less wealthy ones, would be considered. But since the panel did not do so in its report, the strict formal notion of non-discrimination still is the basis of the WTO judiciary's application of Article III:2, first sentence GATT.

bb) Second Sentence: Towards Material Non-Discrimination. As already alluded to, the second sentence of Article III:2 GATT gives slightly more room for domestic policies, in particular as long as the tax differential is not dissimilar. The role non-protectionist purposes play in the WTO judiciary's determination whether a considerable tax differential may not afford protection (and thus, there is no violation of Article III:2, second sentence GATT), is not completely clear. Looking at the cases decided hitherto by the WTO judiciary, such defence appears not to be helpful, even though one could understand some statements by the Appellate Body in the direction that in principle such defence is possible; if so, the domestic regulatory autonomy would be expanded tremendously, but maybe only within the scope of application of Article III:2 second sentence, i.e. with regard to directly competitive or substitutable products. The non-discrimination requirement of Article III:2 second sentence then would adopt a *material concept of discrimination* because it would allow for justifications of considerable tax differentials with objective reasons unrelated to the origin [third alternative approach, introduced *supra* I. 2. c)]. **123**

Hence, making taxation of directly competitive liquors dependant on alcohol strength, with the effect of considerably higher tax burdens for high alcohol containing imported liquors (compared to lower alcohol domestic liquors) could eventually be justified, for example, for reasons of public health. Another example is the introduction **124**

[167] See Panel, WT/DS396/R, WT/DS403/R, para 7.51 – *Philippines – Taxes on Distilled Spirits*.

[168] See the Philippine's argument in panel, WT/DS396/R, WT/DS403/R, paras 3.4, 7.193 – *Philippines – Taxes on Distilled Spirits* which the panel failed to address.

[169] See the worldtradelaw.net Dispute Settlement Commentary on the *Philippines – Distilled Spirits* panel report (WT/DS396R, WT/DS403/R), 13.

of progressive taxation so that more wealthy consumers pay higher taxes due to higher tax rates than less wealthy consumers do for like goods, for example by establishing higher tax rates for products beyond a certain retail price. The already mentioned *Philippines – Distilled Spirits* case could have been an example of acceptable tax differentials insofar. The panel report, however, draws the same conclusion with regard to Article III:2, second sentence, finding a violation of the WTO non-discrimination discipline by protective taxation; it did so with the same arguments which it had used when finding a violation of Article III:1, first sentence, again without considering the motivation of the Philippine government behind the different taxation insofar: The panel merely referred to the fact that all raw material leading to the low tax are domestically grown and all domestic spirits are produced from them whereas the vast majority of the imported products are made from other raw materials hence they are taxed higher.[170]

125 **cc) The Impact of Likeness.** The scope of application of the severe constraint by Article III:2, first sentence again depends, however, on the definition of *likeness*, as already explained. As a general guideline, likeness is not interpreted too narrowly; it is not constrained to meaning identical or more or less same goods[171] because likeness has to be interpreted in light of the overall aim of Article III:1 GATT to protect the equality of competitive conditions. Therefore, likeness refers to goods in a competitive relationship and not only to identical or the same goods.[172] This was also confirmed with regard to Article III:2, first sentence as the spirits were held like even though they were made from different raw materials; all that counted for assessing likeness was the competitive relationship between the imported and domestic spirits.[173] A narrow interpretation of likeness would indeed limit the scope of application of the NT requirements, which would have the effect of expanding domestic regulatory autonomy. Since likeness in Article III:2, first sentence has to be construed in a way that leaves room for the concept of directly competitive and substitutable products decisive for Article III:2, second sentence,[174] the concept of likeness in Article III:2, first sentence is narrower than in other GATT rules, e.g. Article III:4 GATT[175] or Article XVII GATS.[176] Hence, due to the

[170] See panel, WT/DS396/R, WT/DS403/R, para 7.182 et seq – *Philippines – Taxes on Distilled Spirits*; the finding was upheld by the Appellate Body, WT/DS396/AB/R, WT/DS403/AB/R, paras 245, 255–259.

