FACULDADE DE DIREITO
UNIVERSIDADE DE LISBOA

International Economic Law

2022/2023

Written Exam – 16th June 2023

Time: 90 minutes

Maximum marks: 20

Sample Answers

Please note: *These sample answers structured in bullet points are just a help for you to understand how the written exam was corrected. In the exam you were expected to write a coherent text with full sentences.*

I. (6 marks)

Provide an accurate definition of **two** of the following concepts.

a) Gold Tranche.

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One quarter of an IMF member quota is payable in hard assets and three quarters in the member's own currency. (1 mark).

- Article III (3) AoA.
- Now, one quarter of the quota is payable in Special Drawing Rights (hard assets).
- At the outset of the Fund, one quarter of the quota was payable in Gold.

Drawing from the Fund is allowed but is subject to conditions (1 mark).

- Article V (3) AoA.
- Conditions are set in article V (3) b) AoA.
- Undertakings to be made by the states to get the drawing are examined by the Fund in order to determine if they are consistent with the provisions of the AoA and the policies adopted under them (article V (3) c) AoA).

Gold tranche drawings are not subject to challenge by the IMF (1 mark).

- Gold tranche is the drawing amount in which the holdings of national currency of the IMF will not be raised for more than the member's quota.
    - If a member did not exchange draw already from the Fund, the gold tranche equals one quarter of its quota, the gold contribution to the Fund, as stated above.
- Therefore, members receive *"the overwhelming benefit of any doubt respecting drawings which would raise the Fund's holdings of its currency to not more than its quota".*
- So, drawings amounting to one quarter of a member's quota will not be subject to an examination by the Fund of the undertakings by the member state (article V (3) c)).

- Today, gold tranche is called reserve tranche in the AoA.

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b) Stand-by Arrangements.

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Stand-by arrangement means a decision of the Fund by which a member is assured that it will be able to make purchases from the General Resources Account in accordance with the terms of the decision during a specified period and up to a specified amount. (2 marks).

- Article XXX (b) AoA.
- It is understood that conditionality established in article V (3) b) is applicable to stand-by arrangements.
- Stand-by arrangements provide performance targets on such matters as budgetary deficits, tax collection, removal of subsidies, and rates of inflation, with disbursements or drawing at intervals linked to conformance with the targets.
- Recent practice is that all drawings from the Fund are based on a stand-by arrangement or comparable facility.
- To draw from the Fund, a member applies for a stand-by or comparable facility.
    - Negotiations take place between the staff of the Fund and financial officials of the member state.
    - Usually, a mission is dispatched from the Fund headquarters, both to gather information and to discuss the undertakings that the Fund will require in return for, in effect, making a line of credit available to the state, originally, for six months.
    - The end-product is a Letter of Intent to the Managing Director of the Fund signed by the Minister of Finance or Governor of the Central Bank of the applicant state, in consideration of which the Executive Board approves the stand-by.
- Arrangements may be made for longer periods than six months (Extended Arrangements).

A stand-by arrangement is an arrangement not an agreement (1 mark).

- There has been a good deal of discussion in literature about whether a Letter of Intent and an announcement by the Fund that a stand-by arrangement has been approved together constitute a legally binding agreement.
- A stand-by arrangement is a decision of the Fund assuring that a member will be able to make drawings, it is not understood as an agreement between the member and the IMF.
- The letter of intent by the member is signed by a government official and it is not approved by the legislative branch, as would be required in a treaty or other formal agreement.
- To express that they are not international agreements, contractual language is avoided in letters of intent and stand-by arrangements.
- If a state is out of compliance with the performance targets, the Fund will not automatically cut off disbursement under a stand-by, but the stand-by arrangement itself usually requires immediate consultation, and if the consultation does not result in agreement to modify the performance targets,

the Fund has from time to time suspended disbursement under stand-by arrangements, on the basis that failure to meet the performance criteria has created a new situation not provided for in the stand-by.

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c) Free Trade Area.

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Article XXIV, 8 (b) GATT – a free-trade area shall be understood as a group of two or more customs territories in which the duties and other restrictive regulations of commerce are eliminated on substantially all the trade between the constituent territories in products originated in such territories (1 mark).

- Free trade areas are different from Customs Unions because the latter include the elimination of duties and other restrictive regulations of commerce, also the constituent territories of a customs union apply substantially the same duties and other regulations of commerce to the trade of territories not included in the union (article XXIV, 8 (a) GATT).

Free trade areas and customs union are Preferential Trade Agreements (PTAs) (1 mark).

- In principle, PTAs are inconsistent with most favoured nation (MFN) treatment (article I, 1 GATT),
- But these forms of association are allowed and encouraged by the GATT (article XXIV, 4).
- So, they may be regarded as an exception to MFN principle.

Conditions to be allowed: substantially all the trade; not entailing a raise in duties and barriers to trade in the territories establishing the PTA (1 mark).

- Elimination of duties and other regulations between constituent territories should relate to substantially all the trade.
    - Article XXIV, 8, (a), (i) and (b) GATT
- Tariffs and other barriers be no higher than before the constitution of the PTA (article XXIV, 5, a) and b) GATT).
- Landmark case to the interpretation of these concepts: Turkey – textiles.

