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Rex Zedalis

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# A Theory of the GATT “Like” Product Common Language Cases

Rex J. Zedalis\*

## ABSTRACT

*The thesis of this Article is that the decisional law involving GATT “like” product provisions understands the concept of likeness as tied to the theory of comparative economic advantage. The thesis is developed by first analyzing the specific language and negotiating history of the relevant provisions. This is followed by an examination of the opinions of the GATT dispute panels evaluating the meaning and objectives of the term “like.” From the perspective of conventional interpretive assessment like is said to have a broad meaning in the context of GATT’s basic obligations, and a narrow meaning in the context of its exceptional provisions. The fundamental point of the GATT decisional law linking the concept of likeness with comparative economic advantage is also used to survey, in a very preliminary way, other GATT provisions and panel decisions not dealing with the term like. This preliminary survey suggests that comparative advantage may be the single theory unifying all of GATT law.*

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## I. INTRODUCTION

During 1991, trade in goods between members of the world community amounted to \$3.4 trillion<sup>1</sup> and represented slightly less than one-fifth of total world output.<sup>2</sup> As trade measured by value has nearly doubled since 1980<sup>3</sup> and, during that same period, has exceeded the growth of world output by a factor of

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1. U.N. World Economic Survey 1992, U.N. Doc. E/1992/40, ST/ESA/231 (1992) at 50, Table III.1 [hereinafter World Economic Survey]. Recent information suggests a \$3.7 trillion figure for total world trade in 1992. See *GATT Says 1992 World Trade Growth Accelerated, But 1993 Trend Uncertain*, 10 Int'l Trade Rep. (BNA) 560 (Mar. 31, 1993).

2. For 1990, total world output was approximately \$21 trillion (U.S. 1988), World Economic Survey, *supra* note 1, at 6, Box I.1, and was 1/2% below that in 1991. *Id.* at 1, Table I.1.

3. See *id.* at 50, Table III.1 (noting the value of world exports in 1982 ran at \$1.80 trillion (U.S.)).

almost three to one,<sup>4</sup> it would seem the world is moving with ever greater celerity toward a highly interdependent international economic system. Self-sufficiency and insularity eventually may become hallmarks of the past. Standards of living, and development in general, may wind up depending as much on how states fare in the world market as on how they manage their own domestic sources of production.

The movement toward a global economy heightens the significance of the standards that govern international trade. Historically, the General Agreement on Tariffs and Trade (GATT or General Agreement)<sup>5</sup> has played a key role in this regard. The standards GATT establishes can be divided in innumerable ways. Distinguishing standards addressing products that are "like" or the same from standards that address products without requiring this connection, merits special attention. The worth and importance of distinctions separating tariff from nontariff standards, obligational from exceptional standards, import from export standards, or internal from border standards, seems doubtlessly perceptible. The like or non-like product delineation, however, encompasses all of these alternative ways of dividing up the provisions of the General Agreement. Consequently, the delineation based on "likeness" would appear to set forth the most comprehensive route for acquiring a basic understanding of many of the technicalities of the legal regime governing international commercial relations, while at the same time providing insight into the regime's central goal or objective.

This Article explores the concept of likeness in some detail. The essential challenge is to illuminate the meaning of this concept by determining whether some unifying theory runs through the panel decisions involving the various like product provisions of the GATT. To that end, Part II of this Article categorizes each of the like product provisions and proceeds to analyze them from a purely textual perspective. With this task completed, Part III considers the *travaux preparatoires*, or

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4. See *id.* at 6, Box I.1 (noting a \$5-6 trillion (U.S.) growth in world output from 1980 (using 1988 dollars) to 1990, or a rate of increase around 33%). Over roughly the same time, however, it was noted, *supra* note 3, that world export trade has grown by nearly 100%, from \$1.80 trillion (U.S.) in 1982 to \$3.46 trillion (U.S.) in 1991. See also 1991: *A Poor Year for World Trade Growth but U.S. Excels as an Exporter*, FOCUS: GATT NEWSLETTER (Information and Media Relations Division of GATT, Geneva, Switz.), Apr. 1991, at 1 (showing yearly percentage figures by which world trade has outstripped world output from 1982-1991).

5. General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. The current amended version appears in IV GATT Documents, Basic Instruments and Selected Documents (hereinafter BISD).

negotiating record, surrounding the adoption of the General Agreement to gain additional insight on the essence of each of these provisions. Part IV forms the heart of the Article. It focuses on the fundamental rules about likeness stated by the GATT panel decisions concerned with this concept. It also distills the language of these decisions to determine what theory, if any, allows them to be viewed as standing for some single, unitary proposition. Part V of the Article, the conclusion, steers away from the usual effort at summation. As several of the GATT like product provisions have not benefited from panel examination, this Part instead attempts to draw on what is known from decided cases to offer some speculation on how the unaddressed provisions might be interpreted. It ends with a few thoughts about whether the non-like product provisions of the General Agreement are capable of sharing in any theory holding the like product provisions together.

Before beginning the substantive discussion, several important pieces of information bear reference. First, seventeen GATT provisions employ the term like. Several others, including a few in the General Agreement's explanatory Addendum, use terms of a related or associated sort. Further, between 1947 and 1990, there have been twenty panel decisions involving the general concept of likeness, but only as utilized in six of the seventeen provisions. Finally, the provisions employing like fall into three specific categories: those referencing "product(s)" that are like; those referencing "commodities" or "merchandise" that are like; and those referencing some formulation clearly suggesting a concept of likeness beyond what one might term "sameness" or "identity."

## II. TEXTUAL APPRAISAL OF LIKE PRODUCT PROVISIONS

The three categories of like will be examined from a textual perspective to determine if any unifying theme binds the categories into a single coherent body. Prior to commencing this effort, it should be noted that within the three categories, there exist two distinct focuses. Moreover, each separate focus is not discretely correlated with only one of the three specific categories; rather, they often cut across the individual categories. The two focuses speak in comparative terms. Each one either makes central reference to an imported item, or central reference to an item produced domestically in the state of importation. That is to say, the various provisions of the General Agreement dealing with the concept of likeness focus either on an imported item's likeness to

some other item, or on a domestically produced item's likeness to an imported item.

Of the provisions displaying the former type of focus, several call for a comparison of the imported item with items imported from other states of supply,<sup>6</sup> others with items sold in the state from which the imported item was actually exported,<sup>7</sup> and still another with other items imported into the state concerned from the same supplying state.<sup>8</sup> Of the provisions that focus on domestically produced items in the state of importation, the second of the two focuses referenced above, none calls for a comparison between anything but the domestically produced and the imported items. Given that, the provisions sort themselves out as being concerned either with a practice in the importing state that treats domestically produced items differently from imported items,<sup>9</sup> or with injury being inflicted on a domestic production industry as a consequence of imported items being supplied.<sup>10</sup> Bearing in mind this distinction between focus on imports versus focus on domestic items, the three categories or groups of GATT provisions dealing with product similarity will be examined from a textual vantage.

#### A. Like Products

In the "like product" group both focuses are present. Several instances of provisions focusing on the domestically produced item in the state of importation exist.<sup>11</sup> The focus on the imported item is represented both by provisions dealing with comparability between items imported from a particular state of supply and items sold in the home market of that same state,<sup>12</sup> as well as by the varied comparability between imports from distinct states of supply.<sup>13</sup>

Working in reverse order, there would seem to be no reason to view the textual references to likeness between imported products from two distinct states of supply as having different connotations depending upon the precise provision of the GATT in which the references appear. Article I(1) obligates GATT

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6. See *id.* arts. I(1), XIII(1), and IX(1).

7. See *id.* arts. VI(1), VI(4), XVI(4), VI(7), XI(2)(c)(i)-(iii), and XI(2)(c) ("in any form").

8. See *id.* arts. VII(2)(a)-(b).

9. See *id.* arts. II(2), III(2) [first sentence], III(2) [second sentence], III(4), and XI(2)(c)(i)-(ii).

10. See *id.* art. XIX(1)(a)-(b).

11. See *id.* arts. II(2), III(2), III(4), and XI(2)(c)(i)-(iii).

12. See *id.* arts. VI(1), VI(4), and XVI(4).

13. See *id.* arts. I(1), XIII(1), and IX(1).

parties to accord to a product from or destined for another contracting party, customs and internal or national treatment no less favorable than the like product from or destined for any other state (even though not a GATT party) is accorded.<sup>14</sup> Article XIII(1) prescribes the same approach for prohibitions or restrictions on imports or exports.<sup>15</sup> While Article IX(1) also repeats that approach, it appears to speak of a most favored nation (MFN) obligation concerning equality of treatment in marks of origin as the obligation relates to imports, but not as it may also relate to exports.<sup>16</sup>

Obviously, like product(s) could have the same meaning in each and every respect. The thrust of Articles I(1), XIII(1), and IX(1) seems to be to avoid actions that put GATT parties *inter se*, or in relation to non-GATT trading partners, in a different position from the one that would obtain under the natural efficiencies of production possessed by each state. In view of that, identity would appear to be an inappropriate understanding of likeness. The simplest and most superficial changes in an item would provide a basis for variant treatment that could easily result in an

14. Article I(1) provides:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, 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.

*Id.* art. I(1).

15. Article XIII states:

No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

*Id.* art. XIII(i).

16. Article IX provides: "Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country." *Id.* art. IX(1).

While IX(1) is concerned with marks of origin requirements affecting imports, the language of Article I(1) dealing with "all rules and formalities in connection with importation and exportation" would seem to require MFN treatment on marks of origin requirements aimed at exports. *Id.* art. I(1) (emphasis added).

alteration of the normal competitive situation and inconsistency with the goal of these three MFN provisions.

The fact that products can be considered like, even though they are not entirely identical, raises the possibility that likeness also exists every time one item can take the place of another. Without prejudging whether likeness includes this possibility,<sup>17</sup> it is undisputed that one GATT party disadvantages another GATT party whenever it accords that party less favorable treatment on the grounds that the product involved is not sufficiently identical to another, but is merely able to take the place of some product from or destined for another state. For example, either a higher import duty will have to be paid, thus presumably increasing the consumer cost beyond what it otherwise would have been, or some export requirement will have to be complied with, thus upwardly affecting the price to be absorbed by the recipient state. If favorable treatment does not accompany products that are interchangeable with others, then the benefits of natural efficiencies can be rendered nugatory. Therefore, were one to ascertain the meaning of like with reference to nothing more than Articles I(1), XIII(1), IX(1), and the basic goal or objective they seek to promote, it would be perfectly reasonable to conclude that likeness encompasses products that can be used in place of others, that is, products that are interchangeable.

A better grasp of likeness can be obtained by examining the provisions on like products that call for a comparison between a product imported from a particular state of supply and a product sold in the domestic or home market of that supplying state. This is the other way in which the focus on imported items is represented in the like products provisions.<sup>18</sup> The relevant GATT Articles are VI(1), VI(4), and XVI(4). Article VI(1) deems that the unfair practice of dumping exists whenever an imported item is sold at a price below what the like product would fetch when destined for consumption in the home market of the state of exportation or, in the absence of sales in that market, for export to a third state.<sup>19</sup> Article XVI(4) prohibits export subsidies on nonprimary products (i.e., manufactured or industrial items) when the subsidization results in "bi-level pricing," sales for

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17. See *infra* text accompanying notes 72-73.

18. See *supra* note 12 (discussing this focus).

19. GATT, *supra* note 5, art. VI(1) (indicating dumping exists whenever the price of an imported item "is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. . .").



export at a price below the price on sales for consumption in the domestic market.<sup>20</sup>

Article VI(4) declares that neither dumping nor countervailable subsidization exists simply because a low export price results from the state of supply exempting exports from duties or taxes that are borne by the like products when sold for consumption in the home market, or because such duties or taxes happen to be refunded.<sup>21</sup> Though not directly tied to Article XVI(4), the obvious effect of Article VI(4) is to insulate from countervailing duty (CVD) treatment any bi-level price resulting from an exemption or refund of duties or taxes.<sup>22</sup>

The comparison of the price at which a product sells for export with the price at which the like product sells for consumption in the state of supply (or, as in the case of Article VI(1), in a third state, when there are no sales in the state of supply) obligates GATT parties to refrain from employing practices that place imported products in a different price position than if they had been consumed in the home market. This is clearly the case with regard to Articles VI(1) and XVI(4). Both articles respect the price a product carries, if that is the price it would have borne had it never been exported. The effect

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20. Article XVI states:

Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 no contracting party shall extend the scope of any such subsidization beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing, subsidies.

*Id.* art. XVI(4).

For the history of bringing this "standstill/prohibition" into force, see JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 372-74 (1969).

21. Article VI(4) provides:

No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

GATT, *supra* note 5, art. VI(4).

22. It should be observed that, even though Article VI(4) of GATT is here connected with Article XVI(4) on export subsidies granted on nonprimary products, Article VI(4) would also seem to apply in the context of Article XVI(3), dealing with export subsidies on primary products. See *id.* arts. VI(4), XVI(4), and XVI(3).

is that exports are to carry the price which reflects the natural productive efficiencies of each supplying state. Neither the state of supply nor the state of importation shall take any actions to affect that outcome. This complements the like product provisions, which compare the treatment accorded imported products from one state with the treatment accorded imported products from another. Thus, the competitive relationship obtained between imports from different states, a relationship based largely on the price position of the product determined with reference to the home market, is to remain unaltered.

Article VI(4) presents a bit of a wrinkle in this approach. Articles VI(1) and XVI(4) suggest that nothing is to happen to distort the export price compared to the domestic price in the state of supply. Yet Article VI(4) prohibits a state of importation from responding to a practice in the state of supply of providing relief to the sales of goods for export from the taxes or duties normally charged on the sales of a like product when sold for domestic consumption. This practice would appear inconsistent with the idea that an exported product should carry its normal home market price. Relieving goods of taxes or duties can result in exports being sold at a price below the domestic sales price. The price of real concern, however, is the one a seller would offer to sell the item in the state of supply, not the price the consumer who actually purchases it would have to pay to complete the transaction. In virtually every case, the latter figure will include something for the government. In this sense, then, Article VI(4) is entirely consistent with Articles VI(1) and XVI(4). Moreover, it also complements those like product provisions which seek equal treatment among various states of supply. It does this by its directive against responsive antidumping or CVD action. This directive has the same thrust as Articles VI(1) and XVI(4), for it maintains prices determined with reference to the home market as the basis for the competitive relationship among trading partners.

As to the implication of this complementarity between Article VI(4) and the other provisions, some small ray of additional guidance for the meaning of like products would seem to be provided. The increment of guidance emerges from the fact that Articles VI(1) and XVI(4) appear to warrant slightly different approaches. Though both seek the maintenance of a product's home market price, the former includes not only the like product formula for securing that objective, but also an artificial constructed price formula which may be employed whenever

using the like product method is not appropriate.<sup>23</sup> Article XVI(4), on the other hand, provides no fallback method for determining subsidization on nonprimary products.<sup>24</sup> Thus, it might be suggested that, since dumping can be determined even though no domestic sales of nearly identical products exist, Article XVI(4)'s reference to like in the subsidization context should be subjected to a somewhat looser reading than indicated by Article VI(1)'s reference to the term.

The merit of this suggestion is that it seeks to prevent the evisceration of the prohibition on export subsidies on nonprimary products. This is done by acknowledging that in the dumping context, when no domestic sales of nearly identical products exist, resort is had to a less attractive, though nonetheless available, cost-plus profit approach. It would produce a strange result to refrain from subjecting Article XVI(4)'s reference to like to a broader reading and to insist that likeness has the same meaning in both Articles VI(1) and XVI(4). Trading partners cognizant of a constructed price formula for determining dumping may reasonably infer that like means very closely similar. If they took the same approach with regard to subsidization, the home market price of an imported item could be substantially benefited, in the event sales in the supplying state's market happened to be of products that could not be considered to share the same degree of very close similarity. Conversely, if those trading partners read Article VI(1) in a loose fashion, to comport with a reading of Article XVI(4) designed to avert the problem just referenced, the presence of the constructed value formula for determining dumping would be all but ignored. An exception, perhaps, would exist if no sales of even remotely similar products occurred in the home market.

A very similar point can be made about Article VI(4). Supplying states normally would be expected to have no reason to offer a tax exemption, or refund a tax already collected, unless the beneficiary product is identical to or very closely approximates the one sold in the home market that is subjected to a tax. Presumably an exemption or refund scheme would be premised on the idea that, if an item sold domestically and subjected to a tax or duty were taken and sold for export, it would not be subject to the tax or duty. Thus likeness seems to have a stricter meaning here as well than in the context of Article XVI(4). Supporting this narrow reading of Article VI(4) is the fact

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23. See *id.* art. VI(1)(b)(ii).

24. See *id.* art. XVI(4), referencing only export subsidies on nonprimary products that result in sales "for export at a price lower than the comparable price charged for the like product to buyers in the domestic market."

that the state of supply may depart from the normal course and grant an exemption or a refund to a specific item exported and not sold domestically (e.g., pears), while taxing domestic sales of all items in the larger, generic grouping (e.g., fruit) to which the exported item belongs. Under these circumstances reading likeness as referring to products that are able to take the place of others would effectively allow the state of supply to earmark certain items (e.g., pears) for export sale only, and use tax revenues on dissimilar yet interchangeable products (e.g., apples) to undercut the usual productive efficiencies that other trading partners might possess on the subsidized item. Only a strict meaning of likeness avoids this inconsistency with the basic goal of Article VI(4).

Likeness in Article XVI(4) could be understood to include products a little less similar, a little more removed from precisely identical, than the products included in the concept of likeness in Articles VI(1) and VI(4). That seems to say something about whether it is accurate to read like products as used in the six GATT provisions reviewed so far as having a common meaning that covers any product capable of taking the place of, or that is interchangeable with, another. That was certainly the suggested reading given to those Articles (I(1), XIII(1), and IX(1)), which focused on comparing imports from different states.<sup>25</sup> The shared theme of maintaining the naturally occurring efficiencies of production exemplified by traded products,<sup>26</sup> present in Articles VI(1), VI(4), and XVI(4), the provisions focused on comparisons with home markets, suggests the same reading. However, it has been suggested that the inclusion of an alternative dumping formula connotes that home market or third state price is to be used, perhaps, only when there exists some reasonably close degree of identity or similarity with the imported products. This certainly indicates that Article VI(1)'s use of like does not encompass products that are nothing more than capable of being used in place of or interchanged with others. The normal expectation about the employment of a tax or duty exemption or refund program for exported products would further confirm that indication with regard to Article VI(4).

The third and final group of like product provisions compare the imported item with items produced domestically in the state of importation. Their emphasis on assuring that a traded product be able to carry to the territory of a state of importation consumer attractiveness flowing from naturally obtained productive

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25. See *id.* arts. I(1), XIII(1), and IX(1). See also *supra* text accompanying notes 14-18.

26. See *supra* text accompanying notes 18-25.

efficiencies is clear. As has been seen, the principal thrust of the imports-to-imports grouping is to make sure that, between foreign suppliers, every state is on an equal footing. The import-to-home market grouping, captured by Articles VI(1), VI(4), and XVI(4), reinforces this same objective and goes beyond it, to assure equality between imports generally and production within the importing state itself. The grouping of imports-to-importing state production provisions centers exclusively on the latter objective. In calling for a comparison between products that are imported from abroad and those produced in the state of importation itself, the grouping focuses on an equality between imports and domestic production.

Four provisions of the General Agreement on Tariffs and Trade fall into this final grouping. The best known are: Article III(2), the first sentence of which prohibits importing GATT parties from imposing internal charges on imports in excess of those imposed on "like domestic products;"<sup>27</sup> and Article III(4), which prohibits similar discriminatory treatment through laws, regulations, or requirements affecting internal sale, transportation, distribution, or use.<sup>28</sup> Perhaps almost as well known is Article XI(2)(c)'s prohibition on import quotas for agricultural or fisheries products not necessary to the enforcement of government measures restricting the production or marketing of the like domestic product or removing temporary

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27. Article III(2) provides:

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 in excess of those applied, directly or indirectly, to like domestic products. 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 1.

GATT, *supra* note 5, art. III(2).

28. Article III(4) states:

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.

*Id.* art. III(4).

surpluses of the like domestic product.<sup>29</sup> The provision in this category that has escaped much of the attention surrounding the others is Article II(2). Article II generally proscribes the imposition of customs duties in excess of those referenced in the appropriate tariff bindings.<sup>30</sup> Paragraph 2 of that Article, however, allows the bindings to be exceeded by charges that represent internal taxes levied by the importing state on any like domestic product.<sup>31</sup>

Obviously, all of these provisions are aimed at protecting the natural efficiencies reflected in products produced and then marketed between trading states. Just as the trading states are to refrain from actions designed to alter the variations in consumer attraction towards different suppliers that are generated by these efficiencies, they are also to refrain from actions which alter the attraction extant between imports and indigenous products. Articles III(2), III(4), XI(2)(c), and II(2) are all directed at prohibiting a state of importation from pursuing measures that disrupt the market consequences flowing from the production situation which would normally obtain in each GATT

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29. Article XI provides:

2. The provisions of paragraph 1 of this Article shall not extend to the following: . . .

(c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:

(i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is not substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or

(ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level or.

*Id.* art. XI(2)(c)(i)-(ii).

30. *See id.* art. II(1).

31. Article II(2)(a) states:

Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

(a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part . . . .

*Id.* art. II(2)(a).

party. Individual genius and entrepreneurship are encouraged and rewarded; external intervention is frowned upon. Those whose products stimulate consumer demand should not be disadvantaged through intrusions aimed at leveling competition or creating market distortions.

Clearly, then, the concept of like domestic products further informs our understanding of the notion of likeness. In short, it appears to track the stricter or narrower meaning evident in Article VI(1) and (4). In essence, this meaning allows states to avail themselves of the attractions incident to their own initiative, enterprise, and natural efficiencies. In the context of requiring no less favorable treatment for imports than that accorded to like products produced domestically in the state of importation, the reference to like domestic products in Articles II(2), III(2), III(4), and XI(2)(c) would seem to indicate that opportunities to implement discrimination incongruous with natural efficiencies of production proceed from anything but a restrictive notion of likeness. Specifically, it is not difficult to imagine importing states succumbing to discriminatory protective pressures to neutralize attractions of an import enjoying a host of productive efficiencies. The broader the notion of likeness in Articles II(2), III(2), III(4), and XI(2)(c), the more pervasive and disruptive the protection is likely to be. By keeping the meaning of likeness narrow, problems of that sort can be minimized.

### B. *Like Commodity or Merchandise*

Two GATT Articles use phraseology different from like products or like domestic products. Article VI(7) of the GATT refers to "like commodity,"<sup>32</sup> and Article VII(2)(a) and (b) to "like

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32. Article VI(7) provides:

A system for the stabilization of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that:

(a) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and

(b) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.

merchandise."<sup>33</sup> The questions are: whether the fact these two provisions employ a word configuration distinct from that seen in the provisions examined in the preceding section alters the textual conception of likeness sketched so far; and whether (apart from the use of like commodities or merchandise, instead of like products) the manner by which Articles VI(7) and VII(2)(a) and (b) regulate the trade topics with which they deal suggests a different understanding of likeness than has already been seen.

At the outset, it should be observed that these two GATT provisions illustrate only one of the aforementioned focuses. Though all the GATT likeness provisions either focus on imported items or domestic items,<sup>34</sup> Articles VI(7) and VII(2)(a) and (b) focus solely on imports. Article VI(7) declares that a commodity under a price support plan in an exporting state shall be presumed in some cases not to cause a dutiable injury when it is imported by another state, even though the export price is below that charged for the like commodity in the exporting state's markets.<sup>35</sup> As duties responding to unfair trade practices are designed to offset price differentials between an item in its export mode and in its home market mode, Article VI(7) necessarily must focus on the imported item. The same is true of Article VII(2)(a) and (b). They provide that, for customs duty purposes, imports are to be valued on the basis of the actual value of "the imported merchandise" or of "like merchandise,"<sup>36</sup> and that value is generally the price at which "such or like merchandise" is sold

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*Id.* art. VI(7)(a)-(b).

33. Article VII(2)(a)-(b) reads:

(a) The value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values.

(b) "Actual value" should be the price at which, at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions. To the extent to which the price of such or like merchandise is governed to which the price of such or like merchandise is governed by the quantity in a particular transaction, the price to be considered should uniformly be related to either (i) comparable quantities, or (ii) quantities not less favourable to importers than those in which the greater volume of the merchandise is sold in the trade between the countries of exportation and importation.

*Id.* art. VII(2)(a)-(b).

34. See *supra* text accompanying notes 5-6.

35. See *supra* note 32 for the language of GATT Article VI(7).

36. See *supra* note 33 for the language of GATT Article VII(2)(a).



in the ordinary course of business.<sup>37</sup> With valuation, the focus could hardly be on anything but imports. Even if it was permissible to base valuation on the value of domestic items produced in the state of importation,<sup>38</sup> that figure would only be significant for disclosing the value to be ascribed to an import.

Next, does the switch in terminology from products to commodity or merchandise, and does the manner by which Articles VI(7) and VII(2)(a) and (b) regulate the concerns they address, change what has already been said about likeness? Consider first the move from the word products to the words commodity and merchandise.

By presuming that a program to support the economic position of a commodity avoids injury of a dutiable nature to a state importing the supported commodity, Article VI(7)'s use of like product rather than like commodity has no impact on the meaning of likeness. The term commodity must be seen in the context of GATT Addendum Note 2 to paragraph 3 of Article XVI. Article XVI(3) strikes at GATT party subsidies that increase exports of any "primary product" to the point of giving the subsidizing state more than an equitable share of the product's world trade.<sup>39</sup> Note 2 of the Addendum to Article XVI(3) provides that exporting state price support programs on primary products shall not, in some cases, be considered subsidies capable of violating Article XVI(3), even though they result in exports from the state of subsidization at a price below that charged for the like product in the exporting state's markets.<sup>40</sup> Primary product

37. See *id.* art. (2)(b).

38. See *id.* art. (2)(a) ("and should not be based on the value of merchandise of national origin").

39. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of the world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.

40. Note 2 to § B, ¶ 3 of Article XVI reads:

A system for the stabilization of the domestic price or of the return to domestic producers of a primary product independently of the movements of export prices, which results at times in the sale of the product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market, shall be considered not to involve a subsidy on exports within the meaning of paragraph 3 if the CONTRACTING PARTIES determine that:

is defined, in large measure, as an item in its natural form or that has undergone the most minimal processing.<sup>41</sup> Any primary product that has been subjected to substantial transformation (e.g., wheat into pasta)<sup>42</sup> would not qualify for the liberal treatment accorded subsidization by Note 2 of the Addendum to Article XVI(3). In that case, while the price support program may be violative of paragraph 3's strict standard, Article VI(7) provides that, if certain determinations are made through consultation between substantially interested contracting parties, a presumption exists that the importing state has suffered no injury<sup>43</sup> for which it may respond with a retaliatory duty. The effect is to use dialogue to temper the inclination of importing states toward unilateral action. More importantly for present purposes, the connection between Articles VI(7) and XVI(3) indicates that a commodity could be considered nothing other than a primary product in an advanced stage. Accepting this understanding of the word commodity, the fact that Article VI(7) calls for a comparison between commodities that are like, while Note 2 of the Addendum to Article XVI(3) calls for a comparison between products that are like, means the switch from one to the other has no real affect on the meaning of likeness. The thrust of the wording is directed at stages of preparation alone.

Nor does the other possible reading of the meaning of likeness change the relationship between Article VI(7) and Note 2 to paragraph 3 of Article XVI. That reading points to the fact the

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(a) the system has also resulted, or is so designed as to result, in the sale of the product for export at a price higher than the comparable price charged for the like product to buyers in the domestic market; and

(b) the system is so operated, or is designed so to operate, either because of the effective regulation of production or otherwise, as not to stimulate exports unduly or otherwise seriously to prejudice the interest of other contracting parties.

Notwithstanding such determination by the CONTRACTING PARTIES, operations under such a system shall be subject to the provisions of paragraph 3 where they are wholly or partly financed out of government funds in addition to the funds collected from producers in respect of the product concerned.

GATT, *supra* note 5, art. XVI, § B, ¶ 3, note 2.

41. Note 2 also states:

For the purposes of Section B, a "primary product" is understood to be any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.

*Id.*

42. See *European Economic Community—Subsidies on Exports of Pasta* (U.S. v. EC), BISD 31st Supp. 259 (1985) (pasta is not a primary product).

43. See *supra* note 32 for the language of GATT Article VI(7).

latter provision contains not only reference to products, rather than commodities, but an additional proviso, not found in Article VI(7), preventing recourse to Note 2's escape from Article XVI(3) when the subsidy provided is in whole or in part from government funds.<sup>44</sup> In the context of Article VI(7), the proviso seems to indicate that, while there may be instances in which the chance of imposing a responsive duty is nonexistent because of Article VI(7)'s presumption of no injury, if the subsidization generating the controversy is funded out of government monies, then the exporting state is still bound to refrain from using the practice to secure more than an equitable share of the world trade. Restated, Article XVI(3) limits the subsidization, even though the remedy of a countervailing duty may not be available under Article VI. Obviously, Article VI(7)'s switch from like product to like commodity in this situation has no real relevance for the meaning of likeness.

