

LEGAL STATUS OF SECTIONS 10 AND 12 OF THE NIGERIAN OIL AND GAS INDUSTRY CONTENT DEVELOPMENT ACT (2010) UNDER THE GATT REGIME

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ABSTRACT

The Nigerian Federal Government in 2010 made a regulatory intervention in the Nigerian oil and gas industry by enacting the Nigerian Oil and Gas Industry Content Development Act (The “Act”). The Act prescribes in sections 10 and 12 that preference should be given to ‘...goods manufactured in Nigeria’. This paper considers the legal standing of these sections in international trade law against the backdrop of the national treatment principle contained in Article III of General Agreement on Tariffs and Trade (GATT). A comparative analysis is made using Article III to establish that the two sections flagrantly violate the obligations of the Nigerian state as a member of the World Trade Organisation (WTO) and GATT. An unexplored contract alternative to legislation argument is then advanced and recommended.

Keywords: Local content, trade, GATT, WTO, national treatment

1. INTRODUCTION

In spite of the huge oil reserves in Nigeria and the boundless potentials that come with it, the country continues to be plagued by unemployment and low capacity in the oil and gas industry. The Nigerian Federal Executive Council have pointed out repeatedly that the problem can be remedied by having a local content enactment to ensure greater participation by Nigerians. This, it was felt will create jobs and build capacity in the industry. The Nigerian Oil and Gas Content Development Act¹ was signed into law in the year 2010. The Act requires that preference and priority should be given to Nigerians and Nigerian products.² This move has stirred up questions on whether the provisions of the Act violate the non-discrimination principles

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1 The Nigerian Oil and Gas Content Development Act, Chapter P10 Laws of the Federation of Nigeria (LFN) 2004.

2 *ibid* ss 10 and 12.

under the GATT regime. This paper attempts to make a contribution to this debate. In doing so, the paper examines whether local content principles potentially conflict with Nigeria's obligations as a member of GATT and the WTO to eliminate barriers to trade and to promote the non-discrimination principles.

The Act was a product of so many years of consultation and debate.³ This was as a result of the feeling, over the years that the Nigerian economy has not received a fair benefit from the oil and gas industry.⁴ It is a notorious fact that the oil industry is the backbone of the Nigerian economy with the government deriving over 80 per cent of its revenue from this sector. It also accounts for over 70 per cent of Nigeria's export.⁵ Such is the importance of the industry. Observably, in spite of all these, unemployment rate continues to increase. Successive governments have pointed out that securing a greater participation for Nigerians, Nigerian companies and Nigerian products is the way forward for the economy. It has been argued that building local capacity as well as securing technology transfer will have a ripple effect on the economy and ultimately ensure greater economic benefits for Nigerians.

There is, on the other hand, the obligation of the Nigerian nation as a member of the WTO and GATT.⁶ The obligation is such that Nigeria, as a member state, should ensure that protectionist policies, laws and regulations are avoided to make for trade liberalisation. This principle of non-discrimination forms the bedrock of the WTO and GATT.⁷ Under the GATT regime, the non-discrimination principle can be further broken down into two: the most-favoured nation treatment and the national treatment principles.

The most-favoured nation treatment obligation contained in Article I:1 of GATT prohibits any form of discrimination between 'like' products originating from or going to other countries.⁸ The purpose is to ensure trade

3. See for example A Adefulu, "Nigeria: National Treatment & Nigeria's New Local Content Legislation" (2010) < <http://www.mondaq.com/Nigeria/x/102400/international+trade+investment/National+Treatment+Nigerias+New+Local+Content+Legislation> > accessed June 23, 2015.

3 G Etikerense, *Nigerian Petroleum Law* (2nd edn, Macmillan 2004) 221.

4 E. Nwaokoro, 'Signed, sealed but will it deliver? Nigeria's local content bill and cross-sectoral growth' [2011] *Journal of World Energy Law and Business* 2.

5 National Bureau of Statistics, 'Review of the Nigerian Economy in 2011 & Economic Outlook for 2012-2015' (May 2012) <www.nigerianstat.gov.ng> accessed 11 July 2012.

