

Title of the Paper:
Reconceptualizing 'Like Products' in WTO Law: Beyond Physical Characteristics

Author: Poonam Khandelwal

4th year BA.LLB. (HONS.)

Email Address: poonam.khandelwal.ballb2021@aurouniversity.edu.in

INTRODUCTION

A question that is easy to ask is, what is the essence of WTO's principles of non-discrimination? Are two products 'like'? It forms the basis for the obligations of Article 1:1 (Most-Favoured-Nation Treatment) and Article 3:4 (National Treatment) of the GATT 1994. What is "like"? Decides if a measure is a discrimination or a legitimate regulatory differentiation.

Historically, the WTO and its precursor, the GATT 1947, have taken a literal approach to "like products," including physical characteristics, uses, consumer preferences, and tariff classification. It thus preserved neutrality and predictability of trade rules. But the multifactorial, value-based, digitized nature of trade in 2024 demands a reconsideration of this catechism. Consumers and regulators today want to know not just what the product is but also how it is produced, if it is polluting, if it is hurting, and if it is ethically grounded.

This paper approaches the doctrinal pedigree of "like products", its development in WTO jurisprudence, recent inadequacies, and a potential re-set because of climate action, digital trade, and ethical production.

I. Definition of "Like Products" in the Traditional Context

The term "like products" is used repeatedly in various GATT provisions but is never defined. The WTO panels and the Appellate Body have articulated a flexible test, first articulated in *Japan – Alcoholic Beverages II*, that takes into account the following factors:

- Physical characteristics,
- Uses,
- Consumer tastes and habits,
- Customs classification.¹

The test is flexible, but WTO case law has often, in practice, focused on physical similarity and substitutability in the marketplace to the detriment of ever more important non-physical production-related characteristics in modern trade.

II. Evolution of Jurisprudence and Abstract Adaptation

1. EC – Asbestos (2001)

France banned the use of building products containing asbestos on health grounds in *EC – Asbestos*. Canada challenged the action, arguing that asbestos and its substitute, cellulose fiber, were "like products." Health factors were relevant in

¹ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted 4 Oct. 1996) [hereinafter *Japan – Alcoholic Beverages II*].

determining likeness, and purely physical or market-based tests were not compelling, the Appellate Body held.² This was a landmark ruling — it added public health into the equation.

2. US – Tuna II (Mexico)

This dispute concerned the U.S. labelling tuna products as “dolphin-safe,” depending on the fishing methods employed. While the ruling did not directly address likeness itself, the AB affirmed the regulatory validity of process and production methods (PPMs), even if they bear no relationship to the end-product's physical attributes.³

3. Indonesia – Chicken

Religious factors (halal certification) led Indonesia to restrict imports of poultry. Brazil was arguing that imported and domestic chicken were “like.” The panel highlighted competitive and physical traits while minimizing any cultural or ethical differences.⁴ The case illustrates the WTO’s reluctance to adopt values-based PPMs with no basis in accepted international standards.

The Old-Timey Test Does Not Work in 2024

1. Carbon Border Adjustment Mechanisms (CBAMs)

The European Union’s Carbon Border Adjustment Mechanism (CBAM), now in transition, applies carbon costs to imported products such as steel and cement. This leads us to a critical question: Do identical physical goods need to be treated differently based on the carbon intensity of production?

The legality of CBAM under WTO law may depend on whether carbon-intensive and green steel are “like.” Taking the traditional test, the answer would likely be yes, and that would classify CBAM as discriminatory. However, ignoring environmental impact fights against global climate goals and leaves WTO law blind to environmental impacts.⁵

2. Ethical and Sustainable Products

Today’s consumers are demanding ethically produced products — organic food, sweatshop-free clothes, and cruelty-free cosmetics. They are physically and

² Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WTO Doc. WT/DS135/AB/R (adopted 5 Apr. 2001) [hereinafter *EC – Asbestos*]

³ Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/AB/R (adopted 13 Jun. 2012) [hereinafter *US – Tuna II*]

⁴ Panel Report, *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products*, WTO Doc. WT/DS484/R (adopted 22 Nov. 2017)

⁵ **European Commission**, *Carbon Border Adjustment Mechanism (CBAM)*, EUR. COMM’N,

functionally identical to conventional products but divergent in their values of production. WTO law does not currently reflect this distinction.

India and Chile have endorsed eco-labelling and fair-trade certifications, but reforms would run afoul of WTO rules unless likeness is redefined to include ethical dimensions.⁶

3. Digital Trade and Algorithmic Products

With the rise of digital trade, likeness has become even more abstract. Two streaming apps or language models might look and function the same but differ in how they collect and use data. Are they “like”? WTO lacks clear tools to analyze **algorithmic transparency, data ethics, and source code biases** under existing criteria.

Similarity in the Field of Commerce in Services and Electronic Items

While the concept of “like products” is rooted in the GATT and pertains to trade in goods, a similar notion is applied in the context of GATS and trade in services—specifically under Articles II (Most-Favoured-Nation Treatment) and XVII (National Treatment). On the other hand, determining “likeness” in digital and service industries poses challenges due to the intangible nature of such products and how they are differentiated algorithmically.

Two platforms can have the same interface, subscription price, and payment model but still be radically different in terms of data privacy, data curation through algorithmic sorting, and content curation through algorithmic prioritization. Likewise, AI language models or translation services may fulfil similar roles but differ in what training data is leveraged, what bias signals have been minimized, or the sustainability of remediated cloud infrastructure. Does it matter whether these services can be described as “like” simply for providing consumers with comparable outputs?