Article VII(2)(a) and (b)'s switch from like product to like merchandise seems to warrant the exact same conclusion about the impact on the meaning of likeness. The term merchandise is a generic term that encompasses both product as well as commodity. Merchandise is any item or good sold by a merchant, no matter how that item or good happens to be characterized. In fact, paragraphs (1),<sup>45</sup> (3),<sup>46</sup> and (5)<sup>47</sup> of Article VII, in

44. See *supra* note 40 (final sentence) for the relevant portion of note 2.

45. Article VII(1) states:

The contracting parties recognize the validity of the general principles of valuation set forth in the following paragraphs of this Article, and they undertake to give effect to such principles, in respect of all products subject to duties or other charges or restrictions on importation and exportation based upon or regulated in any manner by value. Moreover, they shall, upon a request by another contracting party review the operation of any of their laws or regulations relating to value for customs purposes in the light of these principles. The CONTRACTING PARTIES may request from contracting parties reports on steps taken by them in pursuance of the provisions of this Article.

GATT, *supra* note 5, art. VII(1).

46. Article VII(3) provides: "The value for customs purposes of any imported product should not include the amount of any internal tax, applicable within the country of origin or export, from which the imported product has been exempted or has been or will be relieved by means of refund." *Id.* art. VII(3).

47. Article VII(5) declares:

The bases and methods for determining the value of products subject to duties or other charges or restrictions based upon or regulated in any manner by value should be stable and should be given sufficient publicity to enable traders to estimate, with a reasonable degree of certainty, the value for customs purposes.

*Id.* art. VII(5).

confirmation of this understanding of merchandise as an expression of inclusiveness, refer to the subject of valuation of imported products. Paragraphs 2(a) and (b) provide that the valuation is to follow certain standards and is to value imported merchandise or like merchandise. The apparent connotation is that the standards for determining value apply to all merchandise, that is all imported goods or items sold by one entity to another. This would seem to mean that, accepting the existence of the earlier distinction between products and commodities,<sup>48</sup> the system of valuation established in Article VII(2)(a) and (b) is inclusive enough to encompass all items, whether considered products or commodities. Consequently, the drafters use of merchandise, instead of products, in paragraphs 2(a) and (b) of Article VII would seem to be of little relevance to the meaning of likeness. The only relevance of this change in language would seem to be as a reflection of a decision to employ as broad a term as possible when dealing with the subject of import valuation.

This conclusion is not weakened by the fact that previously discussed Article VI(7) references like commodity, while several other Article VI provisions refer to like product.<sup>49</sup> One might view use of both merchandise and product in the same article as not suggesting that the former term is inclusive of the latter, when another article of the General Agreement uses product and commodity to mean two distinct and exclusive things.<sup>50</sup> Article VI's use of product and commodity, however, does not distinguish between the two terms. That results from the relationship between Article VI(7) and Note 2 of the Addendum to Article XVI(3).<sup>51</sup> Moreover, even if one accepted the distinction as deriving from Article VI alone, there is no reason to thereby extrapolate that merchandise and product, as used in Article VII, are entirely exclusive terms. The conclusion that such exclusivity would automatically have some relevance to the meaning of Article VII(2)(a) and (b)'s use of the word like would seem especially strained.

Even if the switch from products to commodity or merchandise proves of little significance to the meaning of likeness, the same may not be true of the manner in which Articles VI(7) and VII(2)(a) and (b) regulate the concerns they address. Let us examine Article VI(7)'s regulation of domestic

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48. See *supra* text accompanying notes 39-45.

49. See GATT, *supra* note 5, art. VI(1)-(6).

50. See *supra* text accompanying notes 39-45 for a discussion of the difference between product and commodity.

51. See *supra* text accompanying notes 39-45 on Articles VI(7) and XVI(3).

price stabilization schemes on primary commodities, and Article VII(2)(a) and (b)'s regulation of calculations of actual value of merchandise imported by one state from another, to ascertain whether their approaches will help illuminate the concept of likeness.

Article VI(7) appears geared toward an objective quite similar to that observed in Articles VI(1), VI(4), and XVI(4), specifically, getting exports to carry their home market price with them, so as not to allow some trading states to artificially and unfairly advantage the items which they sell abroad. As examined earlier, Articles VI(1), VI(4), and XVI(4) did this by insisting that unfair trading occurs whenever one sells for export at below home market price, unless it is caused by consumption tax exemptions or refunds, or whenever nonprimary products benefit from export subsidies that result in bi-level pricing. These trading practices can trigger responsive antidumping or CVD action by the state of importation.<sup>52</sup> Article VI(7) is not as wholly wedded to the same objective. While it no doubt would like implementation of domestic price stabilization plans to always avoid the possibility of lower export prices than domestic home market prices for the like commodity, it allows for a lesser degree of success. This is done by providing for a presumption of no dutiable injury when consultation between parties substantially interested in the commodity determines that the support plan also occasionally results in an export price below the market price of the supplying state.

Article VII(2)(a) and (b) appears to be aimed at another goal. It declares that for customs purposes imports are to be valued on the basis of the actual value of what is imported, or of merchandise like that imported, and that actual value is considered the price at which it is sold or offered for sale in the ordinary course of trade under fully competitive conditions. Article VII(2)(a) and (b) thus seeks to establish a uniform international benchmark for valuation, not a standard that assures items traded between states will take with them their home or domestic market price.<sup>53</sup>

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52. See *supra* text accompanying notes 18-26 (describing Articles VI(1), VI(4) and XVI(4)).

53. Notes 1-4 of the Addendum to paragraph 2 of Article VII of the GATT make clear that price information is to be represented by the importer's invoice price, plus other figures that are appropriate to factor-in to the price calculation (e.g., non-included charges for legitimate costs, as well as abnormal or special accounts). Additionally, they also allow the exclusion from consideration of sales involving interrelated business partners and sales where price is not the sole consideration. The importing state is at liberty to use either the invoice price information of the importer whose merchandise is actually being valued, or

To be sure, there is some overlap between these two goals. In seeking to have internationally traded goods carry the price they have in the state of supply, it is imperative to have a figure representing import price against which the home market price can be matched. Such a figure allows one to then determine the existence of unfair trading practices like dumping and subsidization producing bi-level pricing. Article VII(2)(a) and (b) supplies just that kind of figure. Article VII(3) provides that value is to be determined without reference to exemptions or refunds of taxes granted by the supplying state,<sup>54</sup> acknowledging the overlap by paralleling the language of Article VI(4), which is totally focused on products carrying their home market price. Additionally, however, Article VII(2)(a) and (b) goes further and supplies a figure that can be used for the distinct and unrelated task of levying run-of-the-mill tariff duties. It thereby attempts to limit the occasions for abuse of GATT tariff bindings.

Given Article VII(2)(a) and (b)'s primary objective of establishing a universal standard for valuation, and Article VI(7)'s objective of getting traded products to take with them their home market price, it might be asked: Does either provision inform the meaning of likeness beyond the preceding discussion of the General Agreement's other relevant provisions? The obvious point is that the objective of Article VII(2)(a) and (b) indicates that, no matter how likeness is construed, it should be given a uniform meaning by every GATT party. It would be intolerable to have a situation in which some states compute value on the basis of like meaning precisely identical in every respect, others as meaning different yet very similar, and still others as meaning entirely distinct but interchangeable. Less obvious, but of greater significance, is what the objective of a universal standard for valuation implies about what the uniform meaning for likeness should be. In this context, recall the overlap between Article VII(2)(a) and (b)'s goal of a benchmark standard for valuation, and the notion of getting products to carry their home market price. Since the reason for the latter goal is tied to the notion of allowing trading states to capitalize on their own indigenous efficiencies, it would seem strange to construe like to mean only items that are exactly the same in every respect. A state exporting goods to an importing state that calculates value on the basis of the invoice price for like (meaning identical) merchandise could thereby advantage itself over other states exporting to the same state. Simply by changing one or two characteristics, so as to

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general invoice price information regarding like imported merchandise. See GATT, *supra* note 5, art. VII, ¶ 2, notes 1-4.

54. See *supra* note 46 for the text of Article VII(3).

distinguish the exported item from those otherwise supplied by itself or third states, a state may be able to secure a reduced duty that will enable its goods to compete favorably with other items.<sup>55</sup> This problem would be minimized if like were construed to mean goods very closely similar, though not entirely identical, to the imported goods of concern. In that situation, changes in some of the characteristics of an exported item, to distinguish the items supplied by one state from those supplied by others, would not put the state of importation fixing value in a position to use a figure that results in a lower duty, thereby conceivably allowing a particular supplying state to be advantaged through artifice rather than through industriousness.<sup>56</sup> Perhaps all the importing state needs to do is calculate value according to the invoice price of closely similar goods supplied by the same exporter. That would bring the duty imposed more in line with what is suggested by the extant level of efficiencies.

Article VI(7) is geared to the notion of exported products carrying their home market price and would seem to support a reading of like which is flexible enough to include products very closely similar to each other. This stems from the fact that Article VI is designed to regulate practices resulting in unfair price advantages, and paragraph 1 of Article VI strikes at these practices whenever they involve goods that very closely approximate each other.<sup>57</sup> Thus, if Article VI(7) endeavors to accomplish its objective by blessing only those domestic price stabilization plans that periodically result in export prices above

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55. This could happen because the duty imposed on the imported item might be based on a value calculated through use of the invoice price on sales by the same exporter to an importer in a third state. In the event the invoice price for such sales of the same product are used to calculate the amount of duty owed, it is quite possible the invoice price, and thus the duty owed, would be lower than the corresponding amounts relative to the competing exporting states. On the permissibility of using third state prices for calculating value, see GATT Article VII(2)(b)'s reference to "at a time and place determined by the legislation of the country of importation." GATT, *supra* note 5, art. VII(2)(b) (emphasis added).

56. To construe "like" as meaning "identical" could result in such an advantage if supplying state A competes with state B in its shipments to and sales in state C of an item here called W. Were A to begin shipping  $W^1$ , as well as W to state C, and also ship  $W^1$  as well as W to a third state, sales of  $W^1$  to a particular importer in C would be valued according to sales of  $W^1$  to importers in the third state or sales of  $W^1$  to other importers in C itself. To the extent that the invoice price for such sales is below that for W, state A may be advantaged over state B, since B ships what is a different item at a higher invoice price. Moreover, C will not value A's shipment of  $W^1$  at the invoice price for A's shipment of W because, again,  $W^1$  is not "like" (identical) to W. Beyond the import duty ramifications of construing like narrowly, the implications for dumping and antidumping are obvious.

57. See *supra* text accompanying notes 22-26.

what is charged on the supplying state's market for the like commodity and are operated to avoid unduly stimulating exports, then all other plans must fall within the basic test of Article VI(1). Because Article VI(1)'s test conceptualizes like as meaning both identical and closely similar, Article VI(7)'s use of like should be read in the same manner. It would be inappropriate to go further and read it to also include goods that are interchangeable.<sup>58</sup> That would put a state with a price stabilization plan on a single item sold in both the domestic market and abroad for exactly the same price in the position of being charged with an unfair trading practice if it sold a nonqualifying, entirely different (though interchangeable) item abroad at any lower price. Not only would this be incongruous with the objective of having all products carry their home market price, for the lower price of the interchangeable item may be the same as the price of that item in the supplying state. It would also be contrary to the language of Article VI(7). In speaking of a price stabilization plan for "a primary commodity . . . which results . . . in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity" (emphasis added)<sup>59</sup> in the home market, Article VI(7) does not envision a price comparison between an exported stabilization item and a nonqualifying item that can be used in its place.

### C. *Directly Competitive or Substitutable*

If one were to categorize the provisions of the General Agreement falling under this heading from the standpoint of the two focuses mentioned at the outset of this section,<sup>60</sup> all would fall into the grouping that centers on the domestic products. Furthermore, all would call for a comparison of imported-to-domestic goods; that is, they all look at whether the imported item can be considered directly competitive with or substitutable for some particular product produced in the state of importation.<sup>61</sup> The articles of concern, of course, are Articles XIX(1)(a) and (b), III(2), and XI(2)(c)(i) and (ii). It may be recalled that Articles III(2) and XI(2)(c)(i) and (ii) have already been discussed.<sup>62</sup> Presently, however, attention will not be devoted to

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58. It should be recalled that Articles I(1), XIII(1), and IX(1) are able to support a reading of like that covers interchangeable items. See *supra* text accompanying notes 13-18.

59. See *supra* note 32 for the full text of Article VI(7).

60. See *supra* text accompanying notes 5-6.

61. See *supra* notes 6-10 for a discussion of the categories of comparison.

62. See *supra* text accompanying notes 27-32.



the previously seen first sentence of Article III(2), but rather to the Note in the Addendum to the second sentence of Article III(2). Article XI(2)(c)(i) and (ii) will be considered from the vantage of the language in the concluding clause of its provisions, not from that of the opening language's reference to like products, seen earlier. Clearly then, what is now examined is sufficiently distinct from the previous analysis of Articles III(2) and XI(2)(c)(i) and (ii) to hold forth the possibility of adding a further gloss to our understanding of the concept of likeness.

First, Article XIX(1)(a) and (b) will be considered. The prescription contained in this provision of the GATT entitles a state of importation to take what has been characterized as escape or safeguard action,<sup>63</sup> action which would otherwise be inconsistent with GATT obligations regarding things like quantitative limitations<sup>64</sup> or tariff rates in excess of those bound under negotiated agreement.<sup>65</sup> To avail itself of such opportunities, the importing state must make findings on several matters, the most important for current purposes being injury to domestic producers of like or "directly competitive" items.<sup>66</sup> The idea is to allow states to raise barriers whenever unanticipated increases in imports accompanied by serious disruptive consequences to competitive domestic producers occur.<sup>67</sup> Though not specifically spelled out, many subscribe to the notion

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63. See JOHN H. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 616 (1977).

64. See GATT, *supra* note 5, art. XI(1).

65. See *id.* art. II(1).

66. Article XIX(1)(a) states:

If, as a result of unforeseen developments and of the effect of the obligations by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

*Id.* art. XIX(1)(a).

67. Compare Marco C. Bronckers, *The Non-Discriminatory Application of Article XIX GATT: Tradition or Fiction?*, *LEGAL ISSUES EUR. INTEGRATION*, 1981/2, at 35, 39-41 with Mark Koulen, *The Non-Discriminatory Interpretation of GATT Article XIX(1): A Reply*, *LEGAL ISSUES EUR. INTEGRATION*, 1983/2, at 87, 89-111 (on whether the barriers are to be against all states supplying the product of concern, or only those supplying the increased quantities).

that these barriers are to be imposed only as temporary, stop-gap measures.<sup>68</sup>

Article XIX(1)(a) and (b) is principally designed as an exemption from the General Agreement on Tariffs and Trade. As there are a variety of ways by which parties to any international agreement might be exempted by the terms of the agreement from its obligations, the method reflected in the language of Article XIX suggests that the article's principal task is in line with many of the other GATT provisions already reviewed. Specifically, Article XIX speaks of an importing state that raises barriers to protect against injury from increased imports being subject to retaliation by affected supplying states through the suspension of equivalent concessions and obligations.<sup>69</sup> This language indicates that the signatories of the General Agreement are not in a position to escape their GATT obligations with impunity. While one might appropriately act to protect endangered industries from imports, one must expect that the overall standing of the trading relationship is not to be upset. To the extent that the efficiencies in a state of supply give it a product that consumers in a state of importation find more attractive than what is produced domestically, action taken to protect the domestic producers against those efficiencies are to be offset by retaliatory measures aimed at restoring the status quo ante. This emphasis on promoting the natural productive efficiencies of trading partners

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68. The language of XIX(1) itself speaks of "for such time as may be necessary to prevent or remedy such injury." See *supra* note 66 for the text of Article XIX(1). Since injury can be prevented or remedied either by continuing the barriers in place forever, or using the barriers to obtain breathing room for improving the economic situation of the affected industries, it would appear that the temporary nature of escape action is not unequivocally dictated. *But see* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, POLICY PERSPECTIVES FOR INTERNATIONAL TRADE AND ECONOMIC RELATIONS (REY REPORT), reprinted in JOHN H. JACKSON & WILLIAM DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, at 644-45 (2d ed., 1986).

69. Article XIX(3)(a) provides:

If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1(b) of this Article, to trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

is further buttressed by the aforementioned notion of escape action being merely temporary in nature. Presumably then, at some juncture the scales of business dealings extant between rival commercial states are to be allowed to function unfettered. Though Article XIX does not demand the kind of capricious adherence to natural efficiencies that results in the immediate elimination of industries that are irrationally organized, it certainly looks towards either greater rationalization or towards transferences of economic potential to more competitive enterprises.

Article III(2), second sentence, and Article XI(2)(c)(i) and (ii), final clause, have objectives that are not overtly economic in character. In this sense they are quite like Article XIX(1), the principal objective of which is to provide for an exemption from the obligations of GATT, but in a fashion that promotes productive advantages displayed by states possessing them. The second sentence of Article III(2) deals with states applying, though equally to imports as well as like domestic products, internal taxes or charges that afford protection to domestic production. The GATT's Addendum to Article III(2) indicates that in the event of such equal application, the second sentence would be violated only if no similar tax were also imposed on "directly competitive or substitutable" domestic products.<sup>70</sup> Article XI(2)(c)(i) and (ii), final clause, envisages the use of quantitative restrictions on imports of agricultural or fisheries products. This language can be used when necessary for the enforcement of governmental measures limiting the marketing or production amounts, or removing temporary surpluses, of domestic products for which imported products can be "directly substituted." Article III(2) thus deals with equal national treatment for like products that results in consumers moving away from imports and towards unlike yet competitive or substitutable domestic products. Article XI(2)(c) deals with situations in which the GATT's general prohibition on quotas can be avoided, especially to protect against imports eroding domestic limits placed on products for which the imports can be substituted. Directed at these objectives, both provisions continue the theme apparent in Article

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70. See *id.* addendum to art. III, ¶ 2, stating:

A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

XIX(1)(a) and (b) of favoring the trade equilibrium produced by allowing natural efficiencies full play in the international arena. The Addendum to the second sentence of Article III(2) accomplishes this by addressing the situation of importing states treating what may be inferior and less attractive like domestic products in the same way imports are treated; with the effect being that consumers are driven to the competitive or substitutable domestic products that are accorded different treatment. Article XI(2)(c) does this by allowing importing states to use quotas against like, as well as substitutable, foreign agricultural or fisheries items, when coupled with efforts to alter the normal trade conditions by reducing domestic supplies, thereby upwardly affecting prices and drawing imports like a magnet.

Shifting focus from the objectives of Articles XIX(1)(a) and (b), III(2) (second sentence), and XI(2)(c)(i) and (ii) (final clause), and moving from their theme of supporting the natural economic efficiencies, inquiry might be made about possible changes in conceiving of the idea of likeness. Of the provisions examined so far, Articles II(2), III(2) (first sentence), III(4), VI(1), VI(4), VI(7), VII(2)(a) and (b), and XI(2)(c)(i) and (ii) (first clause) all favor a conception that includes goods which are identical with, or very closely similar to, those to which comparisons are made.<sup>71</sup> Articles I(1), IX(1), XIII(1), and XVI(4) have the potential to encompass even goods that can take the place of, or can be seen as interchangeable with, other goods.<sup>72</sup> By referencing like and then referring to competitive and substitutable, Articles XIX(1), III(2) (second sentence), and XI(2)(c)(i) and (ii) (final clause) plainly cover goods that may be distinct in almost every way from the ones to which they are compared. The proviso is that these goods must compete with, or be able to substitute for, the other goods. However, to say that these goods must compete with, or be able to substitute for, the other goods suggests a parallelism between Articles XIX(1), III(2), and XI(2)(c) on the one hand, and Articles I(1), IX(1), XIII(1), and XVI(4) on the other. Both sets of articles deal with items capable of replacing others. However, the references to competitive and substitutable appear in provisions also referencing like, while Articles I(1), IX(1), XIII(1), and XVI(4) reference like without referencing competitive or substitutable. It therefore would appear that the concept of likeness either is not designed to encompass goods that can take the place of, or can be seen as interchangeable with, others; or it is meant to view the notion of replaceability in a more sophisticated fashion.

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71. See *supra* text accompanying notes 18-24, 25-59.

72. See *supra* text accompanying notes 14-18, 24-25.

On the basis of textual analysis alone, it is extremely difficult to tell which of these two possibilities is most viable. Either one, though, would further inform our understanding of the meaning of the term like. To conclude that competitive and substitutable, when used in conjunction with like, eliminate the chances of like by itself being read to encompass interchangeable results in Articles I(1), IX(1), XIII(1), and XVI(4), covering nothing more than identical and very nearly identical goods, would completely reject parallelism. On the other hand, one could conclude that competitive and substitutable elevate the level of sophistication regarding distinctions between related goods, which results in the concepts of interchangeable or replaceable, implicated by Articles I(1), IX(1), XIII(1), and XVI(4), being distinct from competitive or substitutable. A certain degree of parallelism is then preserved, but it is purely asymmetrical. To the extent like is able to support a reading encompassing goods that can take the place of others, it is restricted to replacement goods that are by their very nature the same as those replaced. Competitive or substitutable goods, however, are without restriction beyond the requirement that the goods must be capable of replacing others.<sup>73</sup>

#### D. In Any Form

The language prefacing Article XI(2)(c)(i) and (ii)'s reference to "directly substituted" states: Article XI(1)'s prohibition on quantitative limitations does not extend to "[i]mport restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures"<sup>74</sup> that affect the quantities of domestic products. The Note in the Addendum to paragraph 2(c) of Article XI indicates that "in any form" is designed to cover the same product as the one under import limitation, whenever it is in "an early stage of processing" and still perishable, provided that if it were freely imported it

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73. Were this second, or latter, possible reading to be selected, the GATT like-product common language provisions would fall into three categories: first, "like" meaning identical or very nearly so; see GATT, *supra* note 5, arts. II(2), III(2) [first sentence], III(4), VI(1), VI(4), VI(7), VII(2)(a)-(b), and XI(2)(c)(i)-(ii) [first clause]; second, "like" meaning interchangeable goods that are by nature the same; see *id.* arts. I(1), IX(1), XIII(1), and XVI(4)); or, finally, "competitive" or "substitutable" meaning interchangeable goods that are by nature different; see *id.* arts. XIX(1), III(2) [second sentence explained by the Addendum], and XI(2)(c)(i)-(ii) [final clause]. Meat provides a concrete example of the three categories in action. Top sirloin from cattle fed only organically grown grains is very nearly similar to that from those fed growth hormones; poultry is interchangeable with beef, and both are meats; tofu (soybean curd) can be used as a meat replacement, but is of an entirely different nature from either beef or poultry.

74. See *id.* art. XI(2)(c).

would compete with the fresh product and "tend to make the restriction on the fresh ineffective."<sup>75</sup> The consequence is to allow importing states, which have acted to affect the quantities of domestic agricultural and fisheries products, to limit imports of foreign products that are like or can be substituted for the domestic. This includes foreign products that have undergone some processing and are therefore at a different stage in the nature-to-pantry chain than any of the fresh products restricted.

Without devoting undue attention to the in any form phrase, it seems reasonably clear that it confirms the objective, goal, or theme apparent in the other provisions of the General Agreement surveyed here, to give natural productive efficiencies free reign. This phrase provides for action that responds to measures disrupting the equilibrium resulting from that freedom. Specifically, government regulations affecting downwardly the quantities of domestic agricultural or fisheries goods can be buttressed by import limits on even processed foreign agricultural or fisheries goods that could prove competitive therewith. If this responsive action were not permitted, the equilibrium resulting from the regulations borne out of productive efficiencies would be thrown out of kilter. Domestic prices of the regulated goods would spiral upwards, thereby attracting imports; and processed imports would be used to circumvent import limits on unprocessed fresh items.

Article XI(2)(c)'s use of in any form also seems to confirm the accuracy of reading paragraph 2(c)(i) and (ii)'s reference to directly substituted in a broad fashion. It goes without saying that the use of this reference simultaneously with the reference to likeness implies that substitutable means something vastly more inclusive than identical or very closely similar. When the phrase in any form is coupled with this, the plain and simple meaning would seem to snare as many kinds of goods that could undermine the basic exception of Article XI(2)(c) as possible. Substitutable could not possibly be read to require identity or a high degree of similarity when it is prefaced with a reference as encompassing as in any form. It cannot be emphasized strongly enough that this reference applies to agricultural and fisheries products alone, and even then in only very confined circumstances. This leaves little doubt about the fact that other

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75. See *id.* addendum, Note to ¶ 2(c), Article XI, which provides: "The term 'in any form' in this paragraph covers the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective."

kinds of items are left unaffected, and farm and fishery products receive privileged treatment under the GATT.

### III. NEGOTIATING HISTORY OF COMMON LANGUAGE PROVISIONS

Before beginning an examination of the General Agreement's negotiating history to see whether the record of development of the provisions containing the term like, or associated configurations, illuminate the meaning of that word and suggest a unifying theme or theory, it might be good to briefly review what the foregoing textual analysis has indicated. First, the likeness provisions fall into three categories: those dealing with products that are like; those addressing commodities or merchandise that are like; and those using a formulation that suggests a concept of like well beyond the idea of sameness. Second, the provisions using the concept of likeness focus on either the imported item's likeness with another product—most often produced in a third state of supply—or a domestic item's likeness with the imported item. Third, the textual analysis suggests Articles II(2), III(2) (first sentence), III(4), VI(1), VI(4), VI(7), VII(2)(a) and (b), and XI(2)(c)(i) and (ii) (first clause) use like to connote identity or very close similarity. Articles I(1), IX(1), XIII(1), and XVI(4) might extend beyond that to interchangeable items. Articles III(2) (second sentence), XI(2)(c)(i) and (ii) (last clause), and XIX(1)(a) and (b), however, appear to extend beyond identity or close similarity to encompass entirely distinct yet interchangeable goods. Allowing natural productive efficiencies to fully evidence themselves appears to be the basic theme of these various GATT provisions. The notion of in any form, expressed in the opening language of paragraph 2(c) of Article XI, corroborates many of these conclusions.

One other point should be made, concerning the exact dimensions of the GATT's negotiating history. In essence that history is reflected in the products of four international conferences.<sup>76</sup> The first three were to lay the groundwork for the

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76. These four conferences were initiated largely as a result of an invitation from the United States to commence negotiations on a multilateral trade agreement, see U.S. State Dep't, Press Release, Dec. 16, 1945, *reprinted in* 13 DEP'T STATE BULL. 970 (1945); and a United Nations Economic and Social Council resolution, passed during the Council's first session at the request of the United States, calling for the convening of a United Nations Conference on Trade and Employment, with the objective of drafting a Charter for an International Trade Organization, see *Resolution on the Calling of an International Conference on Trade and Employment*, U.N. ESCOR, U.N. Doc. E/22/Rev.1 (1946). To a certain extent, the movement towards a multilateral effort in the trade area was contributed to by

last in the series. The opening conference, known officially as the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment but often referred to as the London Conference, was held in London in 1946. At this conference, delegates worked on redrafting the charter for an International Trade Organization (ITO) that was submitted to the Conference by the United States. The second conference involved deliberations by the Drafting Committee of the Preparatory Committee, and has been referred to as the New York Conference. The deliberations occurred in Lake Success, New York in the Winter of 1947 and resulted in several provisions of the London Conference's draft ITO Charter<sup>77</sup> being elaborated into an early version of the GATT.<sup>78</sup> The last of the ground laying conferences, which has occasionally been referenced as the Geneva Conference, but was formally titled the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, was held in Geneva between April and October 1947.<sup>79</sup> Work was completed at the Geneva Convention on the draft ITO Charter by one group of delegates, while another finalized multilateral trade and tariff negotiations, including the GATT, with the latter's provisions drawn from the draft Charter itself.<sup>80</sup> The fourth and last of the conferences fleshing out the

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the 1944 Bretton Woods Conference recommendation that governments strengthen the International Monetary Fund and International Bank for Reconstruction and Development objectives by reducing "obstacles to international trade." See United Nations Monetary and Financial Conference (Bretton Woods, N.H.), July 1-22, 1944, PROCEEDINGS AND DOCUMENTS 941 (U.S. Dep't of State Pub. No. 2866, 1948).

77. *Report of the First Session of the Preparatory Committee, U.N. Conference on Trade and Employment*, 1st Sess., U.N. Doc. E/PC/T/33 (1946) [hereinafter *London Report*].