6 Nigeria became a member of the WTO on the 1st of January 1995 and a member of GATT on the 18th November 1960.

7 Peter Van den Bossche, *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (1st edn, Cambridge University Press 2005) 308.

8 Canada - Autos (19 June 2000) WT/DS139/AB/R, WT/DS142/AB/R Appellate Body Report [84].

liberalization and free flow of imports and exports within member states. In essence, where an import from country A comes into country B, it must receive a treatment not less favourable than that accorded to an import from country C coming into country B provided the products can be regarded as like products. Furthermore, the national treatment principle⁹ is relevant to market access under GATT and WTO.¹⁰ As far as goods and products are concerned, the principle is to the effect that once products are imported and all the necessary and applicable border measures such as custom duties and tariffs have been charged and collected, they must be accorded the same treatment as 'like'¹¹ domestic products, or at least treatment not less favourable to like domestic products. Hence, no internal tax, levies, policies or other forms of regulatory measures and interventions, which will have the effect of limiting the sale, use or transportation of such products should be applied. Protectionist policies, which influence competition conditions between imported products and 'like' domestic ones should not be allowed. The effect of Article III is to limit the protective measures of member states to border control in the form of tariffs.¹² Goods that have crossed the border and fulfilled all border measures should be treated as domestic for all intent and purposes.

Sections 10 and 12 of the Nigerian Oil and Gas Industry Content Development Act places an express prohibition on the use of imported goods in the Nigerian oil and gas industry where like domestic products are available. They attempt to protect the local manufacturing industry in this sector with this enactment, which compels operators in the Nigerian oil and gas industry to procure materials locally if and where such is available. *Prima facie*, this is in contravention of the national treatment principle contained in Article III of GATT.

This paper attempts a comparative analysis of Article III and sections 10 and 12 with particular focus on the three tier tests for ascertaining the circumstances in which there will be a violation of Article III.

9 General Agreement on Trade in Services (April 15 1994) Marrakesh Agreement Establishing the World Trade Organisation 'GATT 1994', Article III.

10 M Mitsushita et al, *The World Trade Organisation Law, Practice and Policy* (2nd edn, Oxford 2006) 234.

11 The meaning of 'like product' is examined closely later as it is a recurring phrase in this paper.

12 Italian Discrimination Against Imported Agricultural Machinery 23 Oct. 1958, GATT B.I.S.D. (7th SUPP 1959) 60, para 12.

2. SECTIONS 10 AND 12 OF THE NIGERIAN OIL AND GAS INDUSTRY CONTENT DEVELOPMENT ACT (2010) AND INTERNATIONAL TRADE PRINCIPLES

The Act was established to integrate local participation and representation in oil and gas investments and activities in the Nigerian oil and gas industry.¹³ It entrenched a regulatory framework for the participation of Nigerians, Nigerian companies¹⁴ and Nigerian products in project investments and activities. A key requirement of the Act is that operators are to submit a *Nigerian Content Plan* when bidding for any permit or licence and also before embarking on any project.¹⁵ It is only after this plan has been certified to be in compliance with the Act that a ‘Certificate of Authorization’ will be issued.¹⁶ The Nigerian Content Plan should be drawn in such a way as to ensure that:

- a) first consideration shall be given to services provided from within Nigeria and goods manufactured in Nigeria; and
- b) Nigerians shall be given first consideration for training and employment in the work programme for which the plan was submitted.¹⁷

The implication of the Nigerian content plan in section 10 is that where there are domestic products and equipment to be used, they should be given priority over and above ‘like’ products and equipment that have been imported. For operators not to err against section 10 (1)(a), they have to accord a less-favourable treatment to ‘like’ imported products in their operations in this regard. Furthermore, section 12 goes on to impose another obligation on the operators and their contractors. It provides as follows:

13 The preamble of the Act provides that it is ‘for the development of Nigerian Content in the Nigerian oil and gas industry; for Nigerian Content Plan; for supervision, coordination, monitoring and implementation of Nigerian content and for matters incidental thereto’.

