The principle of non-discrimination is fundamental to the regulation of international trade in goods and services. In the context of trade in goods, the concept of ‘like products’ has become a key element of the legal analysis of whether a trade obstacle violates GATT non-discrimination obligations. The equivalent concept of ‘like services and service suppliers’ in GATS rules on non-discrimination has received little attention in WTO jurisprudence. In light of the remaining uncertainties, Nicolas Diebold analyses the legal problems of the GATS ‘like services and service suppliers’ concept using a contextual and comparative methodology. The ‘likeness’ element is not analysed in isolation, but in context with ‘less favourable treatment’ and regulatory purpose as additional elements of non-discrimination. The book also explores how far theories from non-discrimination rules in GATT, NAFTA, BITs and EU law, as well as market definition theories from competition law, may be applied to ‘likeness’ in GATS.

Nicolas F. Diebold is an attorney with Froriep Renggli, Zurich. He was formerly with the Department of Economic Law and the World Trade Institute, University of Bern.
As the processes of regionalization and globalization have intensified, there have been accompanying increases in the regulations of international trade and economic law at the levels of international, regional and national laws.

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Non-Discrimination in International Trade in Services: ‘Likeness’ in WTO/GATS
Nicolas F. Diebold
NON-DISCRIMINATION IN INTERNATIONAL TRADE IN SERVICES

‘Likeness’ in WTO/GATS

NICOLAS F. DIEBOLD
To my wife Valerie and our children
SUMMARY OF CONTENTS

Introduction  page 1

PART I  Foundations  13
1 Objective and forms of non-discrimination  15
2 Particularities of trade in services and GATS  23
3 Legal elements of non-discrimination obligations  32
4 Concluding summary: reconciling the three elements  94

PART II  Framing the conceptual breadth of
‘likeness’ in GATS  101
5 ‘Likeness’ in national treatment  103
6 ‘Likeness’ in MFN treatment  127
7 Comparative analysis of ‘likeness’  140
8 Concluding summary: economic standard  171

PART III  GATS specific ‘likeness’ issues  175
9 The scope of GATS rules on non-discrimination  177
10 ‘Likeness’ across ‘services’ and ‘suppliers’  186
11 ‘Likeness’ across ‘methods’ and ‘modes’ of supply  220
12 Concluding summary: merged test and crossover
‘likeness’  238
SUMMARY OF CONTENTS

PART IV Methodology for the ‘likeness’ analysis in GATS 243

13 The border tax adjustments framework 245
14 Applying market definition theories to ‘likeness’ 269
15 The PPM-problem in the GATS ‘likeness’ context 339
16 Concluding summary: substitutability framework 349

Summary of conclusions 351
CONTENTS

Foreword page xvii
Acknowledgements xix
Abbreviations xxi
Table of cases xxiv
Table of legal texts xxxv
Table of documents xxxviii

Introduction 1

I The quest for an appropriate standard of 'likeness' in GATS 2
   A ‘Likeness’ linking trade liberalization and regulatory autonomy 2
   B Linkage between ‘likeness’ and progressive liberalization 5
   C ‘Likeness’ linking trade with other policy and legal disciplines 5
   D ‘Likeness’ linking legal and economic analysis 7

II Methodology, scope and structure 8

PART I Foundations 13

1 Objective and forms of non-discrimination 15
   I National treatment 17

   II Most-favoured-nation treatment 21

2 Particularities of trade in services and GATS 23
   I Modes and methods of service supply in GATS 23

   II The main GATS obligations in a nutshell 28
      A Most-favoured-nation and national treatment 28
TABLE OF CONTENTS

1 Legal Elements of Non-Discrimination Obligations 32
   A Basis and Standard of ‘Less Favourable Treatment’ 34
      1. De jure discrimination in trade 35
      2. De facto discrimination in trade 37
      3. Subjective theory of ‘Less Favourable Treatment’ 45
   B Typology of ‘Less Favourable Treatment’ under GATT 46
      1. ‘Less Favourable Treatment’ through border measures 46
      2. ‘Less Favourable Treatment’ through internal measures 47
   C Typology of ‘Less Favourable Treatment’ under GATS 50
      1. Spillovers from border measures applying to products 50
      2. Quantitative restrictions 51
      3. Internal taxes, charges and fees 53
      4. Domestic regulations 53
         a. Nationality, residency and ownership requirements 54
         b. Registration/authorization and qualification/licensing requirements 55
         c. Restrictions on the purchase, lease and use of real estate 59
         d. Supplier and employment-related measures 59
         e. Other horizontal and sector-specific requirements 60
      5. Subsidies 62
      6. Exception: disadvantages inherent to foreign character 63

