



ISSN: 0976-3376

Available Online at <http://www.journalajst.com>

ASIAN JOURNAL OF
SCIENCE AND TECHNOLOGY

Asian Journal of Science and Technology
Vol. 10, Issue, 09, pp.10201-10214, September, 2019

RESEARCH ARTICLE

INDICES OF IDENTIFICATION OF PRODUCTS LIKENESS IN WORLD TRADE ORGANIZATION

***Mohammad Shamsaei and Emadoddin Shoaie**

Allameh, Tabataba'i University, Tehran, Iran

ARTICLE INFO

Article History:

Received 25th June, 2019
Received in revised form
29th July, 2019
Accepted 27th August, 2019
Published online 30th September, 2019

Key words:

Non-Discrimination, Like Products,
competitive Products, Substitutability,
Dispute Settlement, Appellate Body.

***Corresponding author:**

Citation: Mohammad Shamsaei and Emadoddin Shoaie. 2019. "Indices of Identification of Products Likeness in World Trade Organization", *Asian Journal of Science and Technology*, 10, (09), 10201-10214.

Copyright © 2019, Mohammad Shamsaei and Emadoddin Shoaie. This is an open access article distributed under the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction in any medium, provided the original work is properly cited.

ABSTRACT

The current essay has studied the indices of identification of the likeness of products in WTO and their impact on the investigation of the dispute between the exporting countries with the importing country and demonstration of the breach of these countries in illegal support of the internal products versus the imported product. Through the library based study of the issues related to the likeness one can conclude that we can find few cases in which the reasons of the "likeness" of products could lead us to clear results. The results suggest that the DSBs and the Appellate Body have often been grappling with the ambiguity of the definition of likeness. However, in various statements they have alluded to the relevant likeness criteria including physical features, tariff classification, the tastes and habits of the customers, products price (cross price elasticity of demand), marketing strategies, distribution channels and sale places.

INTRODUCTION

In the years between the WWI and WWII, the development of protectionism and emergence of Great Recession provided the suitable ground for the governments to turn to the institutionalization of free trade in international arena. In the acme of WWII and particularly in the following years extensive efforts were made by the United States and its allies for systematization of the relations between countries in political and economic domains and reaching an agreement toward the reduction of trade tariffs.¹ During the post WWII era the world powers gathered together in order to reach an agreement as to reducing the product trade tariffs and they wished to establish an international trade organization (ITO).² In political domain, the result of these efforts led to the foundation of the United Nations as an organization for management of international political relations and the outcome of these efforts in the field of trade and commerce was the establishment of General Agreement on Tariffs and Trade (GATT) in 1947.³ On January 1st of 1995 the World Trade Organization was established as an international institution with a permanent organizational structure and

within the framework of various agreements supervises the rights and obligations of the member states. This organization is located in Geneva. Since the establishment of this organization, GATT which was not recognized as an international organization got promoted to a specialized organization.⁴ Among the most important goals of establishment and governing principles of WTO, one can refer to the principle of trade freedom and the principle of international partnership which is one of the common principles of international law and WTO. On the other hand, the ultimate end of the GATT and the agreement on the establishment of the WTO has been deemed to be the improvement and development of the welfare in the life of people of various countries under the shadow of free trade in global scale.⁵ WTO is of the youngest and most original international organizations which are engaged in international trade. This organization, despite its short history, has become one of the most influential originations in the ever-changing world.⁶ With the passage of time and transformation of commercial relations and its undeniable impact on the economy of countries the old procedure has undergone

¹B Mercurio, A Davies, World trade law: text, materials and commentary S Lester, Bloomsbury Publishing, 2018, PP 65-67

²Timothy Stostad, Trappings of Legality: Judicialization of Dispute Settlement in the WTO, and Its Impact on Developing Countries, Cornell International Law Journal, Volume 39, Number 3, 2006, p815

³Douglas A. Irwin, Free Trade under Fire, Princeton & Oxford University Press, 2015, pp. 158-160.

⁴Schermers, H. G., & N. M. Blokker, International Institutional Law, Unity Within Diversity, 5th Revised ed., Leiden, MartinusNijhoff, 2011, p 1088.

⁵Hoekman, B. M. & P. C. Mavroidis, The World Trade Organization: Law, Economics and Politics, London, Routledge, 2007, p. 1.

⁶Van den Bossche, Peter, The Law and Policy of the World Trade Organization: Text, Cases and Materials, Cambridge University Press, 2005, p. 77.

through an essential change. The expected interests and fruit of free international trade have forced the politicians to consider the liberation of products trade and the issue of joining WTO. This has led to the daily increase in the volume and value of products import from other producing countries. For example, in agricultural industry almost 60 percent of fresh fruit and vegetables and 80 percent of sea food consumed in the US (with an approximate value of 85 billion dollars per year) are imported. Generally speaking, almost 15 percent of the total volume of food in the United States is imported from other countries.⁷ Besides the key principles of non-discrimination and transactional behavior, there are other complementary principles among which one can refer to the principle of transparency. Principle of "transparency" means that the governments should have clearcut regulations and policies which are monitored by GATT and any change in them has to be announced to this international organization. In other words, governments should act clearly and honestly within the framework of GATT and WTO and their practice in this field can be easily controlled and evaluated.

Although the roots of the principle of transparency have to be sought for in internal law, this principle has entered the international law in recent centuries and has influenced it.⁸ The experts believe that the significance of the principle of transparency can be compared with such important principles as "principle of national treatment" and the "principle of most favored nation".⁹ However, one needs to take it into consideration that due to particular features of international law, principle of transparency has not succeeded to have an equal impact on all domains.¹⁰ Along with this principle, the principle of "tariff control" becomes important. As in the discussion related to "principle of national treatment" it is noted that governments cannot use non-tariff trade barriers in order to reduce or lift the tariff barriers. In other words, according to GATT and WTO, the proper and legal way for protection of national products is using tariff because it is a transparent means for understanding and evaluation of the commercial policy of governments while such tools as internal regulations and tax do not enjoy the required clarity and predictability and secretly distort the free trade.¹¹

Place of Product likeness in Discriminatory Treatment

Introduction

WTO which was established in January 1995 as the substitution of GATT in extensive aspects, aims at creation of a lawful trade system between the member states for enhancing the employment, income, effective demand and life level in a predictable, secure and transparent environment in a way that the trade development could continue with a stable pace and with the preservation of environment. By joining to WTO and acceptance of its supplementary agreements the

governments express their commitment to the avoidance of interventionism in market in discriminatory way.¹² This organization introduces some key principles as the guiding stars of the policy of trade liberalization for the governments. The first and foremost principle that governs the actions and strategies of the WTO is the Non-Discrimination Principle. Accordingly international trade should be free from every type of discrimination. In international law, the countries are obliged to cooperate with each other based on the UN Charter and commitment to the principle of non-discrimination.¹³ According to the article 26 of International Covenant on Civil and Political Rights (ICCPR), discrimination based on any situation is forbidden and the countries are committed to respect the rights and freedoms.¹⁴

The principle of non-discrimination is comprised of two principles of National Treatment and Most Favoured Nation (MFN). The principle of MFN complements the principle of National Treatment in the sense that the governments should not commit any discrimination in granting the concessions to the trade partners. According to the principle of MFN, governments are obliged to avoid discrimination in granting the commercial privileges and concessions to a specific country and should treat the other trade allies or member states of WTO on equal terms in order to strengthen the principle of free trade and allow all partners to have access to comparative advantages. This principle guarantees the import to be handled in most economic way and the comparative advantage to determine the trade partners. In fact, the principle of MFN implies granting the best trade concession to every member state. One can say that the MFN code has been considered to be promoting and constituting international relations and prevents from the possible bitterness and tensions resulted from the discriminatory policies.¹⁵ Nevertheless, in some cases the most favoured nation state is restricted including the special measures adopted for supporting the developing countries or national security concerns and building fair conditions.¹⁶ The National Treatment condition suggests that when a certain product or service crosses the border after paying the duties no discrimination whatsoever should take place between the foreign product and service provider and the native provider. This is also the case with the service provider¹⁷ as compared to the like service provider although the intangible nature of services makes the interpretation of the national treatment as to it more complicated.¹⁸ At the threshold of the establishment of GATT, the United States insisted on the inclusion of the latter principle within the framework of GATT as one of the basic principles.¹⁹ According to this principle, the governments should not force restricting

¹²Hibbert, E., "The New Framework for Global Trade in Services – All about GATS", *The Service Industries Journal*, vol. 23, Issue 2, 2003, p. 67.

¹³Ustor, E., *The Most-Favoured-Nation Clause in the Law of Treaties*, Yearbook of the International Law Commission, vol. II, 1968, p. 168.

¹⁴Ondersma, Chrystin, *Consumer Financial Protection and Human Rights*, *Cornell International Law Journal*, Volume 50, Number 3, 2017, p562

¹⁵Cottier, T. et al., *Regulatory Barriers and the Principle of Non-discrimination in World Trade Law: Past, Present, and Future*, University of Michigan Press, 2000, p. 56

¹⁶Theodore H Cohn, *Global Political Economy –Theory and Practice* (Addison Wesley Longman, 2000), p 10

¹⁷European Communities-Regime for the Importation, Sale and Distribution of Bananas, C by Ecuador-Organization, 22 May, 1997 - wto.int, p. 375, para. 7.314.

