Further Thoughts on the Role of Regulatory Purpose Under Article III of the General Agreement on Tariffs and Trade: A Tribute to Bob Hudec

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Further Thoughts on the Role of Regulatory Purpose Under Article III of the General Agreement on Tariffs and Trade

A Tribute to Bob Hudec

Donald H. Regan*

Because I am a newcomer to trade law, I did not have the privilege of a long association with Bob Hudec. But a few years was time enough to learn to admire Bob's work, which spanned the whole spectrum of the General Agreement on Tariffs and Trade (GATT) and World Trade Organization (WTO) law. Bob combined breadth of knowledge, depth of insight, and plain good sense about the limits of legalism. The one time I met Bob in person, I learned of his human warmth as well. I wish I had known him longer. Along with his other virtues, Bob was a prompt and willing reader of draft manuscripts—although he pulled no punches. He was generous in praise of what he liked; he could be extremely blunt in his criticism of what he found inadequate. Of course, the blunt criticism was more useful than the praise, if less fun to receive. Briefly as I knew Bob, I will miss him.

My topic in this article is the role of regulatory purpose under Article III of the GATT, and I regard Bob as the patron saint of efforts to establish the relevance of purpose. His famous "Requiem for an 'Aims and Effects' Test" may have been called a requiem, but it was reluctant and sceptical.1 Bob thought dispute settlement tribunals ought to consider the regulator's purpose, and he thought they would do so, whatever they said. As decisions on Article III accumulate, we are in the process of learning that he was right on both counts.

I. INTRODUCTION

Perhaps I should be embarrassed to have further thoughts. Just one year ago I published an article on regulatory purpose in this Journal that was quite long enough.2 I shall not repeat here the arguments of that article. After a brief summary of my position as background, I shall try to keep repetition to the unavoidable minimum. Claims I assert here without argument I have argued for elsewhere.

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2 Donald Regan, Regulatory Purpose and "Like Products" in Article III:4 of the GATT (With Additional Remarks on Article III:2), 36 J.WT. 3 (June 2002), 443-478.
My basic claim is that when a measure is reviewed under any provision of Article III of the GATT, the central question should be whether the measure is the result of a protectionist legislative purpose. The object of Article III as a whole is set out in paragraph III:1; it is to prevent measures being applied "so as to afford protection to domestic production". The target of this prohibition is obviously some sort of discrimination between foreign and domestic products; the question is, what sort of discrimination is prohibited? I argue in the original article that the ordinary meaning of the term "protection" in context is purposeful protection. A measure is applied "so as to afford protection to domestic production" if and only if it is designed with the intention of conferring a competitive advantage on domestic goods. Indeed, I think this should be clear to anyone who is not either excessively worried about dispute tribunals' ability to identify regulatory purpose or else under the spell of the conventional understanding of the Appellate Body Report in _Japan—Alcohol_3 (of which more later). The principal operative provisions of Article III (in particular, III:2, first sentence, III:2, second sentence, and III:4) are formulated in varying terms, so that the precise manner in which they embody the principle of III:1 differs from provision to provision, but each of the provisions includes one or more terms that can be read, and in context should be read, as incorporating the idea that what is forbidden is protectionist purpose.

The other point that must be made in this quick summary is about the meaning of "protectionist purpose". The question about purpose is not a question about the subjective motives of individual legislators. As has often been pointed out, legislators may vote as they do for any number of reasons that have nothing to do with the merits. They may use their vote to do a political favour for a friend, or to harm a political enemy, to keep in the good graces of party leaders, or to reward particular constituents, and so on, almost without limit. Identifying the regulatory purpose does not require us to identify and then aggregate all the motives of the individual legislators. But in almost all cases it makes sense to ask, at a more general level, what political forces were responsible for the ultimate legislative outcome. Was it environmentalists? Was it consumer protection groups? Was it an industry group seeking competitive advantage?

This gives us the correct, albeit necessarily rough, understanding of legislative purpose. If the measure was adopted at the behest of industry groups seeking protection, it is protectionist. If the very same measure was adopted primarily as a result of environmentalist lobbying, it is not protectionist. I invite the reader to consider if this does not fit precisely with the ordinary understanding of when a measure is applied "so as to afford protection".4

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4 And what if there are multiple purposes? The rough answer is that the regulation should be invalidated if and only if the contribution of protectionist purpose was a but-for cause of the adoption of the regulation. For further discussion of why I think the purpose test, as I understand it, is the right test, see sections IV and V below, and see also Regan, note 2 above, 444–464; and Donald Regan, _Judicial Review of Member-State Regulation of Trade Within a Federal or Quasi-Federal System: Protectionism and Balancing_ Da Capo, 99 Michigan L. Rev. (August 2001), 1853–1902.
A final introductory comment—I will sometimes be careless about the precise structural differences between Article III:2, first sentence, Article III:2, second sentence, and Article III:4. That carelessness will simplify the exposition. These three provisions all have the same general aim, specified in Article III:1, and they should all be interpreted in the same spirit. I tend to treat III:4 as paradigmatic; I have explained my views about III:2 at length elsewhere. Everything I shall say in my careless mode could be said more punctiliously; I hope it will be obvious to the reader how.

II. THE SIGNIFICANCE OF CHILE—ALCOHOL

In Chile—Taxes on Alcoholic Beverages, the Appellate Body twice says explicitly that when a tribunal is considering if a measure is applied “so as to afford protection”, the focus of review is the regulatory purpose. Thus, for example,

“The subjective intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry, if only because they are not accessible to treaty interpreters. It does not follow, however, that the statutory purposes or objectives—that is, the purposes or objectives of a Member’s legislature and government as a whole—to the extent that they are given objective expression in the statute itself, are not pertinent.”

In other words, “the purposes or objectives of a Member’s legislature and government as a whole” are pertinent. (What the Appellate Body says indirectly here they say directly in a quote I analyse later.) This flies in the face of the conventional understanding of Japan—Alcohol, which is supposed to have rejected all concern with regulatory purpose along with the “aims and effects” test.

Holding the view I do about the significance of regulatory purpose, I naturally regard Chile—Alcohol as a very important case, and for a long time I was at a loss to understand how it could be that other commentators regularly dismissed Chile—Alcohol as uninteresting, saying it merely repeated Japan—Alcohol. I think I have the answer. The report in Chile is deceptive to the reader who approaches it with the wrong preconceptions. The report in Chile quotes Japan—Alcohol repeatedly, and at length, and with nothing but approval. There is not a word of disagreement with Japan...

5 Regan, as note 2 above, 471–477.
6 Chile—Taxes on Alcoholic Beverages, WT/DS87 and DS110/AB/R (adopted 12 January 2000) [hereinafter Chile—Alcohol or Chile], paras 62, 71. Chile, of course, was about Article III:2, second sentence. But there is no reason to doubt that what they say about the interpretation of “so as to afford protection” applies anywhere that phrase is relevant—in particular, after European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (adopted 5 April 2001) [hereinafter EC—Asbestos or Asbestos], in connection with Article III:4. See section VI below.
7 Chile—Alcohol, para 62 (emphasis in original).
8 E.g., John Jackson, William Davey and Alan Sykes, Legal Problems of International Economic Relations: Cases, Materials, and Text, 4th edn (St Paul, MN: West Publishing, 2002), p. 502; Henrik Horn and Petros Mavroidis, Still Hazy After All These Years: The Interpretation of National Treatment in GATT/WTO Case-Law on Tax Discrimination, manuscript on file with the author, 2002. An exception is Gaëtan Verhoosel, National Treatment and WTO Dispute Settlement: Adjudicating the Boundaries of Regulatory Autonomy (Oxford: Hart Publishing, 2002), who sees Chile as different from Japan, although he does not share my view that Chile establishes the centrality of protectionist purpose. Verhoosel argues that Chile establishes a necessity test under Article III. For a brief discussion of such tests, see section V below.
in the Chile report. Indeed, the passage from Chile that I quoted in the previous paragraph is followed immediately by an approving quotation of the famous sentence in Japan. “Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure.” It is therefore easy and natural for the reader to assume that Chile contributes nothing of interest: Japan rejected concern with regulatory purpose; Chile fully approves of Japan; therefore Chile rejects concern with regulatory purpose also—so the thinking goes.