14 ‘Nigerian company’ is defined to mean companies incorporated in Nigeria under the Companies and Allied matters Act, Chapter 59, LFN 1990. Also, Nigerians must hold at least 51 per cent equity in such companies.

15 Nigerian Oil and Gas Industry Content Development Act 2010, s 7.

16 *ibid* s 8.

17 *ibid* s10.

Subject to section 7 of this Act, the Nigerian Content Plan submitted to the board by an operator shall contain a detailed plan, satisfactory to the board, setting out how the operators and their contractors will give first consideration to Nigerian goods and services, including specific examples showing how first consideration is considered and assessed by the operator in its evaluation of bids for goods and services required by the project.¹⁸

Under this provision, operators are not just compelled to apply the provisions of the Act, they are also required to hold their contractors to the same standard and give a convincing explanation on how the Nigerian content plan has been implemented. Whatever procurement is to be made must be in conformity with this provision. With emphasis on ‘...first consideration to Nigerian goods’, like imported goods which have passed all the border measures at the port of entry will invariably be placed at a competitive disadvantage.

The Principle of Non-Discrimination

The non-discrimination principle is cardinal in the laws and policies of the WTO.¹⁹ According to the preamble of the Marrakesh Agreement, ‘the elimination of discriminatory treatment’ is a key goal of the WTO.²⁰ The term ‘discrimination’ is very slippery. Care has to be taken so as not to attribute to it a meaning not intended in the context in which it is used. This warning was issued succinctly when a panel report noted that:

Discrimination is a term to be avoided whenever more precise standards are available, and when employed, it is a term to be interpreted with caution, and with care to add no more precision than the concept contains.²¹

18 *ibid* s12.

19 Van den Bossche (n 8) 308. See also Marrakesh Agreement Establishing the World Trade Organisation, pmbl., cl. 3, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144.

20 *ibid*.

21 Canada - Patent Protection of Pharmaceutical Products (March 17, 2000) WT/DS114/R (panel report, adopted April 2000) 7.94. The report makes reference to the term ‘discrimination’ in Article 27.1 of the TRIPS.

Under the WTO law, the principle of non-discrimination can be sub-divided into two. They are: most favoured nation treatment obligation;²² and national treatment obligation.²³

Most Favoured Nation Treatment

In discussing the most favoured nation treatment, it is expedient to lay out the provisions of Article I:1 of GATT. It goes thus:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payment for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any [Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [Members].²⁴

The most favoured nation treatment imposes an obligation on member states not to discriminate between products coming from or going to other member states. As it is, the essence of the Most Favoured Nation treatment is to guarantee ‘equality of opportunity’ in import and export to and from all WTO member states.²⁵ A measure which *prima facie* is non discriminatory may in fact have an effect of discrimination on its application.²⁶

In determining whether there has been a violation of the Most Favoured Nation treatment contained in Article I, a measure must be subjected to a three-tier test. They are as follows:

22 Article I of the GATT 1994.

23 Article III of the GATT 1994.

24 *ibid.*

25 EC - Bananas III (Article 21: 5) Appellate Body Report, [190].

26 Canada – Autos (n 9) [78]. In this case, Canada had argued that Article I should not be applicable in circumstances where the measure complained of appear to be ‘origin-neutral’ on the face of it. This argument was rejected as such measures could have the effect of giving some countries greater trading opportunities than others. That, in itself was said to be discriminatory.

- 1) Does the measure give a trade advantage?
- 2) Are the products concerned like products?
- 3) Is the conferred advantage given immediately and unconditionally to all concerned like products?

