

Regulating TRQ Schemes Under WTO Law: Time to Throw Away Old *Bananas*?

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Tariff-rate quota (TRQ) schemes are a commonly used, yet controversial trade policy instrument to regulate market access for sensitive products. In examining their regulation, the Appellate Body in European Communities' (EC) – Bananas III (Article 21.5 – Ecuador II) (Article 21.5 – US) held that these measures are regulated by both Articles I:1 and XIII General Agreement on Tariffs and Trade (GATT) since the provisions establish 'distinct' notions of non-discrimination. This article argues that the Appellate Body's approach creates an unclear result based on a false distinction between Articles I:1 and XIII. Instead, World Trade Organization (WTO) jurisprudence suggests both obligations serve to create expectations of equality of competitive opportunities, even though they develop distinct approaches for achieving this end. It is proposed that, in line with the principle of judicial economy, Article XIII:5 should be interpreted as creating a carve-out from the Article I:1 Most-Favoured-Nation (MFN) obligation.

Keywords: WTO, Tariff-rate quotas, Most-Favoured-Nation Treatment, non-discrimination, Article I:1 GATT, Article XIII GATT, carve-out, normative conflict, harmonious application

1 INTRODUCTION

On 27 December 2021, in a bid to end its trade war with the European Union (EU), the United States agreed to replace the section 232 tariffs imposed on EU steel and aluminium imports by introducing a tariff-rate quota (TRQ) scheme.¹ From a policy perspective, the decision to use a TRQ scheme seems well-justified: while removing the Trump Administration's protectionist section 232 measures, the TRQ scheme allows for restrictions to be placed on the overall quantity of sensitive product imports and for tariff rents to be earned while political tensions are decreased. Yet, this is only half the story of TRQ schemes: their use remains highly contentious within international trade relations. They have notably been the

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¹ The White House, *A Proclamation on Adjusting Imports of Steel into the United States* (27 Dec. 2021), www.whitehouse.gov/briefing-room/presidential-actions/2021/12/27/a-proclamation-on-adjusting-imports-of-steel-into-the-united-states/ (accessed 14 Dec. 2022).

subject of multiple trade disputes, including over the then-European Communities' (EC) TRQ scheme for banana imports in the *EC – Bananas III* saga,² the EU scheme on poultry products in *EU – Poultry (China)*,³ and the Chinese scheme for administering wheat, grain rice, and corn imports in *China – TRQs*.⁴ Consultations have also been initiated over the EU schemes for corn gluten and the US scheme for groundnuts.⁵

The issues surrounding TRQ schemes extend beyond the fact that they are often applied to sensitive products, such as agricultural products and raw materials. As legal instruments, they straddle the traditional distinction between tariff and non-tariff barriers to trade.⁶ In essence, they comprise two-tiered tariff rates – a lower or zero-duty in-quota tariff applicable to a certain quantity of imports either on an origin-specific or first-come-first-served basis, and a higher out-of-quota tariff applicable to all imports above the overall quota line or country-specific quota allocation limit. Products imported below the quota line thus benefit from lower market access costs, while imports falling outside the quota are subject to restrictive costs with the aim of discouraging market access. Given its ambiguous effects, which share similarities to both tariff and non-tariff barriers, the TRQ scheme has been widely criticized for its complexity, lack of transparency, and welfare-constricting effects within the economics literature.⁷ These same features have also shaped the legal regime applicable to TRQ schemes under the General Agreement on Tariffs and Trade (GATT).⁸

In *EC – Bananas III (Article 21.5 – Ecuador II)(Article 21.5 – US)*, the Appellate Body had been tasked with determining the legal regime applicable to TRQs in the context of the then EC scheme for regulating country-specific imports of bananas. It first concluded that Article XIII:5 recognizes that TRQs 'do not fall

² For summary of the dispute, see Eckart Guth, *The End of the Bananas Saga*, 46(1) J. World Trade 1 (2012).

³ Panel Report, *European Union – Measures Affecting Tariff Concessions on Certain Poultry Meat Products*, WT/DS492/R, adopted 19 Apr. 2017 (Panel, *EU – Poultry (China)*).

⁴ Panel Report, *China – Tariff Rate Quotas for Certain Agricultural Products*, WT/DS517/R, adopted 18 Apr. 2019.

⁵ WTO, *European Communities – Tariff-Rate Quota on Corn Gluten Feed from the United States – Request for Consultations by the United States* (30 Jan. 2001) WT/DS223/1; G/L/436; G/SG/D14/1; WTO, *United States – Tariff Rate Quota for Imports of Groundnuts – Request for Consultations by Argentina* (8 Jan. 1998) G/AG/GEN/16; G/L/217; G/LIC/D/16; G/RO/D/2; WT/DS111/1.

⁶ TRQ schemes replicate the effects of tariffs where consumer demand is low, distribute quota rents where demand exceeds the quantitative restriction, or operate as a quantitative restriction where '[i]mport demand at the world price plus the in-quota tariff exceeds the minimum access commitment, but import demand at the world price plus the MFN tariff is less than the minimum access commitment': Philip C. Abbott, *Tariff-Rate Quotas: Failed Market Access Instruments?*, 29(1) Eur. Rev. Agric. Econ. 109, 113–118 (2002).

⁷ *Ibid.*, at 127–128; David Skully, *U.S. TRQs for Peanuts, Sugar, and Tobacco: Historical Allocation and Nondiscrimination*, 29(1) Agric. & Res. Econ. Rev. 81, 84–90 (2000).

⁸ Marrakesh Agreement Establishing the World Trade Organization (signed 15 Apr. 1994, entered into force 1 Jan. 1995) 1867 UNTS 3, Annex 1 A ('GATT').

under' the prohibition on quantitative restrictions found in Article XI:1, and are thus lawful under the GATT before turning to the relevant disciplines.⁹ The Appellate Body further affirmed the earlier *EC – Bananas III (Article 21.5 – Ecuador II)* panel conclusion that TRQs must comply with both the Most-Favoured-Nation (MFN) treatment under Article I:1 and the non-discrimination obligations established under Article XIII respectively.¹⁰ To justify this conclusion, the Appellate Body inter alia argued that Articles I:1 and XIII reflect different notions of non-discrimination.¹¹

The conclusion reached by the Appellate Body does not provide a convincing explanation of how TRQ schemes are regulated under the GATT. In brief, while TRQ schemes do not qualify as quantitative restrictions in the sense of Article XI:1, this does not necessarily lead to the provision being subject to both Articles I:1 and XIII. Moreover, the Appellate Body has failed to justify the notional and subject-matter distinctions it drew between the principle of non-discrimination embodied in Articles I:1 and XIII respectively. Instead, this article proposes a reconceptualization of the relationship between Articles I and XIII with respect to TRQ schemes.

This article suggests that the approach adopted in *EC – Bananas III (Article 21.5 – Ecuador II)*(*Article 21.5 – US*) presents a false distinction between the non-discrimination obligations and an inconsistent explanation of the relationship between the two provisions. First, it clarifies the nature and function of the non-discrimination obligations found in Articles I and XIII, showing that each serves to ensure equality of competitive opportunities. Second, Article XIII:5 should be better understood as creating a carve-out from the Article I:1 MFN obligation.

The argument is developed as follows. First, drawing on the language of Articles XI:1 and XIII:5, it is argued that TRQ schemes do not qualify as quantitative restrictions even though they pose similar restrictions to trade. The jurisprudence on the principle of non-discrimination found in Articles I and XIII is then analysed in section 3 to ascertain what notions of discrimination the

⁹ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW/USA; WT/DS27/AB/RW2/ECU, adopted 11 Dec. 2008, para. 335 (AB, *EC – Bananas III (Article 21.5 – Ecuador II)*(*Article 21.5 – US*)). See also Appellate Body Report, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R; WT/DS444/AB/R; WT/DS445/AB/R, adopted 26 Jan. 2015, para. 5.219 (AB, *Argentina – Import Measures*).

