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REFLECTIVE ESSAY

An Uncommon Mind: Frieder Roessler's Legacy

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1. Doubts, Persistent Doubts

'U-huh'. This is what I recall being Frieder's routine reaction whenever he was exposed to an argument. He rejected nothing, but at the same time he agreed to nothing right away. He needed his time to process, and would reach his conclusions only at a later stage. He applied this standard to his own, spontaneous thinking which might have sounded entirely convincing to me when we were working together, but not to him. 'Let us think this issue through' – a literal translation of the German'durchdenken' – he would say to me when we on occasion spoke together.

The scope of his intellectual endeavors was breathtaking. With his often interlocutor, Bob Hudec, he shared the urge to transcend the ostensible. Nothing was taken for granted irrespective who the source of information was – 'Nullius in verba', as the motto of the Royal Society dictates. I recall numerous discussions about what some might have considered obvious. Frieder was never shy to confront well-established dicta, or to bring to light inconsistencies and errors. He was irreverent towards the past, but in an honest, intellectually challenging manner.

Nothing in my view exemplifies his strive for improving on past knowledge than his contributions to the understanding of non-discrimination in the GATT (General Agreement on Tariffs and Trade).

2. Likeness in GATT: The House that Frieder Built

GATT case law did not seriously delve into the question of 'like products', the foundational element in understanding non-discrimination, until the end of the 1970s. For reasons eminently explained in Baldwin (1970), and Jackson (1969), the 'bite' of behind-the-border policies was hard to assess (and anyway a concern of secondary order) in the presence of high import duties. *Japan–Alcoholic Beverages I*[1] emerges as the first panel report that provided a comprehensive discussion on this score adopting what later became known as the 'marketplace' test: consumers would define 'likeness'.

The theoretical underpinning of this interpretation was the construction of Article III of GATT (where the term 'like products' appears) as an instrument to avoid concession diversion. Were it left to governments to decide on likeness, they might be led (for political economy reasons) to adopt an understanding of the term that would reduce the value of tariff concessions. Trading nations, so the thinking goes, would not sit idle. For what is the purpose of reciprocally reducing the level of tariffs if protection can reemerge through the back door under the guise of unilateral regulatory distinctions? Consumers' choices, however, are heavily guided by scarcity of economic resources, and hence buying national is definitely not the cardinal preference for the critical mass of the citizenry.

There you go. A sound rational basis for substantiating a plausible outcome. Who would disagree with this construction?

[1]*Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, *I*, DS8, www.wto.org/english/tratop_e/dispu_e/gatt_e/87beverg.pdf.

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At that time (1978), Frieder was not dealing with panels. Indeed, there was no GATT Legal Office back then.[2] However, he understood only too well the importance of the question, as well as the potential shortcomings of the approach adopted in the aforementioned case. In his subsequent writings, namely Roessler (1996, 2003), after he had left the GATT/WTO, Frieder left no doubt that he was siding with the approach developed in the two reports I discuss next.

2.1 Change (The House that Frieder Helped to Build)

US–Malt Beverages[3] was an odd case. A tax distinction favoring a variety that only seldom appears and was present in the territory of the regulating state, was challenged for violating non-discrimination. The outcome is irrelevant for the purposes of our discussion. What matters is §5.25 of the report:

> The purpose of Article III is thus not to prevent contracting parties from using their fiscal and regulatory powers for purposes other than to afford protection to domestic production. Specifically, the purpose of Article III is not to prevent contracting parties from differentiating between different product categories for policy purposes unrelated to the protection of domestic production. The Panel considered that the limited purpose of Article III has to be taken into account in interpreting the term 'like products' in this Article. … While the analysis of 'like products' in terms of Article III:2 must take into consideration this objective of Article III, the Panel wished to emphasize that such an analysis would be without prejudice to the 'like product' concepts in other provisions of the General Agreement, which might have different objectives and which might therefore also require different interpretations.[4]

This paragraph provided the impetus for what became known as the 'aims and effect' test to define likeness. The advent of this test did not wait for long. In *United States – Taxes on Automobiles*, the panel held at §5.10:

> The Panel then proceeded to examine more closely the meaning of the phrase 'so as to afford protection.' The Panel noted that the term 'so as to' suggested both aim and effect. Thus the phrase 'so as to afford protection' called for an analysis of elements including the aim of the measure and the resulting effects. A measure could be said to have the aim of affording protection if an analysis of the circumstances in which it was adopted, in particular an analysis of the instruments available to the contracting party to achieve the declared domestic policy goal, demonstrated that a change in competitive opportunities in favour of domestic products was a desired outcome and not merely an incidental consequence of the pursuit of a legitimate policy goal. A measure could be said to have the effect of affording protection to domestic production if it accorded greater competitive opportunities to domestic products than to imported products. The effect of a measure in terms of trade flows was not relevant for the purposes of Article III, since a change in the volume or proportion of imports could be due to many factors other than government measures.[5]

[2]Marceau (2015) edited an excellent volume tracing the history of the Legal Office of the GATT/WTO.

[3]*United States – Measures Affecting Alcoholic and Malt Beverages*, www.wto.org/english/tratop_e/dispu_e/gatt_e/91alcohm.pdf.

[4]Hudec (2000) offers an excellent account regarding the relevance of regulatory intent in order to respond to the question whether two goods are 'like'. In his account, which in part builds on *US – Malt Beverages* dispute, unless the regulatory intent has been accounted for, the WTO judge might end up committing false positives by sanctioning measures which were never intended to function as protectionist devices. In Hudec (1988), and (1998), the same author explained the current text of Article III of GATT could be reconciled with his preferred interpretation of the term like products.

[5]The full report is available at www.wto.org/english/tratop_e/dispu_e/gatt_e/93autos.pdf. This report builds on the previous report on *US–Malt Beverages* and in a way expands on it. Here the panel found that the regulatory aim pursued is, in and of itself, the sole criterion for deciding on 'likeness' between domestic and imported goods. The relevance of trade effects was

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Indeed, what is wrong with that? And yet, this understanding of 'like products' flies against the previous understanding of 'likeness', does it not? Can they both be right?

It defies the purposes of this short paper to analyze in more detail Frieder's thinking. The house that he built, like all ideas that he was consistently willing to discuss and debate, was not meant to be a permanent edifice. Frieder wants to bring in a platform, a more complete background that would host new ideas so as to build a better house than the one before. And so he did.

2.2 Onto the WTO

WTO case law rejected the 'aims and effect' test for defining likeness of domestic and imported goods the very first time that it had an opportunity to do so. But it did not dismiss out of hand the relevance of the regulatory aim in deciding on likeness. Few have observed that in *Japan–Alcoholic Beverages II*,[6] the panel conspicuously added that Japan had advanced no regulatory justification for its tax differential between sochu (a predominantly Japanese drink) and a series of drinks that were predominantly Western. This report then, adopted the marketplace-test when dealing with a domestic tax differential for which no (plausible) justification had been advanced.

And of course, the Agreement on Technical Barriers to Trade (TBT) explicitly endorsed the legitimacy of distinctions based on the process of production of competing goods.[7]

I would not be far off from the truth stating that the basic intuition of Frieder (the relevance of the regulatory aim in likeness-analysis) has gained pace over the years. The manner in which it has been practiced has been rightfully (in my view) criticized.

3. Frieder and Me

It is hard to over-estimate Frieder's influence on my thinking. He hired me in the GATT Legal Office in 1992, and 'it did not take much time for him to realize that he was giving too much time to me'. But he gave me the time and space necessary for me to understand the basic logic of the system, by asking me to continue the excellent work of Friedl Weiss in updating the GATT Analytical Index. He then gave me the opportunity to work as Legal Affairs Officer in GATT disputes. He also often involved me in discussions with luminaries in the field: Bob Hudec, John Jackson, David Palmeter, and Ernst-Ulrich Petersmann were his preferred 'Stammtisch' and he generously offered them and me a seat at the 'Nachwuchsgeneration'. My years next to him were the best complement I could have hoped for to add to my years in various schools.

In my eyes, he did everything right. He even picked the most able and suitable successor in Bill Davey who headed the Legal Office during the first years of the WTO, and picked up from where Frieder had left.

As years passed by and I started forming my own opinions on the issues we had discussed in the early nineties, I came to realize that he was secretly proud of all of us as we developed through time. And it is not the case that we all agreed.[8] What mattered to him most I discovered, was the internal coherence of the argument. The external validation could wait. For Frieder was a legitimate intellectual.

I never managed to pay him back. I did (and continue to do) try to move forward. I know that this is the way he would have liked it anyway.

dismissed because, in the panel's view, the aim of Article III of GATT is to establish equality of competitive conditions and not to protect a certain market outcome.

