TAX PROTECTIONISM AND TAX DISCRIMINATION: CARTOGRAPHY OF MULTILATERAL AND BILATERAL TRADE AND INVESTMENT AGREEMENTS

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I. INTRODUCTION

Trade policies are an issue of the outmost concern to the developing countries because these policies dictate the terms on which less developing countries will be integrated into the global economy. In fact, the development canvass is often framed as "Trade versus aid" propounding that participation in the global market is adequate for the less developing countries to begin to clamber the development ladder and address poverty among their citizens. In reality, trade is just one more tool for development. International trade policy consists of bilateral and multilateral arrangements between countries and dictates the terms of commerce between them.

More generally, global trade may be hampered by the current economic climate, which is encouraging protectionist tendencies, as evidenced by the current difficulties encountered in the Doha Rounds. Exports to some countries can attract severe taxes and duties as a result of protectionist measures. The aim of tax protectionism is to bolster domestic businesses and industries from overseas competition and prevent the outcome resulting from inter-play of free market forces of supply and demand.

Interdictions of tax discrimination have long emerged in constitutions, tax treaties, trade treaties, and other sources, but despite their ubiquity, little agreement exists as to how such provisions should be interpreted. Albeit International Trade Agreements contain broad non-discrimination provisions that are potentially applicable to tax measures, in general tax measures are carved out of trade agreements and are dealt with exclusively under bilateral income tax treaties.

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II. TRADE AGREEMENTS

Trade policies are an issue of the outmost concern to the developing countries because these policies dictate the terms on which less developing countries will be integrated into the global economy. Trade agreements are when two or more nations agree on the terms of trade between them. The three basic approaches to trade reform are unilateral, multilateral, and bilateral. For many countries, unilateral reforms are the only effective way to reduce domestic trade barriers. However, multilateral and bilateral approaches of dismantling trade barriers in concert with other countries- have two advantages over unilateral approaches:

First, when many countries or regions agree to a mutual reduction in trade barriers, the economic gains from international trade are reinforced and enhanced. Concentrated liberalization of trade increases competition and specialization among the countries by broadening markets and thus giving a bigger boost to efficiency and consumer incomes.

Political oppositions to the free trade in each of the countries involved may be reduced by the multilateral reductions in the free trade because groups that otherwise would oppose or be indifferent to trade reform might join the campaign for free trade if they see opportunities for exporting to the other countries in the trade agreement.

Consequently, free trade agreements between countries or regions are a useful strategy for liberalizing world trade.[2]

The best possible outcome of trade negotiations is a multilateral agreement that includes all major trading countries. Then, free trade is widened to allow many participants to achieve the greatest possible gains from trade. Multilateral trade agreements are between many nations at one time. For this reason, they are very complicated to negotiate, but are very powerful once all parties sign the agreement. The primary benefit of multilateral agreements is that all nations get treated equally, and so it levels the playing field, especially for poorer nations that are less competitive by nature. These are agreements negotiated in and monitored by the World Trade Organization (WTO)[3]. While many such agreements exist, the main trade agreements include:

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2 The concise encyclopedia of economics- International Trade Agreements by Douglas A. Irwin, Available at : http://www.econlib.org/library/Enc/InternationalTradeAgreements.html

3 WTO is a forum for the countries to thrash out their trade issue. It provides the following benefits:

- The system helps promote peace.
- Disputes are handles constructively.
- Rules make life easier for all.

Free trade cuts the cost of living.

- It provides more choice of products and qualities.
- Trade raises income.
- Trade stimulates economic growth.
- The basic principles make life more efficient.

- The General Agreement on Tariffs and Trade (GATT).
- The General Agreement on Trade and Services (GATS), which covers services including health, services, water and other utilities.
- The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which covers patent, copyright and trademarks on a wide assortment of products from software to medicines.
- The Agreement on Agriculture.
- The Agreement on the Application of Sanitary and Phytosanitary Measures.
- The Agreement on Technical Barriers to Trade
- The Agreement on Trade-Related Investment Measures (TRIMS), which covers the rules and practices that countries must adhere to regarding the treatment of foreign investors, including foreign investors in private health delivery and medicine production.
- The Anti-dumping Agreement.
- The Agreement on Customs Valuation.[4]

In this age of globalization, the world trading order is based on the World Trade Organization (WTO) Agreement, which is a multilateral treaty. Free trade agreements are often signed in conjunction with other bilateral economic agreements such as investment agreements, double taxation treaties, or even currency agreements. Bilateral Trade Agreements and Regional Trade Agreements are an important social phenomenon in the world today. The purpose of such agreements is to invigorate trade relations between the members. A bilateral trade agreement is the one made between two contracting parties are fairly easy to negotiate and give those two nations favored trading status between each other. Whereas, a regional trade agreement is the one made between two or more contracting parties that share some common denomination known conceptually as 'region'. As the result of the value judgment, the WTO does not differentiate between a bilateral and a regional trade agreement, instead all the additional trade agreements between the WTO members are referred to as regional trade agreement.[5]

- Governments are shielded from lobbying.
- The system encourages good government.