II Likeness 65
   A Introduction to the Concept of ‘Likeness’ 65
   B Tertium Comparationis for ‘Likeness’ in Trade 69
      1. Economic Standard of ‘Likeness’ 71
         a. Broad marketplace standard of ‘Likeness’ 71
         b. Narrow physical characteristics standard of ‘Likeness’ 72
      2. Objective Standard of ‘Likeness’ 73
      3. Subjective Standard of ‘Likeness’ 73
Contents

III Protectionist regulatory purpose 73
   A Regulatory purpose under non-discrimination 74
      1. Regulatory purpose under ‘likeness’: aim and effects test 75
      2. Regulatory purpose under ‘less favourable treatment’ 80
      3. Regulatory purpose as a self-standing and substantive element 83
   B Regulatory purpose as justification 86
   C The legal challenges of regulatory purpose 87
      1. Determining the legitimacy of a purpose 87
      2. Means of proof and evidence 89
         a. Subjective determination with direct proof 89
         b. Objective determination with circumstantial evidence 90
      3. Allocating the burden of proof and setting a standard of review 91
         a. Burden of proof 91
         b. Standard of review 92
      4. Delimiting regulatory purpose with necessity or proportionality 92

4 Concluding summary: reconciling the three elements 94

PART II Framing the conceptual breadth of ‘likeness’ in GATS 101

5 ‘Likeness’ in national treatment 103
   I GATT national treatment 104
      A Tax measures, Article III:2 GATT 105
      B Regulatory measures, Article III:4 GATT 111
   II GATS national treatment 117
      A Comparing national treatment in GATT and GATS 118
      B Interpreting ‘likeness’ in GATS national treatment 120

6 ‘Likeness’ in MFN treatment 127
   I GATT most-favoured-nation treatment 128
   II GATS most-favoured-nation treatment 135
      A Comparing most-favoured-nation treatment in GATT and GATS 135
      B Interpreting ‘likeness’ in GATS most-favoured-nation treatment 136
CONTENTS

7 Comparative analysis of ‘likeness’ 140

I ‘Likeness’ in the TBT and SPS Agreements 140

II ‘Like circumstances’ in NAFTA rules on non-discrimination 143

A ‘Like-circumstanced’ investors or suppliers: an economic standard 146
  1. Chapter 11 on investment 147
  2. Chapter 12 on cross-border services trade 149
B ‘Like-circumstanced’ treatment: a subjective exception 150
C The ‘less favourable treatment’ standard 154
D Excursus: like ‘circumstances’ and ‘situations’ in BITs 156

III ‘Likeness’ in WTO trade remedies 161

A ‘Like products’ in trade remedy provisions 161
  1. Anti-dumping measures 161
  2. Countervailing measures and subsidies 162
     a. Countervailing measures 162
     b. Excursus: substantive rules on subsidies 163
  3. Safeguards 165
B A variable interpretation of ‘like products’ for trade remedies 166

8 Concluding summary: economic standard 171

PART III GATS specific ‘likeness’ issues 175

9 The scope of GATS rules on non-discrimination 177

I Reasons for including ‘suppliers’ in GATS rules on non-discrimination 177

II Definition of ‘service suppliers’ 182

10 ‘Likeness’ across ‘services’ and ‘suppliers’ 186

I Are suppliers of ‘like’ services ‘like’ suppliers? 188

A Mutually dependent determination in panel jurisprudence 188
  1. EC – Bananas III 188
  2. Canada – Autos 191
     a. Import duty exemption and GATS MFN 191
     b. Import duty exemption and GATS national treatment 193
CONTENTS

c. CVA requirements and GATS national treatment 193

3. China – Publications and audiovisual products 194

B Critical appraisal of the jurisprudence 195
1. Text and negotiating history 197
2. Deficiencies of a mutually dependent determination of ‘likeness’ 198
   a. ‘Different’ suppliers of like services 198
   b. ‘Similar’ suppliers of like services 198
   c. Regulation of public services 199
   d. Method of service supply 201
   e. Inseparability of supplier and service 203

