FACULDADE DE DIREITO
UNIVERSIDADE DE LISBOA

International Economic Law

2022/2023

Written Exam – 19th July 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) Special drawing rights.

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Special drawing rights (SDR) were created by the IMF (0,5 marks).

- SDR were created by a decision of the Board of Governors of the IMF (1969),
  - Following the authorization given by the first amendment to the Articles of Agreement (1968) by a decision of the Board of Governors with an 85% qualified majority.
  - It substituted the gold as the hard asset in which one quarter of the quota of a member should be paid (article III (3) (a) AoA).

SDR are an international reserve asset and they are used as unit of account for the IMF (1,5 marks).

- SDR is not a currency, it is simply a claim to the Fund's resources in freely usable currencies (article XXX (f) AoA).
- IMF does not back SDR's value (separation of assets and property in Article XVI (2) AoA and liquidation in Article XXV).
- SDRs are used as unit of account for the IMF, for instance members' quotas are expressed in SDR (article III (1) AoA).

SDR may be used to buy freely usable currencies (0,5 marks).

- SDRs may be used as provided in article XIX to purchase freely usable currencies from other members.
  - There are incentives to use: allocation pays charges, but holdings earn interest (charges equal interest) - a member holding more SDRs than allocated earns net interest (Article XX).
  - Using SDRs: members may agree bilaterally to exchange SDRs (article XIX (2) (b) AoA); or the IMF may designate members with strong reserves to purchase SDRs from

members with wear external positions (Article XIX (2) (a), subject to a requirement of need – Article XIX (3)).

- Other than States, only prescribed holders may use SDRS (e.g., BIS, ECB and regional development banks) acquired from members (Article XVII).

Value of SDRs is determined by the Fund (0,5 marks).

- Article XV (2): determined by the Fund (70% majority the respective weight and 85% majority for changes to the principle of valuation).
- Originally it was defined as a gold equivalent to one dollar.
- Since 1974, it is valuated based on a composite basket of currencies, weighted toughly in accordance with the issuing countries' shares of world trade and finance.

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b) National treatment.

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National treatment is a key principle of non-discrimination and states that a WTO member shall not treat imported products less favourably than domestic products once the products have entered internal commerce. (1 mark)

- Legal basis: Article III GATT
- Under this provision, WTO members must regard all products as equal in terms of how they are affected by the internal legal system.
- The broad and fundamental purpose of National Treatment is to avoid protectionism in the application of internal tax and regulatory measures.

National treatment and Most-Favoured-Nation (MFN) are key principles of GATT non-discrimination (1 mark).

- MFN implies that a good originated from a country should be granted an advantage granted to the same good originated from other country and it is essentially applied to border measures.
- National treatment establishes that a good originated from another country cannot be treated less favourably as the same good originated in the importing country.
    - (Note the difference between "any advantage" and "less favourably").
- Both principles prohibit discrimination whether it is de jure or de facto, essentially meaning discrimination expressly based on nationality or covertly linked to nationality but superficially disguised to appear to be based on some other factors.
- The national treatment obligation is seen as being more demanding on WTO members than MFN because it interferes with a state's own internal regulation.

National treatment implies no less favourable treatment to like products and should be applied to all internal measures, including taxes and charges, the legal system and other internal regulations. (1 mark).

- Like products should be treated no less favourably regardless the origin. Relevant criteria accepted by the Appellate Body to determine likeness:
    - End-uses in a given market;
    - Consumers' tastes and habits;
    - Products' properties, nature and quality;
    - Customs classification.

- All internal measures should be subject to an aim-and-effects test in order to determine if there is a violation of National Treatment or if the measure pursues a legitimate goal regarding National Treatment.

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c) Anti-dumping measures.

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Dumping is essentially price discrimination in international markets (0,5 marks).

- Dumping is a sale of products abroad at a price lower than the normal value or, roughly speaking, the home market price (article VI GATT).

Anti-dumping measures are specific actions against dumping, which may result in imposition of higher duties, price undertaking or provisional measures in the form of cash security or bond. (1,5 marks).

