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A Critical Analysis of the Appellate Body's Interpretation of the Concept of 'Likeness' as Found in Article III GATT

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Abstract: This paper set out to analyses the Appellate Body's interpretation of 'likeness' in Article III The General Agreement on Tariffs and Trade (GATT), this analysis is based on the backdrop of increasingly dynamic and extensive trade between countries around the world. The development of goods exchanged has contributed to a boom in international trade, but also has inevitably given rise to a number of disputes. This paper gives an account that these trade disputes mainly stem from disagreement in the interpretation of keywords in the GATT provisions. This is why the interpretation of 'likeness' is important, the understanding of 'likeness' directly affects whether a country's adoption of different policies for products violates its national obligations under GATT. In this article, the Appellate Body's interpretation of 'likeness' is analysed with a focus on the cases of Alcoholic Beverages II (1996) and EC-Asbestos (2000). The Appellate Body's approach to the interpretation of 'likeness' in these two cases is analysed, as well as the logic and rationality of this interpretation. The validity of the Appellate Body interpretation is also analysed in light of the Vienna Convention on the Law of Treaties (VCLT). This essay analysed and found that the Appellate Body's interpretation of 'likeness' is both comprehensive and consistent with the general principles of treaty interpretation of the Vienna Convention on the Law of Treaties(VCLT). However, there are some drawbacks such as the Appellate Body's interpretation of 'likeness' is too vague and subjective and based on only a single method of interpretation.

1. Introduction

The General Agreement on Tariffs and Trade (GATT) is a multilateral legal treaty.[1] This paper focuses on the Appellate Body's interpretation of the concept at the core of Article III of GATT: "likeness". Article III of GATT uses the term "like products" in Articles III: 2 and Article III: 4.[2] The interpretation of "likeness" is at the core of Article III of GATT. Firstly, "likeness" between imported and domestic products is a prerequisite for determining whether a Member State has breached its National Treatment obligations.[3] "The principle of national treatment prohibits different treatment of like products, while different treatment of various products is permitted." In addition, the interpretation of "likeness" is also essential in defining the obligations of member states, "if the scope of "likeness" is narrow, the obligations will be relatively small; if the scope of "likeness" is broad, the obligations will be relatively large." As a result, "likeness" must be

interpreted with care. Finally, compared with the determination of "different", the determination of "likeness" is much more complex. Thus, there is a need for a theoretical explanation of "likeness".

However, under the WTO system, there is a lack of criteria for the interpretation of "likeness" and it needs to be done on a case-by-case basis. Hence, the interpretation of "likeness" is subject to siginificant uncertainty.[4] This article analyses Appellate Body's interpretation of "likeness" in *Japan–Taxes on Alcoholic Beverages II (1996) and EC-Asbestos (2000).* The Appellate Body asserts that the interpretation of "likeness" should reflect the context and purpose of the Article III of GATT, and indicates that "likeness" will be "squeezed and stretched" in different WTO cases. The Appellate Body's interpretation is controversial. Proponents argue that the Appellate Body's interpretation gives more flexibility to the definition of "likeness" and allows it to be adapted to the case.[5] Some critics indicate that the Appellate Body's interpretation is unclear, because it proposes that the definition of "likeness" to be relative, but gives no specific criteria for judging.[6] Furthermore, its interpretation is based on only the four criteria of the "Border Tax Adjustment"(BTA) Approach and does not, consider other possible approaches, such as the "Aim and Effect" approach.[7] This article critically analyses the Appellate Body's interpretation of "likeness".

This paper is divided into three parts: (1). A thorough analysis of the Appellate Body's interpretation of "likeness"; (2). An analysis of the strengths of the Appellate Body's interpretation; (3). An analysis of the weaknesses of the Appellate Body's interpretation.

2. The Appellate Body's Interpretation of "likeness"

2.1 Interpretation of "likeness" in Japan–Taxes on Alcoholic Beverages II (1996)

The Appellate Body's interpretation of "likeness" in *Japan–Taxes on Alcoholic Beverages II (1996)* focuses on the application of "likeness" in Article III: 2. The Appellate Body emphasizes that "likeness" is a relative concept. The Appellate Body portrays it by using the image of an accordion, indicating the meaning of "likeness" can be "squeezed and stretched" under different conditions of the GATT.[]"

Japan - Taxes on Alcoholic Beverages II (1966) is a case concerning whether the classification of alcoholic beverages for taxation in Japan violates Article III: 2. To address this issue, the first thing is to clarify the meaning of "likeness".

