CONUNDRUM OF LIKE PRODUCT ANALYSIS UNDER NON-DISCRIMINATION PRINCIPLES OF GATT

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ABSTRACT

The non-discrimination principle informs the cornerstone of international trading regime. Non-discrimination principle is enshrined through two prominent principles. The principle of Most Favored Nation (MFN) as well as the National Treatment Principle are the two essential components of non-discrimination principle under GATT regime.

The main purpose of the non-discrimination principles is to regulate trade restrictive measures under GATT regime. The overarching principle to maintain competitive relation in market. Most Favored Nation principle seeks to maintain origin neutrality among various member nations. The purpose is to ensure that the products are not differentiated on the basis of the origin that they belong to. It mainly covers border measures for the same purposes. National Treatment ensures a parity between importers as well as domestic players in the market. It is for this purposes that it covers internal measures in the form of fiscal as well as non-fiscal measures.

Most Favored Principle as well as the National Treatment principle incorporate like product test to identify the relevant products. The main purpose is to maintain non-discrimination among such products which are similar in nature. Thus, the concept of like products is fundamental in analyzing the general scope of non-discrimination principles of GATT regime. The purpose of the present paper is to scrutinize the general ambit of like products under GATT regime.

GATT doesn't provide for a precise definition for the term "like product" under its text. Moreover, the term "like products" is used under different contexts. There is no authority to differentiate various contexts for the term. This creates a certain amount of ambiguity with respect to the scope of non-discrimination principles. The fundamental question is to identify the precise level of similarity that is demanded by the like product test. The present paper delves over such varied facets of like product analysis. Appellate Body as well as the Panel have devised several approaches to apply like product test. The present paper would also reflect upon the merits and demerits of such varied approaches.

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I. INTRODUCTION

Non-discrimination principle remains an important concept under International Law. The principle ensures sovereign equality within the international realm. The World Trade Organization (hereinafter, "*WTO*") incorporates such non-discrimination principles to further liberalize the international market. Such non-discrimination principles are recognized under a number of covered agreements.

While negotiating GATT, the Contracting Parties recognized the need to maintain a parity under international market. The main purpose was to encourage trade creation and discourage trade diversion. Adverse implications of discriminatory measures were well recognized by the Contracting Parties. It is for this reason that such non-discrimination principles informed the core obligations of GATT. The main purpose was to reduce discriminatory measures under international trade. Thus, trade was to be liberalized in environment of competitive equality and fair competition.[1]

A. Non-Discrimination Principles in GATT

Under the GATT regime, the non-discrimination principle is mainly manifested in two principle forms. One exit in the form of Most Favored

[1] Agreement establishing the World Trade Organization, Preamble.

Nation Treatment (as enunciated under GATT Article I) and the other in the form of the principle of National Treatment (as enunciated under GATT Article III). National Treatment obligation (hereunder, "NT principle") prohibits member states from discriminating imported products in comparison to the domestic products.[2] On the other hand, the Most Favored Nation principle (hereunder, "the MFN principle") precludes the member nations from discriminating among like products of GATT member nations on the basis of its origin.[3]

The MFN principle is enshrined under Article I and National Treatment is enshrined under Article III of GATT. Both the articles protect the international arket from discriminatory measures. However, the two articles are meant to fulfil different set of purposes. The main purpose of the MFN principle is to ensure origin neutrality within the international realm. Thus, the product of one country is compared with another. On the other hand, the national treatment principle is enshrined to protect foreign producers from discriminatory measures. Such foreign producers are compared with the domestic players in the market. Thus, it mainly regulates various forms of domestic measures.

Both the articles incorporate a distinct "*like product*" analysis. The like product analysis informs the panel about the relevant traders that are to be compared to one another. Like product analysis identifies the relevant products that are to be compared. Thus, a like product analysis would indirectly compare those traders that are similarly situated. The second step is to provide for a standard of treatment.

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[2] European Communities - Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS401.

[3] General Agreement on Tariffs and Trade 1947, art 3.

The two principles employ different terms to impose the obligation. Article I provides for an obligation to accord such advantage on an immediate and unconditional basis. This indicates that the MFN principle is enshrined as an unconditional principle under GATT regime. Thus, the MFN principle is antithetical to the notion of reciprocity. This is the departure that GATT takes from a number of other international agreements.