[171] See GATT panel, BSID 34S/83, adopted 10 November 1987, para 5.5 b) – *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*. Contra Flett, 'WTO Space for National Regulation: Requiem for a diagonal vector test' (2013) *JIEL*, 37 at 47, 82.

[172] See also Appellate Body, WT/DS135/AB/R, paras 98 et seq. – *EC- Asbestos*.

[173] Appellate Body, WT/DS396/AB/R, WT/DS403/AB/R, paras 119 et seq. – *Philippines – Taxes on Distilled Spirits*.

[174] See panel, WT/DS8, 10, 11/R, para 6.20 – *Japan – Taxes on Alcoholic Beverages*.

[175] See Appellate Body, WT/DS8, 10, 11/AB/R, paras 43, 54 – *Japan – Taxes on Alcoholic Beverages*: "We believe that, in Article III:2, first sentence of the GATT 1994, the accordion of 'likeness' is meant to be narrowly squeezed."; WT/DS31/AB/R, para 65 – *Canada – Certain Measures Concerning Periodicals*; panel, WT/DS308/R, para 8.29 – *Mexiko – Taxes on Soft Drinks and other Beverages*. See also Appellate Body, WT/DS135/AB/R, para 98–99 – *EC – Asbestos*, where the Appellate Body did not decide whether likeness under Article III:4 is coextensive with likeness and "directly competitive or substitutable" under Article III:2, second sentence (although the better arguments speak in favour of co-extensiveness, see Choi, 'Like Products' (2003) *International Trade Law*, 111–112; the panel, WT/DS308/R, para 8.104-106 – *Mexico – Taxes on Soft Drinks*, found that the criteria are the same). It is clear, however, that direct competitiveness/substitutability in Article III:2 second sentence is a broader, looser concept than likeness in the first sentence, as perfect substitutability between products would fall within the first sentence, see Appellate Body, WT/DS31/AB/R, para 90 – *Canada – Certain Measures Concerning Periodicals*.

[176] Likeness in Article XVII GATS has to encompass also services which are directly competitive or substitutable so that likeness corresponds to the concept used in Article III:4 GATT, see Mavroidis, 'Like Products: Some Thoughts at the Positive and Normative Level' in Cottier and Mavroidis (eds), *Regulatory*

narrower notion, the WTO members gain regulatory leeway whereas the coverage of Article III:2, second sentence with its looser standard is broader.

c) Strengthening the Domestic Regulatory Prerogative: The Aims and Effects Test as Material Non-Discrimination Concept. Another way to increase domestic regulatory autonomy by expanding either the notion of likeness in Article III:2, first sentence, or of the "so as to afford protection" requirement of the test applied in Article III:2, second sentence would be the so-called "*aims and effects*" test which a GATT panel once introduced[177], and which was elaborated upon by subsequent GATT panels.[178] **126**

In the determination of whether goods are like, regulatory intents and effects should be considered, due to the purpose of Article III, as emphasized in the general clause of Article III:1 GATT, according to which internal taxes and regulations should not be applied to imported products so as to afford protection to domestic products. "The purpose of Article III is thus not to prevent contracting parties from using their fiscal and regulatory powers for purposes other than to afford protection to domestic production. Specifically, the purpose of Article III is not to prevent contracting parties from differentiating between different product categories for policy purposes unrelated to the protection of domestic production [which means that the states should still enjoy regulatory autonomy to pursue legitimate policy objectives, W.W.] The Panel considered that the limited purpose of Article III has to be taken into account in interpreting the term 'like products' in this Article. Consequently, in determining whether two products subject to different treatment are like products, it is necessary to consider whether such product differentiation is being made 'so as to afford protection to domestic production'"[179], which would require determination whether the aim and effect of the tax differential was to afford protection. If there was not a protective intent, nor a protective effect, but other reasons for the differentiation, the products to which the higher tax burden applies are not to be deemed "like products". **127**

Hence, due to this approach to likeness, differentiated taxation was not assessed as a violation of Article III:2 GATT as Article III only prohibited "discriminatory or **128**

Barriers and the Principle of Non-Discrimination in World Trade Law (2000), 125 at 126-7. Although likeness is interpreted contextually, so that the meaning of the term can vary among WTO provisions, GATT and WTO dispute settlement practice often applied similar tests for the determination of likeness, Krajewski, *National Regulation and Trade Liberalization in Services* (2003), 122. If likeness in rules ensuring tax neutrality like Article III:2 GATT is interpreted differently from rules on regulatory disciplines or tariff bindings, the differences could be used to devaluate the equality promise of the other rule.