¹⁸McLachlan, R., C. Clark & I. Monday, *Australia's Service Sector: A Study in Diversity*, Canberra, Productivity Commission, 2002, p. 6

¹⁹Jackson, J., *World Trade and the Law of GATT*, Bobbs-Merrill Company, 1969, pp. 276-8

⁷Chenglin Liu, *The Obstacles of Outsourcing Imported Food Safety to China*, *Cornell International Law Journal*, Volume 43, Number 2, 2010, p250

⁸Delbruck, JOST, *Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the State*, *Indiana Journal of Global Legal Studies*, 2004 - muse.jhu.edu

⁹Mock, William BT, *An Interdisciplinary Introduction to Legal Transparency: A Tool for Rational Development*, 18 Dick. J. Int'l L. 293 (2000), p. 293.

¹⁰Zoellner, Carl-Sebastian, *Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law*, *Michigan Journal of International Law*, No. 27, Winter, 2006, p.580.

¹¹METI, Chapter2: *National Treatment Principle*, June 2001, p. 17. Available: www.Meti.go.jp/English/report/downloadfiles/gCT0002e.pdf

discriminations against the imported products and services using various non-tariff tricks in order to protect the national products and they are required to treat the imported products the way that they treat the like national products. This principle is supposed to support the free competition current based on the advantages. Within the framework of this principle, the governments should not adopt policies that would present the imported products as having lower quality than national products and thus weaken their competitive power in an indirect way. The member states should adopt equal regulations for these products without any discrimination between the imported products and the national ones.²⁰ Of course in GATT there are some exceptions in which the use of non-tariff discriminatory mechanisms has been prescribed. These measures could be adopted when a country struggles to protect its newly born industries.²¹ However, after the formation of WTO, many efforts have been made in order to expand the scope of the principle of National Treatment.²² Despite its insistence on the principle of Non-Discrimination, in the article 24 of GATT, the establishment of customs unions has been declared legal, but it is stipulated that the trade barriers of the member states of the unions before the non-member countries should not be "higher or more restricting".²³

Principle of Non-Discrimination in GATT: The General Agreement on Tariffs and Trade (GATT) consists of 38 articles and 4 chapters that was signed on October 30 1947 by 23 major developed and industrial countries. This agreement provided a formal policy making framework for the negotiation about the liberalization of access to the markets. Until 1994 when the nations reached an agreement of the establishment of WTO based on the negotiations in Uruguay (1986-1994), GATT was the only international institution that supervised the international trade,²⁴ and later its members increased to almost 123 countries. GATT is not today an international institution and now it is replaced with WTO but it is still alive and is used and referred by the countries.²⁵ The principle of Non-Discrimination has been mentioned in the article one of GATT. In the latter article the discrimination between the products regardless of their origin and destination countries is declared forbidden and the member states are warned of using harsher measures in treating a particular state than the other states.

In the first clause of this article where the principle of non-discrimination has been expressed we read:

"...any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties".

²⁰Barcelo, John J.III, Product Standards to Protect the Local Environment-the GATT and the Uruguay Round Sanitary andPhytosanitary Agreement, Cornell International Law Journal, Volume 27, Issue 3, 1994, p759

²¹Wouters, J. & B. De Meester, The World Trade Organization: A Legal and Institutional Analysis, Intersentia, 2007, pp. 29-30

²²METI, op. cit (9),pp. 15-17

²³Bernard M. Hoekman and Michael M. Kostecki, The Political Economy of World Trading System: From GATT to WTO (Oxford: Oxford Univ, 1995), p.7.

²⁴GAAT, The Results of the Uruguay Round of Multilateral Negotiations: The Legal Text, GAAT Secretariat, Geneva, 1994

²⁵Rashid, Khalid, Philip levy & Mohammad salam; the world trade organization and developing countries, Vienna, Austria, 1999 page 9-11

Generally speaking, this principle says that any favour or privilege that is granted to the products of a particular country in the field of importation or exportation (whether it is a member state of the organization or not) must be also granted to all like products of the member states without any discrimination. Therefore, the principle of non-discrimination should be not only applied regarding the imported like products from the member states rather about the exportation to the member states too. On the other hand, this article also suggests that the advantages granted to the non-member states should be granted to the member states and no the other way round. Besides legal discriminations, this article also includes the practical discriminations. To put it otherwise, even if some regulations do not seem to be in conflict with the obligations delineated in this article, the way that they are applied is so that it leads to discrimination in practice. Thus, these regulations violate this principle. As we see, the principles of National Treatment and the MFN are merely applied as regards the like product belonging to the member states. Moreover, any type of preference and discrimination in general is declared to be in conflict with the concept of free trade and three governing principles, i.e. "principle of annulment of all trade discriminations", "principle of prohibition of restriction in the course of trade" and "principle of safe competition and without bad will" as well as the basic goal of WTO, i.e. "access to market", and overall from an economic point of view, discrimination is essentially undesirable.²⁶

Role and Place of the Element of Likeness in the Implementation of the Non-discrimination Principle in World Trade: Given the place of the element of likeness and its key role in the implementation of the principle of non-discrimination, the domain of this very important and key principle is closely related with the scope of our understanding and knowledge of the concept of likeness in the products of the exporting countries with the products of the importing countries and its identification in various extensions. Having said this, the key point and main goal is the discovery and explication of those indices that can lead the countries involved in this issue as well as the third impartial to the precise knowledge of this notion in the products so that through this conclusion and using the aforementioned indices we can find the way out of every one of the issues and differences that could emerge regarding the claim and identification of the likeness of the products. The exporting member state that always raises the claim of the violation of free trade laws argues that the exported products are "like" the national products and they are treated better than the exported ones while the importing member state denies the existence of such "likeness". Discovery of truth in this regard requires comparative analysis and comprehensive investigations for determination of the threshold of "likeness" regarding the products and identification of the relationship and role of the mode, method and way of presentation in determination of the likeness, features and nature of the product, characteristics of the suppliers and determination of the indices of innovativeness of the product and implementation of the appropriate tests determining the likeness in each case and using the standards of the common sense for achieving the proper mental and practical standard for the "likeness".

²⁶Graeme B. Dinwoodie& Rochelle Cooper Dreyfuss, A Neofederalist Vision of TRIPS: The Resilience of the International Intellectual Property Regime, Oxford University Press, 2012, Chapters 6-7, 2012, p. 103.

The term "like" has been used in various cases in GATT including the articles 1, 2, 3, 6, 9, 11, 13 and 16 but no definition has been offered of this key concept in the Agreement. However, in different claims in WTO some procedures have been proposed for determination of the "likeness" of commodities.²⁷ Among these procedures and indices one can refer to the report of the investigation committee of the case of bananas of 3 European countries.²⁸

It is needless to say that the indeterminateness of the realization of this element results in the absence of required conditions for application of the aforementioned principles. Then, the research concerning the concept, conditions, limits and inclusion scope as well as the criteria of the realization of the element of "likeness" and the study of its relevance to such affairs as physical features and attributes, external characteristics and the product's model, time of their application, preferences and taste of the consumer and also classification of the commodity in determination and demonstration of the "likeness" and identification of other relevant parameters are of particular importance in determination of the obligations of the importing member state. To this end, the practical mechanisms and the path of achievement play a vital role. Generally speaking, identification of the decisive factors in this effective element is a significant affair and enjoys special potentialities. Then, one needs to know what is the criterion of identification and realization of "likeness of products" and its inclusion scope in GATT?

The general conclusion that can be driven from the statements regarding the likeness is that there are few cases in which the reasons of the "likeness" would lead us to clear-cut results, even in some cases of these reasons some contradictory results are achieved. Having said these, in the current essay we seek to provide an analysis of the criteria of determination of "likeness" of products", i.e. the first part of the non-discrimination criterion", in order to reach at least to some relevant indices. The real issue is the existence of physical differences between the products that justify different regulation.²⁹ Moreover, we struggle to study the concept of "likeness" based on the charter of the dispute settlement of WTO, which is an international mechanism,³⁰ and has been interpreted by the DSBs and the Appellate Body in the light of Border Tax Adjustments (BTA) included in the reports of the relevant committee. We continue to study the interpretations that these bodies have offered in past and in fact considered the "goal and effects" of the action of the codifier. According to the latter factor, if the discrimination done by the codifier in charge was based on legal non-protectionistic reasons and had no protectionistic effect, the domestic products cannot be considered like products. Thus, no direct relationship is developed with BTA. At the end we will turn to the criterion of the likeness in those cases which are in conflict with each other. The ordinary meaning of "like products" may help us to consider regulatory goals in the course of deciding when

products are "like".³¹ First, we need to introduce the structure of the article 3 of GATT as an essential part of the definition of the likeness criterion. In this study, the word "likeness" comprises of the like products as delineated in the first paragraph of the second clause of article 3 as well as the third clause of this article and the products which are directly competitive or substitutable included in the second paragraph of the clause 2. The reach of Article III is extensive; the provisions apply to virtually all taxes, laws, regulations or similar domestic policy instruments that affect the sale and/or distribution of imported goods after they have cleared customs and entered domestic commerce.³² The article 3 of GATT can be divided as follows: I) first and second sentences of clause 2 of article 3, II) introductory paragraph of clause 2 of article 3, III) clause 4 of article 3.

First sentence of the clause 2 stipulates that: *"The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind"*. This is to ensure that after a product enters a country it is not subjected to regulations that are designed to protect domestic producers.³³

The second sentence of the clause 2 continues as follows: *"Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph"*.

According to the introductory sentence of the clause 2 of article 3: *"With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax"*.

Clause 4 of the article 3 stipulates that: *"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."*

Of course, one needs to take it into consideration, as we will see in next section, that all these clauses are related with each other and with the clause 1 of article 3. In all clauses the criterion of likeness with a reference to the BTA standard and

²⁷WTO Training Institute. (2002). "Introduction to the WTO and its basic principle" course, Module 4. P9

²⁸European Communities-Regime for the Importation, Sale and Distribution of Bananas, *ibid*, p. 220, para. 4.641

²⁹Howse R., Donald R., Product/Process Distinction-An Illusory Basis for Disciplining "Unilateralism" in Trade Policy, 11 EJIL 2, 2000, P. 260.