Article III provides a general obligation under the first paragraph. The general objective behind the article is to ensure that the internal measures are not applied in a manner to "*afford protection to the domestic players"* in the market. This general obligation is further defined through a number of substantive obligations arising out of various paragraphs under Article III. Each paragraph covers a distinct set of measures. In particular, the second paragraph covers internal taxes or other forms of internal charges. The second paragraph is further bifurcated int two parts. The first part compares like products with one another. The second paragraph precludes a state from imposing a charge "*in excess of"* the charge imposed on domestic players. The second part of the second paragraph compares "*directly or substitutable products"* with one another. The second part imposes an obligation to similar charges. The fourth paragraph covers internal laws or regulations. Unlike the second paragraph, the fourth paragraph covers non-fiscal measures. The paragraph compares "*like products*" to one another. It imposes an obligation of "*no-less favorable treatment*" upon various member nations.

It can be observed that GATT uses the term "*like product*" in different contexts. Each context provides for a new set of measures that are covered under a particular provision of GATT. This brings in a lot of ambiguity with respect to the interpretation of like product analysis. Moreover, the panel as well as the appellate body have provided for different approaches to conduct the like product analysis. The purpose of the present article is to critically

examine such approaches to the interpretation of the term "*like products"*. Further, the author would suggest an interpretation which furthers the object and purpose of the agreement. The article is mainly divided into two parts to expound upon the MFN as well as the National Treatment Principles of GATT. The purpose is to delve over the existing jurisprudence around the two non-discrimination principles. The author would conclude the article to further clarify the general principles around the non-discrimination principles of GATT.

B. Most Favoured Nation Principle

The MFN principle is not a recent development in the international realm. It traces an ancient pedigree.[4] The MFN principle became a common provision under most of the international bilateral arrangements by the early 18th century.[5] Initially, the United States was reluctant to adopt the MFN principle under its domestic policies. However, post the First World War, United States departed from its initial position to become a sustained proponent of the MFN principle.[6] The MFN principle was framed as a fundamental principle under *US Reciprocal Trade Agreements Act of 1934* ("The Reciprocal Agreement"). The Reciprocal Agreement was used as a blueprint for framing GATT provisions.[7]

The MFN principle exists as a cornerstone of the GATT agreement. It imposes an obligation upon its member states to extend the unconditional treatment of "like products" among other member nations on an origin- neutral

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[4] Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (4th edn, Routledge 2013); *see also,* John H Jackson, *World Trade and the Law of the GATT* (Bobbs-Merrill Company 1969) 249.
[5] Treaty of Paris 1814, art 12.
[6] Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (4th edn, Routledge 2013) 56.
[7] Richard Carlton Snyder, *The Most-Favored-Nation Clause: Analysis with Particular Reference to Recent Treaty Practice and Tariffs* (Columbia University Press 1948).

basis.[8] The principal rationale behind the MFN principle can be traced back to the principle of sovereign equality as enshrined under the United Nations Charter.[9] The principle of sovereign equality itself requires the international economic relations to be based on the principle of equality. In addition to the principle of sovereign equality, MFN principle can also be justified on an economic basis. The MFN principle protects the market by eliminating economic distortions. The MFN principle eliminates "bilateral opportunism", a tendency between states to negotiate bilateral agreements on such terms that seem to benefit their policies and thereby create trade externality in the market.[10] The underlying principle is to allow the market to operate without undue hindrance. In a multilateral system it precludes a country from gaining unfair competitive advantage over the products originating in other member nations.[11]

While interpreting the MFN principle, the Appellate Body has observed that there are several MFN clauses enshrined under the GATT agreement.[12] Thus, the MFN principle is pervasive under various GATT obligations.[13] Under the present chapter, the researcher mainly emphasizes upon the general MFN principle as enshrined under Article I GATT.