In determining whether an advantage has been conferred, one must hold in mind that conferring an advantage is not limited to tariffs. Article I:1 makes a list of measures through which an advantage can be bestowed on products originating from a country. They include:

- (a) Custom duties and charges of any kind imposed in connection with importation and exportation.
- (b) Method of levying the tariffs and the charge.
- (c) The rules and formalities in connection with importation and exportation.
- (d) Internal taxes and charges on imported goods.
- (e) Internal laws, regulations and requirements affecting sale.²⁷

In *Canada - Autos*, Canada gave import duty exemptions to car manufacturers that carried out their production inside Canada. It was held by the Appellate Body that this constituted an ‘advantage’ and must be granted to others immediately and unconditionally.²⁸ Again, there has to be a determination on whether the imported and domestic products are ‘like’. Only products found to be ‘like’ will be accorded the same treatment.²⁹ Advantages granted to a member state by another must be granted immediately and unconditionally to other member states.³⁰

The National Treatment Principle

The aim of the national treatment principle is to legally secure the expectations of member countries of the WTO and GATT in international trade law with regards to imported products vis-a-vis their domestic counterparts. It is to ensure that products of an exporting member have a chance to

²⁷ Article I:1, GATT 1994.

²⁸ *Canada - Autos* (n 9) [79].

²⁹ The phrase ‘like products’ is discussed under Article III where it is shown that the phrase takes its interpretation from the context in which it is used. It was used severally in the GATT text but GATT never defined what constituted ‘like product’.

³⁰ *Indonesia - Autos, Certain Measures Affecting the Automotive Industry* (Panel report, adopted 23 July 1998) WT/DS54/R, WT/DS59/R, WT/DS6 4/R [14.145] – [14.146].

compete with domestic products of an importing member country.³¹ With these, there is greater certainty and predictability in international trade.³² Member states have an obligation under Article II on tariff binding.³³ If national treatment is not adhered to, then it will be possible to circumvent Article II.³⁴ In *Korea-Beef*,³⁵ it was up for consideration whether Korea was in breach of Article III by maintaining a ‘dual retail system’ in the sale of beef. The system limited the sale of imported beef to certain stores. Also, imported beefs were to be displayed in a separate section and must be labelled as such. The Appellate body was of the opinion that mere separation does not amount to a violation of Article III.³⁶ However, the ‘effect’³⁷ was to reduce the outlet for imported beef when compared to domestic beef. Thus, the ‘reduction in competitive opportunity’³⁸ amounted to a violation of Article III:4 of GATT.

3. THE SCOPE OF ARTICLE III OF GATT

The national treatment principles contained in Article III stipulates that member countries of the WTO accord national treatment to one another. The use of internal taxes, charges, laws and regulations, which tend to discriminate against imported goods for the purpose of protecting domestic products or production is prohibited. In essence, once tariffs have been charged on imports, they should not be given a less favourable treatment to similar domestic products. At this point, it is expedient to lay out the relevant provisions of Article III:

- 1) The [Members] recognize that internal taxes and other internal charges, laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring

31 J.H Snelson, ‘Can GATT Article III Recover From Its Head-on Collision With United States - Taxes on Automobiles?’ (1996) 5 *Minnesota Journal of Global Trade* 467.

32 *United States - Taxes on Petroleum and Certain Imported substances*, 17 June, 1987, GATT B.I.S.D. (1988, 34th Supp) 136 [5.2.2].

33 Article II of GATT 1994.

34 *Italian Discrimination Against Imported Agricultural Machinery* (n 13).

35 *Korea – beef, Various Measures Affecting Import of Fresh, Chilled and Frozen Beef* (Appellate Body Report, adopted 10 January 2001) WT/DS161/AB/R, WT/DS169/AB/R [133].

36 *ibid* [144].

37 The ‘aim and effect test’ is examined later in this paper. It works to the effect that in order to determine whether an internal measure is discriminatory, one has to look at the aim of the measure and the actual effect it has.

38 *Korea – Beef* (n 36) [147] – [148].

- the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.
- 2) The products of the territory of any [Member] imported into the territory of any other [Member] shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no [Member] shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1...
 - 4) The products of the territory of any [Member] imported into the territory of any other member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.³⁹

From the forgoing, one can safely say that the imposition of an additional tax or charge, which is exclusive to an imported product, is inconsistent with the provisions of Article III. Also, any law or regulation that tends to give a preferential treatment to local products disregards and violates the national treatment principle.

