

## IV

### *Conclusion*

Having finished our performance and confirmed its value through the review process, we have finally reached the point at which we may ask the last question: What common characteristics of the likeness concept can be found in the history of GATT likeness cases referred to in the previous chapters?

The first characteristic is that the likeness concept has been *modified* in its application to various likeness provisions. Starting from the single definition of the term, 'practically identical', offered by the League of Nations,<sup>1</sup> the 'like product' concept during the early stages of the GATT seems to have been understood as having more or less the same scope in all those provisions (*Australia Ammonium Sulphate; Japan Wine and Liquor*).<sup>2</sup> After the WTO system was successfully launched, however, the panel and the Appellate Body made it clear that the likeness concept had different scopes depending on the provision concerned, hence the image of an accordion: even within one provision, the accordion of likeness is meant to be played differently.<sup>3</sup>

One might say that such diversification reflects the 'judicialization' process of international trade law and the changing environment of the world trading system. The WTO Dispute Settlement Understanding represents a 'thickening of legality'.<sup>4</sup> In the 'symbiosis of diplomacy and litigation',<sup>5</sup> the DSU represents a decided move by the GATT/WTO dispute settlement system toward litigation. As this 'lawyers triumph over diplomats'<sup>6</sup> has progressed, the international tribunal has been asked to tailor its deliberations to strict legal interpretations of each provision of likeness, or even of each paragraph of a provision, thereby generating more diverse interpretations.

The judicialization process is not alone in demanding narrowly tailored decisions. As the international tribunal has increasingly encountered a variety of ingenious non-tariff barriers, as well as more close cases, it has needed more precision in the reasoning of its decisions, and thus more diversification in the likeness interpretation. This necessity might have also justified the tribunal's increased discretion.

The second characteristic is that the scope of likeness in basic non-discrimination provisions has been gradually expanded over time. Not only through the sneaky attachment of the *Addendum* to Art. III:2 by the 1948 amendment and the resulting enlargement of scope of the paragraph,<sup>7</sup> the scope of the likeness concept has been generally broadened through interpretations by the tribunal. One notable example: in 1949, conhaque and cognac were considered as being different products due to additives and aromatic differences (*Brazilian Internal Taxes*);<sup>8</sup> in 1996, shochu, vodka, whisky, brandy, rum, gin, genever, and liqueurs were all considered 'like or directly competitive or substitutable products' (*Japan Alcoholic Beverages*).<sup>9</sup> Organoleptic differences that formerly played a role were largely ignored in modern times!<sup>10</sup>

The aim-and-effect theory put a brake on this expansion drive. In the period 1992–1994, the ever-expanding scope of the likeness concept seemed to be reined in in the context of the national treatment obligation. Relying upon the attractions emanating from the aim-and-effect approach, the likeness concept seemed to achieve a balance between free trade and regulatory autonomy, wearing off the ‘surplus fat’ of the ‘incidental (non-inherent) discriminatory effect’.<sup>11</sup>

This ‘fitness’ effort was overruled, however, by subsequent WTO tribunals. Rejecting the aim-and-effect approach out of concern over circumvention of the national treatment obligation (*United States Gasoline, EC Banana, Japan/Korea/Chile Alcoholic Beverages*),<sup>12</sup> the tribunals resumed the drive for expansion of the likeness concept, notably in the national treatment context. Introducing the potential or future competition factor as another ‘regular-entry accordion’ (*Korea Alcoholic Beverages*),<sup>13</sup> the tribunals have marched deep into the territory of traditional regulatory autonomy.

Of course, what made this march possible was the necessity of furthering the ‘judicialization’ process so as to deal with the variety of newly-emerging non-tariff barriers, and the altered environment of the international trading system in which the GATT/WTO was empowered with much stronger credibility and authority. Finally, free from the *German Sardine*-type hesitation,<sup>14</sup> the WTO tribunals are able to announce the existence of two accordions<sup>15</sup>, tuned to the *unavoidable elements of individual discretionary judgement* of the tribunals.

All of this diversification and expansion of the likeness concept share a common justificatory source—the ‘judicialization’ of international trade law, which indeed provides an excellent justification. Yet can this judicialization also provide justification for the panels’ emphasis on *discretion* and the *accordion* in likeness analysis? Do we need more accordions and greater discretion in order to allow the judicialization process to progress? The WTO tribunals seem to think so, probably hoping that the justification of judicialization will cover all substantive issues (definition and scope of likeness) as well as methodological issues (discretion and use of the accordion in likeness tests).

This justification does not excuse their lack of methodology, however. Despite its handiness, the traditional *Border Tax Adjustment* Report approach lacks the precision and flexibility that are necessary to face changes in specific social contexts not contemplated in the original GATT. Thus, in close cases involving new areas, the approach often fails (see Chapter II, at 3.3). On the other hand, in spite of its attractiveness in dealing with *de facto* discrimination and regulatory autonomy, the aim-and-effect approach collapses because of the greater danger of circumvention. Facing an increasing number of close or *de facto* cases, the WTO tribunals have put forward the potential and future competition concept. But this merely offers old wine in new bottles. The tribunals, other than emphasizing accordion-like discretionary judgements put forward by themselves on a case-by-case basis, have shied away from indicating what the general tone of the accordion is supposed to sound like in relevant contexts, or even what its general mechanism is. This lack of

guidance is clear with regard to the traditional likeness factors, not to mention the potentiality factor. As a consequence, consistency, transparency, and predictability—the very values that the judicialization has sought to promote—have been put in peril. GATT tribunals might have won each battle in court, but they emerged defeated in the war of judicialization.