³⁰Sauvant, PK, Appeals Mechanism in International Investment Disputes, Oxford University Press, 2008, p. 270.

³¹Regan DH., Regulatory Purpose and 'Like Products' in Article III:4 of the GATT (With Additional Remarks on Article II:2), *Journal of World Trade*, Volume 36, Number 3, 2002, P. 444.

³²Davis A., The Shochu Conundrum: Economics and GATT Article III, *Undergraduate Economic Review*, Volume 12, Issue 1, 2015, P. 2.

³³Sampson GP., The WTO and sustainable development, United Nations University Press, 2005, P. 80.

tariff classification has been emphasized. Nevertheless, this list is not exclusive and other alternative criteria have been offered in order to complement the other four criteria.

Indices and Criteria of Identification of the Likeness of Products

Criteria of Border Tax Adjustments (BTA): Having studied the investigated cases by the DSBs and the Appellate Body, one can draw the conclusion that almost all decisions made by GATT/WTO regarding the existence or lack of "likeness" between certain products have been based on the practical uses of the product in particular market, tastes and habits or preferences of the customers, and its content, nature and quality. They rightly argue that in the evaluation of these criteria the competitive relationship is the necessary condition for determination of the "likeness" of products.³⁴ In 1970 the member states of GATT have insisted on the above criteria in determination of likeness. One question is raised in this regard to the effect that whether these criteria some of which have been proposed by the representatives can be declared authentic and valid criteria?

In the clause 18 of BTA report we read:

*"With regard to the interpretation of the term "... like or similar products ...", which occurs some sixteen times throughout the General Agreement, it was recalled that considerable discussion had taken place in the past, both in GATT and in other bodies, but that no further improvement of the term had been achieved. The Working Party concluded that problems arising from the interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a "similar" product. 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. It was observed, however, that the term "... like or similar products ..." caused some uncertainty and that it would be desirable to improve on it; however, no improved term was arrived at."*³⁵

Besides the aforementioned cases the criterion of tariff classification in which the tariff class of each product is decided according to the data provided in the tariff tables of the member states as considered by these bodies. It allows traders to better assess the economic viability of a particular transaction prior to undertaking it.³⁶ Of course, the criterion of the tariff classifications cannot be considered along with such criteria as the taste and habits of the customers, final applications and features and nature of the product, as one of the criteria included in the report because in BTA the criterion of classification has not been noted.

In 1966 the Appellate Body announced that: "In the implementation of the criteria included in BTA concerning the facts of each particular case and in the investigation of other criteria that might be at stake in every case the dispute

settlement bodies (DSBs) are not able to provide the best judgment regarding the presence or absence of likeness in products". In fact, this theory shows that there is a kind of personal expediency and judgment in all cases. Of course, several criticisms have been leveled against the idea of the body that the distinction between "like products" and "directly competitive or substitutable products" is an "arbitrary decision". These scholars believe that this decision is discriminatory and it should be taken in view of different features of the products in every particular situation.³⁷ (Alcoholic Beverages Case, Japan)³⁸. Accordingly, some other indices and features can be considered for investigation of the likeness of the products.

In 2001 Appellate Body announced that: "These general criteria or the classifications based on the potential common features in fact provide a framework for analysis of the likeness of some particular products in an occasional way. One needs to take it into account that these criteria are merely tools for helping the categorization and the study of the reasons; they have not been considered compulsory based on an agreement nor they provide any exclusive list of the criteria that specify the legal features of a product."

Also this body states that: "Although every criterion only considers a different aspect of the relevant products that needs to be studied, these different criteria are all related with each other. For example, physical features of a product changes or limits its final application. Likewise, the customer's notion of the product can influence its traditional applications, change them or even abolish it. Moreover, tariff classification of a product clearly reflects its physical features."³⁹ (Asbestos Case-European Countries)⁴⁰. Accordingly, one can conclude that features, nature and quality, final applications and the habits of customers do not have any special place in BTA report. When we speak of the characteristics, nature and quality of a product we think mainly of its form, weight, and sizes or its physical features, while by the final use of the product we mean the ultimate use of the product in the market.⁴¹ Moreover, when we refer to the tastes and habits of the customers we mean the preferences or notions of customers in the market of a particular product. Anyway, no allusion has been made to its definition in the above report.⁴² Then, the ultimate use and tastes and habits of the customers are the only criteria which are related to the situation of the product in the market before the features, nature and quality of the product. Nevertheless, tariff classifications are more related with physical features of the product because these features are often taken into consideration in product classification in the tariff table of the members of GATT/WTO. Part of the aforementioned doctrine considers the criterion of final use a very important criterion in tariff

³⁷MattiaMelloni, The principle of national treatment in the GATT: A Survey of the Jurisprudence, Practice and Policy, BruylantBruxelles, 2005, EEC Animal Feed Protein, PP. 33-34

³⁸World Trade Organization Dispute Settlement 8, 10, II Appellate Body Reports, Japan Taxes on Alcoholic Beverages, pp. 20-21.

³⁹MattiaMelloni, ibid, EC Asbestos, PP. 102-108

⁴⁰World Trade Organization Dispute Settlement 135 Appellate Body Reports European Communities – Measures Affecting Asbestos and Asbestos Containing Products, Paras 3, pp 418-419.

⁴¹W.M, CHOI, Like Products in International Trade Law. Towards a Consistent WTO/GATT Jurisprudence, 2003, pp. 12-21

⁴²World Trade Organization Dispute Settlement 135 Appellate Body Reports, European Communities - Measures Affecting Asbestos and Asbestos Containing Products, p. 39.

³⁴Donald H. Regan, Regulatory Purpose and "Like Products" in Article III:4 of the GATT (With Additional Remarks on Article III:2), Journal of World Trade, Volum 36, Issue 3, 2002, pp. 443-478

³⁵Border Tax Adjustments, Report of the Working Party adopted on 2 December 1970 (L/3464), BISD IS S;102.

³⁶Copenhagen Economics, Analysis of aspects of uniform tariff classification, 2014, P. 2.

classification of the product. Moreover, some of the member states of WTO have such a view among which one can refer to the EU's view regarding the alcoholic beverages of Chile according to which the tariff classification of the product can be done based on its physical features and final use. Accordingly, we need to investigate each one of these criteria as they have been interpreted by the DSBs and the Appellate Body. In this regard, particularly the physical features are taken into account along with the tariff classifications while the final uses and tastes and habits of the customers are studied each one in an independent way. The reason for this is that the relevant judicial procedure related to the final uses and the tastes and habits of the customers is comparatively more than the existing procedure regarding the tariff classifications and then it should be independently studied.

Previous Judicial Procedure of WTO in Determination of Likeness Criteria

Some regulations and characterizations are used to determine like products in different countries.⁴³ Physical features and tariff classification have been the only considerable criteria for evaluation of the likeness of products after the adoption of BTA. Thus in the case of internal taxes of Brazil when the Brazilian government enacted lesser tax for ginger Cognac than the French Cognac and in 1949 (June 27) it claimed that this action is not an act of discrimination because the two products are not the same.

According to this government, ginger cognac contained aromatic and medicinal elements that made it different from the French cognac (Brazil internal taxes case).⁴⁴ On October 30 1952 a DSB of GATT announced that Ammonium Sulphate and Sodium Nitrate are not "like products" because they have been classified under two different tariff categories in the tariff table and then they treated them differently (Ammonium Sulphate case of Australia).⁴⁵ Following the latter case, twenty years were required so that the judicial authorities of GATT to take another decision regarding the like products.

Impact of Publication of BTA Report on Judicial Procedure

As it was explained in previous section, the physical features and tariff classification were regarded by the DSBs of GATT as the criterion of evaluation and determination of product likeness and this procedure continued after the publication of the report of BTA in 1970 (December 2). One of the bodies of GATT in 1977 (December 2) concluded that vegetable, animal and synthetic proteins cannot be regarded like because their contents are not the same (Animal Feed Proteins Case).⁴⁶ This body also argued that these three types of protein cannot be declared "similar" because they are not classified in the EU tariff table under the same category. On June 17 1981 one of the DSBs of GATT announced that the imported and domestic soya bean oils are "like" products, because both of them contain the same physical features (Soybean Oil Case, Spain).⁴⁷ Another DSB in 1985 (September 17) considered the imported and domestic gold coins "like" and announced its cause to be their production based on the same standards and equal percentage of the gold used in these coins (Gold Coins

Case, Canada).⁴⁸ In the case of US Superfund law, the investigating body announced in 1987 (June 5) that the crude oil products, crude oil condensate and diesel fuel are "like" products due to their similar physical features (Superfund Law Case, the United States).⁴⁹ In the same year, Vodka and Shochu were declared "like" products and the reason of this judgment was that "both were white and made of the same materials" (Japan, Alcoholic Beverages Case). Moreover, the same DSB announced that another cause of this similarity was their inclusion in the same tariff class.⁵⁰ As to the issue of EU parts and components one of the DSBs of GATT in 1989 (June 16) adopted a decision against EU because in EU more tax was levied on the imported car parts and components as compared to domestic parts and components and for this reason a "less desirable treatment" had taken place. The aforementioned DSB believed that EU had violated the clause 4 of article 3 because the imported parts and components shared similar features with the domestic products (EU Parts and Components Issue).⁵¹