1. MEASURES COVERED UNDER ARTICLE I GATT

Article I is termed broadly under the GATT Agreement. Thus, all forms of measures having an effect on international trade are subjected to the MFN principle. Essentially, the principle covers all forms of border measures having

[8] US Appropriations Act, s 211.
[9] United Nations Charter, art 2(1).
[10] Kyle Bagwell and Robert W Staiger, *The Economics of the World Trading System* (MIT Press 2002).
[11] Warren F Schwartz and Alan O Sykes, 'The Positive Economics of Most-Favoured-Nation Obligation and its Exceptions in the WTO/GATT System' (1998) Economic Dimensions in International Law 43.
[12] Canada — Certain Measures Affecting the Automotive Industry, WT/DS139
[13] ibid.

an effect on the import or export of goods.[14] In addition to such border measures, Article I also covers such internal measures which are applicable upon the goods once they enter into the market.[15] Therefore, the member nations are prohibited from imposing such unilateral measures which affect the competitive relations of like products originating among various member nations. While applying the MFN principle, the Dispute Settlement Body is expected to analyze whether the concerned measured in its *"design, structure and expected operation"* has a detrimental impact upon the competitive conditions of members' "*like products*".[16]

The term "*Custom Duties and charges of any kind imposed or in connection with importation or exportation*" can collectively be referred to as tariffs. Member nations are under an obligation to provide for equal treatment while imposing such tariffs upon imports from other countries or exports to other countries. The obligation of equal treatment applies upon bound duties[17] as well as to unbound duties. Such obligation is also applicable upon tariffs which are lower than the bound rate. Therefore, when a member nation sets its tariff rate lower than the bound rate then it is under an obligation to extend such lower rate to all like products.[18] The MFN obligation is not only restricted to positive actions but also covers such omissions which confer a certain form of advantage to the member nation.[19]

MFN obligation also extends to non-fiscal border measures. Therefore, imposition of a less complex license procedure was also recognized by the

[14] General Agreement on Tariffs and Trade, art I (1).
[15] ibid.
[16] EC — Seal Products (n 2)
[17] General Agreement on Tariffs and Trade 1947, art 2.
[18] Spain—Tariff Treatment of Unroasted Coffee (27 April 1981) L-5135 - 28S/102.
[19] United States Customs User Fees (25 November 1987) L/6264 - 35S/245.

panel as a violation of Article I:1.[20] Furthermore, Article I:1 explicitly clarifies that it covers measures referred under para 3 and para 4 of Article III. Therefore, internal measures imposed in the form of internal taxation as well as internal regulations are also covered within the ambit of Article I. Therefore, a member nation is prohibited from imposing both border measures as well as internal measures in a discriminatory manner to affect the MFN obligation.[21] It is also important to note that MFN obligation extends to advantages granted to non-WTO members as well.

2. ADVANTAGE, FAVOR, PRIVILEGE OR IMMUNITY UNDER ARTICLE I

Article I is termed so broadly that it covers all forms of advantage accorded to a member nation. Any such measure which benefits a member's access to market or impacts the competitive relationship in the market can be construed as a measure conferring advantage under Article I.[22] A similar interpretation was given by the Appellate Body by emphasizing upon the broad term "*any advantage…*" used under Article I text.[23] Thus, backdating of a revocation order pertaining to imposition of countervailing duty without an additional requirement of review was construed as an advantage under Article I.[24] Similarly a measure exempting certain imports from custom duty was also construed as a matter of advantage.[25] A measure providing for a less onerous procedure may also be covered as measure conferring an *"advantage"* under Article I GATT.[26] Similarly in another dispute, the Panel observed that

[20] European Communities- Regime for the Importation of Bananas (22 May 1997) WT/DS 27/R, para 7.188.
[21] China- Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (21 December 2009) WT/DS363/AB/R.
[22] United States- Certain Measures Affecting Imports of Poultry from China (5 November 2010), WT/DS 392/AB/R, para 7.415.
[23] Canada-Autos (n 12).
[24] United-States- Denial of Most-Favored Nation Treatment as to Non-Rubber Footwear from Brazil (10 January 1992) L/6439 - 39S/128, para 6.12.
[25] Canada-Autos (n 12).
[26] EC — Bananas III (n 20).

granting of market access to certain importers could also be qualified as a grant of "*advantage*" under Article I GATT.[27]

II. LIKE PRODUCT ANALYSIS UNDER *GATT PRINCIPLES*

The application of MFN treatment is limited to such products which are "*like*" in nature. Therefore, member nations have the right to treat *"unlike*" products differently. However, GATT does not provide for any form of definition of "*like products*" under its text. Since, the policy objective behind Article I is to ensure equality in competitive relationship, the like product test must also be interpreted within the context of protecting equality of competitive opportunities in the market.[28]