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d) Security Exceptions.

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Important exception to the principles of the GATT related to security interests (1,5 marks).

- Article XXI GATT
- GATT does not prevent a contracting party from taking any action "which it considers necessary for the protection of its essential security interests".
- Political exception, related to national sovereignty and national defence and security.

Traditionally regarded as a self-judging measure and no procedure has ever been created to subject a contracting party's assertion of national security to international scrutiny, the provision had the potential to become a significant means for evading GATT obligations (1,5 marks).

- Not to have a commercial purpose, but the only guarantee to that is the interpretation by the members.
- Difficult to control through dispute settlement procedure.
    - Panel report in Nicaragua/US (1986): "both by the terms of Article XXI and by its mandates [the Panel] was precluded from examining the validity of the United States invocation of Article XXI".
- History shows that it was invoked in times of confrontation, in the right way (e.g. EC, Canada, Australia/Argentina during the Falklands/Malvinas war of 1982; US/Nicaragua during the Sandinista control of Nicaragua and guerrilla activity in 1984-85; EC/Yugoslavia after the break-up of the former constituent territories in 1991-92).
- Case Russia – Traffic in Transit
    - Article XXI(b)(iii) is not totally self-judging; the invocation is limited to circumstances that objectively fall within the scope of the three subparagraphs of article XXI (b).
    - Article XXI(b)(iii) implies the existence of an emergency in international relations. The situation can not be of mere political or economic differences between members.

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II. (6 marks)

With reference to the underlying legal framework whenever applicable, comment **<u>two</u>** of the following sentences.

a) The United States has a veto power because of its IMF quota of 17,43 per cent.

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Voting rights are designed to reflect economic importance of member states as shown in quotas in the Fund, adjusted to give each member state a minimum voting power (1,25 marks).

- The Fund operates on the principle of consensus in all organs.

- However, when there is a need to vote, voting rights are designed to reflect economic importance of member states as shown in quotas in the Fund, adjusted to give each member state a minimum voting power.
- Total votes of each member equals the sum of its basic votes and its quota-based votes (article XII:5, a) AoA).
    - Basic votes are the number of votes resulting from the equal distribution among all the member of 5,502 percent of the aggregate sum of the total voting power, so basic votes are equal to all members.
    - Quota-based votes are the number of votes resulting from the allocation of one vote for each part of a country's quota to one hundred thousand special drawing rights.

Some decisions are subject to super-majorities and under the Amended Articles, a substantially increased number of decisions require super-majorities (1,25 mark):

- In some instances, 70 per cent of total voting power (Article V(7)(g) (Postponement of Repurchase Obligations); Article V(8) (Determination of charges); Article XV (Determination of method of valuation of Special Drawing Rights)).
- In others 85 per cent (Article III(2)(c) ((Adjustment of quotas); Article IV(4) (Introduction of fixed exchange rate system); Article XVIII (Allocation, cancellation, and determination of conditions of use of Special Drawing Rights); Article XXIX(b) (Overruling Decision of Committee on Interpretation)).

Conclusion: the sentence is true, If the United States has a quota of 17,43%, voting power depends largely on quota-based votes, and there are decisions that are adopted with eighty-five per cent majorities, the United States will have a veto power on these decisions, meaning they are not adopted when the United States votes against them (0,5 marks).

- The same applies when the European Union votes as a bloc.

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b) The IMF does not have a dispute settlement body as the WTO has.

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International Economic Law dispute settlement has a long history, generally the choice of means depends on the consent of the parties (0,5 marks).

- Sometimes, resolving international economic issues relies on the use of force.
- To avoid going to war, UN charter provides in article 33(1): *"The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."*

- Besides the use of force, one can group means of solving issues in diplomatic means and legal means.
    - Legal means in IEL are those established in International Agreements.
- To use one of those, parties to the dispute must consent on its use.

Contracting parties to the GATT agreed on a system of dispute settlement (1 mark).

- Article XXII and XXIII of the GATT.
- Dispute Settlement Understanding signed in 1995.
    - Established the Dispute Settlement Body
    - Procedure to resolve disputes
    - Panels and panel reports
    - Appeal Body
    - Implementation

Articles of Agreement of the IMF do not provide for a dispute settlement mechanism, but just for a procedure of interpretation before the executive board and the board of governors (1 mark).

- Obligations contained in AoA suffer from a lack of enforceability and there is no formal system for the settlement of dispute regarding adherence to or breach of IMF obligations.
- Questions of interpretation may be raised with the Executive Board (article XXIX, a) AoA).
- An "appeal" possibility to the Board of Governors within three months from the decision of the Executive Board (article XXIX, b) AoA).
- Recourse to the ICJ is available in theory, but this was never sought.

Conclusion: the sentence is true (0,5 marks).

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c) Most-favoured-nation clause is a powerful tool of trade liberalization at a multilateral level.