- Following article VI of the GATT, which defines dumping as stated above, Anti-Dumping Agreement drafted during the Uruguay Round recognizes the right of members to counteract injurious dumping while at the same time imposing substantive conditions and rules on the conduct of the investigations and the imposition of anti-dumping measures.
- WTO members are allowed to depart from key GATT principles when dealing with dumping, for instance members Anti-Dumping Agreement allows WTO members to impose anti-dumping duties in excess of the tariffs as negotiated among members as part of their Schedule of Concessions.

Anti-dumping measures should be limited to the amount of the margin of dumping and only when there is a material injury to an established industry (1 mark).

- Valuation of dumping is important as it is the limit to the amount of the anti-dumping measure (article VI, 2 GATT).
- Rules on valuation are established in article 2 of the Anti-Dumping Agreement.
- To be allowed to apply an anti-dumping measure, there has to be a material injury (article VI, 1 GATT).
- Rules on determination of injury are established in article 3 of the Anti-Dumping Agreement.

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d) Enabling clause.

The enabling clause is the decision of the GATT Contracting Parties of 28 November 1979 on "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries" (1 mark).

- Adoption of the decision by a two-thirds majority allowed by the waiver clause provided in Article XXV, 5 GATT.

This decision allows a more favourable treatment to contracting parties qualified as developing countries (1,5 marks).

- Exception to MFN as provided in paragraph 1 of the decision, so concessions made based on this decision do not need to be extended to other WTO members.

- Paragraph 2 specifies the most favourable treatment measures, for instance it may be a preferential tariff treatment, more favourable treatment concerning non-tariff measures.
- Under this decision, developed countries are allowed to establish generalized systems of preferences in which developed countries offer non-reciprocal preferential treatment (such as zero or low duties on imports) to goods originating from developing countries.

Beneficiaries of this treatment are determined in a self-judging way (0,5 marks).

- The GATT specifies the term 'developing countries' in Article XVIII:1 as 'those contracting parties the economies of which can only support low standards of living and are in the early stages of development'.
- In practice, classification of a State as a developing country is self-judging. When a country claims status as a developing country, this self-assessment is, as a rule, accepted by the other Member States on a regular basis. China claimed in the accession process developing country status, but many commitments assumed by China do not support this claim.
- This self-judging way of classification contrasts with article XI, 2 of the WTO Agreement attributes a privileged position to the States classified as least developed countries by the United Nations.

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II. (6 marks)

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

a) A stand-by is an "arrangement", not an "agreement".

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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. (1 mark).

- 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 of the IMF approves the stand-by.

A stand-by arrangement is an arrangement, not an agreement (2 marks).

- 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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b) After a panel report, members of the WTO may appeal but now they are appealing into the void.

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After a panel report, members are allowed to appeal to the Appellate Body (1,5 marks).

- Under Dispute Settlement Understanding (DSU, 1994), panels are requested and therefore established after consultations fail to resolve the dispute between countries (article 4.7 DSU).
- A panel is an ad hoc body composed of usually three well-qualified persons appointed by the Secretariat (article 8.1 and 8.5 DSU).
- Panels are expected to provide a report in form of a recommendation to the full membership of the WTO sitting as Dispute Settlement Body, which will adopt the report unless there is a consensus in rejecting the panel report (article 16.4 DSU).
- Prior to the adoption of the Panel report, parties to the dispute may formally notify the intention to appeal regarding the decision in the panel report, in that case the panel report will not be adopted by the DSB (article 16.4 DSU).
- The appellate body shall hear appeals from panel cases (article 17.1 DSU).

Although there is a legal basis for a standing Appellate Body to hear appeals from Panel Reports, the Appellate Body has not any member, hence WTO members may appeal but they are appealing into the void. (1,5 marks)

- The Appellate Body is a standing tribunal, established by the Dispute Settlement Body (article 17 DSU).
- DSB appoints seven persons to serve on the Appellate Body for a four-year term (article 17.2 DSU).
- Three of the seven shall serve in each case (article 17.1 DSU).
- The appointment of Appellate Body members is made by consensus (article 2.4 DSU).
- Since the Trump administration, the United States are vetoing every nomination or reappointment of members; currently, since 2020, there are no members on the Appellate Body.
- So, although countries have the right to appeal, they are appealing to a body that does not have any member, therefore it may not hear appeals.

c) The concept of preferential trade agreements, to an extent, is antithetical to the concept of MFN-based trade.