¹⁰ AB, *EC – Bananas III (Article 21.5 – Ecuador II)*(*Article 21.5 – US*), *supra* n. 9, paras 335, 343; Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/RW2/ECU, adopted 11 Dec. 2008, para. 7.303 (Panel, *EC – Bananas III (Article 21.5 – Ecuador II)*) (holding that 'Articles I and XIII of the GATT 1994 do not have the same scope, and that an inconsistency with Article XIII is possible irrespective of an inconsistency with Article I').

¹¹ AB, *EC – Bananas III (Article 21.5 – Ecuador II)*(*Article 21.5 – US*), *supra* n. 9, para. 343.

disciplines embody. Next, section 4 evaluates three possible ways of reconciling the disciplines under Articles I and XIII insofar as they apply to TRQ schemes: (1) as harmoniously interpreted and applied disciplines, (2) as disciplines which partially conflict, or (3) Article XIII serves as a carve-out to the obligation under Article I:1, by virtue of Article XIII:5. It is suggested that the third option presents the most plausible route which is consistent with the principle of judicial economy. Section 5 summarizes the findings.

2 THE LEGAL STATUS OF TRQ SCHEMES UNDER GATT

While the economic literature rightly recognizes that TRQs may restrict trade in a way that mirrors ordinary tariffs or quantitative restrictions depending on their design and the underlying market conditions, this nuance is not fully reflected within the text of the GATT. The operative rule determining whether a particular rule constitutes a quantitative restriction or not is Article XI:1, which reads:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party. (emphasis added)

The prohibition on quantitative restrictions under Article XI:1 applies to three categories of measures affecting the import or export of products: quotas, import or export licences, and 'other measures'. For a measure to fall under the latent category of 'other measures', existing World Trade Organization (WTO) panel jurisprudence has emphasized that the measure adopted by a Member must merely form a 'restriction' to the competitive opportunities of imported or exported products. The panel in *Argentina – Hides and Leather* highlighted that Article XI:1 'protects competitive opportunities of imported products, not trade flows' and there is no need for 'actual trade effects' to be demonstrated even where the measure is a de facto restriction.¹² The *Colombia – Ports of Entry* panel further considered the issue of whether a 'restriction' must affect the specific 'quantity' of imports in the context of Colombia's port of entry measure. While addressing Colombia's argument that the Article XI:1 prohibition only concerns quantitative restrictions, the panel summarized existing jurisprudence and concluded that Article XI:1 applies 'to measures which create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly,

¹² Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, adopted 16 Feb. 2001, para. 11.20.

all of which have implications on the competitive situation of an importer' (emphasis added).¹³

The broad definition of what constitutes a 'restriction' for the purposes of Article XI:1 seems to prohibit the anti-competitive effects of TRQs. Likewise, the text of Article XIII:5, which extends the provision to TRQ measures, seems to treat TRQs as 'quantitative restrictions' since the phrase is found in the provision heading: 'Non-Discriminatory Administration of Quantitative Restrictions'.¹⁴ At the same time, any Article XI:1 restriction is subject to a general carve-out for 'duties, taxes or other charges', as understood in light of Articles I and II.¹⁵ As TRQ schemes are comprised of two-level tariffs, they accordingly qualify as 'duties' as opposed to 'restrictions' for the purposes of Article XI:1.¹⁶ This interpretation has since been confirmed by subsequent practice, as the 1995 Decision on quantitative restrictions does not include a category for TRQs and the updated 2012 Decision expressly excludes them from its coverage.¹⁷ The importance of this distinction *vis-à-vis* in WTO law has been highlighted by the famous dictum in *India – Additional Import Duties*, where the Appellate Body emphasized that 'tariffs are [...] the preferred trade policy instrument, whereas quantitative restrictions are in principle prohibited'.¹⁸

This leaves open the important issue of what role Article XIII:5 plays in qualifying the legal status of TRQs. While the Appellate Body in *EC – Bananas III (Article 21.5 – Ecuador II/ Article 21.5 – US)* seems to have relied on both Articles II and XIII:5 to infer that TRQ schemes are 'not prohibited quantitative restrictions', this can already be derived from the text of Article XI:1 itself as such measures are expressly carved out from the scope of 'prohibitions and restrictions' since they qualify as 'duties'.¹⁹ A more plausible reading, then, would be for Article

¹³ Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R, adopted 20 May 2009, para. 7.240 (Panel, *Colombia – Ports of Entry*).

¹⁴ For the limited function of headings in interpreting the material scope of provisions, see Panel, *Colombia – Ports of Entry*, *supra* n. 13, para. 4.117.

¹⁵ For discussion indicating that measures falling under Art. II GATT are excluded from the scope of Art. XI:1, see Panel Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/R, adopted 10 Jan. 2001, paras 6.59–6.61. See also Petros C. Mavroidis, *The Regulation of International Trade: GATT* (MIT Press 2015), at 78 and fn 11 ('According to this principle, one should not overinterpret one provision so as to render redundant another provision in the same treaty').

¹⁶ AB, *Argentina – Import Measures*, *supra* n. 9, para. 5.219.

¹⁷ WTO Council for Trade in Goods, 'Decision on Notification Procedures for Quantitative Restrictions' (10 Jan. 1996) G/L/59; WTO Council for Trade in Goods, 'Decision on Notification Procedures for Quantitative Restrictions' (3 Jul. 2012) G/L/59/Rev.1, at fn 1.

¹⁸ Appellate Body Report, *India – Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/AB/R, adopted 17 Nov. 2008, para. 159.

¹⁹ AB, *EC – Bananas III (Article 21.5 – Ecuador II)(Article 21.5 – US)*, *supra* n. 9, paras 333–335. While the Appellate Body does not specify the exact grounds for its conclusion, it refers to both Arts II and XIII:5 in its reasoning.

XIII:5 to suggest the non-discrimination obligations found in Article XIII serve as a more appropriate discipline for regulating TRQ schemes given their distinct effects mirroring both regular tariff duties and quantitative restrictions.²⁰ This argument is further developed in section 4 below.

3 TWO NOTIONS OF NON-DISCRIMINATION?

Given their flexibility and restrictive effects as market access measures, TRQ schemes have ostensibly been treated as tariff duties subject to two non-discrimination obligations: Articles I:1 and XIII:1 and 2 GATT respectively. The legal framework leads to an obvious problem: if two overlapping rules of non-discrimination apply to the same measure, which rule would prevail if their application leads to mutually inconsistent outcomes?²¹ In claiming that Articles I:1 and XIII apply in harmony with each other, the Appellate Body has drawn a distinction between the two provisions by arguing that they reflect different notions of non-discrimination. Before turning to the relationship between Articles I:1 and XIII, it is first necessary to establish what 'notion' of non-discrimination each obligation respectively embodies.

3.1 ARTICLE I:1 GATT

The unconditional MFN treatment obligation found in Article I:1 requires Members to immediately and unconditionally grant 'any advantage, favour, privilege or immunity' (hereinafter, 'any advantage') to the 'like products' originating in the territory of all other Members. The provision notably applies to both de jure as well as de facto discrimination: hence, even measures which are 'on their face' non-discriminatory to the import or export of like products from other Members could violate the obligation.²² In order to define the notion of discrimination

²⁰ This implication should not be understood to mean that Arts XIII:1 and XIII:2 fosters an economically efficient outcome as a discipline. For criticism of non-discrimination obligation under Art. XIII, see Skully, *supra* n. 7, at 82–84 and s. 3.2 below.

