

“Like Product”: The Differences in Meaning in GATT Articles I and III

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A commonplace usually recited at the beginning of every discussion of the term “like product” is the observation that the term appears in several different GATT provisions,¹ and that its meaning is likely to vary from one GATT provision to another. This statement must be distinguished from the equally common statement that “like product” must be defined on a “case by case” basis — a statement that suggests that the concept itself cannot be reduced to definable criteria, and thus that individual applications of the concept, even under the same provision, will differ for reasons cannot be explained. The former statement suggests that, notwithstanding the lack of a precise definition, there may be identifiable and describable differences in the policy contexts of the various GATT Articles in which the term “like product” is used, and that these policy

¹ Professor Jackson lists 10 GATT provisions” I:1, II:2(a), III:2, III:4, VI:1(a,b), IX:1, XI:2(c), XIII:1, XVI:4, JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1968) at 259n1. The 1970 Working Party on Border Tax Adjustments reported that the phrase “like or similar products” appears 16 times in the text of the General Agreement. GATT, BISD, 18th Supp. 97, 101 (1972). In his comprehensive study of the texts, negotiating history and dispute settlement rulings on the “like product” concept and similar expressions in GATT, Professor Zedalis counts 17 GATT provisions that use the term “like.” Zedalis, *The Theory of GATT “Like” Product Common Language Cases*, 27 *VANDERBILT JOURNAL OF TRANSNATIONAL LAW* 33, 36 (1994)

In addition to the above-listed sources, other studies of the “like product” concept include: Berg, *Dividing the Like-Product: Economics, the Law and the International Trade Commission*, 20 *WORLD COMPETITION LAW AND ECONOMICS REVIEW* 73 (1997); Berg, *An Economic Interpretation of “Like Product,”* 30 *JOURNAL OF WORLD TRADE* 195 (1996); Steen, *Economically Meaningful Markets: An Alternative Approach to Defining “Like Product” and “Domestic Industry” under the Trade Agreements Act of 1979*, 73 *VIRGINIA LAW REVIEW* 1459 (1987); Langer, *The Concepts of Like Product and Domestic Industry under the Trade Agreements Act of 1979*, 17 *GEORGE WASHINGTON JOURNAL OF INTERNATIONAL LAW AND ECONOMICS* 524 (1983).

Finally, the paper by Marco Bronckers and Natalie McEllis in this volume, pp. ****, contains a lengthy study of the “like product” concept as it applies to GATT/WTO antidumping law and to the GATT/WTO law pertaining to environmental measures.

differences may yield identifiable differences in the meaning, or at least the range of meaning, accorded to that term from one Article to another..

The purpose of this paper is to examine one setting in which such a difference of meaning might be expected to occur. The paper asks whether such a policy-based difference in meaning can be found between (1) the meaning accorded to the “like product” concept in the Most Favored Nation obligation of GATT Article I:1, and (2) the meaning accorded to “like product” concept in the National Treatment obligations of paragraphs 2 and 4 of GATT Article III.

During the past decade, an effort was made to launch a new definition of “like product” as that term is used in Article III of GATT. Basing their ruling on the policy statement in Paragraph 1 of Article III stating that internal taxes and internal regulatory measures should not be used “to afford protection to domestic production,” two GATT panel decisions ruled that “like product” was to be defined in terms of two questions that were only indirectly connected to the issue of “likeness” — the question whether the product distinction in question had the “aim” of protecting domestic industry, and the question whether that product distinction had the “effect” of protecting the domestic industry.² In 1996, the WTO Appellate Body rejected this “aim and effects” interpretation of the “like product” concept as contrary to the text of Article III:2, and indicated that GATT dispute settlement panels should return to the more traditional definitions in terms of “likeness.”³

This paper is not a further discussion of the “aim and effects” definition of “like product.” Instead, it sets aside that definition and examines policy-based differences in the definition of “like product” within the traditional concepts of “likeness” called for by the Appellate Body. It asks how more traditional interpretations of the “like product” concept have been, or should be, impacted by the difference between that policies underlying GATT Articles I:1 and III respectively..

The thesis of the paper is that, *in certain cases*, there should be a difference between the meanings given to the “like product” concept under Articles I and III. Specifically, it will be argued that the term “like product” in Article I:1 should be interpreted to allow rather fine distinctions between products *when it is applied to product distinctions made by tariffs*, but that the “like product” term should not allow such fine distinctions when it is being applied to product distinctions made by internal taxes and internal regulations. The latter, more demanding standard for product distinctions made by internal measures would apply not only under Article III:2 (taxes) and Article III:4 (regulations), but also to that part of the Article I:1 MFN obligation that applies to “all matters referred to in paragraphs 2 and 4 of Article III.” Because of the rather unusual two-sentence architecture of Article III:2, however, it will be necessary to make a further qualification about how the term “like product” should be interpreted under that particular GATT provision.

The paper finds that present GATT/WTO tariff practice does reflect this distinction to a

² *United States — Measures Affecting Alcoholic and Malt Beverages*, BISD, 39th Supp. 206 (1993); *United States — Taxes on Automobiles*, GATT, GATT Doc. DS.31/R (11 October 1994).

³ *Japan — Taxes on Alcoholic Beverages*, WT/DS8, -10, -11/AB/R (4 October 1996).

significant degree, but that GATT/WTO legal precedents for the most part do not. It finds that governments generally do employ a quite permissive interpretation of “like product” with regard to the product distinctions they make in their own national tariffs, and that this permissive interpretation has been given general support in at least one GATT dispute settlement ruling. The paper also finds, however, that no such distinction between tariffs and internal measures has as yet been recognized by the small group of other dispute settlement rulings that have treated this issue to date. Whatever the policy merits of the distinction argued for in this paper, it would appear to be quite far from being recognized.

I. THE POLICY DIMENSION

A. Differences in Definitions of Likeness

It is often said that one cannot apply the concept of “likeness” without specifying the characteristics by which likeness is to be measured. The usual illustration of this point is to say that it is impossible to tell whether one apple is “like” another apple without specifying whether or not characteristics such as edible quality, taste, color, size, or other features are relevant. In fact, however, it is quite common to compare different definitions of “like product” according to what looks like a single scale of “likeness.” For example, if we see two legal rulings, one ruling saying that the only product “like” an apple is another apple, and the other ruling saying that any edible fruit is “like” an apple, we have no difficulty in saying that the standard applied in the former decision requires a greater degree of likeness than the standard applied in the latter -- meaning, of course, that by any criteria one can imagine being applied as relevant, the former standard requires a closer degree of “likeness” than the other. The one-dimensional “likeness” scale works best, of course, the closer one of the two standards being compared is a standard requiring nearly identical qualities.