[177] GATT panel, BISD 34S/83, adopted 10 November 1987, para 5.9 c) – *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*: "The Panel was further of the view that there could be objective reasons proper to the tax in question which could justify or necessitate differences in the system of taxation for imported and for domestic products. The Panel found that it could be also compatible with Article III:2 to allow two different methods of calculation of price for tax purposes. Since Article III:2 prohibited only discriminatory or protective tax burdens on imported products, what mattered was, in the view of the Panel, whether the application of the different taxation methods actually had a discriminatory or protective effect against imported products. The Panel could therefore not agree with the European Community's view that the mere fact that the so-called "fixed subtraction system" was available only for domestic liquors constituted in itself a discrimination contrary to Article III:2 or 4."

[178] See e.g. GATT panel, BISD 39S/206 (DS23/R), adopted 19 June 1992, para 5.25, 5.71 et seq – *US – Measures Affecting Alcoholic and Malt Beverages*; GATT panel, DS31/R, unadopted, para 5.10 et seq – *US – Taxes on Automobiles*.

[179] GATT panel, BISD 39S/206 (DS23/R), adopted 19 June 1992, para 5.25 – *US – Measures Affecting Alcoholic and Malt Beverages*.

protective taxation … but not the use of differentiated taxation methods as such".[180] In effect, such interpretive approach would expand the domestic policy space by allowing domestic measures based on non-protectionist intentions, thus limiting the WTO's detrimental effect on domestic regulatory autonomy. The reason behind this – at first glance – rather arbitrary interpretation lies in the concern of the panel that, because "likeness [refers to] factors such as the product's end-uses in a given market, consumers' tastes and habits, which change from country to country; the product's properties, nature and quality. The Panel noted that regulatory distinctions based on such factors were often, but not always, the means of implementing government policies other than the protection of domestic industry. Non-protectionist government policies might, however, require regulatory distinctions that were not based on the product's end use, its physical characteristics, or the other factors mentioned. Noting that a primary purpose of the General Agreement was to lower barriers to trade between markets, and not to harmonize the regulatory treatment of products within them, the Panel considered that Article III could not be interpreted as prohibiting government policy options, based on products that were not taken so as to afford protection to domestic production."[181] (This consideration of the GATT panel, even though unadopted, confirms our above finding (*supra* I. 3.) that distinctive product features may either be used for holding products unlike, or for assessing the treatment accorded to imported goods not to be discriminatory, even though, from a formal standpoint, the treatment differs at least in its effect.) The panel was concerned that the definition of likeness was market place oriented (which is a logical consequence of a market place approach in defining the aim and purpose of non-discrimination: ensuring equality of competitive conditions on the market) which considered objective circumstances like the consumers choices to be decisive so that there was no room to consider a legislator's perspective and its intentions which looked at goods from a point of view of legitimate policy objectives. For, from the perspective of policy objectives, two goods deemed like on the market could be assessed as unlike for regulatory purposes (for safety reasons, or because they were produced in different ways, one of which was considerably more environmentally friendly).

129 The need for government intervention in the market arises in particular in situations in which consumers do not distinguish between products, whereas, in the view of the government they should. Distinctions based on legitimate policies will be made by a domestic regulator precisely because the market treats these products as like.[182] Assessing interventions in the market based on such distinctions as a violation of Article III GATT because (allegedly) "like" products were ruled to be treated distinctly (and thus, discriminatory) would not pay attention to the insight that likeness from a consumer point of view may not correspond to likeness from a legitimate government point of view.[183]

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[180] GATT panel, BISD 34S/83, adopted 10 November 1987, para 5.9 b) – *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*: "The Panel was of the view that a "mixed" system of specific and ad valorem liquor taxes was as such not inconsistent with Article III:2, which prohibits only discriminatory or protective taxation of imported products but not the use of differentiated taxation methods as such, provided the differentiated taxation methods do not result in discriminatory or protective taxation.".