²¹ Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* 175–176 (Cambridge University Press 2009) suggests where two norms overlap in their *ratione materiae* and *ratione personae* scopes, then a conflict may emerge 'if one [norm] constitutes, has led to, or may lead to, a breach of the other'.

²² Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R; WT/DS142/AB/R, adopted 19 Jun. 2000, paras 78–81 (AB, *Canada – Autos*). While Lothar Ehring, *De Facto Discrimination in World Trade Law National and Most-Favoured-Nation Treatment – or Equal Treatment?*, 36(5) J. World Trade 921, 931–948 (2002) argues that Art. I:1 may create 'equal treatment' in cases of de facto discrimination, this is an ancillary effect of Art. I:1 arising from the jurisprudence and has not been clearly recognized in Appellate Body or panel reports.

established by Article I:1, this subsection examines more closely the relevant obligation and its purpose.²³

3.1[a] *Article I:1 GATT Obligation*

For the MFN obligation to apply, the covered measure must concern the import or export of a ‘like product originating in or destined for the territories of all other contracting parties’ as compared with the treatment of a ‘product originating in or destined for any other country’. The criteria chiefly drawn by the Appellate Body and panels to determine whether a product is ‘like’ was established by the *Border Tax Adjustments* GATT Working Party, which emphasized the need for a ‘case-by-case’ assessment of, inter alia, product end-uses, consumer tastes and habits, and the physical characteristics of the product.²⁴ Given the open-endedness of the criteria, panels have often also resorted to distinctions found in Members’ tariff schedule classifications, although this has resulted in inconsistent inferences being made within the jurisprudence.²⁵ While determining if the products are ‘like’ determines whether the obligation applies, Pauwelyn is right to point out that this condition largely operates as ‘threshold question’ within the overall test: it identifies the precise circumstances in which imports and exports originating from different Members must be treated alike without clarifying the nature of the non-discrimination obligation which should then be afforded.²⁶

²³ While Art. 31(1) Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 Jan. 1980) 1155 UNTS 331 (VCLT) indicates that the object and purpose of the agreement as a whole must be resorted to, in WTO jurisprudence the object and purpose of individual provisions has also been examined: Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at 18, 22. See for discussion, Julia Y. Qin, *Defining Nondiscrimination Under the Law of the World Trade Organization*, 23 Boston U. Int’l L.J. 215, 235–236 (2005).

²⁴ GATT Working Party Report, *Border Tax Adjustments*, BISD L/3464, adopted 2 Dec. 1970, para. 18.

²⁵ The jurisprudence the types of inference which could be drawn from Members’ tariff schedules has largely been inconsistent. For instance, cf. GATT Panel, *Spain – Tariff Treatment of Unroasted Coffee*, BISD 28S/102, adopted 11 Jun. 1981, paras 4.4–4.8 drawing a negative inference from the fact that Spain adopted a tariff classification of coffee beans which differed from all Contracting Parties, with GATT Panel Report, *Canada/Japan – Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, BISD 36S/167, adopted 19 Jul. 1989, para. 5.13 holding ‘if a claim of likeness was raised by a contracting party in relation to the tariff treatment of its goods [...], such a claim should be based on the classification of the latter’. See discussion in William J. Davey & Joost Pauwelyn, *MFN Unconditionality: A Legal Analysis of the Concept in View of Its Evolution in the GATT/WTO Jurisprudence With Particular Reference to the Issue of ‘Like Product’*, in *Regulatory Barriers and the Principle of Non-discrimination in World Trade Law: Past, Present, and Future* 28–34 (T. Cottier, P. C. Mavroidis & P. Blatter eds, University of Michigan Press 2000).

²⁶ Joost Pauwelyn, *Comment: The Unbearable Lightness of Likeness*, in *GATS and the Regulation of International Trade in Services* 362 (M. Panizzon, N. Pohl & P. Sauvé eds, Cambridge University Press 2008). While Pauwelyn points to the diminished significance of the test since ‘[a]ny argument that could have been made under “likeness” [...] will anyhow be fished up under the real test of whether the regulation differentiates on origin’, it is nonetheless a key first step in activating the

When a Member grants ‘any advantage’ to the group of like products imported from one country (whether that is a WTO Member or not), it is required to extend this same treatment to the group of like products originating from all WTO Members. From a textual perspective, the determiner ‘any’ suggests a broad reading of what may constitute an ‘advantage’ for the purposes of Article I:1 so long as this is linked to the import, export, internal taxation, internal sale, purchase, transport, or use in line with Articles III:2 and III:4.²⁷ The main determiner for whether there is an ‘advantage’ within the case-law seems to be whether the advantage stemming from a measure may affect conditions of competition. In *EC – Seal Products*, for instance, the then-EC argued on appeal that there is no discrimination where the ‘detrimental impact on competitive opportunities [...] stems exclusively from a legitimate regulatory distinction’ as under Article 2.1 Agreement on Technical Barriers to Trade.²⁸ The Appellate Body rejected this argument and instead affirmed the panel finding that the ‘measure at issue detrimentally affects the conditions of competition’ since it did not create the same market access advantage for Canadian and Norwegian seal products.²⁹

Article I:1 further requires ‘any advantage’ to be conferred ‘immediately and unconditionally’. While this phrase is commonly cited as a whole, the two adjectives have been treated as separate disciplines. The adverb ‘immediately’ places a temporal obligation and may textually be understood as requiring an advantage to be provided ‘at once’ or ‘instantly’.³⁰ In brief, the obligation suggests that imported groups of like products from different Members must be treated equally at the same point in time when the advantage is ‘granted’. To illustrate, this prevents importing Member A from introducing less stringent customs procedures for like imports from exporting Member B, while compensating exporting Member C at a later stage and increasing their suppliers’ initial entry costs.

The term ‘unconditionally’, by contrast, has been the subject of greater scrutiny within the jurisprudence. A seemingly expansive approach was first developed by the *Belgian Family Allowances* GATT panel in a dispute concerning

obligation. Should the concerned products be deemed ‘not like’, then the substantive test is longer applicable.

²⁷ AB, *Canada – Autos*, *supra* n. 22, para. 79.

²⁸ Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R; WT/DS401/AB/R, adopted 18 Jun. 2014, para. 5.84 (AB, *EC – Seal Products*).

²⁹ AB, *EC – Seal Products*, *supra* n. 28, para. 5.95. Given that the test emphasizes potential impact on conditions of competition, panels have rightly held that an advantage is not granted ‘immediately and unconditionally’ where a disadvantage is offset through balancing given at a later point in time: see Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/WT/DS27/R/GTM; WT/DS27/R/HND, adopted 25 Sep. 1997, para. 7.239 and fn 446 (Panel, *EC – Bananas III*).

