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COMMENTARY ON THE "NATIONAL TREATMENT" PRINCIPLE STIPULATED IN ARTICLE III OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 (GATT 1994)

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Abstract:

Article III of the General Agreement on Tariffs and Trade (GATT) regulates National Treatment and is one of the most important provisions in the international trade system. The main objective of Article III is to ensure that imported goods are treated fairly, like domestically produced goods, once they have passed through tariff barriers. However, the application of this regulation remains controversial and requires further analysis.

Key words: GATT, national treatment, NT principle.

I. Introduction

Article III of the General Agreement on Tariffs and Trade 1994 ("*1994 GATT*") stipulates "*national treatment*".[1] It stated that "*Products imported from the territory of any contracting party into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin.*"[2] This principle requires member countries not to discriminate between imported goods and domestic produced goods once tariffs have been applied.[3] In other words, domestic goods must not be favored over imported goods through measures such as domestic taxes or other regulations. Specifically, the principle of "*national treatment*" is defined as follows: National Treatment ("*NT principle*") means that "*Based on trade*

[1] World Trade Organization, *GATT 1994*, https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_e.htm (accessed on 15/10/2024).

[2] *Ibid.*

[3] Gerhart, P.M. and Baron, M.S. (2003), "Understanding National Treatment: The Participatory Vision of the WTO", *Indiana International & Comparative Law Review*, 14, p. 505.

commitments, a country will grant products, services, and suppliers from other countries no less favorable treatment than it grants to its own products, services, and suppliers."[4] This means the importing country must not discriminate between domestic and foreign products, services, and suppliers concerning domestic taxes and fees as well as competition conditions. Moreover, in the World Trade Organization ("*WTO*"), the NT principle is stipulated in Article III of 1994 GATT, Article XVII of the General Agreement on Trade in Services 1994 ("*GATS"*),[5] and Article III of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("*TRIPs*").[6] Accordingly, foreign goods, services, and intellectual property rights, after passing customs procedures (having paid the legally required taxes) or being registered for protection, must be treated equally as domestic goods, services, and intellectual property rights.

In Vietnam, Ordinance No. 41/2002/PL-UBTVQH10[7], dated May 25, 2002, on Most Favored Nation ("*MFN*") and NT principle in International Trade, is currently in effect. The NT principle, combined with the MFN principle, is the foundational principle of the WTO that aims to achieve non-discrimination and trade liberalization among member countries.

II. Scope of application

In international trade, the NT principle contrasts with the MFN principle.[8] MFN principle is considered the initial rule of conduct that the host country must comply with when receiving foreign goods, services, or merchants. Therefore, the scope of MFN primarily focuses on initial procedures, such as import taxes and non-tariff measures. Meanwhile, the NT principle is regarded as the rule of conduct that the host country

[4] Verhoosel, G. (2002), *National treatment and WTO dispute settlement: adjudicating the boundaries of regulatory autonomy*, Bloomsbury Publishing, p. 4.

[5] Muller, G. (2017), "Troubled relationships under the GATS: tensions between market access (Article XVI), national treatment (Article XVII), and domestic regulation (Article VI)", *World Trade Review*, 16(3), p. 449.

[6] Yu, P.K. (2006), "TRIPS and its Discontents", *Marquette Intellectual Property Law Review*, 10, p. 369.

[7] Standing Committee of the National Assembly, Ordinance No. 41/2002/PL-UBTVQH10. https://vanban.chinhphu.vn/default.aspx?pageid=27160&docid=10766 (accessed on 15/10/2024).

[8] Ehring, L. (2002), "De Facto Discrimination in World Trade Law", *Journal of World Trade*, 36, p. 921.

must comply with when foreign goods, services, or merchants have deeply entered the domestic market.[9] Thus, the scope of the NT principle primarily includes the following domestic measures:[10]

Foremost among these measures are domestic taxes and fees, as stipulated in Clause 2, Article III. Under this provision, member countries are explicitly prohibited from implementing discriminatory taxation systems that would impose higher levies on imported products compared to similar domestic products. Furthermore, the clause extends beyond mere tax rates, addressing the broader issue of protectionist taxation practices by preventing the application of domestic taxes and fees in ways that could shield domestic production from international competition.[11]

Additionally, the principle extends to commercial regulations, as outlined in Clause 4, Article III. This comprehensive provision ensures that all laws, regulations, and requirements pertaining to the sale, transportation, distribution, or use of products must maintain equitable treatment between imported and domestic products. This far-reaching requirement fundamentally shapes the regulatory landscape within member states, ensuring that administrative measures do not become de facto trade barriers.

Moreover, the NT principle addresses quantity regulations through Clause 5, Article III. This provision is particularly significant as it prohibits member countries from establishing or maintaining domestic regulations that mandate specific quantities or mixing ratios for domestic sourcing. Notably, any localization rate requirement, regardless of its magnitude, constitutes a violation of the NT principle. For instance, when a country implements policies requiring domestic automobiles to contain a

[9] Horn, H. (2006), "National Treatment in the GATT", *American Economic Review*, 96(1), pp. 394-404.