C Conclusion: individual determination 203

II Cumulative test: two separate and cumulative elements 204

III Alternative test: two separate and alternative elements 207

A Combined approach 209

B Disjunctive approach and determination of the comparators 210
1. At the discretion of the complainant 211
2. Based on the subject matter of the measure 211
   a. Measures applying neither to the service nor to the supplier (Mode 2) 212
   b. Measures applying to the supplier (Modes 3 and 4) 213
   c. Measures applying to the service (Modes 1, 3 and 4) 214
   d. Conclusions: deficiencies of the subject matter approach 214
3. Based on modes of service supply 215
4. Conclusion: a combined subject matter and modes of supply approach 217

IV Merged test: one merged element 217

11 ‘Likeness’ across ‘methods’ and ‘modes’ of supply 220

I Cross-method ‘likeness’ in national treatment 220

A Natural person suppliers vs. company suppliers 221

B Domestic suppliers vs. mode 1 and 2 suppliers 222

C On-site supply vs. remote and electronic supply 223
CONTENTS

D Legal analysis 226
  1. Likeness 226
  2. Less favourable treatment and asymmetric impact test 228
  3. Justification 232

II Mode-overreaching commitments in national treatment 233

III Cross-mode and cross-method 'likeness' in MFN 234
  A Symmetric modes: cross-method 'likeness' within identical modes 235
  B Asymmetric modes: cross-mode 'likeness' 235

12 Concluding summary: merged test and crossover 'likeness' 238

PART IV Methodology for the 'likeness' analysis in GATS 243

13 The border tax adjustments framework 245
  I Properties, nature and quality 247
    A WTO/GATT jurisprudence 248
    B Application to GATS 250
      1. Properties and nature of services 251
      2. Properties and nature of suppliers 253
      3. Quality of services and qualification of suppliers 257
  II End-uses 258
    A WTO/GATT jurisprudence 258
    B Application to GATS 260
  III Consumers’ tastes and habits 262
  IV Tariff and service classification 264
  V Conclusions 267

14 Applying market definition theories to 'likeness' 269
  I ‘Market definition’ in competition law 272
    A The concept of market definition in EU competition law 272
      1. Cartelistic behaviour (Art. 101 TFEU) 273
      2. Abuse of dominant positions (Art. 102 TFEU) 274
      3. Merger regulation 275
B The concept of market definition in US antitrust law 276
1. Cartels (Sherman Act § 1) 276
2. Single firm conduct (Sherman Act § 2) 277
3. Merger control (Clayton Act § 7) 278

II 'Likeness' and market definition compared 279
A Protection of competitors vs. protection of consumer welfare 280
B Competitive opportunities vs. market power 282
C Broad 'likeness' in trade vs. narrow markets in competition law 286
D Direct comparison in trade vs. relevant market in competition 290

III Market definition 292
A Demand substitutability 293
1. Competition law 293
2. Application to trade non-discrimination 296
3. Assessing demand substitutability: converging market definition and 'likeness' 299
   a. Price elasticity of demand and the SSNIP test 299
   b. Physical characteristics and end-use (objective element) 307
   c. Views of consumers, customers and competitors (subjective element) 308
   d. Price differences and price trends 311
   e. Evidence of substitution in the past 313
   f. Barriers to substitution 313
   g. Determination by national authorities 314
   h. Evidence from other markets 315
   i. Channels of distribution and points of sale 315
   j. Procedural issues of obtaining evidence 316
B Supply substitutability 317
1. Competition law 318
2. Application to trade non-discrimination 320
   a. Supply substitutability and direct comparison: an issue of scope 321
   b. Supply substitutability and asymmetric impact: an issue of market definition 325
C Potential and future competition 327
1. Competition law: supply-side potential and future competition 328
2. Application to trade non-discrimination 329
   a. Demand-side potential competition in a narrow sense 329
   b. Demand-side future competition 331
   c. Supply-side future competition 333
xvi CONTENTS

