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NATIONAL TREATMENT UNDER THE AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES (TRIMS)

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ABSTRACT

In the international law Diaspora, General Agreement on Tariffs and Trade ("**GATT**") / World Trade Organization ("**WTO**") is considered as the 'genesis block' of the globalization chain, emanating a much-needed boost to the overall growth and development in the world. With respect to free trade, the GATT provides for 'National Treatment on Internal Taxation and Regulation' under Article III.[2] Agreement on Trade-Related Investment Measures ("**TRIMs Agreement**"), in its Article 2 and the subsequent Annex, asserts the importance of Article III of GATT, elucidating that no WTO member country shall implement an investment measure that is inconsistent with the GATT provisions.[3] The same is ascertained that foreign producers are not subjected to unfavourable treatment over domestic producers by virtue of internal taxation regimes and other internal charges. Such investment measures that are inconsistent with the TRIMs agreement need to conform to the national treatment principle provided for in Article 2.

In this research paper, the author has aimed at dissecting and understanding the 'National Treatment' provisions under the TRIMs Agreement with respect to its evolution and need. The author has also discussed the international implications of the TRIMs agreement using contemporary examples. Additionally, the author has elucidated the impact of the 'National Treatment' provision on boosting foreign investments in the global economy, keeping India as the locus of the section.

Keywords: National Treatment, TRIMs, GATT, WTO, Foreign investment

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[2] Art. III, General Agreement on Tariffs and Trade, 1994.

[3] Art. 2, Agreement on Trade-Related Investment Measures, 1995.

NATIONAL TREATMENT UNDER TRIMS: A GLOBAL PERSPECTIVE

Before delving into the intricacies of the national treatment principle and its underlying implications, let us discuss a brief background of the TRIMs agreement along with GATT, alongside the National Treatment principle for the sake of clarity.

GATT

General Agreement on Tariffs and Trade ("GATT") is an international trade accord aiming at eliminating trade barriers and discriminatory tariff rates amongst signatory countries. The GATT was signed at Geneva in 1947 by 23 countries initially, which saw GATT as a primary solution for liberalizing international trade only until the establishment of yet another United Nations body (WTO) to replace that as well.[4] It conclusively revealed to become the finest successful tool for liberalization of world trade, contributing significantly towards the tremendous development of global commerce throughout the latter part of the twentieth century. Eventually, when WTO superseded the GATT in 1995, one of the essential concepts of the GATT remained commerce sans discriminatory practices and meant that all signatories had to open their markets to everyone equitably. The GATT smoothen the path of international trade by propagating the keystone principle of International Trade Law- The *National Treatment* Principle, which lays out equal treatment of the imported goods to that of the domestic goods amongst the member countries.

TRIMs Agreement

The **Trade-Related Investment Measures** allude to the requirements/limits that an administration imposes on international investments within the jurisdiction of a nation.[5] Overseas investors among most emerging economies are subject to these kinds of restrictions. They place restrictions such as using a certain proportion of domestically sourced components or raw materials, native ownership constraints, exporting competence, and importation management, which force international investors into utilizing domestic sources.[6] To overcome the issue, The Agreement on Trade-Related Investment Measures ('**TRIMs Agreement**') was entered into between the member states to foster liberalized international

[4]The Editors of Encyclopaedia Britannica, *General Agreement on Tariffs and Trade | international relations | Britannica*, https://www.britannica.com/topic/General-Agreement-on-Tariffs-and-Trade.
[5]AbhipsaVagadia, *A Study on Agreement on TRIMs and India*, 3 PARIPEX - INDIAN JOURNAL OF RESEARCH (2014)
[6]World Trade Organization, *WTO | Trade and investment*, https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm .

trade and investment by creating a free competitive environment for trade.[7] This Agreement is only applicable to the measures relating to goods trade and does not bring under its ambit the trade-in services. The primary purpose of the TRIMs Agreement was to promote international trade development via incremental democratization and allow participation in investment opportunities across state lines to assure an equal playing field & enhanced business development among stakeholders, significantly expanding member powers.[8] Definite investing policies impede as well as impair commerce, as per the TRIMs agreement. It states that no member state shall use any TRIM incompatible with Article III that mainly covers the national treatment. Towards that objective, the Agreement includes an exemplary set of TRIMs that have been determined to be inconsistent with all these articles. The annex[9] to the TRIMs Agreement contain an illustrative list of inconsistent measures like the local content requirement ("**LCR**") or trade balancing requirements which will be discussed in the later in this section.