[10] Bjorklund, A.K. and Vanhonnaeker, L. (2019), "National treatment", *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)*, p. 45.

[11] Horn, H. and Mavroidis, P.C. (2004), "Still hazy after all these years: The interpretation of national treatment in the GATT/WTO case-law on tax discrimination", *European Journal of International Law*, 15(1), p. 39.

specified percentage of locally assembled components, such requirements directly contravene the NT principle, even if accompanied by domestic tax incentives.[12]

For example, if Country A stipulates that domestic cars must have at least 30% locally assembled components and enjoy domestic tax incentives if they have 50% locally assembled components, this localization rate clearly violates the NT principle.

While the NT principle serves as a fundamental pillar of international trade law, it is essential to acknowledge that this principle is not absolute in its application. The 1994 GATT Agreement explicitly recognizes several significant exceptions that provide member states with specific regulatory flexibility. These exceptions encompass three primary areas: the provision of subsidies to domestic producers under Clause 8b of Article III, the allocation of commercial screen time between domestic and foreign films as detailed in Article IV, and government procurement activities as stipulated in Clause 8a of Article III. Furthermore, the agreement incorporates broader exceptions within the trade liberalization principle group, specifically outlined in Articles 20, 21, and 25 of GATT.

Implementing Article III fundamentally centers on two critical aspects: domestic taxation and technical regulations.

Regarding domestic taxation, Shadikhodjaev (1970) emphasizes that the principle mandates equal treatment of imported goods once they have completed customs inspection and fulfilled import duty obligations. This equality in treatment manifests particularly in the application of domestic tax measures. For instance, in the automotive sector, if a member state implements a 10% excise tax on vehicles, this tax rate must be uniformly applied to both imported and domestic automobiles without any preferential treatment through supplementary fees or surcharges.[13]

The technical regulations component represents another crucial dimension of Article III, encompassing comprehensive standards for product specifications, safety

[12] Hudec, R.E. (1998), "GATT/WTO constraints on national regulation: requiem for an aim and effects test", *International Law*, 32, p. 619.

[13] Shadikhodjaev, S. (1970), "National Treatment on Internal Taxation: Revisiting GATT Article III: 2", *No. 21941*.

protocols, and hygiene requirements. These regulations serve a dual purpose: ensuring product quality while preventing the establishment of unnecessary protective barriers for domestic goods. The regulatory framework extends across multiple sectors, each with its distinct requirements and standards.

For example, in the food industry, regulatory measures address various aspects of product safety and quality. These comprehensive regulations govern the entire production process, from ingredient selection and additive usage to processing methodologies, preservation techniques, and labeling requirements. Such measures ensure consumer safety while maintaining equitable treatment of domestic and imported products.

In addition, the automotive sector presents another significant area of technical regulation, where standards focus on environmental impact and safety features. These regulations encompass emission controls, fuel efficiency requirements, and critical safety systems including airbag deployment mechanisms, anti-lock braking systems, and vehicle stability control technologies.

Similarly, the electronics industry faces stringent technical requirements regarding electrical safety protocols, electromagnetic compatibility standards, and energy efficiency metrics. The construction sector also operates under detailed regulations governing building materials, structural integrity requirements, and fire safety protocols.

These technical regulations must be applied fairly to both imported and domestic goods to avoid becoming unnecessary trade barriers. They ensure that the regulations are made for legitimate reasons such as protecting human, animal, and plant health, protecting the environment, or preventing fraud. Proper and reasonable compliance with these regulations not only helps protect consumers but also creates fair competition in the market. For example, if a country requires imported products to undergo stricter quality tests than domestic products, it violates the provisions of Article III. This is crucial in promoting fair trade and preventing disguised protectionist measures. When countries comply with Article III, they contribute to maintaining fairness and transparency in international trade.

III. Analysis of case studies: interpreting Article III of 1994 GATT in practice

The practical application of Article III of 1994 GATT can be better understood by examining specific case studies that illustrate its scope and limitations in real-world scenarios. Two particularly illuminating cases demonstrate the nuanced interpretation of the NT principle in different commercial contexts.

The first case study concerns market display practices in the retail sector, specifically examining the ARO supermarket chain's decision to implement separate display areas for domestic and imported liquor in Country A, which commands an 80% market share. Upon careful analysis, this practice does not violate Article III of 1994 GATT, primarily because the scope of Article III is confined to specific areas of regulation. The rationale behind this interpretation is that product display practices fall outside the two principal regulatory domains governed by Article III: domestic taxes/fees and technical regulations. While display practices represent a business and marketing strategy, they do not impact the fundamental technical or tariff requirements that Article III was designed to regulate. Moreover, although such practices may intersect with various marketing and trade regulations, they remain distinct from the technical regulations that specifically address product quality, safety standards, and performance metrics under 1994 GATT.