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Preferential trade agreements (PTA) are economic integration agreements between countries allowed by GATT and GATS in which PTA contracting parties agree to lower barriers to trade between them (1,5 marks).

- Legal basis: Article XXIV GATT and article V GATS
- PTA may consist of Free Trade Areas or Customs Unions
    - Free Trade Areas 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 (article XXIV (8) (b) GATT).
    - Customs Union have the same characteristics of a free trade area and additionally contracting parties agree to apply substantially the same duties and other restrictive regulations of commerce to the trade of territories not included in the union (article XXIV (8) (a) GATT).
- Thus, the duties and other restrictions to trade are different between the members of a PTA than those applicable to all other WTO members.

Sentence is true, in principle PTA are inconsistent with most favoured nation (MFN) treatment, because there are more favourable rules applied only to the members of a PTA not to all WTO members (1,5 marks).

- MFN is established in article I (1) of the GATT and it consists of the obligation to apply duties and similar charges on the import or export of goods equally among Contracting Parties of the GATT, regardless of the origin of the goods.
    - It is a part of non-discrimination principle.
- PTA, as explained, consists of agreements in which contracting parties establish more favourable rules to trade among them.
- So, they are antithetical to the MFN principle.
- PTAs are allowed by article XXIV of the GATT.
    - Despite the considerations that led to the institution of MFN as a cornerstone of the GATT, drafters of the GATT recognized that voluntary regional agreements could advance closer integration among economies through freedom of trade, in other words an MFN based system could coexist with regionalism.

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III. (8 marks)

Patria, Xandia and Hopeland are members of the WTO.

Xandia and Hopeland are countries with flourishing fishing industries.

Patria is an environmental concerned country and considers fishing a threat to sea and marine life. Because of it, Patria imposed a ban on importation of fish products from both Xandia and Hopeland.

Patria continued to produce fish products for domestic consumption and export.

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

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

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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The ban of fish products imposed by Patria is prohibited by the GATT (2 marks).

- A ban on imports is a quantitative restriction (QR).
- QRs are in general prohibited by article XI, 1 GATT.
- QRs on fish products can be imposed under article XI, 2, c) GATT.
    - Despite that being possible, the requirements are not met to the application of that exception.

The ban seems to be allowed by the exceptions established in article XX, b) and g), but the measure does not fulfil all the conditions established by the exceptions (4 marks).

- Article XX GATT allows a WTO member to maintain certain measures, which would otherwise be inconsistent with WTO obligations.
    - Patria invokes that fishing is a threat to sea and marine life. Lit b) and lit g) can be applicable concerning the reasons invoked.
    - Exception under lit g) is applicable to measures *relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.*
        - Measures applied, as seen, are not made effective in conjunction with restrictions on domestic production or consumption. So, requirements to apply lit g) are not all fulfilled, meaning that the measure is not justified under lit g).
    - Exception under lit b) of the article XX of the GATT is applicable to measures *necessary to protect animal life*.
        - 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.

        - Patria entered in negotiations with Hopeland and they have reached a deal to end 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 fish industries, and still consumes fish and fish products, also Patria concluded an agreement to import fish and fish products from Hopeland.
    - Xandia may also question the bilateral agreement between Hopeland and Patria on the grounds of Most-Favoured-Nation clause, because a concession has not been awarded to Xandia. And article XIII non-discriminatory quantitative measures.
- In conclusion, the measure is not covered by any exception, and it is discriminatory.

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).
- Before the adoption of the report, if it does not favour 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.
- Being the report adopted by the Dispute Settlement Body, by a negative consensus (article 16.4 DSU), it is implemented through the implementation procedure in article 22.

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