The working document of WTO found executive power in 1995 (January 1st). In that time, physical features and tariff classifications were still the basic measures in analysis and evaluation of "likeness" of the products.⁵² On January 29 1996 a DSB of WTO concluded that American diesel fuel and the imported gasoline are "like products" because they share the same chemical structure and are placed in the same tariff class (Case of Gasoline, the US).⁵³ Six months later another body of this organization argued that despite the differences in filtration, Vodka and Shochu should be declared the like products because they are "often used in diluted form" while in other alcoholic beverages including Whisky, Gin, Rum and Jenever they cannot be declared like products because these beverages contain other elements and additives. The same DSB stated that Vodka and Shochu are classified under the same tariff category in Japanese tariff table and for this reason they have to be considered as "like products" (Japan, Alcoholic beverages Case).⁵⁴ In the issue of periodicals of Canada, a DSB of WTO in 1997 (June 30) announced that the imported advertising periodicals and the domestic non-periodical magazines are like products because they enjoy similar physical features.⁵⁵ On September 9 1997 another DSB declared that the bananas produced by the third world countries are "like" the bananas produced by African, Caribbean and Oceanic countries because they all share the same physical features and are classified under one tariff category (EU bananas Case).⁵⁶ In the Case of Indonesian autos a DSB in 1998 (July 2) concluded that Corolla Toyota 1600 cc and Timur 1500 cc are like products because they have similar features, identity and quality (Indonesian Autos).⁵⁷ Two months later another DSB remarked that despite the different colors that are the result of specific filtration and production process, domestic beverages like Soju and the imported

⁴⁸ *ibid*, Canada – Gold Coins, P. 30

⁴⁹ *ibid*, US Superfund, PP. 31-32

⁵⁰ Japan Custom Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages, Basic Instruments and Selected Documents (of GATT) 34 S/83, para 5.7.

⁵¹ Mattia Melloni, *ibid*, EEC - parts and Components, PP. 35-36

⁵² WTO Analytical Index: Guide to WTO Law and Practice, 191st Edition (2003), p. 38.

⁵³ Mattia Melloni, *ibid*, US - Gasoline, PP. 87-89

⁵⁴ *ibid*, Japan – Alcoholic Beverages II, PP. 46-50

⁵⁵ *ibid*, Canada - Periodicals, PP. 51-53

⁵⁶ *ibid*, EC - Bananas, PP. 90-93

⁵⁷ *ibid*, Indonesia Autos, PP. 94-9

⁴³ see WTO analytical index: Supplement Covering New Developments in WTO Law and Practice October 2011 – August 2015 pp. 6-7

⁴⁴ Mattia Melloni, *ibid*, Brazil - Internal Taxes, P. 29

⁴⁵ *ibid*, Australia – Ammonium Sulphate, PP. 68-69

⁴⁶ *ibid*, EEC Animal Feed Proteins, PP. 71-72

⁴⁷ *ibid*, Spain-Soyabean Oil, PP. 73-75

beverages like Whisky, Gin, Vodka and Rum are like products because they all are made of Ethanol (Alcoholic Beverages, Korea Case).⁵⁸ In the same way, in 1999 a DSB decided that Whisky and Pisco are like products because both of them enjoy the same features in the sense that they were both drinks that had high percentage of alcohol and could be combined with other drinks (Chile- Alcoholic Beverages Case).⁵⁹ On February 11 2000, the DSB declared the domestic auto parts and components to be like the imported parts and components because they enjoyed the same physical features. The court also added that the privileges which have been granted to the domestic products versus the foreign imported products are considered a sign of "less desirable treatment" (Canada-Autos Case).⁶⁰ On March 2001 the Asbestos and alternative fibers and the products containing asbestos and alternative fibers were identified as "unlike" products and the reason for this identification was announced to be the high toxicity of asbestos and the products that contain it. The features, nature and quality of asbestos, according to the particular combination of the molecular structure, chemical combination and fibrillation potentiality, distinguish the asbestos from synthetic fibers. The same molecular structure, chemical combination and fibrillation grants particular function to the products made of asbestos and then distinguish them from the products made of the alternative fibers. By the same token, the difference in tariff classes between the asbestos and alternative fibers makes these fibers different (EU, Asbestos Case).

Judicial Procedure based on the Index of Final (Abstract)

Use: Physical features and tariff classifications as the only criteria of evaluation and judgment of the existence of likeness between the products of two countries which are involved in a conflict were the standard based on which the DSBs worked. Following the EEC animal feed protein issue in 1977 (December 2) when seven years had passed since the release of the reports of BTA the issue of final uses was raised in DSBs (EEC, Animal Feed Proteins). But one point is noteworthy in this regard that although the necessity of paying attention to the place where the product is sold in the assessment of its final use by the judicial authorities of GATT/WTO has been highlighted in the text of the report of BTA, no allusion has been made neither to market place nor to the customers of the products. Then, from the latter facts the conclusion is drawn that the DSBs only take the abstract final uses of products into consideration and without paying any attention to the market place and the customers of the products at issue. Within this framework, DSBs make no allusion to various uses of a special product in the market as well as the notions of the customers of it. Moreover, the differences between the final uses and the tastes and habits of the customers have not been mentioned and even sometimes the DSBs considered the latter case to be among the final uses of the products. It was not long ago that the Appellate Body announced that these two factors must be taken into account in an independent way and all criteria have to be thoroughly studied as compared to each other. The use of the word "must" by the Appellate Body shows that in difficult cases one can draw a line between all factors (ECC, Asbestos). Thus, the same DSB that identified vegetable, animal and synthetic proteins as different products stated that the imported skimmed milk powder and vegetable proteins were directly competitive

and substitutable products because they were "technically substitutable in terms of their final use" (EEC, Animal Feed Proteins). In the same way, edible oils and soybean oil could be considered as "like" products due to their common final uses (Spain, Soybean Oil).⁶¹ Imported hydrocarbon products and domestic crude oil, crude oil condensate and natural gasoline were also identified as directly competitive or substitutable because their final uses are the same (the US, Superfund issue). By the same token, Shochu and Vodka were declared "like products" because both products are used either as strong alcoholic beverages or in combinatory form with other drinks (Japan, Alcoholic Beverages).

Criterion of Analysis of Product Price in Market: As to the example of criterion of common final use one can refer to the US Gasoline issue about which the DSB of WTO in 1999 (January 29) remarks that the imported and domestic gasoline are "like products" because both have common final uses (the US, Gasoline Case). Six months after this opinion, the judicial authorities of GATT/ WTO struggled to take the market where product is sold as a proper criterion for evaluation of the likeness of products into account. Thus, analysis of abstract final use of the product was replaced with the analysis of its price (cross price elasticity of demand). They also relied on the preferences of customers in this field. In other words, DSBs grounded the analysis of likeness of products in their competitiveness an affair that should take place in view of the prices, preferences of customers and other criteria of the sale market which will be discussed below.

On July 7 1996 a DSB of WTO decided that the western beverages and Shochu are directly competitive and substitutable because in all of them we can see "the high flexibility of the prices, i.e. flexibility of the price of Shochu on the one hand and the brown beverages (Scotch, Whisky, Japanese Whisky, Japanese Brandi, North American Cognac) and three white beverages of (Gin, Vodka and Rum), on the other hand" (Japan, Alcoholic Beverages).⁶² This DSB strongly relied on the economic principles shown in the studies regarding the market which were provided by the parties to the conflict. However, the DSB noted that the cross price elasticity demand as such cannot contain all the extensive gamut of variables that can influence the substitutability of product in the market including the qualities and incomes. For example, the duties levied against the individuals' income can affect their demand in the market. Governmental policies can influence the prices as the result of which the customers' preferences will influence the profit of domestic industry. To put it otherwise, the DSB noted that the criterion of cross price elasticity demand cannot be decisive in the likeness of products and this was confirmed by the Appellate Body too (Japan, Taxes of Alcoholic Beverages). One year later, the Appellate Body annulled a decision of a BSD regarding the likeness, because the aforementioned decision was based on the hypothetical comparison of the domestic and foreign versions of a periodical and accordingly the products were declared to be directly competitive or substitutable while their readers were the same (Canada, Periodicals). The Appellate Body relied in this decision on the studies concerning market which spoke of the competitive price between imported and domestic magazines.

⁵⁸ibid, Korea – Alcoholic Beverages, PP57-62

⁵⁹ibid, Chile – Alcoholic Beverages, PP. 63-65

⁶⁰- ibid,Canada – Autos, PP. 95-96

⁶¹ibid, Spain – Soyabean Oil, PP. 73-75

⁶²World Trade Organization Dispute Settlement 8, 10, 11/Reports, Japan — Taxes Alcoholic Beverages, paras. 6.29.

In the same year, Timur 1500 cc autos were declared to be "like" the Corolla Toyotas 1600 cc because both had common final uses. Once again the DSB of WTO relied on the studies around the market which were provided by the disputing parties (Indonesia, Autos issue). It should be noted that in these issues the reasons related to the supply domain were also given to the DSBs for evaluation of the products likeness but these institutions did not pay any attention to none of them. However, for conducting a proper analysis of the "like products" the study of the factors of supply sector was also necessary and part of the aforementioned doctrine rightly believes that in evaluation of the likeness of products the factors related to the supply should be taken into account because these factors contain profitable information.

Analysis of Products Price and Study of the Reasons of their Substitutability in the Market: The DSB in charge of investigation of the issue of Korean alcoholic beverages insisted on the necessity of analysis of the use of prices for the study of likeness of products in the same way that the DSB in charge of investigation of the dispute of Japanese alcoholic beverages had done and it announces that: "other elements besides the cross price elasticity demand play role in this analysis". This DSB believes that although this criterion does not have any priority over other criteria it enjoys the relevant place and significance (Korea, Alcoholic Beverages Dispute). Thus, this DSB concluded that Soju and western beverages were directly competitive and substitutable products because they are generally used for the same purposes (i.e. chatting, relaxing and quenching one's thirst) in the same way (pure or in combinational form) and in similar places (at home or outside areas).