³⁰ ‘immediately’ in C. Soanes and S. Hawker, *Compact Oxford English Dictionary of Current English* (3d ed., Oxford University Press 2005).

a Belgian tax levy exception applied to government procured products from other countries which had similar family allowances schemes to the Belgian one.³¹ The GATT panel ultimately determined that the measure was conditional since it discriminates ‘between countries having a given system of family allowances and those which had a different system or no system at all’, and thus breached Article I:1 GATT.³²

The Appellate Body in *EC – Seal Products* has since attempted to distinguish between legitimate and illegitimate types of conditions by drawing on the purpose of Article I:1, namely ‘protecting expectations of equal competitive opportunities for like imported products from all Members’.³³ As such, the Appellate Body held that the provision does not prohibit ‘a Member from attaching *any* conditions’ to the receipt of an advantage, but only ‘*those conditions* that have a detrimental impact on the competitive opportunities for like imported products from any Member’.³⁴

In practice, however, the two readings of ‘unconditionally’ are largely complementary and overlapping. This is because the broad framing of the condition placed in *Belgian Family Allowances* should be read in the context of the dispute which focused on a measure which distinguished between importing countries based on ‘government policy standards’, that is measures requiring the government of an importing country to adopt certain policy standards before an advantage could be granted to their exported products.³⁵ Such measures invariably affect the conditions of competition, as products from one Member will ultimately receive an advantage that like products from another Member do not for distinctly product-independent reasons. Moreover, the approach adopted by the Appellate Body in *EC – Seal Products* may more accurately be seen as a clarification of the purpose of the test, as opposed to developing a marked divergence in the application of the ‘unconditionality’ test in *Belgian Family Allowances*. The need for such a clarification may be attributed to both the different requirements under the Agreement on Technical Barriers to Trade and the terse wording found in the *Belgian Family Allowances* report itself, since the panel’s purpose was not to clarify the law but rather to reach a vaguely framed, yet diplomatically acceptable resolution to a sensitive dispute. As Hudec rightly points out³⁶:

³¹ GATT Panel Report, *Belgian Family Allowances*, BISD 1S/59, adopted 7 Nov. 1952, paras 1–2 (GATT Panel, *Belgian Family Allowances*).

³² *Ibid.*, para. 3.

³³ AB, *EC – Seal Products*, *supra* n. 28, para. 5.88.

³⁴ *Ibid.*, para. 5.88.

³⁵ Steve Charnovitz, *Belgian Family Allowances and the Challenge of Origin-Based Discrimination*, 4(1) World Trade Rev. 7, 12 (2005). See also Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* 122 (1st ed., Praeger Publishers 1975): ‘Requiring a country to have a family allowances program was exactly the kind of “condition” which the MFN clause was designed to eliminate’.

³⁶ Hudec, *supra* n. 35, at 138.

The Panel could not simply state the law that directly. What it could do, however, was to suggest such a conclusion in terms vague enough to avoid being pinned down and yet clear enough in the context to add some authority to the desired result. These suggestions would not have any operative effects by themselves, but they could invite a community reaction somewhat stronger than the document itself.

3.1[b] *The Purpose of Article I:1 GATT*

While existing jurisprudence has broadly linked the MFN treatment obligation to the principle of non-discrimination,³⁷ the Appellate Body in *EC – Seal Products* offers the clearest link to a particular ‘notion’ of non-discrimination. The report expressly draws a link between the unconditional MFN treatment obligation under Article I:1 GATT and ‘expectations of equal competitive opportunities’ *vis-a-vis* the market access conditions provided to like products imported from different Members.³⁸ As Cottier and Schneller rightly point out, the discipline thus differs from conditional MFN treatment obligations as it does not require ‘reciprocity’ but instead calls for ‘[a]dvantages [...] to be extended irrespective of returns’ and ‘free riding essentially is part of it and partly tempered by forms of conditional MFN’.³⁹ More broadly, creating equal conditions of competitive opportunity for market access is essential for achieving the negotiating function of the WTO. For instance, it largely prevents more powerful Members from taking advantage of their gain from their negotiating power based on ‘bilateral opportunism’, as well as for discriminatory market access barriers from largely being placed on individual Members during tariff round renegotiations.⁴⁰

3.2 ARTICLES XIII:1 AND XIII:2 GATT

Article XIII establishes two types of non-discrimination obligations which apply to permitted prohibitions and restrictions under Article XI, as well as TRQ schemes owing to Article XIII:5.⁴¹ Article XIII:1 requires covered prohibitions or

³⁷ See for instance, AB, *Canada – Autos*, *supra* n. 22, para. 88.

³⁸ AB, *EC – Seal Products*, *supra* n. 28, para. 5.88.

³⁹ Thomas Cottier & Lena Schneller, *The Philosophy of Non-discrimination in International Trade Regulation*, in *The Principle of National Treatment in International Economic Law: Trade, Investment and Intellectual Property* 9 (A. K. Sanders ed., Elgar 2014).

⁴⁰ Kyle Bagwell & Robert W. Staiger, *The Economics of the World Trading System* 71–73 (MIT Press 2002); Oisín Suttle, *Distributive Justice and World Trade Law: A Political Theory of International Trade Regulation* 183 (Cambridge University Press 2017).

⁴¹ While Holger Hestermeyer & Friedl Weiss, *Article XIII*, in *Max Planck Commentaries on World Trade Law* vol. 5, 324 (R. Wolfrum, P.-T. Stoll & H. P. Hestermeyer eds, Brill 2010) argue that Art. XIII covers ‘both legal and illegal quantitative restrictions’, a narrower reading of the scope of Art. XIII would be more consistent in light of the prohibition on quantitative restrictions under Art. XI:1 GATT: Mavroidis, *supra* n. 15, at 127 (‘obligations regarding the administration of QRs should kick in only after the consistency of a QR with GATT has been established’). The issue is practically moot, as

restrictions to be applied ‘similarly’ to all ‘third countries’. By contrast, Article XIII:2 disciplines the distribution of products when Members apply ‘import restrictions’, and sets out four self-standing obligations governing the administration of such restrictions. These additional rules are, in brief, (1) the duty to fix quota amounts where practicable, (2) the permissibility of import licences where quotas are impractical, (3) the general prohibition on import licences or permits being used to identify product origin, and (4) specific rules governing the allocation of a quota among supplying countries.

A preliminary issue is how the obligations under the two paragraphs interact. The Appellate Body in *EC – Bananas III (Article 21.5 – Ecuador II)(Article 21.5 – US)* held that while Article XIII:1 sets out a ‘a principle of non-discriminatory access to and participation in’ a quantitative restriction, Article XIII:2 provides ‘a principle regarding the distribution of the [import restriction] in the least trade-distorting manner’.⁴² However, this does not mean that a quota or TRQ scheme distributed ‘in the least trade-distorting manner’ would be consistent with the Article XIII:1 non-discrimination obligation; it merely ‘mimics’ the expected outcome were there no allocation.⁴³ Hence, as panels have later established, where conflict emerges between the first and second paragraphs of Article XIII, the latter prevails as *lex specialis*.⁴⁴

In view of this, the obligations found in Articles XIII:1 and XIII:2, particularly the chapeau and sub-paragraph (d), are first reviewed before the purpose of the disciplines is assessed.

3.2[a] Article XIII:1 GATT Obligation

The non-discrimination obligation found in Article XIII:1 provides a general principle governing the administration of permissible restrictions under Article XI and TRQ schemes. The provision reads:

No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted. (emphasis added)

panels rely on judicial economy to avoid addressing Art. XIII claims where a breach of Art. XI:1 is already established: see Panel, *Colombia – Ports of Entry*, *supra* n. 13, paras 7.290–7.292; GATT Panel Report, *Quantitative Restrictions Against Imports of Certain Products from Hong Kong* (adopted 12 Jul. 1983) BISD 30S/129, para. 33.

⁴² AB, *EC – Bananas III (Article 21.5 – Ecuador II)(Article 21.5 – US)*, *supra* n. 9, para. 338.

⁴³ *Ibid.*, para. 338.

⁴⁴ Panel, *EC – Bananas III*, *supra* n. 29, para. 7.75. See similarly, for the relationship between Arts XIII:1 and XIII:2(d), Panel, *EU – Poultry (China)*, *supra* n. 3, para. 230, at fn 140.