NATIONAL TREATMENT PRINCIPLE

Concept and Statutory Provisions

National treatment is an international trade law principle that essentially states that where a country grants specific protections and benefits towards its residents, they must also likewise extend those same privileges and opportunities to outsiders presently existing in a country.[10] The notion of providing foreigners the very same regard as one's citizens is known as *National Treatment*. Specifically, GATT provides for the national treatment under Article III, which is reinforced via Article 2 of the TRIMs agreement, given *ad verbatim* as follows,

> "*1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.*
>
> *2. An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation*

[7]Ming Du, *Treatment No Less Favorable And The Future Of National Treatment Obligation In GATT Article III:4 After EC-Seal Products*, 15(1) World Trade Rev., 139, (2015).
[8]World Trade Organization, *WTO | legal texts - A Summary of the Final Act of the Uruguay Round*, https://www.wto.org/english/docs_e/legal_e/ursum_e.htm#eAgreement.
[9]Annex, Agreement on Trade-Related Investment Measures, 1995.
[10]Will Kenton, *National Treatment Definition*, INVESTOPEDIA, https://www.investopedia.com/terms/n/nationaltreatment.asp.

> *of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement.*"[11]

The Annex to Article 2 lays down the TRIMs that are inconsistent with Article III:4 of GATT, i.e., the obligation of national treatment,

> "*1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:*
>
> > *(a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or terms of a proportion of volume or value of its local production;*
> >
> > *or*
> >
> > *(b) that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.*"[12]

Statutory Analysis

Firstly, Article 2.1 provides that no country will apply any TRIMs inconsistent with the provisions of Article III of GATT, which is the provision we would be focusing upon.[13]

Article III:1 of the GATT forbids the discriminatory practices among domestic and like imported items via the employment of different administrative measures, which are quoted as follows,

> "*.... 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.....*"[14]

[11]Agreement on Trade-Related Investment Measures, *supra* note 5.
[12] Annex 1, Agreement on Trade-Related Investment Measures, 1995.
[13]Art. 2.1, Agreement on Trade-Related Investment Measures, 1995.
[14]Art. III:1, General Agreement on Tariffs and Trade, 1994.

This part lays down the groundwork for the rest of Article III, in the sense that the remainder of Article III is guided by the concept of non-discrimination under Article III:1. Article III's following several sections detail explicit anti-discrimination duties. Internal taxes are particularly addressed in Article III:2, while the internal regulation is addressed under Article III:4. There is one more line to be drawn. Article III:2 states that the non-discrimination provision in internal taxes extends to "directly competitive or substitutable items" as well as "similar products."[15] Article III:4's non-discrimination provision for internal rules, on the other hand, only applies to "similar items."

Therefore, Article 2.1 of the TRIMs agreement states that any trade-related investment measures in the form of a taxation regime or an internal regulation put forth by a member state must comply with Article III of the GATT. This essentially means that member nations are not allowed to undertake discriminatory taxation policies with respect to activities listed explicitly in Article III:1 of GATT.[16] Article 2.1 also devolves upon equal taxation of domestic and foreign products, by way of Article III:2 of GATT, which provides explicitly that products of any foreign member state "*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.*"[17] However, this provision is not supreme, as it can be superseded by invoking specific articles under GATT, such as the general and security exceptions.

Secondly, and most importantly, Article 2.2 of the TRIMs agreement focuses on tackling regulations inconsistent with Article III:4 of GATT. We must understand the contents of Article III:4 before looking into the Annex because that is from where we get the directive of following a non-discriminative practice. Article III:4 of GATT provides that any product of a foreign member state, when imported into the jurisdiction of another member state, must not be subject to any unfavorable treatment in comparison to domestically produced goods of national origin.[18] Such discriminatory behavior can be attributed to legislation and statutory regime of the country, regulatory barriers affecting the internal sale of the goods, transportation, distribution, use, *inter alia.*[19] When we look at Annex 2, we observe that

[15]World Trade Organization, *Dispute Settlement, 3.5 GATT 1994* (2003), https://unctad.org/system/files/official-document/edmmisc232add33_en.pdf.
[16]*Id.*
[17]Art. III:2, General Agreement on Tariffs and Trade, 1994.
[18]Art. III:4, General Agreement on Tariffs and Trade, 1994.
[19]*Id.*

TRIMs inconsistent with Article III:4 of GATT include the investment measures that have been essentially made mandatory to comply with by a member nation.[20]

The Annex to the TRIMs Agreement provide for an illustrative list of requirements that must be present with respect to such restrictive investment measures to qualify as inconsistent, enumerated, and discussed as follows,

I. Annex 1(a): It provides for restrictive investment measures requiring procurement or usage of products from a domestic enterprise or a source of domestic origin, specified in terms of volumes, quantity, particular products, or proportion of value or volume from the total production.[21] These measures are imposed chiefly on foreign investors to ensure that they source raw materials or components for their finished products from domestic sources to promote the host country's economy.
II. Annex 1(b): The second part of Annex 1 provides for restrictive measures requiring enterprises to a restriction on an enterprise's procurement or usage of imported products in the proportion of value or volume of local goods exported.[22] This is done to ensure that the foreign investors generate more value for the host nation than for the foreign country.