For most purposes, however, meaningful comparisons of “like product” definitions requires specifying the criteria by which likeness to be measured. One must describe the individual criteria with some care, and after that it is possible to talk about degrees of likeness within the boundaries of those criteria or characteristics.

The first criterion of likeness that comes to mind is physical characteristics -- the more two products have the same physical characteristics, the more “like” they can be said to be. Taken individually, physical characteristics would appear to be a sterile concept in a policy sense. That is, it is usually difficult to understand why a difference in this or that physical characteristic, as such, should dictate that two products need not be treated the same. To be sure, a high degree of physical likeness can be a reliable proxy for many other criteria that do have policy content — criteria such as commercial interchangeability. The greater the physical identity of two products the more likely it is that they are interchangeable. That is probably why similarity of physical characteristics is so often the first criterion that legal decisions look to. As soon as any difference of physical characteristics is found, however, one has to resort to other criteria to determine whether the difference is relevant to the question of “like” treatment.

Since GATT is a commercial agreement, it seems reasonable to start with the assumption that “likeness” is (or should be) a commercial concept, meant to describe one or more market phenomena. The central commercial concept that comes to mind is competitiveness. The two most important articles in which the “like product” concept is used -- Articles I and III -- involve rules prohibiting differences in treatment between certain products. The obvious reason for preventing differences in treatment is to prevent distortions in competition between otherwise competitive goods. The other main “like product” rules are Articles VI and XIX, in which GATT tries to define the producers who are to be protected from unfair or harmful imports. Once again, the logical candidates for protection are those producers whose goods are competitive with the harmful imports.

Many of the criteria of likeness that have been offered in GATT legal discussions of the “like product” concept can be viewed as overlapping variations on the idea of competitiveness. . First, there is substitutability -- the extent to which consumers perceive two products as functionally equivalent, measured by the consumer’s willingness to substitute one for the other, a willingness which in turn is usually measured by the extent to which relatively small changes in price affect consumer preferences for one or the other. Next, there is concept of functional likeness, the extent to which the two products do in fact perform the same function, like sweeping dirt. Finally, although the producer-oriented provisions sometimes do employ “likeness” criteria that do not, strictly speaking, relate to the competitiveness of the goods in question -- e.g., the extent to which two products are made from the same raw materials, in the same establishments, by the same capital goods, or by the same workers — the competitiveness criteria are still the first and most important factor in the “like product” decisions in those areas as well.⁴

It is not the purpose of this paper to explore all the criteria that have been suggested to date. In keeping with our purpose of comparing the application of the “like product” concept under Articles I and III, we turn to the more particular policy goals that can be identified in those two legal settings.

B. The Policy Goals of GATT Article III:2 and III:4

The general policy behind paragraphs 2 and 4 of Article III is fairly simple. The starting point is the policy stated in Paragraph 1 of Article III: Governments should not employ “internal” measures -- internal taxes or internal regulations -- to give protection to domestic industry. A rule that internal measures must not give less favorable treatment to “like” foreign products, will achieve this anti-protection goal if “like [foreign] products” is defined to mean competitive foreign products.

Less favorable treatment will tend to protect domestic products whenever it imposes a commercial disadvantage on those foreign products with which the domestic product competes for sales. “Competitiveness” in this sense is best measured by the substitutability of the foreign product -- the extent to which consumers are willing to choose the foreign product in substitution for the domestic

⁴ For an essay in this volume that argues in favor of a “like product” definition in terms of competitiveness for the producer-oriented rules, see the paper by Marco Bronkers and Natalie McEllis, pp. ****.

product.

By the same token, the basic policy of Article III would *not* be served by a definition of “like product” which limited that concept to products that had nearly identical physical characteristics. Such a narrow definition of “like product” would allow governments to give less favorable treatment to a foreign product that, although competitive with the relevant domestic product, had some different physical characteristics.

If one were re-writing Paragraphs 2 and 4 of Article III, and wanted to be clearer about where to draw the line, there would be a temptation to substitute the word “competitive” for “like.” Upon further reflection, however, one would realize that the word “competitive” would probably need to be narrowed a bit, for political rather than economic reasons. The range of foreign products that would feel at least some negative competitive impact from being taxed or regulated more heavily than a particular domestic product could be fairly wide. To avoid undue interference with the tax and regulatory policy of the importing country, one would probably want to draw a line that separates those foreign products that suffer a major competitive disadvantage from those upon whom the negative effect will be milder.

Looking for a way to narrow the concept of “competitive,” we would see that GATT itself usually frequently uses the term “*directly competitive*” when it wishes to narrow the scope of the word “competitive” to some extent.⁵ For purposes of analysis, we can adopt “directly competitive” as the next, less intrusive concept for defining the scope of protection given to foreign products.

At this point, however, we confront the fact that the drafters of Article III:2 seemed to regard “like product” as a term defining an even narrower relationship than the term “directly competitive.”

The second sentence of Article III:2, as explained by its Ad Note, makes it clear that “directly competitive” products include a range of products that are not “like” the product in question. Thus, it would appear that the concept of “like product” in Article III:2 may in fact be referring to similarity of physical characteristics, contrary to the idea that such a standard would be too narrow to prevent the kinds of product discrimination that one would need to prevent in order to achieve Article III’s general policy against protectionism described above. The answer, of course, is that Article III:2 does not in fact allow such protective product distinctions, because the second sentence of Article III:2 goes on to prohibit those other kinds of product discrimination as well -- the less favorable treatment of “not-like-but-directly-competitive” products — *if* the protective effects of such discrimination can be shown.⁶ Thus, the overall policy of Article III:2 is consistent with the

⁵ To be accurate, the Ad Note to Article III:2 which introduces this term uses the longer term “directly competitive or substitutable.” Notwithstanding the rule that every word of a treaty must have a meaning and purpose, the author views the two terms as essentially synonymous, and for convenience this paper will omit reference to “substitutable.”

