Differences in The Approach Under Article 2.1 of The TBT and GATT Article III : 4

As per the two recent case laws, it is very clear that scope and content of both the Articles are very different. Even the approach of claim under TBT and GATT is different. In ascertaining 'less favorable treatment' under GATT only effect test has to be satisfied and under TBT claim both aim and purpose test has to be fulfilled. Thus, a measure will not violate Article 2.1 of the TBT agreement if a regulatory purpose has been established but it will still go ahead and violate Article III: 4 of the GATT. Therefore, in any case there needs to be further investigation and analysis done. Thus both the claims are very different and judicial economy cannot be exercised.

**Introduction:**

The Appellate Body’s recent decisions in US Clove Cigarettes and US Tuna II (Mexico) observed that both the GATT and the TBT Agreement are aimed at striking a balance between trade liberalization and domestic autonomy.\(^{1}\) There are many similarities under examination of Claim under Article 2.1 of TBT agreement and Article III: 4 of the GATT. Even though there are similarities, there are major differences in claim under both the agreements as per recent cases. The issue at hand is that a panel can exercise judicial economy if the terms used in both the Articles are same i.e. Applicability/Scope (Kind of measure), and Content (uses of term 'Like' product and 'no less favourable treatment'). This paper elucidates upon the different approaches taken by the panel in rejecting the plea for exercising judicial economy\(^{2}\) as the content and scope of both the provisions is different.

**Relationship between TBT and GATT:**

TBT agreement was entered to further the objective of GATT.\(^{3}\) The Technical Barriers to trade Agreement can apply simultaneously with GATT. Article 2.1 of TBT and III: 4 GATT are similar. They both impose obligation of national treatment. Article III: 4 is much broader as it covers 'any' treatment. It is more general in nature and TBT is only restricted to technical regulation.

GATT and TBT may apply to a measure simultaneously, but in case of conflict between the both, TBT would prevail.\(^{4}\) If a specific claim under the TBT fails, then panels can examine the claim under GATT.

The three elements of a violation of Article III: 4 National Treatment are\(^{5}\):

(a) Domestic and imported products are like products;
(b) that the measure at issue is a 'law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use'; and
(c) That the imported products are accorded 'less favourable' treatment than that accorded to like domestic products.\(^{6}\)

In order to prove the violation of Article 2.1 of the TBT Agreement, three elements that must be fulfilled: (i) The measure imposed is a technical regulation under TBT agreement\(^{7}\) within the meaning of Annex 1.1; (ii) Imported products and domestic products are like products. (iii) The treatment accorded to imported products must be less favourable than that accorded to like domestic products and like products from other countries.\(^{8}\)

Thus, both Article 2.1 of the TBT and Article III: 4 GATT imposes an obligation on the members to treat ‘like’ imported and domestic product ‘no less favourable’ than each other. Thus, there are two similar requirements to be established for proving a violation of TBT and GATT. First, is like products and the second is no less favourable treatment. But the interpretation and application of the terms and whole agreement calls for refusal for exercising judicial economy.

**Different Approaches under TBT and GATT:**

The difference between TBT agreement and GATT is that a measure may be violative of Article III: 4 could still be justified under General exception under Article XX. Article 2.1 is violated as soon as the three elements provided above are fulfilled and is not subject to any exception.

**Test of like products:**

In US-Cloves AB rejected the Panel's regulatory context approach\(^{9}\) and extended the test of like products of GATT.
elucidated in EC Asbestos to TBT Agreement. In EC-Asbestos determination of “likeness” under Article III: 4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products.\(^\text{10}\) Similarly, in US-Cloves, Appellate Body observed that product is like can be determined on the basis that they are in a competitive relationship with each other in the relevant market and are substitute goods. The rationale for extending the GATT interpretation of article III: 4 was that it would also be useful to determine whether the measure is less favourable to imported product if the measure affects the competitive relationship of the products in the market.\(^\text{11}\)

**Interpretation of ‘no less favourable treatment’**: While dealing with the questions involved in US-Clove Cigarettes, the Appellate Body provided observations on the national treatment framework “less favourable treatment” within GATT and drew an analogy with that of TBT agreement. The Appellate Body was of the view that assessment of competitive conditions, as relatively against the foreign goods, is the focal point for examining the violation of the national treatment provision.\(^\text{12}\) However, as has been identified by the Appellate Body, this approach finds digression when applied under TBT Agreement, to the effect that a detrimental impact on imported goods would be allowed to flow from the measure in question unless there is no distinction that is legitimately placed for attainment of the objective as sought.\(^\text{13}\)