Overall, restrictive measures are clearly defined and encapsulated within Article 2 of TRIMs and Annex 1, providing the application of the national treatment principle. These articles, however, employ broad horizons and might not fit in perfectly in every scenario. To illustrate further, the researcher proceeds with a case analysis pertaining to the national treatment principle and its implications.

CASE STUDY: INDONESIA – AUTOS (1998)[23]

Facts

Indonesia had launched a National Car Program in the year 1993.[24] For the domestic Indonesian automotive businesses, the scheme gave favorable consideration as well as a

[20]Lakshmi Neelakantan, *National Treatment principle Analysis of GATT Article III*, https://lakshmisri.com/insights/articles/national-treatment-principle-analysis-of-gatt-article-iii/.
[21]Annex 1(a), Agreement on Trade-Related Investment Measures, 1995.
[22] Annex 1(b), Agreement on Trade-Related Investment Measures, 1995.
[23]Jus Mundi, *Indonesia — Autos, Panel Report, Jul 2 1998*, https://jusmundi.com/en/document/decision/en-indonesia-certain-measures-affecting-the-automobile-industry-report-of-the-panel-thursday-2nd-july-.
[24]Jus Mundi, *Indonesia — Autos, Panel Report, Jul 2 1998*, https://jusmundi.com/en/document/decision/en-indonesia-certain-measures-affecting-the-automobile-industry-report-of-the-panel-thursday-2nd-july-1998.

variety of other advantages. In 1996, the United States, Japan, and the European Communities sought consultations with Indonesia, arguing that Indonesia's measures violated the National Treatment obligation under the GATT and TRIMs, specifically Article III and Article 2, respectively. A panel was formed in response to a request from the European Communities and Japan to adjudicate upon the dispute.[25] From the aspect of Article 2 of the TRIMs Agreement and precisely the national treatment principle, the LCR of car programs of 1993 and 1996 (February) was scrutinized by the Panel.[26]

Issue Raised

Several issues were raised by the complaining parties, which essentially was: Whether the measures adopted by Indonesia for its National Auto Program violated the TRIMs Agreement, specifically the National Treatment obligation?

Observations of WTO Panel[27]

The Panel decided against Indonesia, observing that the Indonesia's auto program requiring 'local content' constituted 'advantages' and was covered by the Illustrative List annexed to the TRIMs Agreement. The local autos received sales plus tax advantages. This TRIM violated Article 2.1 of the TRIMs Agreement, which states that such parties to an agreement must not levy tariffs on imports or levies on items brought inside the jurisdiction of any other contracting state.

Finally, Indonesia announced a comprehensive, novel automobile program in a statement dated Jul 15, 1999. The changes made in the policy successfully enforced the Dispute Settlement Body's recommendations.

Analysis of the Judgment

One of the crucial aspects that fell within the purview of inconsistent TRIMs was reducing import duty and exemptions pertaining to automotive parts based on local content. In so far as passenger automobile's local content was less than 20%, then the importer would have had to

[25] *Id.*
[26] *Id.*
[27] World Trade Organization, Indonesia - Autos (1998).

incur a 100% import tariff on the imported components, and so forth until the local content rate reached 60%. At that point, the importers would be exempted.[28]

When read in line with Article 2 of the TRIMs Agreement and Annex 1(a), it is evident that the LCR was discriminatory and constituted a restrictive trade measure. In particular, there was an inherent 'advantage' to the domestic product manufacturers over the foreign players under this policy, coming in direct violation of the National Treatment obligation as given in Article 2.1 of the TRIMs Agreement.

Moreover, to qualify as violative TRIMs, the measures imposed by the Indonesian Government needed to be inconsistent with Article III of GATT and thereby, Article 2 of the TRIMs Agreement. The impugned automotive policy of Indonesia imposed import duties and tariffs following LCR requirements, which essentially fell within the purview of Article III:2 of GATT. Upon a bare reading of the said provision, "*internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products*" cover the import duty and tariffs imposed by the Indonesian Government, ergo, essentially putting down the nail in the measures implemented.

In the researcher's opinion, the decision put forth by the Dispute Settlement Body providing for violation by the Indonesian Government of national treatment under the TRIMs Agreement by imposing various sales taxes and import duties was justified.

Several disputes have come before the WTO in the automotive sector on similar lines as being violative of the National Treatment obligation under the TRIMs Agreement. Some being: *Canada – Autos*[29], *India – Autos*[30], and the *China – Auto Parts*[31].

CANADA – FIT PROGRAMME[32] - CASE STUDY

Among the most popular, yet complicated instances of the National Treatment concept include the *Canada – Renewable Energy* dispute. The Government of Canada, through the

[28]Mundi, *supra* note 30.
[29]*Canada – Certain Measures Affecting the Automotive Industry (Canada – Autos)*, DS139, DS124, AB Report adopted on June 19, 2000.
[30]*India – Measures Affecting the Automotive Sector* and *India – Measures Affecting Trade and Investment in the Motor Vehicle Sector*, DS146, DS175, Panels Reports adopted on April 5, 2002.
[31]*China – Measures Affecting Imports of Automobile Parts, DS339, DS340, DS342*, Panel and AB reports adopted on January12, 2009.
[32]*Canada – Certain Measures Affecting the Renewable Energy Generation Sector* and *Canada – Measures Relating to the Feed-In Tariff Programme (Canada – Feed-In Tariff Programme*) DS412, DS426, Panel and AB Reports adopted on May 6, 2013.