⁶ There is some disagreement at present about the exact meaning of the policy statement contained in closing words of Article III:1. The authors of the “aim and effects” test found that the language contained a prohibition of *purposeful* protection. The Appellate Body ruled that no such “aim” was not to be considered in applying this policy statement, but when the Appellate Body itself applied this policy statement, it came up with an analysis that looked quite like the “aim” analysis put forward by the panel decisions it was rejecting. The point is beyond the scope of our

policy goals of Article III described above. In this particular setting, the drafters of Article III:2 have simply used a narrow definition of “like product” to define a sub-group of the competitive products that were to receive protection from less favorable treatment — a subgroup that could receive that protection *without* having to prove anything more than their “likeness,” rather narrowly defined. In other words, a narrow concept of “likeness” is used in Article III:2 as the basis of a *per se* rule. Because of this rather limited function accorded to the “like product” concept in the two-sentence architecture of Article III:2, it seems clear that one should treat the narrow definition of “like product” in that section as a definition that should not necessarily be generalized to other parts of Article III, where the same legal architecture does not appear. The need for a “like product” definition based on competitiveness is not otherwise altered by the peculiar structure of Article III:2,

As all students of GATT will already know, the main problem with this explanation of GATT Article III:2 is the fact that Paragraph 4 of Article III -- the other pivotal rule of Article III that deals with internal non-tax regulations — is not constructed the same way as Paragraph 2. Paragraph 4 does not contain a second sentence prohibiting differential treatment of not-like-but-directly-competitive products. The rule for all internal regulation is a simple *per se* rule and nothing else -- one that states that less favorable treatment must not be given to “like” foreign products, *period*.. If the foreign product is not “like” the relevant domestic product, the government may treat it less favorably, even if such differential regulation has a protective effect (or purpose).

There would seem to be two possible ways to reconcile the apparent conflict between the wording of Paragraphs 2 and 4 of Article III:

(1) It may be that the term “like product” simply has a different meaning in Paragraph 4. Given that recent WTO legal rulings tend to give the “like product” test of Article III:2 a very narrow reading,⁷ a different meaning is quite likely to be adopted if, as one assumes, it is thought necessary to give Article III:4 a broad enough scope to make it effective. It must be noted, however, that this answer would create a reverse kind of mismatch with Paragraph 2 — that is, if Paragraph 4’s “like product” concept includes some or all of Paragraph 2’s “directly competitive” products, it will be giving “directly competitive” products the benefit of a *per se* rule whereas Paragraph 2 requires that all but nearly identical products must prove adverse competitive effects (and possibly discriminatory purpose).

(2) It may be that the term “like product” is really a lot broader than we have assumed, that it includes a lot of what we would normally call “not-like-but-directly-competitive” products, and that the second sentence of Paragraph 2 is meant to cover only quite dissimilar goods — goods like bananas and apples that are so dissimilar that one would not be inclined to assume meaningful competitive impact unless it were proved. Such a broader definition of “like

“like product” analysis. Further discussion can be found in Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an “Aim and Effects” Test*, 32

⁷ See, e.g., *Japan — Taxes on Alcoholic Beverages*, *supra* note 3, at page 21 (“We believe that, in Article III:2, first sentence of the GATT 1994, the accordion of “likeness” is meant to be narrowly squeezed.”)

product” would take us back to the idea of directly competitive products — a category that might be defined in market terms as a competitive relationship, or degree of substitutability, sufficiently strong to make it likely that differential treatment would have protective effects.

Although this explanation leaves us with an unusually restricted interpretation of the words “directly competitive” in Paragraph 2, it is the most logical way to make Paragraphs 2 and 4 at least roughly consistent despite their quite different structures. The second sentence of Paragraph 2 would still result in somewhat broader protection for foreign products from tax discrimination than from other regulatory discrimination, but one could possibly justify that difference with two arguments: **(a)** Differences in tax rates are inherently arbitrary, and thus should be harder to justify than regulatory distinctions. **(b)** It is easier to trace the competitive effects of tax differences (money charges) on dissimilar but competitively related products than it is to trace the effects of regulatory distinctions on such products..

Before examining what GATT legal rulings and other sources have to say about the puzzle of the Article III concept of “like product,” we must look at how the “like product” concept relates to the somewhat different policy context of GATT Article I:1.

C. The Policy Goals of GATT Article I:1

The anti-discrimination rule of Article I:1 covers a variety of measures. It covers tariffs, it covers most other measures taken in connection with border charges, it covers payments restrictions, and it covers all internal measures covered by Paragraphs 2 and 4 of Article III (i.e., essentially *all* internal measures). Although the words of Article I:1 appear to apply the same MFN principle to each of these different subject areas, defined in terms of what appears to be the same “like product” concept, the fact that the provision covers so many different measures raises the possibility that the content of the MFN rule may not be the same for each area. Instead, it may be that the different policies applicable to different subject areas will call for a different type of MFN rule, expressed by a different definition of “like product” for at least some of the different subject areas. This section of the paper focuses on one such difference of meaning within Article I:1.

From an economic point of view, the non-discrimination policy behind the MFN rule of Article I:1 should be quite similar to the anti-protection policy behind the National Treatment rule of Article III. In terms of its economic effects, “discrimination” (less favorable treatment of goods from one foreign country vis a vis the goods of another foreign country) is no different than breach of the National Treatment obligation (less favorable treatment of foreign goods vis a vis domestic goods). The economic effect of discrimination is to “protect” the goods of the advantaged country from competition with the goods of the disadvantaged country, just as denial of national treatment protects local goods against all foreign goods.. Both kinds of protection equally distort the market, equally distort the allocation of resources, and thus equally diminish global wealth.⁸ Consequently, it would seem that the range of goods protected by Article I’s MFN obligation should be same as the

⁸ To be sure, the effects are not exactly symmetrical. “Discrimination” that consists of lowering barriers to goods from favored countries can also involve a little trade creation.

range of goods protected by Article III's National Treatment obligation. In each case, the goods to be protected against less favorable treatment should be those goods that are directly competitive with goods receiving more favorable treatment. The same "like product" definition should do for both obligations.