78. *Report of the Drafting Committee of the Preparatory Committee, U.N. Conference on Trade and Employment*, U.N. Doc. E/PC/T/34/Rev. 1, U.N. Sales No. 1947.11.3 (1947) [hereinafter *New York Report*]; U.N. Doc. E/PC/T/C.6/W.58 (1947) (first full draft, GATT). (NOTE: Due to the difficulty in accessing these materials, early United Nations documents hereinafter are cited only by document number.)

79. *Report of the Second Session of the Preparatory Committee, U.N. Conference on Trade and Employment*, 2nd Sess., U.N. Doc. E/PC/T/186, U.N. Sales No. 1947.11.4 [hereinafter *Geneva Report*].

80. The tariff and trade negotiations at Geneva were conducted by the Tariff Agreement Committee. The Committee concerned itself with negotiating tariff concessions and drafting of the GATT. With regard to the latter, the Committee simply concerned itself with which ITO Charter provisions on general commercial policy should be included in the GATT. It was not thought appropriate to redraft the provisions of interest. See U.N. Doc. E/PC/T/TAC/SR-1-28 (1947) and U.N. Doc. E/PC/T/TAC/PV.7 at 3 (1947). This duplication of provisions on general commercial policy occurred largely because the delegates from the United States felt as though they had been authorized by Congress to enter into a multilateral



GATT's negotiating history is the so-called Havana Conference, the United Nations Conference on Trade and Employment, the conference that the earlier three looked toward. Running from November 1947 to the end of March 1948, the Conference reviewed and reworked the draft ITO Charter submitted by the Geneva Conference delegates.<sup>81</sup> Though GATT had been completed during the Geneva Conference, because its provisions were drawn from the draft ITO Charter, much of what was said at Havana is relevant to understanding the various provisions of the General Agreement. The following relies on materials appearing in the records of each of these conferences.

#### A. *Likeness Read Restrictively*

The narrow, restrictive sense in which GATT Articles II(2), III(2) (first sentence), III(4), VI(1), VI(4), VI(7), VII(2)(a) and (b) and XI(2)(c)(i) and (ii) (first clause) employ the term like imparts a meaning of identity or very close similarity. The negotiating background of some of these provisions lends support to this textual reading. For instance, at the Havana Conference, Mr. Morton, the delegate from Australia, suggested that like products as used in the antidumping and countervailing duties standard of GATT Article VI refers to products that are exactly the same.<sup>82</sup> The basic idea underlying Article VI was to allow actions to negate unfair pricing advantages upsetting the normal competitive relationship obtaining between businesses in a state of import and those in a state of supply.<sup>83</sup> Therefore, a narrow reading of

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trade agreement but not a multilateral trade organization. See *Hearings on Operation of the Trade Agreements Act in Proposed ITO Before the House Ways and Means Comm.*, 80th Cong., 1st Sess. 19-95, 235 (1947) (concerning limited authority).

81. *United Nations Conference on Trade and Employment, Final Act and Related Documents*, U.N. Doc. E/Conf. 2/78 (1948); U.N. Doc. ICITO/1/4 (1948).

82. Mr. Morton was responding to an inquiry from Mr. Corea, of Ceylon, during the thirtieth meeting of Committee III, the body charged with consideration of provisions on general international commercial policy. See *Third Committee Commercial Policy, Summary Record of the Thirtieth Meeting, U.N. Conference on Trade and Employment*, 3d Comm., 30th mtg., U.N. Doc. E/Conf. 2/C.3/SR. 30 at 5 (1948).

83. What eventually became Article VI of GATT was originally found in Article 11 of the United States 1946 Suggested Charter for the ITO. See U.S. Suggested Charter for an International Trade Organization of the United Nations, Dep't of State Pub. No. 2598 (1946) [hereinafter U.S. Suggested Charter]. With regard to that proposal, a predecessor document containing an admonition for an Article 11 type standard, U.S. Proposals for Expansion of World Trade and Employment, Dep't of State Pub. No. 2411, ch. III(A)(3), at 9-12 (1945) [hereinafter U.S. Proposals], provided that its aims were to be effectuated by states avoiding actions "incompatible with . . . undertakings designed to promote an expanding volume of

likeness makes it easier to accomplish this objective. Reading like to encompass distinctly dissimilar items, on the other hand, results in protection disruptive to normally prevailing level of competition.

This restrictive, narrow reading of Article VI's reference to like is further supported by earlier negotiating records. The United States furnished the basic negotiating text for the ITO Charter employed during the 1946 London Conference. Article II, paragraph 1 of that draft addressed the concerns now dealt with by GATT Article VI. The language of Article II as examined by the Technical Subcommittee of Committee II at the London Conference referenced not only like but also similar products.<sup>84</sup> Presumably because of an awareness of the potential for disruptive protective action by importing nations, Australia proposed that the Subcommittee delete any reference to similar from what eventually became Article VI of the General Agreement.<sup>85</sup> The absence of any such reference in GATT Article VI thus leaves no doubt that like does not include goods that are only similar to others.

The negotiating history of GATT Article XI(2)(c)(i) and (ii) (first clause) suggests a record closely parallel to that of Article VI. At the twelfth meeting of Committee II during the 1946 London Conference, the delegate from Chile, Mr. Videla, commented on the meaning of like that appeared in an early version of the article.<sup>86</sup> Reading from a report prepared by Mr. Hawkins, the

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. . . trade . . . in accordance with comparative efficiencies of production." Moreover, at the first of the three preparatory meetings leading up to the Havana Conference, it appeared the delegates were concerned with the disruption of normal competition brought about by several dumping practices. These included price, freight or service, exchange rate, or forced labor practices that resulted in commercial advantages for benefited products. See *First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, U.N. Doc. E/PC/T/C.II/48 at 1 (1946) [hereinafter *London Conference*]; U.N. Doc. E/PC/T/C.II/54 at 11 (1946). Ultimately, only price dumping was singled out as being subject to responsive action. See *New York Report*, *supra* note 78, at 13 (product of the second of the preparatory meetings); *Report of Conference, United Nations Conference on Trade and Employment*, U.N. Doc. E/Conf. 2/C.III/SR.30 at 6 (1948) [hereinafter *Report of Conference*], and U.N. Doc. ICITO/1/8 at 74 (1948) (work of the Havana Conference itself). The thrust of the responsive action remained nonetheless clear.

84. See *London Conference*, *supra* note 83; *Draft Report of the Technical Subcommittee of Committee II* (Nov. 16, 1946), U.N. Doc. E/PC/T/C.II/54 at 12 (1946).

85. *Draft Report of the Technical Subcommittee of Committee II*, *supra* note 84, at 13 (1946).

86. The language commented on was that of the United States Suggested ITO Charter version of what became GATT Article XI(2)(c)(i)-(ii). Its thrust and terminology was largely identical to the GATT provision. See U.S. Suggested Charter, *supra* note 83, at 13.

United States delegate, Mr. Videla noted that the concept "definitely does not mean what [it] mean[s] in other contexts—merely a competing product."<sup>87</sup> He continued that if a nation restricted production of domestic apples, it could not also place importation limits on foreign bananas because they compete with apples.<sup>88</sup> Mr. Hawkins suggested exactly the same kind of approach to the concept of likeness in what eventually became Article XI of the General Agreement at the fifth meeting of Committee II.<sup>89</sup>

In Article XI(2)(c)(i) and (ii) (first clause) like does not simply mean one item that can be interchanged with another. It appears to mean that items are alike when they are identical or very closely similar. This is the thrust of the comments by both Mr. Videla and Mr. Hawkins at the London Conference. In line with this narrow conception is Article XI(2)(c)'s basic objective, to provide a mechanism for stabilizing fortuitous fluctuations in the supply of agricultural and fisheries products without creating a device useable for ordinary protective purposes.<sup>90</sup> Taken together, the interpretive conception of like and the objective of the inclusive article confirm the conclusion from textual analysis that GATT favors allowing natural productive efficiencies free reign. Products that are not affected by some unusual fluctuation in supply cannot claim protection under Article XI(2)(c). Even when such fluctuations occur and are addressed by appropriate governmental measures, they cannot provide a pretext for using Article XI(2)(c) to limit imports of other kinds of

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87. See *London Conference*, *supra* note 83; see also U.N. Doc. E/PC/T/C.II/PV.12 at 6 (1946); U.N. Doc. E/PC/T/C.II/36 at 8 (comment to same effect made by Mr. Hawkins, United States, at the 5th meeting of Committee II).

88. See U.N. Doc. E/PC/T/C.II/PV.12, *supra* note 87, at 6.

89. The United States delegate was responding to an inquiry from Mr. Speekenbrink, of the Netherlands, regarding whether like meant "products used for the same purpose." See U.N. Doc. E/PC/T/C.II/PV.2 at 20 (Speekenbrink's inquiry); U.N. Doc. E/PC/T/C.II/PV.5 at 27 (Hawkins' response).

90. See *Report of Conference*, *supra* note 83; U.N. Doc. ICITO/1/8 at 91-92 (1948) (noting the basis for invoking XI(2)(c) related to supply rather than price fluctuations); see also *The Geneva Charter for an International Trade Organization*, Dep't of State Pub. No. 2950 at 6 (1947). With respect to Article XI(2)(c)'s agricultural and fisheries exceptions, it is there stated:

First, imports may not be restricted unless the domestic product is also restricted. This rule is necessary to prevent the use of quotas for ordinary protective purposes. Secondly, the domestic product must be restricted to approximately the same degree as the imported product. This requirement, which is related to the first, is necessary to prevent countries from applying their restrictions in such a way as to boost domestic output by cutting down on imports.

foreign products just because natural economic efficiencies make them attractive.

The negotiating record of Article III is also instructive. Recall that neither Article III(2) (first sentence) nor III(4) mention anything other than that imports must receive the same internal treatment within an importing GATT state as accorded to like products produced in the state of importation. Yet curiously enough, a subcommittee redraft of the United States originally proposed ITO Charter, considered by the delegates at the London Conference in 1946, referenced "identical or similar products" in conjunction with the national treatment obligation.<sup>91</sup> Not only would the fact Article III, as it eventually emerged, failed to reference similar products indicate a restrictive meaning of like, but the very scope of likeness would seem informed by the subcommittee's use of the term "identical." Evidence from the Geneva Conference of 1947 further supports this restrictive reading. In the debates regarding Article III, both the United States delegate, Mr. Winthrop Brown, and the British delegate, Mr. Shackle, clearly indicated that an importing state was not free to levy internal charges on an imported item when the same kind of item was not produced by the importing state.<sup>92</sup> The obvious reason for insisting that imports not be subjected to internal burdens in such situations is to avoid disadvantaging imports vis-à-vis domestic goods.<sup>93</sup> In this respect, the overlap

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91. See *Draft Report of the Technical Subcomm. of Committee II* (Nov. 16, 1946), U.N. Doc. E/PC/T/C.II/54 at 4-5 (1946) (U.S. Suggested Charter, Articles 9(1)-(2), as redrafted by the Subcommittee).

92. See U.N. Doc. E/PC/T/TAC/PV.10 at 37 (Mr. Winthrop Brown), 40 (Mr. Shackle) (1947).

93. See *id.* (Brown objecting to internal taxes on imports when the effect is to protect a similar domestic product that is untaxed; Shackle arguing that a state importing natural products should not be able to tax such so as to allow untaxed domestic synthetics an economic advantage); see also U.N. Doc. E/PC/T/TAC/PV.10 at 14-15 (1947) (comments of Chinese delegate, Mr. Wunsz King).

It should be noted that the negotiating record referenced above is interpreted as saying that if a domestic item exactly the same as (or very closely similar to) a taxed imported item is not also being taxed, then the state of importation is violating III(2), first sentence. Thus, the record is viewed as reading like restrictively. Admittedly, however, it could also be read as viewing like more flexibly. That is, the comments by the delegates from the United States and United Kingdom suggest importing states are not permitted to impose internal taxes on imports (when those states do not even produce items the same as what is imported) in order to favor domestic production of similar, competitive, or substitutable items. Therefore, Article III's reference to like must be understood in a broad sense. See discussion of III(2), second sentence, *infra* part III.C. A part of the record of the 1948 Havana Conference, however, seems to undercut this position. See *Reports of Committees and Principal Subcommittees, UN Conference on Trade and Employment*, U.N. Doc. ICITO/I/8 at 64 (1948) (rejecting an

with some of the other like product provisions is quite pronounced.

### B. Likeness Read With Some Flexibility

As suggested earlier, Article I(1)'s MFN reference to like might be construed as encompassing items that are interchangeable with, or able to take the place of, other items. This provision's negotiating history supports reading likeness flexibly in the context of that Article. This would distinguish it from the provisions surveyed in the preceding subsection, all of which appear capable of supporting nothing more than a narrow reading. Nonetheless, it does not appear that Article I(1)'s history suggests like may be read as covering items that share the feature of interchangeability. Such an understanding of likeness would allow even totally distinct or different items to be considered like, as long as they could be used in place of the other items.

There are two pieces of evidence in the record of Article I(1)'s formulation that support the foregoing assessment. At the twelfth meeting of Committee II during the 1946 London Conference, the delegate from France, Mr. Nathan, inquired whether the reference to MFN for like products (in what ultimately became Article I(1)) applied when one state was involved with shipments of wheat cereal and another with shipments of different cereals. Were "all cereals . . . considered 'like products' or only wheat?" In response, the Rapporteur, Mr. Leddy, from the United States, indicated that only wheat cereals would be viewed as like products.<sup>94</sup> Clearly, by excluding not only nonwheat cereals but, more importantly, noncereals capable of being used instead of wheat cereals, the conception of like voiced at the Conference did not extend to products merely interchangeable with others. Conversely, as the response was not confined to cover only wheat cereals identical or strikingly similar to those of the other state, it would appear like was envisioned as applying to nonidentical, dissimilar wheat cereals that are able to replace other wheat cereals. Indeed, reaching any other conclusion would be difficult, given the fact that the delegates to the very same Committee at the very same Conference understood likeness, in the context of what became

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importing state's right, under article 18 of the ITO Charter, the analogue of GATT article III, to impose regulations or taxes on imports of an item (i.e., oleomargarine) unless there is "substantial domestic production" of the same item (i.e., oleomargarine)).

94. See U.N. Doc. E/PC/T/C.II/65 at 2 (1946).

Article XI(2)(c), to mean identical or very closely similar.<sup>95</sup> With this understanding in mind, it would seem strange that the United States delegate's response to the French delegate's inquiry failed to show adequate sensitivity to the distinctions between very closely similar items and distinct yet interchangeable items.

The second piece of evidence comes from the fifth meeting of Committee III during the Havana Conference. At that session, Mr. Zorlu, the delegate from Turkey, asked about the meaning of likeness in Article I(1). In response, Mr. Wilgress, the Canadian delegate and Chair of the Committee, posed the hypothetical of a state with a tariff schedule distinguishing between automobiles under and over 1500 kilograms. He then observed that, as these items were different, Article I would not treat the vehicles as like.<sup>96</sup> Again, the suggestion is that neither mere interchangeability nor exact or virtual identity are required by Article I(1). Interchangeability is surely excluded by the fact that the delegates spoke of automobiles of a certain weight not being like those weighing less. The latter seemingly would also be excluded because the exchange between Mr. Zorlu and Mr. Wilgress focused on but one difference between automobiles from distinct states. It did not degenerate into nit-picking about other sure differences between autos shipped from different states of export. This indicates an awareness that, as long as the vehicles are interchangeable, perhaps they need not be the same in all respects.

The professed objective of Article I(1) confirms a slightly flexible reading of the term like. It also verifies the idea that this GATT common language provision is based on the theme of effectuating natural productive efficiencies. From the earliest sessions of the London Conference in 1946, it was apparent that any final proposal for an international trade regime would include an MFN obligation. The seminal proposal for an ITO Charter, submitted at that Conference by the United States, included MFN as one of five basic principles.<sup>97</sup> It was clear from at least the time of President Woodrow Wilson's "Fourteen Points" in 1918 that equal treatment between trading states was seen as an essential condition of trade,<sup>98</sup> presumably because it would allow

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95. See *supra* text accompanying notes 86-93.

96. See *Third Committee: Commercial Policy, Summary Record of the Fifth Meeting, U.N. Conference on Trade and Employment*, 3d Comm., 5th mtg., U.N. Doc. E/Conf. 2/C.3/SR.5 at 4 (1947).

97. See U.N. Doc. E/PC/T/PV.2 at 2 (1947); see also U.S. Proposals, *supra* note 83, chapter III(A) at 11 (earliest U.S. proposal).

98. See *Commercial Policy in the Interwar Period: International Proposals and National Policies* League of Nations Doc. II ECONOMIC AND FINANCIAL 1942 II.A.6, at 15 (1942).

each state to take full advantage of its indigenous economic strengths. At the Geneva Conference in 1947 the United States again reiterated its position that MFN was an essential part of any negotiation leading to an agreement establishing normal trade.<sup>99</sup> Throughout the process, few delegations disagreed; most attention concentrated on the scope of MFN, rather than whether MFN itself should be included in the final product.<sup>100</sup>

With regard to the other GATT like product articles, at least those which textually seem to merit a construction flexible enough to include interchangeable items, the negotiating record reveals a dearth of information about the drafters' conception of like. The most that can be said on Articles IX(1) and XIII(1) is that, since these were designed to apply MFN or at least fair and equal treatment to both the problems of marks of origin and quotas, they should be interpreted like Article I(1). On Article XVI(4), the other provision using like in a fashion seeming to merit flexible reading, two points merit notation.

First, it must be recalled that Article XVI(4) did not find its way into the General Agreement on Tariffs and Trade until 1955, when the Contracting Parties amended Article XVI to add Section B; they added not only paragraph 4, but also paragraphs 2, 3, and 5.<sup>101</sup> There was little discussion about that amendment relevant to the term like. Nonetheless, it is clear from the language of paragraph 2 of Article XVI that the principal objective of the drafting parties was to address, in some manner, the disruptive effect of subsidization on "normal commercial" patterns. To this extent, it would then seem most appropriate to view the reference to like in paragraph 4 as encompassing interchangeable items. A more restrictive reading could well frustrate the attainment of the Article's basic goal. Further, Article XVI(2)'s articulation of this goal suggests once again a central theme binding the GATT common language provisions, a theme of allowing natural market efficiencies to function with as few impediments possible. Obviously, had the architects of Article XVI been very serious about effectuating this idea they would have drawn the provision much more tightly. That they subjected subsidization to some restriction, nonetheless evidences a genuine commitment to the theme.

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99. See U.N. Doc. E/PC/T/TAC/PV.2 at 29, 46; U.N. Doc. E/PC/T/TAC/PV.23 at 8 (1947).

100. See generally U.N. Doc. E/PC/T/C.II/3 at 6, 7 (1946); U.N. Doc. E/PC/T/C.II/PV.2 at 10, 12 (1946); U.N. Doc. E/PC/T/TAC/PV.2 at 12, 23 (1947).

101. Protocol Amending The Preamble and Parts II and III of the GATT (1955); *Reports Relating to the Review of the Agreement: Other Barriers to Trade*, GATT L/334 (Mar. 3, 1955), BISD 3d Supp. 222, at 224-27.

The second point about Article XVI(4) worthy of notation concerns an observation proffered during the 1946 London Conference, found in a report of a joint drafting subcommittee of Committees II and IV. Commenting on then Article 25 of the proposed United States Charter for the ITO, the subcommittee indicated it would violate one's undertakings to subsidize exports of a certain product and then argue it was permissible because the practice resulted in an export price lower than the home market price, but on a product "differ[ing] slightly from [the] product sold in the [home] market."<sup>102</sup> The restrictions on export subsidization could not be escaped that easily. Like products, as used in Article 25 of the United States proposal, encompassed more than just identical or very closely similar items. Since Article XVI(4) hinged an obligation on export subsidies and price relationships on the concept of likeness,<sup>103</sup> the somewhat flexible understanding evidenced in the London Conference's negotiating history proves valuable in confirming the interpretations of like suggested above.

### C. *Phraseology of Broadest Meaning*

Article III(2) (second sentence) as well as Articles XI(2)(c)(i) and (ii) (last clause) and XIX(1)(a) and (b) go well beyond the conceptions of likeness just discussed. By using the notions of competitive or substitutable goods, seemingly they could be read to cover items sharing absolutely no similarity with another, as long as the items appeal to the consumers of (or can be used in place of) the other item. The negotiating record of these three provisions supports that conclusion.

For Article III(2) (second sentence) at least two evidentiary items in the history of the provision's language are of distinct relevance. Before discussing these, however, it must be recalled that Article III(2) and its explanatory note were incorporated into GATT by a 1948 amendment<sup>104</sup> designed to revise the original GATT Article III,<sup>105</sup> thereby bringing it more in line with the

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102. See *Report of the Joint Drafting Subcommittee of Committees II and IV on Subsidies on Primary Products*, U.N. Doc. E/PC/T/C.II/61 at 4-5 (1947).

103. Although the United States had proposed limits on export subsidies in its draft ITO Charter, such did not originally make their way into the GATT because of the United States delegation's position that it lacked authority to enter a trade agreement containing limitations of this sort. See U.N. Doc. E/PC/T/C.VI/46 at 2 (1947).

104. See GATT Doc. GATT/CP.2/22/Rev. 1, *report adopted* Sept. 2, 1948; Protocol Modifying Part II and Article XXVI of the GATT.

105. Article III was first adopted at the Geneva Conference in late 1947. See 55 U.N.T.S. 188, 204 (1947). The Geneva version read in relevant part:



corresponding provision of the Havana Conference's ITO Charter.<sup>106</sup> This is significant because Article III(2)'s development suggests that the notions of competitive and substitutable are entirely novel to any possible understanding of likeness seen so far. The reference to competitive and substitutable is made in the Addendum, rather than in the second sentence of Article III(2), where it would exist in clear juxtaposition to the concept of likeness appearing in the first sentence. While this placement might suggest the terms refer to items that share characteristics with, yet can be used in place of, other relevant items, this conclusion seems erroneous. The drafting record associated with the Addendum explanatory to Article III(2) (second sentence) is contrary to any reading of competitive and substitutable that tracks Article I(1)'s, IX(1)'s, XIII(1)'s or XVI(4)'s earlier discussion of like as an item interchangeable with some other.<sup>107</sup> True, before the Havana Conference, the actual language of what became Article III did contrast like and competitive or substitutable.<sup>108</sup> Nothing in the records of the Havana Conference, however, suggests the relocation was designed to narrow the distinction between those two terms and the concept of likeness articulated at the precursor Geneva Conference.<sup>109</sup> That distinction was said to prohibit imposing internal charges imposed on imported goods entirely different from domestically

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[I]n cases in which there is no substantial domestic production of like products of national origin, no contracting party shall apply new or increased internal taxes on the products of the territories of other contracting parties for the purpose of affording protection to the production of directly competitive or substitutable products which are not similarly taxed; and existing internal taxes of this kind shall be subject to negotiation for their reduction or elimination.

55 U.N.T.S. at 264.

106. See U.N. Doc. E/Conf. 3/78, Havana ITO Charter art. 18 (1948).

107. See *supra* part II.B.

108. It read:

In cases in which there is no substantive domestic production of like product of national origin, no contracting party shall apply new or increased taxes on the products of the territories of other contracting parties for the purpose of affording protection to the production of directly competitive or substitutable products which are not similarly taxed. . . .

109. At the Geneva Conference, it was specifically indicated that the provision which eventually became the second sentence of Article III(2), and its explanatory Addendum, were intended to encompass distinctly different kinds of goods. With regard to an importing state that imposes an internal tax on oranges, which it does not produce but has given a tariff binding on, the consequent protection resulting to apples, which the importing state does produce but does not tax, was resoundingly condemned. See U.N. Doc. E/PC/T/A/PV.9 at 7 (1947).

produced goods that were used instead of the imports due to the imports' added cost.<sup>110</sup>

The second piece of evidence on the meaning of competitive and substitutable is much more direct. Specifically, it concerns statements of the delegates involved in the drafting of Article III(2) about the meaning of those very words. For instance, there seemed to be some agreement at the Havana Conference that tung oil (an item occasionally used in finishing furniture) would be considered competitive with or substitutable for linseed oil, and that coal in certain cases would be considered competitive with or substitutable for fuel oil.<sup>111</sup> Given the obvious dissimilarities between these items, in particular the last two, one would seem hard pressed to show that competitive and substitutable have the same meaning as like in its most flexible sense.

Moving to the negotiations on Article XI(2)(c)(i) and (ii) (last clause), there is little information on the idea of substitutable as explicit as that regarding the explanatory Note on Article III(2) (second sentence). Nonetheless, the New York Conference draft of the GATT contained, in what ultimately became Article XI(2)(c)(i) and (ii), no reference beyond like products.<sup>112</sup> The Geneva Conference draft ITO Charter provided the first reference to the broader concept of "substitutable."<sup>113</sup> There is some indication<sup>114</sup> that Article XI's use of likeness is not to be read, as it might in other contexts, as connoting mere competitiveness. Understanding likeness as the equivalent of competitiveness is unwarranted. This is true even under the more flexible usages of

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110. See *supra* note 94, regarding wheat cereals and Article I(1). Like in Article I(1) encompasses wheat cereals of different, non-closely similar sorts, but not nonwheat cereals. The justification for this assessment rested on the fact that a negative response had been given to a query, made during the London Conference in 1946, regarding whether nonwheat cereals would be considered like wheat cereals for the purposes of I(1). If like in Article I(1) encompasses non-identical or nonsimilar wheat cereals, but not those nonwheat in content (or noncereals), then any conception of competitive and substitutable that covers oranges replaced with apples (let alone a citrus fruit replaced with a noncitrus fruit), signifies a usage vastly different from the "flexible" meaning of like.

111. See *Third Committee: Commercial Policy, Summary Record of the Fourtieth Meeting, U.N. Conference on Trade and Employment*, 3d Comm., 40th mtg., U.N. Doc. E/Conf. 2/C.3/SR.40 at 1 (1947).

112. *New York Report, supra* note 78, art. IX(2)(e), at 70.

113. *Geneva Report, supra* note 79, art. 20(2)(c)(i), at 20. In the context of the Conference's draft ITO Charter, Article 25, replicating Article IX of the draft GATT, it had been proposed that the broader notion of "directly competitive" be included. *New York Report, supra* note 78, at 20, cmt. g (commenting on art. 25(2)(e)(1)).

114. This is alluded to above in the discussion of Article XI(2)(c)'s reference to like. See *supra* part II.A.

that term in Articles I(1), IX(1), XIII(1), and XVI(4).<sup>115</sup> However, since in common parlance substitutable is seen as synonymous with likeness, that the architects of Article XI employ both concepts in the same provision suggests substitutable was intended to include all competitive products, even though they share few characteristics.

Some support for this position can be gleaned from the record of the 1947 New York Conference. The draft of GATT to emerge from that round of meetings did not refer in Article XI(2)(c)(i) and (ii) (last clause) to anything other than like products. Despite that fact, discussion did occur at the fifth meeting of the Drafting Committee on January 24, 1947 about inserting the broader concept of directly competitive goods. What precipitated the discussion was a proposal by Mr. Shackle, the United Kingdom's delegate, that the draft of Article XI refer to the permissibility of using import restrictions in cases when there exist domestic marketing or production limitations on products "directly competitive" with the restricted products from abroad. This proposal stimulated Mr. Guerra of Cuba to point out that products "may be competing for the same market and yet may be entirely different in form."<sup>116</sup> Guerra's observation is significant for its recognition that competitive can include products that are entirely different in form. Ultimately GATT Article XI(2)(c) opted for "directly substituted," rather than "directly competitive" as Mr. Shackle had proposed. Nevertheless, the two concepts, though admittedly somewhat different, are very closely related. The early recognition by delegates negotiating GATT that even items vastly dissimilar in form could be brought within the ambit of Article XI by the use of language more expansive than like, is extremely instructive when it comes to divining the concept of substitutable. At the very least, substitutable is not to be seen as a merely redundant synonym of like.

With respect to Article XIX, its basic purpose should point toward the exact same conclusion on the meaning of competitive. Any product that can be interchanged with or used in place of another product is considered competitive, notwithstanding that it is entirely distinct and different. The idea behind the provision is to allow GATT parties to safeguard their economic well-being by escaping the general obligations of the Agreement in certain specific cases. Overall the GATT seeks to promote freer trade than had previously existed; it does not seek totally free trade. This is evident in both the terms of Article XIX (and Part IV on Trade and Development), as well as in the fact that Article XIX

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115. See *supra* part II.A. for discussion of these provisions.

116. See U.N. Doc. E/PC/T/C.VI/17 at 4 (1947).

found its way into the agreement at the behest of the United States, which was clearly concerned about entering any commitment that might prove fatally debilitating to economic health.<sup>117</sup> This background suggests that the term competitive could well allow states to respond to increased imports that injure producers of items vastly different from those from abroad which have captured the attention of purchasers in the state of importation.<sup>118</sup> Absent this understanding of Article XIX, the GATT could indeed result in the undoing of a nation's economic well-being, by compelling importing states to refrain from responding to increased shipments of foreign items that take away the market of local producers of goods not identical or similar to those from abroad.