Feed-In Tariff 'FIT' Programme, compelled the energy purchase for time frames of two decades to four decades with a decent return yield to generation units of that kind of energy, given participants procured Canadian components for their infrastructure, in order to increase the productivity of renewable power, – for example solar and wind energy (Minimum Required Domestic Content Levels).

The FIT Programme was held to be in violation of the National Treatment obligation under Article 2.1 of the TRIMs agreement and Article III:4 of GATT 1994 by the Panel.

The Panel said that the Minimum Required Domestic Content Levels necessitated the acquisition or usage of items from such a local origin, and that even this adherence was mandatory for energy producers to engage in the FIT Programme and thus gain an edge. The Panel concluded that there had been a high degree of correlation alone between two different sets of products, particularly regarding electricity (purchased product) but also wind turbines (renewable energy generation equipment), such that the LCRs were all in actuality prerequisites for such procurement of electric power (Government Procurement), allowing for the Article III:8(a) exemption.

The Panel's decision was overturned by the Appellate Body. It stated that in order for such an exception to be invoked, the product to that which it would be to be given must have been in a comparable connection with the purportedly discriminating foreign product. Certainly, that wasn't the situation with electrical as well as renewable energy producing equipment. LCRs were used to track the generating technology acquired by energy producers, although the product purchased via government agencies was really electricity.

NATIONAL TREATMENT UNDER TRIMS IN INDIA

Being a member of the WTO, India is subjected to the TRIMs Agreement and is thus required to uphold the sanctity of the national treatment principle.[33] However, India's measures like the *National Solar Mission*, *automotive policy 1997*, *ban on Chinese apps*, and its *revised FDI policy restricting investments* from neighbouring countries have been viewed as contrary to the National Treatment principle.

[33] AbhipsaVagadia, *supra* note 12.

National Treatment Measures in India

Though naturally, every country across the globe would naturally want to favour its domestic producers, manufacturers, and suppliers over foreign investors, the TRIMs Agreement prohibits the same through the national treatment obligation.[34] With respect to India, the local content requirement measures have violated the WTO obligation of the national treatment principle on several occasions.[35] While the local content requirements allow domestic producers and suppliers to prosper, it discriminates against foreign investors, contrary to the TRIMs objective. At the same time, it is pertinent to note that the TRIMs Agreement does not explicitly prohibit members from introducing investment policies to stimulate their domestic economies and boost specific sectors.[36] However, such policies adopted by the WTO members must strike a balance and be in consonance with the National Treatment obligation.

As India entered into liberalization and globalization in the 1990s, the initial focus was on allowing foreign players into the Indian market to advance into the global market. Soon the focus shifted on making India a self-reliant country. Towards this, technological collaboration and industrial growth within the country were at prime focus.[37] Though India made all efforts to honour the TRIMs Agreement, it was again felt that the National Treatment obligation under the TRIMs Agreement placed India, and other developing countries, at a disadvantageous position as against the more powerful and developed countries like the United States of America ("**USA**").

CASE STUDY: INDIA - SOLAR CELLS[38]

Facts and Arguments

One of the essential instances in India concerning the National Treatment under the TRIMs Agreement is that of the Jawaharlal Nehru National Solar Mission ("**JNNSM**"). Under the JNNSM, introduced in 2010, the Government of India was purchasing electricity only from solar producers that used India-manufactured equipment. The measures adopted by India

[34]Archana K., *Effects of Agreement on Trims on Indian Foreign Trade*, 3 IJCER (2013),
[35]Insights, *India and WTO - Detailed Analysis of All Related Issues and Concepts*, INSIGHTSIAS (2016), https://www.insightsonindia.com/2016/01/20/india-and-wto-detailed-analysis-of-all-related-issues-and-concepts/.
[36]Archana K., *supra* note 37.
[37]AbhipsaVagadia, *supra* note 12.
[38]Sayenko Kharenko, *WTO Case Summary. India - Solar Cells - Energy and Natural Resources - Ukraine*, https://www.mondaq.com/renewables/533696/wto-case-summary-india--solar-cells.

under the JNNSM were challenged by the United States of America ("**USA**") before the WTO as being violative of the National Treatment principle.