The second case study presents a more complex scenario involving differential taxation rates for alcoholic beverages. Specifically, it examines a Ministry of Finance policy that imposes distinct special consumption tax rates: 30% for medicinal alcohol and 60% for imported spirits. This case requires a more nuanced analysis of the NT principle application to tax policy. Upon examination, this tax structure does not violate Article III of 1994 GATT, primarily due to the fundamental distinction between the products being taxed. However, it is crucial to note that differential tax rates between alcoholic beverages could potentially violate Article III if the regulations were not applied equitably to both imported and domestic products within the same category.

To elaborate on this distinction, medicinal alcohol and spirits represent fundamentally different product categories, characterized by distinct purposes, ingredients, and alcohol content levels. Medicinal alcohol, primarily produced from

herbs or roots with therapeutic properties, serves medical and health improvement purposes. Conversely, spirits, typically derived from grains and containing higher alcohol content, are primarily consumed for recreational purposes. This fundamental difference in product characteristics and intended use justifies the application of different tax rates.

Furthermore, this case underscores a critical principle in applying 1994 GATT regulations: while differential treatment between distinct product categories may be permissible, any discrimination between domestic and imported products within the same category would constitute a clear violation of Article III. For instance, if a country were to impose higher tax rates on imported spirits compared to domestically produced spirits of similar characteristics, such a policy would directly contravene 1994 GATT's non-discrimination provisions.

The implications of these case studies extend beyond their specific contexts, offering broader insights into the practical application of Article III. They demonstrate that while 1994 GATT provides robust protections against discriminatory practices, these protections are carefully circumscribed and apply primarily to specific regulatory domains. Understanding these boundaries is crucial for both policymakers and businesses operating in international trade.

Moreover, these cases highlight the importance of fair application of special consumption tax regulations, emphasizing that such policies must avoid creating preferential treatment for domestic goods. The potential consequences of non-compliance are significant, as affected countries retain the right to file complaints and seek dispute resolution through the World Trade Organization's established mechanisms.

IV. Conclusion

The analysis of Article III of 1994 GATT reveals the fundamental importance of the NT principle principle in fostering fair and transparent international trade relations. Through its comprehensive framework addressing domestic taxation, technical regulations, and quantity restrictions, Article III serves as a cornerstone in preventing

discriminatory practices while respecting the legitimate regulatory objectives of member states.

The examination of the principle's scope and application demonstrates its dual nature: while it provides robust protection against discriminatory practices, it also maintains sufficient flexibility through carefully delineated exceptions. This balance is crucial in addressing the complex interplay between domestic regulatory autonomy and international trade obligations. The principle's application to both tax measures and technical regulations ensures a comprehensive approach to trade liberalization, while the exceptions recognized under the 1994 GATT Agreement provide necessary regulatory space for member states to pursue legitimate policy objectives.

The case studies analyzed provide valuable insights into the practical application of the NT principle. They illustrate that the interpretation of Article III requires careful consideration of product characteristics, regulatory context, and the underlying purpose of commercial practices. The ARO supermarket case demonstrates that not all differential treatment constitutes discrimination under 1994 GATT, particularly when the practices fall outside the scope of domestic taxation and technical regulations. Similarly, the medicinal alcohol case highlights the importance of product differentiation in determining the legitimacy of varying tax rates, emphasizing that distinct product categories may warrant different regulatory treatment without violating the NT principle.

Furthermore, these practical applications underscore the principle's role in preventing disguised protectionism while allowing legitimate regulatory distinctions. The framework established by Article III proves sufficiently flexible to accommodate genuine regulatory objectives while maintaining strict scrutiny over potentially discriminatory measures. This delicate balance is particularly evident in the treatment of technical regulations across various sectors, from food safety to automotive standards, where the emphasis remains on ensuring equal treatment while maintaining necessary quality and safety standards.

Looking forward, the continued relevance of the NT principle in an increasingly complex global trading system cannot be overstated. As new forms of trade barriers

emerge and regulatory frameworks evolve, the principles established in Article III provide a stable foundation for addressing discriminatory practices while promoting fair competition. The principle's successful implementation relies on careful interpretation and application by member states, supported by the WTO's dispute resolution mechanisms when necessary.

In conclusion, Article III of 1994 GATT, through its NT principle, continues to serve as a vital instrument in promoting non-discriminatory trade practices while respecting legitimate regulatory objectives. Its balanced approach to preventing protectionism while allowing necessary regulatory distinctions provides a framework that remains relevant and adaptable to emerging challenges in international trade. The principle's effectiveness in promoting fair trade practices, coupled with its recognition of legitimate regulatory objectives, underscores its enduring significance in the international trading system.

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