Article III:1

This provision lays the foundation for the national treatment principle under the GATT regime. It prohibits the use of internal measures as a means of protecting domestic production. The Appellate Body in *Japan - Alcoholic Beverages II* reemphasised the importance of Article III:1 as “a guide to understanding and interpreting the specific obligations contained in Article III:2 and in other paragraphs of Article III while respecting and not diminishing in any way, the meaning of the words actually used in the text of those other paragraphs”.⁴⁰

³⁹ Article III, GATT 1994.

⁴⁰ *Japan - Alcoholic Beverages* (Appellate Body Report, adopted 1 November 1996) WT/DS8/AB/R 18.

Article III:1 is the foundation upon which the subsequent paragraphs in the Article are built as it provides the base principle.

Textual Analysis of Article III:2:

First Sentence

Article III:2 is limited in application to the use of ‘internal tax or other internal charge of any kind’.⁴¹ In *Argentina - Hides and Leathers*,⁴² the Appellate Body posited that it is not necessary under Article III:2 to show that the internal taxation was for the purpose of protecting domestic production. This is because Article III:2 is an application of the anti-protectionist principle contained in Article III:1. In order to determine whether there has been a violation of Article III:2, a two-tier test has to be cleared. The questions to be answered will then be; can we classify the imported and domestic products as ‘like’ products? In addition, are the imported products taxed in excess of their domestic counterparts?

The GATT regime has no clear definition of the phrase ‘like products’. Neither does it stipulate the characteristics that should constitute likeness. Over the years however, recourse has been made to reports emanating from dispute settlements within the GATT. In *Japan - Alcoholic Beverages II*, it was up for consideration whether ‘vodka’ and ‘shochu’ could be termed like products. The Appellate Body opted for a narrow construction of the phrase.⁴³ Perhaps, a case by case approach should be adopted.⁴⁴ This, it is said, involves in a large part, discretion and judgement in individual case.⁴⁵ Back to the vodka/shochu comparison, the Appellate Body held the two to be like products on the reasoning that they were both ‘clean spirits’ and they share identical raw material with the same end use.⁴⁶

On the second question of the excessiveness of the tax imposed on the imported product, it has been established that ‘[e]ven the smallest amount in excess is too much’.⁴⁷ Where the United States levied a tax which impose 3.5

41 The first sentence of Article III:2, GATT 1994.

42 *Argentina - Hides and Leather, Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1 (panel report, adopted 16 Feb. 2001); See also *Japan - Alcoholic Beverages II* (n 41) [18] – [19].

43 See *Japan - Alcoholic Beverages II* (n 41) 18, 19.

44 Report of the Working Party, *Border Tax Adjustments* [18]; See also, *Japan - Alcoholic Beverages II* (n 41) [19] – [20].

45 *ibid.*

46 *ibid* [6.23].

47 *Japan - Alcoholic Beverages II* (n 41) 23.

cent per barrel higher than that which was imposed on like domestic products, it was held to be in violation of the country's obligations under Article III:2 of GATT.⁴⁸ Also, a form of tax which on the surface does not appear to be discriminatory but on a closer look gives a competitive advantage to a like domestic product also violates Article III:2.⁴⁹

Second Sentence

The second sentence of Article III:2 contemplates a broader coverage than the first sentence.⁵⁰ It will only be resorted to in a circumstance where the measure does not violate the first sentence of Article III:1.⁵¹ Determining violation of the 'second sentence' is through a three tier test.⁵² The questions to be answered will be:

- a) Are the imported and domestic products directly competitive or substitutable products?
- b) Are the imported and domestic products similarly taxed?
- c) Is the dissimilar taxation for the purpose of protecting domestic production?⁵³

Obviously, the concept of 'directly competitive or substitutable products' under the second sentence of Article III:2 is broader than that of 'like products' under the first sentence. Products might be considered to be 'directly competitive and substitutable' if they can be used interchangeably or where they provide alternative means of meeting a need.⁵⁴ They don't have to be perfectly substitutable. This is in the same way consumer demand will

48 US Superfund, United States - Taxes on Petroleum and Certain Imported Products (Panel report, adopted 17 June 1987) BISD 34S/136 [5.1.1].