Before the WTO panel, India argued that JNNSM was an effort towards its international obligation to fight climate change.[39] India tried to justify its measures by contending that it was covered by the exceptions to the TRIMs Agreement, whereby measures essential to the acquisition of general products or local short supply are allowed. On the other hand, the USA accused India of violating the national treatment principle. In particular, the USA contended that the Government of India's measures under the JNNSM were discriminatory and, thus, anti-competitive. Against this, India claimed that the said principle did not apply to procurements made for governmental purposes by governmental agencies.[40]

Panel and Appellate Body Findings

The first issue to be determined by the WTO panel was whether the Government of India's policy under JNNSM was covered under the purview of TRIMs. Regarding this, the WTO panel aptly held that since the measure involved domestic content requirements that could affect imports and trades, it squarely fell under the TRIMs provisions, i.e., Article 2.

The second essential issue before the WTO panel was with respect to India's measures under the JNNSM, whether they complied with the TRIMs Agreement or not.

The WTO Panel observed that since India's requirement under the JNNSM was like a "mandate," India had violated its obligations, including the national treatment, under the TRIMs Agreement.

India then filed an appeal before the Appellate Body in April 2016 against the Panel's holding. In September 2016, the Appellate Body affirmed the observations made by the Panel over the violative trade relative investment measures adopted by India under its National Solar Mission, and ultimately a reasonable period expiring till December 2017 was provided to India for making suitable changes in the policies so formed and to bring them in consonance with the GATT and TRIMs Agreement.

ANALYSING THE INDIA-SOLAR CELLS DISPUTE

[39] Art. XX(j) and Art. XX(d), General Agreement on Tariffs and Trade, 1994.
[40] Art. III:8(a), General Agreement on Tariffs and Trade, 1994.

India invoked the general exception provided under the GATT for its argument. The exception, Article XX(j) of the GATT lays down the contours of when an item may be in local short supply. However, it is imperative to note that there must be a shortage of quantity despite sourcing from "*all sources*." The term "all sources" includes exports as well as imports. Since India could not establish that it was facing a shortfall of solar energy supply from all sources, the WTO Panel rejected India's argument. India's local preference requirements inculcated were in contravention of the National Treatment under Article 2 of the TRIMs Agreement and the subsequent Annex.

INDIA – MEASURES AFFECTING THE AUTOMOTIVE SECTOR[41]

In 1997, India had introduced its new automotive policy whereby automotive manufacturers were mandated to sign a memorandum of understanding (MoU) with the then Ministry of Commerce and Industry.[42] As per the said MoU, restrictions were imposed on automobile manufacturers with respect to the thresholds for imports, exports, and sourcing.

Subsequently, after the European Union approached WTO challenging India's move being contrary to the National Treatment, India abolished its discriminatory automobile policy.

INDIA'S REVISED POLICY ON FOREIGN DIRECT INVESTMENTS

India's FDI Policy has been exhaustive regarding the investment limits by multiple types of entities across multiple sectors. In April 2020, India revised its Foreign Direct Investment Policy ("**FDI Policy**"), restricting investments from its neighbouring countries by subjecting the same to approval. The revision also made "approval" necessary for cases where the final or beneficial owner of an investment into Indian companies is situated in or is a citizen of any such neighbouring country.[43] Though these revised measures in the FDI Policy were not a surprise given the ongoing Indo-China tensions, the revision struck the enormous trade between India and China at the core.[44]

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[41]World Trade Organization, *WTO | dispute settlement - the disputes - DS146: India — Measures Affecting the Automotive Sector*, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds146_e.htm.

[42]Kyle Bagwell & Alan O. Sykes, *India – Measures Affecting the Automotive Sector**, 4 WORLD TRADE REVIEW 158–178 (2005).

[43]Department for Promotion of Industry and Internal Trade, *Review of Foreign Direct Investment (FDI) policy for curbing opportunistic takeovers/acquisitions of Indian companies due to the current COVID-19 pandemic* (2020).

[44]Arnav Bose, *A Potential WTO Case Against India's FDI Policy?*, INDIAN JOURNAL OF INTERNATIONAL ECONOMIC LAW , https://ijiel.in/blog/f/a-potential-wto-case-against-india%E2%80%99s-fdi-policy; Prabha Raghavan, *Explained: Why India tightened FDI rules, and why it's China that's upset*, THE INDIAN EXPRESS

POTENTIAL EFFECT ON TRIMS AND NATIONAL TREATMENT PRINCIPLE

The revised FDI Policy carried and still carries the potential of being challenged by China and other countries before the WTO, possibly claiming that the notification is discriminatory and thus contravening the National Treatment principle.

While the revised Indian FDI Policy is based on the steps taken by the USA and the European Union, it is indeed creating barriers for foreign investors, that too for only particular sets of investors.[45] Moreover, the FDI policy applies to all investments across all sectors and does not differentiate between sensitive and non-sensitive sectors. The principle of non-discrimination rests on the two building blocks of the most-favoured-nation (MFN) and the national treatment principle. In a way, India's revised FDI policy is hurting the national treatment obligation under the TRIMs Agreement.[46]

Thus, the revision blatantly suffers defects that violate the National Treatment principle.