IV Conclusions 334

15 The PPM-problem in the GATS ‘likeness’ context 339
   I Analysis of PPM-measures in GATT 340
   II Analysis of SSM-measures in GATS 345

16 Concluding summary: substitutability framework 349

Summary of conclusions 351
   I The underlying policy choice 351
   II A methodology for ‘likeness’ in GATS 353
      A The pragmatic approach: Border Tax Adjustments framework 353
      B The doctrinal approach: substitutability framework 354

Bibliography 357
Index 382
FOREWORD

The scope and definition of like products has always been at the heart of World Trade Organization (WTO) jurisprudence relating to Articles I and III of the General Agreement on Tariffs and Trade (GATT). It is the core of the fundamental principle of national treatment and its practical operation in international trade regulation. The General Agreement on Trade in Services (GATS) is built upon the same foundations, albeit, national treatment assumes a fundamentally different role of allowing for progressive liberalization. Accordingly, the role and function of likeness is not necessarily the same as in the field of goods. There are differences in the treaty texts. Moreover, and unlike GATT, dispute settlement has not brought about further clarification of the subject. The legal development in the field, some 15 years after the adoption of the new Agreement, is still in its infant stage.

The present book analyses the problem of likeness in the context of services in great depth, based upon the findings in GATT, and further developing the field in light of insights gained in the field of competition law. The different structure of services – short of physical properties and the absence of border measures – requires a new and fresh approach in addressing the goal of securing equal and fair conditions of competition for imported services. The author builds upon insights that the problem should, in the field of services, be addressed mainly in terms of substitution of demand, and that the analysis can be largely based on respective criteria developed in domestic competition law. The approach reflects an increasing transition in international trade regulation from border measures to domestic regulation. It may, in the future, also be of interest and relevant in the field of goods, with a view to achieve an overall coherent approach in the analysis of likeness, both in goods and services. The present thesis offers a substantial and in-depth contribution. It will greatly assist the development of an appropriate doctrine in case law and practice. The book is both highly relevant for theory as well as legal practice.

xvii
FOREWORD

Research and the resulting book evolved while Nicolas Diebold was a research fellow at the Department of Economic Law and the World Trade Institute at the University of Bern, Switzerland, from 2007–2008. His PhD was completed during a subsequent one-year visit at Stanford University Law School, working with Professor Alan Sykes. Nicolas emerged as a meticulous and thoughtful researcher and writer, and discussions with him have been inspiring and a challenge. He was always far ahead in the subject matter and my contribution to debating underlying issues and philosophies was inherently limited to conceptual issues and to linking thoughts to other and comparable regulatory issues. It was a privilege to accompany him in this process. His work will mark a leading contribution to the subject of non-discrimination in the international regulation of services.

Prof. Thomas Cottier
Bern, January 2010
ACKNOWLEDGEMENTS

The writing of this doctoral thesis accompanied me over different stages of my professional life and it is my great pleasure to thank those who made this book possible. I owe my deepest gratitude to my supervisor and mentor in academic matters, Professor Thomas Cottier. His encouragement, guidance and support made the writing of this doctoral thesis and my time as research and teaching fellow at the University of Bern and the World Trade Institute a most enjoyable, motivating and rewarding experience. Moreover, I am thankful to Professor Markus Krajewski for the time-intense work of writing the second evaluation report and for contributing valuable comments.

This book greatly profited from the opportunity to conduct research as a visiting scholar at Stanford Law School. I would like to thank Professor Alan Sykes for acting as my faculty sponsor and for sharing his thoughts on a number of issues covered in this book. I am also thankful to Charles Koob, a great lecturer in US antitrust law, who inspired many of my ideas on market definition. My stay at Stanford would not have been possible without the generous fellowship for prospective researchers from the Swiss National Science Foundation.