It has been observed that the Appellate Body seems to be hesitant in assessing the existence of a legitimate objective under Article III: 4 of GATT. The reason that finds textual basis within GATT is the prevalence of Article XX that provides sufficient basis for the right of members of seeking non-trade concerns. It is clear that as per Article 2.2, 5th and 6th recital of the preamble to TBT Agreement, a balance is sought as between the objective of trade liberalization and harmonization of technical regulation, and that of attaining other interests that are close to the sovereignty of the member.\(^\text{14}\) This trade-off has been, at a similar level, addressed under the GATT framework. However, GATT and TBT find distinction to the extent that under the TBT there is the absence of a set of general exceptions that may be allowed to be furnished at the cost of trade restrictions, while GATT clearly incorporates within its framework a provision that involves comprehensive list of objectives that are permissible.\(^\text{15}\)

Consequently, the absence of such a provision under the TBT Agreement raises implication that Article 2.1 of the Agreement can solely be ready to serve balance between non-trade concern and right of, other members to achieve trade liberalization, a function that Article XX when read with Article III:4 of GATT aim to seek.

Recital 6 of the preamble to TBT Agreement provides sufficient basis for allowing measures that are not ‘unjustifiably’ or arbitrarily discriminatory or is a ‘disguised restriction’.\(^\text{16}\) Essentially, similar assessment is warranted under Article XX of GATT. Additionally, while reading ‘less favourable treatment’ under Article 2.1 of the TBT Agreement, the Appellate Body has found adequate basis under Article III:4 of GATT to provide interpretation and guidance due to their textual similarity to the extent of discrimination element that is to be sufficed for establishing a violation. For Article 2.1 interpretation AB has only adopted discriminatory effect test as per Article III: 4.\(^\text{17}\) For the ‘aim test’ the AB found the text of the 6th recital of preamble important. Therefore, the Appellate Body in US-Clove Cigarettes\(^\text{18}\), acknowledged the similar basis within the provisions under TBT Agreement and GATT and found that the ‘aim and effect’ test can be achieved solely under Article 2.1 of the TBT Agreement while Article III:4 and Article XX of GATT provide for demarcated analysis of ‘aim’ test and that of ‘effect’.\(^\text{19}\)

Appellate Body’s recent decisions in US Clove Cigarettes and US Tuna II (Mexico) have approved Dominican Republic Cigarettes and Thailand Cigarettes (Philippines),’ observations about that interpretation of term less favourable treatment is different under Article III: 4 and Article 2.1 of the TBT. In order to prove a violation of Article III: 4 the complainant needs to prove that the effect of the measure lead to less favourable treatment of the imported product. There is no requirement of proving an additional purpose test as compared to TBT where both aim and effects test need to be fulfilled.\(^\text{20}\)

**Applicability of TBT and GATT**: In US-Tuna II (Mexico), a very recent case, the Appellate Body seems to have dealt with the question of similarity between national treatment as embedded under Article III:4 and 2.1 of GATT and TBT Agreement, respectively. Accordingly, it was of the opinion that the panel, while addressing questions relating to Article 2.1 and III:4 would be persuaded to exercise judicial economy and rule on either of the questions. Appellate Body rejected this view, stating that panel exercised judicial economy on the basis that obligations under GATT and TBT are substantially the same.\(^\text{21}\) However, the Appellate Body was cautious to opine that if a measure does not fall under the purview of TBT Agreement for the reason that it is not a ‘technical regulation’ by the definition, this finding, it would not preclude a ruling that finds the measure to be a law, regulation or even a requirement and that, hence, the measure would be covered by GATT, particularly Article III: 4. Consequently, a finding of violation under Article III:4 of GATT does not itself imply that the measure in question is violative under Article 2.1 of the TBT Agreement.\(^\text{22}\)

Thus, GATT is broader as it covers laws, regulation and not only restricted to technical regulation. There is a need of further inquiry with respect to whether the measure has violated Article III:4 of The GATT or not. The inquiry as to the merits of the elements of GATT has to be done.

**Conclusion**: As per the two recent case laws, it is very clear that scope and content of both the Articles are very different.
Even the approach of claim under TBT and GATT is different. In ascertaining ‘less favorable treatment’ under GATT only effect test has to be satisfied and under TBT claim both aim and purpose test has to be fulfilled. Thus, a measure will not violate Article 2.1 of the TBT agreement if a regulatory purpose has been established but it will still go ahead and violate Article III: 4 of the GATT. Therefore, in any case there needs to be further investigation and analysis done. Thus both the claims are very different and judicial economy cannot be exercised.

References:

2. Judicial economy is a practice whereby the Panel or Appellate Body decides not to examine a particular claim for the reason that it may be unnecessary for effective resolution of the dispute in question.
3. Second recital to TBT Agreement; “Desiring to further the objectives of GATT 1994.”
7. Three classes of measures come under the purview of the TBT Agreement: technical regulations, standards, and conformity assessment procedures.
16. Sixth recital of the preamble of TBT Agreement.