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INTERNATIONAL TRADE

amicus

An e-newsletter from Lakshmikumaran & Sridharan, New Delhi, India

November 2013 / Issue 30

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November
2013

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National Treatment principle - Analysis of GATT Article III

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Among the pillars of the modern trading system that developed due to the genesis of GATT/WTO, principle of National Treatment is arguably one of the most significant. It is often regarded as a cornerstone of the GATT/WTO regime and is present in many of the agreements under the WTO, including the General Agreement on Trade in Services (GATS), the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) and the Agreement on Trade-related Investment Measures (TRIMs). National treatment is one of the components of the principle of non-discrimination in the multilateral trading regime; the other is the Most Favoured Nation Treatment (MFN). Importance of principle of national treatment under not just the WTO but also under a number of other international treaty regimes is reflected in its presence in most Bilateral Investment Treaties (BITs) in existence today, thus effectively transforming the way in which nations trade with one another.[1]

This article seeks to outline the scope of the provisions of Article III of GATT 1994, and highlight noteworthy points of interpretation under Articles III:1 and III:2 in order to acquire a fundamental understanding of the concept of national treatment under the above provisions and its interpretation by various WTO panels and the Appellate Body.

The principle of national treatment, in simple terms, prohibits discrimination between imported goods and domestically produced goods with regard to internal taxation or regulation. The history of Article III can be traced to Article 18 of the failed Havana Charter[2] which sought to create the International Trade Organisation (ITO), and provisions of which were reworked into GATT 1947. Article III, in its present form, has been incorporated into GATT 1994 by way of reference.

In the seminal dispute of *Japan – Taxes on Alcoholic Beverages,* the Appellate Body stated that the purpose of Article III was to avoid protectionism in the application of internal tax and regulatory measures and further extended this postulation to mean that members were obligated to **provide equal competitive conditions for imported products in relation to domestic products.**[3] Thus, the focus of Article III is that laws and regulations are not enacted in favour of domestic goods so that imported goods are left with a lesser competitive advantage in the marketplace.

For a more detailed understanding, the relevant extracts of Article III are provided below:

> **"Article III - National Treatment on Internal Taxation and Regulation**
>
> 1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to

[1] National Treatment, UNCTAD Series on issues in International Investment Agreements, UNCTAD/ITE/IIT/11 (Vol. IV) (United Nations, 1999).

[2] Havana Charter for an International Trade Organization, Final Act and Related Documents, United Nations Conference on Trade and Employment, United Nations Document E/Conf. 2/78 (Nov. 21, 1947- Mar. 24, 1948).

[3] Appellate Body Report, *Japan - Taxes on Alcoholic Beverages,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, page 16 (1 November 1996) [*"Japan - Alcoholic Beverages"*].

afford protection to domestic production.

2. 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."

Analysis of Article III:1

Article III:1 emphasizes that internal taxes and other charges, in addition to other laws, regulations or requirements which may affect the internal sale, offering for sale, purchase, transportation, distribution or use of products should not be applied so as to afford protection to domestic production. Article III:1 contains general principles, as opposed to specific obligations contained in other provisions of Article III. However, the general principles enshrined in Article III:1 act as a guiding principle for, and inform the interpretation of the other obligations contained in Article III, apart from the text of the provisions themselves.[4]

Article III:1 often influences the manner in which other provisions such as Articles III:2 and III:4 are interpreted. For instance, the question of which kind of charges fall within the scope of Article III is determined by the usage of the words "internal" and "imported", which suggests that Article III covers charges that are imposed on goods that have already been imported" and the obligation to pay such charges is triggered by an internal factor which takes place inside the relevant customs territory.[5]

Furthermore, the phrase "so as to afford protection to domestic production" is also interpreted to mean that intent is not the key factor for a finding of violation or non-violation, thereby rejecting the so-called "aim-and-effect" test. Indeed, it is immaterial if protection to the domestic industry was not the intended objective of the measure because the relevant consideration is the application of the measure.[6] Therefore, the test of a measure's consistency with Article III will necessarily entail a comprehensive analysis and scrutiny of the design, architecture and entire structure and application of the measure in question.[7]

Analysis of Article III:2, first sentence

With regard to the application of Article III:2, jurisprudence shows that the scope of the first and the second sentence of Article III:2 differ substantially from one another. A combined reading of the text as well as relevant interpretations reveal that a two-tiered test exists in order to ascertain whether a measure is in violation of Article III:2, first sentence:[8]

- Whether the imported products of one contracting party and the domestic products of another are "like products";
- Whether the imported products are taxed "in excess" of the like domestic product.