However, various GATT provisions have used the "*like product*" test in different contexts depending upon the subject matter covered under the concerned provision. The interpretation of "*like product*" must also differ with such varied contexts.[29] In comparison to Article III, a very narrow context is provided for the term "*like product*" under Article I.[30] While making a comparison, the Panel observed that the term *"directly substitutable product"* as used under Article III is not contained under Article I.[31] The Panel then

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[27] EC — Seal Products (n 2).
[28] Philippines - Taxes on Distilled Spirits (25 January 2012), WT/DS396/11, para 170; *see also,* European Communities - Measures Affecting Asbestos and Asbestos, (11 April 2001), WT/DS135/12, para 99.
[29] Case 270/80 *Polydor Limited and RSO Records Inc v Harlequin Records Shops Limited and Simons Records Limited* [1982] ECR 329, para 15.
[30] Robert E. Hudec, '"Like Product": The Differences in Meaning in GATT Articles I and III' in Thomas Cottier and Petros C. Mavroidis, eds., Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law (Ann Arbor: University of Michigan Press, 2000) 101–23, arguing that the concept of 'like product' in Art. I *"should be interpreted to allow rather fine distinctions between products when it is applied to product distinctions made by tariffs."*
[31] EEC Measures on Animal Feed Proteins (2 December 1977), L/4599 - 25S/49 paras 4.1-4.2.

inferred that the scope of *"like product"* must be narrower in comparison to its scope under Article III.[32]

Under the GATT jurisprudence, a common set of considerations is adopted to compare the relevant products. Following considerations are to be considered as essential while analyzing the "like product" criteria:

- The end use of a product under a given market,
- Various habits and preferences of consumers. Such tastes and habits may vary from a country to country,
- Various properties, quality and nature of a given product,
- The relevant tariff classification.

None of the above-mentioned considerations are to be considered as determinative in nature. Rather, a "*like product*" determination would always involve a certain amount of individual discretion.[33] Out of the above mentioned four criterions, the first three were for the first time enunciated under a Working Party on Border Tax Adjustments (hereinafter, "The Working Party Report"). The report was adopted by GATT contracting parties in 1970.[34]

The Appellate Body in Japan Alcohol Beverages II added another test of tariff classification to the list provided under the Working Party Report.[35] Tariff classification arises out of a domestic policy and is generally independent of market forces. However, the relevant tariff classification can always have an impact on the consumer preference in the market and thereby influence the relevant market. Relying upon a similar reasoning, the Appellate Body also took into consideration the domestic regulatory regime while

[32] ibid.
[33] Japan — Taxes on Alcoholic Beverages (9 January 1998), WT/DS8/18 20.
[34] Working Party Report, *Border Tax Adjustments* (1970) BISD 18S/97, para 18.
[35] Japan—Alcoholic Beverages II (n 33).

determining the likeness of a product in the market.[36] Given the narrower context of "*like product*" under Article I, tariff classification holds special importance within the context of Article I.[37]While emphasizing upon the role of tariff classification, the Panel observed that tariff classifications are based upon Harmonized System of Classification, established under the World Customs Organization, and they allow for a very narrow classification of goods. Directly Competitive as well as substitutable goods can also be classified differently under the Harmonized System of Classification. Further, the panel observed that when such claim of likeness is raised by a member nation then such a claim must be based upon the relevant classification adopted by the importing country.[38] However, the tariff classification cannot be considered as the sole test and has to be observed along with other considerations.[39] Furthermore, non-product related aspects may also impact consumer preferences, and thereby affect the likeness of goods.