49 Argentina - Hides and Leather (n 43) [11.183]. The Report noted that "...were it otherwise, Members may easily evade its disciplines. Thus, even where imported and like domestic product are subject to identical tax rates, the actual tax burden can still be heavier on imported products. This could be the case, for instance, where different methods of computing tax bases lead to a greater actual tax burden for imported products". In essence, where the economic impact of a tax levied puts an imported product at a competitive disadvantage, it will be discriminatory.

50 E. Tsai, 'Like is a four - Letter Wort - GATT Article III's Like Product Conundrum' (1999) 17 Berkeley Journal of International Law 27.

51 Canada - Periodicals, Canada - Certain Measures Concerning Periodicals (Appellate Body Report, adopted 30 July 1997) WT/DS31/AB/R 22, 23.

52 Chile - Alcoholic Beverages (2000) Appellate Body Report [47]; See also Japan - Alcoholic Beverages II (n 41) 24; H Horn, 'Still Hazy after All These Years: The Interpretation of National Treatment in the GATT/WTO Case - Law on Tax Discrimination' (2004) 15 (1) European Journal of International Law, 39-69.

53 Canada - Periodicals (n 52) 24, 25.

54 Korea - Alcoholic Beverages (1999) [120].

be relevant since internal taxation could affect consumer demand for a product.⁵⁵ For the second sentence to be violated, the taxes imposed on imported products and like domestic products must be dissimilar. However, quite unlike the first sentence where the slightest difference in the tax imposed would make for a finding of inconsistency, it is not so with the second sentence.

Article III:4

Article III:4 represents the crux of this paper as it deals with internal regulations which are discriminatory against imported products.⁵⁶ The Article stipulates that imported products will not be accorded treatment which is less favourable than that accorded to like domestic products. It goes ahead to enumerate the form of treatment to include treatment by laws, regulations and any other requirement which affects distribution or use, transportation, purchase, internal sale and offering for sale of the product. For there to be a finding of violation of Article III:4, three questions must be answered in the affirmative.⁵⁷

- 1) Is the measure a law, regulation or requirement contemplated by Article III:4?
- 2) Are the import and domestic products 'like'?
- 3) Are the imported products accorded a less favourable treatment?

Even though Article III:4 did not make any reference to Article III:1 as regards 'so as to afford protection to domestic production',⁵⁸ Article III:1 has a 'particular contextual significance in interpreting Article III:4'.⁵⁹ Even though the view that Article III:4 does not require an examination of whether the measure was for the purpose of affording protection to domestic product has been advanced.⁶⁰ Here, there are two conflicting views and the position or this writer is that it will be safer to advance the view that

55 This might not be a decisive criterion for determining 'directly competitive or substitutable'. See Korea - Alcoholic Beverages (n 55) [134].

56 The objective of this paper is to see if sections 10 and 12 of the Nigerian Oil and Gas Industry Content Development Act violate the National Treatment principle in Article III of GATT. The Act does not impose taxes in excess of those imposed on like domestic products but stipulates that preference should be given to products manufactured in Nigeria. Article III:4 is directly relevant in this regard as opposed to Article III:2.

57 Korea - beef (n 36) [133].

58 EC - Bananas III (n 26) [216].

59 EC - Asbestos, EC - Measures Affecting Asbestos and Asbestos-Containing Products (Appellate Body Report, adopted 5 April 2001) WT/DS135/AB/R, DSR 2001 VII3243 [93]

60 See EC - Bananas III (n 26) [216].

Article III:1, being the general principle, should be applicable throughout Article III. Now the three elements will be examined closely.

