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# REFRESHER FOR MOOT COURT EXERCISE

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# Moot Court Exercise: Energy Drinks



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- Types of products at issue:



# Basic Factual Situation



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- Members involved:
  - ❑ **Vitalistan (Respondent/Defendant)**
    - ❖ Developed country Member
    - ❖ High health standards
    - ❖ Important producer of **sports** drinks
    - ❖ Adopted tax and non-tax measures affecting importation and marketing of **energy** drinks
    - ❖ Measures focus on 2 stimulants in energy drinks: caffeine; and taurine

# Basic Factual Situation



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➤ Members involved:

## ❑ **Boostland (Complainant)**

- ❖ Developing country Member
- ❖ Exporter of energy drinks

## ❑ **Taurilania (Third party)**

- ❖ Developed country Member
- ❖ Important producer and exporter of energy drinks

# Basic Factual Situation



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- Members involved:
  - ❑ **Paradistan (Third party)**
    - ❖ Least-developed country Member
    - ❖ Producer and exporter of guarana-enriched sports drinks
    - ❖ Duty free entry of its drinks into Vitalistan
- Others involved:
  - ❑ **Soft Drinks Watch (NGO)**

# GATT 1994/WTO Provisions



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- **Article I – MFN treatment**
- **Article III – National treatment**
- **Article XX – General exception**
- **Article XXIV – RTA exception**



# Article I, GATT 1994



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- Non-discrimination obligation among WTO Members.
- Each WTO Member must grant all other Members “immediately and unconditionally” the best treatment it gives to any trading partner.

# Article I, GATT 1994



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- Does the measure at issue confer a trade “advantage” of the kind covered by Article I:1?
- Are the products concerned “like”?
- Is the advantage at issue granted “immediately and unconditionally” to all like products?



# GATT 1994/WTO Provisions



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# Article III, GATT 1994



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- Article III:1 – general principle
  - ❑ Internal taxation and domestic regulation not applied “so as to afford protection to domestic production”.
  
- Article III:2 – tax discrimination
  - ❑ No tax discrimination between domestic and imported like products (first sentence), or directly competitive or substitutable products (second sentence)
  
- Article III:4 – regulatory discrimination
  - ❑ No regulatory discrimination between domestic and imported like products.

# Article III, GATT 1994



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- Article III:2 – first sentence
  - ❑ Are imported products taxed “in excess of” like domestic products?
  
- Article III:2 – second sentence
  - ❑ Are internal taxes applied in a manner contrary to the principles set forth in Article III:1?
  - ❑ Are domestic products and directly competitive or substitutable products “not similarly taxed”?

# Article III, GATT 1994



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- Article III:4 – regulatory discrimination
  - ❑ Is the measure at issue a law, regulation or requirement covered by Article III:4 ?
  - ❑ Are the domestic and imported products at issue “like products”?
  - ❑ Are imported products accorded treatment “less favourable” than like domestic products?

# Article III (Like Products)



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- Not defined in GATT 1994
- Factors considered by past panels (Working Party on Border Tax Adjustments)
  - ❑ Properties, nature and quality
  - ❑ End uses
  - ❑ Consumer perceptions, tastes and habits
  - ❑ Tariff classification

# Article III (Like Products)

- Article III:2 – 1<sup>st</sup> sentence (4 basic criteria)



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- Article III:2 – 2<sup>nd</sup> sentence (4 basic criteria + competitive conditions)



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- Article III:4
- 4 basic criteria + competitive relationship



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# GATT 1994/WTO Provisions



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- Article III – National treatment
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# Article XX, GATT 1994



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- Invoking Article XX as an exception to MFN and national treatment obligations.
- Does the challenged measure:
  - ❑ fall within one of the exceptions listed in paragraphs (a)-(j) of Article XX?
  - ❑ satisfy the requirements of the “chapeau” of Article XX?



# Article XX(b), GATT 1994



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## Necessary to protect human health



# Article XX(b), GATT 1994



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- “Necessary” requires “weighing and balancing” of several factors:
  - ❑ Importance of the societal value or objective pursued.
  - ❑ Contribution of measure to achievement of its objective.
  - ❑ Trade restrictiveness of measure – reasonably available alternatives.

# Chapeau of Article XX



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- Exception permitted, subject to the requirement that such a measure is not applied in a manner that would constitute:
  - ❑ arbitrary or unjustifiable discrimination between countries where the same conditions prevail; or
  - ❑ a disguised restriction on international trade.

# GATT 1994/WTO Provisions



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- Article I – MFN treatment
- Article III – National treatment
- Article XX – General exception
- **Article XXIV – RTA exception**



# Article XXIV, GATT 1994



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- Article XXIV (Customs Unions and FTAs):
  - ❑ Duties on non-parties not on the whole more trade restrictive than prior to the union (XXIV:5)
  - ❑ Duties eliminated with respect to substantially all trade between parties to the union (XXIV:8)

# Questions?



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The End



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THANK YOU!