Article XIX confirms that GATT is not an economic suicide pact. It strives to fashion a liberalization in trade nonexistent during the interwar years, while preserving in limited and restricted cases the right to utilize protectionist devices. The very fact that Article XIX preserves the opportunity for protectionist action drives home the significance of the changes that GATT rules seek to make in the international trading regime. All along it has been observed that the General Agreement like product and associated language provisions look toward allowing natural economic efficiencies to reshape the world commercial environment. Article XIX may not have even been needed had such an ambitious goal not been set. That it found its way into the GATT does not in the least alter the fact that such a lofty goal exists. The terms competitive and substitutable in Articles XIX, XI(2)(c)(i) and (ii) (last clause), and III(2) (second sentence) lend themselves to extremely broad readings. The theme of promoting the growth of trading partners' strengths is made clear. The

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117. See U.S. DEP'T OF STATE, PUB. NO. 2411, PROPOSALS FOR EXPANSION OF WORLD TRADE AND EMPLOYMENT 13, § B3 (Commercial Policy Series 79) (1945) (proposing an Article XIX-like provision); see also *London Report*, supra note 77, annex 11, 52, 59, art. 29; U.N. Doc E/PC/T/C.II/PV.7 at 3 (1946) (statement by United States delegate at London Conference, expressing fear that freer trade might undermine economic health); 91 CONG. REC. 4,870-72 (1945) (remarks of Rep. Doughton); 1945 *Extension of the Reciprocal Trade Agreement Act: Before the Committee on Finance*, 79th Cong., 1st Sess. 1, 84, 86, 90, 179-80, 459-60 (1945) (insisting on an escape provision in any trade agreement).

118. This conclusion seems further supported by the fact that the London draft ITO Charter contained in its emergency provision the words like or similar products. See *London Report*, supra note 77, app., at 33, art. 34 (1946). This parallels the United States Draft Charter, *id.* annex 11, 52, 59, art. 29. The New York Conference included the phrase like or directly competitive in both the draft ITO Charter, *New York Report*, supra note 78, at 29, art. 34(1); and the draft GATT, *id.* at 76, art. XVIII(1). If this shift signifies anything, it certainly signifies that competitive encompasses items that may be entirely dissimilar from the items made by producers who are injured by increased imports.

central and recurring motif of the GATT common language provisions is comparative efficiencies.

#### D. In Any Form

The negotiating record indicates that the reference in Article XI(2)(c) to restricting imports of agricultural or fisheries products "in any form" when the government has adopted measures limiting domestic production or removing temporary surpluses has been in the various versions of the ITO Charter and the GATT from the beginning. This language appears in both Article 25 of the London Conference's ITO Charter<sup>119</sup> and Article 19 of the earlier United States draft Charter, which served as the basis for discussions at the 1946 London Conference.<sup>120</sup> With the adoption of the draft ITO Charter emerging from the Geneva Conference, the interpretative Note now located in the GATT Addendum relative to Article XI(2)(c) made its first appearance.<sup>121</sup> The obvious intent is to prohibit importing states from imposing restrictions on incoming agricultural or fisheries products when these imports are in some advanced stage of processing.<sup>122</sup> In fact, during the 1947 Geneva Conference it was observed that in any form was not seen as extending to products so far along the processing spectrum that they are "tinned" or "capable of being stocked."<sup>123</sup> Nonetheless, by allowing restrictions on products that are still in the early stages of processing, it is clear the phrase corroborates the more generous readings of like and substitutable articulated above. In so doing, it implicitly reaffirms that the theory of the General Agreement on Tariffs and Trade is directed toward favoring inherent productive efficiencies.

Article XI(2)(c)'s overall thrust has been described as empowering importing states to deal with: the "capricious bounty of nature, which will sometimes give you a huge catch of fish or a huge crop;" and the problem of "a multitude of small unorganized producers that cannot organize themselves"<sup>124</sup> and so produce surpluses. It was not aimed at protecting the industrial processing sector. As the Havana Conference records indicate, the Article "should not be construed as permitting the use of quantitative restrictions as a method of protecting the industrial

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119. *London Report*, *supra* note 77, at 29, art. 25(e).

120. *Id.* at 57, art. 19(2)(e). The United States draft, however, only included restrictions on agricultural products. *Id.*

121. See *Geneva Report*, *supra* note 79, at 20, art. 20, interpretative note.

122. See GATT, *supra* note 5, annex I, addendum to art. XI(2)(c).

123. See U.N. Doc. E/PC/T/A/PV/19 (1947).

124. *Id.*

processing of agriculture or fisheries products."<sup>125</sup> While in any form may indeed be susceptible to a broad and generous reading, it seems the drafters' desire to refrain from providing protection to the domestic processing industry confirms the need for the restricted imports to be at one of the first stages of processing. In fact, the Havana Conference's ITO Charter version of the GATT Addendum Note on Article XI(2)(c)'s reference to in any form not only indicated the imports must be in "such processed forms . . . as are . . . closely related to the original product," but that the relationship must be "as regards utilization."<sup>126</sup>

#### IV. GATT PANEL DECISIONS

The first four plus decades of GATT decisional law have seen no less than twenty cases dealing with the concept of like products. That figure represents roughly one-fifth of all the panel decisions reported during that period.<sup>127</sup> Of the seventeen GATT provisions that in one form or another reference the concept of likeness, the cases decided have only addressed six: Articles I, III, VI, XI, XIII, and XVI. In this Part, the opinions connected with those cases will be considered, and some attempt will be made to ascertain whether they emphasize themes consonant with the previously reviewed language and negotiating history of the relevant GATT provisions.

##### A. Article I: Most Favored Nation Treatment

Five principal decisions have been rendered on Article I's obligation that a contracting party accord to products from another party treatment no less favorable than that accorded to like products from any other state. In one of the earliest panel decisions, it was stated that the notion of likeness differed from competitive or substitutable,<sup>128</sup> the implication being that

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125. U.N. Doc. ICITO/I/8 at 93-94, para. 39 (1948), *Reports of Committees and Principal Sub-committees*.

126. See *Final Act and Related Documents, U.N. Conference on Trade and Employment*, U.N. Doc. E/CONF.2/78, annex P, at 63, interpretative note on art. 20, para. 2(c) (1948).

127. Approximately one hundred GATT decisions have been reported during the referenced four-plus decade span (1947-1990).

128. *The Australian Subsidy on Ammonium Sulphate*, GATT Doc. C.P.4/39 (Apr. 3, 1950) (Chile-Austrl.), 2 BISD 188, ¶ 8 [hereinafter *Australian Subsidy*]. In this case, Chile complained that an Australian subsidy scheme designed to stimulate the purchase and use of fertilizer by Australians violated, *inter alia*, Article I by subsidizing sales of domestic and foreign ammonium sulphate but not

likeness in the context of MFN envisions a closer degree of identity than in some other contexts. Subsequent decisions have accepted this proposition.<sup>129</sup> This narrower reading makes eminently good sense in view that both competitive and substitutable are alluded to in other GATT provisions referencing like products.<sup>130</sup>

Another important consideration that has appeared in the MFN like product cases is tariff classification. The idea is that, while the GATT does not impose a particular classification system on the contracting parties, the discretion left to them is limited by the obligation of Article I to treat like products alike.<sup>131</sup> States are free to introduce into their tariff schedules any number of subcategories.<sup>132</sup> It appears, however, that if an imported item falls within the ambit of a particular tariff classification description, its importation cannot be subjected to less favorable terms than those accorded to another state's imports under that tariff category.<sup>133</sup> Additionally, when the product fails to meet the specific terms of a particular tariff description, the limiting effect of Article I nonetheless may result in the product being

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sales of domestic and foreign sodium nitrate, a product Chile considered to be like ammonium sulphate. The panel found these products not to be like. *Id.*

129. *Treatment by Germany of Imports of Sardines*, GATT Doc. G/26 (Oct. 31, 1952) (Nor. v. F.R.G.), BISD 1st Supp. 53, 56, ¶ 8 [hereinafter *Treatment by Germany*].

130. See e.g., GATT, *supra* note 5, arts. III(2), annex I, explanatory addendum to art. XI(2)(c), and art. XIX. For analysis of the textual language of GATT provisions using competitive and substitutable, see *supra* part I.C.

131. *Spain-Treatment of Unroasted Coffee*, GATT Doc. L/5135 (June 11, 1981) (Braz. v. Spain), BISD 28th Supp. 102, 111, ¶ 4.4 [hereinafter *Tariff Treatment*]; *Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, GATT Doc. L/6470 (July 19, 1989) (Can. v. Japan), BISD 36th Supp. 167, 198, ¶¶ 5.8-5.10 [hereinafter *Tariff on Imports*].

132. It should be noted, however, that if the introduction results in a violation of a basic commitment under a concession on a "bound" item, then GATT Article II(5) becomes relevant.

133. *Imports of Beef from Canada*, GATT Doc. L/5099 (Mar. 10, 1981) (Can. v. E.E.C.), BISD 28th Supp. 92, 98, ¶ 4.2(a) [hereinafter *Imports of Beef*]. In this case, Canada alleged that the EEC violated Article I through the imposition of an import levy, over and above a 20% ad valorem tariff, on high quality grain-fed beef from Canada, while permitting the levy free entry of high quality grain fed beef from the United States. *Id.* § 2.2. Under EEC Commission Regulation No. 2972/79, such "levy" free beef was described and said to automatically meet the description provided if graded as choice or prime by the U.S. Department of Agriculture's Food Safety and Quality Service (FSQS). *Id.* § 2.4. This Regulation implemented a concession negotiated between the EC and the United States during the Tokyo Round of the MTN. Beef could be imported levy free only under a Certificate of Authenticity issued by the FSQS. *Id.* § 2.5. The practical effect of requiring certification by a United States agency was that Canadian beef otherwise within the described tariff category was subject to the import "levy." *Id.* §§ 3.5-3.7.

eligible to receive the same favorable treatment granted to products within that description. From the standpoint of tariff classification, the important factors consulted by the panel decisions in such instances include: whether the importing nation accused of contravening Article I classifies the product of concern in another distinct category; and whether other states maintain these distinctions in their own tariff classification systems. The idea of course is that in some instances an importing state may have failed to accord like products like treatment. The fact the importing state itself maintains a distinct classification category is not determinative of whether the product of concern is unlike and different from products within other categories receiving more favorable treatment. Nevertheless, the maintenance of such a highly detailed system of classification has resulted in decisions that find differing treatment to be in conformance with Article I.<sup>134</sup> The exact reverse has also been found when the evidence suggests the product involved has been slotted into another tariff classification under circumstances which appear akin to those that might ring of estoppel.<sup>135</sup> Obviously, though, how states other than the one allegedly contravening MFN classify the imported item would seem just a bit more significant in deciding likeness. Perhaps in recognition of this self-evident truth, several panel decisions have

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134. See *Australian Subsidy*, *supra* note 128, at 191, ¶ 8.

135. See *Treatment by Germany*, *supra* note 129, at 57, ¶ 13. This case involved, *inter alia*, German tariffs on two members of the clupeoid family of fish (i.e., spratts and herrings) that were higher than on the third (i.e., sardines). Since all three fish were of the same family, Norway contended like products were being treated differently. The decision discusses like products, and mentions both the idea of like and competitive/substitutable. Germany historically classified spratts and herrings differently from sardines. However, for other reasons, the panel concluded that Article I had not been violated. The panel stated:

Although the Norwegian complaint rested to a large extent on the concept of "like" products as set out in the Agreement and the German reply addressed itself also to that concept, the Panel was satisfied that it would be sufficient to consider whether in the conduct of the negotiations [between Norway and Germany in 1948] at Torquay the two parties agreed expressly or tacitly to treat these preparations [of fish] as if they were "like products."

*Id.* at 57, ¶ 12. The panel found that the evidence indicated that the parties understood the products to be different for tariff purposes. *Id.* ¶ 13. Thus, the panel stated that any argument for Norway's position had to be based on "assurances which it considered it [had] obtained in the course of the negotiation *rather than on the automatic operation of the most-favored-nation clause.*" *Id.* at 57-58, ¶ 13 (emphasis added). Ultimately, the panel found nullification and impairment under Article XXIII(2), because Germany had assured Norway that though spratts and herrings were different from sardines, they would be accorded similar tariff treatment. *Id.* at 58-59, ¶¶ 16-17.



emphasized the importance of examining whether other states, in their own tariff systems, employ the same kind of differentiations as employed by the importing states whose practices are under scrutiny.<sup>136</sup> When classification differentiation by the importing state and other states coincides, the case against likeness is strengthened.<sup>137</sup> On the other hand, when other states do not construct their tariff schedules to differentiate in the same manner as the particular importing nation, the case against likeness is weakened.<sup>138</sup>

Aside from the distinction between competitive or substitutable and like, and the factor of specific tariff classification (whether in the importing nation or elsewhere), a third element that has been consulted in deciding Article I like product cases is the existence of discrimination based on the origin of the products. The absence of any evidence suggesting that a particular item is being treated differently than some other because of its state of origin undercuts claims that MFN is being violated.<sup>139</sup> At the same time, concrete evidence affording the opportunity to draw inferences regarding the existence of some discriminatory motive, that is evidence of de jure discrimination, has gone a long way toward building a case for a GATT infraction.<sup>140</sup> Discrimination in effect, that is, de facto discrimination, is also an available contention for one complaining to a GATT panel about a presumed contravention of Article I.<sup>141</sup>

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136. See *Australian Subsidy*, supra note 128, at 191, ¶ 8; *Tariff Treatment*, supra note 131, at 112, ¶ 8; *Tariffs on Imports*, supra note 131, at 183, ¶ 3.27 (for an argument to this effect advanced by a party to a dispute) and at 199, ¶ 5.14 (for the apparent recognition of this factor by the panel).

137. See, e.g., *Australian Subsidy*, supra note 128, at 191, ¶ 8.

138. See, e.g., *Tariff Treatment*, supra note 131, at 112, ¶ 4.8.

139. See *Treatment by Germany*, supra note 129, at 57, ¶ 11. Arguments of this sort were advanced by the parties in *Tariffs on Imports*, supra note 131, at 184, ¶ 3.31, 192, ¶¶ 3.55-3.57. The decision of the panel in that case, however, does not take up in absolutely clear terms discussion of the arguments. Nowhere does it follow a straightforward statement of the arguments with a plain and unequivocal articulation that it views the arguments as fundamentally sound. There is language in the decision, though, intimating the panel endorses the idea. See *infra* notes 148-161 and accompanying text.

140. See *Imports of Beef*, supra note 133, ¶¶ 4.2(b), 4.5(a) (holding out possibility that some tariff systems may be so structured that prohibited discrimination is obvious; reference in Article II(1)(b) of GATT to "terms, conditions, or qualifications," is not a limitation on Article I); see also *id.* ¶ 4.3 (finding the violation in this case to be more of the de facto sort); cf. *Tariff Treatment*, supra note 131, ¶ 3.4 (indicating tariff applied without regard to product origin).

141. See *Tariff Treatment*, supra note 131, at 112, ¶¶ 4.6-4.10.

Palpable physical characteristics, end use, and consumer perceptions constitute another important group of factors in the MFN like product cases. Though the early Article I cases seem to dwell on the other factors referenced above, the recent cases have devoted at least as much, if not more, attention to the three instant factors. With regard to shared physical characteristics, the panel decisions indicate that so-called organoleptic differences, that is differences of taste, texture, aroma, and general aesthetic appearance deriving from genetic, chemical, or morphological features that impress the senses, are open for consideration.<sup>142</sup> At least one decision suggests such differences are certainly not determinative of whether products are dislike; it suggests they may even be somewhat unimportant when conjoined with practices like product-blending that aim to mix several items together to produce a commodity available for public purchase.<sup>143</sup> On end use, the decisions of various GATT panels find the case for likeness strengthened whenever the products being compared have a single end use. That is, when one imported item is argued to be like some other item benefiting from more favorable treatment, panels seem to be more inclined to agree with the argument if both items are put to the same single use.<sup>144</sup> If several disparate uses exist for the products, there would seem to be less of an inclination to agree with an argument of likeness.<sup>145</sup> As for consumer perceptions, this factor has been both inferentially and explicitly alluded to by panel decisions.<sup>146</sup> While some have suggested that only "objective

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142. See *id.* at 107-08, ¶¶ 3.6-3.10; *Tariff on Imports*, *supra* note 131, at 187-90, ¶¶ 3.40-3.48 (evidence on physical characteristics heard by panels).

143. See *Tariff Treatment*, *supra* note 131, at 112, ¶¶ 4.6-4.7. This case involved a dispute between Brazil and Spain concerning the latter's imposition of a 7% ad valorem tariff on coffee classified as "unwashed Arabica," "Robusta," or "other," while admitting tariff free coffee classified as "Colombian mild" and "other mild." Spain's tariff classification system came about as a result of a 1979 change in its schedule that replaced the former unbound 22.5% tariff on all items classified simply as "coffee" with a zero or lower rate, depending within which of five categories of coffee an item fell. In finding in favor of Brazil's claim of violation of Article I, the panel gave particular attention to arguments about the physical characteristics of the various types of coffees involved, being the first time a panel called upon to decide an Article I case took up that matter at length.

144. See *id.* at 109, ¶ 3.13 (Brazilian argument), 112, ¶ 4.7 (finding of panel); see also *Tariff on Imports*, *supra* note 131, at 190, ¶ 3.49 (Canada argues single end use as one basis for a finding of likeness).

145. See *Tariff on Imports*, *supra* note 131, at 190, ¶¶ 3.50-3.51 (Japan refers to several end uses in arguments against finding of likeness). Although the *SPF Dimension Lumber* panel reached a judgment against Canada, it did not rely on Japan's argument regarding several end uses. See *id.* at 197-99, ¶¶ 5.1-5.16.

146. See *id.* at 191, ¶¶ 3.52-3.53 (explicit reference to consumer perception argued by disputants; the case is not decided on this factor). See also *Tariff*

criteria" should be consulted,<sup>147</sup> there is no doubt that knowledge of consumer perceptions provides an additional criteria for helping panels decide whether two products are like.

The panel decision involving the most intricate and elaborate exposition of matters raised by a MFN like product complaint is the *Tariff on Imports of SPF Dimension Lumber* (1989) case between Canada and Japan.<sup>148</sup> At the risk of serious oversimplification, and without attempting to summarize all the claims and counterclaims regarding the Japanese practice of subjecting planed or sanded spruce, pine, or fir (SPF) lumber to an eight percent ad valorem tariff, Canada alleged the tariff violated Article I because it fell on SPF "dimension lumber" (i.e., standard cut two by fours, two by sixes) but not non-SPF "dimension lumber" (e.g., hemlock, douglas fir). As the evidence suggested Canada was the dominant supplier of SPF dimension lumber and possessed a heavy concentration of spruce, pine, and fir in comparison with other species,<sup>149</sup> the Japanese failure to treat all dimension lumber the same meant like products were not being treated alike.<sup>150</sup> Moreover, supplies of dimension lumber from other states, particularly the United States, tended to be less concentrated in SPF, and these suppliers, particularly in the northwestern part of the United States, tended to have larger stands of non-SPF species.<sup>151</sup> Consequently, the eight percent tariff on Canadian SPF dimension lumber, and the free-entry status of United States non-SPF dimension lumber, meant the different treatment of like products resulted in injurious discrimination between states of supply.<sup>152</sup> Obviously, as Japan appeared to be according SPF and non-SPF lumber different treatment in order to protect its own economically sensitive SPF

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*Treatment, supra* note 131, at 108, ¶ 3.8 (Spanish argument of distinctiveness based partly on consumer perceptions), 108-09, ¶¶ 3.12-13 (Brazilian counter-argument based on "blending"), 112, ¶ 4.7 (panel acceptance of Brazilian argument).

147. See *Tariff on Imports, supra* note 131, at 191, ¶ 3.53 (Canadian suggestion).

148. *Id.*

149. See *id.* ¶¶ 2.19-2.22 (approximately 73% of Canada's dimension lumber shipments to Japan are SPF, 19% hemlock and douglas fir; approximately 76% of Canada's standing timber is SPF, 12% hemlock and douglas fir).

150. See Canada's argument, *id.* ¶¶ 3.1-3.2.

151. See *id.* ¶¶ 2.19-2.22 (approximately 55% of the United States shipments of dimension lumber to Japan are SPF, 31% hemlock and douglas fir; approximately 55% of the United States standing timber is SPF, and 33% hemlock and douglas fir).

152. See *id.* at ¶¶ 3.4-3.5.

lumber industry,<sup>153</sup> the Canadian argument was of de facto discrimination.<sup>154</sup>

The Canadians contended the state of origin nondiscrimination requirement of Article I, referenced above, is part of a larger obligation requiring that all products considered like be treated alike, irrespective of the absence of state of origin discrimination.<sup>155</sup> Given that at least one earlier Article I case did not address state of origin discrimination,<sup>156</sup> while another mentioned it only after making findings with regard to likeness,<sup>157</sup> it is understandable this contention might be advanced. In essence, the significance of this claim meant that discrimination between like products coming from the same state of supply would contravene Article I. This fact largely accounts for the *SPF Dimension Lumber* panel's lengthy consideration of the physical characteristics of different species of dimension lumber. However, both the contention of de facto state of origin discrimination, as well as discrimination between like products irrespective of differences in treatment based on state of origin, turn on the supposition that dimension lumber is a universally acknowledged standard form of product presentation. That is to say, it is a presentation so widely embraced that it evidences itself in the form of an extant customs classification category. Because the panel in the *SPF Dimension Lumber* case was unable to find any evidence in the Japanese tariff schedule of such universality,<sup>158</sup> it proceeded to enter judgment against Canada, without taking advantage of the opportunity offered by the dispute to hold forth on the important matters of physical characteristics, end use, and consumer perceptions. On the even more important matter of whether Article I requires like treatment for like products, the most the decision provides are some oblique

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153. Japan essentially claimed that the 10% tariff on SPF lumber was the product of post-1962 economic expansion that resulted in huge strains on its indigenous lumber industry. In order to address such strains, there was a general liberalization on imports of foreign lumber. But seeing as how the domestic preference for locally produced cedar and cypress provided a large margin of profitability, it was thought liberalization could be even more generous regarding imported hemlock and douglas fir (the logical competitors with cedar and cypress) than regarding SPF, species where local producers had very small profit margins. See *id.* ¶¶ 3.21-3.26.

154. See *id.* ¶ 3.54 ("gave preference to United States suppliers and discriminated against Canadian suppliers.").

155. See *id.* ¶¶ 3.30 and 3.54.

156. See *Australian Subsidy*, *supra* note 128.

157. See *Tariff Treatment*, *supra* note 131, ¶¶ 4.9-4.10.

158. See *Tariff on Imports*, *supra* note 131, ¶¶ 5.11-5.14.

references, which could be read as indicating state of origin discrimination is absolutely essential.<sup>159</sup>

In the wake of the *SPF Dimension Lumber* case, several points about the law of Article I's like product provision can be advanced with a modicum of certainty. At the outset, while like probably does not mean absolute identity (as even the Article I cases finding likeness have involved products with some differences), it clearly means something more than just competitive or substitutable. Additionally, a product will be found to be like another if it falls within the other's specific tariff description. When it falls within a different and distinct description, however, it may still be considered a like product. That an importing state classifies the item in another category is illuminating, but not determinative. More important is whether the classification is consonant with the practice of other states, and whether the relations between the importing and supplying states suggest the possibility of estoppel. Further, there is the element of state of origin discrimination. Though not definitively addressed, there is language in the like product cases to suggest that reliance on Article I requires proof of this discrimination. It would seem proof could take either the *de jure* or *de facto* form. If the former, a violation of Article I will be acknowledged. If the latter, at least the case for a violation will be viewed as substantially supported. Finally, end use and consumer perceptions affect determinations about contravention of the like product provision. Comparisons of the products' physical characteristics are meaningful, but seem less influential than findings about the singularity or multiplicity of uses available and the consistency or diversity of consumer perceptions regarding the products.

All of this argues that Article I's like product provision allows products from one state of supply to compete on the same terms with products from another state of supply, whenever the products from the two, looked at from a multifactor perspective, can be considered comparable. Though the items need not be exact duplicates, it is not enough that they are able to simply be used instead of, or displace the sales of, each other. Basically, the products involved must be understood to be largely the same.

From the vantage of a unifying theme or theory, the emphasis on comparability says much. According MFN protection only to products that are essentially the same gives effect to the idea of perfecting an international economic system that promotes trade in a setting of respect for the natural productive efficiencies of trading partners. Were concern about

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159. See *id.* ¶ 5.9 ("originating in different contracting parties"), ¶ 5.10 ("different extraneous sources").

guaranteeing the rights of nations naturally able to supply certain products more cheaply than other nations not a matter of top priority, the need for the products to be nothing more than largely the same would not have emerged so clearly. Product protection under Article I could have been limited to those completely identical with others, undercutting efficiencies of production by allowing extremely slight and insignificant differences between items to be used to justify discriminatory treatment. By emphasizing that the degree to which the products involved are alike need satisfy nothing more than comparability, the GATT like products provision of Article I endorses the concept of trade promotion through a regime that greatly values permitting natural productive advantages largely to have free reign. Mere superficial differences between items from distinct states of supply fail to authorize disparate treatment by the state of import. If products are so much alike that they are generally regarded as the same, then the states supplying them should battle head-to-head for consumers without one being disadvantaged by artificial and extraneous government intervention by the state to which the products are supplied.

The arguments proffered in the *SPF Dimension Lumber* case appear to indicate unanimity, among those involved, on the paramount importance of increased trade and competition between exporting states. The Japanese, with the European Economic Community (EC) as intervener, contended like should be interpreted to exclude SPF dimension lumber, because the opposite interpretation would compel Japan to extend the same favorable treatment to SPF that it extended to dimension lumber of the non-SPF variety. As a consequence, impediments would be erected to trade liberalization because states would incline against negotiating tariff concessions at multilateral rounds, as the benefit of any concessions negotiated could be extended through the like products provision to a large variety of items without any corresponding quid pro quo concessions.<sup>160</sup> After all, if a state knew a concession it granted could be extended to cover a different item as well, would not its reluctance to offer concessions be increased? And, if a state looking for concessions knew the like products provision could result in any concession grant being extended to many products other than those on which it was actually negotiated, would not its inclination to offer corresponding quid pro quo concessions be reduced?

The Canadians also acknowledged the trade-creating and competitive notion underpinning Article I's use of likeness.<sup>161</sup>

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160. See *id.* ¶¶ 4.1-4.6 (EEC) and ¶ 3.35 (Japan).

161. See *id.* ¶¶ 3.37-3.38; see also *id.* ¶ 3.33.

Approaching the issue from an entirely different angle, they argued that a broader, more liberal interpretation of the term like than that sought by Japan and the EC would serve the purpose of enhancing trade and competition. In Canada's estimation, this approach was dictated by the fact the like products reference of the MFN provision was a statement of an obligation of the GATT, and obligations, unlike exceptions, should be construed broadly. Moreover, the Canadians also submitted that the greater danger to trade and competition came from construing like in accordance with the tariff line description given by a certain importing state, rather than from any effect a broad interpretation might have on multilateral tariff negotiations.<sup>162</sup> Notwithstanding Canada's difference in perception concerning a broad or narrow interpretation, it is absolutely clear that all the parties concerned accepted the trade and competition notion behind the concept of likeness. The only obvious reason for accepting this fundamental foundational principle appears to be the promotion of a trading regime favoring natural productive efficiencies. Though ultimately the panel found in favor of Japan, even a decision supporting the Canadian position could be construed to accept competitive advantage.

### B. Article III: National Treatment

A variety of extremely interesting Article III decisions have been handed down by GATT dispute panels over the years. Some have addressed the interrelationship between the national treatment obligation of Article III and the most favored nation obligation of Article I.<sup>163</sup> Others have elaborated on the range of practices prohibited by Article III. Essentially, this range extends beyond even direct limits on the conditions of sale, to any official action impacting the circumstances of competition between indigenous and foreign products.<sup>164</sup> It includes monetary bestowals made to those not involved in the growth or production of an item subjected to further processing, though the grower or producer may indirectly benefit therefrom.<sup>165</sup> It also reaches a

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162. *Id.*

163. See, e.g., *Belgian Family Allowances*, GATT Doc. G/32 (Nov. 7, 1952) (Nor. & Den. v. Belg.), BISD 1st Supp. 59.

164. See *Italian Discrimination Against Imported Agricultural Machinery*, GATT Doc. L/833 (Oct. 23, 1958) (U.K. v. Italy), BISD 7th Supp. 60 [hereinafter *Italian Discrimination Case*].

