

52. Different like product analyses may be conducted under different GATT Articles. However, nothing in past GATT practice suggests that WTO dispute settlement panels must adhere rigidly to a particular test applied in respect of a specific Article in an earlier case. Rather, GATT 1947 panels have repeatedly stated that like product analyses are to be conducted on a case-by-case basis. Although one GATT 1947 Panel noted that a like product determination under one GATT Article is "without prejudice" to like product concepts in other GATT provisions as the other provisions *might* have different objectives and which *might* therefore also require different interpretations,²⁸ this cannot be interpreted as requiring that different criteria *must* be used in like product analyses conducted under separate GATT Articles. Nothing in past GATT practice precludes a panel from using the same criteria to determine whether two products are like under different GATT provisions.²⁹

53. In this case, there is no reason to conduct a different analysis under different Articles where the same measure, the same products, and the same market are at issue. Under Article I, the analysis compares *Pecten maximus* (from countries other than France) to Canadian scallops. The analysis under Article III also compares *Pecten maximus*, this time from France, with Canadian scallops. The products at issue under both Articles I and III are the same. Moreover, the matter in question is the same: this dispute is about the treatment of *Pecten maximus* relative to *Placopecten magellanicus* in the French market. It is the same advantage under both Articles I and III that is being bestowed on *Pecten maximus* that is being denied to *Placopecten magellanicus*.

ii. *The context of the like product analysis*

54. The regulatory purpose of a measure can form a significant part of the context within which a like product analysis ought to be conducted. The EC argues that the most important criterion to be taken into account is the purpose of the regulatory measure; the purpose of the Order is to name scallops. However, this ignores the relevant criteria established in long-standing GATT practice.

²⁸ *United States - Measures Affecting Alcoholic and Malt Beverages*, Report of the Panel adopted on 19 June 1992, BISD 39S/206.

²⁹ GATT 1947 Working Parties and Panels have used a variety of criteria in like product analyses under both Articles I and III of the GATT and typically have not distinguished between criteria to be used in determining whether products were like under GATT Articles III and I. In fact, generally the same criteria have been used for like product analyses under those Articles. *The Australian Subsidy on Ammonium Sulphate*, Report of the Working Party adopted on 3 April 1950, BISD II/188; *Border Tax Adjustments - Report of the Working Party*, Report of the Working Party adopted on 2 December 1970, BISD 18S/97; *EEC - Measures on Animal Feed Proteins*, Report of the Panel adopted on 14 March 1978, BISD 25S/49.