While the Appellate Body in *EC – Bananas III (Article 21.5 – Ecuador II)(Article 21.5 – US)* distinguished between the notion of non-discrimination found in Articles I:1 and XIII:1, Article XIII:1 has largely been treated as a ‘MFN-type’ obligation within the jurisprudence.⁴⁵ This is confirmed by the negotiating history: the pragmatic conclusion that quantitative restrictions and TRQ schemes could be consistent with MFN treatment, which may be traced back to a study by the Economic Committee of the League of Nations,⁴⁶ is found in the language of the existing Article XIII and also earlier draft treaty texts.⁴⁷ The proximity between the two provisions has also been established in the interpretation of the latter. In determining what constitutes a ‘like product’ for the purposes of Article XIII:1, the *EC – Bananas III (Article 21.5 – Ecuador II)* panel drew on the ‘same considerations’ it had used in its Article I:1 assessment to establish that ‘fresh bananas [...] originating in ACP countries, are like products to those fresh bananas originating in other WTO Members’.⁴⁸ Another significant textual similarity is that both Articles XIII:1 and I:1 extend to the treatment offered to products originating from or destined to both WTO Member and non-WTO Member countries.⁴⁹

Where the obligation applies, Members must ensure that like products are ‘similarly prohibited or restricted’. From a textual perspective, the adverb ‘similarly’ suggests Members are not required to extend equal treatment to all like products. The jurisprudence has not clarified what differences between prohibitions and restrictions are permissible, although certain factors have been emphasized as crucial for such measures to be ‘similar’. The *EEC – Apples I (Chile)* GATT panel highlighted three core differences between the suspensions applied to Chilean apple imports and voluntary export restrictions (VERs) concluded with ‘other Southern Hemisphere suppliers’: (1) the ‘difference in transparency between the two types of action’, (2) the ‘difference in the administration of the restrictions, the one being an import restriction, the other an export restraint’, and (3) ‘the import suspension was unilateral and mandatory while the [VER] was voluntary and negotiated’.⁵⁰ While the GATT panel did not explain which forms of

⁴⁵ See for instance, AB, *Canada – Autos*, *supra* n. 22, para. 82, at fn 72; similarly, see implication in Panel, *EU – Poultry (China)*, *supra* n. 3, para. 213. This view builds on conclusions reached by earlier GATT panels, including GATT Panel Report, *EEC Restrictions on Imports of Apples from Chile*, BISD 27S/98, adopted 10 Nov. 1980, para. 4.21 (GATT Panel, *EEC – Apples (Chile I)*).

⁴⁶ League of Nations, *Recommendations of the Economic Committee Relating to Tariff Policy and the Most-Favoured-Nation Clause* 14 (16 Feb. 1933) E805.1933.II.

⁴⁷ Compare Art. XIII GATT with United Nations Economic and Social Council, *Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment* (24 Jul. 1947) UN Doc E/PC/T/A/PV/33, 30–31 (Art. 27 London Draft), 58 (Art. 21 United States Draft Charter).

⁴⁸ AB, *EC – Bananas III (Article 21.5 – Ecuador II)(Article 21.5 – US)*, *supra* n. 9, para. 7.326.

⁴⁹ Article I:1 GATT uses the phrase ‘any other country’, while Art. XIII:1 refers to ‘all third countries’.

⁵⁰ GATT Panel, *EEC – Apples (Chile I)*, *supra* n. 45, para. 4.11.

distinctions are generally permissible, the factors taken into account (a measure's transparency, administration, unilateralism, and bindingness) indicate any differences in how restrictions affect expectations of equality of competitive opportunities for like products from different WTO Members are impermissible. It seems that there has not been a departure from this approach in WTO jurisprudence. The Appellate Body's conclusion that 'imports of like products of all third countries' must have 'access to, and be given an opportunity of, participation' in TRQ schemes for the restrictions to be 'similar' is broadly consistent with the *EEC – Apples I (Chile)* approach, in that it prevents exporting Members from being deprived of their expectation to receive market access opportunities on an equal footing.⁵¹

3.2[b] Article XIII:2 Non-discrimination Obligations

3.2[b][i] Article XIII:2 Chapeau

The chapeau of Article XIII:2 creates an obligation requiring Members implementing restrictions to 'aim at a distribution of trade in such product *approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions*' (emphasis added). As the obligation extends to both allocated and non-allocated restrictions, it targets both the country-specific distribution of market access opportunities, but also whether any country-specific distortions are made to the opportunities of unallocated market access restrictions.⁵² Notably, the obligation only affects the *distribution* of market access opportunities: Members nonetheless maintain their right to limit the *overall quantity* of permitted or unrestricted imports where this is consistent with Article XI GATT.

In applying the Article XIII:2 chapeau, historical trade flows have been relied on as an 'objective, factual basis for projecting what might have occurred in the absence of that measure'.⁵³ While importing Members are permitted to make allocations for exporting countries which had previously failed to import, the use of historical trends as a proxy for unrestricted trade flows reveals one of the key flaws of the Article XIII:2 chapeau obligation (and, by extension, Article XIII:2(d)): it gives preferential access to suppliers from exporting Members

⁵¹ AB, *EC – Bananas III (Article 21.5 – Ecuador II)(Article 21.5 – US)*, *supra* n. 9, para. 337 emphasizing the form and allocation of the restriction; Panel, *EU – Poultry (China)*, *supra* n. 3, paras 7.431–7.432.

⁵² Article XIII:2(a), (b) and (c) GATT mainly concern the regulation of *non-allocated restrictions*, while only Art. XIII:2(d) specifically determines how Members may allocate their quota and TRQ schemes. As such, the Art. XIII:2 chapeau obligation should apply to both forms of restrictions.

⁵³ Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 8 Mar. 2002, para. 7.54.

which have established trading relationships with the importing Member.⁵⁴ This issue is discussed further in section 3.2[c].

3.2[b][iii] Article XIII:2(d)

Restrictions covered by the Article XIII:2 chapeau must also satisfy the subparagraph obligations, with Article XIII:2(d) being relevant for our current purposes. The obligation concerns situations where Members allot a quota or TRQ scheme either through an agreement or unilaterally. While satisfying Article XIII:2(d) has been interpreted by the Appellate Body to establish a ‘safe harbour’ and is ‘presumed’ to be lawful under the Article XIII:2 chapeau,⁵⁵ the *EU – Poultry (China)* panel has narrowly framed the scope of this presumption ‘insofar as “substantial suppliers are concerned”’, and largely treated the two obligations as essentially separate.⁵⁶ As such, *both* Article XIII:2(d) agreement-based and unilaterally allocated quota and TRQ schemes are bound by the chapeau discipline where allocations are made to exporting Members without a substantial interest.⁵⁷

Under Article XIII:2(d), Members which allocate their quota or TRQ scheme are permitted to ‘seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned’. Article XIII:2(d), first sentence, thus creates an initial opportunity for exporting Members ‘having a substantial interest in supplying the product concerned’ to negotiate their in-quota allocation with the importing Member where the latter considers this ‘practicable’. The negotiation process must involve the importing Member and all exporting Members having a ‘substantial interest’ of around 10% share of actual imports in the product.⁵⁸ Where an agreement does not involve all Members with ‘substantial interest’, however, the

⁵⁴ Mavroidis, *supra* n. 15, at 129; Iñara Espa, *Export Restrictions on Critical Minerals and Metals Testing the Adequacy of WTO Disciplines* 177–178 (Cambridge University Press 2015).

⁵⁵ AB, *EC – Bananas III (Article 21.5 – Ecuador II)(Article 21.5 – US)*, *supra* n. 9, para. 338.