My interest in international economic law was first awoken during my studies at Duke Law School. I am most grateful to Professor Joost Pauwelyn who taught me the principles of WTO law at Duke and who made his support for this book available in a number of ways. A very special thank you also goes to Professor Marion Panizzon for integrating my thesis in the research project on trade in services with the NCCR Trade Regulation. I am further indebted to many of my colleagues for supporting me during my time as a PhD student, in particular Professor Matthias Oesch and Rachel Liechti from the University of Bern as well as Pierre Sauvé, Professor Panagiotis Delimatsis and Martín Molinuevo from the NCCR Trade Regulation.

I am most thankful to my parents, Mechthild and Paul Diebold, who always approved of my undertakings and enabled me to pursue the studies.
in law at the University of Geneva. Most importantly, this book would not have been possible without the continuous and infinite love, encouragement and support from my wife Valerie. Her motivation and belief in my capabilities as well as her dedication to our family gave me the necessary determination and focus to complete this book. Lastly, our children have not only been a great source of inspiration, but they also provided the needed distraction and helped me to keep things in the right perspective.

Nicolas F. Diebold

January 2010
ABBREVIATIONS

AB  Appellate Body
ABA  American Bar Association
ACP  African, Caribbean and Pacific
AD Agreement  Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement)
aff’d  affirmed
AoA  Agreement on Agriculture
Art./Arts.  Article/Articles
ASEAN  Association of Southeast Asian Nations
ATC  Agreement on Textiles and Clothing (terminated on 1 January 2005)
BGH  Bundesgerichtshof
BIT/BITs  Bilateral investment treaty/treaties
cert.  certiorari
CETS  Council of Europe Treaty Series
Cir.  Circuit
CPC  Central product classification
CTFS  Committee on Trade in Financial Services
CTG  Council for Trade in Goods
CTS  Council for Trade in Services
CVA  Canadian value added
DCS  Directly competitive or substitutable
DSU  Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding)
EC  European Communities
ECJ  European Court of Justice
e-commerce  Electronic commerce
ECR  European Court Reports
ECSC  European Coal and Steel Community
EEC  European Economic Community
EU  European Union
<table>
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<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>Euratom</td>
<td>European Atomic Energy Community</td>
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<tr>
<td>FTA</td>
<td>Free trade agreement</td>
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<tr>
<td>FTC</td>
<td>Federal Trade Commission</td>
</tr>
<tr>
<td>GATS</td>
<td>General Agreement on Trade in Services</td>
</tr>
<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
</tr>
<tr>
<td>GNS</td>
<td>Group of Negotiations on Services (Uruguay Round)</td>
</tr>
<tr>
<td>HFCS</td>
<td>High-fructose corn syrup</td>
</tr>
<tr>
<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<td>IIA</td>
<td>International investment agreement</td>
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<tr>
<td>ILM</td>
<td>International Legal Materials</td>
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<tr>
<td>LCIA</td>
<td>London Court of International Arbitration</td>
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<tr>
<td>Member</td>
<td>Member State of the World Trade Organization</td>
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<td>MFN</td>
<td>Most-favoured-nation</td>
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<td>MTN</td>
<td>Multilateral trade negotiations (Uruguay Round)</td>
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<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<td>NGR</td>
<td>Negotiating Group on Rules</td>
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<td>NT</td>
<td>National treatment</td>
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<tr>
<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
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<td>OJ</td>
<td>Official Journal of the European Communities</td>
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<tr>
<td>passim</td>
<td>here and there</td>
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<tr>
<td>PCB</td>
<td>Polychlorinated biphenyl</td>
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<tr>
<td>PPM/PPMs</td>
<td>Process and production method/methods</td>
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<tr>
<td>Prov.</td>
<td>Provisional</td>
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<td>Rev’d</td>
<td>Reversed</td>
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<td>SA</td>
<td>Agreement on Safeguards (Safeguards Agreement)</td>
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<td>SCC</td>
<td>Stockholm Chamber of Commerce</td>
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<td>SCM Agreement</td>
<td>Agreement on Subsidies and Countervailing Measures</td>
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<td>SDMI</td>
<td>S.D. Myers, Inc.</td>
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<td>SPF</td>
<td>Spruce–pine–fir (softwood lumber)</td>
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<td>SPS Agreement</td>
<td>Agreement on the Application of Sanitary and Phytosanitary Measures</td>
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<td>SR</td>
<td>Systematische Sammlung des Bundesrechts (Switzerland)</td>
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<tr>
<td>SSM</td>
<td>Service supply method</td>
</tr>
<tr>
<td>SSNDP</td>
<td>Small but significant non-transitory decrease in price</td>
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<tr>
<td>SSNIP</td>
<td>Small but significant non-transitory increase in price</td>
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<tr>
<td>SSRN</td>
<td>Social Science Research Network</td>
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<td>Stat.</td>
<td>United States Statutes at Large</td>
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<td>TBT Agreement</td>
<td>Agreement on Technical Barriers to Trade</td>
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<td>TEC</td>
<td>Treaty establishing the European Community</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union (formerly TEC)</td>
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<tr>
<td>TNC</td>
<td>Trade Negotiations Committee (ministerial level overseeing Uruguay Round)</td>
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<tr>
<td>TRIMs Agreement</td>
<td>Agreement on Trade-Related Investment Measures</td>
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<td>TRIPs Agreement</td>
<td>Agreement on Trade-Related Aspects of Intellectual Property Rights</td>
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<tr>
<td>UK</td>
<td>United Kingdom of Great Britain and Northern Ireland</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<tr>
<td>UNTS</td>
<td>United Nations Treaty Series</td>
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<td>US/U.S./USA</td>
<td>United States of America</td>
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<tr>
<td>VAT</td>
<td>Value added tax</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>Ver.</td>
<td>Version</td>
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<td>WGTCP</td>
<td>Working Group on the Interaction between Trade and Competition Policy</td>
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<td>WPDR</td>
<td>Working Party on Domestic Regulation</td>
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<td>WPGR</td>
<td>Working Party on GATS Rules</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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</tr>
</tbody>
</table>
TABLE OF CASES