The WTO has not developed a framework of jurisprudence for determining the likeness of services or digital goods. In cases like China — Electronic Payment Services, likeness was interpreted broadly, with a focus on competitive relationships between services, but without engaging with technical back-end differences or ethical implications.⁷

⁶ OECD, “Eco-labelling and Consumer Perception,” Environment Directorate (2021).

⁷ Panel Report, *China – Certain Measures Affecting Electronic Payment Services*, WTO Doc. WT/DS413/R (adopted 31 Aug. 2012)

As digital trade burgeons, the need for criteria beyond substitutability — including source code transparency, data governance, and algorithmic accountability — is pressing, particularly in sectors where such factors materially affect consumer experience or regulatory considerations. The narrow approach carries the risk of missing the big policy gaps, whether that of surveillance, misinformation, or digital colonialism.

Just as the balance between market access obligations and the regulatory autonomy of states in the evolution of likeness in services must be achieved — particularly where technologies underlay viable democratic discourse and economic fairness.

WTO Reform and Next Steps

The interpretive challenges around “like products” highlight the need for broader WTO reform — particularly to align trade rules with the goals of sustainability, digital fairness, and social justice. In recent years, existing rules have been deemed inadequate by WTO members and experts alike to respond to climate change, ethical production, and technology governance.

One initiative, the Trade and Environmental Sustainability Structured Discussions (TESSD), was launched in 2020 and now includes more than 70 WTO members. TESSD will discuss trade policies that support climate action, green supply chains, and standards of sustainability. These discussions also often address the necessity to update non-discrimination rules to ensure that states can treat goods differently according to their carbon intensity or sustainable sourcing credentials without risking WTO litigation.⁸

The Committee on Trade and Environment (CTE) has also become a venue in which ways and means of incorporating process and production methods (PPMs) into measures coherent with WTO-preferential ones have been discussed. Proposals have included creating guidelines for environmental labeling and carbon adjustment mechanisms and flexible interpretation of the exceptions provided in Article XX.⁹ Scholars, including Robert Howse and Petros Mavroidis, have argued for a “value-sensitive” reinterpretation of likeness that adds ethical production or risk to human health or limits to planetary boundaries to the roster of potential considerations for the WTO’s jurisprudence.¹⁰ Others advocate for the use of soft law instruments—whatever that means, an interpretive statement,

⁸ WTO, “Trade and Environmental Sustainability Structured Discussions (TESSD)” https://www.wto.org/english/tratop_e/environment_e/tessd_e.htm.

⁹ WTO Committee on Trade and Environment, “Work Programme,” WTO Doc. WT/CTE/W/40 (2022).

¹⁰ Robert Howse & Petros Mavroidis, *The World Trade Organization and Externalities: Trade Law as a Problem Solver or a Problem Creator?*, 113 Am. J. Int’l L. 1 (2019)

non-binding guidelines, and further — in offering guidance to panels in their determination of likeness with newly recognized global priorities. WTO reform on likeness needs to support legitimate regulatory distinctions while maintaining trade fairness and predictability. The steadfast application of traditional likeness tests threatens to render WTO law irrelevant during a period marked by climate urgency, digital ethics, and global inequality.

Ideas for Re-thinking

1. Broaden the Similarity Test to Cover PPMs

An up-to-date similarity analysis should look at:

Environmental effects, Human rights and work practices, Standards for animal care, Ethics in data use and AI, and PPMs, which WTO law has long opposed, now need recognition when they connect to reasonable, fact-based goals of domestic policy.¹¹

2. Consumer Perception in a Value-Driven Economy

Courts and panels should pay more attention to how consumers see products. If numbers show that many buyers prefer goods that are sourced or have a low carbon footprint, this view should shape what we consider similar. This fits with the Japan – Alcoholic Beverages II method, which already takes into account what consumers like.¹²

3. Treatment Differences Under the Article XX Exception

Expanding likeness does not mean permitting unrestrained discrimination. Any differential treatment would need to be consistent with Article XX of GATT (General Exceptions), which permits trade restrictions that are necessary to protect health and morals or conserve exhaustible natural resources — as long as it's not applied in a disguised or arbitrary way.¹³

Risks and Safeguards

Risks:

- Abuse masquerading as environmental stewardship,
- More litigation and uncertainty,
- Trade distortions hurt developing nations.

¹¹ Steve Charnovitz, "Environmental Measures and the WTO: Defining the Limits of Trade Law," 24 Geo. Wash. Int'l L. Rev. 279 (1992).

¹² Japan – Alcoholic Beverages II, supra note 1

¹³ General Agreement on Tariffs and Trade 1994, art. XX.

Safeguards:

- Furthermore, multilateral norms on sustainable and ethically appropriate PPMs,
- Capacity building of developing countries through technical assistance
- Soft law instruments (declarations, guidelines) to implement progressive interpretation.

CONCLUSION

In the modern world, trade is more than an exchange of goods: it's also an exchange of values, processes, and sustainability. If two products are identical in appearance, but that's where the similarity ends — because one has a vastly greater carbon footprint, say, or is produced under conditions of labor exploitation — WTO law shouldn't compel us to treat them as "like." The reconceptualization of "like products" seeks not to go beyond objectivity but to craft a more nuanced, fair, and future-oriented global trade paradigm. The WTO should step up to the plate and establish a framework in which non-discrimination and legitimate differentiation can live side by side. In the 21st century, resemblance goes beyond skin deep.