
International Economic Law

June 29, 2016

Duration: 120 Minutes

- The test includes 4 questions.

Grading:

Question 1	(25%)
Question 2	(25%)
Question 3	(25%)
Question 4	(25%)
Total	100%

Good Luck!

Question 1 (25%)

Country Y is an emerging economy and a Member State of the WTO. In the aftermath of the Panama Paper scandal the socialist government decides to take firm action against tax evasion. To this aim, it creates a black list with countries considered “not cooperating for tax transparency purposes”. Furthermore, it envisages the amendment of its Gain Tax Law (GTL) establishing different tax levels for foreign service suppliers’ income (e.g. through remuneration by local residents): Whereas the standard taxation rate amounts to 15%, financial service suppliers from blacklisted countries are now subject to a capital tax of 35%.

Prior to enactment of the amendment, the government of Country Y asks you as a legal counsel to analyze the compatibility of the planned amendment with WTO law, namely with Article II:1 GATS. What is your assessment? Please also take the possible justification reasons of Article XIV GATS and paragraph 2(a) of the Annex on Financial Services into consideration.

Question 2 (25%)

Country A recently enacted a “Timber Regulation” (TR), encompassing measures to counter the trade in illegally harvested timber. The Preamble of the TR reads as follows:

Illegal logging is a pervasive problem of major international concern. It poses a significant threat to forests as it contributes to the process of deforestation, which is responsible for about 20 % of global CO₂ emissions and threatens biodiversity.

According to the TR, timber products cannot be placed on the domestic market, unless they are certified with a “Sustainable Forest Label”. Producers and retailers can attain this label through providing comprehensive documentation to prove that their products have been harvested in a sustainable manner.

Country B is a developing country with large areas of rain forests and a major producer of wood products. In apprehension of negative trade effects, it challenges this measure in front of the WTO dispute settlement body. Country B submits that the TR was enacted for purely protectionist reasons and that it accords “treatment less favourable” to foreign wood producers and was thus in violation of Articles I:1 and III:4 of the GATT. What arguments can Country A as the responding party put forward in its defense of the TR?

Question 3 (25%)

After the 2011 nuclear disaster in Fukushima, and as the culmination of a decades-long public debate, the parliament of Catonia decided to amend its Atomic Energy Act to speed up the phase-out of nuclear energy, so that it would be completed by 2022. The amendment entailed the immediate shutdown of some of Catonia’s oldest reactors. Pluton, an energy company

wholly owned by the Catonia's neighbor country Doglandia, operates and owns two of those oldest reactors. Catonia and Doglandia have close economic relations.

According to Pluton's chairwoman, the shutdown of the two reactors resulted in a loss of expected revenues of 1.5 billion US \$ in 2014 and 2015. Pluton asks for your advice on how to proceed against Catonia.

- a) Which legal basis could *Pluton* invoke?
- b) Which legal claims can *Pluton* bring against the Government of Catonia?

Question 4 (25%)

Please explain the meaning and relevance of the "race to the bottom" in International Economic Law.

Answers for Regular IEL Exam

Question 1 (10 points)

General answers:

- **Discussion of the basic principles of the GATS (non-discrimination, market access und transparency) (0.5)**
- **Subsumption: Why could the measure at issue be in violation of the MFN obligation? (0.5)**

National treatment:

- **Discussion of the concept of likeness and its evaluation under the GATS (against the background of general trade regulation) (2)**
- **Discussion of the criteria of „treatment no less favorable“ (1)**
- **Interim Conclusion (0.5)**

Justification reasons

- **Rationale and functionality of the exception reasons (1)**
- **Test under the general exception of the GATS (2)**
- **Test under the Annex on Financial Services (1)**
- **Interim Conclusion (0.5)**

Conclusion (1)

General remarks:

On the one hand, the candidates were expected to discuss why the MFN treatment obligation could have been violated in this case (differentiation between blacklist and other countries). On the other hand, candidates should have elaborated upon the various reasons under which an alleged violation of the GATS could have been justified. Thereby, points were awarded for any presented solution under the various subparagraphs of Article XIV GATS. A full point was awarded for a short explanation of the rationale of the exception provided for in Paragraph 2(a) of the Annex on Financial Services. In this context, students were expected to recognize the importance of the element of „prudential reasons“.