4 Available at : http://www.who.int/trade/glossary/story066/en/index.html.

5 Bilateral and regional trade agreements by John Shijian Mo, available at : http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0019.xml

III. INVESTMENT AGREEMENTS: CHAUFFEUR OF THE GLOBAL ECONOMY

The Foreign direct investment (FDI) is an increasingly important driver of the global economy. In the absence of an overarching multilateral framework on investment, bilateral investment treaties (BITs) and investment chapters in free trade agreements (FTAs) collectively referred to as "international investment agreements," have emerged as the primary mechanism for promoting a rules-based system for international investment. Provisions on non-discriminatory treatment of investments by the host country, limits on expropriation of investments, and access to impartial binding procedures to settle investment-related disputes with host governments are contained in these agreements.

Over the past decennary, the International investment agreements (IIAs) have proliferated at the bilateral, regional and interregional levels. A range of trade liberalization and promotion provisions with commitments to liberalize, protect and/or promote investment are being covered by these agreements.

The IIAs universe is composed of bilateral treaties for the promotion and protection of investment (or bilateral investment treaties), treaties for the avoidance of double taxation (or double taxation treaties), other bilateral and regional trade and investment agreements as well as various multilateral agreements that contain a commitment to liberalize, protect and/or promote investment.[6]

Under the Agreement on Trade-Related Investment Measures of the World Trade Organization (WTO), commonly known as the **TRIMs Agreement**, WTO members have agreed not to apply certain investment measures related to trade in goods that restrict or distort trade.

The TRIMs Agreement[7] prohibits certain measures that violate the national treatment and quantitative restrictions requirements of the General Agreement on Tariffs and Trade (GATT).

6 United Nations Conference on Trade and Development, Geneva- Systemic issues in International Investment Agreements, IIA MONITOR No. 1 (2006) International Investment Agreements

7 The Trade Related Investment Measures Agreement came into effect on 1 January 1995 as part of the Uruguay Round negotiations. The Agreement did not define TRIMs, but provided an illustrative list (Annex 1).
Examples of TRIMs are;

- Local content requirements where governments require enterprises to use or purchase domestic products.
- Trade balancing measures where governments impose restrictions on imports by an enterprise or link the amount of imports to the level of its exports.
- Foreign exchange balancing requirements where an enterprise has the level of imports linked to the value of its exports in order to maintain a net foreign exchange earnings.

The lack of a precise definition means that the issue is not always clear cut and there has been considerable disagreement as to whether or not certain measures are covered by the Agreement.

Prohibited TRIMs may include requirements to:

- achieve a certain level of local content;
- produce locally;
- export a given level/percentage of goods;
- balance the amount/percentage of imports with the amount/percentage of exports;
- transfer technology or proprietary business information to local persons; or
- balance foreign exchange inflows and outflows.

These requirements may be mandatory conditions for investment, or can be attached to fiscal or other incentives. The TRIMs Agreement does not cover services.

All WTO member countries are parties to this Agreement.

In the **Indonesia- Autos case**[8]

- *Measure at issue: (i) "The 1993 Programme" that provided import duty reductions or exemptions on imports of automotive parts based on the local content percent; and (ii) "The 1996 National Car Programme" that provided various benefits such as luxury tax exemption or import duty exemption to qualifying (local content and etc.) cars or Indonesian car companies.*

- *Product at issue: Imported motor vehicles and parts and components thereof.*

- *Key Panel Findings:*

- *TRIMs Agreement Art. 2.1 (local content requirement): The Panel found the 1993 Programme to be in violation of Art. 2.1 Because (i) the measure was a "trade-related investment" measure; and (ii) the measure, as a local content requirement, fell within para.*

8 Indonesia – Certain Measures Affecting the Automotive Industry

1 of the Illustrative List of TRIMs in the Annex to the TRIMs Agreement, which sets out trade-related investment measures that are inconsistent with national treatment obligation under GATT Art. III: 4.