A. Hypothetical Like Product Analysis

Under the GATT jurisprudence, the dispute settlement body has often applied a hypothetical like product test to examine measures which are proved to differentiate on the basis of the origin.[40] In such an event the Panel would assume likeness without even identifying the specific imported product.[41]Thus, in a dispute pertaining to importation of poultry products,

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[36] Philippines—Distilled Spirits (n 28)
[37] Canada/Japan—Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber, L/6470, GATT BISD (36th Supp) 167 paras 5.13-5.15.
[38] ibid.
[39] Spain - Tariff Treatment of Unroasted Coffee (27 April 1981), L/5135 - 28S/102, paras 4.7-4.10.
[40] China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (12 August 2009), WT/DS363/R, para 7.1446.
[41] Indonesia - Certain Measures Affecting the Automobile Industry (2 July 1998), WT/DS64/R, para 14.113; *see also,* Canada—Autos (n 12); India – Measures Affecting the Automotive Sector, (21 December 2001), WT/DS175/R, paras 7.174-7.176.

once the Panel found the relevant measure to be solely targeting imports coming from China it assumed likeness without specifically identifying relevant imported products. Thus, it straightaway examined whether the advantage accorded to all other members was extended *unconditionally* to imports from China.[42] The main purpose is to facilitate the complainants against such measures which are inherently against the very spirit of the MFN obligation.

B. Origin Neutrality

Article I imposes a general obligation upon the member nations to provide equal treatment to like products "*irrespective of the origin that they belong to*". Determination of origin can be ambiguous under certain instances. The same product can be manufactured, produced, packaged etc under different nations. Determination of origin would then depend upon the relevant criteria adopted by a particular nation.

1. UNCONDITIONAL AND IMMEDIATE TREATMENT

The MFN principle mandates the member nation to accord any form of advantage on an *immediate* and *unconditional* basis. The term *immediate* provides for a very strict requirement. Thus, a member nation can demand for the equal treatment from the very moment that an advantage is conferred at the very first instance.

The unconditional standard requires a member state to extend the advantage to all member nations. Such advantage may be conditional or unconditional in itself. GATT jurisprudence seems to be divided upon the proper interpretation of conditional MFN. Certain dispute settlement reports seem to suggest that member states are precluded from imposing any form of

[42] United States – Certain Measures Affecting Imports of Poultry from China (29 September 2010), WT/DS392/R, paras 7.431-7.432.

a condition upon the advantage so extended.[43] However, in a later report, the Panel clarified that the term "unconditional" is not to be interpreted as a prohibition against any form of condition.[44] Rather, the Panel explained that a determination of unconditional MFN cannot be independent of the non-discrimination analysis. Further, it differentiated between a conditional advantage and an advantage extended conditionally. An advantage can be subject to a condition but at the same time extended to all other members on an unconditional basis.[45] This interpretation of unconditional MFN seems to be in conformity with GATT principles.[46] The main purpose of the MFN obligation is to preclude discrimination among like products. Thus, the term *unconditionally* should be interpreted within the context of such discrimination. This interpretation was further confirmed by the Appellate Body in a subsequent dispute.[47] The Appellate Body explained that the overarching principle behind Article I is to ensure equal competitive opportunities in the market. Thus, only such conditions must be prohibited which have an adverse effect upon the competitive advantage of like products in the market.[48]

C. De Jure and De Facto Discrimination

Under Article I member nations are prohibited from imposing all forms of discrimination among the like products. It does not matter whether such discrimination exists in law or in fact. The Appellate Body explained that the scope of Article I is not limited to measures which appear to be discriminatory

[43] *European Economic Community—Imports of Beef from Canada*, L/5099, GATT BISD (28th Supp) 92 paras 4.2 and 4.3.
[44] Canada-Autos (n 12).
[45] Canada-Autos (n 12).
[46] Petros C. Mavroidis, *The Regulation of International Trade, Vol. 1: GATT* (MIT Press 2015).
[47] EC — Seal Products (n 2)
[48] ibid.

by its explicit terms. It also covers measures which are discriminatory in fact or are *de facto* discriminatory.[49] The main purpose is to protect competitive opportunities in the market. It is not necessary to show the concerned measure was implemented with the intention to discriminate.[50] Thus, the non-discriminatory obligation is based on an objective test of equality in competitive opportunities. This interpretation is also in consonance with the principles of state responsibility under International Law.[51]