The Appellate Body cites the BTA Approach set out in the working party report in *Border Tax Adjustments (1970).*[8]" The Appellate Body contends that "likeness" is a relative concept, should be applied differently under different WTO regulations." Furthermore, the Appellate Body suggests that since Article III: 2 refers not only to "like products" but also to "directly competitive or substitutable products", "likeness", therefore, needs to be interpreted narrowly, as the scope of the two affects each other." Specifically, "the central principle of Article III:1 is to avoid protectionism.[9]" This principle "constitutes part of the context of the other paragraphs in Article III." The interpretation of "likeness" must reflect this principle. If the interpretation is too narrow, protectionism cannot be avoided, a country can improperly protect its products by imposing different taxes on products that are not classified as "like products" but are essentially the same. On the other hand, an overly broad interpretation would unduly impede a country's normal economic trade activities.

A frequent criticism of much of the research on explanation of 'likeness' concerns that the Appellate Body's interpretation focuses too much on freedom of trade to the detriment of national sovereignty. [10]However, these criticism fail to specify that the Appellate Body's interpretation takes national sovereignty into full consideration. As the Appellate Body suggests, "based on not discriminating against imported products to protect domestic products, members of the WTO are

free to pursue their own domestic goals through internal taxation or regulation." This reflects the Appellate Body's approach of considering the need to avoid protectionism but without affecting national sovereignty and internal regulations.

The obvious finding to emerge from the Appellate Body's interpretation of "likeness" in *Japan–Taxes on Alcoholic Beverages II (1996)* is that the Appellate Body primarily emphasizes that the meaning of "likeness" is relative and varies according to the context and purpose of the WTO Agreement.

2.2 The Interpretation of "likeness" in EC—Asbestos (2000)

In addition to the explanation given above in *Japan–Taxes on Alcoholic Beverages II (1996)*, the Appellate Body further explained "likeness" in *EC--Asbestos (2000)*. In this case, "asbestos products and asbestos-containing products were banned in France for health reasons, which Canada challenged on the basis that these products were 'like' domestically produced products which France did not ban.[11]"

The Appellate Body continued use of the BTA Approach, believes that interpreting "likeness" need a systematic approach, analysed each of the criteria.[12] In addition, with regard to the difference between Article III:4 and Article III:2, the Appellate Body found that the scope of "likeness" in Article III:4 is broader than in Article III: 2. This is mainly because in Article III: 2, there are separate obligations with respect to "like products" and to "directly competitive or substitutable products." This is not the case with Article III:4, it "only through the single obligation of "like products"." Therefore, "if the "likeness" in Article III:4 is interpreted in the same narrow sense as in Article III:2, it will leave a legal loophole----if imported products and domestic products are directly competitive or substitutable, then they can be treated differently, which will violate the non-discrimination principle of GATT III.[13]"

In *EC--Asbestos(2000)*, the Appellate Body proposed firstly that the interpretation of "likeness" in Article III: 4 needs to consider the four criteria in the BTA Approach and cannot be interpreted as narrowly as in Article III: 2, and, secondly, that the interpretation of "likeness" must in line with the principles of Article III: 1.

By analyzing the Appellate Body's interpretation of "likeness" in the preceding cases, it is clear that the Appellate Body applied the BTA Approach, emphasising the principle of Article III:1 in interpreting, and emphasising the need for "likeness" in Articles III:2 and III:4 to be interpreted differently. The following section offers a critical analysis of this interpretation.

3. Critically Analyse the Strengths of the Appellate Body's Interpretation

The primary opinion of this paper is the Appellate Body's interpretation of "likeness" is comprehensive and consistent with the provisions of the Vienna Convention on the Law of Treaties (VCLT) and with the principles of the validity of treaty interpretation.