The most meaningful index as regards the distribution channels was the index of use of beverages at home and outside it (public places), because both Soju and the imported beverages were distributed in both ways. The same DSB also argued that the process that was initiated after the liberalization of market in Japan is now beginning in Korea. According to this DSB, the strategies of production and marketing of Korean domestic companies strengthen the overlapping of the final use of these products, because these companies arrange their marketing using the methods adopted by the western beverages. Moreover, the method of distribution of products reflects their final use. Then, the strategies of marketing and product distribution channels can affect the substitutability of domestic and imported products. Particularly, the studies regarding the price provide useful information of the potential competitiveness of the domestic and imported products.⁶³ Of course, the DSB noted that such factors as marketing strategies can be intensively taken under control and at the same time provided information of the existence of heavy potential competition among the products. In 2-2-4 we will discuss the close relationship between the final use, marketing strategies and distribution channel or sale places. One year after this dispute another DSB turned to the factor market and this shows that the studies of the products market are still one of the basic criteria that are taken into account by the DSBs in their investigations of the likeness of products. The aforementioned DSB argued that Pisco and western beverages were the directly competitive and substitutable products because their consumption place (home,

bar or disco), sale place (supermarkets and liquor stores) and sale strategies are same for both of them. Finally, the studies of prices showed the competitive nature of Pisco and western beverages (Chile, Alcoholic Beverages Case). However, after the disputes of alcoholic beverages of Korea and Chile, no DSB or Appellate Body turned to the study and analysis of products market. On September 18 2000 one DSB repeated that the likeness of products should be evaluated in view of their market (EEC, Asbestos Case). Nevertheless, the latter DSB did not rely in the evaluation of the likeness of asbestos fibers and the products containing them on the cross price elasticity demand, rather it took the non-market criteria including the health risks into consideration. On March 12 2001 the Appellate Body took another path and for the first time the necessity of paying attention to the market was confirmed regarding the clause 4 of the article 3 though one of the judges in the Appellate Body was against such approach. Nevertheless, due to the lack of sufficient reasons regarding the products market, the Appellate Body could not complete its analysis. The Appellate Body argued that determination of likeness according to the clause 4 of the article 3 basically implies the determination of the competitive nature and relation among the products.

According to this body, asbestos fibers and the products containing them were like the synthetic fibers and the products made of them because both enjoy the same final use in some fields. This issue is only raised regarding the asbestos fibers and alternative fibers. However, it can be as such applied to other products including the asbestos fibers and the products that contain alternative fibers. Moreover, this DSB argued that the raw fibers have no use but when they are used in the production of a special product (i.e. asbestos products and the products containing alternative fibers), they all represent one final product. Moreover, their final use is decided in terms of their physical features. The Appellate Body rejected the decision of this DSB. According to Appellate Body, the fibers and products are not "like products" and mere existence of few common uses is not sufficient for declaring the two products similar. Furthermore, the close relation of final use with the physical features of the product makes impossible the proper evaluation of the final use of products as the criterion of determination of their likeness. The decision of DSB about the final use of the product was rejected too because this decision had a close relationship with the physical features.

Reference of DSBs to the Criterion of the Habits and Tastes of Consumers: By comparing the reference of DSBs to the criteria and indices of customer's tastes and habits as well as the physical features of the product for studying the likeness of the products we see that the tastes and habits of the customers are different from the physical features criterion and are less used by the DSBs rather in many cases they are used in the form and framework of the criterion and index of final use of product. We mentioned earlier that the element of market is common between the final use and the tastes and habits of the customers. However, each one of these two domains has different scope. The final use of product in fact turns to the existing products in a particular market. For example, Soju and western beverages, both are used in gatherings, before and after the meal, at home and outside it. Of course, there is no doubt that both classes have specific place in the evaluation and determination of likeness of products, because the final use of the product in market certainly influences the taste of customers regarding that

⁶³World Trade Organization Dispute Settlement 75, 84/Appellate Body Reports, Korea — Taxes on Alcoholic Beverages, pp. 32-40.

product in the same market. Finally, one might establish an actual or potential competitive relationship between the existing products in the market but in those cases where the market's situation is not clear one can pay attention to the reasons related to other markets. On the other hand, the tastes and habits of customers are related with their preferences and notions of the product. It needs to be mentioned that the DSB in the Philippines alcoholic beverages dispute announced that in the evaluation of likeness one must take the tastes and habits of the consumers into consideration.⁶⁴ Given what was mentioned earlier, one can state that the above criterion was taken into account by the courts for the first time in 1987. On November 10 of this year, a DSB of GATT announced: "since the habits of customers vary in the course of time and place and since levying various taxes for the sake of making the preferences of the customers transparent regarding the traditional domestic products obstructs the realization of the goal of clause 2 of article 3 for guaranteeing the impartiality of the tax system as to the imported and domestic products, this DSB concludes that the habits of Japanese customers as regards Shochu do not offer any reason to the DSB not to take Vodka a like product as compared to Shochu."

The same DSB argued that: "since the habits of customers as to these products vary in view of their price one can believe that the following alcoholic beverages can be regarded directly competitive or substitutable products in the sense mentioned the second sentence of the clause 2 of article 3."⁶⁵ Moreover, the same DSB stated that: "we cannot declare different the like products merely based on the existing differences in the traditions of customers of a country (including the consumption of Shochu in some particular regions)" (Japan, Alcoholic Beverages Dispute).⁶⁶ Like the final use criterion, the DSB voiced its concerns regarding the domestic policies that would have influenced the existing tastes of the customers in favor of the domestic industry. It needs to be mentioned that the criterion of tastes and habits of the customers has been used for determination of the likeness according to the first sentence of the clause 2, on the one hand, and for determination of the likeness as mentioned in the second sentence of this clause, on the other hand. In practice, the determination of product likeness based on that sentence would require similar physical features and common end-uses of the goods in concern.⁶⁷ Seven years later, EU and the US in the automobiles tax dispute, claimed that the passenger cars and light trucks are two like products because American customers use them for personal transportation interchangeably.⁶⁸ However, the aforementioned DSB assessed the likeness of products based on the goal of regulatory action and its protective effects. In 1997 the Appellate Body stated that the periodical and non-periodical advertising journals are directly competitive or substitutable products because their readers and publishers can refer to the non-periodical journals

for having access to the information included in the periodical journals (Canada, Periodicals Dispute). The DSB strongly insisted on the legal documents and other governmental information. One year later, the DSB declared the Timur 1500 cc to be like the Corolla Toyota 1600 cc because their differences in the tastes and habits of the customers were not so much that to make them different from each other (Indonesia, Automobiles Dispute). In this case the court was mostly focused on the studies related to the market which were conducted by the auto industry sector and this clearly indicated that the classification of passenger cars is in fact reflecting the tastes and habits of the customers.

Substitutability of Product based on the latent Demand of Buyers:

Latent demand as its name suggests represents a type of demand in which the customer understands his need to the product later than normal time. Thus, even if he proceeds to buy the product he would disapprove some features of the product and be not interested in them. But later he would think of these features and decide to buy the product. In the investigation of the Korean dispute of alcoholic beverages the judicial authorizes of GATT/ WTO in 1999 took the criterion of latent demand into consideration and added it to the criterion of the tastes and habits of the customers (Korea, Dispute of Alcoholic Beverages). According to the Appellate Body, "Competition in market is a dynamic and evolving process. Therefore, the products could not be assessed merely based on the actual explicit demand. The word "substitutable" shows that there is a necessary relationship between the products that in the eyes of the customers can be substituted by each other in particular time but in fact they are just substitutable with each other not necessarily the substitute of one another".⁶⁹ On the other hand, the Appellate Body warned over the mere reliance on the market analysis. The Appellate Body stated that: "Mere reliance on the existing information of the market cannot be so assuring, because it might neglect the competitive relationship. In fact, the result of such an action will be that the most restricting and discriminatory policies of the government would be immune to the existing challenges due to the domestic data regarding the market as mentioned in the article 3".

Therefore, the Appellate Body considers the element of market analysis of a less effective role in the assessment of the "likeness of products". This Body indeed endorsed the same view that was propounded regarding the Japanese alcoholic beverages in which both the AB and DSB argued that the domestic policies can adopt some domestic measures (including taxes and regulatory actions) and border measures (like tariffs and few restrictions) in order to discriminate between the domestic and imported products and in this way influence the views of the customers regarding the latent demand. Appellate Body also noted that the customer's latent demand can be a sign of a particular problem in such commodities as food and beverages, i.e. the products that the customers buy them because of their familiarity with them. On March 12 2001 the Appellate Body expressed that the asbestos fibers and the products that contain them are different from the alternative fibers and the products made of them because the high toxicity of asbestos fibers and the products made of them caused the customers and producers hardly declare them as "like products" (EEC, Asbestos Case).

⁶⁴Marios C. Iacovides, 'Marginal Consumers, Marginalized Economics: Whose Tastes and Habits Should the WTO Panels and Appellate Body Consider When Assessing 'Likeness'?' (2014) Volume 48 Journal of World Trade, Issue 2, pp. 323-349

⁶⁵Basic Instruments and Selected Documents (of GATT), Japan- Custom Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages, 34 S/83, para. 5.7

⁶⁶ibid., para. 5.9 (b).

⁶⁷Zhou W., The role of regulatory purpose under Articles III: 2 and 4 – toward consistency between negotiating history and WTO jurisprudence, World Trade Review, Volume 11, 2012, P. 113.

⁶⁸Dispute Settlement 31 Reports, United States -Taxes on Automobiles, paras. 3.160-3.162.