With regard to the internal measures covered by Article III, there really is no reason to distinguish between the Article I definition of "like product" and the Article III definition of "like product." The basic policy of Article III is the economic policy to eliminate market distortions caused by internal measures, and that economic policy is just as compelling with respect to National-Treatment-type discrimination as it is to MFN-type discrimination.⁹

If we look at the non-discrimination policy with regard to tariffs, however, the policy picture becomes clouded by countervailing considerations. In the first place, we must be careful not to miss the obvious. The GATT policy of allowing governments to maintain tariffs is a policy to allow a market distortion. There is thus no overall, "no-distortions" policy that one can appeal to for guidance in the way we treat tariffs. The overall goal of Article I here is not chastity. It is merely the orderly management of protection in order to contain its effects and remove its unnecessary evils.

The fact that Article I accepts the business of tariff protection means, among other things, that it must also accept the tools of tariff protection. Specifically, governments managing a policy of tariff protection need to be able to draw lines between products in order to confine protection to those imports which do in fact threaten domestic producers, and also to confine tariff liberalization to those products for which the removal of protection will be found acceptable to domestic interests. The policy being served by such product distinctions is thus something different from, and potentially more complex than, the Article III goal of eliminating market distortions.

A second and more important policy difference between the Article I policy toward tariffs and the Article III policy toward internal measures is the fact that GATT policy toward tariffs must include an added objective of promoting negotiation to lower tariffs. For political reasons, it has been considered necessary to conduct such negotiations on the basis of a *reciprocity* principle -- the principle that governments are expected to pay for the market opportunities created when other governments lower their tariffs, by lowering their own tariffs in return. As long as everyone contributes equally, a reciprocity policy can be consistent with anti-discrimination policy. But in the case where reciprocal payment is not made, a reciprocity policy requires that the non-paying party be denied the benefit of the tariff concessions for which it is unwilling to pay. A reciprocity policy requires being able to discriminate against "free riders." In sum, the reciprocity dimension of tariff negotiations is in conflict with the non-discrimination rules of Article I:1.

⁹ Article III is often explained in terms of the practical value of confining protection to the border — the value of removing the difficulty that traders have in identifying the multiple sources of internal protection, and also the value of removing the difficulty that trade negotiators have in dealing with multiple political authorities when internal measures are used as instruments of protection. The use of internal measures for third-country discrimination would be equally objectionable on this score as well.

The GATT has reconciled these conflicting policy preferences in two ways. The first way has been to avoid the conflict by management of negotiations. Tariff negotiations usually do not proceed until there is a general political agreement that the important parties will make a roughly equal contribution, thereby eliminating the largest part of the free-rider problem by advance agreement. Advance agreement cannot eliminate the free rider problem entirely, however, and so there is need for some further lever to solve the reciprocity problem at the margin. The second answer has been to allow a limited type of discrimination against countries that decline to offer reciprocal payment. Although the terms of the Article I:1 MFN obligation preclude explicit discrimination against other countries by name, governments have agreed, tacitly, that they may discriminate against free riders by making fine product distinctions in their tariffs -- product distinctions that are calculated to limit the benefit of tariff reductions to the countries that have granted equivalent concessions in return.

Everyone has heard the story of the 1904 German tariff concession to Switzerland lowering the tariff on “Large dapple[d] mountain cattle reared at a spot at least 300 meters above sea level and having at least one month’s grazing each year at a spot at least 800 meters above sea level.”¹⁰ The example is primarily used today as an illustration of something that would not be allowed under Article I:1. Probably so. To the author, however, the more important message conveyed by this story is the fineness of tariff differentiation that must have been considered acceptable practice in 1904 in order for the German government, bound by MFN clauses with all its European trading partners, to have even considered trying to get away with such a finely wrought product distinction.

Ultra-fine tariff distinctions were a well established tradition among the trade negotiators who, forty-three years later, wrote the GATT.

What rules apply to this traditional tolerance for fine product distinctions? The rules are defined only by established practice. According to the author’s perception of the practice followed by GATT governments, the guiding principle appears to be a tolerance for any distinction based on an objective characteristic of the products in question. The types of characteristics that have been used in practice suggest a very broad range of possibilities. The following is merely a sample of the kinds of product characteristics that have been used in tariff distinctions:

- differences in materials of construction
- differences in method of manufacture
- scientifically recognized distinctions between plant or animal species
- differences in value (“value brackets”)¹¹
- differences in shape, size or dimension
- quality distinctions, e.g., differences in the thread count of textiles

¹⁰ CURZON, MULTILATERAL COMMERCIAL DIPLOMACY (1965) at page 60n1. Curzon provides the original German text of the concession.

¹¹ Unlike ad valorem tariffs which apply the same percentage rate to the value of a product, value brackets have different rates for different ranges of value.

Practice indicates that the validity of such distinctions does not depend on the competitive significance of such characteristics. Nor, indeed, does the purpose of such distinctions matter. Although the reason for most tariff distinctions can be found in the trade-neutral taxonomic motivations of the ordinary tariff writer, with some contribution from the frequent non-discriminatory desire to limit concessions to products that will not threaten domestic producers, a significant number of the very finest product distinctions are an unconcealed effort to discriminate against non-contributing third parties, imposed without objection.

Most observers have their own anecdotal evidence to support this generalization about tariff practice. The author's is the United States "Chicken War" retaliation against the European Community in 1963, an action in which the author served as very junior member of the legal team acting as counsel to the United States.¹² The United States had a right to retaliate under Article XXVIII:3 due to a prior withdrawal of a tariff concession on poultry by the Community. It was decided that Article XXVIII:3 retaliation must be imposed on an MFN basis. Wishing to strike only the Community, and France in particular, the United States examined its import data to find existing tariff lines under which all imports had been supplied only by the Community, and by France in particular. Nothing suitable was found for France, and so the United States looked for a more general tariff line that could be subdivided to accomplish this objective. The product chosen was brandy. Although many countries supplied the United States with brandy, none sold brandy as expensive French Cognac and Armagnac, and the expensive brandy imports from France were large enough to supply the volume of retaliation desired. So, the United States subdivided the brandy tariff into two parts — "brandy at more than \$9.00 per gallon" and "other brandy" -- and then withdrew the GATT tariff concession on the former. All this was done openly, the purpose acknowledged. To the author's knowledge, neither the EC nor France uttered a word about the discriminatory purpose of the tariff subdivision.¹³ It was something that every GATT member had done hundreds of times before in trade negotiations.