⁵⁶ Panel, *EU – Poultry (China)*, *supra* n. 3, para. 7.394.

⁵⁷ Importantly, AB, *EC – Bananas III (Article 21.5 – Ecuador II)(Article 21.5 – US)*, *supra* n. 9, para. 338, at fn 408 is ambiguous regarding whether importing Members are required to allocate TRQ schemes to supplying Members without a substantial interest based on subsequent practice, although this may more plausibly be considered grounds for a non-violation complaint under Art. XXIII(1)(b): ‘If a Member allocates quota shares to Members with a substantial interest in supplying the product, in accordance with Article XIII:2(d), it must also respect the requirement in the chapeau of Article XIII:2 – that distribution of trade approach as closely as possible the shares that Members may be expected to obtain in the absence of the restriction. *This is usually done by allocating a share to a general “others” category for all suppliers other than Members with a substantial interest in supplying the product.*’ (emphasis added).

⁵⁸ Panel, *EU – Poultry (China)*, *supra* n. 3, paras 7.178, 7.341–7.349, 7.354. It is unclear from the panel report whether the documents and statements stated in support of the 10% benchmark constitute ‘subsequent practice’ for the purposes of Art. 31(3)(b) VCLT (fn 297). Nonetheless, this appears to be the likeliest method used to interpret the phrase. For discussion of what constitutes subsequent practice in the context of WTO law, see Isabelle van Damme, *Treaty Interpretation by the WTO Appellate Body* 338–346 (Oxford University Press 2009).

negotiated allocation is subject to the default non-discrimination obligation found in the second sentence of Article XIII:2(d).⁵⁹

Alternatively, importing Members may unilaterally resort to allocating their import quotas and TQRs by following the Article XIII:2(d) non-discrimination obligation where reaching an agreement ‘is not reasonably practicable’. The obligation in Article XIII:2(d), second sentence, requires importing Members to ‘allot’ to exporting Members with ‘a substantial interest in supplying the product shares’ based on ‘the proportions, supplied by such contracting parties *during a previous representative period*, of the total quantity or value of imports of the product, *due account being taken of any special factors which may have affected or may be affecting the trade in the product*’ (emphasis added). While the obligation only extends to providing access for exporting Members with ‘a substantial interest’, importing Members may nonetheless provide access to other minor importing Members subject to complying with the non-discrimination obligation under Article XIII:2 chapeau.

Panels have construed ‘a previous representative period’ to mean a prior three-year period.⁶⁰ At the same time, given the use of the indefinite article ‘a’ in the phrase, the importing Member may exercise ‘a margin of discretion in selecting a previous period that it considers to be representative for the purpose of allocating country-specific shares in the TRQ at issue’.⁶¹

There is less clarity regarding what considerations could qualify as ‘any special factors’ requiring the readjustment of overall quota allocations. The current jurisprudence seems to only take into account those factors which have clear effects on an exporting Member’s relative share of imports in the product concerned. In *EC – Poultry (China)*, for instance, the panel drew on the ordinary meaning of Article XIII:2(d) and the Article XIII:2(d) Ad Note to argue that the appropriate approach should be ‘dynamic’ and ‘may entail consideration of developments that have taken place between the end of the reference period selected and the time of the TRQ being allocated’.⁶² At the same time, the panel reasoned against considering sanitary and phytosanitary measures applied by the EU during the selected previous representative period to Chinese poultry imports as ‘special factors’, as this would have required ‘an extremely complex task involving the use of highly speculative estimates’.⁶³ In addition

⁵⁹ GATT Panel Report, *Newsprint*, BISD 31S/114, adopted 20 Nov. 1984, para. 33.

⁶⁰ See for instance, GATT Panel, *EEC – Apples (Chile I)*, *supra* n. 45, paras 4.8, 4.16.

⁶¹ Panel Report, *European Union – Safeguard Measures on Certain Steel Products* (adopted 31 May 2022) WT/DS595, para. 7.288 (Panel, *EU – Safeguard Measures on Steel (Turkey)*).

⁶² Panel, *EU – Poultry (China)*, *supra* n. 3, paras 7.356, 7.367–7.378. See for the significance of relative increases in import shares, GATT Panel Report, *European Economic Community – Restrictions on Imports of Dessert Apples*, BISD 36S/93, adopted 22 Jun. 1989, para. 12.24 (GATT Panel, *EEC – Dessert Apples*); GATT Panel, *EEC – Apples (Chile I)*, *supra* n. 45, para. 4.17.

⁶³ Panel, *EU – Poultry (China)*, *supra* n. 3, paras 7.340–7.341. For criticism of how the panel drew this conclusion, see David R. Deremer & Federico Ortino, *Getting Your Ducks in a Row: The Case for More Inclusive Renegotiations in EU – Poultry Meat (China)*, 18(2) *World Trade Rev.* 309, 315–318 (2019).

to the complexity of a consideration, the *EU – Safeguard Measures on Steel (Turkey)* panel held the ‘magnitude’ of the EU antidumping and countervailing measures imposed on Turkey’s market share of steel products was insufficient to qualify as a ‘special factor’ under Article XIII:2(d).⁶⁴ It seems that the quota allocation established under Article XIII:2(d), second sentence, sets a relatively high standard requiring importing Members to consider only those market distortions which demonstrably affect the equality of competitive opportunities of suppliers from different Members.

3.2[c] *The Purpose of the Article XIII Non-discrimination Obligations*

The examined obligations under Articles XIII:1 and XIII:2 each create distinct and only partly overlapping disciplines for achieving non-discrimination. While Article XIII:1 prevents imports from being subject to different restrictions and prohibitions which impede on market access conditions of competition, Article XIII:2 chapeau disciplines the allocation of market access opportunities by relying on historical trade flows as a proxy for undistorted market access. Article XIII:2(d), in turn, restricts the right of Members to allocate quotas and TRQs to either agreements involving all importing Members with a ‘substantial interest’, or unilaterally to those importing Members based on their relative import proportions derived from historical trends over a representative period and taking account of any ‘special factors’.

Despite the apparent differences in how they operate, the disciplines ultimately aim to achieve compliance with a common notion of non-discrimination: equality of competitive opportunity for the market access of like products from different importing Members. This had been recognized by the Appellate Body in *EC – Bananas III (Article 21.5 – Ecuador II)(Article 21.5 – US)*, as it highlighted that Article XIII:1 requires ‘imports of like products of all third countries’ to be granted ‘access to, and be given an opportunity of, participation’.⁶⁵ Similarly, the Appellate Body proceeded to claim that the Article XIII:2 chapeau requires a second-best alternative for safeguarding importing Members’ competitive opportunities: ‘all Members producing the like product are afforded access to, and competitive opportunities under, the tariff quota *in a manner that mimics their comparative advantage vis-à-vis other Members who would participate under the quota*’ (emphasis added).⁶⁶ Moreover, since it treated Article XIII:2(d) as falling within the ‘instances of authorized forms of allocation’, it seems that the latter discipline fulfils the same purpose.⁶⁷

⁶⁴ Panel, *EU – Safeguard Measures on Steel (Turkey)*, *supra* n. 61, para. 7.297.

⁶⁵ AB, *EC – Bananas III (Article 21.5 – Ecuador II)(Article 21.5 – US)*, *supra* n. 9, para. 337.

⁶⁶ *Ibid.*, para. 338.

⁶⁷ *Ibid.* On whether allocated TRQ schemes de facto create conditions of ‘equal treatment’ or ‘equitable treatment’ when it comes to market access, see Michael Rom, *The Tariff Quota and Its Treatment in GATT*, 5(2) J. World Trade 131, 150–153 (1971).