The criteria relating to "likeness" will involve a case-by-case determination of the product's properties, nature and quality; the product's end-

[4] *Id,* page(s) 17-18.

[5] Appellate Body Report, *China - Measures Affecting Imports of Automobile Parts,* WT/DS339/AB/R, WT/DS340/AB/R / WT/DS342/AB/R, para 161 (12 January 2009).

[6] *Japan - Alcoholic Beverages, supra* note 3, page(s) 27-28.

[7] *Id,* page 29.

[8] *Id,* page(s) 18-19; Appellate Body Report, *Canada - Certain Measures Concerning Periodicals,* WT/DS31/AB/R, page(s) 22-23 [*"Canada - Periodicals"*].

uses in a given market; consumers' tastes and habits and a uniform tariff classification.[9] In addition, the test with regard to the phrase "in excess of" is applied strictly to the tax or charge faced by the imported products and the domestic products, and the tax/charge in question is not required to be scrutinized under a "trade effects" test or a *de minimis* standard. Even a small amount of tax on imported products which is "in excess" of the tax on the like domestic product will attract a violation of the first sentence of Article III:2.[10]

Analysis of Article III:2, second sentence

However, the scope of the second sentence of Article III:2 is significantly altered by Ad Article III:2 which is extracted as follows:

> "Paragraph 2
>
> 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 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."

The following points of interpretation thus arise from Article III:2, second sentence. First, the phrase "in a manner contrary to the principles set forth in paragraph 1" indicates that it **specifically invokes the application of Article III:1**, as opposed to the **implicit invocation of Article III:1 in the first sentence of Article III:2.**

Furthermore, for a measure to be in violation of the second sentence of Article III:2, the following elements must be fulfilled:[11]

- The imported products and the domestic products are "*directly competitive or substitutable products" which are in competition with each other*;
- The directly competitive or substitutable imported and domestic products are *"not similarly taxed"*;
- The dissimilar taxation of the directly competitive or substitutable imported domestic products is *"applied...so as to afford protection to domestic production"*, a criterion which is present in Article III:1.

As can be inferred from the above requirements, the category of goods that can be evaluated under the second sentence of Article III:2 is broadened to "directly competitive or substitutable products" from "like products" in the first sentence of Article III:2.

Conclusion

The analysis in the foregoing paragraphs reveal that Article III:2 is structured such that if the imported and domestic products are not "like", then no violation of the first sentence of Article III:2 is triggered. However, in light of the second sentence of Article III:2, the products in question may not be "like" products, but may still fall within the scope of "directly competitive or substitutable goods" as per Ad Article III:2.[12] Thus, Article(s) III:1 and III:2 necessitate a multi-layered examination of a measure which may involve varied questions of fact and law. In conclusion, the principle of national treatment under Article(s) III:1 and III:2 will be interpreted according to the facts and circumstances of each case and the panel/Appellate Body is expected to apply the relevant principles on a case-by-case basis.

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[9] Report of the Working Party on Border Tax Adjustments, BISD 18S/97, para. 18 in *Japan - Alcoholic Beverages, supra* note 3, page 20 & *Canada- Periodicals, supra* note 8, page(s) 20-21.

[10] *Japan- Alcoholic Beverages, supra* note 3, page 23.

[11] *Japan- Alcoholic Beverages, supra* note 3, page 24.

[12] *Japan- Alcoholic Beverages, supra* note 3, page 25.