⁶⁹World Trade Organization Dispute Settlement 75, 84/Appellate Body Reports, Korea - Taxes on Alcoholic Beverages, p. 33

Like the final use criterion, the Appellate Body due to the lack of sufficient reasons regarding the market could not ground its argument based on the tastes and habits of customers. However, the latent demand of the customer was confirmed within the framework of clause 4 of article 3 of GATT.

Factors of Marketing Strategies, Distribution Channels and Sale Situations: The DSB of the Japanese dispute 2 of alcoholic beverages in 1996 (July 11) announced:

"Regardless of the existing similarities in the field of physical features or tariff classes, what should be emphasized is the flexibility in substitution of products. In this regard, such factors as marketing strategies should be also of importance because the issue at stake has been presented in fact as the reaction of the customers to various products and this reactivity should be just taken into account in terms of domestic taxes" (Japan, Alcoholic Beverages⁷⁰). Accordingly, in this year marketing strategies, supply channels and sale places started to complete the criteria of final use and tastes and habits of customers. The DSB in charge of investigation of the aforementioned dispute despite the close relationship between the marketing strategies, distribution channels, sale places and final use, have taken only the distribution channels and sale places into account in an independent way.

On September 17 1998 another DSB of WTO stated that: "Article 3 deals indeed with the markets and the reactions of Korean producers to markets change indicate the existence of at least one competitive relationship between Soju and imported beverages. Moreover, marketing strategies of Korean domestic companies show that these products have common final use. Their physical features have been changed so that they enjoy price privileges as a result of the lesser taxes and at the same time to be "like" the imported beverages. The complaining parties believed that these products are advertised in the market as the rivals of western beverages" (Korea, Alcoholic Beverages Dispute). On July 15 1999 a DSB of WTO confirmed the decision taken as regards the Korean case of alcoholic beverages (Chile, Alcoholic Beverages). In this case, the aforementioned DSB concluded that Pisco and imported beverages are the directly competitive or substitutable products because the marketing strategies used by the domestic companies show the common final use between them. Then, Chilean companies could compete with the imported beverages by producing and selling superfine vintage Pisco which was more expensive than the ordinary Pisco and was sold as a luxurious alcoholic drink like Whisky, Cognac or high grade Brandi. Moreover, this beverage was advertised as rival product of such stylish imported beverages as Whisky, Cognac or vintage Brandi.⁷¹ As to the distribution channels and sale places, the DSB in charge of investigation of Korean alcoholic beverages indicated that there is a considerable overlapping between the final use and distribution channels in the sense that "the product supply and distribution channels in fact show the current structure of the market while the final use of the product deals with current overlapping and the potential overlapping."⁷²

Therefore, Sujo and alcoholic beverages are regarded directly competitive or substitutable products because both were sold through similar channels and in the same way for consumption outside the house. The DSB in charge of investigation of the dispute of Chilean alcoholic beverages confirmed the decision made of the Korean alcoholic beverages and stated that Pisco and imported beverages are also directly competitive or substitutable products because both of them "are sold through similar channels though their sale volume is somewhat different". The same DSB spoke of the existence of a close relationship between the supply and distribution channels and sale places and the tastes and habits of customers. This DSB stated that: "We believe that having different distribution channels is considered to be a negative point concerning their substitutability. For example, if the products are separately supplied the customers may not compare them with each other and would have no notion of their group. In our view, the existing facts before us show a general pattern of the use of distribution channels that includes the products supply through their channels which in turn suggests that imported and domestic products are directly competitive or substitutable products."⁷³ In 1997 such marketing strategies as advertisement were considered by the Appellate Body and accordingly it concluded that periodical and non-periodical advertising magazines are directly competitive or substitutable products (Canada, Periodicals Case).

Application of Intention Criterion and the Result of Rule based Action in Judicial Procedure: One of the other criteria that were used by the DSBs in 1990s for evaluation of the likeness of products is the criterion of "goal and effects". Of course, this criterion was rejected in 1996 by the Appellate Body as regards the dispute of Japan alcoholic beverages 2. The reason for this action, a correct one indeed, was that the likeness of the products, as one can understand from the clauses 2 and 4 of the article 3 GATT, cannot be combined with the analysis of protection, including the lawful (rule based) goal or intention as noted in the clause 1 of this article. Then, the protective goal or intention should be analyzed within its correct context, i.e. clause 1 of article 3 and thus the member states of WTO must protect the domestic products in view of the subject and goal of article 3. Until 1992 the likeness of products was assessed base on physical features, final use, tastes and habits of customers and tariff classifications. However, in March of this year, a DSB decided to grant the BTA a less colorful role in this field and instead of it to strengthen the role of the goal and effects of rule based goal and effects. In other words, this DSB of GATT struggled to study the likeness in view of the good will or lack of good will of the regulating action and the possible protective effects of these actions. On March 16 1992 a DSB of GATT announced that all imported and domestic beverages of the US are "like" because all of them regardless of their alcohol dose enjoy the same physical features. This DSB added that the domestic and imported carbonated and non-carbonated beverages are all "like" because "tariff classifications and tax laws related to these beverages does not distinguish between them based on the amount of grape used in them"⁷⁴ (the US, Malt Beverages Dispute).⁷⁵

⁷⁰World Trade Organization Dispute Settlement 8, 10, II/ Reports, Japan - Taxes on Alcoholic Beverages, para. 6.28,

⁷¹World Trade Organization Dispute Settlement 8, 10, 11/Reports, Japan - Taxes on Alcoholic Beverages, paras. 7.45-7.47.

⁷²World Trade Organization Dispute Settlement 75, 84/Reports, Korea , Taxes on Alcoholic Beverages, para. 10.83.

⁷³World Trade Organization Dispute Settlement 87, 110/Reports, Chile - Taxes on Alcoholic Beverages, paras. 7.57-7.59.

⁷⁴MattiaMelloni, *ibid*, US – Malt Beverages, PP. 81-84

⁷⁵United States - Measures Affecting Alcoholic and Malt Beverages, Basic Instruments and Selected Documents (of GATT) 39 S/206, para. 5.26.

This DSB left all criteria aside save the criterion of tastes and habits of the customers whose analysis was conducted only regarding the beers and it concluded that the beers with low alcohol are not "like" the beers with high alcohol because their customers do not substitute the beer with low alcohol with the beer with high alcohol. However, this DSB immediately put this criterion aside and started to see whether the distinction which is drawn by the US government between the products is based on legal and non-protective reasons and has protective effect in the market or not. The DSB believed that the clause 1 of article 3 of GATT which includes one element that belongs to the second branch of the non-discrimination should be taken into account in the analysis and determination of likeness of products. As to wine which is the next product discussed in this dispute, the investigating DSB expressed that the US does not speak as to the discrimination between various extracts of grape out of good will. Therefore, the only goal of the US in adoption of financial measures can be the protection of domestic wines. Thus, this DSB declared the carbonated and non-carbonated beverages the "like" products. But as to the domestic and imported beverages the DSB was witness to many policies related to social welfare all of which justified the discrimination between the products. The DSB also understood that this distinction did not have any competitive and protective effect although Canadian brewing companies like the winemakers paid higher taxes. For these reasons and despite the physical similarities, the DSB concluded that the imported and domestic beers with low and high doses of alcohol could not be declared "like products" in the sense intended by the first sentence of the clause 2 of article 3 and the clause 4 of this article. This argument of the DSB finally served as the basis of the criterion that came to be known in the professional literature of GATT as "goal and effects".

In 1994 another DSB which was searching after a more complicated analysis for justification of non-protective goals of governments turned to the explanation of the criterion of "goal and effects". This was about the measures adopted by the US government which was distinguishing between the automobiles based on their price (tax of luxury products) and their fuel efficiency (less fuel efficient cars) (the US- Taxes on Automobiles).⁷⁶ As to the tax of less fuel efficient cars, EEC as the plaintiff claimed that the adopted measures regarding the automobiles and not trucks are for economic purposes and reducing pollution. Then, the question is that can we consider the automobiles and trucks like or directly competitive or substitutable products? The DSB indicated that the substitutability of trucks and automobiles in view of their final use in the market has a decisive role in determination of their likeness. Moreover, it argued that the notions of customers has a significant role because the existing reasons show that American customers consider light trucks to be like the passenger cars and then they declare them to be the substitute of this class of automobiles: "Many of the light trucks were use with the same goal due to which the passenger cars were used" This DSB also relied on the studies conducted regarding the market which were supplied by EEC and the US. According to these studies, light trucks were used instead of the passenger cars. The DSB argued that since the goal of article 3 of GAAT is avoidance from protectionism the likeness mentioned in the clauses 2 and 4 of this article can be only studied in the light of the clause 1 of the article at issue particularly in view of the sentence in this article that reads as follows: "so as to afford

protection to domestic production", the sentence which refers to the "goal and effects" of the measures adopted by the US. In line with this point the DSB notes that the goal of GATT is reducing the trade barriers not harmonizing the actions of the member states regarding the products. Then, we should not interpret the article 3 of the Agreement in a way that would prevent the governments from adoption of policies which seek not to afford protection for the domestic production.

Scope of Reference to Likeness Criteria and Indices in Judicial Procedure: According to the content and the concept of theme and latent goal in article 3 of GATT, the assessment of likeness must take place in line with the goal and theme of this article and all known and effective criteria and indices involved in the evaluation of product likeness should be taken into account (EEC, Asbestos). Nevertheless, this view was not taken into account so much in the first years of GATT. In those years only some few criteria were considered for evaluation of products likeness insofar as in most cases, the physical features of the products was taken to be the only decisive criterion in the first sentence of the clause 2 and the final use of products was declared to be the basic criterion as regards the second sentence of this clause.