The current study reference to the VCLT in order to gain insights into the Appellate Body's interpretation of "likeness". The VCLT is "widely regarded as reflecting the customary international law of treaty interpretation." "Article III: 2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) provides that the interpretation of the provisions must be based on existing rules of interpretation of international law. In *US--Gasoline(1996)*, the Appellate Body stated that "the rules of interpretation at the top of Article 31 of the VCLT already have the status of 'customary or general international law'." Thus, the VCLT falls within the DSU's "existing rules of international law", and can be regarded as one of the criteria for evaluating the Appellate Body's interpretation of "likeness". Articles 31 and 32 of the VCLT set out "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the

treaty in their context and in the light of its object and purpose."

Firstly, the Appellate Body's interpretation of "likeness", both in *Japan--Taxes on Alcoholic Beverages II(1996)* and in *EC--Asbestos(2000)*, is based on the good faith approach to treaty performance, i.e., that the interpretation does not place one of the member states in an unfair position.

Secondly, with regard to the principle of textual interpretation, in *Japan--Taxes on Alcoholic Beverages II(1996)*, the Appellate Body emphasised that "the correct interpretation of an article is first and foremost a textual interpretation." Furthermore, the BTA Approach also relies on a textual interpretation of the treaties to determine "likeness" by looking at the features of the products and other elements.[14]

Some point that the Appellate Body's interpretation is too textual. However, such expositions are unsatisfactory because they ignore the Appellate Body suggests that the interpretation of "likeness" needs to vary according to the specific case, not just the text, as is evident in the *EC--Asbestos(2000)* when analysing the dictionary interpretation of "like"." The Appellate Body's interpretation "is not a purely textual interpretation, but rather an interpretation that places the dictionary meaning in the context of the treaty for interpretation."

Finally, regarding contextualizing the interpretation in relation to the object and purpose of the treaty. In interpreting "likeness" in *Japan--Taxes on Alcoholic Beverages II(1996)*, the Appellate Body emphasized that Article III GATT must be given its ordinary meaning in its context and in light of the general object and purpose of the WTO Agreement.[15] Thus, the Appellate Body's interpretation of "likeness" also takes into complete account the context and purpose of the WTO Agreement.

Effectiveness is another essential principle of treaty interpretation, Effectiveness requires that the interpretation of a treaty satisfy the integrity of its object and purpose and not invalidate the treaty.[16] Therefore, this paper considers it crucial to analyse whether the Appellate Body's interpretation of "likeness" is consistent with Effectiveness. In both *Japan--Taxes on Alcoholic Beverages II(1996)* and *EC--Asbestos(2000)*, the Appellate Body emphasized the need for the interpretation of "likeness" to be consistent with the principles of Article III:1, and, the overall purpose of the Article III of GATT. The Appellate Body's conclusion that "likeness" in Article III:4 required a broader interpretation, due to inconsistencies between Article III:4 and Article III:2, is also evident from its focus on interpreting "likeness" to make the GATT effective as a whole.

However, this paper contends that one flaw in the Appellate Body's interpretation is that it fails to recognise that the non-financial factors outlined in Article III:4. This may result in de facto discrimination, and necessitating a more careful reading of the term "likeness." As Jackon notes, the most difficult issue to deal with in national treatment is where a domestic regulation is not apparently discriminatory, but in fact leaves the imported product adversely affected.[17] GATT III is a national treatment provision, which, together with Most-Favored nation (MFN) treatment, forms the two wings of the anti-discrimination principle.[18] Discrimination in international trade can generally be divided into de jure and de facto discrimination, "de jure discrimination treats imported products less favourably than domestic products.[19]" Because of its explicit nature, such discrimination is often more easily regulated. De facto discrimination, on the other hand, is where the law does not ostensibly provide for unfair treatment, but in fact imposes a heavier burden on the imported product.[20] For example, in *Korea - Various Measures on Beef (2001)*,[21] Korea required imported beef to be sold in specialty shops or in a separate section of a supermarket.[22] On its face, this regulation does not appear to be discriminatory, but in practice, such distribution can place imported products at a competitive disadvantage.