- *GATT Art. III: 2, first and second sentences (national treatment - taxes and charges): The Panel found that the sales tax benefits under the measures violated both Art. III: 2, first and second sentences. The Panel noted that under the Indonesian car programmes, an imported motor vehicle would be taxed at a higher rate than a like domestic vehicle in violation of Art. III: 2, first sentence, and also, any imported vehicle would not be taxed similarly to a directly competitive or substitutable domestic car due to these Indonesian car programmes whose purpose was to promote a national industry.*

- *GATT Art. I: 1 (most-favoured-nation treatment): The Panel found the measures to be in violation of Art. I: 1 because the "advantages" (duty and sales tax exemptions) accorded to Korean imports were not accorded "unconditionally" to "like" products from other Members.*

IV. TAX PROTECTIONISM: TAILORING TAX INCENTIVES

The view that the domestic sector of an economy, its consumers and its producers should be shielded from imports by imposing barriers to foreign trade is based on the notion that imports are deleterious to the economy and to its citizens.

More generally, global trade may be hampered by the current economic climate, which is encouraging protectionist tendencies, as evidenced by the current difficulties encountered in the Doha Rounds. Non-tariff barriers have grown substantially in recent years, many in the form of health, safety or environmental requirements.

184 new trade-restrictive measures were reported by WTO enacted between October 2010 and April 2011 and 182 between October 2011 and May 2012. In addition, where countries are not bound by FTAs, import duties are still a common and often used means to steer trade and production.

The GATT[9] requires its signatories to extend most-favored nation (MFN)[10] status to other trading partners participating in the WTO as a multilateral trade agreement. Exports to some countries can attract severe taxes and duties as a result of protectionist measures.

Trade protectionism is a defensive measure, and it is usually politically motivated. It is used by the countries when they think their industries are being damaged by unfair competition by other countries. It can often work, in the short run. However, in the long run it usually does the opposite of its intentions. It can make the country, and the industries it is trying to protect, less competitive on the global marketplace. Varieties of ways are used by the countries to protect their trade. One way is to enact tariffs, which tax the imports.[11] This immediately raises the price of the imported goods, and therefore less competitive when compared to locally produced goods.

The Government's subsidization of the local industries with tax credits or even direct payments is another way of protecting the trade, which again lowers the price of locally produced goods and services. In this case, the goods are cheaper even when shipped overseas and thereby it works even better than tariffs.

The aim of tax protectionism is to bolster domestic businesses and industries from overseas competition and prevent the outcome resulting from inter-play of free market forces of supply and demand.

Protectionism usually takes the form of tariffs, import quotas, and assorted non-tariff regulatory barriers and is intended to secure domestic jobs, increase domestic wages, promote domestic production and create a balance of trade surplus.

9 The General Agreement on Tariffs and Trade (GATT) covers international trade in goods. The workings of the GATT agreement are the responsibility of the Council for Trade in Goods (Goods Council) which is made up of representatives from all WTO member countries. The current chairperson is H.E. Dr. Anthony Mothae MARUPING (Lesotho). The Goods Council has 10 committees dealing with specific subjects (such as agriculture, market access, subsidies, anti-dumping measures and so on). Again, these committees consist of all member countries.

10 MFN status means that each WTO member receives the same tariff treatment for its goods in foreign markets as that extended to the "most-favored" country competing in the same market, thereby ruling out preferences for, or discrimination against, any member country.

11 The most famous example is the Smoot-Hawley Tariff of 1930. It was originally designed to protect farmers from agricultural imports from Europe, which was stepping up farming after the destruction of World War I. However, by the time the bill made it through Congress, it had slapped tariffs on many more imports. As so often happens with tariffs, other countries retaliated. This tariff war restricted global trade, and was one reason for the extended severity of the Great Depression.

In addition, where countries are not bound by Free Trade Agreements (FTAs)[12], import duties are still common and often used means to steer trade and production. With more than 150 countries now operating a VAT/GST system and international trade still growing, it is becoming more important than ever to provide a global framework for a coherent interaction for all these different systems.

V. TECHNICAL BARRIERS TO TRADE

The phrase "technical barriers to trade" refers to the use of the domestic regulatory process as a means of protecting domestic producers.[13]

The TBT Agreement[14] seeks to balance two competing policy objectives:

(1) The prevention of protectionism, with

(2) The right of a Member to enact product regulations for approved (legitimate) public policy purposes (i.e., allowing Members sufficient regulatory autonomy to pursue necessary domestic policy objectives).

