

Interpretation of the Concept of ‘Likeness’ as Found in Article III GATT

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Abstract: *Although the concept "likeness" is of vital importance in article III GATT, there is no clear definition of it. Historically, the appellate body has used two methods of interpretation, first is the border tax adjustment approach, then in the early 1990 s, it was replaced by the aim and effects approach. Soon after, however, the aim and effects approach was abolished by the appellate body and the border tax adjustment approach was brought back again.*

Keywords: *Likeness, Article III GATT, concept interpretation, border tax adjustment approach, aim and effects approach*

1. Introduction

Article III of GATT is playing an increasingly important role in the world trade system. Its core is to compare the treatment of imported products and domestic products. The assumption behind this comparison is that the two things being compared are "likeness", as it is acceptable to apply different treatments to different products. However, in practice, it is fairly simple to compare the treatment, but the identification of like products is extremely controversial. Therefore, if we want to judge whether article III GATT is violated, it seems to compare the treatment, but in fact, it is judging whether the two products are "likeness".

This essay will analysis of the appellate body’s interpretation of "likeness" in three parts. The first part is the analysis of the border tax adjustment approach, which can be divided into two sub-parts. One is the examination of the four factors of the border tax adjustment standard, and the other is the investigation of a classic case of application of this approach. The second part of the essay, however, analyzes another approach to interpret "likeness", namely the aim and effects approach which has existed only for a short period. This section also analyzes two classic cases applying this approach. The third part talks about the re-adopt of border tax adjustment approach and lists two advantages of border tax adjustment approach over the aim and effects approach. On the one hand, the border tax adjustment approach combines both subjective and objective aspects, while the aim and effects approach only have subjective aspect thus it’s less comprehensive. On the other hand, in applying the aim and effects approach, the panel pays little attention on textual and contextual explanation and focused almost all its efforts on analyzing the object and purpose of article III which not comply with the Vienna Convention on the Law of Treaties.

2. Border Tax Adjustment Approach

Although the GATT lacks a rule to define "likeness", in the early times, the panel and the appellate body have developed a common approach through judicial practise. This approach, which was based on the Border Tax Adjustment Report adopted in 1970, thus became known as the border tax adjustment approach.

According to boarder tax adjustment approach, there are four factors to consider in judging "likeness". First, product’s physical characters. That is, the nature, characteristics and properties of the product. Also, as the product to be studied here is a commodity with exchange value, it needs to be evaluated from the perspective of general market entities. Second, product’s end-uses in given market. As for this factor, two aspects should be considered. On the one hand, how to judge the end-use. Typical example of this is

Japan Taxes on Alcoholic Beverages in 1996. The European Community think shochu and whisky are "like product" because they are drinking in the same way which means they have the same end-use. Japan, however, argues that the two types of alcohol are usually consumed at different times and therefore cannot be considered to have the same end-use. The appellate body ultimately sided with the EC, stating that shochu and whisky are "likeness" because of their substitution effect. The other thing to note is the "given market". The same item may have different end uses in different markets. For example, a bottle in market A is used as a daily water container, and in market B, such as in the flower and bird market, may be used as a vase. Third, consumer's tastes and habits. This factor is more subjective and can change over time and space. Also, national policies may influence consumer tastes and habits by intervening the markets. For instance, a lower tax on a product may lead consumers to prefer that product. Fourth, tariff classification. Through the same or similar classification of the disputed products in the tax tariff of the disputing party, it is possible to ascertain whether the disputed products are like products or not.

There is a classic case of using this approach. The Japanese Liquor Tax Law of 1987 classifies alcoholic beverages into different categories, subcategories and grades based on their characteristics such as alcohol content, and sets different tax rates for different categories. The EC claims that this policy violates article III GATT by imposing a higher tax rate on imported products than on like products in Japan, also it does not comply with second sentence of article III (2) by imposing a different tax rate on imported "directly competitive or substitutable products". In response, Japan argues that it has the right to establish product categories, and as long as there is no discriminatory treatment based on origin when taxing, in interpreting article III there is no need to take into account whether there is "likeness" or "directly competitive or substitutable" between imported and domestic products. However, according to the panel, two steps^[1] (Panel Report, 1987) should be taken in reviewing domestic taxes which is to first determine whether there is "likeness" or "directly competitive or substitutable" between imported and domestic products and then to examine whether the tax is discriminatory or protective.