WTO Panel and Appellate Body Reports


<table>
<thead>
<tr>
<th>Case Study</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>**China – Measures Affecting Financial Information Services and Foreign</td>
<td>Financial Information Suppliers: request for consultations 3 March 2008 from EC (DS372) and US (DS373) and 20 June 2008 from Canada (DS378); mutually agreed solution notified on 4 December 2008</td>
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<td>Measures Affecting Trading Rights and Distribution Services for Certain</td>
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</tr>
<tr>
<td>Publications and Audiovisual Products: Panel Report, China – Measures</td>
<td></td>
</tr>
<tr>
<td><strong>China – Value-Added Tax on Integrated Circuits</strong>: DS309, mutually</td>
<td>agreed solution notified 6 October 2005</td>
</tr>
<tr>
<td><strong>Dominican Republic – Import and Sale of Cigarettes</strong>: Dominican Republic –</td>
<td>Measures Affecting the Importation and Internal Sale of Cigarettes</td>
</tr>
<tr>
<td><strong>EC – Asbestos</strong>: European Communities – Measures Affecting Asbestos and</td>
<td>Asbestos-Containing Products</td>
</tr>
<tr>
<td>Communities – Regime for the Importation, Sale and Distribution of</td>
<td></td>
</tr>
</tbody>
</table>
TABLE OF CASES

EC – Bananas III: European Communities – Regime for the Importation, Sale and Distribution of Bananas


EC – Hormones: European Communities – Measures Concerning Meat and Meat Products (Hormones)


Japan – Alcoholic Beverages II: Japan – Taxes on Alcoholic Beverages

Korea – Alcoholic Beverages: Korea – Taxes on Alcoholic Beverages
<table>
<thead>
<tr>
<th>Table of Cases</th>
<th>xxvii</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>US – Gasoline</strong>: United States – Standards for Reformulated and Conventional Gasoline</td>
<td></td>
</tr>
</tbody>
</table>
TABLE OF CASES


GATT 1947 Reports and Rulings

Belgium – Family Allowances: GATT Panel Report, Belgian Family Allowances, G/32, adopted 7 November 1952, BISD 1S/59
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TABLE OF CASES


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XXX

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European Court of Human Rights


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