3.1 Laws, Regulations and Requirements

Establishing this element requires a clear and straightforward analysis. It will appear that the scope of Article III:4 covers all laws and regulations which will have an impact on the sale and use of imported products. GATT case law offers some guidance in assessing this element. Now, the term ‘affecting’ as used in the text of Article III:4 was interpreted in *Italian Agricultural Machinery* to mean not just laws and regulations that directly affect the use and sale of imported products but also any law or regulation affecting the conditions under which the imported product competes with ‘like’ domestic products.⁶¹

Similarly, the term ‘laws and regulations’ does not just cover substantive laws but also procedural laws.⁶² If the contrary were to hold true, then it will be conceivable that members have substantive laws which comply with Article III:4 in letter but violate it in its application procedures.⁶³ Laws and regulations will ‘affect’ the sale and use of imported products if they will influence private persons’ decision on whether or not imported products should be bought or used.⁶⁴ ‘Requirements’ under Article III:4 covers situations and circumstances where the measure at issue was imposed by private persons rather than government. This is however beyond the scope of this paper.

3.2 Are the Domestic and Imported Products ‘Like’?

The phrase ‘like products’ is somewhat ambiguous in the jurisprudence of GATT.⁶⁵ It will be recalled that this has been discussed earlier under Article III:2. Fundamental to the analysis what constitutes ‘like products’ is

61 *Italian Discrimination Against Imported Agricultural Machinery* (n 13) [12].

62 US - Section 337, United States - Section 337 of the Tariff Act of 1930 (Panel Report, adopted 7 November 1989) BISD 36S/345 [5.10].

63 See US - Malt Beverages (1992) Panel Report [5.32] where a law requiring imported beer and wine to be sold only through certain wholesalers was held to violate Article III:4. See also Canada - Provincial Liquor Boards (US), Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies (Panel Report, adopted 18 February 1992) BISD 39S/27 [4.26].

64 Canada - Autos (n 9) [10.80], [10.84].

65 R. Hudec, *Regulatory Barriers and The Principle of Non-Discrimination in World Trade Law* (University of Michigan Press 2000) 1.

the case of *EC-Asbestos*.⁶⁶ In this case, it was up for consideration whether chrysotile asbestos fibre is 'like' glass fibre and polyvinyl alcohol. The panel sitting at first instance had found the two products to be 'like' and the measure at issue a violation of Article III:4 after considering:

- 1) the properties, quality and nature of the products,
- 2) consumers' habits and taste,
- 3) the end-uses of the products and
- 4) the tariff classification.⁶⁷

The European Community contended on appeal to the Appellate Body that the panel did not take into account the aim and purpose of Article III:4 in reaching its conclusion. The Appellate Body posited that since the GATT did not prescribe what interpretation should be ascribed to the phrase 'like products', it should be interpreted to give effect to the purpose and objective in the context in which it is used. Hence, we cannot have a single standard for determining what constitutes 'like products' which will be applicable in every situation and circumstance. 'Like products' under Article III:4 will have to be interpreted with due regard to the aim and objective of the Article which is to ensure that competition conditions are not distorted 'so as to afford protection to domestic production'. On the strength of these, there will be a variation in the interpretations given to 'like products' in different Articles. A broader meaning will be accorded to the phrase under Article III:4.⁶⁸ In determining what constitutes 'like products' under Article III:4, the general principle of the whole Article III must be held in mind and it is that the conditions of competition must not be distorted 'so as to afford protection to domestic production'.⁶⁹

3.3 Was the Treatment Less Favourable?

There has to be an 'effective equality of competitive opportunities'.⁷⁰ Where a measure allows the sellers of domestic gasoline to use a baseline different from that to be used by sellers of imported gasoline, this was found to constitute a less favourable treatment.⁷¹ Also, in *Korea-Beef*, a system that ensured

66 Appellate Body Report, EC - Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001: VII, 3243.

67 Japan - Alcoholic Beverages (n 41) 20.

68 EC - Asbestos (n 60) [94] - [96].

69 *ibid* [98].