While the obligations under Article XIII share a common notion of non-discrimination, it should nonetheless be mentioned that Article XIII:2 only facilitates a second-best alternative to undistorted equality of competitive opportunities.⁶⁸ By allowing importing Members to both *maintain* and *allocate* quota and TRQ schemes based on historical trade flows and subject to certain ‘special factors’, the disciplines de facto create a margin of discretion for importing Members to grant preferences solely to established supplying Members. This accordingly disadvantages supplying Members with minor or recently established supplying interests from exporting, except where the importing Member decides to include such supplying Members or the TRQ scheme is renegotiated.⁶⁹ To illustrate, in *EU – Poultry (China)*, the panel only considered the fact that the actual import share of Chinese poultry products falling under HS Code tariff lines 1602 39 29 and 1602 39 80 had increased from 0% in 2006–2008 to 52.8% and 61.1% in 2011, respectively.⁷⁰ In other words, China’s ‘substantial interest’ was established based on the ‘special factor’ that it had become an established supplier with the largest share of certain poultry product imports to the EU market.

4 PUTTING THE PUZZLE TOGETHER: HARMONY, CONFLICT, OR CARVE-OUT?

The regulation of TRQ schemes under Articles I and XIII remains a contentious question with clear implications for how such measures are utilized and to what effect. This section considers three potential solutions to clarifying the relationship between both provisions: (1) Articles I and XIII reflect different notions of non-discrimination and are mutually compatible with one another, (2) the two provisions reflect an identical notion of non-discrimination but conflict in how they seek to achieve this; as such, insofar as the two provisions conflict, Article XIII:2 operates as *lex specialis*, and (3) the non-discrimination obligations under Article XIII are a general carve-out from Article I:1 by virtue of Article XIII:5.

4.1 ARTICLES I:I AND XIII AS MUTUALLY COMPATIBLE OBLIGATIONS

The Appellate Body in *EC – Bananas III (Article 21.5 – Ecuador II)*/*(Article 21.5 – US)* raised two arguments for the consistency of applying the non-discrimination

⁶⁸ Accordingly, Robert E. Hudec, *Tiger, Tiger in the House: A Critical Appraisal of the Case Against Discriminatory Trade Measures*, in *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems* 179 (M. Hilf & E.-U. Petersmann eds, Springer 1988) has argued that the historical attempt to square MFN treatment with the permissibility of certain forms of quantitative restrictions has led to Art. XIII becoming ‘a rather sickly child’.

⁶⁹ Chris Downes, *The Post-Brexit Management of EU Agricultural Tariff Rate Quotas*, 51(4) J. World Trade 741, 749–750 (2017).

⁷⁰ Panel, *EU – Poultry (China)*, *supra* n. 3, paras 7.366–7.371.

obligations under Articles I:1 and XIII to TRQ schemes. First, focusing on the nature of the obligations, it drew a distinction between ‘the notion of “non-discrimination” in the application of tariffs under Article I:1 and the notion of non-discriminatory application of a “prohibition or restriction” under Article XIII’.⁷¹ Second, concerning the material scope of the obligations, the Appellate Body held that ‘Article I:1, which applies to tariffs, and Article XIII:1, which applies to quantitative restrictions and tariff quotas, may apply to different elements of a measure or import regime’.⁷² These arguments are addressed in turn.

The first argument is largely inconsistent with the text, purpose, and negotiating history of Articles I:1 and XIII. As section 3 demonstrates, there are clear links between the provisions, particularly given their textual similarities, common emphasis on protecting (expectations of) equality of competitive opportunities, and the historical role of unconditional MFN treatment obligation in shaping the disciplines under both provisions. Likewise, insofar as Article XIII:1 is concerned, both GATT and WTO panels have drawn on the approaches developed previously under Article I:1 when interpreting terms such as ‘like products’ and ‘similarly restricted’. Curiously, the Appellate Body provided no explanation of how the two notions differ, and even recognized their proximity in the same paragraph of the report: ‘Article XIII adapts the MFN-treatment principle to specific types of measures, that is, quantitative restrictions, and, by virtue of Article XIII:5, tariff quotas’.⁷³

Even if the Appellate Body’s characterization of the notions of non-discrimination found under both provisions were accurate, it does not address the issue of whether a normative conflict emerges. Ultimately, this would depend on whether the result of applying the two norms would be inconsistent. For instance, an obligation requiring importing Members to ensure the equality of *competitive opportunities* for all foreign products is clearly inconsistent with an obligation to ensure equality of *outcome* across supplying Members, since the latter rule disadvantages Members with established production capacity and comparative advantage.

By that same token, even rules which embody the same overall notion of non-discrimination may conflict in *how* their subject is supposed to achieve with the end-result. Consider Articles XIII:1 and XIII:2(d). While both obligations ensure the non-discriminatory application of TRQ schemes by ensuring that foreign suppliers may import on an equal footing, under Article XIII:1 all imports must be ‘similarly restricted’. By contrast, should Members allocate their TRQs,

⁷¹ AB, *EC – Bananas III (Article 21.5 – Ecuador II)(Article 21.5 – US)*, *supra* n. 9, para. 343.

⁷² *Ibid.*, para. 343.

⁷³ *Ibid.*

Article XIII:2(d) allows importing Members to restrict access to in-quota tariffs for Members without substantial interest.

The Appellate Body's second argument separates the functions of Articles I:1 and XIII by drawing on their material scope. As such, Article I:1 is breached 'if a Member imposes differential in-quota duties on imports of like products from different supplier countries under a tariff quota', while Article XIII would be violated where a 'Member fails to give access to or allocate tariff quota shares on a non-discriminatory basis among supplier countries'.⁷⁴ This clear-cut separation, however, does not entirely reflect the scope of either discipline in practice. For instance, since TRQ schemes are comprised of two-tiered tariff rates, it is unclear why Article I:1 would only apply to out-of-quota tariffs, or how the *ex ante* exclusion of supplying Members without substantial interests from TRQ allocations could be unconditional when it affects the underlying conditions of competition for suppliers without a substantial interest.

Additionally, the claim that the Article XIII obligations only regulate in-quota tariffs suggests a limited understanding of what the 'restriction' imposed by a TRQ scheme is in fact. The Appellate Body essentially only treats the obligations as affecting the limited volume or allocation of a TRQ scheme.⁷⁵ However, the actual restriction which distorts conditions of competition under TRQ schemes is the imposition of a *relatively higher* tariff rate on out-of-quota imports, as opposed to just the limitation on how many imports could benefit from reduced in-quota tariffs. Hence, there is no reason why Article XIII:1 is excluded from regulating the application of out-of-quota tariff rates if the provisions do not conflict.

4.2 ARTICLES I:1 AND XIII AS CONFLICTING NON-DISCRIMINATION OBLIGATIONS

An alternative approach to examining the regulation of TRQ schemes under Articles I:1 and XIII would be to suggest that the obligations only conflict in part. As already shown, the obligations under Articles I:1 and XIII:1 have been interpreted harmoniously and largely converge with respect to the type of treatment the measures they each cover must afford. Since the Article XIII:2 obligations are *lex specialis* in relation to Article XIII:1 when governing 'distribution of trade' through import restrictions, the question remains whether this provision also operates as *lex specialis* where a conflict emerges with the MFN obligation under Article I:1 over the 'distribution of trade' under TRQ schemes.

This justification seems to be reflected in how the Appellate Body applied Articles I:1 and XIII in *EC – Bananas III (Article 21.5 – Ecuador II)*(Article

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, para. 345.