First, in judging whether they are like products, the panel applies the border tax adjustment approach. Since the imported alcoholic beverages have similar physical characteristics, end-uses and tax classification with the above-mentioned domestic alcoholic beverages in Japan, it is concluded that these alcoholic beverages are "like products". In addition, the panel also cited *Spain Tariff Treatment of Unroasted Coffee*^[2], (Panel Report, 1981) pointing out that the subtle differences in taste, color and other properties of these alcoholic beverages do not influence the judgment of "like products". Second, regarding vodka and Japanese shochu, they cannot be considered like product, but they can be "directly competitive or substitutable" due to their flexibility in use and their shared characteristics. Also, there is direct competitive or substitutable relationship between Japanese domestic products and imported products in the categories of distilled liquors, liqueurs, sweetened and unsweetened wines, and sparkling wines. It is concluded that the scope of "like products" is narrower than that of "directly competitive or substitutable products".

3. "Aim and Effects" Approach

In early 1990s, another approach was proposed in the *United States-Measures Affecting Alcoholic And Malt Beverages (1992)*. In this case, the Panel considered that the purpose of article III (2) GATT should be considered in the judgment of like products. Regarding the issue of like product in respect of measures dealing with state excise taxes applicable to liquor produced from certain kinds of grapes and restrictions on the sale of beer with a specific alcohol content, the panel think that ".....the purpose of article III is not to prevent contracting parties from differentiating between different product categories for policy purposes unrelated to the protection of domestic production.Consequently, in determining whether two products subject to different treatment are like products, it is necessary to consider whether such product differentiation is being made "so as to afford protection to domestic production"."^[3] (Panel Report, 1992) After investigation, the panel find that the policy background for the law to distinguish beer by alcohol content is to protect human health and upholding public morals, and to provide a new source of tax revenue for the government, also, the restriction of the sale of high alcohol content beer applies to all high alcohol content beers. Therefore, the panel considered that the domestic measure mentioned above is in conformity with article III (4) GATT.

Therefore, under the "aim and effects" approach, though the physical characteristic has to be considered, it is more important to clarify the aim and effect of relevant dispute measures when judging like products. It is also worth noting that the purpose may be different under different perspectives. For instance, magazines are learning resources for students while they are recyclable waste in the eyes of scavenger. Thus, the feature of this approach is that it does not first determine the "likeness" as the border

tax adjustment approach, instead, it directly judges the government policies. If the government policies are legal and have no protective purpose, then the products targeted by this policy are not like products.

The classic case applying this approach is *United States--Taxes on Automobiles (1994)*. The case concerns U.S. measures to impose luxury excise taxes and gas-guzzler taxes on imported and domestic automobiles based on their price and fuel consumption per mile. The EC claims that the all automobiles involved are like products and supports its position with the border tax adjustment theory: ".....all automobiles represented a single "like product" with a single, clearly defined end-use, common physical characteristics, and inter-related consumer demand."^[4] (Panel Report, 1994) The United States, however, cited the panel's opinion in the *United States-Measures Affecting Alcoholic and Malt Beverages* which indicates the aim and effects theory: "The proposed two-part test ignored altogether a very important factor in the analysis: the policy goals that were being pursued by the facially neutral measure. As such it did not accurately reflect the goals of article III, which was to prevent measures being applied so as to protect domestic production. "The panel finally sided with the United States and advocates the "aim and effects" approach. In order to investigate the aim and effect of this measure, first should find out what it intend to achieve and secondly, what the consequence it has brought. Since the technology to produce fuel-efficient automobiles is not which only possessed by America, and there is also no evidence shown that foreign automobile manufacturers do not have the ability to design, build and sell low-priced automobiles, the policy of the United States was not intended to provide protection for its domestic automobiles thus it did not violate its national treatment obligations under article III (2) GATT.

4. Re-adopt of the "border tax adjustment" approach

Aim and effects approach have not been applied for a long time and was abolished in 1996 in *Japan -Taxes on Alcoholic Beverages*. In this case, the EC held that the border tax adjustment approach should be applied, while the United States and Japan both held that the aim and effects approach should be applied. The panel, however, ultimately adopted the border tax adjustment approach and held that the first sentence of article III (2) GATT did not mention the aim "to afford protection to domestic production". The second sentence of article III (2) refers specifically to the principle laid down in article III (1), and such a distinction must have its own meaning. It is therefore not necessary to prove the protective purpose in determining that a measure violates the first sentence of article III (2). The views of the panel have been recognized and affirmed by the appellate body and the border tax adjustment approach was been brought back and widely applied later.