The trouble with this reasoning is that Chile unmistakably asserts a concern with regulatory purpose. How can that be? The answer is that although the Chile Appellate Body has no disagreement at all with the Japan Appellate Body, it gives us a very important gloss on the meaning of the Japan report—a gloss which is completely at odds with the conventional understanding of Japan. Consider this quote from a bit further on in the Chile report:

“We recall once more that, in Japan—Alcoholic Beverages, we declined to adopt an approach to the issue of ‘so as to afford protection’ that attempts to examine ‘the many reasons legislators and regulators often have for what they do’. We called for examination of the design, architecture and structure of a tax measure precisely to permit identification of a measure’s objectives or purposes as revealed or objectified in the measure itself. Thus, we consider that a measure’s purposes, objectively manifested in the design, architecture and structure of the measure, are intensely pertinent to the task of evaluating whether or not that measure is applied so as to afford protection to domestic production.”

Japan—Alcohol’s famous inquiry into “design, architecture and structure” is generally thought to be a substitute for an inquiry into purpose, but here the Chile Appellate Body tells us that the inquiry is actually undertaken precisely to identify the measure’s objective or purpose. Nor is this any sort of deviousness on the part of the Chile Appellate Body. Their gloss was the best reading of the Japan report all along, even if the way that report was written made it hard to see.

In sum, it is true, as many commentators have suggested, that Chile—Alcohol works no change on Japan—Alcohol. But Chile is nonetheless flatly inconsistent with the common understanding of Japan—Alcohol. It ought to work a change on our understanding.

III. “PROTECTIVE APPLICATION”

There are two further puzzles about Chile—Alcohol, both of which may contribute to the full explanation of why the case has been so inadequately noticed. The first puzzle has to do with the phrase “protective application”. Recall that the Japan report said we look at design, architecture and structure to discern the

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9 Chile—Alcohol, para. 62, quoting and adding the emphasis to Japan—Alcohol, s. H.2(c).
10 Chile—Alcohol, para. 71 (first emphasis added. Footnote omitted).
11 See Hudec, as note 1 above, 629–632; Regan, as note 2 above, 471–477.
"protective application" of the measure. The Chile report picks up this language of "protective application" and repeats it frequently—always with the same approval bestowed upon every other aspect of the Japan report. But this may seem to suggest that regulatory purpose is not the issue; rather, the issue is "protective application".

I think that the Japan report invited a misunderstanding of the phrase "protective application". Consider: if we ask ourselves what facts amount to "protection" in the sense of Article III:1, we immediately come up with some obvious possibilities. One possibility is that "protection" is constituted by protectionist purpose; another is that "protection" is constituted by a disparate impact on foreign products as compared to domestic products they compete with. Reading the Japan report, it seems that "protective application" is intended to name a third possibility of the same sort—some basic fact or constellation of facts that is the crucial factual ground for the existence of "protection". Of course, if we take the phrase "protective application" that way, we face a most perplexing issue: what exactly is the factual ground that the phrase names (that is distinct from protectionist purpose and disparate impact)? No one has ever given a remotely plausible answer to that question. Commentators have hidden the lack of an answer behind references to exercising judgment and deciding every case on its particular facts; but that really is not enough when we want to know what facts matter and how.

The solution is to realize that "protective application" does not name a particular factual ground for illegality of a measure; it is not a new candidate for the role that "protectionist purpose" and "disparate impact" are competing candidates for. Think rather about where the phrase comes from. Article III:1 tells us that the basic prohibition is on measures that are "applied ... so as to afford protection". "Protective application" is just a nominalization of this participial phrase. In other words, "protective application" does not even purport to name another putative factual ground of illegality; rather, it simply refers to the condition of illegality itself. So, the Japan—Alcohol Appellate Body merely told us, in that famous quote, that we discern illegality from the design, architecture and structure. The Chile Appellate Body makes explicit the further point, which was always just below the surface in the Japan report, that the bridge between the design, architecture and structure on the one hand and a finding of illegality on the other hand, is a finding, based on design, architecture and structure, of protectionist purpose.

IV. "Objective Expression in the Statute"

Now the second puzzling point about Chile—Alcohol. The Appellate Body says that "the purposes or objectives of a Member's legislature and government as a whole" are pertinent "to the extent that they are given objective expression in the statute

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12 Japan—Alcohol, s. H.2(c).
13 Chile—Alcohol, paras 62, 67, 71.
14 The reader might wonder if the Chile report, which undoubtedly makes purpose central, is so clear that the ultimate question is protectionist purpose. On that issue, see section V below.
itself". This might seem to suggest that we are to look in the statute and nowhere else for evidence regarding regulatory purpose. But this belies both Appellate Body practice in other cases, and the dynamic of decision in Chile itself. It seems clear that the (schematized) story of the decision process in Chile is this: First, the Appellate Body looks at the statute itself. The peculiar graph of tax rate versus alcohol level, plus the distribution of local and foreign products between the low-tax and high-tax categories, plus the relation between the location of the "kinks" in the tax rate schedule and the alcohol levels of local and foreign products were enough to establish a prima facie case of protectionist purpose. At this point, Chile has lost under Article III unless it can produce some explanation for the facts just noted (an explanation that will not be obvious from the face of the statute read in the light of common sense and common knowledge). The Appellate Body invites Chile to produce such an explanation. Chile attempts an explanation based on the interaction of (primarily) two policies, reducing alcohol consumption and reducing the regressivity of the alcohol tax. But the Appellate Body is not persuaded that action based on those perfectly legitimate policies would really lead to anything like the Chilean tax scheme. In particular, those policies give no explanation of the "kinks" in the tax rate schedule and their location. The prima facie case of protectionist purpose is not rebutted, and Chile loses under Article III.

In this story, the Appellate Body looks at the face of the statute for its prima facie case, but it then looks beyond the face of the statute when it asks Chile for any unobvious explanation. Once Chile asserts some legitimate (non-protectionist) purpose, the Appellate Body returns to the statutory scheme as the test of the plausibility of Chile's claim. The Appellate Body has no occasion in this case to look to ministerial statements (as in Canada—Periodicals) or legislative reports (as in Australia—Salmon) as evidence on the issue of purpose. But it does look beyond the statute when it asks Chile for an explanation. And notice that if it had been persuaded by whatever explanation Chile offered, which was surely a possibility, then it would have found, in effect, that both an illegal purpose and an innocent purpose were consistent with the "objective facts" on the face of the statute. It follows that the "objective facts" of the statute cannot be all that matters, since in some cases those facts are consistent with either a legitimate or an illegitimate purpose.

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15 Chile—Alcohol, para. 62.
17 It is possible to think that the Appellate Body was wrong not to be persuaded by Chile's explanation, or indeed that they were wrong to have thought that the structure of the tax scheme made a prima facie case of protectionist purpose. Horn and Mavroidis, as note 8 above, make arguments for both of these views. But even if the Appellate Body misapplied their approach (I am not persuaded is the case), that does not undermine my claim about what the approach was.
18 Note 16 above.
19 Id.
FURTHER THOUGHTS

But if this is right, what do we make of the Appellate Body's emphasis in Chile on the purpose's being given "objective expression in the statute"? There is no real difficulty here. Notice first that the Appellate Body's initial focus is on the "design, architecture, and structure" of the statute; and further, that even when they consider Chile's alternative story about purpose, the question is whether the story can be plausibly squared with what the statute says and does. But beyond that, we can point out a different sense in which it is the actual purpose, and no other, that is given objective expression in the statute. We have only to remember that the "purpose" is determined by the nature of the political forces that produced the statute. It is not all views that are expressed in the legislative process that are given objective expression in the statute. Rather, it is the views that prevail in the process and that actually generate the statute that receive "objective expression" there. The Appellate Body is reminding us that we should not find a law protectionist just because some individual legislators made protectionist speeches. The issue is what forces actually produced the law—and thus what purposes are given "objective expression" in the law in that sense. In many cases the objective facts about the design, architecture and structure will be fully adequate to make a *prima facie* case and will be all but determinative overall. But it is the legislature's actual purpose that is the ultimate issue in principle.