INDO-CHINA TENSION: BAN ON CHINESE APPS

Soon after the revised FDI policy decision, India also restricted the import of goods and services from China. Such measures were in furtherance of India's 'Make in India' and 'Digital India' initiatives.[47]

The measures so implemented cropped up in two major forms- one, the ban on more than 200 Chinese Apps on national security concerns; and second, the levy of tariffs on information and communications technology. Naturally, China expressed its agitation and concerns over the issues on the grounds of violation of principles of the TRIMs Agreement. However, undeterred India maintained its stand of adopting such measures in the wake of the country's security interests.

So far as the increase in tariff rates on the information and communications technology sector is concerned, a dispute was initiated by China in September 2019 before the Dispute

(2020), https://indianexpress.com/article/explained/why-india-tightened-fdi-rules-and-why-its-china-thats-upset-6374693/.

[45]Aditi Vishwas Seth, *Does India's changed FDI Policy violate WTO Rules? – GNLU Journal of Law & Economics*, http://gjle.in/2020/05/30/does-indias-changed-fdi-policy-violate-wto-rules/.

[46]Srinivas AtreyaChatti, *Make in India causes American discontent: Notes on World Trade Organization dispute DS456*, INDIALAW LLP BLOG (2015), https://www.indialaw.in/blog/blog/international/make-in-india-world-trade-organization-dispute-ds456/.

[47]One year of Chinese apps ban — Indian alternatives take over TikTok, BUSINESS INSIDER, https://www.businessinsider.in/tech/apps/news/one-year-of-chinese-apps-ban-indian-alternatives-take-over-tiktok/articleshow/83943865.cms.

Settlement Body of the WTO on the grounds of such measures being violative of Article II:1(a) and Article II:1(b) of GATT. The ban on Chinese apps implies favouring Indian mobile applications over Chinese applications, for instances: FAUG – Indian version of the Chinese application PUBG, or the TakaTak short video app, the Indian version of the Chinese TikTok. Thus, it is evident that this ban has contravened the National Treatment principle.

However, it will be a question for consideration before the WTO whether mobile applications fall under the meaning of "trade" of goods or services since this is a new-age issue requiring rulings of the adjudicatory body for future purposes.

CONCLUSION AND FINDINGS

National Treatment has been the cornerstone for developing an extensive anti-trust regime globally, which keeps the trade balance in check among nations. Upon breaking down and analysing the statutory provisions under the TRIMs agreement, it is observed that the same provides an extension over Article III of GATT. A comparatively broader purview of scrutiny helps WTO maintain an effective watch over practices that might be done under the garb of giving indirect benefit to domestic producers and restricting investment from foreign entities. It is observed, for instance, in the *Indonesia –Autos* case study, wherein the Government of Indonesia claimed that the advantage was indirect and cannot be attributed to the policy they had put in place. The WTO Panel took a more result-centric approach, ascertaining the policy's inconsistencies with the National Treatment principle under the TRIMs Agreement. The 'advantage' analysis approach taken up by the WTO may not fit well in certain jurisdictions, as policies may reflect legislators' intent in bolstering their economy due to reasons of self-sufficiency, as frequently observed in countries like China.

When it comes to implications, it is imperative to understand that the national treatment principle aims to provide an 'equitable' ground for players to compete in. One may contemplate that giving foreign entities with advanced innovative tools and developing technologies a leeway by way of equal taxation might be to the detriment of domestic manufacturers. However, it is also pertinent that the domestic producers better understand the consumer base, demographic requirement, and most importantly, established goodwill amongst the residents. Hence, 'equity' is a concept that must be kept in consideration by the Disputes Settlement Body when adjudicating disputes falling under the umbrella of the national treatment principle and Article 2 of the TRIMs Agreement.

From an Indian perspective, the national treatment principle is not a straitjacket rule preventing economic growth. Reasonable measures which are not 'unfavourable' to foreign investors in terms of principles of equity might not be inconsistent with the provisions provided for under Article 2 of TRIMs, hereby providing enough room for the domestic as well as foreign manufacturers and producers to manoeuvre their investment strategies accordingly, without losing out of 'advantages.' Policies preventing investments from neighbouring states and banning of apps can be effectively put into the category of security exceptions under GATT. However, it would be subject to justification put forth by the country.

In essence, the present study proves that the National treatment principle, as embedded in Article 2 of TRIMs Agreement, *inter alia*, is indeed an effective provision to eliminate any unfavourable treatment to foreign investors over the domestic producers.