Where is the limit? The author's sense of actual practice is that it would take something like the 1904 German cattle concession to set off a legal alarm. What was wrong with that concession? As understood by the author, the sense of the objection is that the particular combination of objective characteristics used to limit that concession was so unique that it could not have had any conceivable taxonomic function — in other words, that its only conceivable function was to identify goods from a particular country. Stated differently, a product distinction will be objected to when it is closer to an explicit distinction between countries than it is to a distinction between products according to their objective characteristics. So viewed, the 1904 German cattle

¹² See Walker, *Dispute Settlement: The Chicken War*, 58 AMERICAN JOURNAL OF INT'L LAW 671 (1964); Lowenfeld, "Doing Unto Others . . ." — *The Chicken War Ten Years After*, 4 JOURNAL OF MARITIME LAW & COMMERCE 599 (1973).

¹³ The one legal consequence of the brandy retaliation was a lawsuit in the U.S. courts by an importer of expensive Spanish brandy, arguing that the domestic US legislation relied upon for authority to increase the tariff did not allow MFN tariff increases that punished innocent countries.. *United States v. Star Industries*, 462 F.2d 558 (C.C.P.A.), cert. denied 409 U.S. 1076 (1972). The MFN scope of the retaliation was upheld as authorized by U.S. law.

concession essentially falls within the Article I:1 prohibition of “origin-specific” discrimination — discrimination that distinguishes between goods explicitly by country of origin.

Why would GATT permit governments to do indirectly (discrimination-by-product-distinction) what it prohibits them from doing directly (origin-specific discrimination)? The technique is the familiar one of seeking compromise between conflicting objectives by bending the rules on one side while appearing to honor them. Although product distinctions are a clumsy tool that often fails to produce the desired kind of discrimination, their clumsiness is part of the eventual balance. This is not a sophisticated attempt to balance conflicting policies by sorting out winners or losers according to their proximity to one policy objective or the other. Rather, it is simply an attempt to create a limited opportunity to discriminate against free riders by allowing governments to use a rather weak and ineffective tool. The fact that it doesn’t work very well is what makes it a tolerable compromise.

It may be easier to understand this compromise if one understands that a country’s need for “reciprocity” in tariff negotiations is primarily a political need rather than an economic one. It is more important that the government appear to be achieving reciprocity than it is that the government actually achieve it. Consequently, product distinctions serve their primary purpose as long as they *look like* they punish non-paying parties, satisfying the political need for reciprocity, while the fact that they work rather badly in practice actually helps to satisfy the conflicting economic goal of non-distortion.

To sum up, it is suggested that the GATT policy toward tariffs and tariff negotiations would justify a quite narrow interpretation of the “like product” concept with reference to claims of tariff discrimination under Article I:1 -- an interpretation in which any objective difference between products would justify a separate tariff classification, and thus a different tariff rate. In contrast, we suggest, the “like product” concept should be given a to a broader interpretation -- one that would prohibit product distinctions between directly competitive products -- when applied to product distinctions made by internal measures. We suggest that such a broader definition be applied *both* under Article III *and* under that part of Article I:1 that applies to internal measures which discriminate between foreign countries. Such a broader interpretation would best be achieved by defining “likeness” in terms of the competitive relationship between the products in question, rather than requiring near identity of physical characteristics.

II. THE LEGAL RULINGS

In this section of the paper, we assess whether GATT/WTO legal rulings reflect the suggested differences in the definitions of “like product” with respect to tariffs, on the one hand, and with respect to internal measures, on the other.

A. The 1970 Working Party Report

There are only a few GATT/WTO legal rulings on the meaning of “like product,” and a significant number of those have been seriously questioned. Perhaps for that reason, most GATT

and WTO panel rulings on “like product” issue start their analysis by quoting a comment on (but hardly a definition of) the term “like or similar products” from a 1970 report of a Working Party on Border Taxes. After noting that the term appears sixteen times in the 1947 GATT agreement, the working party concluded that the term caused uncertainty, needed improvement, and should be interpreted on a case-by-case basis (i.e., without any fixed criteria specific enough to govern its application). The Working Party went on to say

Some criteria were *suggested* for determining, on a case-by-case basis, whether a product is “similar”: the product’s end-uses in a given market; consumers’ tastes and habits, which change from country to country; the product’s properties, nature and quality.¹⁴

It is difficult to understand why so much respect is accorded to this passage, given that it is discussing the term “like or similar” and “similar,” whereas the key words of Article I, III:2 and III:4 are “like product” — period. Moreover, the criteria listed in the report were just “suggestions” from one or more members of the Working Party, and even at that are merely an illustrative list of “some” criteria that might be applied. The suggestions are merely *reported* by the Working Party, but in no way officially recommended by it. Although the subject before the Working Party -- border tax adjustments -- fell under GATT Article III, the Working Party’s discussion of “likeness” says nothing to indicate it is speaking of Article III in particular. For all one can tell, the Working party is referring to all sixteen provisions where the “like product” concept appears.

Read as a definition, the quotation from the 1970 Working Party report calls for analysis of both competitive factors and physical characteristics. Although the reference to competitive factors would seem to lead toward a broader interpretation, the list of factors can just as easily be used as a list of individual factors that can be used to justify a rather fine product distinction. Panels have not settled on either inference. On the whole, the principal legal value of the quotations seems to be its legitimization of the case-by-case approach

B. The Article I:1 tariff cases

As of July 1998, there were only five panel decisions that said anything substantive about the “like product” concept in Article I:1. The cases are *Australian Subsidy on Ammonium Sulphate*,¹⁵ *Germany -- Treatment of Imports of Sardines*,¹⁶ *EC Measures on Animal Feed Proteins*,¹⁷ *Spain -- Tariff Treatment of Unroasted Coffee*,¹⁸ and *Japan -- Imports of SPF Dimension*

¹⁴ BISD, 18th Supp. at 101-102. (1972) (Emphasis added)

¹⁵ II BISD 188 (1952).

¹⁶ BISD, 1st Supp. 53 (1953).

¹⁷ BISD. 25th Supp. 49 (1979).

¹⁸ BISD, 28th Supp. 102 (1982).