The progressive tariff reductions that have taken place in the GATT/WTO framework have left certain industrial and political leaders looking for other means of protecting their industries. These means of protection frequently take the form of non-tariff barriers (i.e., means other than tariffs for protecting business sectors). Technical regulations, standards and conformity assessment procedures are all potential non-tariff measures that are sometimes used for protectionist purposes. As such, they can be potential barriers to international trade.[15]

According to the report, the European Commission achieved progress towards eliminating some of the most trade distortive barriers hindering global activities of EU companies in 2012:

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12 Free trade, usually defined as the absence of tariffs, quotas, or other governmental impediments to International Trade, allows each country to specialize in the goods it can produce cheaply and efficiently relative to other countries. Such specialization enables all countries to achieve higher real incomes. The largest free trade agreement is NAFTA, or the North American Free Trade Agreement, which is between the U.S., Canada and Mexico. Other free trade agreements are CAFTA, which is between the U.S. and Central America, and agreements with Chile, Colombia, Panama, Peru and Uruguay, most countries in Southeast Asia, and the Middle Eastern countries of Israel, Jordan, Morocco, Bahrain, and Oman.

13 The TBT Agreement seeks to assure that:

- mandatory product regulations,
- voluntary product standards, and
- Conformity assessment procedures (procedures designed to test a product's conformity with mandatory regulations or voluntary standards) do not become unnecessary obstacles to international trade and are not employed to obstruct trade.

14 The TBT Agreement is a multilateral as opposed to a plurilateral agreement meaning that it applies to all WTO Members – it forms part of the Uruguay Round's "single undertaking". Second, the TBT Agreement has a much stronger enforcement mechanism, being subject to the WTO's Dispute Settlement Understanding (DSU).

15 United Nations Conference on Trade and Development, Dispute Settlement- Technical Barriers to Trade. Available at: http://unctad.org/en/Docs/edmmisc232add22_en.pdf

- The European Union in the WTO case against China on access to raw materials brings to an end a fundamental disadvantage affecting the competitiveness of the European industries.
- The Russian accession to the WTO resulted last year in the significant lowering of import duties after many years of difficult negotiations.
- European Union trade diplomacy made progress toward the opening of the Indian market to EU telecommunication equipment, tyres and steel products. The bilateral discussions conducted with Japan are making it easier for European Union producers of liquor, beef meat and possessed food to respond to the Japanese appetite.

But several long-standing obstacles, together with a number of new trade-distortive measures, still stand in the way of European companies looking for markets outside the EU.

- The persisting Chinese investment barriers. Disappointingly, further restrictions in some industrial sector were introduced by China which raised the uncertainty levels to discourage potential investors;
- The refusal by India to withdraw the unjustified regulatory measures that maintain its agri-food market closed to imports. Also, trade in electronic products and renewable energy technology suffers from a protectionist attitude of the Indian authorities;
- The rise of Protectionism in Argentina and Brazil. There has been no improvement regarding measures affecting import and export, public procurement procedures, reinsurance services or maritime transport in these countries. The increasing preference to domestic producers against the interest of European companies by the new Tax regime in Brazil. Furthermore, the looming perspective to increase 100 tariffs in Brazil up to the permitted WTO limit imperils the future of commercial relations.
- Russia adopted a series of protectionist measures in addition to longstanding market access issues, the majority of which are not in compliance with its WTO obligations. Those include discriminatory recycling fees for imported vehicles and various technical and sanitary barriers to trade.[16]

16 EU reports on progress in fight against protectionism, Available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=878

In the Canada Periodicals Case[17]

- *Measure at issue: (i) Tariff Code 9958, which prohibited the importation into Canada of any periodical that was a "special edition"18; (ii) the Excise Tax Act, which imposed, in respect of each split-run edition19 of a periodical, a tax equal to 80 per cent of the value of all the advertisements*

- *contained in the split-run edition; and (iii) the postal rate scheme under which different postal rates were applied to domestic and foreign periodicals.*

- *Product at issue: Imported periodicals (from the United States) and domestic periodicals.*

- *Summary of the Key Panel/ AB findings:*

- *GATT Art. XI (prohibition on quantitative restrictions) and Art. XX (d) (exceptions - necessary to secure compliance with laws): The Panel found that Tariff Code 9958, which prohibited the importation of certain periodicals, violated Art. XI, and was not justified under Art. XX (d) because it could not be regarded as a measure to secure compliance with Canada's Income Tax Act.*