I have argued that the Appellate Body goes beyond the "objective facts" on the face of the statute in its inquiry into actual regulatory purpose, and I have argued that their doing so is still consistent with the idea that the relevant purpose is given "objective expression in the statute". But let me step back a moment, to consider a possible suggestion about how we might decide such a case entirely by reference to the statute after all. Might we not say (a) that the objective facts on the face of the statute determine a set of possible purposes that are consistent with the statute (even if in practice we sometimes have to rely on the respondent country to point out some of the purposes in the set), and (b) the statute should be upheld if it is consistent with any possible nonprotectionist purpose (that is, if there is any nonprotectionist purpose in the set)? We could say this, and this test would indeed allow us to claim that all that matters is the objective facts on the face of the statute. But it would be a bad test.

Consider a case where an origin-neutral statute that imposes a regulatory standard on some product is clearly passed for protectionist reasons. Foreign producers are disproportionately disadvantaged by the standard, and there are voluminous ministerial statements and committee reports about the purpose of the statute—official policy statements as opposed to just the occasional comments of individual legislators—all of which focus solely on the protectionist benefit. No other purpose is even mentioned. The statute is now challenged as an Article III violation. In the dispute settlement proceedings, the respondent country points out that its regulation is identical in substance to regulations adopted by several other countries for environmental reasons.

20 Nor, from the other direction, is it a necessary condition for finding protectionist purpose that any legislator should have been so careless as to make a protectionist speech on the record.

21 And if there are multiple purposes? See note 4 above.
In other words, there is a possible legitimate explanation for the statute. But for reasons I have noted, we can be confident that the actual respondent country here was not protecting its environment; it was concerned solely with protecting its producers.\textsuperscript{22}

In my opinion, the statute should be invalidated, because of its clearly established bad purpose. A reader who is anxious to avoid the purpose inquiry might say, "But why worry about purpose? Surely it is effects that really matter, and by hypothesis, the law has good environmental effects. If the country has stumbled into a good law for bad reasons, let us rejoice. To strike down the regulation because of its tainted origins would be foolishly and pointlessly punitive." This reasoning is specious. There is a sense in which "it is effects that matter", but that formulation is too simple. What really matters is effects as they are valued by the people they impinge on.\textsuperscript{23} It is perfectly possible that the very same regulation—with the very same empirical effects on imports, and the level of domestic production, and the local environment—is a good law, and economically efficient, when adopted in a jurisdiction whose citizens care about the local environment and a bad law, and economically inefficient, when adopted in response to protectionist forces in a jurisdiction whose citizens do not care about the local environment. If the environmental effects are local, as I assume, then we are not in a position to insist that they should care. But that means that the very same law may be efficient or inefficient depending on the legislative purpose, if we remember that legislative purpose is to be understood in terms of the political forces that produced the law.

All roads lead back to the question of regulatory purpose.\textsuperscript{24}

\textsuperscript{22} The case I hypothesize may be rare, but we should still have a theory that accommodates it in principle. And thinking along these lines also matters in practice because of the way the purpose question may become entangled with judicial review of empirical judgments about effects through the issue of the appropriate degree of deference. See section V below.

\textsuperscript{23} I set aside the special problem of effects on animals, as from leg-hold traps or cosmetics testing.

\textsuperscript{24} People sometimes object to the fact that on my purpose view; an identically worded statute may be legal in one jurisdiction and illegal in another. But actually, that will be true on any plausible test. It is certainly true, for example, on a test that looks at effects, since an identically worded statute can easily have different effects in different jurisdictions. On a different point, it might be suggested that willingness to look beyond the face of the statute for evidence of protectionist purpose leaves governments with transparent political processes at a disadvantage. But surely we believe that the other benefits of transparency more than compensate, especially if we reflect that it may not be an advantage to most nations' populations at large for their governments to be able to get away with protectionist laws.

On yet another point, it might be asked why I assume a law passed at the behest of environmentalists is efficient and a law passed at the behest of an industry seeking protection is not: even environmentalists lobby and are a political interest group. The best answer in the present context is just that GATT Article III seems to presuppose such a distinction, when it disfavours "protection". But beyond that: (1) the forces that benefit from protection get a good deal of consideration for their interests out of the operation of the market (even if not as much as they want), whereas environmental externalities are by definition not considered by the market mechanism; (2) protectionist forces are more naturally organized than environmentalist forces, so their coming together may be less evidence of strength of interest. Both of these considerations explain why industry groups may be more likely than environmental or consumer groups to achieve "overrepresentation" in the political process. Of course, what I am relying on here is not a hard-and-fast distinction—some environmental laws are inefficient, and some protectionism may be defensible—but it does seem a reasonable working presumption.
FURTHER THOUGHTS

V. ANTI-PROTECTIONISM OR LESS RESTRICTIVE MEANS ANALYSIS?

It may seem that I have moved too rapidly from the premise that regulatory purpose matters under Article III—which the Chile Appellate Body asserts unambiguously—to the conclusion that the determinative issue involving regulatory purpose is whether the purpose is protectionist or not. Is there no other question we might ask that turns on regulatory purpose? Obviously there is another possibility. We can ask some question about the fit between the legislative means chosen in the statute and the regulatory purpose. The question might be about "rational relation" of means to ends, or about whether there are "less trade-restrictive means" available, or about whether the law has desirable effects on balance. To discuss all of these possibilities in detail is beyond the scope of this article. The most popular candidate for means/ends testing under the WTO is probably the "less restrictive means" question, so I shall concentrate on that. Even "less restrictive means" analysis is too big a topic for full coverage here, so I shall restrict myself further to three central questions, treated at a fairly general level. The questions are: (1) To what regulatory purpose do we apply the "less restrictive means" (LRM) test? (2) How much deference do we give to the regulating country's own decision on the LRM question? And (3), Why do we ask the LRM question at all?

As to the first question, "To what regulatory purpose do we apply the LRM test?" it may seem that the answer is obvious: we apply the test to the regulating government's actual purpose, whatever it is. Indeed, I think this is the right answer. But notice that just as in the previous section, someone who wants to avoid the inquiry into actual purpose might suggest that we should simply apply the LRM test to whatever the government claims is its purpose. They would say we can afford to take the government's assertion of an innocent purpose at face value, provided the government is required to name a specific purpose that we can then go on to subject to the LRM test. What this means, in effect, is that if the government can name any non-protectionist purpose that the challenged measure is the least restrictive means of achieving, the measure is upheld. But this is not acceptable, for two reasons. The first is the same reason we pointed to in the last section. Even if the law is the least restrictive means to some innocent purpose, we could have overwhelming evidence in a particular case that the actual purpose behind the law was protectionism and nothing else. In that case the law is inefficient, locally and globally (even though it has the same physical effects and market effects as an identical law that would be efficient in a society with different preferences), and it should be invalidated.