III. NATIONAL TREATMENT PRINCIPLE

The National Treatment Principle ("NT Principle") is one the most important application of the non-discrimination principle enshrined under GATT. The National Treatment principle mandates a state to treat the foreign product on a non-discriminatory basis in comparison to the domestic products. However, it is impossible to maintain non-discrimination between imported and domestic products without further qualifying the principle of non-discrimination. One major distinction between the foreign producer and the domestic producer would always lie in the fact that only a foreign producer is under an obligation to incur the cost of border measures such as tariffs. Thus, National Treatment principle is applied only when the concerned product enters into the domestic market of the host nation.[52] Article III of GATT clarified in its text that only such goods that have transgressed the border customs and entered into the local market are not to be discriminated

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[49] Canada-Autos (n 12).
[50] EC — Bananas III (n 20).
[51] General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49 (Vol. I)/Corr.4: *'There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State'*. There is no mention of intention while attributing state responsibility for a wrongful act.
[52] Canada-Chile Free Trade Agreement (6 February 1997), art 1; *see also*, North American Free Trade Agreement (17 December 1992), art. 300-301.

against.[53]Thus, it is important to differentiate between "internal measures" (state measures which are applicable once the good enters into the market) and "border measures" (measures which are applied at the stage of crossing the border) while interpreting Article III of GATT.[54]

A. National Treatment under Article III of GATT

Article III GATT prohibits a state to adversely affecting competitive conditions between imported products and domestic products through its domestic laws or domestic regulations. Article III covers all such measures which either favor domestic products or disfavor imported products in the market. The overarching aim is to ensure that the competitive relationship between the imported products and domestic products remains protected in the market. However, the purpose of Article III is not limited to the actual trade volume in the market. Thus, a discriminatory measure not having an impact on the actual volume of trade could still be in violation of Article III. GATT Article III covers measures having an actual impact as well as measures having a potential to affect the competitive relation.[55]It covers both measures having a direct impact as well as measures resulting in an indirect impact on the competitive relation. It covers *de jure* discriminatory measures[56] as well as de facto discriminatory measures[57]. Additionally, it is important to observe that a measure not yet enforced can also be covered under the broad ambit of Article III.[58]

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[53] Italian Discrimination Against Imported Agricultural Machinery, L/833, GATT BISD (7th Supp) 60 para 5.
[54] *India— Autos* (n 41); see also, Canada - Administration of the Foreign Investment Review Act (25 July 1983), L/5504 - 30S/140, para 5.14.
[55] Canada-Autos (n 12).
[56] Korea- Various Measures on Beef (24 April 2001), WT/DS161/12.
[57] Japan—Alcoholic Beverages II (n 33).
[58] *US—Section 337 Tariff Act*, L/6439, GATT BISD (36th Supp) 345 para 5.13.

Article was drafted with the intention to preclude a member state from using its internal measures to offset benefits arising out of tariff concessions to the foreign producers.[59] However, the sole purpose of Article III cannot be reduced to the protection of such tariff concessions.[60] The overarching purpose behind Article III is to prohibit protectionism. Thus, it seeks to protect the expectations of a foreign producer to face fair competition in the domestic market once it passes through the tariff barriers imposed at the border level. The Appellate Body explained the principle by observing that Article III prohibits a member from imposing its domestic regulations in manner that affords protection to the domestic producer in the market.[61] The article seeks to ensure equality of opportunity for the importers of foreign products in the market.[62] Article III covers all such measures which might have an influence over the competitive relationship between the imported product as well as the domestic product. It also covers such products for which no tariff commitment is made under Article II GATT.[63]

B. Internal Taxation under Article III paragraph 2

Article III paragraph 3 imposes an obligation upon the member states to implement its taxation regulations in accordance with National Treatment requirement upon foreign producers.[64] Where on the one hand the custom tariffs are generally bound under Article II of GATT, there is no such

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[59] ibid.
[60] Tariff Act, (n 58).
[61] EC—Asbestos (n 28).
[62] Tariff Act, (n 58); *see also,* Japan—Alcoholic Beverages II (n 33).
[63] Working Party report, *Brazilian Internal Taxes*, GATT/CP.3/42, BISD II/181 para 4.
[64] Article III (2) states, *"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."*