[6]The full text of the report is available at www.wto.org/english/tratop_e/dispu_e/cases_e/ds8_e.htm.

[7]Even though case law has turned the logic behind Arts. 2.1 and 2.2 TBT to its head, as I have argued in Mavroidis (2019). See also Charnovitz (2002), and Petersmann (2000).

[8]In Grossman et al. (2013), for example, while we see the relevance of regulatory aim, we take distance from the 'aims and effect' test as practiced.

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Frieder lived during good times, or maybe times back then were good because people like Frieder made them good. While preparing this short note, I turned back to a re-reading of the reports I mention above (and a few others where Frieder was involved as legal advisor to panels). At the risk of waxing lyrical here, I was overwhelmed with nostalgia. I would kindly ask the reader to focus on the choice of words in the cited passages. And then take a step back and reflect on the logical construction permeating the quoted paragraphs.

These passages reflect a deep thinking about the most fundamental issues circumscribing trade integration. They also embed a coherent approach when expressing these ideas: how to understand agreed contractual terms in context? What is the most plausible across competing interpretations? Why is it the case? In a few pages, a solution to a dispute is provided, and its intellectual underpinning is explained as well. I dread the moment when a new report is issued these days, as I know I am in for a repetition of platitudes, a concatenation of empty sentences and lengthy citations, the usefulness of which is hard to discern.

When thinking about Frieder and his generation, I am reminiscent of Benjamin Franklin, the American polymath and Founding Father. When asked during the negotiations that led to the enactment of the US Constitution about the choice of regime that he and the others had made, he replied (almost stoically):

> A Republic, if you can keep it.

Frieder and his generation bequeathed us with a Republic. I am afraid this is not what we will leave to those who come next.

References

Baldwin, R.E. (1970) *Non-Tariff Distortions in International Trade*. Washington. DC: The Brookings Institution.

Charnovitz, S. (2002) 'The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality', *Yale Journal of International Law* 27, 59–109.

Grossman, G.M., H. Horn, and P.C. Mavroidis (2013) 'Domestic Instruments', in H. Horn, and P.C. Mavroidis (eds.), *Legal and Economic Principles of World Trade Law, ALI, The American Law Institute Reporters' Studies on WTO Law*. New York City: Cambridge University Press, 205–345.

Hudec, R.E. (1988) 'Tiger, Tiger in the House: A Critical Evaluation of the Case against Discriminatory Trade Measures', in E.-U. Petersmann and M. Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problem*. Kluwer: Deventer, 165–196.

Hudec, R.E. (1998) 'GATT Constraints on National Regulation: Requiem for an Aims and Effect Test', *International Lawyer* 32, 619–649.

Hudec, R.E. (2000) '"Like Product": The Differences in Meaning in GATT Articles I and III', in T. Cottier, and P.C. Mavroidis (eds.), *Regulatory Barriers and the Principle of Non-discrimination in World Trade Law*. Ann Arbor, Michigan: University of Michigan Press, 101–123.

Jackson, J.H. (1969) *World Trade and the Law of the GATT*. Indianapolis, Indiana: Bobbs-Merrill.

Marceau, G. (2015) *A History of Law and Lawyers in the GATT/WTO*. Geneva, Switzerland: Cambridge University Press & the WTO.

Mavroidis, P.C. (2019) 'Last Mile for Tuna (to a Safe Harbour): What is the TBT Agreement All About?', *European Journal of International Law* 30, 279–301.

Petersmann, E.-U. (2000) 'International Trade Law and International Environmental Law: Environmental Taxes and Border Tax Adjustment in WTO Law and EC Law', in R. Revesz, P. Sands, and R. Stewart (eds.), *Environmental Law, The Economy and Sustainable Development*. Cambridge: Cambridge University Press, 127–165.

Roessler, F. (1996) 'Diverging Domestic Policies and Multilateral Trade Integration', in J. Bhagwati, and R.E. Hudec (eds.), *Fair Trade and Harmonization, vol. 2: Legal Analysis*. Cambridge: Cambridge University Press, 21–64.

Roessler, F. (2003) 'Beyond the Ostensible: A Tribute to Professor Robert Hudec's Insights on the Determination of the Likeness of Products under the National Treatment Provisions of the GATT', *Journal of World Trade* 37, 771–781.

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