The search for ‘likeness’ must be undertaken and pursued with relentless clarity. It is, in essence, an economic task put to the uses of the law.<sup>16</sup> Unless this task is well done, the results will be distorted in terms of the conclusion whether the law has been violated and what the recommendation of implementation should contain.<sup>17</sup>

Why should only physical properties, tariff classification, or end-use in general be relevant in the likeness determination? When 99 per cent of consumers in the relevant market consider that two products are no longer ‘like’ due to certain subjective perceptions on, e.g. process or production methods (PPMs), why should the tribunal stick to the old approach and rule against the predominant perception? When an increasing number of close and controversial disputes appear in the world trading system, involving new and more politically sensitive subject matters, how persuasive can this old approach be as regards the recalcitrant losers and their constituency?

The market-based economic analysis suggested in this book rescues the methodological justificatory source from the oxymoronic excuse of judicialization (or any other poor excuse of, say, the ‘nature’ of the term ‘likeness’) and restores it to the genuine power of the self-determination rule of democracy. This rule offers the simple proposition: what the people see as being ‘like’ ought to be ‘like’; what the people consider to be ‘potentially like’ ought to be ‘potentially like’; and what the people believe will be ‘like in the near future’ ought to be considered ‘like in the near future’. In this light, the recent case of *EC Asbestos*, in which consumer preferences were taken into account as a legitimate and indispensable factor, indicates the possible development of a welcome trend in likeness determinations.<sup>18</sup>

Under the self-determination rule, the democratic tribunals are entitled only to act as ‘umpires’ in the dispute, not to ‘govern’ it: they must listen to what people say. For future tribunals, which will necessarily have to be requested to identify and exploit a middle ground between free trade and domestic regulatory autonomy, the various standards and criteria suggested in the market-based economic analysis provide the ideal tools for the development of democracy and transparency, with which the tribunals can function as trusted umpires. Indeed, taking the worst-case scenario, an imperial umpire is better than most umpire-like emperors for the sake of stability of people’s lives. The good news for the tribunals is that acting in this way does not deprive them entirely of their discretion. A certain degree of discretion is always readily available to an umpire. Of course, this discretion is functional in nature, not tyrannical.

Truly, the GATT system has witnessed remarkable changes. Again, the most basic change has been the shift in focus from diplomacy to legality. This started from the

resolution of a dispute in a way that laid down GATT's first thin layer of legality. The addition of a multitude of further layers over the years has established today's rather remarkably thick system of legality as the basis for settling international trade disputes.

In the area of 'likeness or substitutability' determination, this process should progress, if only belatedly. In the past, the tribunals laid down the first thin layer in the *Border Tax Adjustments* Report, sealing it with a cover made from the *unavoidable elements of individual discretionary judgement*. As a result, not being able to penetrate the hard cover, something important seems to have been left out: the theory of comparative advantage that continues to provide the focus of liberal trade policies and the rules of the international trade law system. Cut off from the theory, the first layer has been contaminated with intellectual inconsistency. While we may have made progress in the development of trade law for over 50 years, the relationship between that law and its intellectual underpinnings remains enigmatic in this subject area. This enigma will most likely remain as long as the likeness determination is kept out of the marketplace.

One response to this enigma might be to continue to live with the intellectual inconsistency between accepted economic theory and existing rule. Perhaps the system under the rule might continue to evolve in an *ad hoc*, reactionary fashion. But for those who prefer a legal system consistent with the fundamental concepts justifying its existence, discomfort is then inevitable. For them, two other choices are available: (1) either to change the rule to make it consistent with the economic theory; or (2) to find a new statement of economic theory that justifies the existing rule. For these diligent people, it is clear that as long as this evolutionary process remains incomplete, one must continue to inquire whether the existing rule tallies with the economic theory underpinning the international trade system as a whole. In other words, in order to complete the evolutionary process, it would be preferable to adjust the rule to make it consistent with economic theory.

This simple dynamic seems to have been overlooked by the tribunals, scholars, and practitioners of our 'dismal science', although they have been living alongside economics and watching its brilliant application to the field of antitrust law. Its absence (or willful blindness to it) seems to have been covered by such theoretical excuses as the unique soil of international society and the imperfection of the science of econometrics, as well as by such practical ones as the strict time-limits on panel procedures, the lack of resources for panels' fact-finding processes, and/or considerations of judicial economy. But in the era of electronic commerce, in which electronic sales data as well as Internet market surveys are easily and credibly available for the use of econometric methodology, and in the second stage of the WTO's *drive-to-maturity*, in which the tribunal, through its transparent and consistent standard-setting efforts, has to prepare for its own mature demise (making the meaning of WTO law so predictable that litigation will not be needed),<sup>19</sup> those excuses will continue to lose validity (if they ever had any).

The WTO tribunal has crossed the Rubicon halfway,<sup>20</sup> but is still hesitating to land on the other side.<sup>21</sup> Once it has crossed, it should conquer Rome as quickly as possible. Otherwise, it will end up being conquered by ‘enemies’, who are mostly strangers to GATT drafters. Moreover, even if the tribunal does not cross, such enemies might themselves ford the river. Indeed, to Caesar, who had not been in control of Rome, time must have been the enemy’s ally.

Similarly, for *you*, the tribunal, accustomed to old excuses while suffering from an outdated, two-culture syndrome between law and economics,<sup>22</sup> time will only be on the side of your virulent ‘enemies’ or so-called moralists, who are poised to hide behind environment, labor, or human rights shields: it will make you a convenient target. Alas! The emperor was right: attack is the best defense.

*Cast the die!* Take your seat of glorious umpireship at the Colosseum of Rome, giving signals to the winner of fair and transparent games—for the peace of world citizens, not to mention for your own survival!