SUGGESTIONS

On the completion of this study, the author, in his humble opinion, feels that there is a need to revisit the National Treatment obligation for making suitable amends to the existing framework of the TRIMs Agreement so as to bring all member nations – developed, developing, or least developed in consonance. A need is seen to strengthen the Dispute Settlement Body to monitor the National Treatment principle implemented in letter and spirit. It is particularly mentioned to highlight the inequalities on a global stage and that a developed nation might dominate a developing or underdeveloped country using external and diplomatic forces without going through a dispute resolution process, as the costs of litigation before the WTO Dispute Settle Body is huge. With the strengthening of the Dispute Settlement Body, and incorporating a provision for *suo moto* cognizance will protect the interests of developing and underdeveloped nations and fulfil the true objective of the National Treatment to achieve liberalized and free flow of international trade.

REFERENCES

- ***Articles***

1. Soutik Biswas, *Why India is greeting Amazon's Jeff Bezos with protests*, BBC NEWS, January 15, 2020, https://www.bbc.com/news/world-asia-india-51117315 (last visited Nov 17, 2021).

2. Edmund Dell, *Free Trade and Laissez-Faire*, *in*THE POLITICS OF ECONOMIC INTERDEPENDENCE 189–194 (Edmund Dell ed., 1987), https://doi.org/10.1007/978-1-349-18874-1_13 (last visited Nov 17, 2021).
3. Stanley A. Wolpert, *British raj | Imperialism, Impact, History, & Facts | Britannica*, https://www.britannica.com/event/British-raj (last visited Nov 17, 2021).
4. J. P. Jones, *British Rule in India: II*, 168 THE NORTH AMERICAN REVIEW 463–475 (1899).
5. Editorial, *Manmohan Singh's 1991 Budget: the day that changed India forever*, THE HINDU, July 24, 2016, https://www.thehindu.com/business/Economy/Manmohan-Singhs-1991-Budget-the-day-that-changed-India-forever/article14505003.ece (last visited Nov 17, 2021).
6. World Trade Organization, *Trade Guide: WTO TRIMs*, https://www.trade.gov/trade-guide-wto-trims (last visited Nov 17, 2021).
7. Anna Nicolaou, James Fontanella-Khan & Kiran Stacey, *Walmart shifts global strategy to battle Amazon*, FINANCIAL TIMES, May 13, 2018, https://www.ft.com/content/48bc9928-5540-11e8-b3ee-41e0209208ec (last visited Nov 17, 2021).
8. Evelyn Cheng, *China trade surplus with the U.S. rises to monthly record in September*, CNBC (2021), https://www.cnbc.com/2021/10/13/china-trade-data-imports-grow-17point6percent-in-september-miss-expectations.html (last visited Nov 17, 2021).
9. World Trade Organization, *Dispute Settlement, 3.5 GATT 1994* (2003), https://unctad.org/system/files/official-document/edmmisc232add33_en.pdf.
10. World Trade Organization, *WTO | Trade and investment*, https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm (last visited Nov 19, 2021).
11. Will Kenton, *National Treatment Definition*, INVESTOPEDIA ,https://www.investopedia.com/terms/n/nationaltreatment.asp (last visited Nov 19, 2021).
12. World Trade Organization, *WTO | legal texts - A Summary of the Final Act of the Uruguay Round*, https://www.wto.org/english/docs_e/legal_e/ursum_e.htm#eAgreement (last visited Nov 19, 2021).

13. Lakshmi Neelakantan, *National Treatment principle Analysis of GATT Article III*, https://lakshmisri.com/insights/articles/national-treatment-principle-analysis-of-gatt-article-iii/ (last visited Nov 19, 2021).
14. Shiraz Rajiv Patodia& Mayank Singhal, *The Law Reviews - The International Trade Law Review*, https://thelawreviews.co.uk/title/the-international-trade-law-review/india (last visited Nov 19, 2021).
15. AMERICAN LAW INSTITUTE, LEGAL AND ECONOMIC PRINCIPLES OF WORLD TRADE LAW: ECONOMICS OF TRADE AGREEMENTS, BORDER INSTRUMENTS, AND NATIONAL TREASURES (Henrik Horn & Petros C. Mavroidis eds., 2013), http://ebooks.cambridge.org/ref/id/CBO9781139839105 (last visited Nov 19, 2021).
16. Bernard Hoekman& Kamal Saggi, *Assessing the Case for Extending WTO Disciplines on Investment-Related Policies*, 15 JOURNAL OF ECONOMIC INTEGRATION 629–653 (2000).
17. Arnav Bose, *A Potential WTO Case Against India's FDI Policy?*, INDIAN JOURNAL OF INTERNATIONAL ECONOMIC LAW , https://ijiel.in/blog/f/a-potential-wto-case-against-india%E2%80%99s-fdi-policy (last visited Nov 19, 2021).
18. Sandeep Thomas Chandy &Anupal Dasgupta, *Government Procurement: A Multilateral Perspective Into Goods And Services Trade*, 4/2019 CTIL (2019), https://ctil.org.in/cms/docs/Papers/Discussion/Discussion%20Paper%2007.pdf.
19. Srinivas Atreya Chatti, *Make in India causes American discontent: Notes on World Trade Organization dispute DS456*, INDIA LAW LLP BLOG (2015), https://www.indialaw.in/blog/blog/international/make-in-india-world-trade-organization-dispute-ds456/ (last visited Nov 19, 2021).
20. Insights, *India and WTO - Detailed Analysis of All Related Issues and Concepts*, INSIGHTS (2016), https://www.insightsonindia.com/2016/01/20/india-and-wto-detailed-analysis-of-all-related-issues-and-concepts/ (last visited Nov 19, 2021).
21. Aditi Vishwas Seth, *Does India's changed FDI Policy violate WTO Rules? – GNLU Journal of Law & Economics*, http://gjle.in/2020/05/30/does-indias-changed-fdi-policy-violate-wto-rules/ (last visited Nov 19, 2021).
22. Archana K., *Effects of Agreement on Trims on Indian Foreign Trade*, 3 IJCER (2013), http://www.ijceronline.com/papers/Vol3_issue5/Part.2/L0352071076.pdf.