- *GATT Art. III: 2, first and second sentences (national treatment - taxes and charges): The Appellate Body reversed the Panel's finding that imported split-run periodicals and domestic non-split run periodicals were "like products" (Art. III: 2, first sentence). The Appellate Body concluded that the Excise Tax Act was inconsistent with Art. III: 2, second sentence because (i) imported split-run periodicals were "directly competitive or substitutable" with domestic non-split-run periodicals; (ii) imported and domestic products were not similarly taxed; and (iii) the tax was applied so as to afford protection to domestic products.*

17 Canada – Certain Measures Concerning Periodicals.

18 "Special edition" is a periodical that "contains an advertisement that was primarily directed to a market in Canada and that does not appear in identical form in all editions of that issue of the periodical that were distributed in the periodical's country of origin".

19 The Excise Tax Act defines "split-run edition" as an edition of an issue of a periodical: (i) that is distributed in Canada; (ii) in which more than 20 per cent of the editorial material is the same or substantially the same as editorial material that appears in one or more excluded editions of one or more issues of one or more periodicals; and (iii) contains an advertisement that does not appear in identical form in all of the excluded editions.

- *GATT Art. III: 4 (national treatment - domestic laws and regulations) and III:8(b) (national treatment - subsidies exception): The Panel found that the application of discriminatory postal rates for domestic and imported periodicals under Canada's postal rate scheme violated Art. III: 4. The Appellate Body reversed the Panel's further finding that this postal scheme, however, was justified under Art. III:8(b), on the ground that the kinds of measures covered by Art. III: 8(b), and thus exempt from the obligations of Art. III, are "only the payment of subsidies which involves the expenditure of revenue by a government". Under Canada's postal rate scheme at issue, however, no subsidy payments were made to private entities, and certain companies simply received a reduction in postal rates.*

VI. TAX DISCRIMINATION: A CATALYST OR INHIBITOR OF THE FREE TRADE

The heart and soul of the International Trade Law is the non-discrimination obligation. The principle of non-discrimination has a longstanding history in international trade relations and it has turned into a central pillar of postmodern international economic law. The non-discrimination rules in the UN and OECD Model Conventions apply to all taxes, including national and sub-national level taxes, income tax, VAT, property taxes, petroleum taxes etc. Tariffs and taxes are the classical field addressing non-discrimination in international economic law. The practice of international economic law determined different tertia comparationis[20] which in turn leads to different standards of non-discrimination. Non-discrimination principle is represented by the term “Most Favoured Nation” (MFN) i.e. a status or level of treatment accorded by one state to another in international trade in international economic relations and international politics. The term means that the country which is the recipient of this treatment must, nominally, receive equal trade advantages as the "MFN" by the country granting such treatment. In effect, a country that has been accorded MFN status may not be treated less advantageously than any other country with MFN status by the promising country.

GATT, WTO norms, etc. generally deal with inequalities in connection with taxes on products and not on income. Countries give certain benefits to “MFN” through bilateral tax treaties.

The locus classicus of non-discrimination- Article III (2) of GATT address two constellations. The first is applicable to like products. A strict implementation has been given to National Treatment consistently in such constellations. Members are not allowed to apply internal taxes to imported products or charges in excess of those applied, directly or indirectly to domestic products.

20 It refers to the quality or element which two ‘situations’ or ‘objects’ must have in common in order to conclude that they are ‘alike’ for the purpose of the comparison.

One of the most important WTO dispute settlement decisions interpreting "likeness" is that of the Appellate Body in **Japan – Alcoholic Beverages II**.

The Appellate Body noted in its interpretation of GATT Article III: 2 of the GATT 1994, in what has become a famous passage, that:

- *GATT- Art III: 2 (national treatment - taxes and charges), first sentence (like products): The Appellate Body upheld the Panel's finding that vodka was taxed in excess of shochu, in violation of Art. III: 2, first sentence, accepting the Panel's interpretation that Art. III:2, first sentence requires an examination of the conformity of an internal tax measures by determining two elements: (i) whether the taxed imported and domestic products are like; and (ii) whether the taxes applied to the imported products are in excess of those applied to the like domestic products.*
- *GATT Art. III:2 (national treatment - taxes and charge), second sentence (directly competitive or substitutable products): The Appellate Body upheld the Panel's finding that shochu and whisky, brandy, rum, gin, genever, and liqueurs were not similarly taxed so as to afford protection to domestic production, in violation of Art. III:2, second sentence. Modifying some of the Panel's reasoning, the Appellate Body clarified three separate issues that must be addressed to determine whether a certain measure is inconsistent with Art. III:2, second sentence: (i) whether imported and domestic products are directly competitive or substitutable products; (ii) whether the directly competitive or substitutable imported and domestic products are not similarly taxed; and (iii) whether the dissimilar taxation of the directly competitive or substitutable imported and domestic products is applied so as to afford protection to domestic production..21*