165. See *European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, GATT Doc.

diverse spectrum of other regulations affording protection to domestic goods.<sup>166</sup> It does not include, at least within the concept of equality in internal tax or charge treatment, the discontinuation of government payments on imported as opposed to domestic items, despite the fact the discontinuation affects price relationships in the same way as the imposition of a tax or charge.<sup>167</sup> However, when it comes to the meaning of Article III's references to the concept of likeness, or its interpretive Note's reference in the GATT Addendum to "directly competitive or substitutable," there are four principal decisions. Two of them stand out with clarity and add to the jurisprudence evidenced in the decisions concerning the MFN obligation of Article I.

The *Australian Subsidy* case was the first case to elaborate on the interpretation of like in the context of national treatment.<sup>168</sup> It foreshadowed the decision in the *Italian Discrimination* case eight years later. The Italian case expressly acknowledged that the language of paragraph 4 of Article III, prohibiting discriminatory laws, regulations, or requirements "affecting" internal sale or purchase, extended beyond direct limitations (e.g., "no sales of imported goods on Fridays") to limitations adversely impacting the conditions of competition (e.g., no favorable government financing to purchasers of imported goods).<sup>169</sup> It conceived likeness in Article III to have the same meaning as in Article I.<sup>170</sup> In essence, it meant something distinct from competitive or substitutable, with attention accorded to how the product was classified in the tariff schedule of the importing state and other states as well.<sup>171</sup> There is reason to believe that subsequent decisions, and expressed positions of

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L/6627 (Jan. 25, 1990) (U.S. v. EEC), BISD 37th Supp. 86, ¶¶ 136-41 [hereinafter *Oilseeds Case*].

166. See *EEC-Measures on Animal Feed Proteins*, GATT Doc. L/4599 (Mar. 14, 1978) (U.S. v. E.E.C.), BISD 25th Supp. 49.

167. See *Australian Subsidy*, *supra* note 128, ¶ 7 (concluding Article III(2) is not relevant).

168. *Id.* ¶ 9.

169. *Italian Discrimination Case*, *supra* note 164. See *id.* ¶¶ 11-13. The earlier *Australian Subsidy* case appears to have accepted the same kind of broad interpretation of the word "affecting" in Article III(4). See *supra* note 128. Without discussion of that matter, it proceeded to address the issue of whether a subsidy on domestic ammonium sulphate fertilizer, not also given to imported sodium nitrate fertilizer, violated the prohibition on discriminatory laws, regulations, or requirements affecting the sale or purchase of like products. Obviously, for the panel to have addressed the concept of likeness there, it must have envisioned the Australian laws on subsidization as a law affecting sales or purchases, even though it did not directly limit such. *Id.*

170. See *Australian Subsidy*, *supra* note 128, ¶¶ 8-9.

171. *Id.* ¶ 8.



some states-party to the General Agreement, confirm the parallelism between likeness in Articles III and I.<sup>172</sup>

In addition to tariff classification, other so-called objective factors have received attention by dispute panels in Article III cases.<sup>173</sup> These include the physical properties, the nature, and the quality of the products being compared,<sup>174</sup> as well as the end use of the products,<sup>175</sup> all indicators of likeness consulted in MFN cases.<sup>176</sup> An identical or substantially identical end use is satisfactory to suggest likeness.<sup>177</sup> Price differences between

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172. With reference to the positions of states-party to the GATT, see, e.g., *Tariff on Imports*, *supra* note 131, ¶ 3.37 (Canada's position regarding how panels have viewed like in Articles I and III as the same). *But see id.* ¶ 3.39 (Japan indicating the meaning not the same, though perhaps intending to suggest nothing more than internal identical treatment does not necessitate identical treatment at the border). *See also id.* ¶¶ 4.3-4.6 (EEC position that like be read "to avoid an interpretation which would make the distinction between Article I and other provisions, such as [Article] . . . III . . . unclear," though perhaps focusing on the substantive obligations of these respective provisions, not the meaning of like as such). With reference to panel decisions, see *Treatment by Germany*, *supra* note 129, ¶ 15; *Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, GATT Doc. 46216 (Nov. 10, 1987) (U.S. v. Japan), BISD 34th Supp. 83, ¶¶ 5.5 (a)-(b), 5.6 [hereinafter *Japanese Tax on Alcoholic Beverages*]. In the *Japanese Tax on Alcoholic Beverages* case the panel does not explicitly state that like in Article III means the same thing as it does in Article I. *Id.* ¶¶ 3.2, 3.10. Nonetheless, frequent reference is made to the elements that comprise likeness under Article I when the panel is attempting to understand the meaning of the same term in the context of Article III. *Id.* In the *Sardines* case the panel initially determined that Article I's MFN obligation had not been violated because the different *ad valorem* rates were imposed on different or unlike products coming from different states. *See supra* note 135. It then refused to address the matter of whether an internal charge on the same products violated III(2)'s national treatment obligation, since the products had already been found not like under Article I. *Id.*

173. The notion of "objective" factors appears in *Japanese Tax on Alcoholic Beverages*, *supra* note 172, ¶ 5.7.

174. *Id.* ¶ 5.6.

175. *Id.* ¶¶ 5.5(d)-5.6; *United States—Taxes on Petroleum and Certain Imported Substances*, GATT Doc. L/6175 (June 17, 1987) (Can., EEC & Mex. v. U.S.), BISD 34th Supp. 136, ¶ 5.1.1 [hereinafter *United States-Taxes on Petroleum*].

176. *See supra* notes 143-48 and accompanying text.

177. *See United States—Taxes on Petroleum*, *supra* note 175, ¶ 5.1.1. This case involved a challenge to a United States charge on petroleum imposed under the 1986 Superfund Act (i.e., environmental "cleanup" legislation). Among other things, the Act imposed an 11.7 cents per barrel charge on imported crude oil, crude oil condensates, natural gasoline, refined and residual oil, and liquid hydrocarbon products. A corresponding 8.2 cents per barrel charge was imposed on domestic crude oil, crude oil condensates, and natural gasoline. There was no charge on domestic refined and residual oil or liquid hydrocarbon products. In a complaint brought by Canada, EEC, and Mexico, a decision was entered that, *inter alia*, the United States charge violated Article III(2), first sentence, in that imported products were treated less favorably than like domestic products.

products are insufficient to make otherwise like products unlike.<sup>178</sup> Similarly, as in the case of Article I,<sup>179</sup> minor differences in things like taste, color, and aroma have no effect upon whether products can be considered alike.<sup>180</sup>

The subjective factors most frequently referenced have been consumer preference, habit, or taste.<sup>181</sup> To the extent various items are perceived by the purchasing and using public as virtually the same, decisions regarding likeness are thereby influenced. Whenever the perception of consumers regards two products as clearly different, the exact opposite influence is exerted. However, that distinct preferences exist with respect to products that are otherwise alike does not mean that governmental action ossifying or permanently entrenching these perceptions is to be tolerated under the national treatment obligation. In a free and open market, consumer perceptions can, and do, change. Given that, official actions addressed by Article III are intolerable if they make it unlikely perceptions will catch up with the reality that products thought of as different are actually the same.<sup>182</sup>

A very important aspect of Article III is found in the second sentence of paragraph 2. It provides that, even though internal taxes or charges are not discriminatorily applied to imported items that are like domestic items, taxes and charges shall not "otherwise apply" to afford protection to domestic production.<sup>183</sup> The Addendum's interpretive Note to Article III(2) indicates the idea is to prevent a contracting party from structuring a system that treats imports that are like domestic products in the same way the domestic products are treated, when at the same time treatment involving a tax on the imports leaves directly competitive or substitutable domestic products untaxed.<sup>184</sup> This

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Domestic and imported petroleum products were like because they served identical or substantially identical end uses. *Id.*

178. See *Japanese Tax on Alcoholic Beverages*, *supra* note 172, ¶ 5.9(b).

179. See *supra* notes 141-43 and accompanying text.

180. See *Japanese Tax on Alcoholic Beverages*, *supra* note 172, ¶ 5.6.

181. *Id.* ¶¶ 5.6-5.7.

182. *Id.* ¶ 5.7 ("Since consumer habits are variable in time and space and the aim of Article III:2 of ensuring neutrality of internal taxation ... between imported and domestic like products could not be achieved if differential taxes could be used to *crystallize consumer preferences* for traditional domestic products, the Panel found that the traditional ... consumer habits . . . provided no reason for not considering" certain products to be like. (emphasis added).

183. See GATT, *supra* note 5, art. III(2) [second sentence], art. III(1).

184. See GATT, addendum, Note to art. III(2), [second sentence] which reads:

A tax conforming to the requirements of the first sentence of paragraph would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved

notion of competitive or substitutable products clearly extends the scope of Article III(2). That point seems to have been recognized by panel decisions.<sup>185</sup> As a consequence, products not identical or virtually identical are entitled to nondiscriminatory internal tax treatment. By emphasizing that identity or virtual identity is not imperative, it has been decided that the phrase directly competitive or substitutable envisions consideration of the extent to which the products concerned are flexible in terms of use and common characteristics.<sup>186</sup> Essentially, this means alcoholic beverages that are clean and white, made from the same raw materials, and drunk straight or in mixed form (e.g., Japanese shochu and western vodka) could be considered competitive and substitutable, while beverages with distinctly different features and a smaller range of uses (e.g., beer and brandy) could not.

Perhaps the most significant of the Article III like product cases is the *Japanese Tax on Alcoholic Beverages* case.<sup>187</sup> In this 1987 dispute between the EC and Japan, it was determined that a variety of Japanese internal tax practices contravened, inter alia, the provisions of Article III(2). The first sentence was violated because several imported products (e.g., European gin, whiskey, wines) were taxed at different rates than like domestic products (e.g., Japanese gin, whiskey, wines). The second sentence was violated because imported products (e.g., European vodka) were taxed at different rates than directly competitive or substitutable domestic products (e.g., shochu A), affording protection to the domestic goods. The Japanese argued their internal tax system was consistent with Article III(2) in that it was based not on the object of discrimination, but on assuring that higher priced and higher quality beverages bore a higher tax burden than lower priced and lower quality beverages. Moreover, they noted that, while their tax system separated alcoholic beverages into ten categories (i.e., sake, sake compound, shochu, mirin, beer, wines, whiskeys, spirits, liqueurs, and other liquors) and thirteen subcategories (i.e., shochu: A and B; mirin: A and B;

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between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

*Id.*

185. See *Australian Subsidy*, *supra* note 128, ¶ 7; *Japanese Tax on Alcoholic Beverages*, *supra* note 172, ¶¶ 5.6-5.7 (first, determining that one could conclude that Japanese shochu A and imported vodka could be considered like, and secondly, determining that even were that conclusion not accepted, shochu A and vodka could be considered directly competitive and substitutable).

186. See *Japanese Tax on Alcoholic Beverages*, *supra* note 172, ¶ 5.7.

187. See *supra* note 172.

wines: wine and sweet; whiskeys: whiskey and brandy; spirits: spirits and raw material alcohol; other liquors: sparkling, powdered, and other miscellaneous), with the category sake being separated into three grades (i.e., special, first, and second), and the subcategories whiskey and brandy into the same three grades, the exact same rate of taxation was applied irrespective of whether a beverage subject to tax under any of these classifications was imported or domestic.<sup>188</sup>

The European Community argued that the Japanese system of classification tended to separate traditional Japanese beverages (i.e., sake, shochu, and mirin) from western beverages (i.e., beer, wine, whiskeys, spirits, and liqueurs). The system then subjected the latter to a higher level of taxation than the former, and imposed still higher levels on beverages falling within the most elite grades, which frequently tended to be of foreign origin. Comparatively, imports in the various classifications of traditional alcoholic beverages amounted to only a very small fraction of the total Japanese production,<sup>189</sup> and, generally, domestically produced beverages clearly represented the overwhelming amount of so-called western style alcohol consumed in Japan.<sup>190</sup> This meant imported western style alcoholic beverages never benefited from the lower levels of taxation enjoyed by traditional Japanese beverages. As they also tended to fall into the more elite grades in the classification system, they never even enjoyed the lower rates the western style beverages produced in Japan could claim.<sup>191</sup> As the EC felt many of the products the classification system considered to be different were really either like or directly competitive or substitutable, the disparity in treatment between domestics and imports contravened Article III, paragraph 2.

In determining that the Japanese internal tax system violated Article III(2)'s like product provision,<sup>192</sup> the panel ruled that gin as well as whiskey, grape brandy, fruit brandy, classic liqueurs, unsweetened still wine, and sparkling wines formed distinctive product classifications in which the imports in that classification were like the Japanese product of the same sort.<sup>193</sup> The panel also found Article III(2)'s prohibition on protective practices

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188. See *id.* ¶¶ 3.9-3.12.

189. See, e.g., *id.* ¶ 3.5 (imported shochu represented only .4% of domestic production).

190. See, e.g., *id.* ¶ 3.10(a) (91% of the whiskeys and 94% of the spirits consumed in Japan were domestically produced).

191. See, e.g., *id.* ¶ 5.9(a)-(d) (panel's discussion of how like products treated differently).

192. See *id.* ¶¶ 5.6-5.11.

193. *Id.* ¶ 5.6.

violated in view of the Japanese system's practice of affording protection to domestic items that were competitive with or substitutable for unlike imported products.<sup>194</sup> With regard to this specific finding, the panel noted that more than a de minimis difference in tax levels is enough to produce a violation. This statement is especially informative given that Article III(2)'s notion of prohibiting practices that afford protection to competitive or substitutable domestic products might be seen as necessitating proof of trade distortion.<sup>195</sup> The panel also noted that the domestic competitive or substitutable product at issue (shochu) was almost exclusively produced in Japan; it was not a case in which several other states were producing and shipping the same product into Japan.<sup>196</sup> The relevance is that Japan would not have been protecting domestic production in the latter situation.<sup>197</sup>

The most profound point to emerge from the *Alcoholic Beverages* case, however, involved the panel's response to Japan's position regarding Article III(2). Essentially, Japan argued Article III(2) could never be considered contravened when imported products falling into the same categories, subcategories, and grades as domestically produced items were subjected to the exact same rate of taxation as the domestics. This was said to be so despite the fact an incredibly large amount of the imports were subjected to taxation at the highest levels. The Japanese argued as long as domestic production also existed within the classifications taxed at the highest levels, the importing state fulfilled what Article III(2) required. Japan considered this especially true when the amount of domestic production, as a percentage of total consumption, represented the clear overwhelming bulk of what was consumed.<sup>198</sup> In rejecting this argument, the panel's decision leaves no doubt that Article III's like and directly competitive or substitutable standards limit the ability of GATT states-parties to employ ever more refined internal tax classification systems to discriminate against imports. This view is not at all surprising considering the decision six years earlier that tariff classifications were limited by the like product

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194. See *id.* Again, the panel held open the possibility that items (e.g. vodka and shochu A) in distinctive and separate categories could also be considered like. *Id.* ¶ 5.7.

195. See *id.* ¶¶ 5.7, 5.10-5.12. Here, too, vodka and shochu A were compared. The panel's position was that even if the two were not like they were at least competitive or substitutable. *Id.*

196. See *id.* ¶¶ 5.10-5.12.

197. See *id.* ¶ 5.11.

198. See *id.* ¶¶ 5.4 (panel's characterization of Japan's argument), 3.11 (Japan's statement of its position).

provision of Article I(1).<sup>199</sup> Even when all the products falling within an unfavorable internal tax classification are not imported from abroad, the methodology employed to determine compliance with Article III(2)'s nondiscrimination (first sentence) and nonprotective (second sentence) obligations involves inquiring into the likeness and competitiveness or substitutability of the products concerned. Lest states be entitled to use artifice and deception to unfairly burden others, that facial consonance with Article III(2) should be regarded as nothing more than some evidence of adherence to the standards of the General Agreement on Tariffs and Trade.<sup>200</sup>

Consider the obligation under Article III(2) and its interpretive Note to avoid protecting domestic production of directly competitive or substitutable items. There is little question that it condemns stratagems affecting market disadvantage. Couple this with the panel's refusal to accept the Japanese claim that Article III(2) is inapplicable when the treatment is facially equal, in spite of the existence of both domestic production and imports in allegedly discriminatory internal tax categories. It is then apparent that the objective of the nonprotective (second sentence) and nondiscrimination (first sentence) provisions of Article III is to proscribe governmental internal tax interventions that distort natural trade relationships. Whether in the context of like products<sup>201</sup> or directly competitive or substitutable products,<sup>202</sup> the distortive practices prohibited extend beyond those which can be shown to negatively impact international trade. The prohibited practices also extend to those that displace expectations about how domestic and imported products compare with each other. The theory behind the actual equality required by the first sentence of III(2), and the avoidance of practices that protect domestic production required by the second sentence of that same article, is the theory of trade neutrality.<sup>203</sup> Not only does it mean neutrality in the sense of governments of importing states staying away from internal taxation or charges that adversely affect the level of international trade flowing between competitor states. It also means neutrality in the sense of refraining from any practice interfering with or altering the conditions of competition that emerge naturally

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199. *Tariff Treatment*, *supra* note 131, ¶ 4.4.

200. *See Japanese Tax on Alcoholic Beverages*, *supra* note 172, ¶¶ 5.3-5.5(d).

201. *See id.* ¶ 5.7. The seminal case here is *United States—Taxes on Petroleum*, *supra* note 175, ¶¶ 5.1.1, 5.1.9.

202. *See Japanese Tax on Alcoholic Beverages*, *supra* note 172, ¶ 5.11.

203. *See, e.g., id.* ¶ 5.7 (stating that the "aim of Article III(2) [is] ensuring neutrality of internal taxation").

between various products. As the panel so succinctly put it, "Article III:2 protects expectations on the competitive relationship between imported and domestic products rather than expectations on trade volumes."<sup>204</sup> Consequently, even in a situation in which the volume of trade between two GATT parties may be increasing, Article III(2) may have been violated "because, *inter alia*, an increase in imports [says] nothing about what the trade might have been in the absence of the inconsistent trade restrictions."<sup>205</sup>

While the General Agreement's MFN and national treatment obligations may be directed at distinct practices—the one being tariffs, and the other being internal measures—they both emerge from the exact same theoretical premise. Both accept the notion that products traded between states on the world market should possess or lack appeal to potential consumers due to their natural competitive efficiencies. Interventions at the border or within the internal confines of a customs territory that skew the competitive relationship which would otherwise obtain are to be condemned. Whatever attractions products normally possess should be left free to exert their influence on the decisions of the marketplace. Official practices burdening the decisions that are made by the consuming public are to be scrupulously avoided.

### C. Article VI: Dumping and Antidumping Duties

There has been a real dearth of GATT panel decisions under the dumping provision of Article VI. Of the most prominent cases, one suggests assertions that products imported from abroad at prices below the home market price cause material injury to domestic industry in the importing state will be subjected to an independent evaluation and not just unquestioningly accepted.<sup>206</sup> However, none of the other decisions, though addressing matters beyond injury, directly comment on the like product language of paragraphs 1, 4, or 7 of

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204. See *id.* ¶ 5.11 (statement made in regard to directly competitive or substitutable). See also *id.* ¶ 5.7 (similar kind of statement made with regard to the like products language), and *United States-Taxes on Petroleum*, *supra* note 175, ¶ 5.1.9. The result is that *any* tax difference under the nondiscrimination obligation, and even a very small (though not *de minimis*) difference under the non-protection obligation, is prohibited.

205. *Japanese Tax on Alcoholic Beverages*, *supra* note 172, ¶ 5.16.

206. *New Zealand-Imports of Electrical Transformers from Finland*, GATT Doc. L/5814 (July 19, 1985) (Fin. v. N.Z.), BISD 32nd Supp. 55 [hereinafter *New Zealand Imports*].

Article VI.<sup>207</sup> Yet some decisions do refer to the notion of likeness,<sup>208</sup> and at least one report from a group of experts called together to consider various aspects of Article VI offers some explicit understanding about its use of the word like.<sup>209</sup>

The earliest panel decision on dumping claims decided that the MFN obligation of Article I does not require a state invoking antidumping duty action against one state to invoke it against other states engaging in the same practice.<sup>210</sup> But once the action has been triggered, the use of "rules and formalities" connected with any investigation may not be employed to delay the entry of products from one state and not those from another.<sup>211</sup> The parties to the dispute may well have felt that products with the same physical properties and end use were not to be considered like if something about one of them served as a basis for commanding a better-heeled or somehow distinct clientele.<sup>212</sup> The panel itself, however, refrained from offering any

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207. See *Swedish Anti-Dumping Duties*, GATT Doc. L/328 (Feb. 26, 1955) (Italy v. Swed.), BISD 3rd Supp. 91 [hereinafter *Swedish Anti-Dumping Duties*]; *European Community-Regulation on Imports of Parts and Components*, GATT Doc. L/6657 (May 16, 1990) (Japan v. EEC), BISD 37th Supp. 132 [hereinafter *Regulation on Imports*].

208. See *Swedish Anti-Dumping Duties*, *supra* note 207, ¶¶ 27-28; *Regulation on Imports*, *supra* note 207, ¶¶ 3.88 (comments by EEC), 3.98 (comments by Japan), 4.7 (comments by Canada), 4.18-4.20 (comments by Hong Kong), 4.29-4.30 (comments by Singapore).

209. *Anti-Dumping and Countervailing Duties*, GATT Doc. L/978 (May 13, 1959), *Report adopted*, BISD 8th Supp. 145, 149 [hereinafter *Report*].

210. See *Swedish Anti-Dumping Duties*, *supra* note 207, ¶¶ 7-8. The case involved a claim by Italy that Sweden maintained an anti-dumping system for imported stockings which determined (initially) whether an anti-dumping duty would be imposed, and (later) whether an anti-dumping investigation would be started and entry of goods thereby delayed, on the basis of the stockings' invoice price being less than a so-called basic price calculated by Sweden through the averaging of home market prices. In deciding that Italy's complaint might have some merit, the panel addressed several matters, including the Italian observations that Article VI was violated because the basic price was not reflective of the "home market price," thus leaving some low-cost producers subject to duties notwithstanding the absence actual dumping; and Article I was violated because producers in low cost countries were deprived of the competitive advantages they were entitled to under MFN.

211. See *id.* ¶ 9.

212. See *id.* ¶¶ 25-30. The Swedish basic prices were apparently to be a substitute for the so-called home market price, i.e., the price at which products like those imported into Sweden sold for when destined for consumption in the country of export—here Italy. The evidence indicated Sweden arrived at its basic prices by averaging, for each variety of stocking, the prices on the Italian market of trademarked and unmarked stockings. That is to say, a price for each variety was determined by combining the prices of the marked and unmarked stockings and then calculating an average price. However, since Italy exported only unmarked stockings to Sweden, it complained that the price of many of the imported items would naturally be below Sweden's basic price but perhaps, no



opinion on this matter. Nonetheless, to the extent that Article VI aims to limit the situations in which trading partners are entitled to augment regular tariff impositions with supplemental duties designed to protect against injurious dumping, it prevents importing states from distorting the price relationships that affect patterns of commerce. Given the panel's basic support for that provision, one could infer that its decision at least implicitly endorsed the idea that any product difference, including simple ones that appeal to distinct groups of purchasers, undercuts the existence of likeness. Were that not so, importing states would have more freedom to levy antidumping duties, thereby depriving trading partners of the natural advantages incident to making one product slightly different from another. Products should carry with them the price they would normally bear. If that is a figure sensitive to small product differences, then importing states should not have the liberty to disregard those differences and skew the normal pricing patterns.

This strict, narrow interpretation of like clearly appears in the report of the group of experts alluded to above,<sup>213</sup> though it expressed caution about construction so stingy as to elude the application of Article VI(1)(a).<sup>214</sup> The report suggests that the two products being compared should be exactly the same.<sup>215</sup> Of course, comparison is undertaken to determine whether dumping of the import is occurring, that is, whether the price of the import is below the price of the same item when sold for consumption on the home market. Thus, the experts' reference to identity "in physical characteristics"<sup>216</sup> might not depart from the idea that products sharing the same physical properties and end use can be different when something about one of them allows the targeting of an economically distinct clientele. Variations in product presentation that leave physical properties and end use unaffected, but create appeal to clear segments of the consuming public, cannot be said to permit direct cross-comparisons of price. It would not seem to matter whether one argues that such

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less than the home market price for the like unmarked stockings. To Italy, even if one were to view the Swedish basic price as the attempted reflection of the home market price, the price of imported unmarked stockings was being compared with a price of something other than a like product. The Swedes apparently realized that it would be inappropriate under Article VI (1)(a) to make the kind of comparison the Italians suggested was occurring. The panel indicated as much, *see id.* ¶ 28, when it noted Sweden was really resting its case on Article VI (1)(b)(ii), cost of production; *see id.* ¶¶ 28, 30.

213. *See Report, supra* note 209, ¶¶ 12-14.

214. *Id.* ¶ 13.

215. *Id.* ¶ 12 (the members of the group agreed that "like product" should be interpreted to mean "a product which is identical in physical characteristics").

216. *Id.*

products are: "unlike," thereby opening recourse to some constructed price under Article VI(1)(b);<sup>217</sup> or like, yet subject to adjustments in the prices being compared.<sup>218</sup> Under either approach, the focus is on price. To determine the existence of dumping, it is imperative to ascertain whether an imported item is priced lower than it is, or would be, priced if sold for consumption in the state of supply. The basic goal is to assure the price paid by consumers reflects the price controlling in the state of supply.

One of the most recent Article VI antidumping cases is entitled *European Economic Community—Regulation on Imports of Parts and Components*.<sup>219</sup> This 1990 dispute between Japan and the EC grew out of an attempt by the Community to deal with a shift to Europe of assembly operations by Japanese companies involved in the manufacturing of items like electric typewriters, videocassette recorders, and hydraulic excavators. The background to the dispute indicated that originally these products had been assembled in and exported from Japan for some time. Earlier investigations by the EC upon complaints from competitive producers within the Community had resulted in determinations of Japanese dumping and the imposition of antidumping duties.<sup>220</sup> Though denied,<sup>221</sup> there were claims that the Japanese producers had attempted to circumvent these antidumping duties by relocating their assembly operations to facilities situated within the borders of Member States.<sup>222</sup> Parts necessary to produce a finished product were supplied by those same Japanese companies formerly exporting completed goods. The parts were then brought together to make finished products, which, because not assembled outside the EC, were insulated from the original antidumping impositions.

This all changed when the Community adopted legal directives subjecting finished products assembled in the EC by the Japanese firms that were exporting parts and components to proportional antidumping duties based on the value of the parts or components utilized.<sup>223</sup> It must be emphasized that the

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217. This is the approach suggested by *Swedish Anti-Dumping Duties*, *supra* note 207. See also *supra* notes 210-13 and accompanying text.

218. *Id.* (noting that adjustments in product presentation might leave products like, but requires adjustments in the prices used to determine the existence of dumping).

219. See *Regulation on Imports*, *supra* note 207, at 132.

220. See *id.* ¶¶ 3.5-3.28 (general observations of both parties)

221. See *id.* ¶ 3.6 (setting forth Japan's explanation of the shift of assembly operations).

222. See *id.* ¶ 3.17-3.18 (EC position on the impetus for the shift).

223. See *id.* ¶¶ 2.1-2.3.

Community's proportional duties were imposed on the products finally assembled in EC Member States from parts and components imported from those against whom dumping determinations had previously been entered. The duties were not imposed on the parts or components crossing into the EC customs area. The duties brought assertions by Japan that the EC was violating the GATT. Japan maintained, *inter alia*, that because the duties were applied to products finished in the Community, rather than to the parts incorporated into the finished products as those parts entered the Community, they were not duties under Article VI, as that provision focused on duties applied to items finished as of the time of importation. Even if one conceived the duties as really imposed on finished imported parts and components, the imposition still did not occur until well after import. Further, it was made without a dumping determination relative to parts, or any regard to some dumping margin exemplified by the price at which the parts sold.<sup>224</sup> To think of the duties, on the other hand, as some form of customs levy meant they violated both Article I, as only the Japanese faced them, and Article II, as all the parts involved benefited from tariff bindings.<sup>225</sup> If they were internal charges, the duties ran afoul of Article III(1) and (2) because they were not imposed on, and therefore necessarily afforded protection to, indigenous domestic producers. These duties also contravened Articles I and III (4) because they did not apply to imports from other states.<sup>226</sup> The Japanese also argued the duties did not fall within the narrow exception of Article XX(d), which is applicable only in instances in which efforts were made to obtain compliance with laws "not inconsistent" with the GATT.<sup>227</sup>

Needless to say, the EC vigorously disagreed with Japan's assertions. The Community insisted that the duties imposed on finished products assembled in EC Member States were indeed consistent with the thrust of Article VI, as they simply substituted for antidumping duties that would have been imposed had the Japanese not created a substitute way for introducing goods into the Community.<sup>228</sup> Further, the EC stressed that it was not imposing duties on the imported parts,<sup>229</sup> even though it had considered doing so, but had rejected the approach for several reasons. One reason for rejecting the

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224. *See id.* ¶ 3.30.