So, what are the advantages of border tax adjustment approach compared with aim and effects approach in respect of interpreting the concept of "likeness" that led the appellate body to re-adopt the former one?

First of all, the border tax adjustment approach combines both subjective and objective aspects, while the aim and effects approach is more subjective thus less comprehensive than the former one. Under the broader tax adjustment approach, there are four factors to identify "likeness" and the factor which concerns product's physical characters, product's end-uses in given market and tariff classification are objective ones while the factor which concerns consumer's tastes and habits is a subjective one. However, the aim and effects approach clarifies "likeness" only base on whether the purpose of certain measure is to protect domestic production which is only a subjective aspect.

Secondly, according to general rule of interpretation in Vienna Convention on the Law of Treaties, firstly, the interpretation should be based on the principle of good faith, secondly, it should in accordance with the ordinary meaning of the term, and thirdly, the ordinary meaning should be connected with the context, also, the purpose of the treaty should be considered. However, in applying the aim and effects approach, the panel pays little attention on textual and contextual explanation and focused almost all its efforts on analyzing the object and purpose of article III GATT which not comply with Vienna Convention on the Law of Treaties.

In terms of textual explanation. In the case *Japan-Taxes on Alcoholic Beverages (1996)* which finally applies the broader tax adjustment approach, the appellate body concluded different steps in the examination of conformity of domestic measures with the first and second sentences of article III (2) in accordance with the textual meaning of the provision.^[5] (Appellate Body Report, 1996) However, under the aim and effects approach, although "so as to afford protection to domestic production" is the basis of this approach, in the text of the article III, the first sentence of article III (2) and article III (4) have not explicitly mention the above phrase states in article III (1). Therefore, the absence of additional text to support the "aim and effects" approach is the weakness of this approach in terms of textual

explanation^[6].(Choi WM, 2002) Besides the above cases, the appellate body have emphasized the importance of textual interpretation in many other cases which also suggest it's better to apply broader tax adjustment approach. For instance, in *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, the appellate body state clearly that "A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted."^[7] (Appellate Body Report,1998)

In terms of contextual explanation, consideration should be given not only to other paragraphs in the same article but also to other articles in the treaty as a whole. There are two key points concerning. On the one hand, "like product" appears 16 times in GATT clauses and the interpretation of this phrase will be slightly different result from different purposes of these clauses thus it's necessary to have contextual explanation. The interpretation "like product" in one clause will also affects its interpretation in another. For instance, the interpretation of "like product" in article III (2) and article III (4) will affect each other because they are both subject to the principle of national treatment; the interpretation of "like product" in article I and article III will affect each other because they are both principles of non-discrimination. On the other hand, the application of the aim and effects approach would render article XX meaningless^[8]. (Panel Report, 1996) When it comes to exemptions from obligations under article III, article XX provides general exceptions for measures that violate the principle of non-discrimination, but the exception not applies when it constitutes arbitrary or unwarranted discrimination between different countries or disguised restrictions on international trade. It is clear that article XX is subject to strict conditions of application. However, in the case of the aim and effects approach, since it does not include enumerated exceptions to justify a departure from article III obligations, the accused party can choose one of the reasonable policy other than "protective measures" to exempt itself from the obligation in article III. And since no Member is willing to make more effort to achieve the same result, it's possible that article XX could become redundant.

Based on the above two main reasons, the appellate body finally decided to re-adopt the broader tax adjustment approach.

5. Conclusion

To conclude, this essay has analyzed the Appellate Body's interpretation of the concept of "likeness" as found in article III GATT and find two approaches that have been applied. First, in terms of aim and effects approach which intend to judge whether domestic measures are protective. It was proposed in the *United States-Measures Affecting Alcoholic And Malt Beverages (1992)* but only exist for a short period results from its obvious defects. This approach not only lack objective judgment criteria, but also lack analysis of the concept's original meaning and the context of the whole treaty. Second, in terms of broader tax adjustment approach which noted four factors in identifying "like product". It was based on the Border Tax Adjustment Report which adopted in 1970 and after being replaced by the aim and effects approach for a short period, this approach was re-adopted in 1996. However, although the appellate body advocate the border tax adjustment approach, there will inevitably exist an element of personal discretion. Therefore, the concept of "likeness" can evoke the image of an accordion and this situation namely the accordion theory. Under the guidance of this theory, the application of the broader tax adjustment approach should be determined according to the specific case circumstances and the concept of "likeness" should be assessed on a case-by-case basis.

References

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