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Most-favoured-nation clause is established in article I, 1 of the GATT, establishing the obligation to apply duties and similar charges on the import of goods equally among Contracting Parties of the GATT, regardless of the origin of the goods (1,25 marks).

- International trade should be conducted based on non-discrimination principle.

A most-favoured-nation clause enshrined in the GATT allows the parties to benefit from the advantages granted from a contracting party to another (third) State. Every WTO member will benefit from a reduction of barriers to trade made by one of them (1,25 marks).

- Being the GATT a multilateral agreement, applicable to all members of the WTO, article I, 1 MFN clause is multilateral too, when a member of the WTO concedes a commercial advantage, it should concede the advantage to all members of the WTO. In other words, WTO members cannot pick up favorites with respect to the laws which they levy against traded goods.
- MFN is unconditional – offered to all WTO members regardless of whether any concession is offered in return.
- Advantage: distributing the advantages gained by the shrewdest negotiators, perhaps richest countries, to countries which have weaker negotiators, such as developing countries.
- Once something is offered to one, it must be offered to all. So, it allows that every WTO member benefit from the reduction of trade barriers intended to be reduced to only one other member, accelerating trade liberalization.
    - In the 80's, Ernst-Ulrich Petersmann concluded that if the MFN clause was not established in the GATT, it would be necessary to sign 14.000 bilateral agreements to reach the same effects of trade liberalization.

Conclusion: sentence is true, MFN obliges that measures reducing barriers to trade from a WTO member are applied to all of its members (0,5 marks).

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III. (8 marks)

Patria, Xandia and Hopeland are members of the WTO.

Xandia and Hopeland are countries with flourishing asbestos industries.

Patria considers asbestos a threat to human health. Because of that, Patria imposed a ban on importation of asbestos from both Xandia and Hopeland.

However, Patria continued to produce asbestos products for domestic consumption and export.

After that, Hopeland reached a deal with Patria in order to export 5.000 kg of asbestos products per month to Patria provided that it imports the same value in other goods from Patria.

Xandia argues that it is subject to discriminatory treatment because it may not export to Patria, and Patria continues to produce, consume, import and export asbestos.

You have been asked to advise Xandia's government. Explain and justify from a substantial and a procedural standpoint what you would suggest.

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A ban on imports is a quantitative restriction (QR). So, Patria imposed a QR. (0,5 marks)

- QRs are in general prohibited by article XI, 1 GATT.

Article XX GATT allows a WTO member to maintain certain measures which would otherwise be inconsistent with WTO obligations. (5 marks)

- Patria invokes that asbestos is a threat to human health. Lit b) can be applicable concerning the reason invoked.

- Exception under lit b) of the article XX of the GATT is applicable to measures *necessary to protect human life or health*.
    - Meaning of necessary (necessity test): the measure must be "necessary" to the protection aimed. It has to be determined if there are any measures compatible or least incompatible with GATT principles that Patria could adopt aimed at the same objectives (Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes).
- Chapeau: in addition to satisfying one of the elements of subparagraphs a) to j), measures to be considered as exceptions under article XX must comply with the requirement of non-discrimination embodied in the language *"arbitrary or unjustifiable discrimination where the same conditions prevail or a disguised restriction on international trade"* of the introductory part (or chapeau) of article XX GATT.
    - Patria entered in negotiations with Hopeland and they have reached a deal for the end of the import ban. It makes the measure discriminatory (*arbitrary and unjustifiable? – good faith principle should be used to assess*), because Patria did not enter negotiations with other countries in the same conditions, as Xandia is (US Shrimp).
    - The measure could also be considered as a *disguised restriction to trade*, because Patria imposed it regarding environmental concerns, but Patria still has asbestos industries, and still uses asbestos, also Patria concluded an agreement to import asbestos from Hopeland.
- Xandia may also question the bilateral agreement between Hopeland and Patria on the grounds of Most-Favoured-Nation clause (article I, 1 GATT), because the concession is not being awarded to Xandia. And article XIII non-discriminatory quantitative measures.

In conclusion, the measure is not covered by any exception, so it is a prohibited QR and it is discriminatory (0,5 marks).

From a procedural standpoint (2 marks):

- Xandia should start by requesting consultations with Patria (article 4 DSU), stage that is deemed as mandatory.
- If an agreement is reached, the dispute is settled (article 3.7 DSU). If not, Xandia can proceed requesting the establishment of a panel (article 4.7 and article 6 DSU), the request specifies the measures at issue.
- A panel is an ad hoc body established for dealing with a single dispute, it is constituted by experts in International Economic Law (article 8). The panel request shall (1) indicate whether consultations were held; (2) identify the specific measures; and (3) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.
- Panel receives written and oral submissions, and it is expected to present a report (panel report) to the Dispute Settlement Body with findings and conclusions (article 11 DSU).
- Being the report adopted by the Dispute Settlement Body (article 16.4 DSU).
- It is implemented through the implementation procedure in article 22.
- If the report is not in favour of Xandia, there is the possibility to appeal (article 16.4 and article 17 DSU), but now due to the fact that the Appellate Body does not have any elements, Xandia will appeal into the void.

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