23. SayenkoKharenko, *WTO Case Summary. India - Solar Cells - Energy and Natural Resources - Ukraine*, https://www.mondaq.com/renewables/533696/wto-case-summary-india--solar-cells (last visited Nov 19, 2021).
24. The Editors of Encyclopaedia Britannica, *General Agreement on Tariffs and Trade | international relations | Britannica*, https://www.britannica.com/topic/General-Agreement-on-Tariffs-and-Trade (last visited Nov 19, 2021).
25. AbhipsaVagadia, *A Study on Agreement on TRIMs and India*, 3 PARIPEX - INDIAN JOURNAL OF RESEARCH (2014), https://www.worldwidejournals.com/paripex/recent_issues_pdf/2014/June/June_2014_1402919893_31586_36.pdf.
26. Marcia Tavares, *LDCs in the Agreement on Trade-Related Investment Measures (TRIMs) and related decisions | LDC Portal*, https://www.un.org/ldcportal/ldcs-in-the-agreement-on-trade-related-investment-measures-trims-and-related-decisions/ (last visited Nov 19, 2021).
27. Jus Mundi, *Indonesia — Autos, Panel Report, 2 July 1998*, https://jusmundi.com/en/document/decision/en-indonesia-certain-measures-affecting-the-automobile-industry-report-of-the-panel-thursday-2nd-july-1998 (last visited Nov 19, 2021).
28. World Trade Organization, Indonesia - Autos (1998), wto.org/english/tratop_e/dispu_e/cases_e/ds54_e.htm.
29. *Canada – Certain Measures Affecting the Automotive Industry (Canada – Autos)*, DS139, DS124, AB Report adopted on June 19, 2000 (last visited Nov 19, 2021)
30. *India – Measures Affecting the Automotive Sector* and *India – Measures Affecting Trade and Investment in the Motor Vehicle Sector*, DS146, DS175, Panels Reports adopted on April 5, 2002. (last visited Nov 19, 2021)
31. *China – Measures Affecting Imports of Automobile Parts, DS339, DS340, DS342*, Panel and AB reports adopted on January12, 2009. (last visited Nov 19, 2021)
32. *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* and *Canada – Measures Relating to the Feed-In Tariff Programme (Canada – Feed-In Tariff Programme*) DS412, DS426, Panel and AB Reports adopted on May 6, 2013. (last visited Nov 19, 2021)
33. Kyle Bagwell & Alan O. Sykes, *India – Measures Affecting the Automotive Sector**, 4 WORLD TRADE REVIEW 158–178 (2005).

34. World Trade Organization, *WTO | dispute settlement - the disputes - DS146: India — Measures Affecting the Automotive Sector*, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds146_e.htm (last visited Nov 19, 2021).
35. Department for Promotion of Industry and Internal Trade, *Review of Foreign Direct Investment (FDI) policy for curbing opportunistic takeovers/acquisitions of Indian companies due to the current COVID-19 pandemic* (2020), https://dpiit.gov.in/sites/default/files/pn3_2020.pdf.
36. Prabha Raghavan, *Explained: Why India tightened FDI rules, and why it's China that's upset*, THE INDIAN EXPRESS (2020), https://indianexpress.com/article/explained/why-india-tightened-fdi-rules-and-why-its-china-thats-upset-6374693/ (last visited Nov 19, 2021).
37. World Trade Organization, *WTO | dispute settlement - DS472: Brazil — Certain Measures Concerning Taxation and Charges*, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds472_e.htm (last visited Nov 19, 2021).
38. One year of Chinese apps ban — Indian alternatives take over TikTok, , BUSINESS INSIDER , https://www.businessinsider.in/tech/apps/news/one-year-of-chinese-apps-ban-indian-alternatives-take-over-tiktok/articleshow/83943865.cms (last visited Nov 19, 2021).

- ***Websites***

- www.wto.org
- www.commerce.gov.in
- www.trade.gov.in
- www.meti.go.jp
- www.unctad.org