225. *See id.* ¶ 3.32.

226. *See id.* ¶¶ 3.40-3.42.

227. *See id.* ¶¶ 3.56-3.69.

228. *See id.* ¶¶ 3.35-3.36.

229. *See id.* ¶¶ 3.35, 3.88.

approach was because, without a separate dumping finding on parts alone, any imposition would have to be justified by making the uncomfortable argument that parts were like the imported finished products against which dumping findings had already been entered.<sup>230</sup> The Community also stated that, in its estimation, the real source for the anticircumvention tack it was taking was Article XX(d), not Article VI,<sup>231</sup> and submitted that this tack was perfectly consistent with the terms of that general exception provision.<sup>232</sup>

Ruling against the EC, the panel determined not to examine the anticircumvention duties as customs impositions on imported parts and components under Article VI, because the EC claimed it was not justifying its actions by this GATT provision.<sup>233</sup> Instead the panel looked at the duties as internal charges<sup>234</sup> and found them to be both violative of Article III<sup>235</sup> and unprotected by the exception contained in Article XX(d).<sup>236</sup> Despite the panel's refusal to examine the matter in controversy on the basis of Article VI, several relevant observations by the disputants and intervenors on the term like were offered during the proceedings. Some comment therefore is warranted with regard to the various suggestions put forward on the concept of likeness by those who participated in the anticircumvention case.

Perhaps the most important comment that can be advanced focuses on the irrelevance, at least as to an analysis of Article VI, of any of the observations offered about the meaning of the term like during the proceedings against the EC. When Article VI of the General Agreement employs the term like, it does so by calling for a comparison of the price of the imported product with the price of a like product sold for domestic consumption in the state of supply. Yet the observations about this term put forward by participants and intervenors during the panel deliberations conceived of like in one of two entirely distinct contexts: a

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230. See *id.* ¶¶ 3.86-3.88. Other reasons for rejecting the approach included: dumping determinations on parts might not be possible because finished products may be dumped while parts are not dumped; dumping of parts might not be injuring domestic parts manufacturers; and, even if parts dumped with consequent injury, all exporting parts suppliers would be subject to anti-dumping duties, not just those associated with assembling electric typewriters, video cassette recorders, hydraulic excavators, etc. See *id.* ¶ 3.87.

231. See *id.* ¶¶ 3.20, 3.37; see also *id.* ¶ 3.76 (emphasizing United States view that anti-circumvention is based on the total framework of Articles VI, XX(d), and their related histories, while the EC based its view specifically on Article XX(d)).

232. See *id.* ¶¶ 3.70-3.92.

233. See *id.* ¶ 5.11.

234. See *id.* ¶¶ 5.4-5.8.

235. See *id.* ¶¶ 5.9-5.10.

236. See *id.* ¶¶ 5.12-5.18.

comparison of the imported parts and components of items assembled in the EC to finished imported items already subject to antidumping determinations;<sup>237</sup> and, a comparison of indigenous domestic items produced in the EC to the imported items subjected to levy.<sup>238</sup> Obviously, neither of these conceptions use like in the sense in which it appears in Article VI. The first envisions proceeding against imported parts and components whenever they are like the imported finished items under dumping duties. The second envisions a proceeding whenever the parts and components (or, for that matter, imported finished items) are like some item produced by a domestic industry in the state of importation. Article VI links dumping to discrepancies between the price of items as imported from a particular state of supply and as sold for consumption within the very same supplying state.<sup>239</sup>

Even though the comments offered on the term like seem inapposite to understanding its use in Article VI, and notwithstanding the panel's determination to refrain from examining the EC's action from the vantage of this specific GATT provision, the final opinion of the panel does contain some language that is at least suggestive of how likeness in Article VI is currently interpreted. This language appears in the context of the panel's consideration of the thrust of Article XX(d)'s reference to an exemption being available when a party adopts or enforces measures necessary "to secure compliance with laws or regulations" consistent with the GATT.<sup>240</sup> The Panel found the Community's anticircumvention duties were not within the ambit

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237. See *id.* ¶ 3.88 (discussing EC position that if parts and components were to be seen as imported finished items, then like would be extended beyond what GATT has viewed as acceptable); see also *id.* ¶ 3.98 (stating the Japanese position that, while the EC refuses to acknowledge it is engaged in the preceding over extension, such is nonetheless occurring); *id.* ¶¶ 4.18-4.19 (Hong Kong's position that parts could be viewed as finished items only where parts were so significant in the final product that it was substitutable with the final product").

238. See *id.* ¶ 4.7 (describing Canada's understanding that any item proceeded against must cause injury to a corresponding like domestic item); see also *id.* ¶ 4.29 (discussing Singapore taking a similar approach).

239. GATT does not use like in either of the two ways suggested. The 1979 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, see BISD 26th Supp. at 171, and the EC Regulations in dispute in the instant case, however, both use like in the second sense. Since both legal instruments were in play in the EC/Japan dispute, the use of like in that fashion is explicable. The use of like in the first sense does not appear in the instruments of concern, though there is some indication that such a use had been put forward by the Community at an earlier point. *Regulation on Imports*, *supra* note 207, ¶ 4.19 n.1 (noting Hong Kong's observation that the EC had raised this in the context of a 1988 GATT Committee meeting).

240. See *id.* ¶¶ 5.14-5.18.

of this quoted terminology. The Panel stated that this exemption extended only to measures essential to ensure antidumping duties on imported finished products were enforced; it did not include measures (i.e., anticircumvention duties) designed to attain the spirit or objective of laws and regulations consistent with the General Agreement (i.e., the EC's antidumping laws for imported finished products). The Panel thus expressed a preference for construing GATT exception provisions narrowly.<sup>241</sup> The Panel's perception was that, in addition to other provisions (e.g., Articles XII and XIX), Article VI's authorization on the imposition of entry duties to adjust the price of imports was a departure or exception from the idea of no entry duties in excess of those appearing in the schedule of concessions. If Article XX(d) could be construed to mean importing states were at liberty to pursue the spirit or objective of Article VI, then whenever laws or regulations consistent with that provision were unable to attain the spirit or objective, measures totally inconsistent with GATT would be permissible. Yet Article VI is clear in attaching specific conditions to its invocation. Thus, the panel concluded, Article XX(d) cannot be given a construction that renders nugatory Article VI's character as a specifically conditioned exception.<sup>242</sup>

The Panel, though scrupulously avoiding consideration of the Community's action in light of Article VI, nevertheless illuminated the meaning of that Article's terms by its discussion of the interaction between Article XX(d) and GATT exceptions. Quite obviously the Panel saw Article VI, and other exceptions, as subject to a very limited and conservative reading. This position was shared by those states participating in the proceedings who

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241. See *id.* ¶ 5.17; see also *United States—Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, GATT Doc. D57/R (July 11, 1991) (U.S. v. Can.), BISD 38th Supp. 30, ¶ 4.6 (again reiterating a narrow construction, this time preventing "such product" in Article VI(3) from being construed to allow countervailing duties on pork products when subsidies were granted on live swine).

242. The panel explicitly stated:

Each of the exceptions in the General Agreement—such as Articles VI, XII or XIX—recognizes the legitimacy of a policy objective but at the same time sets out conditions as to the obligations which may be imposed to secure the attainment of that objective. These conditions would no longer be effective if it were possible to justify under Article XX(d) the enforcement of obligations that may not be imposed consistently with these exceptions on the grounds that the objective recognized to be legitimate by the exception cannot be attained within the framework of the conditions set out in the exception.

ventured any comment on the matter.<sup>243</sup> This circumscribed approach to Article VI would appear completely consonant with its goal or purpose. Specifically, by interpreting the antidumping authority in a strict fashion, the balance of trade that naturally emerges from tariff concessions negotiated during any particular round is allowed to surface in an unfettered way. The apparent acceptance by the disputants of this objective in the Japan/EC case is evidenced by their proffered observations about the relationship between Article VI, protectionism, and trade flows resulting from the overall liberalization effected by the GATT.<sup>244</sup> Given this consensus regarding a narrow construction of the anti-dumping provision, and the prevention of abusive duty practices by importing states as a principal focus of that very same provision, it would seem best to read the term like in Article VI as referring to products that are identical or very closely similar. Doing so characterizes as dumping only pricing practices that result in the importation of products at a price below what the same products are sold for when destined for consumption in the supplying state. Down-grade differences resulting in lower price figures for imports prevent the receiving state from ignoring the lack of identity or close similarity and proceeding to impose an antidumping duty. The possibility of abuse by exporting states is kept in check by the fact that slight differences may render products unlike, although the effect is to allow the importing state to make pricing comparisons on the basis of cost of production.<sup>245</sup> From the standpoint of theory, all this promotes consumer purchasing in an environment of competitive advantage. Producers best able to satisfy the needs and desires of the purchasing public at prices that are attractive are allowed to capitalize on that position. Disruptions consequent to skewed

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243. See *id.* ¶¶ 3.57-3.58 (stating comment by Japan on Article VI being a "limited exception" invocable "only in exceptional circumstances"); 3.70 (discussing comment by EC that Article XX(d), which the Community argues interacts with or supplements VI, is to be invoked only "as a last resort"); 4.14 (describing Hong Kong's observation that Article VI was "specifically circumscribed" and that general exceptions like Article XX(d) should be interpreted "narrowly" so as to avoid approaches "inconsistent with specific provisions" like Article VI); 4.26 (describing statement by Singapore that Article VI appears only in "exceptional circumstances" and is to be "interpreted narrowly").

244. To be sure, there was disagreement between the Community and Japan about what this relationship meant *vis-à-vis* the EC's anti-circumvention duties. The Community insisted the relationship meant Article XX(d) could be used to stamp out unfair trade practice strategies designed to get around Article VI. See *id.* ¶¶ 3.73, 3.99. Japan asserted, on the other hand, that any action resulting in duties above the bound rates had to be justified on the basis of meeting Article VI's specific requirements. See *id.* ¶¶ 3.68, 3.93.

245. See GATT, *supra* note 5, art. VI (1)(b)(ii) (applying whenever likeness is absent).

pricing practices or complicating supplemental fiscal impositions are impermissible.

#### D. Article XI: Quantitative Limitations

There have been a number of GATT panel decisions concerning the proscription of quantitative limitations contained in Article XI of the General Agreement on Tariffs and Trade. No less than seven decisions have offered insight about the meaning of the like products language appearing in paragraph 2 of Article XI, the portion setting forth the exceptional circumstances under which quantitative limitations may be imposed. Two points need to be noted before proceeding to examine the GATT jurisprudence on Article XI's conception of likeness. The first is that a broad range of measures have been utilized by importing states to affect shipments from supplying states. The spectrum range includes quotas,<sup>246</sup> permits,<sup>247</sup> minimum import prices,<sup>248</sup> and state licensed import monopolies.<sup>249</sup> In each and every case, however, claims that the measures employed fell within the ambit of the exceptional language of Article XI(2)(c)(i) or (ii) have been rejected.<sup>250</sup> The second point relates to the reference in the

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246. In chronological order, see *EEC Restrictions on Imports of Apples from Chile*, GATT Doc. L/5047 (Nov. 10, 1980) (Chile v. EEC), BISD 27th Supp. 98 [hereinafter *Chilean Apples I Case*]; *Japan-Restrictions on Imports of Certain Agricultural Products*, GATT Doc. L/6253 (Mar. 22, 1988) (U.S. v. Japan), BISD 35th Supp. 163 [hereinafter *Japan-Restrictions on Imports*]; *European Economic Community Restrictions on Imports of Dessert Apples-Complaint by Chile*, GATT Doc. L/6491 (June 22, 1989) (Chile v. EEC), BISD 36th Supp. 93 [hereinafter *Chilean Apple II Case*]; *European Economic Community Restrictions on Imports of Apples-Complaint by the United States*, GATT Doc. L/6513 (June 22, 1989) (U.S. v. EEC), *id.* at 135 [hereinafter *EEC/US Apple Case*]; *Canada-Import Restrictions on Ice Cream and Yoghurt*, GATT Doc. L/6568 (Dec. 5, 1989) (U.S. v. EEC), *id.* at 68 [hereinafter *Ice Cream and Yoghurt Case*].

247. See *Ice Cream and Yoghurt Case*, *supra* note 246.

248. See *EEC—Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables*, GATT Doc. L/4687 (Oct. 15, 1978) (U.S. v. EEC), BISD 25th Supp. 68 [hereinafter *Tomato Case*].

249. See *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT Doc. D510/R (Nov. 7, 1990) (U.S. v. Thail.), BISD 37th Supp. 200 [hereinafter *Cigarette Case*].

250. Beginning with the earliest case, see *Tomato Case*, *supra* note 248, ¶ 4.14; *Chilean Apple I Case*, *supra* note 246, ¶ 4.10; *Japan-Restrictions on Imports*, *supra* note 246, ¶¶ 6.1-6.9; *Chilean Apple II Case*, *supra* note 246, ¶ 13; *EEC/US Apple Case*, *supra* note 246, ¶ 5.26; *Ice Cream and Yoghurt Case*, *supra* note 246, ¶ 84. *Cigarette Case*, *supra* note 249, ¶ 87; see also *Chilean Apple II Case*, *supra* note 246, ¶ 12.4 (comment by Panel to effect that no contracting party has been able to satisfy the stringent requirements of Article XI's exceptions). Further, it bears noting that the panel decisions have drawn a distinction between prohibitions imposed by the importing country and mere restrictions. The exceptional language of Article XI(2)(c) only protects the latter. See, e.g., *id.* ¶ 12.5



opening terminology of Article XI(2)(c) to the concept of in any form. As discussed above,<sup>251</sup> this configuration enlarges or expands the idea of likeness, though focusing on how the imported item compares with an item produced in the state imposing a quantitative limitation. (It will be recalled that Article XI uses the term like in regard to focusing on how an item produced in the importing state compares with the one supplied from abroad.) Several panel decisions taken up below have gone to great pains to deal with the significance and meaning of the words in any form.<sup>252</sup> In keeping with that emphasis, this concept will be discussed separately from the notion of like products.

The place to begin in understanding Article XI's use of the term like, and the related idea of in any form, is with the constructional perspective of those involved in disputes precipitated by the imposition of quantitative limitations. The provisions of Article XI(2)(c)(i) and (ii) have been characterized by complainants as narrowly drawn<sup>253</sup> or, more confining, lending themselves to narrow construction.<sup>254</sup> This presumably results because the provisions are exceptions. Basic obligations might be construed judiciously, but derogations from these obligations are to receive a circumscribed reading. At first, the panel decisions refrained from going further than to observe the extreme difficulty faced by states in meeting all the requirements connected with the exceptions of Article XI(2)(c).<sup>255</sup> Recently, however, there has been at least one clear expression that both Article XI(2)(c)'s exception for supporting a parallel domestic production or marketing limit and for dealing with temporary surpluses are to be read very narrowly.<sup>256</sup>

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(suggesting though imports are stopped when a quota level is reached, the action is still a "restriction"); *Japan-Restrictions on Imports*, *supra* note 246, ¶ 5.3.1.2 (allowing importation for limited purposes is a de facto "prohibition"); *Cigarette Case*, *supra* note 249, ¶¶ 19(a) (United States. argument of state import monopoly not importing for many years constituting "de facto prohibition"), 67 (panel view that state import monopolies, not just quotas, have to satisfy "restriction" v. "prohibition" distinction).

251. See *supra* text accompanying parts I.D., II.D. (In Any Form).

252. See *Tomato Case*, *supra* note 248; *Japan-Restrictions on Imports*, *supra* note 246; *Ice Cream and Yoghurt Case*, *supra* note 246; *Cigarette Case*, *supra* note 249.

253. *EEC/US Apple Case*, *supra* note 246, ¶ 3.3.

254. See *Tomato Case*, *supra* note 248, ¶ 3.27 (assertion by United States); *Japan-Restrictions on Imports*, *supra* note 246, ¶ 3.2.2 (assertion by United States); *Cigarette Case*, *supra* note 249, ¶ 18 (argument by United States).

255. See *Chilean Apple II Case*, *supra* note 246, ¶ 12.4.

256. See *Ice Cream and Yoghurt Case*, *supra* note 246, ¶ 59.

How has that approach played itself out with regard to Article XI's use of the term like product? Essentially it has meant that panels have distinguished between products competitive with one another, and those that may not be but yet are "practically identical." A competitive relationship between items is neither necessary nor sufficient to result in likeness.<sup>257</sup> What is essential is a sharing of characteristics that permits the items to be considered virtually the same.<sup>258</sup> In perhaps the earliest of the Article XI like product cases, this approach meant that fresh tomatoes were questionable as a like product to tomato concentrate, when the latter was subjected to import restriction and the former to domestic limitation. Clearly, were domestic tomato concentrate limited, the product in the state of importation could have been considered like the imported product subject to restriction.<sup>259</sup> The identity between such products would have been marked;<sup>260</sup> the same is true with respect to a pairing of imported fresh tomatoes and domestic fresh tomatoes. Though there can be differences among types of tomato concentrates, it appears that practically identical is adequately flexible to accommodate products with some degree of difference. It has been argued that varietal differences between items of the same class or type (i.e., Valencia oranges versus

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257. See *Japan-Restrictions on Imports*, *supra* note 246, ¶ 5.1.3.4 (relying on negotiating history for this position).

258. See *Tomato Case*, *supra* note 248, ¶ 4.12; *Japan-Restrictions on Imports*, *supra* note 246, ¶¶ 5.1.3.4.

259. See *Tomato Case*, *supra* note 248, ¶ 4.12. The *Tomato Case* is one of two categories of Article XI like/product in any form cases reviewed herein. As noted below, the cases concern import restrictions on either "fresh" products or on "processed" products, when limitations on domestic agricultural or fisheries products happen to be in place. See *infra* notes 268-79. The *Tomato Case* involved an EC system of minimum import prices, licenses and surety deposits on imported tomato concentrate. *Tomato Case*, *supra* note 248. Among other things, the minimum import price was said by the EC to work in tandem with a production and marketing limitation on domestic tomatoes that operated through a system of intervention prices resulting in withdrawals of such tomatoes from availability. The fear was that low priced imported tomato concentrate would be purchased by those otherwise interested in purchasing the limited domestic fresh tomatoes. Obviously the case falls in the category of cases on processed imports. Nonetheless, the panel took the occasion, as others have from time to time, to comment on the idea of likeness. For our purposes, however, the cases stressed with regard to like products involve restrictions on imports of fresh items. Processed items are stressed in connection with my discussion of in any form.

260. This is not to say that restrictions on imports of processed goods are permissible under Article XI 2(c)(i) and (ii) when virtually identical domestic processed goods face limitation. As is noted below, the permissibility of such restrictions hinges on whether Article XI contemplates the use of import restrictions in relation to protecting domestic processing industries. See *infra* notes 271-75.

Naval oranges) result in the items concerned being thought of as unlike.<sup>261</sup> On several occasions, GATT panels have flatly rejected this argument.<sup>262</sup> They have also rejected the idea that differences in price, quality, and freshness render products unlike.<sup>263</sup> Indeed, it seems that while the exceptions of Article XI(2)(c) referring to the concept of likeness may be subject to a narrow reading, GATT panels considering quantitative restrictions on imports under the exceptional language of Article XI have

261. See *Chilean Apple I Case*, *supra* note 246, ¶ 3.10.

262. See *id.* ¶ 4.4; *Chilean Apple II Case*, *supra* note 246, ¶ 12.7; *EEC/US Apple Case*, *supra* note 246, ¶ 5.7. The *Chilean Apple I Case* is the earliest expression by a panel on this point. There, Chile complained, *inter alia*, that the European Community's quota restrictions on imports of apples, to support the Community's system of intervention prices resulting in withdrawals of domestic apples from availability, could not be justified by Article XI(2)(c), as Chilean apples were not of the same variety as the EC apples under limitation. In finding in favor of Chile, the panel nonetheless determined that varietal differences were insignificant. For consistency with Article I MFN, see rejection of organoleptic differences as a basis for distinguishing between products in *supra* notes 141-43.

263. See *Chilean Apple II Case*, *supra* note 246, ¶ 12.7; *EEC/US Apple Case*, *supra* note 246, ¶ 5.7. In the *Chilean Apple II Case*, decided nine years after the original apple dispute between Chile and the EC, it was argued that the earlier decision against the EC in the *Chilean Apple I* case, though implemented by the Europeans, had not completely disposed of all Article XI issues. While *Chilean Apple I* decided that the Community's Golden Delicious apples were like Chile's Red Delicious and Granny Smith apples, it found reliance on paragraphs 2(c)(i) and (ii) of Article XI to be inappropriate. The requirement of governmental measures operating to restrict domestic quantities was presumably met by the EC's system of private producer withdrawals (though there was little discussion of this point, see *Chilean Apple I Case*, *supra* note 246, ¶ 4.6), but those mandating public notice of the quantities or values of permissible imports, the maintenance of a proportion that would be expected to rule without import restrictions, and the existence of a surplus that is temporary were not satisfied. See *id.* ¶¶ 4.7-4.9. In *Chilean Apple II*, Chile pressed for a decision adverse to the EC on issues such as governmental measures operating to restrict domestic quantities, the extent to which the import restrictions could be viewed as necessary to the enforcement of the domestic governmental quantitative restrictions, and the existence of a surplus that is temporary when a sudden aberrational spike occurs in domestic quantities that appear to show a condition of structural surplusage. The panel found that the voluntary nature of the domestic withdrawal system did not prevent it from being considered a governmental measure, as the crux was whether the program was "essentially dependent" on governmental initiative. See *id.* ¶¶ 12.8-12.9; *Japan-Restrictions on Imports*, *supra* note 246, ¶¶ 5.1.3.3, 5.3.5.1, 5.4.1.4. But see *Tomato Case*, *supra* note 246, ¶ 4.13 (opposite conclusion eleven years earlier under the same EC program). The measure, however, was not found to restrict domestic quantities, as its thrust was aimed principally at supporting domestic prices, while the exceptions of Article XI exempt actions aimed principally at limiting supply, though price is consequentially affected. See *Chilean Apple II Case*, *supra* note 246, ¶¶ 12.10-12.18. The panel offered no response to Chile's contentions on the necessity of the quantitative import limits, but it did express some skepticism about the matter of upward supply blips during periods of structural surplusage. See *id.* ¶ 12.19.

generally been satisfied that products are like whenever, from a consumer and marketing perspective, their essential character allows them to be seen as "substantially similar."<sup>264</sup> This appears to mean that even after-season, storage-fresh items can be viewed as like recently-picked, fresh items of the same sort.<sup>265</sup> While the juxtaposition of like and directly substituted in Articles XI(2)(c)(i) and (ii) suggests to some the inappropriateness of this approach in the absence of a finding of "no substantial domestic production of the like product,"<sup>266</sup> a GATT panel as recently as 1989 refused to accept the call for construing like as meaning anything more narrow and confining than "substantial similarity."<sup>267</sup> There is no doubt that the use of directly

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264. See *Chilean Apple II Case*, *supra* note 246, ¶ 12.7; *EEC/US Apple Case*, *supra* note 246, ¶ 5.7. The *Chilean Apple II* and the *EC/US Apple* cases were decided by the same panelists and adopted by the GATT Council on the same day.

265. Chile seems to have made an argument against that kind interpretation of like in the *Chilean Apple II Case*. See *Chilean Apple II Case*, *supra* note 246, ¶ 3.14-3.16 (emphasizing that recently-picked fresh Red Delicious and Granny Smith apples from Chile were competing during the spring and summer with after-season, storage-fresh Golden Delicious apples grown in the EC). See *id.* ¶ 12.7 (not accepting Chilean argument).

266. See *EEC/US Apple Case*, *supra* note 246, ¶¶ 3.13-3.15 (submission by the United States). This case involved a complaint by the United States against the European Community concerning quantitative limitations on imported apples imposed under the program involved in the *Chilean Apple II* case. The essential argument advanced by the United States was that the panel should rethink its position in the earlier *Chilean Apple I* case about varietal, price, quality, and freshness differences not providing an adequate justification for considering products of the same general sort to be unlike. Rejecting the invitation, the panel continued to follow what had been done in *Chilean Apple I* and *II*. Any doubt extant from the language in the *Chilean Apple II Case* with regard to the inability of intermittent upward spikes in domestic supply constituting a surplus that is temporary when there exists substantial structural surplusage, is completely eliminated in the *EEC/US Apple Case*. The panel concluded that, since supply variations are to be expected from year-to-year, such upward blips do not satisfy the concept of temporary. *EEC/US Apple Case*, *supra* note 246, ¶ 5.19. Many of the other points made in the case replicate what appeared in *Chilean Apple II*.

267. *Id.* ¶ 5.7 (not accepting the United States position). It should be observed that in the *EEC/US Apple Case*, two northern hemisphere growing areas with the same growing season were involved. The *Chilean Apple II Case* (as well as the earlier *Chilean Apple I Case*) matched a southern hemisphere area against the EC in the north, and thus pitted recently-picked fresh against after-season, storage-fresh apples. While it might have been possible to structure an argument that the *Chilean Apple I* and *II* cases hinged on directly substituted (i.e., at the time recently-picked apples from Chile were imported there existed "no substantial domestic production of the like product"), the panels in both cases focused only on the concept of like products. In the *EEC/US Apple Case*, since there was simultaneous production in the Community, like was the only concept available. The United States argument was, as pointed out in *supra* note 266, that the panel should reconsider the whole idea, accepted in the *Chilean Apple I Case*, of an apple being an apple, despite differences in variety, quality, etc. By refusing to do so, the panel clearly indicated substantial similarity is the standard

substituted, a somewhat commodious standard, in conjunction with reference to like indicates that the latter term be read narrowly. Nonetheless, recourse cannot be had to the broader concept if there is domestic production of the same product as that being subjected to import restriction. Thus, the correctness of refraining in such a situation from using nonessential differences between items being compared as a basis for finding the items fail to satisfy the test of likeness at least suggests itself as a distinct possibility.

One should not be led to conclude that, because it has been found questionable whether domestic fresh tomatoes are like imported tomato concentrate,<sup>268</sup> processed imports made out of the same kinds of domestic fresh items subject to limitation within the state of importation cannot be restricted in accordance with the exceptions of paragraph 2(c) of Article XI. This implicates the major point alluded to earlier about Article XI(2)(c)(i) and (ii)'s use of like and in any form.<sup>269</sup> To stress the distinction between these concepts, likeness refers to situations in which the imported products subject to restriction are fresh, and there exists a governmental measure in the importing state placing limitations on the same fresh product of domestic origin. In any form, on the other hand, refers to situations in which the restricted imports are items that have been processed from fresh products, while the governmental measure in the state of import limits the same fresh products of domestic origin. In sum, like covers comparisons of fresh to fresh, and in any form covers comparisons of processed to fresh.<sup>270</sup> Consequently, despite expressed reservations about finding fresh items (such as tomatoes) to be like processed items (such as tomato concentrate),<sup>271</sup> Article XI(2)(c) contains in the concept in any form a mechanism that provides importing states with an authorization for restricting incoming shipments of processed products.<sup>272</sup>

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for likeness, whether the products concerned find themselves facing each other in or out of season. One might have been in a position of understanding "substantial similarity" after the *Chilean Apple II Case* as somehow relating to situations in which the operative standard is that of directly substituted. With the *EEC/US Apple Case*, it is quite apparent the test applies even if the comparatively narrower standard of likeness is in play.

268. See *Tomato Case*, *supra* note 248, ¶ 4.12 ("unable to decide if fresh tomatoes grown within the Community would also qualify.").

269. See *supra* text accompanying notes 250-56.

270. See *Japan-Restrictions on Imports*, *supra* note 246, ¶ 5.3.1.4; *Ice Cream and Yoghurt Case*, *supra* note 246, ¶ 67.

271. See *supra* note 268 and accompanying text.

272. See *supra* note 270 and accompanying text. In addition to the *Ice Cream and Yoghurt Case*, *Japan-Restrictions on Imports Case*, and the *Tomato Case*, the

One may observe that like refers to or covers comparisons between domestic fresh and imported fresh, while in any form does the same for comparisons between domestic fresh and imported processed goods. However, that should not be thought of as leaving open the possibility that one of these two notions might also allow comparisons between domestic processed and imported processed, and thus the imposition of import restrictions in a case when domestic processed goods are subject to some form of government limitation program.<sup>273</sup> If the idea of likeness must defer to in any form when import restrictions are imposed on processed goods from abroad, then it would seem the restrictions could not be justified on the basis of the existence of a governmental program limiting like domestic processed goods.<sup>274</sup> A GATT panel in 1990 found it completely misplaced to rely on in any form to justify restrictions on imported processed goods when the same kinds of domestic processed goods are under an internal limitation scheme.<sup>275</sup> Both with regard to like, as well as to in any form, these conclusions are supported by the fact that Article XI(2)(c) was designed to provide protection to the producers of agricultural and fisheries products, not to those involved in the processing of these products.<sup>276</sup> In conjunction with stressing the differentiation between when the concept of like applies and when that of in any form applies, this latter point is integral to a thorough understanding of Article XI(2)(c). Imports of processed goods from trading partners cannot be

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GATT decisions involving restrictions on processed, rather than fresh products is rounded out by the *Cigarette Case*, *supra* note 249.