21 Appellate Body Report Japan – Alcoholic Beverages II, page- 114

The second constellation relates to substitutable, but unlike, products. Contrary to the first sentence of Article III (2), the second sentence explicitly refers to Paragraph 1 and thus to the obligation not to apply internal taxes and other charges to imported or domestic products so as to afford protection to domestic production. Such reference relates to the overall objective of the provision and allows for greater flexibility in assessing the discriminatory effects of tax regimes. To the extent that differential taxation does not amount to protection of domestic industries, it thus allows for diverging tax regimes for domestic and imported products. In essence, the regime is subject to the so-called 'aims and effect' test, otherwise formally confuted by the WTO Appellate Body with respect to like products and non-tariff measures. Special rules exist for border tax adjustment and fees.[22] They are not subject to tariff bindings, along with duties offsetting dumping and unlawful subsidies (Art. II (2), GATT).[23]

In the Dominican Republic- Import and sale of the Cigarettes case

- *Measure at issue: Dominican Republic's general measures relating to import charges and fees and other measures specific to import and sale of cigarettes.*

  Product at issue: Cigarettes imported from Honduras as well as all imported products in the case of transitional surcharge measure and the foreign exchange fee.

- *Key panel/ AB findings:*
  --Stamp requirement
- *GATT Art. III: 4 (national treatment - domestic laws and regulations): The Panel found that the stamp requirement, which required tax stamps to be affixed to cigarette packets in the Dominican Republic, "accords less favourable treatment to imported cigarettes than that accorded to the like domestic products, contrary to GATT Art. III: 4". The Appellate Body upheld the Panel's finding that this requirement was not necessary within the meaning of Art. XX (d) as, inter alia, there were "reasonably available" alternative WTO-consistent measures and, thus, the measure was not justified under Art. XX (d).*

22 The U.S Generalized System of Preferences (GSP) is a program designed to promote economic growth in the developing country by providing preferential duty-free entry for upto 5,000 products when imported from one of 127 designated beneficiary countries and territories. Many U.S. jobs are being supported by this program. Most manufactured items; many types of chemicals, minerals and building stone; jewelry; many types of carpets; and certain agricultural and fishery products is the list of the products that are eligible for duty-free treatment under GSP

23 Working Paper No 2011/16 | April 2011 -Direct and Indirect Discrimination in WTO Law and EU Law by Thomas Cottier and Matthias Oesch.

The Appellate Body upheld the Panel's rejection of Honduras's claim under Art. III:4, and agreed with the Panel that a detrimental effect of a measure on a given imported product does not necessarily imply that the measure accords less favourable treatment to imports if the effect is explained by factors unrelated to the foreign origin of the product, such as the market share of the importer.

VII. CONCLUSION

The guiding principle behind the interdiction of tax discrimination is the prevention of protectionism (expressed negatively) or the promotion of competition (expressed affirmatively). In other words, the tax-nondiscrimination principle promotes a level playing field between similarly situated economic actors from different member states.

The Superior interpretation of the language of the treaties is competitive Neutrality (Competitive neutrality implies that no business entity is advantaged (or disadvantaged) solely because of its ownership). Interpreting the tax-nondiscrimination principle to require competitive neutrality is welfare enhancing. Competitive neutrality involves two requirements: (1) uniform taxation and (2) universal adoption of one of two possible methods of double tax relief. First, competitive neutrality requires what we called "uniform" source and residence taxation. (A source tax is uniform if it applies the same way to taxpayers earning income in the jurisdiction without regard to their state of residence. A residence tax is uniform if it applies the same way to all residents of the jurisdiction, no matter where they earn their income.) Second, strict adherence to competitive neutrality requires all states to agree on the same method of double tax relief. Specifically, competitive neutrality requires universal adoption of either worldwide taxation with unlimited foreign tax credits or what we labeled the "ideal deduction method," one instantiation of which is exemption of foreign-source income. Thus, uniform taxation combined with universal adoption of either worldwide taxation with unlimited foreign tax credits or the ideal deduction method would achieve competitive neutrality under ideal condition and a policy argument.