corresponding provision to bind the internal taxes imposed by a member state. Such taxation measures are unilateral measures imposed by a member state within its domestic regime. Thus, a member state has the freedom to charge as high or as low a tax rate as it is possible to charge. However, member states are restricted under Article III to ensure that such regulations are applied in a non-discriminatory basis upon the like products arising out of the other member states when compared to its domestic products.[65] Therefore, Article III is not to be extended to cover tariffs or other such measures which are imposed in relation to the imports or exports of various products.[66] Article III is only applicable on *"imported product"* and does not cover such goods which are destined for importation.[67] Article III would also cover such internal taxes or charges of any other kind which are collected at the point of importation of imported products as long as they also apply to domestic products in the market.[68]The character of such internal charges or taxes would not change just because they happen to be collected at the time of importation.[69] The determining criteria remain that such charges or taxes must arise due to some internal event. Examples of such internal events can arise due to sale, distribution or transportation of such imported products.[70] As an instance one such measure a border tax adjustment would also be covered under wide ambit of Article III.[71]

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[65] Indonesia—Autos (n 41).
[66] China – Measures Affecting Imports of Automobile Parts (15 December 2008), WT/DS342/AB/R, para 162; see also, China – Measures Affecting Imports of Automobile Parts, (18 July 2008), WT/DS342/R, para 7.212.
[67] ibid.
[68] General Agreement on Tariffs and Trade, art 3(1).
[69] China – Auto Parts (n 68).
[70] ' India—Additional Import Duties (Appellate Body), para. 153, fn. 304 of the judgement explicitly clarifies that "*Whether a measure is a "charge" to which Article II:2(a) applies, or an "internal tax or other internal charge" referred to in the Ad Note to Article III, has to be decided in the light of the characteristics of the measure and the circumstances of the case.*"
[71] Working Party Report, *Border Tax Adjustments*, L/3464, GATT BISD (18th Supp) 97 para 14.

Article III primarily covers taxes applied upon imported products. Such products generally take the form of indirect taxes for example, excise tax, sales tax or a value added tax etc). As such income tax generally falls outside the ambit of Article III paragraph 2.[72] However, if imposition of income tax happens to affect the competitive relations of foreign good and domestic good in the market then such measure would also be covered under Article III paragraph 2.[73] Similarly administrative taxation measure can also be covered within the ambit of Article III paragraph 2.[74] However, "*internal taxes*" under Article III paragraph 2 cannot be interpreted to also include such charges which are applied in the form of a penalty to incentivize a certain form of conduct from the foreign producers.[75] Thus, it is not correct to interpret every form of charge or governmental levies as internal taxes under paragraph of Article III.

Article III

While interpreting the first sentence of Article III:2, the Appellate Body observed that the sentence mandates for a two-step analysis to cover a measure. First, it must be examined whether the imported good and domestic good are "*like*" in nature and secondly, it must be examined whether the tax imposed upon the imported good happens to be in "excess" in comparison to that imposed upon the domestic good.[76] Therefore, the author would firstly interpret the "like product" requirement and then secondly, interpret the import of "in excess of" under Article III:2.

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[72] ibid.
[73] Canada - Certain Measures Concerning Periodicals (30 June 1997), WT/DS31/AB/R.
[74] Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines (17 June 2011), WT/DS371/AB/R, para 114.
[75] United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco (12 August 1994), DS44/R, para 80.
[76] Chile – Taxes on Alcoholic Beverages, (27 February 2001), WT/DS87/17/Add.2; *see also,* EC–Asbestos (n 28); Korea –Taxes on Alcoholic Beverages (17 January 2000), WT/DS75/18; Thailand—Cigarettes (n 74); Japan—Alcoholic Beverages II (n 33).

1. LIKE PRODUCT ANALYSIS

Article III:2 requires a member state to prove that the concerned measures is discriminatory among "*like*" domestic and foreign products. Thus, a like product analysis is fundamental to develop a proper understanding of Article III. However, there is no definite or precise interpretation of the term "*like products*" under Article III.[77] Further, the Appellate Body has clarified that it is not possible to provide for a definitive or an exhaustive definition of the term "like product" under the agreement.[78] However, it is possible to outline the broader parameters of likeness enshrined under Article III:2 by interpreting various decisions. The term likeness provides for the precise scope, degree and extent of the competitive relationship that is sought to be protected under Article III:2 of GATT.[79]