[181] GATT panel, DS31/R, unadopted, para 5.8 – *US – Taxes on Automobiles*.

[182] Horn and Mavroidis, 'Still Hazy After All These Years: The Interpretation of National Treatment in the GATT/WTO Case-Law on Tax Discrimination' (2004) *EJIL*, 39 at 60.

[183] See again Horn and Mavroidis, 'Still Hazy After All These Years: The Interpretation of National Treatment in the GATT/WTO Case-Law on Tax Discrimination' (2004) *EJIL*, 39 at 59–60.

The introduction of the "aims and effects test" in the interpretation of likeness therefore appears to be a reaction to the strict standard in the interpretation of Article III non-discrimination requirements, which adopted – as shown above – a very formal understanding of non-discrimination, not only in Article III:2 first sentence, but also with regard to Article III:4 (to the effect that no differentiation between like products was allowed[184]).[185] The strict standard considerably restrained the domestic policy space; hence, the "aims and effects test" was a tool to reinstate some regulatory space to GATT members, in order to enable them to introduce distinctions in treatment which were based on legitimate intentions and grounds; the national governments would receive freedom to define likeness thereby permitting a larger set of measures to be in conformity with the requirements of non-discrimination obligations[186]: The *US – Malt Beverages* panel "recognized that the treatment of imported and domestic products as like products under Article III may have significant implications for the scope of obligations under the General Agreement and for the regulatory autonomy of contracting parties with respect to their internal tax laws and regulations: once products are designated as like products, a regulatory product differentiation, e.g. for standardization or environmental purposes, becomes inconsistent with Article III even if the regulation is not 'applied … so as afford protection to domestic production'. In the view of the Panel, therefore, it is imperative that the like product determination in the context of Article III be made in such a way that it not unnecessarily infringe upon the regulatory authority and domestic policy options of contracting parties."[187] Non-protectionist differentiations should form a sound, legally acceptable basis for distinctions. **130**

Thus, if such an approach was continued in current times, regulatory intent would become meaningful; considering regulatory intent would give WTO members a possibility to justify less beneficial tax treatment (provided that there is no protectionist intent). WTO members could use tax distinction as a tool for pursuing legitimate policy objectives. **131**

The problem of this approach is that under Article III:2, first sentence, an "aims and effects test" can hardly be related to the wording of "likeness". Even though the starting point of the panel that the general purpose of Article III must be reflected in the interpretation of its paragraphs and its wording, is correct, one must not forget that first, Article III:2, first sentence does not explicitly refer to Article III:1, and – as later, under WTO times recognized, *see supra* – the first sentence of Article III:2 is an application of the general principle embodied in Article III:1. Hence, one could apply the "aims and effects test" as a regulatory intent test within the determination under Article III:2, second sentence, as to whether considerable tax differentials afford protection (see the related discussion above). The WTO judiciary rejected the "aims and effects test" also with regard to Article III:2, second sentence for reason of not **132**

[184] See GATT panel, BISD 7S/60, adopted 23 October 1958, para 11 – *Italy – Agricultural Machinery*: "It was considered, moreover, that the intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given."; GATT panel, BISD 39S/206 (DS23/R), adopted 19 June 1992, para 5.31 – *US – Measures Affecting Alcoholic and Malt Beverages*. Also Lester, 'Book Review' (2003) *JIEL*, 291 at 292 reports that some panels "have taken a strict approach …concluding that any differential treatment of products that are like leads to a violation of the national treatment requirement."

[185] See insofar Englisch, *Wettbewerbsgleichheit im grenzüberschreitenden Handel* (2008), 393.

[186] Mattoo and Subramanian, 'Regulatory Autonomy and Multilateral Disciplines' (1998) *JIEL*, 303 at 305.