273. See *Tomato Case*, *supra* note 248, ¶ 4.12 ("the Panel considered that tomato concentrate produced within the Community would qualify as 'the like domestic product' . . ."). It should be pointed out that on at least two occasions GATT parties have suggested theories about like including processed to fresh comparisons. See, e.g., *Japan-Restrictions on Imports*, *supra* note 246, ¶ 3.2.8 (Japanese argument from the absence of a definitive understanding of like). See also *id.* ¶¶ 3.4.4, 3.4.16, 3.4.28, 3.4.34, 3.4.44; *Ice Cream and Yoghurt Case*, *supra* note 246, ¶ 55 (arguing that like includes some processed dairy items because they can be "converted" back to fresh milk); *id.* ¶¶ 23-24 (Canada arguing that like might include some processed items).

274. There are no GATT panel decisions specifically addressing whether like can or cannot include comparisons of processed to processed. Nonetheless, the very idea of restrictions on processed imports being dealt with by the phrase "in any form" certainly suggests the proposition stated in the text.

275. See *Cigarette Case*, *supra* note 249, ¶ 70 (where restrictions are imposed on imported cigarettes, "the only domestic marketing and production restrictions that would be relevant . . . were those . . . imposed on the production of leaf tobacco—not those on cigarettes . . ."). Though the panel in paragraph 70 speaks in terms of like, the panel's reference to "Note ad Article XI:2(c)" clearly indicates this is an in any form case.

276. See *Japan-Restrictions on Imports*, *supra* note 246, ¶ 5.1.2; *Ice Cream and Yoghurt Case*, *supra* note 246, ¶¶ 59, 60.

restricted under Article XI(2)(c) because domestic processed goods of the same sort happen to be under government limitation. The agricultural and fisheries exception from the general prohibition on quantitative limitations was not designed to protect the domestic processing industry.

If the concept of likeness applies to situations in which comparisons are between fresh and fresh, and the very meaning of like is satisfied when, from a marketing and consumer perspective, products are considered substantially similar, what do in any form and directly substituted mean when they apply? Specifically, what do they mean in comparisons between domestic fresh and imported processed, and when insufficient domestic production exists to allow comparisons on the basis of likeness? Though there have been occasions when the concept of substitutable has been referenced in Article XI(2)(c) cases,<sup>277</sup> it appears that the panel decisions have not addressed its meaning. However, as alluded to above, given that substitutable appears in conjunction with the reference to like, it seems safe to conclude that the former term is broader and more inclusive. Thus, if like has been perceived as meaning substantially similar and discounting differences in price, quality, freshness, and variety,<sup>278</sup> then substitutable might be viewed as meaning items with definitely distinct basic character differences that are nonetheless viewed by consumers as capable of meeting the same essential purposes (e.g., mangoes and oranges, mutton and beef). The meaning of in any form has been quite plainly elaborated by several GATT panels. The technical requirements found in Article XI(2)(c)'s interpretive Note in the Addendum to the General Agreement define the concept itself, and the panel decisions dealing with in any form flesh out those technicalities. Most instrumental in this respect have been the 1988 *Japan-Restrictions on Imports* case<sup>279</sup> and the 1989 *Ice Cream and Yoghurt* case.<sup>280</sup>

The *Japan-Restrictions* case involved import restrictions on numerous agricultural products supplied by the United States to Japanese consumers. The domestic production restrictions themselves were largely nonmandatory, nonstatutory, "administrative guidance" designed to reduce the amount of acreage cultivated by local farmers; they were enforced through reliance on persuasion and peer pressure rather than through

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277. See *supra* note 267 and accompanying text (observing that in the *Chilean Apple I* and *Chilean Apple II* Cases directly substituted was theoretically available).

278. See *supra* notes 264-67.

279. See *supra* note 246.

280. See *id. ef*

specific civil penalties.<sup>281</sup> Nonetheless, given the compliant nature of social actors within Japan, the restrictions were found by the panel to be the kinds of governmental measures contemplated by Article XI(2)(c).<sup>282</sup> The case establishes at least three prominent points with regard to satisfying the requirements in the GATT Addendum's definition of in any form, requirements that the imported product be in an "early stage of processing" so that, if not restricted, imports would "tend to make the restriction on the fresh [domestic] product ineffective."<sup>283</sup> First, the case makes clear that whenever import restrictions are imposed on processed goods, the restrictions are unjustifiable if lesser processed competitive or even like fresh goods are permitted entry without restriction.<sup>284</sup> Any other conclusion would render the requirement connecting import restrictions on processed goods with the effectiveness of domestic limitations on fresh goods completely and totally meaningless. Second, the processing of imports that results in the agricultural or fisheries products being made "consumer-ready" goes beyond leaving the end product in an early stage of processing.<sup>285</sup> Only items that have undergone initial processing from the fresh state fall within the concept of in any form.<sup>286</sup> Third, and directly related to the last point, the notion of a product being in an "early stage of

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281. See *Japan-Restrictions on Imports*, *supra* note 246, ¶¶ 3.25-3.26 (United States contentions and Japan's responses).

282. *Id.* ¶ 5.3.5.1 (panel's view that "effectiveness" in actually reducing production is more important than the method used to accomplish such); see also *id.* ¶¶ 5.4.1.4 (panel's view that social organization, though irrelevant in some instances, can be important in the context of "effectiveness"), ¶ 5.1.3.3 (concept of "effectiveness" derives from negotiating history of Article XI(2)(c)). Compare *id.* ¶ 5.4.1.4, on largely voluntary measures meeting the requirement of the addendum to Article XI(2)(c)'s concept of in any form, with the rejection of this possibility in the *Tomato Case*, *supra* note 248, ¶ 4.13. The seeming inconsistency is explicable in light of the panel's assumptions about the nature of Japanese society.

Attention should also be called to two other points. Paragraph 5.3.5.1 of the *Japan-Restrictions on Imports Case* is so focused on the test of effectiveness that it endorses the idea that the withholding by the government of a subsidy from farmers who fail to meet government reduction objectives may satisfy the need for an enforceable program to limit production. Further, it would also appear that the panel has little concern with the fact a program is aimed at acreage reduction instead of limits on production as such, since effectiveness can be achieved through measures indirectly reducing actual production available.

283. See *supra* note 75.

284. See *Japan-Restrictions on Imports*, *supra* note 246, ¶ 5.3.11 (processed canned pineapple imports cannot be restricted if imports of frozen pineapple are not restricted).

285. *Id.* ¶ 5.3.4 (comments made in context of dairy products).

286. *Id.*



processing" means that it requires further processing.<sup>287</sup> In the event no additional processing is contemplated, then the product concerned cannot qualify for the processed product exception under Article XI(2)(c)(i) and (ii).<sup>288</sup>

The 1989 *Ice Cream and Yoghurt* case<sup>289</sup> involved a United States complaint about a Canadian program to restrict imports of ice cream and yoghurt. The restrictions were said to be part of an overall plan by Canadian dairy farmers to control milk production. Essentially the plan required that all raw milk produced by those farmers be sold to government marketing groups, who provided compensation to the extent of compliance with individual production quotas. Imports of ice cream and yoghurt were restricted because it was thought that, if left unrestricted, they would displace sales of domestically produced ice cream and yoghurt made from government-controlled domestic milk, thereby undermining the economic benefits from the Canadian dairy program.<sup>290</sup> The panel ruled against Canada's contention that the restriction on these processed imports was permissible under the reference to in any form. The panel disagreed with the conclusion in the *Japan-Restrictions* case that "consumer-readiness" prevents processed products

287. *Id.* ¶ 5.3.2.2 (panel observations made in context of Japan's restrictions on processed cheese). The essentialness of finding that a processed product must look toward further processing in order to be considered in an "early stage of processing" under the concept in any form, was confirmed in the 1990 *Cigarette Case*, *supra* note 249, ¶ 70 ("Since cigarettes could not be described as 'leaf tobacco in an early stage of processing' because they . . . were not intended for further processing, the Panel found that they were not among the products eligible for import restrictions under Article XI:2(c)(i).") The *Thai Cigarette* case involved a 1989 claim by the United States that Thailand was violating, *inter alia*, Article XI of the GATT by maintaining an import licensing system that granted import licenses to no one but the Thai Tobacco Monopoly, which had imported on only three occasions since 1966. Thailand contended the system was part of an overall program directed at reducing smoking by its population. In finding against the Thai contention that the restrictions were exempt by Article XI(2)(c), the Panel not only reiterated the point that, for a processed item to meet the standard spelled out in the GATT Addendum for the concept in any form, the item must look toward further processing (and cigarettes certainly do not), but went on and made the additional point, noted earlier, at *supra* note 275, that Article XI(2)(c) does not contemplate import restrictions on *processed goods* being justified by the fact that a system of government controls exists on comparable *domestic processed goods*.

288. The *Japan-Restrictions on Imports*, *supra* note 246, also determined that the Japanese practices inconsistent with Article XI could not be justified by reference to the state-trading provisions of Article XVII, or the general exception provisions of Article XX, in particular paragraph (d) thereof. See *id.* ¶¶ 5.2.1-5.2.2.3. For arguments by the opposing parties on this front, see *id.* ¶¶ 3.3.1-3.3.8.

289. See *supra* note 246.

290. *Japan-Restrictions on Imports*, *supra* note 246, ¶¶ 5-12, 25, 28, 35.

from being in an "early stage" and thus within Article XI's exceptions.<sup>291</sup> This seems to make sense in that consumer-ready goods are not necessarily synonymous with goods that have undergone extensive processing. This conclusion also is supported by an even more recent Article XI decision that stressed the intention of further processing as the real standard for determining whether goods were still in an early stage of processing, not consumer-readiness.<sup>292</sup>

Aside from the important point about consumer-readiness, the *Ice Cream and Yoghurt* case notes another especially significant point. Specifically, the overall objective of in any form is to assure a close degree of consumer use between the processed imported product being restricted and the domestic fresh product subject to government limitation.<sup>293</sup> This makes sense from the perspective of the definition of in any form, which speaks of a processed product that competes with the limited domestic fresh. It also makes sense from the perspective of in any form offering an opportunity to restrict imports of processed goods, as imports of fresh goods can be restricted only when the like kinds of domestic fresh items are subject to limitation. Likeness exists whenever, from a marketing or consumer perspective, the products being compared are substantially similar. It seems quite natural that processed products bearing close consumer similarity to certain domestic fresh items should be subject to import restrictions.

The strikingly close relationship required for both likeness and in any form suggests a basic theme for Article XI and its exceptions. By generally prohibiting quantitative restrictions, paragraph 1 of Article XI reflects an antiprotectionist theme, one that seeks to allow those with natural economic advantages to capitalize on their position. States are not free to employ quantitative restrictions to compensate for disadvantages they face. The exceptions contained in Article XI(2)(c)(i) and (ii) do create departures from antiprotectionism. The departures, though, still operate within the overall theme or theory of favoring normal competitive relationships. This is evident from the fact the exceptions are not generally available to overtake the basic prohibition in other than pressing circumstances. Further,

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291. See *id.* ¶ 71 (rejection of U.S. argument that consumer-ready goods were not in an "early stage of processing").

292. See *supra* notes 287-88, discussing *Cigarette Case*. But see *Japan-Restrictions on Imports*, *supra* note 246, ¶ 5.3.12.3, where the panel apparently took the position that consumer-ready goods were not normally subject to further processing and, therefore, could not be in a "early stage" of processing.

293. See *Ice Cream and Yoghurt Case*, *supra* note 246, ¶ 69; see also *id.* ¶ 29 (United States taking same position).

unless the specific conditions of the exceptions are met, the quantitative restrictions authorized cannot lawfully be imposed. The conditions themselves are severely confined in paragraph 2(c)(i) and (ii) to instances of supporting domestic production or marketing limitations, or addressing temporary domestic surpluses. The idea, of course, is that in the case of a surplus, restrictions on imports seem explicable; in the case of domestic production and marketing limits, import restrictions make sense if they are in an amount in line with the domestic limits themselves.<sup>294</sup>

The GATT panel decisions reviewed above provide corroboration for the suggestions that Article XI(2)(c)(i) and (ii), and its references to like, directly substituted, and in any form, strives to establish an international trading regime based on the promotion of comparative economic advantage. The domestic limitation and temporary surplus exceptions of paragraph 2(c) have been deemed unavailable, as stated above, to provide protection to the domestic processing industry.<sup>295</sup> They also have been held unavailable to allow producers of fresh domestic agricultural or fisheries products to expand production.<sup>296</sup> In nonsurplus situations, the domestic limitation exceptions additionally have been held unavailable to allow government programs designed to limit supply simply by supporting a certain producer price level.<sup>297</sup> This does not mean, however, that import restrictions imposed in situations of surplusage are incongruous with the theme of comparative advantage. The restrictions respond to an aberrant and temporary situation and have nothing to do with supporting prices at historically high artificial levels. Several panels have stated that the fundamental

294. Restrictions on imports would not seem inconsistent with anti-protectionism in cases of surpluses that are temporary, or the use of domestic production and marketing limits, since the temporary nature of the surpluses suggest a short-term aberration, and use of domestic limits cannot serve as a justification for distorting the normal balance of trade. See GATT, *supra* note 5, art. XI(2)(c)(i)-(ii).

295. See *supra* note 275.

296. See, e.g., *Japan-Restrictions on Imports*, *supra* note 246, ¶ 6.3 (conditions of Article XII(c) imposed "to prevent the use of this provision for import restrictions that have the effect of expanding domestic production").

297. Obviously, the thrust of Article XI(2)(c)(ii), which applies in cases of temporary domestic surplus, may be seen as having a direct connection to supporting prices in order to help sustain domestic producers in somewhat aberrational situations. For non-surplus cases, the proposition stated in the text is voiced in the *Chilean Apple II Case*, *supra* note 246, ¶¶ 12.12-12.18; *EEC/US Apple Case*, *supra* note 246, ¶¶ 5.12-5.18. Note that both cases implicitly acknowledge the permissibility of domestic limitation programs not tied to production amount, rather than product selling price, though even programs of that nature tend indirectly to support price.

theory underpinning refusals to allow the like product and the in any form exceptions to be extended to these situations is to avoid the use of quantitative restrictions to protect noncompetitive domestic industry. In the earliest Article XI like product or in any form case, even the representative arguing the position of the party that had imposed quantitative restrictions and justified them by reference to the exceptional language of Article XI, acknowledged that paragraph 2(c) was not aimed at disrupting the "balance of advantages" that trading partners normally enjoyed.<sup>298</sup> Several of the succeeding decisions, up to the present, confirm at least the public fidelity of the GATT parties to the basic principle of competitive advantage.<sup>299</sup>

*E. Articles XIII(1) and XVI(4): Nondiscrimination and Subsidization*

When it comes to Articles XIII(1) and XVI(4), the relevant GATT panel decisions are not terribly helpful in deciphering the meaning of like products. These two provisions fix obligations on the parties to the General Agreement in regard to quantitative limitations and subsidies. Article XIII(1) requires states to refrain, when using authorized quantitative limitations, from discriminating against one party to the advantage of another.<sup>300</sup> Article XVI(4) requires that states exporting nonprimary products refrain from using export subsidies that result in the price of the exported product being lower than its price when sold in the home market of the exporting state.<sup>301</sup> Despite the failure of panel decisions to elaborate on the concept of likeness in these GATT provisions, they have shed some light on the basic theory underpinning the obligations the provisions articulate. Therefore, it is useful to devote at least a brief amount of space to a review of the propositions established by the decisions.

In the case of Article XIII(1), it is clear its requirements apply whenever a GATT party imposes quantitative limitations consistent with the provisions of the General Agreement.

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298 See the *Tomato Case*, *supra* note 248, ¶ 3.80 (submission by the European Community).

299. See *Japan-Restrictions on Imports*, *supra* note 246, ¶¶ 5.4.3 ("Article XI protected expectations on competitive conditions"), 3.2.11, 3.2.13 (United States argument to same effect); *Chilean Apple II Case*, *supra* note 246, ¶¶ 12.15 (Article XI(2)(c)(i) "not intended to be a provision permitting protective actions"), 12.16 ("not intended to provide a means of protecting domestic producers against foreign competition"); *EEC/US Apple Case*, *supra* note 246, ¶ 5.16; *Cigarette Case*, *supra* note 249, ¶¶ 19(c) (United States argument that the exceptions of Article XI not intended to be protective), 69 (panel agreeing that protective actions are to be avoided).

300. See *supra* notes 14-18 and accompanying text.

301. See *supra* notes 18-26 and accompanying text.

Limitations imposed inconsistent with Article XI, for instance, often result in determinations not to examine the measures under the prescriptions of Article XIII.<sup>302</sup> On the occasions when panels have looked beyond inconsistency with provisions such as Article XI and examined quantitative restrictions in the context of Article XIII(1), important principles of substantive law have been announced. For instance, a panel has decided that the use of restrictions mandatorily keeping out imports, and unilaterally imposed by the importing state against one specific state, are violative of Article XIII(1)'s nondiscrimination obligation, even when the same state imposes on other trading partners voluntary restrictions bilaterally negotiated.<sup>303</sup> Likewise, suspensions of import licenses entitling states to supply quantities of desired products violate Article XIII(1) whenever aimed at only one particular state.<sup>304</sup> The usual quota limits made effective by importing states can also prove violative of this article if some supplying states are left unaffected.<sup>305</sup>

With regard to the concept of like, virtually all the Article XIII(1) decisions take the term to mean whatever it means in the context of the operative prohibitory provision under which the acting state's restriction is challenged. Those challenges resting on Article XI evidence an understanding of Article XIII(1)'s reference to like that replicates the meaning of that term in Article XI(2)(c)(i) and (ii).<sup>306</sup> Similarly, challenges raising Article I apparently have taken Article XIII(1)'s use of like to mean the same thing that it means in the opening provision of the General Agreement.<sup>307</sup> Presumably, because the overall thrust of Article XIII is that of nondiscrimination,<sup>308</sup> the theme or theory running through the Article XIII(1) cases is allowing natural economic advantages to function without interference.

302. See e.g., *Japan-Restrictions on Imports*, supra note 246, ¶ 5.4.2 (no need to examine Japanese import restrictions under Article XIII, since they are impermissible under the exceptions of Article XI(2)(c)); *Ice Cream and Yoghurt Case*, supra note 246, ¶ 82 (taking same position).

303. See *Chilean Apple I Case*, supra note 246, ¶ 4.11.

304. See *Chilean Apple II Case*, supra note 246, ¶ 12.21.

305. See *Treatment by Germany*, supra note 129, ¶ 11 (but here, even though Portugal was receiving different treatment, it "was not based on the origin of the goods.")

306. This is not explicitly stated by the panel decisions, but it seems to be implicit. See, e.g., supra notes 303 and 304.

307. See *Treatment by Germany*, supra note 129, ¶¶ 10-12 (examining both Articles I and XIII in same context).

308. See, e.g., *Chilean Apple I Case*, supra note 246, ¶ 12.25 ("Article XIII's overall concern with the non-discriminatory application of quantitative restrictions"); *EEC/US Apple Case*, supra note 246, ¶ 5.23.

In the case of Article XVI(4), no particular panel decisions focusing on likeness exist. There have been decisions of the GATT dealing with the issue of subsidization, however, and these certainly illuminate the basic theory that resonates throughout Article XVI. One of the early GATT cases commented on domestic subsidization available to locally produced items, but not to those produced in foreign states.<sup>309</sup> Although the practice involved implicated paragraph 1 of Article XVI, likeness in the context of subsidization was not addressed. The panel nevertheless did take the opportunity to observe that the practice of subsidization, albeit in this case internal, was not to be employed in a fashion upsetting the competitive relationships that would otherwise obtain between trading partners or competitors.<sup>310</sup> A 1958 panel decision involving export subsidies on primary products displacing sales of a competitor state in third-party markets<sup>311</sup> found a similar violation, this time under Article XVI(3).<sup>312</sup> Again, the decision spoke of subsidy permissibility inquiries keeping in mind the satisfaction of importer needs in "the most effective and

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309. See *Australian Subsidy*, *supra* note 128. The case involved the withdrawal of a domestic subsidy that had previously been available to the foreign produced item from Chile. The chief challenges raised by Chile, though, concerned the MFN provision of Article I, and the national treatment obligation of Article III. As reviewed above, *see* part III.A., these challenges hinged on the concept of "likeness." The panel, however, also held forth on Article XVI.

310. *Id.* ¶ 10 ("improve its competitive position either on the domestic market or on foreign markets").

311. Export subsidy cases typically involve sales within another state displacing sales by domestic producers within that country, or, as here, sales in a third state displacing those made by a competitor nation which markets its goods in the third state. The former type of situation often leads to explorations about the possibility of imposing countervailing duties pursuant to GATT Article VI. The latter, however, tends to focus only on claims that Article XVI has been violated, accompanied by assertions of nullification and impairment under Article XXIII. Article XVI(3) is raised whenever the subsidization is on primary products, while Article XVI(4) is raised whenever the products are of a nonprimary nature.

312. See *French Assistance to Exports of Wheat and Wheat Flour*, GATT Doc. L/924 (Nov. 21, 1958) (Austl. v. Fr.), BISD 7th Supp. 46, ¶ 19 [hereinafter *French Assistance Case*] (the test under Article XVI(3) is whether subsidization results in one obtaining more than "equitable share" in world exports, and the "present French share . . . is more than equitable"). The *French Assistance Case* involved a dispute between Australia and France concerning export subsidies granted by France on wheat and wheat flour exports to traditional Australian markets in Ceylon, Indonesia, and Malaysia. The Australian complaint was based on the claim that the subsidized sales displaced sales Australian wheat and wheat flour exporters would have otherwise made, resulting in France obtaining more than an equitable share of the world market. On the need to show acquisition of more than an equitable share of the world v. individual market, *compare id.* ¶ 15 with *Agreement on Interpretation and Application of Articles VI, XVI, and XXII of the General Agreement on Tariffs and Trade*, BISD 26th Supp. 56, art. 10(3) (1980).

economic manner."<sup>313</sup> Given the factual peculiarities of this particular case, the panel decision also spoke of sensitivity to the impact nonprice and agricultural policy considerations were having on exports to the markets involved.<sup>314</sup>

One of the more recent decisions involving subsidies was rendered in the *Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed-Proteins* case.<sup>315</sup> This case concerned internal subsidies provided by the EC to the domestic agricultural sector within the Community; therefore, it involved another dispute not specifically addressed to Article XVI(4) and its reference to like products.<sup>316</sup> Article XVI is implicated by virtue of the relationship between paragraph 1 of this Article and the language of Article III(8)(b). The latter provision authorizing subsidies to domestic producers alone, despite the general obligation to avoid treating foreign entities less favorably; the former provision condemning only those domestic subsidies that operate to reduce imports. In rejecting the EC's contention that Articles III(8)(b) and XVI(1), in authorizing the subsidies at issue, created an expectation that trade could be affected,<sup>317</sup> the panel held nullification and impairment of tariff concessions to exist.<sup>318</sup> The panel's central observation was that tariff concessions were designed to "improve price competition,"<sup>319</sup> and subsidies were not to be used to adversely impact the "competitive relationship" between domestic

313. *Id.* ¶ 15. This is the language used by the panel when discussing the question of whether France had used subsidization to obtain more than an equitable share of the world market, and in setting forth the considerations that the GATT parties involved in drafting Article XVI thought essential to be kept in mind when determining the lawfulness of subsidization.

314. *Id.* ¶ 26. As the panel observed, the entire Southeast Asian market was in a state of change ("disequilibrium"). France was shifting from sales to Indochina, to sales to Ceylon, Malaysia and Indonesia. Other European exporters were entering the markets. Many of those involved were allowing "other than strict commercial considerations and . . . agricultur[al] policy . . . [enabling] exporters to obtain substantial assistance" to shape their role. These factors suggested to the panel that organizing measures needed to be taken.

315. This case was referred to in the earlier discussion of the national treatment obligation. See *Oilseeds Case*, *supra* note 165.

316. The primary concern in the so-called *Oilseeds Case* is Article III. The United States Article III case is founded largely on the fact the European Community subsidized processors of domestic oilseeds, but not those processing "like" imported oilseeds. Article II is also raised in the claim that the EC's subsidization impaired tariff concessions granted by the EC to the United States in the 1962 Dillon Round.

317. See *Oilseeds Case*, *supra* note 165, ¶¶ 115-16. For the panel's characterization of the EC argument, see *id.* ¶ 147.

318. See *id.* ¶¶ 148-52, 156.

319. *Id.* ¶ 148.

and imported products.<sup>320</sup> Clearly, then, a theme of comparative advantage pervades many of the GATT subsidy decisions.

F. *Article XIX(1): Temporary Departures.*

Another relevant provision is GATT Article XIX(1).<sup>321</sup> This provision authorizes, in certain unusual cases, the temporary use of measures escaping from the obligations of the General Agreement to safeguard or protect producers in the importing state who make "like or directly competitive" items.

The earliest and perhaps most relevant decision dealing with Article XIX(1) is the 1951 *Report on the Withdrawal by the United States of a Tariff Concession Under Article XIX of the General Agreement*, the so-called *Hatters' Fur* case; it involved a complaint against the United States by the then state of Czechoslovakia.<sup>322</sup> In this case, the Czechs had obtained a rather large tariff concession on women's fur felt hats during the 1948 Geneva Round. Hats of this sort made by domestic producers in the United States tended to have plain finishes, because of the costs connected with the extensive hard labor necessary to give the hats nap, or pile finishes. Czech producers, on the other hand, enjoyed cheaper labor costs and thus could supply specially finished hats at an attractive price. At the time of the Geneva Round, United States negotiators had realized that a style shift from plain finished hats to specially finished hats was afoot. They had no idea, however, about the degree, scope, or magnitude the shift would eventually encompass. The GATT decision, therefore, focused on whether the requirement of Article XIX(1), that domestic producers suffer an injury because of increased imports arising from some "unforeseen development,"<sup>323</sup> included situations in which the development itself was foreseen, but not its extent. Though the working party rejected the acceptability of the United States position on that matter,<sup>324</sup> it ultimately held that import limiting action taken on

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320. *Id.*

321. This provision has already been addressed, though not in the context of a panel decision specifically elaborating on the meaning of likeness or an associated concept. See *supra* note 66.

322. *Report on the Withdrawal by the United States of a Tariff Concession Under Article XIX of the GATT* (Nov. 1951) (Czech. v. U.S.), Sales No. GATT/1951-53 [hereinafter *Hatters' Fur Case*], reprinted in JOHN H. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT* 618-20 (1977).

323. See *supra* note 66 for the text of Article XIX(1).

324. See *Hatters' Fur Case*, *supra* note 322, at 619, ¶ 9.



the basis of a good faith or reasonable misinterpretation of Article XIX(1) did not constitute a violation of the General Agreement.<sup>325</sup>

Without pretending the case represents the definitive gloss on Article XIX(1)'s reference to like or directly competitive products, one would seem able inferentially to conclude the report of the working party understands the reference to cover both identical as well as closely similar goods. The mere fact that the fur felt hats from Czechoslovakia were not exactly the same (i.e., plain or nonspecial-finish hats) as those produced by the United States companies complaining of injury was not a point of significance in the decision. Indeed, given the language of directly competitive used in juxtaposition with the word like, the differences between the products concerned could well have been even more pronounced without any suggestion by the working party of great discomfort. Perhaps any product consumers decide to purchase instead of another is one that is directly competitive. A product capable of being used in place of another would seem to satisfy the notion of substitutable. Nevertheless, competitive might well bring within its ambit an even larger number of items, not by virtue of requiring that one item be something that can be used in place of another (e.g., pipe tobacco as opposed to cigars), but by requiring that an item simply be one consumers would purchase instead of another (e.g., chewing gum as opposed to tobacco). The intimation is that in the case of competitive, the items compared could be vastly different and involve a complete shift in consumer preference to some clearly distinguishable product line. While with regard to substitutable, the items must be basically similar so that no shift in preference to a new and distinct product line would be involved.