Trade Remedy News

Anti-dumping /Safeguard actions by India

Product	Country	Notification No.	Date of Notification	Remarks
Acrylic Fibre	Thailand and Korea RP	15/16/2013-DGAD	24-9-2013	ADD second sunset review investigation initiated
Cable Ties	China and Taiwan	15/20/2013-DGAD	17-10-2013	ADD sunset review investigation initiated
Cefadroxil Monohydrate	EU	22/2013-Cus. (ADD)	10-10-2013	Definitive ADD imposed
Ductile iron pipes	China	23/2013-Cus. (ADD)	10-10-2013	ADD re-imposed after sunset review
Methyl Acetoacetate	All countries	GSRD 22011/8/2013	8-10-2013	Imposition of safeguard duty not recommended
Methylene Chloride	EU, USA and Korea	24/2013-Cus. (ADD)	21-10-2013	Provisional ADD imposed
Paracetamol	China	26/2013-Cus. (ADD)	28-10-2013	ADD re-imposed after sunset review
Persulphates	Taiwan, Turkey and USA	14/9/2012-DGAD	23-10-2013	ADD - Time limit for completion of investigation extended till 27-11-2013
Phenol	South Africa	15/21/2013-DGAD	28-10-2013	ADD sunset review initiated
Phosphoric Acid (Technical, food and industrial grade)	China	15/1010/2012-DGAD	1-10-2013	ADD - Time limit for completion of investigation extended till 9-11-2013
Purified Terephthalic Acid	China, EU, Korea and Thailand	14/7/2013-DGAD	8-10-2013	ADD investigation initiated
PVC Suspension Resin	EU and Mexico	14/1012/2012-DGAD	23-10-2013	ADD - Time limit for completion of investigation extended till 4-1-2014
Recordable Digital Versatile Disc (DVD)	Vietnam	15/5/2012-DGAD	15-10-2013	ADDenhancementrecommended in mid-term review investigation
Red Phosphorous	China	14/12/2012-DGAD	23-10-2013	Time limit for completion of ADD investigation extended till 27-12-2013
Sodium Nitrite	China	15/2/2013-DGAD	18-10-2013	ADD - Mid-term review investigation initiated
Vitrified and Porcelain Tiles	China	25/2013-Cus. (ADD)	22-10-2013	Final ADD imposed pursuant to the final findings of the New Shipper Review concerning goods produced by M/s. Foshan Qingbiao Ceramics Co Ltd and exported through M/s. Sheenway Corporation, HongKong.

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Certain Lined Paper Products	USA	A-533-843; 78 FR 63162	23-10-2013	Preliminary determination of dumping margin for two companies and rescission of review for others
Certain Lined Paper Products	USA	C-533-844; 78 FR 62584,	22-10-2013	Affirmative preliminary results of countervailing duty administrative review
Sulphanilic acid	European Union	2013/C 300/05 and 2013/C 300/04	16-10-2013	Initiation of expiry review of the anti-dumping as well as countervailing duty measures

WTO News

Ukraine's Safeguard measures on cars taken to dispute settlement by Japan

Japan has, on 30-10-2013, notified the WTO Secretariat of a request for consultations with Ukraine on the latter's imposition of safeguard duty on certain passenger cars. Japan alleges that Ukraine acted inconsistently with the Agreement on Safeguards and the GATT 1994 and had not provided adequate opportunity for prior consultations as required by the Safeguards Agreement. It is also alleged that the safeguard measures have been applied beyond the extent necessary to prevent or remedy serious injury to the Ukraine's domestic industry.

Earlier, Japan had on 11-7-2013, in a meeting of Council for Trade in Goods, questioned the basis for the Ukrainian measure and EU, Russia, Australia, Korea and Turkey had also voiced their concerns over the measures which imposed safeguard duty of 6.46% and 12.95%, depending upon the size of vehicle. This is the second case in recent times against measures restricting trade in automobiles, the first one being Russia's recycling fees on imported automobiles which was also disputed by Japan along with EU. Russia has rejected panel request made by EU and DSB has deferred establishment of panel on 22 October, 2013.

Ukraine has also imposed recycling fees on imported automobiles though Ukraine has, on 18-10-2013, in the Council for Trade in Goods meeting said that draft amendments, to ensure that the measure is in compliance with the WTO, are expected to be passed by its Parliament in the near future.

China seeks consultations with EU on implementation of earlier DSB report

China has, on 30-10-2013, sought consultations with the European Union on the latter's implementation of DSB Appellate Body report in the dispute *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* (DS397). Consultations pursuant to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes allege that that the measures taken by EU

have not made it compliant with obligations under the AD Agreement and GATT 1994 inasmuch as they do not fully and correctly implement the recommendations and rulings of the DSB.