21.5 – US).⁷⁶ By limiting Article I:1 to the treatment offered by out-of-quota tariffs, the Appellate Body essentially held that in-quota tariffs may be subject to certain market distorting conditions so long as they comply with the second-best alternatives required under Article XIII:2.

While this approach presents a more consistent explanation of how Articles I and XIII discipline TRQ schemes, it nonetheless introduces two problems. First, by following the Appellate Body's logic, it is unclear what role Article XIII:1 serves in regulating TRQ schemes under this approach. While the provision has largely been interpreted in line with Article I:1 in regulating the application of quotas, the Appellate suggests that it is essentially inapplicable to *both* in-quota tariff rates and out-of-quota tariff rates established by TRQ schemes. This conclusion, however, conflict with the extension of the Article XIII:1 obligation to TRQ schemes through Article XIII:5.

The second issue concerns the justification for treating Article XIII:2 alone as *lex specialis*. For Article XIII:2 alone to operate as *lex specialis* in relation to Article I:1, it must establish a greater 'common contact surface area' *vis-à-vis* TRQ schemes as a subject-matter. While the text of Article XIII:2 alone expressly addresses the regulation of trade distribution by import restrictions, and the structure of Article XIII further suggests that Article XIII:1 presents a general obligation which may be departed from by more specific obligations, the same cannot be said of Article I:1.⁷⁷ This is because Article I:1 expressly covers 'customs duties and charges of any kind imposed on or in connection with importation or exportation', and creates specific obligations for how 'any advantages' must be 'granted' to products imported from different Members.

4.3 ARTICLE XIII:5 AS A CARVE-OUT FROM ARTICLE I:1

Since neither understanding of the Appellate Body's approach to examining the relationship between Articles I and XIII in regulating TRQ schemes leads to a cogent conclusion, it is instead suggested that Article XIII alone regulates TRQ schemes to the exclusion of the MFN treatment obligation under Article I:1. Such a reading may be derived from Article XIII:5, which provides that '[t]he provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party'. Importantly, the reference to 'the provisions' suggests that the non-discrimination obligations under *both* Articles XIII:1 and XIII:2 are applicable to TRQ schemes. Given the clear incompatibility between the approaches to

⁷⁶ *Ibid.*, para. 343.

⁷⁷ Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* 439 (Elgar 2019), para. 9.44.

achieving equality of competitive opportunities envisaged in Article I:1 and Articles XIII:1 and XIII:2, only the latter two ‘provisions’ are expressly empowered to discipline TRQ schemes. In this sense, Article XIII:5 may be better understood as a carve-out: excluding Article I:1 from regulating TRQ schemes.⁷⁸

As a matter of legal history, this conclusion is broadly consistent with the pragmatic solution developed in 1933 by the Economic Committee of the League of Nations to squaring MFN treatment with the use of TRQ schemes.⁷⁹ While the Committee noted that its economic assessment could be read to mean ‘that Customs quotas, whether equal or proportional, are all to be condemned, although in varying degrees’, it held that this conclusion ‘would perhaps be excessive’.⁸⁰ Citing historical examples of the positive policy implications of TRQ schemes, the Committee instead argued for the effectiveness of reaching agreements and posited a test for compliance with the MFN treatment obligation which closely resembles the disciplines under Articles XIII:1 and XIII:2⁸¹:

Any country desiring to adopt Customs quotas [i.e., TRQ schemes] must bear in mind that the most-favoured nation treatment which it has conceded to other countries imposes on it the obligation not to impair the equality of conditions in international commercial competition; therefore, quotas must be fixed so as to safeguard, as far as possible, the position of the countries interested. Whether this is done by fixing the first Customs quota with the principal exporting country, or by negotiations conducted with each of the various interested countries in turn, is not a matter of essential importance.

Finally, this reading of Article XIII:5 aligns closely with the principle of judicial economy as exercised within WTO and GATT jurisprudence.⁸² Under existing WTO jurisprudence, the Appellate Body and panels are permitted to exercise judicial economy and determine necessary legal issues so long as this does not lead to either a partial resolution of the underlying dispute (i.e., false judicial economy).⁸³ In the *EEC – Apples (Chile I)* dispute, the GATT panel considered the arguments raised by the parties under Articles I:1 and XIII concerning the EEC’s apples TRQ scheme and ultimately refrained from addressing the Article I:1 by holding that it was ‘more appropriate to examine the matter in the context of Article XIII which deals with the non-discriminatory administration of

⁷⁸ Jorge E. Viñuales, *Seven Ways of Escaping a Rule: Of Exceptions and Their Avatars in International Law*, in *Exceptions in International Law* 67–70 (L. Bartels & F. Paddeu eds, Oxford University Press 2020).

⁷⁹ League of Nations, *supra* n. 46, at 13.

⁸⁰ *Ibid.*, at 13.

⁸¹ *Ibid.*, at 14.

⁸² Graham Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* 174 (Cambridge University Press 2015).

⁸³ Appellate Body Report, *Australia – Measures Affecting Importation of Salmon* (adopted 6 Nov. 1998) WT/DS18/AB/R, para. 223; Appellate Body Report, *Japan – Measures Affecting Agricultural Products* (adopted 19 Mar. 1999) WT/DS76/AB/R, para. 111.

quantitative restrictions'.⁸⁴ A similar approach has also been followed by the GATT panel in *EEC – Dessert Apples*, and more recently, by the *EC – Bananas III* and *EU – Poultry (China)* panels.⁸⁵

5 CONCLUSION

TRQ schemes are a commonly used, yet controversial instrument of international trade policy: they are applied to regulating sensitive product imports *precisely* because they may imitate the effects of regular tariffs, provide for quota rents, or operate as de facto quota restrictions depending on their design. The approach to regulating TRQ schemes by the Appellate Body, namely, to apply *both* Articles I:1 and XIII, has created greater confusion surrounding the legal regime. This is because the Appellate Body has presented a distorted description of the non-discrimination principles found in both provisions and failed to explain how they may apply either in harmony or as conflicting rules.

As such, this paper advanced two claims regarding the relationship between Articles I:1 and XIII. First, the non-discrimination obligations under both Articles I:1 and XIII reflect the same notion of equality of competitive opportunities. However, the disciplines conflict in how this result should be achieved. While Article I:1 creates an unconditional MFN treatment obligation, Article XIII:2 establishes second-best alternatives which importing Members may instead comply with.

Second, the approaches developed by the Appellate Body's report in *EC – Bananas III (Article 21.5 – Ecuador II)(Article 21.5 – US)* to reconciling the two provisions – namely the formal explanation and actual application of the norms – are internally inconsistent. While the claim that Articles I:1 and XIII are mutually harmonious fails to recognize the incompatibility between the approaches to achieving non-discrimination found under both provisions and artificially limits their scope, seeing the provisions as mutually conflicting by itself does not clarify which provision would prevail and in what circumstances. As such, it is proposed that the non-discrimination obligations under Article XIII operate as a carve-out from the MFN treatment obligation under Article I:1 by virtue of Article XIII:5. This conclusion is consistent with the exercise of judicial economy by both GATT-era and WTO panels.

⁸⁴ GATT Panel, *EEC – Apples (Chile I)*, *supra* n. 45, para. 4.2.

⁸⁵ GATT Panel, *EEC – Dessert Apples*, *supra* n. 62, para. 12.28 (holding that Art. XIII 'deals with the non-discriminatory administration of quantitative restrictions and is thus the *lex specialis* in this particular case'); Panel, *EC – Bananas III*, *supra* n. 29, para. 7.129; Panel, *EU – Poultry (China)*, *supra* n. 3, paras 7.444–7.445.