Obviously, Article XIX represents a tremendous departure from the notion seen in the other like product common language provisions of allowing the natural productive efficiencies inherited by competitor states to fully manifest themselves in a way that divides production responsibilities in the most economically sensible fashion. By allowing competitors to escape their international trade law commitments, Article XIX opens the door to avoidance of a trading regime otherwise seeming to rest on the promotion of inherent national efficiencies. It is beyond contravention, however, that the very way in which the Article's allowance is framed suggests a reaffirmation of the theory of comparative advantage that appears to run throughout the common language panel decisions analyzed in this part of the paper. States are not left wholly free to decide on their own

whether they may escape their GATT commitments. In each case specific factors must exist, not the least of which is that producers of like or directly competitive items must suffer or be threatened with injury.<sup>326</sup> Surely, if the dedication of the GATT parties to the idea of promoting competitive advantage was less than ardent, it would seem hard to fathom why these limiting factors were imposed on the exercise of this exception. The restriction to like or directly competitive assures that nonproductive and inefficient enterprises, in no way remotely associated with items subject to import, cannot be protected from economically better organized and dominant foreign competitors, unless the importing state can show that the strictures of Article XIX are met by those very enterprises. The escape provision of the General Agreement is not designed to eviscerate comparative advantage. To the contrary, by refusing to somehow read out of Article XIX(1) the requirement of likeness, the working party in the *Hatters' Fur* case confirmed the vibrancy of the theory.<sup>327</sup>

## V. CONCLUSION

At this juncture, a manuscript traditionally turns its attention to recapitulating the essential thoughts scattered throughout the preceding pages. But in this case these can be summed up by observing: the meaning of like products is broader in situations involving GATT prohibitions than in situations involving exceptions therefrom (while competitive and substitutable are always broader than like); and the panel decisions dealing with these concepts seem to rest on the theory of comparative economic advantage. What therefore follows is an examination of some entirely distinct questions in light of these thoughts. Specifically, in light of what is known about the like product common language provisions of Articles I, III, VI, XI, XIII, and XVI from the panel decisions, is it possible to suggest how like or its related phraseology might be interpreted in a dispute raising one of the other provisions of the General Agreement on Tariffs and Trade containing the same common language?

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326. See GATT, *supra* note 5, art. XIX.

327. See also *Hatters' Fur Case*, *supra* note 322, ¶ 50, where it is observed that action under Article XIX is essentially emergency in nature and therefore "should be of limited duration." Accepting this as a given, another indication exists, apparently in Article XIX itself, and in the opinion of the working party report on the case, regarding prominence of comparative economic advantage. Specifically, if safeguard action is to be of a temporary nature, it would seem contemplated that industries finding themselves incapable of developing to a more competitive position are not entitled to perpetual protection.

Further, if the GATT like product common language decisions turn on the central theme of comparative economic advantage, is this reflective of the fact the theme serves to join all the provisions of the General Agreement and the panel decisions concerning them through a single unifying theory?

Quite obviously, this is not the place to attempt an examination of all the other GATT provisions and each of the panel decisions exploring their unarticulated parameters. Moreover, any suggestion about how other like product common language provisions in the GATT might be construed in the context of a genuine dispute must admit to being highly speculative. Nevertheless, a quick look at a few of the other GATT provisions and their decisional refinements can lay a foundation that might indicate if inquiry into whether all GATT decisions revolve around comparative economic advantage merits in-depth exploration. Despite its admittedly speculative nature, suggestions about how the GATT like product provisions in Articles II(2), VI(7), VII(2)(a) and (b), and IX(1) might be construed in the context of panel decisions is not simple, ungrounded, rank conjecture, but well-based, half-intelligent prognostication.

#### A. *Likeness in Unaddressed GATT Articles*

Recall that the like product language of Articles II(2), VI(7), VII, and IX of the GATT focus, respectively, on allowing tariff bindings to be exceeded in limited circumstances,<sup>328</sup> imposing countervailing duties on primary products in certain cases,<sup>329</sup> ascribing a value to imports for tariff assessment purposes,<sup>330</sup> and treating all trading partners the same when it comes to requiring marks of origin on imports.<sup>331</sup> Article II(2) notes that tariff bindings may be exceeded only as a result of a charge equivalent to an internal tax being imposed on like domestic products. Article VI(7) speaks of CVDs not being imposed when there exists a domestic price system only occasionally resulting in exports at prices below those charged for the like commodity in the exporting state. In the case of valuation, Article VII(2)(a) and (b) provides that imports should be ascribed their actual value, and that should be the price at which items the same as, or like, that imported are sold in an ordinary trade transaction. With regard to Article IX(1), it requires GATT parties to accord to each

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328. See *supra* text accompanying note 31.

329. See *supra* text accompanying note 32.

330. See *supra* text accompanying note 33.

331. See *supra* text accompanying note 16.

other marks of origin treatment that is no less favorable than what is accorded to like products from third states.

One would presume that both Articles VII(2) and IX(1) establish basic obligations of the GATT and that Article VI(7) states some exception therefrom. Article VII obligates a certain valuation approach be used, just as Article IX obligates states to refrain from discriminatory marking requirements. Article VI(7), on the other hand, simply elaborates further on the notion that only under exceptional circumstances may charges beyond normal customs duties be imposed on products from one GATT party seeking to enter another. Therefore, it would appear that Articles VII(2) and IX(1) should have their references to like construed broadly, while Article VI(7) should have its reference construed narrowly.

In actuality, even though Article VII(2) should be viewed as a basic obligation of the GATT because valuing products for tariff purposes can result in the establishment of indirect impediments to trade, a strong argument can be made that the liberties Article VII accords to importing states in the valuation context should be read in a strict and narrow fashion. Similarly, a strong argument can be made that Article VI(7), though part of a GATT exceptional provision, is best interpreted in a broad and liberal fashion. This is because it serves to restrict importing states in their exercise of the exceptional power to impose duties over and above normal customs charges, thereby advancing the free flow of trade. Accepting this reconceptualization of these provisions means that Articles VI(7) and IX(1) are associated with each other, while Article VII(2) stands alone as a narrowly construed provision.

Regarding Article VII(2)(a) and (b) and the valuation of imports, it would seem to matter little that the concept of likeness is connected to the term merchandise instead of product,<sup>332</sup> as product is the term used elsewhere in Article VII without any indication of a distinct meaning.<sup>333</sup> If Arabica coffee beans present themselves at customs for entry into a GATT state, they could be valued for tariff purposes at the value ascribed to Robusto coffee beans.<sup>334</sup> Despite organoleptic differences

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332. See JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 448 (1969) ("must certainly be related").

333. See, e.g., GATT, *supra* note 5, art. VII, ¶¶ 3, 5.

334. See generally *Tariff Treatment*, *supra* note 131, which focused on Article I's MFN provision. While this is clearly a basic obligation of the GATT, and therefore entitled to a more generous form of construction than exceptions to GATT, even in cases dealing with exceptions, differences of the nature between Arabica and Robusto beans have not resulted in determinations that the products failed to meet the likeness test. See also *Chilean Apple I* and *Chilean Apple II*

between the two items, and even though the invoice figures may differ on prices, they could be deemed like products because of essential similarity. Obviously, the state determining value must uniformly proceed on the basis of like product comparisons, or by looking at the product actually imported. It cannot vacillate back and forth between these two alternative bases of valuation.<sup>335</sup>

The harder case would involve comparisons of products that either are different yet fall within the same general category (e.g., oranges and tangerines, grapefruit and tangelos, or peaches and watermelons),<sup>336</sup> or are different because one has undergone some minimal level of processing (e.g., crude oil and anhydrous crude oil, or cob corn and kernel corn) or some slightly distinct form of processing (e.g., canned crushed tomatoes and canned tomato sauce, or moderate climate bricks and severe climate bricks, or rough milled lumber and smooth milled lumber). In such cases it would seem the circumscribed nature of Article VII, which suggests like receive a narrow reading, inclines in the direction of looking for a degree of resemblance not present when comparisons are between unprocessed and processed goods, or goods processed in different ways. Here pricing disparities, which valuations should reflect, can be accounted for by the existence of processing or differences in processing. When unprocessed original or raw products are not sufficiently different to result in their being thought of as in distinct product categories (e.g., the oranges and tangerines series of examples), pricing disparities cannot be explained by reference to processing. Nonetheless, weather, growing care, and other factors affect price. The question is whether these factors should be allowed to evidence themselves through different valuations, or whether states should be left free to take neutralizing action by ascribing the same valuations. Bearing in mind that the theme of comparative advantage pervades all the panel decisions reviewed herein, it could be argued that the narrow interpretive approach to the like products concept in Article VII(2)(a) and (b) might best be captured by considering unprocessed original or raw products that fall together into a more general product category, despite obvious differences between the items compared (e.g., again, the oranges and tangerines series), as not like. It cannot be disputed

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*Cases, supra* note 246 (finding Golden Delicious, Red Delicious, and Granny Smith apples to all be like under Article XI(2)).

335. See GATT, *supra* note 5, art. VI, addendum, ¶ 2 n.4.

336. These examples are graduated in degree of difficulty from the easiest to the most challenging. Both oranges and tangerines are dessert citrus fruit, though each is distinct from the other. Grapefruit and tangelos are both citrus fruit, though only the latter might be considered a dessert fruit. And peaches and watermelons, while both fruit, vary widely in terms of characteristics.

that comparative advantage is more apparently connected with the obvious GATT exceptional provisions of Articles I(1) and XI(2). Thus, each supplying state should be able to capitalize on whatever natural efficiencies it enjoys.

Comparative advantage also operates in the product valuation setting to accord producers within a single state the efficiencies they have vis-à-vis their competitors.<sup>337</sup> Allowance of valuations failing to distinguish between different kinds of items all falling into the same general category, or between unprocessed versus minimally processed items, or different items processed in slightly distinct ways, would result in the loss of economic advantages associated with competition within a product line that runs a modest gamut loosely thought of as containing similar items (e.g., apples and bananas both thought of as fruit). The basic theory underlying the GATT concept of likeness suggests the rejection of such an approach to valuation.<sup>338</sup> Clearly, the most-favored-nation obligation of Article I would prohibit an importing state from distinguishing between items in a product line coming from one trading partner and not those coming from another.

What about the fact that in the context of the GATT Article XI(2) exception, which is also construed narrowly, the element of price is not viewed as instrumental in determining likeness? Is it not inconsistent therefore to suggest the importance of price in determining likeness under Article VII(2)(a) and (b)? The answer is not really, the reason being that products which are plainly different from each other are not to be considered like, for purposes of Article VII, just because they carry the same price. Conversely, products plainly the same are not to be considered unlike if they carry different prices. In neither the context of Article XI nor Article VII is likeness determined by price. When the essential characteristics of items differ, price has no bearing on making them like or unlike. As far as the valuation provisions of Article VII(2)(a) and (b) are concerned though, once the essential characteristics of items are determined to be different,

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337. The focus of attention here is on competition existing between producers selling different yet somewhat substitutable products (e.g., apples and bananas, or moderate weather bricks and severe weather bricks). In regard to importing states valuing products in accordance with the like merchandise standard, it would seem inappropriate if two suppliers of the exact same product (e.g., mangoes) had different values ascribed to what they supplied.

338. Taking particular end uses into consideration, there is no doubt that some products cannot really be substituted for others. Nevertheless, for other uses, even items as distinct as apples and bananas or peaches and watermelons can be substituted. Substitution of such a sort would clearly be influenced by considerations of overall consumer cost.

price differences should be reflected in the valuations the items are ascribed.

Articles VI(7) and IX(1), as already observed, state basic GATT obligations; therefore, they are entitled to a much more generous construction than that given the language of Article VII(2)(a) and (b). Article IX(1) is very much like the MFN obligations of Articles I and XIII, in that it prohibits a practice—marks of origin—that discriminates between states of supply. Thus it is seemingly easy to construe this provision's reference to like in exactly the same way as that term is construed in the contexts of Articles I and XIII, in which consumer considerations of the close similarities in products control whether likeness exists.<sup>339</sup> As for Article VI(7), the same type of approach would seem useful; it would preclude importing states from imposing CVDs adding a further measure of protection for their own domestic industries whenever slight and insignificant differences are found to exist between the subsidized import and allegedly like products sold in the home market of the supplying state. By interpreting the term like in paragraph 7 of Article VI to mean closely similar though not identical products, the authorization to subject imports to protective countervailing charges is restricted. The effect of this broader approach to both Articles IX(1) and VI(7) is to reaffirm the commitment to the notion of comparative economic advantage so indubitably manifest in the General Agreement's decisional law.

From the practical perspective of application, construing Articles IX(1) and VI(7) in the manner suggested could well mean that certain differences between distinct raw or original products would result in unlikeness. Comparisons of raw and minimally processed items from the same raw ingredients, or of processed items that might be somewhat different because processed in slightly different ways, would not necessarily result in unlikeness. Raw items of the same sort that are simply of different varieties (e.g., American long-grain rice and Asian basmati rice, or acorn squash and butternut squash, or red seedless grapes and green or white seedless grapes) easily could be thought of as alike. To switch to raw items of completely different sorts (e.g., grapefruit and tangelos, or peaches and watermelons, or sweet natural gas and sour natural gas), however, not only implicates consumer product considerations (e.g., consumption setting, amount, and method of preparation), but also the fact that the concept of like is to be kept clearly distinct from that of substitutable. As long as products are obviously of a different sort and regarded as such

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339. For the importance of this and other elements considered in the context of Article I(1), see *supra* notes 141-47.

by those who would purchase them, it is easy to view them as unlike. That consumers may think of the products in such circumstances as subject to being switched (e.g., peaches rather than watermelons, or sweet natural gas rather than sour natural gas) is not enough to prevent this from happening. After all, switching is substitution, and substitution would seem to suggest the products are not perceived as like.

With regard to raw as opposed to slightly processed items made from the raw ingredient itself (e.g., the crude oil and anhydrous crude oil series of examples alluded to above), or processed items that are different because the ingredients are subjected to slightly differing processes (e.g., the canned crushed tomatoes and canned tomato sauce series), the distinction between like and substitutable again seems to surface. Here, however, the switching or substituting behavior of consumers is probably undertaken in many cases with a plainly different attitude towards the alternative item selected. Because what is selected is a slightly different form of what one may have preferred to obtain, rather than something of an entirely different sort, the switching may not be seen as the kind of substitution contemplated in the General Agreement on Tariffs and Trade by the term substitutable.<sup>340</sup> In one sense, this is how the subjectivity associated with consumer product considerations becomes entwined with what the term substitutable conveys. Whenever a purchaser looking for one specific item settles for something else in its stead, the items may be considered unlike, if of an entirely different sort, especially since the level of satisfaction associated with the purchase must be markedly affected. But if the items are of the same sort and differ only in that they are minimally processed, rather than raw, or processed in one way rather than another, the reverse should be true, especially since the level of satisfaction is probably not so affected.<sup>341</sup> Again, by restraining importing states from

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340. It strikes me that purchasers having to decide on cob corn, rather than kernel corn (or vice versa), or canned crushed tomatoes, rather than canned tomato sauce (or vice versa), might have a different degree of satisfaction than those having to decide on peaches, rather than watermelon (or vice versa). The reason the text accompanying this note is written in less than unequivocal terms is to account for the possibility of choices like crude oil, rather than anhydrous crude oil (or vice versa), or moderate weather bricks, rather than severe weather bricks (or vice versa), leading to the same degree of satisfaction as peaches, rather than watermelons.

341. One should recall that several Article XI(2) panel decisions determined the following: imported processed items were not like the domestic items placed under limitation by the importing state, see *supra* notes 250-80. In that context, does it not seem peculiar to now suggest that likeness is present in connection with Articles IX(1) and VI(7)? Apart from Article XI(2) being subjected to a narrow



disregarding the essential similarity of raw goods versus goods minimally processed from the same raw ingredients, or goods that are slightly different because subjected to one method of processing versus another, the General Agreement's theory of allowing naturally advantaged states to benefit from what providence has bestowed is allowed full reign. An importing state is not free to justify different cost-affecting marks of origin or customs entry duty treatment on the basis of the existence of minimal or slightly different processing regarding the goods concerned. To engage in that would contravene either GATT Article IX(1) or Article VI(7).

The only other like product common language provision not yet mentioned is Article II(2). This article allows charges in excess of tariff bindings whenever those charges are the equivalent of internal impositions borne by like products produced domestically in the state of importation.<sup>342</sup> This provision is clearly an exception to the basic GATT obligation on tariff bindings,<sup>343</sup> and as such is to be subjected to a narrow interpretation. With regard to the reference in paragraph 2 to domestic products like the imports subjected to a tariff-exceeding imposition equivalent to internal charges, the implication is that the domestic products and the imports must be virtually the same. Indeed, since the whole notion of negotiated tariff concessions is to insist that only competitive position is to accord one protection below agreed-to tariff levels,<sup>344</sup> the thrust of Article II(2) could be argued to approve of nothing more than additional

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interpretation, and Articles IX(1) and VI(7) being subjected to a broad interpretation, it must be remembered that comparisons of processed and unprocessed goods are triggered by the reference to in any form, defined by the GATT Addendum as meaning "in an early stage of processing and still perishable." The panel decisions alluded to above hinge on this standard, and not on the mere fact the imported goods are processed.

342. See *supra* text accompanying notes 327-28 for reference to the fact that Article II(2) is not examined.

343. For one of the important early cases on tariff bindings, see *Greek Increase in Bound Duties Case*, GATT Doc. L/580 (Nov. 9, 1956) (F.R.G. v. Greece), reprinted in JOHN JACKSON & WILLIAM DAVEY, *INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT* 398 (2d ed. 1986) (deciding that "long-playing records" are to be assimilated to bound "gramophone records" in a situation where the Greek tariff schedule did not contain an "otherwise not provided" category).

344. See e.g., *European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, GATT Doc. L/6627 (Jan. 25, 1990) (U.S. v. EEC), BISD 37th Supp. 86, ¶ 148 ("[T]he main value of a tariff concession is that it provides an assurance of better market access through improved price competition. Contracting parties negotiate tariff concessions primarily to obtain that advantage. They must therefore be assumed to base their tariff negotiations on the expectation that the price effect of the tariff concessions will not be systematically offset.")

charges that track internal charges borne by domestically produced goods of an identical nature. This exceedingly strict approach would prevent importing states from ignoring differences between products and proceeding to impose charges to protect domestic competitors on the basis of an equivalent charge being imposed on some other economically well-situated domestic industry producing a somewhat similar product considered distinct by the consuming public. Any other conclusion would allow the internal charges an economically dominant and well-organized domestic industry absorbed also to be imposed at entry upon a foreign supplier of items identical to those produced by a disorganized and economically inefficient importing-state industry that is not having to absorb such internal charges. Therefore raw goods could never be paired with minimally processed goods, nor slightly different goods processed in one way with those processed in another.

There is no doubt comparative advantage is the theme of Article II(2). The fundamental requirement of respecting tariff concessions and refraining from employing measures that undermine the economic position established by such concessions is evident in Article II(2)'s standard regarding charges equivalent to internal charges borne by domestically produced goods. In providing that charges of this sort are appropriate only when domestic products like the products imported from abroad are subjected to parallel internal charges, the General Agreement aims at prohibiting circumvention of tariff bindings and the competitive relationships such bindings are designed to secure.

#### *B. Comparative Advantage in Non-Like Product Language Provisions*

The second question posed earlier was whether the theory of comparative economic advantage, evidenced in the like product common language provisions, appears in other articles of the General Agreement, and thus serves to unite the many diverse standards set forth in the GATT. As suggested above, only a sampling of other articles will be examined, in a brief and limited fashion. The general objective is to determine whether it might be profitable to devote additional energy to a more comprehensive and thorough analysis. For present purposes, the sampling will be confined to Articles XVII and XX(d).

Article XVII focuses on state-trading enterprises, business entities given special privileges related to carrying on import and

export trade.<sup>345</sup> The idea is that these enterprises must adhere to the nondiscrimination obligations of the General Agreement,<sup>346</sup> give due regard to the Agreement's other provisions,<sup>347</sup> and make their purchases and sales in accordance with purely commercial considerations.<sup>348</sup> Moreover, the governments establishing state-trading enterprises must themselves refrain from preventing these enterprises from complying with those obligations.<sup>349</sup> In recognition of the possibility that the operation of state enterprises might obstruct trade, negotiations to reduce or limit obstructions are urged.<sup>350</sup> Public notice of the products concerned<sup>351</sup> and information about any import mark-up are required to be made available.<sup>352</sup>

Clearly, the basic idea of Article XVII is to allow state-trading enterprises, even though they may result in the monopolization of import or export activity. Correlative to this allowance is the obligation of these enterprises to refrain from discrimination and generally respect other relevant provisions of the GATT in their purchase and sales activities. Essentially, then, these enterprises are to operate under the same rules that apply to every other form of commercial endeavor. The principal departure from the usual scheme of business activity is the centralization in government-established or recognized enterprises of the right to engage in all purchasing and sales connected with the importation or exportation of goods. This leaves both supply and price subject to greater control, thus opening the possibility for different quantitative levels of imports or exports than may have otherwise been the case, and domestic or foreign sales at different

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345. See GATT, *supra* note 5, art. XVII(1)(a). For an interesting case presenting Article XVII, see *Canada—Administration of the Foreign Investment Review Act*, GATT Doc. L/5504 (Feb. 7, 1984) (U.S. v. Can.), BISD 30th Supp. 140.

346. GATT, *supra* note 5, art. XVII(1)(a).

347. *Id.* art XVII(1)(b).

348. *Id.*

349. *Id.* art. XVII(1)(c). It should be observed that first sentence of Article XVII(2) provides for an exception to the nondiscrimination obligations of GATT that runs very much like the government procurement exception of Article III. The government procurement exception allows discrimination in favor of domestic goods over those of foreign origin. Article XVII's exception, however, seems to extend to discrimination as between different foreign suppliers as well. The second sentence of Article XVII(2), however, obligates state-trading enterprises to pursue government purchase efforts in a way that treats other GATT parties in a "fair and equitable" manner. In this sense, there really seems to be little difference between the basic GATT government procurement exception and that contained in Article XVII(2).

350. *Id.* art. XVII(3).

351. *Id.* art. XVII(4)(a).

352. *Id.* art. XVII(4)(b).

prices as well. The potential for an adverse effect on domestic and foreign consumers is self-evident.

Just as Article XVII requires that state-trading operations be carried on under the same standards applicable to private trading, it also attempts to deal with the possibility for abuse incident to centralized importation and exportation. It accomplishes this by requiring the dissemination of information about products impacted and import price mark-ups<sup>353</sup> and by urging negotiations to limit or reduce obstacles to trade expansion.<sup>354</sup> Somewhat like the escape provision of Article XIX,<sup>355</sup> the fact that the state-trading provision of GATT Article XVII allows departures from the normal private way in which import and export business would be conducted does not indicate that this business can be carried on in disregard of the relative economic position of competitor states. Article XIX strictly limits "safeguard" measures. They are only available in emergency situations, can only be applied to remove injury to domestic industries producing items "like or directly competitive" with those imported, and are essentially envisioned as nothing more than measures of a temporary sort. Article XVII is similarly subject to tight restriction, even though the centralizing aspect of state-trading admittedly opens the potential for erosion of an international trading regime based on the rationality of pure economics. This restriction is embodied in the article's notification requirements on product identification and price mark-up and in its negotiation requirement's aim of limiting or reducing obstacles that state-trading may pose to the expansion of worldwide commerce.

From Article XVII's interest in erecting standards that ensure the relative economic position of competitors is largely held intact, it would seem reasonable to consider this provision as consonant with the theory of comparative advantage. Even in the hardest case of a state-trading enterprise that engages in no discrimination between foreign trading partners, it is clear that this enterprise generally cannot freely engage in discrimination favoring domestic industry at the expense of foreign competitors, especially to neutralize natural economic efficiencies enjoyed by the latter. In at least one recent GATT panel decision, this seems to have been the thinking. When it was argued that disruptions of normal trade flows through import limits were justifiable if taken by state-trading operations, the panel declared that "parties cannot escape their obligations with respect to private

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353. See *id.* art. XVII(4)(a)-(b).

354. *Id.* art. XVII(3).

355. See *supra* notes 321-27 and accompanying text.

trade by establishing state-trading operations."<sup>356</sup> In another still more recent decision, discussed in the same context, a panel left no doubt that state-trading monopolies designed to protect domestic industries contravened a theme of fundamental importance. As the opinion stated: "[C]ontracting parties may maintain governmental monopolies . . . on the importation and domestic sale of products. . . . [p]rovided it thereby does not accord [imports] less favorable treatment than domestic" products.<sup>357</sup>

As for paragraph (d) of Article XX,<sup>358</sup> it contains one of several general exceptions to the GATT. These exceptions run the spectrum from trade measures directed at protecting public morals,<sup>359</sup> human, animal, or plant life,<sup>360</sup> to those dealing with products of prison labor,<sup>361</sup> national artistic, historic, or archaeological artifacts,<sup>362</sup> or aimed at situations of short supply,<sup>363</sup> or implementation of a domestic price stabilization plan.<sup>364</sup> Article XX(d) itself excepts the adoption or enforcement of measures "necessary to secure compliance with laws or regulations . . . not inconsistent with the provisions of this Agreement."<sup>365</sup> As with Article XVII's allowance of state-trading operations and Article XIX's escape provision, this exception seemingly focuses on permitting practices that might otherwise be thought prohibited by GATT. The explanation might be that the very language of the exception suggests, as long as the law or

356. See *Japan—Restrictions on Imports*, *supra* note 246, ¶ 79.

357. See *Cigarette Case*, *supra* note 249, ¶ 79. It must be acknowledged that the basic government procurement exception of Article III, as well as that of Article XVII(2), see *supra* note 349, appear completely incongruous with the idea of comparative economic advantage. After all, the whole thrust of these exceptions is to give a preference to domestically produced goods over those produced abroad. Thus, less efficient domestic industries could be protected from more efficient foreign competitors. While this is neither the time nor the place to address this matter at length, it is clear that for one to successfully invoke these exceptions, the goods must be purchased for use or consumption by the government alone. Consequently, it may be possible that, since the private consuming markets must remain open to foreign competitors and governments naturally want to be able to have stable and secure sources of supply available for goods they need, exceptions for government procurement may be seen as less destructive of the importance of comparative advantage than might at first be thought. Query: Can the same be said about the provisions of Part IV of the General Agreement?

358. See GATT, *supra* note 5, art. XX.

359. *Id.* art. XX(a).

360. *Id.* art. XX(b).

361. *Id.* art. XX(e).

362. *Id.* art. XX(f).

363. *Id.* art. XX(j).

364. *Id.* art. XX(i).

365. *Id.* art. XX(d).

regulation the measure in dispute seeks to enforce is allowable under the GATT, the measure itself is beyond challenge, even though otherwise objectionable.

That argument appears to have been rejected by GATT panels.<sup>366</sup> For measures of enforcement to be permissible under Article XX(d), they must not only be closely linked to securing compliance with a law or regulation that comports with the dictates of all the GATT provisions. They also must be of a nature that does not transform the consistent law or regulation into something inconsistent with the General Agreement. In other words, the fact that a law or regulation adopted by a trading state is consistent with the terms of GATT does not insulate from attack any measure necessary to secure compliance therewith. The establishment of an action in accordance with the requirements of the Agreement does not entitle the establishing state under Article XX(d) to pursue any measure of compliance it would choose.<sup>367</sup> The implication is that the basic goal or objective of GATT is not somehow eroded by Article XX(d).

Further evidence that this is indeed the vantage from which all of the exceptions of Article XX, not just paragraph (d), should be approached is found in Article XX's preambular statement. It states that each and every one of the exceptions of Article XX must not amount to "arbitrary or unjustifiable discrimination" between states, nor a "disguised restriction" on international trade.<sup>368</sup> Because the purpose of the GATT's most-favored-nation provisions is to eliminate disparate treatment between different trading partners, and the purpose of its national treatment provisions is to eliminate obstacles to trade that prefer domestic suppliers at the expense of their foreign competitors, it would seem the references in the opening language of Article XX could be characterized as setting forth loose MFN and national treatment obligations. As has been observed repeatedly in these pages, the theory underpinning obligations of this sort is one founded on the promotion of benefits obtained through the natural economic conditions prevailing within competitor states. In condemning the use of measures outside what the General Agreement envisions as appropriate (even though employed to obtain compliance with legal or regulatory actions deemed

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366. See, e.g., *Japan--Restrictions on Imports*, supra note 246, ¶ 5.2.2.3 (holding violative Japanese import controls inconsistent with Article XI(2)(c), even though designed to secure compliance with a state-trading operation consistent with Article XVII).

367. See, e.g., *United States--Imports of Certain Automotive Spring Assemblies*, GATT Doc., L/5333 (May 26, 1983) (Can. v. U.S.), BISD 30th Supp. 107

368. See GATT, supra note 5, art. XX.

permissible), and in rejecting any measure that operates to discriminatorily handicap certain trading partners (or all in relation to domestic sources), Article XX(d) seemingly reiterates the fundamental theme of comparative economic advantage found in the like product cases. Presumably, this once again suggests the possibility that it is on this concept of comparative advantage that GATT parties and panel decisions, for good or bad, have rested the development of world commercial relations.