The second reason we do not take the government's asserted purpose at face value is that the Appellate Body in Chile—Alcohol says we look at design, architecture and structure "to permit identification of a measure's objectives or purposes".25 There is no suggestion here that we take the regulating state's assertion of purpose at face value,

25 Chile—Alcohol, para. 71.
subject to the application of the LRM test. Rather, the Appellate Body clearly says that one of the tribunal’s tasks is to identify the measure’s (actual) purpose. In sum, whatever the difficulties of ascertaining legislative purpose, they are not difficulties we can avoid by adopting the LRM test (or indeed, any type of “means/ends” test). We have to ascertain the purpose before we have a purpose to apply the LRM test to. (And of course, if the purpose we come up with is protectionism, the case is over; it is only if we think we find an innocent purpose that we proceed with the LRM test.)

When I said that we have to ascertain the purpose before we have a purpose to apply the LRM test to, that may have sounded a “bit off” somehow. It is absolutely correct in principle: if we are thinking about the LRM test as free-standing test, we have to identify a purpose before we can apply it. The reason the sentence sounds strange is that in many cases where we think about means/ends fit, the means/ends test does not actually function as a free-standing test at all. Rather, the inquiry into means/ends fit is part of the inquiry into purpose. This is illustrated by Chile—Alcohol itself. The Appellate Body approvingly describes the Panel’s procedure thus: “The Panel did not find any clear relationship between [Chile’s] stated objectives and the tax measure itself and considered the absence of a clear relationship as ‘evidence confirming the discriminatory design, structure and architecture’” of the measure.26 This is ten lines before the Appellate Body tells us that the point of looking at design, architecture and structure is to identify the purpose. In other words, the kind of discrimination that is in issue in the first quote is purposeful discrimination. The passage as a whole makes it clear that the point of the means/ends inquiry concerning the Chilean measure was to help in the identification of purpose.27 And this is very often the case.28

But suppose we think that we have identified what appears to be an innocent purpose, and we try to apply the LRM test as a free-standing test. That brings us to the second of our three questions above, “How much deference do we give to the regulating country’s own decision on the LRM question?” I assume it is not controversial that some deference is required.29 The LRM question is essentially an empirical question,30 and there is no reason to suppose that WTO tribunals are more competent to answer it than the responsible officials in the regulating country. Indeed,

26 Ibid., para. 69 (emphasis added by the Appellate Body).
27 Verhoosel, as note 8 above, reads Chile—Alcohol as asserting his view that the use of unnecessarily restrictive means, relative to the regulator's announced purpose, is the sort of discrimination with which we are concerned. This ignores the fact that the Appellate Body says that a lack of relation of means to ends is evidence of discrimination, and that it says the task is to identify the purpose.
28 When this is the case, the question in the means/ends inquiry is not the truth of the empirical judgments and the objective soundness of the normative commitments implicit in the government's story. The issue is rather the plausibility of the government's story, its ability to displace protectionism as the best explanation of the government's choice.
29 What we are talking about here is deference under Article III. For reasons that are explained in section VII below, we may not want so much deference under Article XX. The Appellate Body may have cause to regret the very deferential stance it suggests under XX in Asbestos, paras 167-175.
30 I assume that we are dealing with what I call “strict” LRM analysis in Regan, as note 4 above, pp. 1899-1900. Alan Sykes has recently argued that WTO tribunals actually engage in some balancing (and hence make some value judgments) in the course of what they refer to as less restrictive means analysis. Alan Sykes, The Least Restrictive Means, 70 Univ. Chicago L. Rev. 1 (Winter 2003), 403-419.
there is every reason to think they are usually less competent, especially since the effectiveness of suggested means may vary with local conditions. So, we must decide what degree of deference is appropriate. Should we have a “clear and convincing evidence” standard, or a “capricious and arbitrary” standard, or what? Generally, questions about degrees of deference seem to me too amorphous to bear much discussion. But here it seems there is a clearly right answer in principle: the tribunal should defer to the regulator’s decision unless the regulator’s conclusion seems so unsupported and improbable that the tribunal thinks it must have been insincere, a mere cover for protectionist purpose. Short of that, I cannot see any justification for replacing the regulator’s decision on the crucial empirical question with the tribunal’s. What this means, of course, is that the attempt to maintain the LRM test as free-standing test collapses. If we try to apply the LRM test on its own, we must confront the issue of deference, and when we do that, the LRM test dissolves as an independent test. The purpose inquiry and the LRM inquiry are inextricably entangled (see the preceding paragraph), and it is the purpose inquiry that is the real crux.

One qualification is necessary. I have mentioned deference to the regulator’s decision on an empirical question. That assumes the regulator has actually made a decision, that it has actually considered the relevant question. The one situation where even I would concede the appeal of LRM analysis is that where we doubt that the regulator has properly considered the relevant question, but where the omission is apparently not motivated by protectionism. I have two particular sorts of case in mind. One is where the regulator has a product standard in place, but circumstances have changed (e.g., the circumstances in which the product is used) so that the standard is no longer necessary, and the regulator never considers in any serious way the effect of the changed circumstances. If the old standard has a disparate impact on foreign producers, the failure to re-examine it might be demonstrably the result of protectionist motivation, in which case we can invalidate the standard on the ground that its present existence manifests a protectionist purpose. But the failure to re-examine the standard might equally just be the result of legislative inertia. The other sort of case I have in mind is where the regulator has formulated a standard based on one technology for avoiding or abating some undesired effect associated with a product, and where it simply refuses to consider seriously the possibility that some exporting country’s different standard based on a different technology is equally effective for the purpose. Again, this could be the result of protectionist motivation, but it could also be the result of mere stubborn allegiance to “our way”.

What to do with these cases is a delicate and complicated question. A full discussion would be too long for this article. I am inclined to suggest in general terms that in cases such as this the regulating government should be required to produce an explanation for its continued use of the challenged standard, but that if the regulating
government has any colourable story to tell about why the changed circumstances do not in fact make its existing standard unnecessary or unduly restrictive—or similarly if the regulating government has any colourable story to tell about why the exporting country’s standard is not in fact equally effective—then the dispute tribunal should defer. In such cases, one function of the dispute settlement process may be to compel the regulator to confront some issue it might otherwise burke. But once it has confronted the issue (or created the appearance of confronting it), the question becomes again the appropriate degree of deference, or in other words whether the failure to reform the regulation can be plausibly explained otherwise than by protectionist purpose. If it can, then the measure should be upheld.

All roads lead back eventually to the question of protectionist purpose.

VI. Asbestos: Taking it a Few Steps at a Time

If I am right about the significance of Chile—Alcohol, then it is undeniably puzzling that the Appellate Body did not talk about regulatory purpose in EC—Asbestos (which even involved two of the same Appellate Body members as Chile). If the “majority” in Asbestos had been willing to discuss regulatory purpose, they could have written a report that was shorter, simpler, and quite possibly unanimous. After the usual preliminaries and a discussion of the meaning of “likeness” that brought in regulatory purpose, the Appellate Body could have said there was no plausible evidence of anything other than a health purpose for the French regulation, and that was the end of the matter. That would have been much more persuasive—at least to me, and I suspect to many others. But the Appellate Body apparently wanted to move more slowly. It pointed out that this case was its first engagement with the “like products” issue under Article III:4—and there was a great deal to say.