Question 2 (10 points)

General answers:

- **Discussion of national treatment and MFN treatment as basic principles of the GATT (1)**
- **Subsumption: Why does the measure at issue affect the national and MFN treatment obligation? (0.5)**

National treatment and MFN treatment:

- **Discussion of the concept of likeness and its evaluation under the BTA criteria (3)**
- **Subsumption: Which criteria do apply to wood and why (1)?**
- **Discussion of the criteria of „treatment no less favorable“ (1)**
- **Interim Conclusion (0.5)**

Justification reasons:

- **Discussion of the rationale for the possibly applicable justifications (0.5)**
- **Subsumption under Article XX(g) GATT (0.5)**
- **Test under the chapeau (0.5)**
- **Interim conclusion (0.5)**

Conclusion (1)

General remarks:

Points have been awarded for a discussion of the relevance of the “likeness” assessment in WTO law, the four criteria established by jurisprudence (“BTA-criteria”) as well as for placing them in the context of the case at issue.

Question 3 (10 points)

General answers:

- **Field of international investment law. (1)**
- **Mention of the relevant case law (either Metalclad, Pope Talbot and/or SD Meyers). (1)**

a) *Which legal basis could Pluton invoke?*

- **It is mentioned that the two countries have “close economic relations”. Therefore, Pluton may potentially draw upon a BIT between Catonia and Doglandia. (1)**
- **Pluton could invoke Customary International Law and General Principles of International Law. (1)**
- **Pluton could bring claims before an arbitration panel according to UNCITRAL rules, if there is an agreement in a BIT, or before ICSID arbitration if both countries are members. (1)**
- **Since Pluton is wholly owned by Doglandia, the latter could proceed against Catonia before the ICJ (diplomatic protection). The leading case in this regard is, Barcelona Traction. (1)**

General remarks:

Students were expected to distinguish between legal proceedings open to Pluton as a corporation and Doglandia as a state. Points were awarded for a concise argument based on students' assessment of the facts, provided that the relevant applicable rules and case law were mentioned.

b) *Which legal claims can Pluton bring against the Government of Catonia*

- **Pluton can claim that the actions of Catonia lead to an indirect expropriation. (1)**
- **According to Customary International Law, a legal expropriation must be in the public interest, non-discriminatory and the procedure needs to meet due process standards. (1.5)**
- **In the present case, due process standards are not fully met (unpredictable, because “immediate” shut down). Pluton could ask for compensation. (1)**
- **The Hull-Formula states that compensation needs to be prompt, adequate and effective. (0.5)**

General remarks:

Students were expected to distinguish between direct and indirect expropriation. Regardless of the result, alternative arguments were also awarded points, as long as the relevant legal criteria were applied correctly and in a coherent way throughout the whole question.

Question 4 (10 points)

- The “race to the bottom” is a phenomenon linked to free trade and linked to the theory of comparative advantage. (2)
- Countries want to be more competitive, so they adjust their regulatory framework (e.g. taxes, labor or environmental standards) in order to attract investment (regulatory competition). (2)
- Since every country wants to be the most favorable one, this could lead to a chain reaction, resulting in a “race to the bottom”. (2)
- This can lead to negative impacts on social standards. (2)
- There is a risk of further widening the (technological) gap between developing and industrialized countries, because workers in industrialized countries have better access to training and specialization. (2)

General remarks:

Points have been awarded for mentioning the narrow room for manoeuvre countries have with regard to independent policies because of globalization of international trade. Students were also expected to discuss a potential human rights basis of free trade. Comparative examples, such as Rana Plaza or POSCO, could be integrated.