In the dispute of Brazil domestic taxes, only the physical features have been taken into account in the definition of likeness according to the clause 2 and no attention has been paid to other criteria. In the dispute of the Aluminum Sulfate in Australia the DSB only regarded the criterion of tariff classification of products. However, the contracting parties relied on the competitive relation between Sodium Nitrate and Aluminum Sulfate. Of course, it seems that the DSB has relied on the relation between the two fertilizers although this has not been clearly noted in the report of the DSB. Therefore, the DSB's belief that elimination of the subsidiaries from Sodium Nitrate has damaged Chilean interests during war time based on the GATT implies that the two mentioned products are considered to be directly competitive or substitutable products. Nevertheless, if the DSB had assessed the likeness in the light of objective use of article 3 it would have considered these products "similar" and declared Australia guilty of violation of its obligations according to the clause 4 of the article 3. The narrow sense of likeness that was observed in Australia's dispute of Aluminum Sulfate was later confirmed in the dispute of ECC animal feed proteins by the investigating DSB. In this case, the DSB relied on the physical features, tariff classification and final use. However, the physical features and tariff classification had important place in the analysis of "like products". In the dispute of Spain Soybean oil, as we mentioned before, the DSB confirmed the decision taken as regards the animal feed proteins. Therefore, physical features were decisive criterion for likeness based on the clause 4 of article 3. In this case no allusion was made to the preferences of the customers. Thus, once again the DSB rejected the adoption of an expansive interpretation of the likeness based on the competitive relation between the products. In the dispute of Canada gold coins only the physical features were taken into account within the framework of the clause 2 of article 3 and none of the other criteria was assessed. It is interesting that South Africa asked the DSB to pay attention to the similar prices of the two products in the international markets. Once again the DSB refused to analyze "products likeness" based on the market. In the US superfund dispute, the DSB focused on the physical features of domestic and imported crude oil, crude oil extracts, and natural gasoline.

⁷⁶MattiaMelloni, *ibid*, US – Taxes on Automobiles, PP. 85-86

Of course, final use of the aforementioned domestic products and hydrocarbon products was taken into account by the DSB within the framework of the clause 2 of article 3. Nevertheless, tariff classifications in other countries and the interests of customers have not been taken into account by the DSB. But in the dispute of Japanese alcoholic beverages, the DSB focused on the tastes of customers and tariff classifications and studied these criteria along with physical features and final use of the products. Given the definition of "the like products" it seems that the DSB has not paid sufficient attention to the physical features of the product and instead referred to a more extensive definition of likeness which was applied in the dispute of raw coffee. In the latter dispute the investigating DSB expressed that few differences in taste, color and other features of the products could not prevent us from declaring them "like" products. It should be noted that this dispute is the first and only case in the history of GATT that physical features have been considered to have less colorful role in the definition of "like products". As to the definition of the phrase "directly competitive or substitutable" it seems that the DSB has declared the tastes and habits of the customers to be prior over the physical features and tariff classification of the product. In this stage of the analysis of "like products", interests and notions of customers as regards the product are still considered to be part of the criterion of final use.

In the dispute of EEC Automobile parts and components the DSB focused only on the physical features of the imported parts and components used in the finished products. In the dispute of Malt Beverages (the United States) and the dispute of automobile taxes (the US) the likeness mentioned in the clause 2 and 4 of article 3 was assessed mainly resorting to the goal of regulative action and protective effect. Then, the criterion of likeness was not completely taken into account. Moreover, the so called term "goal and effects" was immediately rejected by the DSB and the Appellate Body as to the clause 2 of article 3 (Japan, Alcoholic Beverages 2). Short time after it, the Appellate Body rejected the exertion of this criterion within the framework of clause 4 of this article (EEC, Dispute of Bananas). In the dispute of gasoline (the US) likewise the use of criteria of physical features, final use, and tariff classification was taken into account and the criterion of tastes and habits of the customers was set aside. While in the dispute of Japanese alcoholic beverages 2, the physical features were declared to be the decisive criterion in the definition of "like products" and final use criterion the basic criterion in the definition of "directly competitive or substitutable products". As with like products, determination of appropriaterange of directly competitiveor substitutable products must be made on a case-by-case basis.⁷⁷ Particularly, the reason related to the econometrics of the product was considered to be of importance in determination of competitiveness of western beverages and Shochu according to the second sentence of the clause 2. In the dispute of gasoline (the US) the DSB noted that in the evaluation of likeness all criteria must be taken into account by the DSBs according to the clause 4 of article 3. In other words, this DSB applied the criteria mentioned in BTA to the clause 4 of article 3. Moreover, the Appellate Body endorsed the narrowness of likeness in the first sentence of the clause 1 versus the second sentence of the same clause.

Furthermore, the Appellate Body in both fields gave less importance to the criterion of tariff classification and expressed that this criterion can only be useful when it is determined in most precise fashion. Despite the dispute of Japanese alcoholic beverages, the DSB did not rely on the criterion of tastes and habits of the customers in determination of competitiveness of western beverages and Shochu. This narrow definition of likeness as mentioned in the first sentence of the clause 2 of article 3 was later endorsed in the dispute of Canadian periodicals. In this dispute, the DSB relied on the hypothetical comparison of physical features and final use of the domestic and foreign versions of a journal entitled Harrow Smith Country Life. However, in the opinion of the DSB, the physical features of the two versions of this journal are more important than their competitiveness. It is interesting to note that the DSB showed no interest in the content of these journals in the analysis and interpretation of likeness while this could play a significant role in determination of the likeness or competitiveness of the products. Moreover, such an interpretation was in line with the occasional interpretative procedure that was expected from the DSB. The DSBs are asked to consider all aspects of the products discussed in the case including the market related aspects as well as the content of the journal. Of course, this criterion was implicitly endorsed by the Appellate Body though the latter did not mention this issue in its analysis of the issue and was instead more interested in relying on the criteria that show the competitive relationship between the imported advertising periodical and non-periodical magazines. Thus, according to the Appellate Body, given the previous interpretations offered of the clause 2 of the article 3, the interests of customers are more important than the physical features.

In the dispute of Indonesian autos, the physical features and final use were considered to be of an equal importance while the criterion of tastes and habits of the customers was not declared decisive. However, tariff classifications were not taken into account by the DSBs at all. This shows the narrow interpretation offered by the DSBs in the time of interpretation of "like products" according to the first sentence of the clause 2 of article 3. Surprisingly, the DSB based its analysis on the market studies, which was not so prevalent among the DSBs. It needs to be mentioned that in the dispute of Corolla Toyota 1600 cc and Timur 1500 cc and also the periodical and non-periodical advertisements the like products were declared directly competitive or substitutable because the producers believed them to have these qualities. However, neither the DSBs nor the Appellate Body offered any analysis of the studies regarding the market. In the dispute of bananas (ECC) the disputing parties and DSB agreed upon the presentation of a narrow interpretation of like products in line with previous procedure of GATT DSBs as regards the clause 4 of article 3. In the dispute of Korean alcoholic beverages and Chilean alcoholic beverages, the criteria of final use and tastes and habits of customers were taken to be more important than the physical features and tariff classification. In these disputes, the DSBs and the Appellate Body insisted more on the market analysis through the final use and preferences of the customers which were completed by marketing strategies, distribution channels and reasons related to other markets. However, tariff classifications were not declared relevant to this dispute because "using such a criterion showed the studies that had been conducted with more precision of other relevant factors of the product, i.e. physical features and final use" (Chile, Alcoholic BeveragesCase).

⁷⁷Trebilcock M. J., and Howse R. *The Regulation of International Trade*, 3rd edition, Psychology Press, 2005, P. 93.

In the dispute of Canadian autos, the restricted scope of the clause 4 of article 3 was confirmed by the DSB in the sense that only the physical features of the product were considered as the decisive criterion in "likeness" of the product while in the dispute of asbestos for the first time a new procedure was adopted and the narrow scope of the clause 4 was expanded in line with the goal and theme of the article 3. The Appellate Body believed that all relevant criteria to the likeness should be studied in full form and at the same time independently and evaluated as against each other. This was exactly what the DSB did not turn to it. In this regard, health risks should be taken into account as part of the analysis of physical features of these products.⁷⁸ Therefore, health risks which are hidden in asbestos fibers and the products made of them influence the tastes and habits of the customers. The relationship between cancer creating effect of asbestos fibers and the products made of them along with their physical features caused the fibers and products to be considered two different products. Thus, the importance of health risks as well as the tastes and habits of customers and physical features was prioritized over their final use and tariff classification.

Relationship of the Concept of Product Likeness with Competitiveness and Substitutability: As it has been frequently noted, in the study of criteria and indices of determination of likeness between two domestic and imported products in the disputes discussed in the DSBs and the Appellate Body one come across such concepts as product likeness, directly competitive and substitutable the determination of their relationship seems necessary. In this regard Standards higher than those commanded on domestic goods between imported goods and "like" domestic products, or between imported products and "a directly competitive or substitutable product." Should not be applied.⁷⁹ The article 3 of GATT distinguishes between "like products" and "directly competitive or substitutable products". This distinction is noted in the clause 2 of this article. In the dispute of Japanese alcoholic beverages 2 the DSB argues: "... like products must be declared as a subset of directly competitive or substitutable products." The DSB concludes that all like products as the latter definition suggests are directly competitive or substitutable products while not all directly competitive or substitutable products are necessarily like products. This distinction reflects the goal and theme of the article 3 which has been mentioned in the clause 1. Of course, if it was not so, the product likeness remained just as a barren concept in the domain of policy making.⁸⁰ This can be clearly understood from the following statement of the Appellate Body: "First and second sentences of the clause 2 of article 3 are closely intertwined and both form a unique logical axis" (EEC, Asbestos Dispute, quoted from the decision of Appellate Body in the Dispute of Canadian Periodicals).⁸¹

⁷⁸Marco M Slotboom, 'Do Public Health Measures Receive Similar Treatment in European Community and World Trade Organization Law?', *Journal of World Trade*, Volum37, Issue 3, 2003, pp. 553–596

⁷⁹DU, M., 'Treatment No Less Favorable' and the Future of National Treatment Obligation in GATT Article III:4 after EC–Seal Products, *World Trade Review*, Volume 15, Issue 1, 2016, p. 143

⁸⁰R.E. HUDEC, "Like Product: " The Differences in Meaning in GATT Article I and III", in *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*. World Trade Forum, Vol. 2, the University of Michigan Press, 2000, p. 103.