In conclusion, the Appellate Body's interpretation of "likeness" is comprehensive and consistent with the provisions of the VCLT. As Van Damme notes, "the Appellate Body as a whole has

succeeded in providing a consistent interpretation of the law of the WTO." Nevertheless, there is still a problem with the Appellate Body's lack of caution in interpreting "likeness". In the following section, this article will critically analyse the flaws of the Appellate body interpretation.

4. Critically Analyse the Weaknesses of the Appellate Body's Interpretation

As noted above, the Appellate Body's interpretation has the advantage of fully meeting the requirements of the VCLT and providing a comprehensive review. However, the Appellate Body's interpretation is far from perfect, and there are also some problems with it.

Firstly, the Appellate Body's interpretation of "likeness" is formalistic and overly vague, or, as the Sutherland Report states, "the Appellate Body has been "making law" rather than "interpreting law".[23]" The Appellate Body's interpretation considers the meaning of "likeness" to be relative, but it does not provide an adequate explanation. In *Japan--Taxes on Alcoholic Beverages II (1996),* the Appellate Body stated that "the concept of "likeness" is a relative one that evokes the image of an accordion." This interpretation introduced the creative notion that the meaning of "likeness" changes following WTO provisions. However, the Appellate Body did not further specify how the meaning of "likeness" changes and whether there are certain restrictions on those changes.

Similarly, in *EC—Asbestos (2000),* the Appellate Body emphasised the need for the interpretation of "likeness" to be consistent with the general principles of Article III:1: "Likeness" in Article III:4 should be interpreted as products in a competitive relationship." Then, in determining "like products" on a level competitive field, the Appellate Body stated that not all competing products are like products. However, it does not explain how "like products" meet this condition, and only vaguely states: "Nor do we wish like products under Article III: 4 is co-extensive with the products in Article III: 2." This paper argues that although it is not possible to define "like products" precisely, the Appellate Body's interpretation is too vague in the scope it gives "like products", in that, it simply compares two clauses of Article III of GATT.

Finally, the Appellate Body's interpretation is considered as somewhat weak because it is based solely on the Border Tax Assessment (BTA) Approach. Specifically, the factors it considers are all related to the four criteria of the BTA Approach and lacks consideration of other factors that affect the interpretation of "likeness", such as the "Aim and Effect" approach, under which "whether two products are similar depends on the observer's perspective, and "different conclusions can be drawn from different perspectives.[24]" As Won Mog Choi notes, "A fox and a hawk are both animals and similar to the hare, but to the skinner they are two very different things." A comparison of the Appellate Body's interpretation and the 'Aim and Effect' approach shows that the Appellate Body's interpretation does not consider the product's purpose from the observer's perspective. A determination of the purpose of the product is important, because "without looking at the purpose and effect of the 'measure complained of', it is impossible to know what perspective to take." Moreover, without considering how the observer determines the purpose of the product, there is a risk that some similar products may be missed, which in turn may have negatively impact the products of the importing country in international trade.

The analysis of the approach and rigorousness of interpretation shows that the Appellate Body's interpretation of "likeness" is flawed by the lack of clarity in its interpretation of the concept and because it considers only the BTA Approach as well.

5. Conclusion

Returning to the evaluation of Appellate Body's interpretation of 'likeness', through the comprehensive and critical analysis, it is now possible to state that the Appellate Body's interpretation reasonaly reflects the meaning of "likeness" and considers the meaning of "likeness"

in the context of the WTO provisions, which interpretation is consistent with the provisions of VCLT and the principle of the validity of treaty interpretation.

However, the Appellate Body's interpretation also has some problems. It leaves some concepts ambiguous and some questions unanswered in interpreting "likeness", and its interpretation considers only the BTA Approach. To address this issue, the Appellate Body's future interpretation of "likeness" could be more depth and detailed. One limitation of this article is that its analysis of the Appellate Body's interpretation of "likeness" is limited to just two cases: *Japan–Taxes on Alcoholic Beverages II (1996)* and *EC--Asbestos(2000)*. Many other issues, such as the approach of "hypothetical similar products approach,[25]" the concept of "equally favourable treatment,[26]" "tariff barriers," and similar concepts have not been discussed, so it is hoped that these areas will be examined in greater depth in the future.

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