Lumber.¹⁹ Of these, only the *Sardines*, *Coffee* and *SPF Lumber* decisions involve claims of tariff discrimination (as opposed to internal measures). Only the latter two decisions actually rule on such a claim.

SPF Lumber The most recent panel ruling, the *SPF Lumber* decision, comes close to affirming this paper's effort to distinguish tariff treatment under Article I. The case involved a quite well documented claim by Canada that certain types of softwood lumber were competitively equivalent regardless of the particular species of evergreen tree from which they were made. The background to the claim appears to have been a typical case of reciprocity discrimination -- the classification of lumber by species of tree, resulting in more favorable treatment of United States origin lumber, in response to a tariff concession granted by Japan to the United States in a trade agreement bargain in which Canada did not participate. The panel's reason for rejecting of the Canadian claim was clouded to some extent by the peculiar type of ruling Canada had sought.²⁰ But in the course of its general analysis, the panel report states that the General Agreement leaves members wide discretion in tariff classification, even after HTS. The panel goes on to state that tariff differentiation is a legitimate tool to serve a party's trade policy interests, "comprising both its protection needs and its requirements for the purposes of tariff- and trade-negotiations." The fact that the panel limited itself to these rather opaque references to the needs of tariff negotiations is not surprising, for it was no doubt awkward for the panel to acknowledge, in the face of all the fanfare proclaiming the MFN obligation to be a "cornerstone" of GATT policy, that governments do need a bit of freedom to discriminate in tariff negotiations.

Coffee The *Coffee* case, decided eight years before the *SPF Lumber* case, comes to a quite different conclusion. The case involve a tariff classification that distinguished between five different types of unroasted coffee beans. The different types were recognized as distinct types of coffee by coffee merchants, and by processors who made the final product for consumers. The basis of the commercial distinction between these types of coffee seems to have been a difference in taste, due partly to botanical differences and partly to cultivation and processing. The final product sold to consumers was a blend of the various types, each blend assembled in order to achieve the desired taste. Viewed objectively, the product distinctions involved in the *Coffee* case appeared to have a far stronger commercial foundation than the product distinctions in the *SPF Lumber* case. The panel ruled all five types of coffee to be "like products."

The *Coffee* panel relied on the fact that the coffee was always sold to consumers in blended

¹⁹ BISD, 36th Supp. 167 (1990). The list does not include *United States — Denial of Most-Favored-Nation Treatment as to Non-rubber Footwear from Brazil*, BISD, 39th Supp. 128 (1993), because a specific "like product" determination was rendered unnecessary in that case by a statutory provision requiring adverse treatment of all products from disfavored countries.

²⁰ Rather than attacking the validity of tariff distinctions based on the species of tree from which the lumber came, Canada asked the panel to rule that all "dimension lumber" was a like product. By arguing the case in this way, Canada never called upon the panel to rule specifically on the validity of distinguishing lumber products according to the type of tree. The panel's general comments made it clear, however, that the panel was prepared to sustain a product distinction on those grounds.

form, where it was impossible to distinguish between the various types of coffee in the blend. This was a *non sequitur*, however, because the views of consumers had nothing to do with the market for this product. The market was the coffee merchants and processors to whom the unroasted beans were sold. Indeed, once the proper market was identified, the practice of blending tended to prove quite the contrary conclusion. The practice of blending meant that each component of the blend was regarded as a commercially separate product, one that could not be substituted for by other types of coffee.

The other main argument advanced by the panel was that the product distinctions made by Spain did not appear in the coffee tariffs of other countries. In the face of this evidence of commercial non-substitutability, however, the fact that this product distinction did not appear in the tariffs of other countries hardly seems weighty enough to call for a classification of “like product.” Nor, indeed, is it supported by GATT’s general practice with regard to this issue. Based on the author’s observation of GATT tariff practice in general, there should be a large number of cases in which nations have made unique product distinctions to deal with unique negotiating needs, and have never been challenged on them despite the fact that they are not made in other national tariffs. For example, it is highly unlikely that any other GATT member had a sub-item in its tariff equivalent to the “brandy-valued-at-more-than-\$9.00-per-gallon” sub-item created by the United States in its Chicken War retaliation, but the uniqueness of that tariff distinction seems to have never mattered.

If one looks for an explanation for the disparity between the decision in the *Coffee* case and what we can see of customary GATT tariff practice, the answer can probably be found in two related factors. First, it was generally believed there was a different sort of discriminatory purpose behind the Spanish tariff classification in this case. It was believed that Spain had been pursuing a policy of favoring the coffee exports of certain developing countries, originally through the purchasing policy of a state coffee monopoly, and that the differential tariff classification had been adopted to preserve the favored market position of those countries when the state monopoly had been abolished. This was not, in short, discrimination incident to the reciprocity demands of tariff negotiation. The suggestion is that less desirable types of tariff discrimination elicit different types of legal response on the issue of “like product.”

Second, Brazil conducted a rather vigorous campaign to enlist developing country support for its complaint, apparently persuading many developing countries that Spain’s effort to distinguish between developing country coffee producers was a kind of discrimination offensive to developing countries. Judging by the response when the panel report was adopted, the campaign was successful. Twenty-two other developing countries rose to speak in favor of the report, most of whom usually have nothing to say about panel reports.²¹

In sum, the *Coffee* case has to be viewed as a very strained reading of the “like product” concept as it is normally applied to tariffs -- inconsistent with normal GATT practice toward tariff

²¹ See GATT Doc. C/M/148 (meeting of 11 June 1981).

distinctions and quite possibly even inconsistent with the broader sort of interpretation one could hope to see under a more general, competition-oriented interpretation. One might be justified in dismissing the decision simply as wrong. Alternatively, one could view it as a distinctive response to a distinctive set of policy concerns peculiar to the specific type of discrimination involved in that case.

Because it is one of the few decisions interpreting the “like product” concept, the *Coffee* case has invariably been cited by the “like product” cases that followed, whether or not they involve tariffs. Its main legal impact has been to give general support for the idea that panels can overlook fine distinctions when they analyze the “likeness” of two products. The point is more appropriate for application of the “like product” concept to internal measures rather than tariffs. Most of the subsequent citations have in fact been in cases involving non-tariff measures, leading to a kind of two-wrongs-sometimes-make-a-right result.