It is worth emphasizing how many controversial or potentially controversial propositions the Appellate Body did endorse in Asbestos. First, it told us that “like” means different things in Article 111:2, first sentence, and Article III:4. This should come as no surprise to anyone who has spent time with the texts, but it is still an important proposition to have officially announced, especially since it may seem to be in some tension with the text-centred style of interpretation the Appellate Body has adopted. Second, the Appellate Body told us that in interpreting Article III:4, it was necessary to take explicit account of the Article III:1 policy that measures should not be applied “so as to afford protection”. To many, this may have seemed inconsistent

32 On the concerns of the “concurring” member, see Regan, as note 2 above, 445.
33 EC—Asbestos, para. 88.
34 Ibid., para. 99.
35 There is no inconsistency, of course, since the words of the text are to be read in context, and the context varies from provision to provision.
36 EC—Asbestos, paras 93, 98.
with the approach of Japan—Alcohol to III:2, first sentence, and it flew in the face of a seemingly contrary assertion in EC—Bananas.\textsuperscript{37}

Third, the Asbestos Appellate Body made it clear that the issue of whether there is an Article III violation must be taken seriously.\textsuperscript{38} The Panel had got the right ultimate result, upholding the French regulation, but it first found an Article III violation before finding an Article XX excuse.\textsuperscript{39} This comported with a widespread view about the relation between Articles III and XX, according to which essentially any disparate impact on foreign goods constitutes an Article III violation, and the real work of distinguishing between legal and illegal regulations is done under Article XX.\textsuperscript{40} The Appellate Body, however, emphasized that Article III must be interpreted and applied on its own terms, without being distorted by the notion that there is always Article XX waiting in the wings to authorize any worthwhile regulation.\textsuperscript{41}

In holding thus, the Appellate Body was not only being true to the text; it was also making a symbolic point of considerable institutional importance. As Bob Hudec has pointed out, governments regard it as unacceptable to have their patently innocent and sensible regulations branded as a "violation" of the WTO agreements in any sense—including being branded as a violation of Article III, even if rescue under Article XX is possible.\textsuperscript{42} Opponents of the purpose approach commonly argue against inquiring into regulatory purpose on institutional legitimacy grounds. But Hudec's point reminds us that there are institutional legitimacy reasons in favour of the purpose inquiry as well. Considerations of institutional legitimacy argue that we should find no Article III violation in Asbestos, and by far the best argument for the absence of an Article III violation is (pace the Appellate Body) that there was no reason at all to doubt the \textit{bona fides} of France's regulation.

In this connection, it is worth reverting once more to the text of Article III. Article III:1 says, "The contracting parties recognize that [internal taxes and regulations] ... should not be applied ... so as to afford protection to domestic production." Laws that are applied "so as to afford protection" are disparaged \textit{en masse}, even if, like all other GATT violations, they are subject to being redeemed by Article XX. That means we must interpret "so as to afford protection" in such a way that blanket disparagement makes sense. Mere incidental disparate impact on foreign goods (such as we see in Asbestos) is not enough to justify such disparagement.

\textsuperscript{37} \textit{European Communities—Regime for the Importation, Sale and Distribution of Bananas}, WT/DS27/AB/R (adopted 25 September 1997), para. 216. For an explanation of why I say "seemingly" contrary assertion, see Regan, as note 2 above, 475, n. 91.

\textsuperscript{38} \textit{EC—Asbestos}, para. 115.

\textsuperscript{39} \textit{European Communities—Measures Affecting Asbestos and Asbestos-Containing Products}, WT/DS135/R (18 September 2000).

\textsuperscript{40} This view is discussed in section VIII below, where I point out that despite its hold on people's imagination, it has no support in GATT or WTO jurisprudence.

\textsuperscript{41} \textit{EC—Asbestos}, para. 115

\textsuperscript{42} Hudec, as note 1 above, 639. Bob also pressed this point upon me in e-mail exchanges.
Therefore “so as to afford protection” must mean something more than mere incidental disparate impact.43

Fourth, with regard to the meaning of “like products” in Article III:4, the Appellate Body established that “competitive relationship” is a necessary condition for likeness. The foreign product and the domestic product to which it is being compared must actually compete in the market. This is plainly correct. Article III is about protectionism—or if that seems too tendentious, it is at least about “protection”. There is simply no question of protecting a domestic product against competition from a foreign product unless the two are in competition. I have serious doubts about the Appellate Body’s finding that asbestos and PCG fibres were not actually in a competitive relationship,44 and I would reject any suggestion in the report that competitive relationship is a sufficient condition for likeness (more on that presently). But that competitive relationship is a necessary condition is indubitable.

And yet, notice how we get to the conclusion that competitive relationship is a necessary condition for likeness. It is not just by contemplating the pure “ordinary meaning” of the words “like” or “like products”. I have encountered the suggestion that the Appellate Body in Asbestos is wisely limiting itself to “textual” interpretation, while proponents of a purpose-based approach such as myself are engaged in more activist “contextual” interpretation. This is a false distinction. The Vienna Convention says that a treaty shall be interpreted in accordance with “the ordinary meaning to be given to the terms of the treaty in their context ... ”.45 There is no prioritization of the terms over the context. Indeed, there is (rightly) no suggestion that terms even have any context-independent ordinary meaning. Rather, the Vienna Convention recognizes that “textual” interpretation is necessarily contextual. This is splendidly illustrated by the very holding of Asbestos that we are considering. The issue is the meaning of the word “like” or the phrase “like products” in Article III:4. No one could possibly suggest that either “like” or “like products” has a context-independent ordinary meaning that includes the notion of competitive relationship. The meaning here, and the necessity of competitive relationship, is utterly dependent on the context provided by the rest of Article III and of the GATT. Once we are clear about that, there is a further question of whether or not the ordinary meaning in context also includes a reference to regulatory purpose; I have argued elsewhere that it does.46 But whether I am right or wrong about that, my argument does not involve any new and controversial mode of interpretation.47

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43 I have explained in Regan, as note 2 above, 455–456, that all origin-specific measures that treat foreign products less favourably violate Article III and go to Article XX. In rare cases, such measures may not have a protectionist purpose (see, e.g., the US Supreme Court case Maine v. Taylor, 477 U.S. 131 (1986)), but there is a very strong presumption that they do, and no government can reasonably be offended by being asked for formal justification under Article XX for a measure that is origin-specific. It makes sense to disparage such measures.

44 See Regan, as note 2 above, 465–467.


46 Regan, as note 2 above, 444–454.

47 Actually, it is people who oppose the purpose inquiry on putative grounds of judicial incompetence or institutional legitimacy who seem more open to a charge of teleological interpretation.
FURTHER THOUGHTS

Fifth, although it does not talk about regulatory purpose, the Appellate Body finds a way to make the health risks from asbestos (the obvious ground of the regulation) relevant to the Article III argument—contrary to the approach of the Panel. And sixth, it does this in part by insisting that if the Panel relies on the Border Tax Adjustments criteria for likeness, it must consider them all together, rather than just picking on any criterion that might suggest likeness when taken in isolation. This could be the beginning of a salutary de-emphasizing of the Border Tax criteria—salutary for reasons discussed in the next section.

It is also worth noticing some things the Appellate Body does not do. It does not say explicitly that regulatory purpose is not to be considered under Article III:4. It does not even say unambiguously that regulatory purpose is irrelevant to “likeness”. The general approach of the report does suggest that competitive relationship is both necessary and sufficient for likeness—in which case regulatory purpose is irrelevant. But there are passages where it seems that the health risk from asbestos might make it “unlike” PCG fibres even if it does not eliminate the market for asbestos and thus the competitive relationship. Giving weight to the health risk independently of its supposed effect on consumer behaviour would bring in regulatory purpose without naming it. In any event, even if we read the Appellate Body as saying that regulatory purpose is irrelevant to the issue of “likeness”, it leaves plenty of room for the possible relevance of regulatory purpose in its brief and Delphic discussion of “less favourable treatment”.

VII. PROVING AND DISPROVING “LIKENESS” (WITH OBSERVATIONS ON THE BORDER TAX CRITERIA)

In the previous section, I mentioned that competitive relationship is a necessary condition for likeness. I suggested that it should not be regarded as sufficient. But


Ibid., para. 109.


E.g., EC—Asbestos, paras 118, 121. Also, the desire to suggest that the health risk itself might establish unlikeness, independent of the competitive relationship, seems to be precisely what occasions the “concurring statement”, paras 149–154, although this may seem to confirm that the majority rejected that possibility.