⁸¹World Trade Organization Dispute Settlement 135 Appellate Body Reports, European Communities Measures Affecting Asbestos and Asbestos-Containing Products, p. 30. See also World Trade Organization Dispute Settlement 31 Appellate Body Reports, Canada - Certain Measures Concerning Periodicals, p. 25

Conclusion

Many of the disputes between the member states of GATT/WTO are related to the claims of discrimination on the behalf of the exporting countries against the target country where the domestic like products are treated differently as compared to the foreign imported products according to plaintiffs. These complaints are investigated by the GATT DSBs and Appellate Body and the veracity of the claims of the likeness of products is assessed. Despite the importance of determination of the element of likeness in dissolution of the conflicts between the countries the definition of the likeness and indices of identification of like products is not clarified in world free trade. DSBs and the Appellate Body face this concept in many dispute cases and for solving the disputes they need a clear definition of likeness and specification of the indices of the likeness. In the reports of BTA some of the hidden elements of this likeness have been noted but this report alludes neither to the criteria of likeness including physical features, tariff classifications and tastes and habits of the customers nor to the method of their evaluation. For many years the DSBs assessed the likeness of products based on the market conditions without taking the relevant criteria into account and this can be seen in the investigations of the disputes of Superfund law (the US) and Animal Feed Proteins (EEC). This procedure continued until the middle of 90s when the market based criteria were gradually replaced with the reports of DSBs and the Appellate Body.

In this regard one can refer to the dispute of alcoholic beverages (Japan). Of course, it needs to be mentioned that despite the creation of this approach, in coming years in the disputes of Alcoholic Beverages (Korea) and Asbestos (EEC) the priority and importance of such criteria including econometrical indices related to the products like their price (cross price elasticity demand) and criteria related to market such as tastes and habits of the customers were doubted by the DSBs and the Appellate Body. In this regard, the DSBs and the Appellate Body proposed alternative criteria as the complementary part of the market analysis among which one can refer to marketing strategies, distribution channels and sale places. Generally speaking, based on the study of behavior and function of DSBs and the Appellate Body in their investigation and remarks of various disputes where the element of likeness of the products produced in the exporting country and domestic production of the target country is at stake one can conclude that all the indices and criteria of likeness of products in world free trade and the reasons related to market are all important in the assessment and determination of likeness of products depending on the type of product and the dispute subject. However, neither DSBs nor the Appellate Body has determined when and to which extent these criteria are important.

REFERENCES

- A Neofederalist Vision of TRIPS: The Resilience of the International Intellectual Property Regime, Graeme B. Dinwoodie & Rochelle Cooper Dreyfuss, Oxford University Press, Chapters 6-7, (2012).
- An Interdisciplinary Introduction to Legal Transparency: A Tool for Rational Development, Mock, William BT, 18 *Dick. J. Int'l L.* 293, (2000).
- Analysis of aspects of uniform tariff classification, Copenhagen Economics, (2014).

- Appeals Mechanism in International Investment Disputes, Sauvart, PK, Oxford University Press, (2008).
- Australia's Service Sector: A Study in Diversity, McLachlan, R., C. Clark & I. Monday, Canberra, Productivity Commission, (2002).
- Basic Instruments and Selected Documents (of GATT), Japan-Custom Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages, (L/6216 - 34S/83, 13 October 1987
- Border Tax Adjustments, Report of the Working Party adopted on (2 December 1970), (L/3464), Basic Instruments and Selected Documents (of GATT) IS S;102.
- Consumer Financial Protection and Human Rights, Ondersma, Chrystin, Cornell International Law Journal, (2017). Volume 50, Number 3
- Do Public Health Measures Receive Similar Treatment in European Community and World Trade Organization Law?' Marco M Slotboom, Journal of World Trade, (2003), Volum37, Issue3.
- European Communities-Regime for the Importation, Sale and Distribution of Bananas, C by Ecuador-Organization, wto.int, (22 May, 1997).
- Free Trade under Fire, Douglas A. Irwin, Princeton & Oxford University Pres, (2015).
- GAAT, The Results of the Uruguay Round of Multilateral Negotiations: The Legal Text, GAAT Secretariat, Geneva, (1994).
- Global Political Economy –Theory and Practice, Theodore H Cohn, Addison Wesley Longman, (2000).
- International Institutional Law, Unity Within Diversity, 5th Revised ed., Schermers, H. G., & N. M. Blokker, Leiden, Martinus Nijhoff, (2011).
- Like Product: The Differences in Meaning in GATT Article I and III", in Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law, R.E. HUDEC, World Trade Forum, Vol. 2, the University of Michigan Press, (2000).
- Like Products in International Trade Law. Towards a Consistent WTO/GATT Jurisprudence, W.M, CHOI, (2003).
- Marginal Consumers, Marginalized Economics: Whose Tastes and Habits Should the WTO Panels and Appellate Body Consider When Assessing 'Likeness'?, Marios C. Iacovides, Journal of World Trade, (2014), Volume 48, Issue 2.
- National Treatment Principle, METI, "Chapter2, (June 2001), p. 17. available: www.Meti.go.jp/English/report/downloadfiles/gCT0002e.pdf.
- Product Standards to Protect the Local Environment-the GATT and the Uruguay Round Sanitary and Phytosanitary Agreement, Barcelo, John J.III, Cornell International Law Journal, (1994), Volume 27, Issue 3,
- Product/Process Distinction-An Illusory Basis for Disciplining "Unilateralism" in Trade Policy, Howse R., Donald R., 11 EJIL 2, (2000).
- Regulatory Barriers and the Principle of Non-discrimination in World Trade Law: Past, Present, and Future, Cottier, T. et al., University of Michigan Press, (2000).
- Regulatory Purpose and "Like Products" in Article III:4 of the GATT (With Additional Remarks on Article III:2), Donald H. Regan, Journal of World Trade, (2002), Volume 36, Issue3.
- The Law and Policy of the World Trade Organization: Text, Cases and Materials, Van den Bossche, Peter, Cambridge University Press, (2005).
- The Most-Favoured-Nation Clause in the Law of Treaties, Ustor, E., Yearbook of the International Law Commission, (1968), Volume II.
- The New Framework for Global Trade in Services – All about GATS, Hibbert, E., The Service Industries Journal, (2003), Volume. 23, Issue 2.
- The Obstacles of Outsourcing Imported Food Safety to China, Chenglin Liu, Cornell International Law Journal, Volume 43, Number 2, (2010).
- The Political Economy of World Trading System: From GATT to WTO Bernard M. Hoekman and Michael M. Kostecki, Oxford University, (1995)
- The principle of national treatment in the GATT: A Survey of the Jurisprudence, Practice and Policy, MattiaMelloni, BruylantBruxlles, (2005).
- The Regulation of International Trade, 3rd edition, Trebilcock M. J., and Howse R., Psychology Press, (2005).
- The role of regulatory purpose under Articles III: 2 and 4 – toward consistency between negotiating history and WTO jurisprudence, Zhou W., World Trade Review, Volume 11, (2012).
- The Shochu Conundrum: Economics and GATT Article III, Davis A., Undergraduate Economic Review, Volume 12, Issue 1, (2015).
- The world trade organization and developing countries, Rashid, Khalid, Philip levy & Mohammad salam, Vienna, Austria, (1999).
- The World Trade Organization: A Legal and Institutional Analysis, Wouters, J. & B. De Meester, Intersentia, (2007).
- The World Trade Organization: Law, Economics and Politics, Hoekman, B. M. & P. C. Mavroidis, London, Routledge, (2007).
- The WTO and sustainable development, Sampson GP., United Nations University Press, (2005).
- Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the State, Delbruck, JOST, Indiana Journal of Global Legal Studies, (2004) - muse.jhu.edu
- Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law, Zoellner, Carl-Sebastian, Michigan Journal of International Law, No. 27, Winter, (2006).
- Trappings of Legality: Judicialization of Dispute Settlement in the WTO and Its Impact on Developing Countries, Timothy Stostad, Cornell International Law Journal, Volume39, Number3, (2006).
- Treatment No Less Favorable and the Future of National Treatment Obligation in GATT Article III:4 after EC–Seal Products, DU, M., World Trade Review, Volume 15, Issue 1, (2016).
- World Trade and the Law of GATT, Jackson, J., Bobbs-Merrill Company, (1969).
- World trade law: text, materials and commentary S Lester, B Mercurio, A Davies, Bloomsbury Publishing, (2018).
- World Trade Organization Dispute Settlement, Appellate Body Reports./ European Communities, (1996-2016), Available on :https://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm.
- WTO Analytical Index: Guide to WTO Law and Practice, 191 'Edition (2003),
- WTO Analytical index: Supplement Covering New Developments in WTO Law and Practice (October 2011 – August 2013, 2013).
- WTO Training Institute, Introduction to the WTO and its basic principle course, Module 4, (2002).