In a broader context, all forms of products are at least indirectly competitive to one another since the disposable income would always remain limited in extent.[80] However, the concept of "*likeness*" or *"directly competitive and substitutable"* is restricted to cover such products which are directly competitive in nature.[81] It is in this regard, that in general four conditions have been carved out to determine the likeness of products. These criteria are- the end use of the product, consumer taste and preference, product characteristics and tariff classification.[82] The Appellate body has clarified that none of the four conditions can be construed as more fundamental than the other. Rather, these criteria must be examined in conjunction with each other

[77] Japan—Alcoholic Beverages II (n 33).
[78] ibid.
[79] Philippines—Distilled Spirits (n 28).
[80] ibid.
[81] EC—Asbestos (n 28).
[82] Border Tax Adjustments (2 December 1970), L/3464.

to analyze the scope and extent of the competitive relation between the domestic and imported product in the market.[83]

IV. CONCLUSION

The term "Like products" informs the general scope of non-discrimination principles of GATT. The entire non-discrimination principles is fundamentally based upon the examination and identification of comparable products. This is because the member states are under a mandate to treat comparable products in a non-discriminatory manner. This principle of non-discrimination is crucial in fulfilling the overarching objective of liberalizing and enhancing trade relations. Moreover, the non-discrimination principle helps in maintaining a level playing field for all the nations.

However, fundamental basis of such non-discrimination principle seems to be unclear and ambiguous. This is largely because of the ambiguity arising out of the like product analysis. The general practice is to carve out an objective standard to identify the relevant products. WTO report on Border Tax Adjustment provided a context to carve out such common standards to identify the relevant products. The panel as well as the appellate body have emphasized upon the fact that the application of such standards would be from one case to another. More recently, the panel as well as the appellate body have emphasized upon the need to interpret such standards along the lines of competitive relations between the parties. Thus, the recent trend is to employ a functional approach to interpret the objective standards of comparison.

However, the panel as well as the appellate body have failed to comprehensively expound the policy objectives of Article I as well as Article III. It seems as if the identify of comparable products is independent of the specific objectives that the two articles seem to fulfil. It is extremely important

[83] Philippines—Distilled Spirits (n 28).

to read in such policy framework while applying the interpretative standards. Indeed it is true that the overarching purpose is to maintain a fair competition within international market. However, the true import of such competition might vary according to the specific objectives of the two articles.

It is in this regard important to note that general policy of Article III is indicated by the opening line of the first paragraph of the article. The first paragraph clarifies that the main purpose is to ensure that such measures are not applied in a manner to "*to protect the domestic players"*. Thus, Article III explicitly incorporates a "*non-protectionist*" goal while implementing the principle of non-discrimination under GATT.

It is in this regard important to note that the MFN principle has a much wider ambit. It is broad enough to cover tariff measures as well as measures falling under the second and fourth paragraph of the third article. The policy considerations with regard to internal measures can be similar under both the Articles. However, a tariff measure is to be understood in a different context. The application as well as the implications of such tariff measures are very different from the application of internal measures.

This is mainly because of the fact that the entire focus under Article III is to eliminate all forms of distortions in the international market. Tariff measures are also inherently distortive in effect. GATT allows the member nations to maintain tariffs.[84] Thus, the regulative policy of such measures cannot be confined to the aspect of market distortions.

Member nations are allowed to frame their own policies for tariff measures. Member nations are allowed to select an optimum level of tariff measure for a certain product category. Furthermore, member nations also have the freedom to determine their own product categorization while

[84] General Agreement on Tariffs and Trade, art 2.

imposing such tariff measures. The schedules can be defined in a manner to further differentiate between various product lines. This aspect of product differentiation and product categorization is missing from the general framework of internal measures. Thus, Article I and Article III incorporate different set of policy considerations.

Another important distinction arises because of the general principle of "*Progressive Reduction of* Tariff *Measures*". GATT imposes an obligation upon its member nations to further negotiate to reduce their tariff measures. Such negotiations are conducted on the basis of reciprocity principle. This allows the member nations to take specific measures against various forms of free-riders in the political community.

The author suggests that the Panel as well as the Appellate Body must be mindful of such policy-based distinctions. Like product analysis must reflect the policy considerations that are inherent in the two articles. The difference between MFN principle and the National Treatment principle must be well represented under the Like Product analysis. In particular, the role of tariff classification must be more prominent while assessing a tariff measure along the lines of MFN principle.