Sardines The Article I claim in the *Sardines* case related to a tariff distinction between three types of sardine, according to the species of fish from which the sardine was made — pilchard, herring, or sprat. The tariff distinction was a classic example of an objectively-based distinction of virtually no commercial significance.²² As such, the case provides another good illustration of the type of tariff distinction that the author has suggested is common practice among GATT member countries -- a practice that would support a uniquely narrow concept of “like product” for product distinctions made in tariffs..

The panel in the *Sardines* case chose not to decide the Article I claim, resolving the case in Norway’s favor on the ground that the specific facts of the negotiations between Norway and Germany had created “reasonable expectations” of equal treatment that gave Norway a claim of non-violation nullification and impairment when those expectations were not met. The disposition of the case precludes drawing any firm conclusions about the Article I claim. Nonetheless, two speculations can be offered. First, if the Article I claim had been considered clearly valid, there would have been no need to rely upon the considerably less solid legal concept of non-violation nullification and impairment. The surmise that the Article I claim was not valid -- that these three types of sardines were *not* “like products” -- would be consistent with the thesis that GATT tariff practice treats such fine product distinctions as perfectly normal, and legal, tariff behavior.

Second, it could not have escaped the panel’s notice that the complainant, Norway, had negotiated with Germany on the basis of these tariff distinctions in the Torquay negotiations, and had actually benefitted from the product distinctions in the German tariff, because at Torquay it had been able to bargain for a tariff concession limited to the sardines it produced (herring and sprats) while leaving a higher tariff rate on the sardines produced elsewhere (pilchards). It would have been

²² The author is informed that persons with a well-educated palate for fish products can tell the difference between pilchards and the other two, and would never consider them substitutable. Most of the ordinary mortals to whom the author have spoken are surprised to learn that different types of fish are used, and taste tests conducted with the author’s International Trade Law classes (admittedly not the most educated palates) invariably support the latter view.

especially difficult for a panel to sustain a claim of illegality on behalf of a party that had actually taken advantage of the same distinction at a previous negotiation. It is reasonable to assume that a similar “unclean hands” factor accounts for the lack of challenges to the product distinctions made by national tariffs.

C. Internal measures under Articles I:1 and Article III:4.

The thesis of this paper is that product distinctions involving internal measures — internal taxes, subsidies, and various other regulations affecting internal sale — should be judged under a broader standard that focuses on the competitive relationship between the affected products and pays less attention to physical characteristics. As noted earlier, the particular two-sentence architecture of Article III:2 leads to a *result* consistent with this standard, but because of that architecture the “like product” concept has been relegated to a subordinate role in achieving that policy. Thus, it is only in Articles I:1 and III:4 in which the “like product” concept is employed to define the governing standard, and it is to these cases that one must look for broader interpretations of “like product” needed to carry out this anti-protection policy.

Only two Article I cases contain meaningful discussions of the “like product” concept with regard to internal measures: *Australia -- Subsidy on Ammonium Sulfate*²³ and *European Community -- Measures on Animal Feed Proteins*.²⁴ Only four Article III:4 cases have involved meaningful discussions of “like product” claims pertaining to internal measures: *Animal Feed Proteins* again, *Spain -- Measures Concerning Domestic Sale of Soyabean Oil*,²⁵ *United States — Measures Affecting Alcoholic and Malt Beverages*,²⁶ and *United States -- Taxes on Automobiles*.²⁷ Of these, the last three decisions contain rulings that cannot be considered authoritative. *Soyabean Oil* was not adopted, and the “aim and effects” definition developed in *Malt Beverages*, and *Autos* was explicitly rejected in the 1996 Appellate Body decision in *Japan Alcoholic Beverages*.²⁸

The first three cases -- *Australian Subsidy*, *Animal Feed Proteins* and *Soyabean Oil* — involved “like product” claims that provided a good test of the concept — claims based on the competitiveness of physically dissimilar products. The cases involved, respectively, two types of chemically distinct fertilizers (one natural, one artificial), different types of animal feed proteins (from both animal and vegetable sources), and different types of vegetable oil (made from different kinds of oilseeds).

²³ BISD, vol. 2, 188 (1952).

²⁴ BISD, 25th Supp. 49 (1979).

²⁵ GATT Docs. L/5142 & L/5142/Corr.1 (17 & 22 June 1981) (not adopted).

²⁶ BISD, 39th Supp. 206 (1993).

²⁷ GATT Doc. DS31/R (11 October 1994) (not adopted).

²⁸ *Japan — Taxes on Alcoholic Beverages*, *supra* note 3.

Australian Subsidy and Animal Feed Proteins. Both *Australian Subsidy* and *Animal Feed Proteins* begin by calling attention to the Article III texts that indicate that “like product” is a distinct and narrower concept than “directly competitive.” Having said that, the panels seem content to ignore any further consideration of the extent to which the products in question are competitive. This can hardly be regarded as giving serious attention to the competitive dimensions of the “like product” concept.

The analysis of “like product” in *Australian Subsidy* and *Animal Feed Proteins* tends to focus on other rather limited criteria. Physical differences are obviously in the forefront of the analysis, most explicitly in *Animal Feeds Proteins*. Equally important is tariff classifications in other countries. Both cases also rely heavily on the fact that tariffs in other countries make the same product distinctions. The tendency to cite tariff practice would seem to be quite inconsistent with the thesis of this paper that product distinctions made by internal measures should be judged more rigorously than product distinctions made by tariffs. One is tempted to think that something else may be involved here -- for example, the idea that the appearance of the same distinctions in other places indicates that the distinction does have an objective basis, making it less likely that its *purpose* is discriminatory or protective.²⁹

Soyabean Oil. In the *Soyabean Oil* case the panel rejected the claim of “likeness” on the ground that “like product” meant “more or less the same product” — a definition that was so narrow that it drew a protest from the United States, which in connection with another more serious error,³⁰ led the GATT Contracting Parties to “note” the panel report rather than adopting it — a decision tantamount to rejection. Except for making clear that “like product” at least means something broader than near identity, the final outcome of the *Soyabean Oil* case is of relatively little value.