Earlier, the DSB in its Appellate Body report, adopted on 28-7-2011, had concluded that Article 9(5) of Council Regulation (EC) No. 1225/2009 was inconsistent "as such" with Articles 6.10, 9.2 and 18.4 of the AD Agreement and Article XVI:4 of the Agreement establishing the World Trade Organization and that Council Regulation (EC) No. 91/2009 imposing definitive anti-dumping duty on imports of certain iron or steel fasteners originating in China was inconsistent with several requirements of the AD Agreement.

Cotton producers seek better treatment

Group of Four of the African cotton producing countries has submitted a proposal aimed at reducing subsidies and trade barriers that least developed countries have to face in respect of cotton exports. The proposal by "Cotton Four C4" - Benin, Burkina Faso, Chad and Mali, asks for a decision to be taken in this regard at the WTO's Bali Ministerial Conference scheduled for 3–6 December 2013. As per the suggestions, cotton from LDCs should be given duty-free and quota-free access to the markets of developed countries by 1-1-2015 and export subsidies on cotton in developed countries should be eliminated immediately. The proposal also calls for intensive negotiations on domestic support for cotton in order to substantially reduce same. The proposal was first presented by Burkina Faso to the Trade Negotiations Committee on 25-10-2013, and then by Chad at consultation on the development assistance for cotton on 30-10-2013. India along with group of G-20 developing countries in the agriculture negotiations supports the proposal.

FTA News

EU and Canada sign Free Trade Agreement

European Union and Canada have, after more than four years of negotiations, finally signed a Comprehensive Economic and Trade Agreement. This is EU's first major agreement with a member of the G8 group of the world's main economies and Canada's biggest FTA. The agreement is expected to improve exchange of goods, services, investment and labour across the Atlantic and may serve as a template for the much talked about EU-USA FTA. Services sector is seen as the biggest winner from the deal, as tariff on almost all the goods traded among the two is even otherwise small. The final text of the agreement is expected to take around 2 more years after the in-principle agreement was signed last month. The technical summary released by the Canadian government talks of tariff elimination upto 98% on both sides, transition period for sensitive products like ships, auto and certain agricultural goods and recognition of GI in respect of Feta, Gorgonzola etc. The final agreement will also include chapters on sustainable development, labour and environment. This agreement has to be ratified by all the countries in the European Union as well to actually come into effect. There are reports that Romania may block the same until Canada lifts its visa regime for Romanian nationals.

India and Russian Customs Union to study possibility of CECA

India has shown keen interest in signing Comprehensive Economic Cooperation Agreement (CECA) with the Customs Union of Russia, Belarus and Kazakhstan. The CECA will go beyond trade in goods and include services, investments and

government procurement. As per reports while Russia and Belarus have given their consent to set up the Joint Study Group to study various possibilities, there is some resistance from Kazakhstan. India and Russia have been talking of a Comprehensive Economic Partnership Agreement (CEPA) or FTA for almost 4 years now. The Customs Union of Russia, Belarus and Kazakhstan was set up in 2010 to increase cooperation among the erstwhile USSR states. India primarily exports agricultural goods, pharmaceuticals, paints, readymade garments, footwear, hand tools and software to Russia while Russia exports mineral fuels, chemicals, precious stones, iron & steel and machinery (heavy) to India.

News Nuggets

L&S to advise Government of China

Lakshmikumaran & Sridharan (L&S) has been empanelled by the Ministry of Commerce, China (MOFCOM) for assisting them on (1) WTO dispute settlement and sub-regional trade agreements or Regional Trade Agreements (RTAs) and (2) Trade barriers. L&S is the only Asian law firm to have been empanelled by MOFCOM, China.

Currency swap agreements take front stage

Currency swap agreements seem to be the flavor of the season. China recently signed such swap deals with European Union, Indonesia and Singapore and has such agreements with more than twenty countries. India enlarged its agreement with Japan to cover exchange of currency up to 50 billion USD, which is more than triple the amount agreed earlier. The Indian Commerce and Industry Ministry has, in August this year, constituted a task force comprising representatives from the Ministry, Department of Economic Affairs, Reserve Bank of India (RBI), SBI, industry bodies like FICCI, CII and Federation of Indian Exporters Organisation (FIEO) to work out currency swap arrangements with India's key trading partners. Currency-swap deal works in an emergency to tackle the problem of balance of payments between the trading countries if foreign exchange reserves are scarce and also reduces transaction costs of cross-border exchange for local importers/exporters. With China pushing its currency in the international market, its' currency is being seen an alternative to curb the dollar demand.