[187] GATT panel, BISD 39S/206 (DS23/R), adopted 19 June 1992, para 5.72 – *US – Measures Affecting Alcoholic and Malt Beverages*.

additionally aggravating the burden of proof imposed on the complainant. The complainant might not be (easily) aware of legislative intentions behind a different taxation.[188] Additionally, the repercussions to the general exceptions in Article XX GATT were recognized: introducing an aims and effects test would functionally result in an application (and even extension) of Article XX GATT[189] on the level of the determination of a violation of NT in Article III:2 GATT, and would confound the NT requirement and the stage of determining justifications for breach of WTO rules, assessed in a second step under rules like Article XX GATT. A further reason may have been the fear of having to second-guess the motivation of a legislator.[190] The Appellate Body also clearly expressed that once protection of domestic production is found, the lack of protectionist intent does not matter. That protectionism was not intended, was held irrelevant.[191] As a consequence, the so-called "aims and effects test" which would have given, by way of "interpreting in" regulatory intentions into the criterion of likeness, a *material notion to the concept of non-discrimination* in NT obligations (in the sense of the third alternative, *supra* I. 2. c)) was not taken up by WTO jurisprudence.

133 This shift away from considering regulatory intent of the WTO members is remarkable because it also marked a turn in terms of NT obligations' impact on domestic regulatory autonomy. The strict, formal non-discrimination standard in Article III:2, first sentence, and the looser, but still less deferential non-discrimination standard under Article III:2, second sentence restrains regulatory leeway much more than in former GATT 1947 times, without, however, openly considering the regulatory restraints for the WTO Member States which result from the less deferential standards in interpreting Article III:2, and in particular from the denial of the aims and effects test. In this respect, the discussion in GATT 1947 panel reports appears to have been more sincere, as they had explicitly addressed the political consequences for the regulatory autonomy of the GATT members.[192] On the other hand, as *Hudec* rightly stated, the fact

[188] Panel, WT/DS8, 10, 11/R, para 6.16 – *Japan – Taxes on Alcoholic Beverages*. The Appellate Body impliedly affirmed the Panel's rejection of the aims and effects test, see van den Bossche and Zdouc, *The Law and Policy of the WTO* (4th Edition, 2017), 362; Englisch, *Wettbewerbsgleichheit im grenzüberschreitenden Handel* (2008), 386.

[189] See panel, WT/DS8, 10, 11/R, para 6.17 – *Japan – Taxes on Alcoholic Beverages*: "The Panel further noted that the list of exceptions contained in Article XX of GATT 1994 could become redundant or useless because the aim-and-effect test does not contain a definitive list of grounds justifying departure from the obligations that are otherwise incorporated in Article III. The purpose of Article XX is to provide a list of exceptions … that could justify deviations from the obligations imposed under GATT. Consequently, in principle, a WTO Member could, for example, invoke protection of health in the context of invoking the aim-and-effect test. The Panel noted that if this were the case, then the standard of proof established in Article XX would effectively be circumvented. WTO Members would not have to prove that a health measure is "necessary" to achieve its health objective. Moreover, proponents of the aim-and effect test even shift the burden of proof, arguing that it would be up to the complainant to produce a *prima facie* case that a measure has both the aim and effect of affording protection to domestic production and, once the complainant has demonstrated that this is the case, only then would the defending party have to present evidence to rebut the claim. In sum, the Panel concluded that for reasons relating to the wording of Article III as well as its context, the aim and-effect test … should be rejected." (emphases in the original, references omitted).

[190] Cossy, 'Some thoughts on the concept of 'likeness' in the GATS' in Panizzon, Pohl and Sauvé (eds), *GATS and the Regulation of International Trade in Services* (2008), 327 at 343.

[191] See again Appellate Body, WT/DS8, 10, 11/AB/R, para 63 – *Japan – Taxes on Alcoholic Beverages*. Recently, also with regard to "likeness" in Article 2.1 TBT the Appellate Body confirmed the irrelevance of regulatory intentions, WT/DS406/AB/R, paras 108–115 – *US – Clove Cigarettes*.

[192] See again the above quotes from GATT panel, BISD 34S/83, adopted 10 November 1987, para 5.9 c), – *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*; GATT panel, BISD 39S/206 (DS23/R), adopted 19 June 1992, para 5.25, 5.72 – *US – Measures affecting*