EC—Asbestos, para. 100; for discussion of this paragraph, see Regan, as note 2 above, 468–471. Let me also mention here a distantly related point for which I have found no better place. I have heard it suggested, in support of the view that any disparate competitive impact violates Article III, that we should approach the question of “likeness” under Article III:4 the same way antitrust lawyers approach the comparable issue in defining markets to calculate market share. If the claim were simply that insofar as we are trying to establish competitive relationship as a necessary element of likeness, we should use the same econometric tools that have been refined in antitrust investigations, I would have no disagreement of principle (although I would want to consider further if, in the WTO context, parties have the resources and tribunals have the competence to use these tools). But the claim seems to be rather that the Article III:4 “likeness” issue in its entirety is the same as the market definition issue for antitrust. That simply begs the crucial question of whether competitive relationship is sufficient for Article III likeness. In the antitrust context, the issue is competitive relationship, pure and simple. In the Article III context, the hard issue is precisely if likeness is about competitive relationship alone, or if something else is involved. We cannot appeal to the antitrust inquiry as fully analogous until we have decided independently what is the proper role of regulatory purpose under Article III.
perhaps there is something in between—not in the world of pure logic, but in the real
world of litigation. We might plausibly say that competitive relationship is, in many
cases, sufficient to establish *prima facie* likeness. What does that mean?

On my view, products should be regarded as like if (a) they are in a competitive
relationship, and (b) they are not distinguished by any non-protectionist policy which
actually underlies the challenged regulation. In principle, when one WTO Member
challenges another Member’s regulation under Article III, the challenger has the
burden of proving a violation. Likeness is an element of a violation, so the challenger
has the burden of proving likeness. Given my understanding of likeness, it appears that
the challenger must prove both competitive relationship and the absence of a justifying
regulatory purpose. The former it is obviously proper to require; but it seems
unreasonable to expect the challenger to exclude the possibility of any justifying
purpose. So, as a practical matter, tribunals should do as I think the Panel and Appellate
Body did in *Chile—Alcohol*, for example. The challenger was required to prove a
competitive relationship and competitive impact. Once that was done, and given the
absence of any apparent justifying purpose, the tribunal was prepared to find
protectionist purpose unless Chile could adduce a justification (which, in the event, it
could not). In effect, the competitive relationship, plus the absence of any apparent
justification, made a *prima facie* case, which transferred the burden of going forward to
the respondent. So, as I say, competitive relationship plus the absence of an apparent
justification is sufficient to make a *prima facie* case.1

But if I concede that the burden of producing a non-protectionist purpose as
justification may fall on the respondent, why not just say that the issue of justification
should be dealt with under Article XX, and not under Article III at all? I have already
mentioned two reasons for not remitting the issue of justification to Article XX: first,
we must deal with Article III on its own terms, which properly interpreted encompass
the issue of justification; and second, there are reasons of institutional legitimacy for
not saying that clearly justified measures violate Article III. A third reason for not
limiting the issue of justification to Article XX is that Article XX has a “closed list” of
relevant purposes. If we consider purpose only under Article XX, that would mean
that any measure that pursued a non-protectionist purpose not on the list and that had
a disparate impact would be invalidated. There is nothing in the anti-protectionism
policy of Article III that calls for such a draconian result.

Yet another reason for not considering justification exclusively under Article XX
has to do with the issue of the level of deference that I raised in section V above. Even

53 As stated, this test could be construed as a rational means test or an LRM test, if the question of whether
the products are or are not distinguished by some specified non-protectionist policy is to be decided by the
tribunal for itself. But I explained in section V above why considerations of appropriate deference convert the
means/ends test into a protectionist purpose test.

54 In *Chile—Alcohol*, of course, the issue was not “likeness”, but “so as to afford protection”. But my claim is
that under III:4, the issue of “so as to afford protection” is in effect included in the issue of likeness. We would
also proceed in much the same way under III:4, *mutatis mutandis*, if the regulatory purpose inquiry, which is
required by the “so as to afford protection” idea, were considered under the rubric of “less favourable treatment”
rather than under the rubric of “likeness”.

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No claim asserted to original government works.
FURTHER THOUGHTS

with regard to policies that are listed in Article XX, if we consider them only under XX, we will surely be moved to give a good deal of deference to the regulating country's empirical findings. So far as the cases that come to Article XX from Article III are concerned, we might be able to get the right results by this route. But Article XX exceptions apply to more than Article III; they apply to the whole of the GATT. It is not at all clear—indeed it seems quite doubtful—that we should want to give the same level of deference to governmental findings when we are considering claimed exceptions to unambiguous violations of Articles I, or II, or XI that we would give in Article III cases if we are using Article XX essentially to complete the initial inquiry into the existence of a violation. So, using Article XX to, in effect, complete the Article III analysis, would either lead to finding too many exceptions in other sorts of cases, or else it would mean we could not have a consistent approach to Article XX for the GATT as a whole.

Let me turn now to the *Border Tax Adjustments* report. The list of criteria for likeness in this report notably fails to include any reference to regulatory purpose, and the prominence of the *Border Tax* list has encouraged the view that regulatory purpose is not relevant to likeness under Article III. Of course, the Appellate Body in *Asbestos* said the *Border Tax* list is not exclusive, which is good. But thinking about who proves what and how will bring out a very specific difference between the border tax adjustment context and the Article III context. We shall see that the reason for excluding regulatory purpose from the likeness inquiry in the border tax context has no force in connection with Article III.

First, who will be trying to prove likeness or unlikeness in each context. In the Article III context, it is the challenger who is claiming likeness, and the respondent regulator who is denying it. The reason is that in Article III, “likeness” is one of the conditions for a restriction on the freedom of the regulator. The challenger wants to limit the freedom of the regulator, and hence asserts likeness; the regulator wants to maximize its freedom, to avoid the restriction, and hence the regulator denies likeness. In contrast, in the border tax context, “likeness” is one of the conditions for a permission, for expanding the freedom of the regulator. The regulator is allowed to make adjustments on the condition (inter alia) that certain products are “like”. So in this context, the regulator will assert likeness, and the challenger will deny it.

In sum, in the Article III context, the challenger asserts likeness and the regulator denies it; in the border tax adjustment context, the regulator asserts likeness, and the challenger denies it. Why does this difference matter? Remember the standard

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56 EC—Asbestos, para. 102.
57 This is true both in III:2, which, syntactically, imposes a prohibition, and in III:4, which, syntactically, imposes a positive requirement.
58 See GATT, Article II:2(a) and Note Ad Article XVI. This is not altered, on the export side, by Annex I, paras (g) and (h), of the Agreement on Subsidies and Countervailing Measures, since it will still be the regulator who tries to identify like products on which taxes as large as the export-remission were levied (or on which as much prior-stage cumulative indirect tax was remitted) when sold for domestic consumption.
dynamic of an Article III proceeding as we have described it. The challenger’s *prima facie* showing of a violation, specifically of protectionist purpose, is likely to consist just of presenting the facts about the measure, and its disparate impact, and the absence of any apparent innocent explanation. If a non-protectionist purpose is suggested in justification of the measure, it will be suggested by the respondent regulator, the party who is arguing against a finding of likeness. The crucial point is that if a non-protectionist purpose is adduced, it will be to show unlikeness; that is what such a purpose is useful for showing. The same dynamic is seen, *mutatis mutandis*, in the border tax adjustment context. After the challenger’s initial claim that the adjustment is either an impermissible border charge (in the import context) or an impermissible export subsidy (in the export context), the first move in the border tax adjustment argument proper is made by the regulator/respondent, who is asserting likeness, and who will make a *prima facie* case for the permissibility of the border adjustment on the basis of physical similarity or (perhaps) competitive relationship. The challenger will now have the burden of going forward again and will be the party, if any, who appeals to a specific non-protectionist purpose to show unlikeness.