The “aim and effects” cases. The two other “like product” cases involving Article III:4 were the two 1990s cases in which GATT panels suggested abandoning the traditional definitions of “like product” and replacing them with what became called the “aim and effects” test -- *Malt Beverages* and *Auto Taxes*. These cases represented an effort, *inter alia*, to establish a definition of like product that would require analysis of market effects in every case. These two decisions were rejected by the WTO Appellate Body as an incorrect application of the “like product” concept under Article III:2. Shortly thereafter, the aim and effects test was rather summarily rejected as an incorrect application of the “like product” test under Article III:4 as well.³¹

²⁹ The *Australian Subsidy* case also relies on the fact that the Australian tariff distinguished between the two products, using the practice of the same government in another, unrelated area to demonstrate that the product distinction with regard to fertilizer was objectively justified, and thus not protective in purpose.

³⁰ The panel also took the position which appeared to say that Article III complaints require proof of trade damage. Both that position and the “like product” ruling were the basis of the decision to merely note the report.

³¹ *European Community — Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (9 September 1997) at paragraphs 215-16.

In sum, except for the two now-repudiated “aim and effects” cases, the scanty body of panel decisions interpreting the “like product” concept with regard to internal measures covered by Articles I:1 and III:4 shows little sign of adopting an interpretation that would focus on the competitive relationship between the products. Indeed, there is little evidence of any interest in distinguishing in any way between cases involving internal measures from those involving tariffs. Oddly enough, the broadest definition of “like product” to date appears to be the *Coffee* decision -- a case involving tariff distinctions. However good the policy reasons for a broader “like product” test with regard to product distinctions in internal measures, GATT and WTO legal decisions have not so far accepted it.

D. The Article III:2 cases

Although it is possible to set aside Article III:2 definitions of “like product” as *sui generis* due to the two-sentence architecture of Article III: 2, the tendency to cross cite all manner of “like product” cases makes it relevant to examine the contribution of such cases to the “like product” literature. The cases of particular importance are (1) the two *Japan Alcoholic Beverages* cases — the 1987 GATT panel report in the first case,³² and the 1996 Appellate Body report in the second case³³ — and (2) the recent Appellate Body report in *the Periodicals* case.³⁴

Japan Alcoholic Beverages I and II. In the first, 1987 *Japan Alcoholic Beverages* case, the panel made an interesting series of “like product” rulings. It ruled that standard distilled spirit classifications were “like products” — gin, vodka, whiskey, grape brandy — as well as classic liqueurs, still wine and sparkling wine. The functional effect of the holding was to rule that Japan could not impose different internal taxes on different quality grades within these product categories - - in other words, that it was impossible to subdivide these product categories according to quality.

Arguably the rejection of distinctions based on quality offered a broader and more rigorous definition of “like product” than one would expect to find applied to product distinctions made in tariffs, where similar distinctions appear routinely. The panel did nothing, however, to suggest that Article III requires a more stringent test. The panel said that its “likeness” conclusions had relied upon the criteria listed in the 1970 working party report, plus a variety of tariff and statistical reporting categories that subdivided alcoholic beverages into these categories without further breakdown -- the same kind of reasoning involved in all other “like product” cases. The panel also relied on the broader definition applied in the *Coffee* case, citing that decision for the proposition that minor differences in taste, color and other properties would not affect the “likeness” of products.

³² BISD, 34th Supp. 83 (1988).

³³ *Japan -- Taxes on Alcoholic Beverages*, supra note 3.

³⁴ *Canada — Certain Measures Concerning Periodicals*, WT/DS31/R (panel decision, 14 March 1997) and WT/DS31/AB/R (Appellate Body decision, 30 June 1997).

The panel in the first *Japan Alcoholic Beverages* case indicated that it would not have had a problem with tax differences based on alcohol content, which it viewed as an “objective” basis for product distinctions. The remark indicates that the determining issue in its “like product” analysis, whether consciously or not, may have been the question of protective purpose. The quality distinctions involved in that Japanese tax law apparently struck the panel as protective in purpose, partly because their arbitrary and subjective character, and partly because of their manifestly protective results.

In the second *Japan Alcoholic Beverages* case, the main “like product” issue involved an internal tax on shochu that was lower than the comparable tax on several Western varieties of distilled spirits. Under the first sentence of Article III:2, the question was whether any of Western-type distilled spirits were “like” shochu. The initial panel decision had followed the first panel’s “like product.” classification in which only vodka, which is almost identical to shochu in all respects except filtration, was found to be “like” shochu. In distinguishing other types of distilled spirits, the panel in the second *Japan Alcoholic Beverages* case claimed to be applying market principles, but in fact the panel did do so. Instead of relying on market-based characteristics such as consumer preferences, the panel relied on physical characteristics reminiscent of those employed to make very fine tariff distinctions — color, raw materials, presence of additives. The Appellate Body confirmed the narrowness of the criteria applied by the panel, stating that the juxtaposition of “like” products in the first sentence of Article III:2 with “directly competitive” products in the second sentence of III:2 requires giving “like product” a very narrow reading in this particular context.

Periodicals. The narrow view of “like product” taken in the second *Japan Alcoholic Beverages* case was implicitly confirmed by the outcome in the subsequent *Periodicals* case. The initial issue was whether certain foreign periodicals were “like” more favorably treated domestic periodicals. Although the two kinds of periodicals were clearly competitive, the panel apparently had great difficulty in finding a plausible rationale to explain why such periodicals were “like,” in the face of an argument that the content of the two groups of periodicals was an important distinction. The panel eventually issued a difficult-to-follow rationale that the Appellate Body could not accept. But rather than try its hand a better “like product” rationale — the usual Appellate Body practice in such cases --, the Appellate Body proclaimed the record inadequate to make such a judgment, and so decided the case under the “directly competitive and substitutable” standard of the second sentence of Article III:2 — an issue as to which there was even less information in the record. The tortured course of the “like product” issue strongly suggests that both panel and Appellate Body were operating within a quite narrow view of “like product” in which different characteristics carried more weight than competitiveness.

* * *

Given the tendency of GATT/WTO tribunals to treat all “like product” decisions as fungible, these two most recent Appellate Body decisions on the “like product” issue will probably direct subsequent decisions toward a narrower rather a broader interpretation of “like product,” policy

context notwithstanding. If so, it may well be a long time before the policy distinctions argued for in this paper are accepted by WTO legal decisions. And that is where the issue now stands.