That is the logic of the situation—but if it sounds odd, it is. To allow the challenger to bring in purpose this way would essentially be to allow the challenger to foist a purpose on the regulator. To most readers it will probably seem that we should not allow the challenger to assert the unlikeness of some pair of products on the ground of a regulatory purpose introduced into the proceeding by the challenger as something about which the regulator ought to care. But if we disallow that, then in effect we disallow consideration of regulatory purpose in the border tax context has no force at all in the Article III context. In the Article III context, if anyone wants to assert the relevance of some non-protectionist purpose, it will be the regulator, and the regulator will be claiming that purpose as its own. We will of course want to evaluate the sincerity of the regulator’s claim, but it is obviously appropriate for the regulator to say “This purpose is mine”, in a way it is not appropriate for the challenger to say “This purpose should be his”. In sum, we have an explanation of why regulatory purpose does not appear on the *Border Tax* list of criteria that has no force at all in the Article III context.

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59 The general reason for this is a deep asymmetry between “likeness” and “unlikeness”. We can show products are unlike (i.e., we can justify different treatment) by showing that they differ with respect to any one non-protectionist purpose. In order to show definitively by positive argument that they are like (that the same treatment is required), we must consider all possible non-protectionist purposes and show the products do not differ with regard to any of them. How we avoid this problem and make a claim of likeness possible in the Article III and border tax contexts is explicated in the text.

60 In the border tax context the focus is directly on possible non-protectionist purposes, and not on protectionist purpose, because the border tax provisions are authorizing something that is a sort of “protection”. The overt purpose of the regulator in making the adjustments is to improve the competitive situation of its products; but this is a context where we regard that as acceptably “removing an artificial disadvantage” rather than unacceptably “creating an advantage”. Hence the challenger will get no mileage out of simply showing a “protective” purpose.
FURTHER THOUGHTS

It might seem that no challenger would have the chutzpah to assert a regulatory purpose for the regulator in the way I have imagined, but in fact the European Communities did just this in the border tax adjustment aspect of the Superfund case.\(^{61}\) The United States was applying a tax to certain imported products at the border that reflected a tax imposed within the United States on a component chemical. The EC argued that the United States' reason for the tax on the chemical was local environmental damage caused by its production, and that that reason did not apply to chemicals manufactured in the European Community, so the adjustment should be disallowed. The European Community was appealing to what it claimed was the US policy in order to show that chemicals made in the European Community were not "like" the same chemical made in the United States. The Panel rebuffed this argument, saying in effect that the European Community would not be allowed to speculate in this way about the US policy. It pointed out other possible policies—such as revenue collection, or discouraging the use of certain chemicals not just because of their mode of production, but because of life-cycle environmental effects—and it said that it would not allow consideration of the regulatory policy on the issue of likeness.\(^{62}\)

I am not absolutely committed to the view that the Superfund Panel was right. If the European Community could have proved convincingly that the US' purpose actually was uniquely what they claimed, they had a plausible theoretical point.\(^{63}\) But there is surely much to be said for a flat rule that forbids this sort of imputation of a policy by the challenger. The case here seems quite different from the challenger trying to prove protectionist purpose under Article III. Protectionist purpose is one specific purpose, which we know to be a standing temptation for every Member state, and which can often be the subject of an extremely convincing prima facie demonstration just from the face of the statute. Allowing, even requiring, the challenger to prove protectionist purpose serves the central purpose of the WTO system, and it does not invite a fishing expedition by the challenger among all possible purposes that might distinguish the products the challenger wants to distinguish (in the border tax context). In any event, my point is that assuming the Panel was right to refuse to consider regulatory purpose, the reason it was right is the incongruity of the challenger asserting that some particular non-protectionist purpose identified by the challenger should or does control the respondent regulator's product classification. This is a reason for excluding regulatory purpose from the Border Tax criteria for likeness that is totally irrelevant to the Article III context, where it is the respondent that is claiming some particular non-protectionist purpose as its own.


\(^{62}\) Ibid., para. 5.2.4.

\(^{63}\) On examination, the issue gets a lot more complicated than it looks at first. The special nature of border tax adjustments is entangled with issues about the relevance of regulatory purposes based on production methods. And we need to consider the interaction of possible border tax adjustments by both countries at both ends of the transaction.
Some readers may react that this analysis, however valid and interesting, is irrelevant, because when the Border Tax Working Party produced its list of criteria, it was talking about “like” in all of its occurrences in the GATT. Formally, that is correct. I still think the analysis is a useful cautionary tale. And with regard to the Report itself, I would remind the reader that (1) the Working Party describes its list just as “some criteria [that] were suggested”, and it does not claim or even suggest that the list is exclusive; (2) we should not discount the fact that the report as a whole was squarely focused on the tax adjustment question, which may have influenced what criteria were suggested; and (3) the report was written before there was serious attention to the problem of de facto discrimination by origin-neutral rules under Article III, the context in which regulatory purpose becomes a crucial determinant of likeness.

VIII. PRECEDENT FOR THE DISPARATE IMPACT VIEW—THE EMPEROR'S CLOTHES

If we decide (mistakenly in my view) that “competitive relationship” is both necessary and sufficient for likeness, and if we decide further that “less favourable treatment” just means disparate impact on competitiveness (a further mistake, given the posited interpretation of “likeness”), we are left with what I have referred to as the “disparate impact” view of Article III. Basically, the disparate impact view says that any measure which improves the relative competitive position of products (that happen to be) made domestically vis-à-vis products (that happen to be) made abroad is a violation of Article III and must be justified, if at all, under Article XX. I have already given reasons for rejecting the disparate impact view, but my impression is that it remains the conventional wisdom of the trade community.

This is remarkable, since the disparate impact view has essentially no support in the jurisprudence. So far as I am aware, there is not a single adopted report, WTO or GATT, that clearly relies on it. And such weak positive intimations as there might be in a few GATT reports are balanced by much more important negative signals from the Appellate Body in the WTO period. The first significant report for these purposes is the first Japan—Alcohol Panel, under the GATT. This report may have seemed to support the disparate impact view, especially to those who are predisposed to find that message, but the theory of the report is actually quite unclear. The Panel’s primary theoretical concern was to reject Japan’s argument that, in effect, any origin-neutral measure was ipso facto legal. Rejecting that argument tells us that de facto violations are possible; it does not tell us how we identify de facto violations. Although the Panel finds multiple violations of Article III:2, it seems willing at various points to consider possible justificatory regulatory purposes. The Panel twice says it can see “no objective difference” between pairs of products, where it seems to mean “no objective difference

64 Border Tax Report, para. 18.
66 Ibid., paras 3.10, 5.2-5.5.
relevant to a plausible non-protectionist purpose” (such as taxing on the basis of alcohol content).67 and although the Panel rejects as illegitimate the purpose of adjusting tax rates to the tax-bearing ability of the traditional consumers of a product, it does consider that as a possible purpose.68 In any event, even if one thought that this report on balance suggested the disparate impact view, it would be superseded by the contrary position of the Appellate Body in the later Japan—Alcohol.

The Appellate Body in Japan—Alcohol is commonly thought to have rejected consideration of regulatory purpose, and it might be thought in consequence to have adopted the disparate impact view. I have already suggested that the Appellate Body in Japan does not reject consideration of regulatory purpose.69 But even if we think it does reject consideration of regulatory purpose, it plainly does not establish the disparate impact view. For a start, the analysis of Article III:2, first sentence, does not embody the disparate impact view. The Appellate Body tells us that “like” must be very narrowly interpreted,70 and it seems to end up meaning something like “virtually physically identical”; that is obviously much narrower than “in a competitive relationship”. With regard to III:2, second sentence, by the time the first two stages of the analysis are completed, the Appellate Body has found that “directly competitive or substitutable products” are “not similarly taxed”. In effect, it has found disparate competitive impact. If it were relying on the disparate impact view, the case would be over. But the case is not over; there is still the third step to go through, involving the separate inquiry into “so as to afford protection”. So, whatever “so as to afford protection” means to the Appellate Body, it means something distinct from disparate impact. Notice also that in insisting on the third step, the Appellate Body is quashing the crude disparate impact inclinations of the Panel, just as the Appellate Body does in Asbestos. In Japan, unlike Asbestos, the Appellate Body ultimately agrees with the Panel in finding an Article III violation, but in both cases the Appellate Body is rejecting the Panel’s disparate impact theory for something (in both cases an unclear something) with more nuance.71

Probably the cases that are most often thought to establish the disparate impact view are the cases that say Article III is concerned with “equality of competitive conditions”, such as Italian Agricultural Machinery,72 the Superfund case,73 and the Section 337 case.74 But none of these cases establishes the disparate impact view, for the simple

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67 Ibid., paras 5.9(a),(b).
68 Ibid., para. 5.13.
69 See sections II and III above; and Regan, as note 2 above, 476-477.
70 Japan—Alcohol, s. H.1(a).
71 Notice that one feature of Japan—Alcohol that is continued totally undisturbed in Korea—Taxes on Alcoholic Beverages, WT/DS75 and DS84/AB/R (adopted 17 February 1999), and Chile—Alcohol is this rejection of the disparate impact view. Both of the later cases continue the same basic framework from Japan that I have explained in the text is inconsistent with the disparate impact view.
73 As note 61 above.
reason that none of these cases addresses the hard question about “likeness”. The hard question about “likeness” is what it means in cases involving origin-neutral measures (such as Japan—Alcohol and Asbestos), and the disparate impact view is committed to a particular answer: “likeness” means simply “being in a competitive relationship”. But the three cases named above all involved origin-specific measures, and therefore no serious issue about likeness at all. In Section 337 there is literally no discussion of likeness. In Superfund a brief and trivial discussion of likeness is followed by the observation that the United States effectively conceded the Article III violation, arguing only that it was de minimis and so gave rise to no impairment under Article XXIII.

In other words, these cases simply presuppose that it is like products that are entitled to equal competitive conditions, without giving us any general insight into what “likeness” means. Saying that like products are entitled to equal competitive conditions leaves completely open the question of how to define likeness. In particular, saying that like products are entitled to equal competitive conditions does not entail that likeness itself is to be defined solely by reference to the existence of competition. The proposition that like products are entitled to equal competitive conditions does suggest that competitive relationship is a necessary condition for likeness, since only a product that is in competition will benefit from the equal competitive conditions—but we already knew that anyway. The real question, as before, is if competitive relationship is sufficient for likeness. As explained, none of the three cases named casts any light on this, because none of them involved a significant issue about likeness.

None of them addresses the issue of whether health risk, say, can make products unlike. Ironically, the case that most strongly suggests the disparate impact view is Asbestos itself. It is easy to read the Asbestos report as saying that competitive relationship is necessary and sufficient for likeness, which gives one element of the disparate impact view. And this element, combined with the disparate impact reading of “less favourable treatment”, would give the disparate impact view. However, I have pointed out that the report is not completely clear about the sufficiency of competitive relationship for likeness. And the report is even less clear—indeed, totally unclear—that “less favourable treatment” is just a matter of disparate impact. Most importantly, whatever the logic of the Asbestos report might suggest, it does not read at all like a disparate impact opinion. The Appellate Body struggled to make the health risk from

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75 With regard to Superfund, remember I am now talking about the Article III aspect, where there was no serious “likeness” issue, and not the border tax adjustment aspect, discussed in section VII, where there was such an issue.

76 Incidentally, the origin-specificity of the measure also removes any significance from the Panel’s observation that it finds “no evidence that [the illegal differences in treatment] had been deliberately introduced so as to discriminate against foreign products”. Section 337, para. 6.2.

77 Superfund, paras 5.1.1, 5.1.2.

78 See again note 70 above.

79 See section VI above, note 50; and Regan, as note 2 above, 468.

80 EC—Asbestos, para. 100; and Regan, as note 2 above, 468–471.
asbestos a ground for finding unlikeness—in effect denying the existence of a disparate impact that was obvious to most viewers. To be sure, by claiming that nobody would buy asbestos even in the absence of the regulation, the Appellate Body was able to deny the existence of a competitive relationship between asbestos and PCG fibres, and thus to bring its conclusion within its formal analytical scheme. But the argument is tortured. The insistence on not finding an Article III violation shows that this is not a disparate impact opinion in spirit. The Appellate Body is concerned to rein in the crude disparate impact inclinations of the Panel. So, *Asbestos* does not really support the disparate impact view to any degree. If it seems, ironically, the closest thing we have to a disparate impact report, that is only because no other case supports the disparate impact view even colourably.82

IX. IN A NUTSHELL

*Chile—Alcohol* tells us the “so as to afford protection” inquiry is about regulatory purpose. *Asbestos* tells us the “so as to afford protection” inquiry is in effect part of Article III:4. It follows that III:4 requires consideration of regulatory purpose. The *Asbestos* Appellate Body was plainly reluctant to rely on an argument about purpose; it relied instead on a tortured argument to precisely the conclusion that a purpose analysis would have reached straightforwardly. But it was equally unwilling to accept the obvious analysis under the disparate impact view, as represented by the Panel. The term “protection” in Article III:1, given its ordinary meaning in context, calls for consideration of whether or not there is protectionist purpose. The disparate impact view of “protection” disparages Member State laws that there is no ground to disparage. There is no support for the disparate impact view in the adopted reports. The “less restrictive means” approach shares all the supposed disadvantages of requiring identification of the actual regulatory purpose—and it then collapses into the protectionist purpose approach once we focus on the appropriate level of deference.

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81 See Regan, as note 2 above, 465-467.
82 When I asked a colleague if I had overlooked any cases that somebody might think supported the disparate impact view, he mentioned (not as serious support, but just as cases someone might bring up) the Minnesota tax-credit for microbreweries and the Canadian provinces’ minimum prices on beer. One could write paragraphs on each of these cases, but I shall deal with them summarily. Whatever the Minnesota microbrewery case might suggest if it were a free-standing decision, it seems to me it would take exceptional brazenness to claim it supports the disparate impact view if we remember that it was just one “caselet” in *United States—Measures Affecting Alcoholic and Malt Beverages*, B.I.S.D. 39th Supp. 206 (1993) (adopted 19 June 1992), the *fons et origo* of the “aims and effects” test. With regard to *Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, B.I.S.D. 39th Supp. 27 (1993) (adopted 18 February 1992), there are two points: first, there was a strong whiff of protectionist purpose in the “origin-specific” procedure of setting the minimum price for beer by reference to the prices of domestic producers, see paras 5.29-5.32; second, there was no controverted issue of “likeness”, so the decision does not remotely establish that competitive relationship is all that matters to likeness, which is the central element of the disparate impact view.

Incidentally, if we look at Article I cases, not worrying about just how the tests under Articles I and III might compare, *Spain—Tariff Treatment of Unroasted Coffee*, B.I.S.D. 28th Supp. 102 (1982) (adopted 11 June 1981), might seem to suggest a disparate impact approach, but to the extent that it does, it is surely cancelled by *Japan—Tariff on Import of Spruce-Pine-Fir (SPP) Dimension Lumber*, B.I.S.D. 36th Supp. 167 (1990) (adopted 19 July 1989), which incidentally adopts a clear purpose approach, saying the challenger must show the tariff classification “has been diverted from its normal purpose so as to become a mean of discrimination”, para. 5.10.
The lesson is clear. The disparate impact view, for all its popularity, should be a non-starter. Means/ends inquiry has no justification under Article III (I emphasize, I refer only to Article III) except as it contributes to an inquiry into protectionist purpose. The real choice is between the protectionist purpose view and theoretical obscurity. Of course, cases can be correctly decided without a clear explicit theory. But anyone who regards them as correctly decided must have their own theory, explicit or implicit. Most people's implicit theory, I suspect, is the protectionist purpose view.