70 Canada - Provincial Liquor Boards (US) (n 64) [5.12] - [5.14], [5.30] - [5.31].

71 US - Gasoline Panel Report (May 20, 1996), 35 ILM 274.

that imported beef was displayed separately in supermarkets and labelled as such was held to be a less favourable treatment.⁷² Since the objective of Article III is ‘not to accord protection to domestic production’, one can say any different treatment for imported products, which tend to hamper the chances of the imported product to compete with its domestic counterpart will amount to a less favourable treatment. Any regulatory intervention that tilts the playing field in favour of the domestic product for the purpose of protecting domestic production will be inconsistent with the obligations under Article III.

4. THE LEGAL STATUS OF SECTIONS 10 AND 12 UNDER THE GATT REGIME

The provision of Section 10 requires that ‘first consideration shall be given ... to goods manufactured in Nigeria’. The effect of this Section is such that should there be a ‘like’ imported product in the circumstance, preference and priority should be given to the goods manufactured in Nigeria. This is regardless of whether the imported product in question has passed all the border measures in the form of tariff. It will be recollected that Article III:1 prohibits the discriminatory treatment of imported products which have passed all the border measures in the importing country.

Article III:4 Versus Sections 10 and 12

In determining whether there has been a violation of Article III:4, a three tier test was identified above. Now, the test will be applied to the relevant provisions of the Nigerian Oil and Gas Industry Content Development Act to ascertain the provisions offend against Article III. It seems evident that since the Act does not impose an additional tax or charge on imported products in excess of that imposed on ‘like’ domestic products. In applying the three-tier test to Sections 10 and 12, three questions will be considered.

1) Is The Measure At Issue a Law, Regulation or a Requirement Affecting Internal Sale, Purchase and Use of Imported Products?

This seems to be the most straightforward of the three requirements to be met before there can be a finding of violation. To fall within the purviews of Article III:4, the measure at issue must pass as a law, regulation or

⁷² Korea – Beef (n 36) [135] – [137].

a requirement. The Blacks' Law Dictionary defines law as 'the regime that orders human activities and relations through systematic application of the force of politically organised society, or through social pressure, backed by force, in such a society...'⁷³

The regime designed to shape human conduct, a derogation from which will be punished can be said to be law. For all intent and purpose, the Nigerian Oil and Gas Industry Content Development Act satisfies the requirements of a law and should be so categorised under the GATT regime. Also, its provisions, particularly Sections 10 and 12 affect the internal sale, offering for sale, purchase, transportation distribution or use of imported products in the Nigerian oil and gas industry. These two provisions will definitely influence the decisions of private persons on which products to purchase and use in the Nigerian oil and gas industry.⁷⁴

Are The Imported and Domestic Products 'Like'?

'Like' products under Article III:4 was given a succinct enunciation in *EC - Asbestos*. It was the Appellate Body's position that the meaning ascribed to the phrase 'like products' under Article III:2 will be different from that given to it under Article III:4.⁷⁵ Article III:2 imposes two different obligations in its two sentences under which 'like products' take on different interpretations.⁷⁶ Although Article III:4 does not restate the principle of 'so as not to afford protection to domestic production', it is very crucial in its interpretation.⁷⁷ As a result, imported and domestic products that are in a competitive relationship will be classified as 'like products' under Article III:4.⁷⁸ In the analysis of whether Sections 10 and 12 violates Article III:4, it is difficult to conceive a circumstance where preference and priority will be

⁷³ *Blacks' Law Dictionary* (8th edn, 2004) 900.

⁷⁴ The decision of the Appellate Body in *EC- Bananas III* was that the EC's requirement that a valid licence had to be held before permission can be given to import bananas from non traditional ACP suppliers was a violation of Article III:4. The measure was said to have given a competitive advantage to bananas produced locally.

⁷⁵ *EC - Asbestos* (n 60) [94].

⁷⁶ *ibid* [95]. The Appellate Body gave its reasons thus; "In construing Article III:4, the same interpretive consideration do not arise, because the 'general principle' articulated in Article III:1 is expressed in Article III:4, not through two distinct obligations, as in the two sentences in Article III:2, but instead through a single obligation that applies solely to like products. Therefore, the harmony that we have attributed to the two sentences in Article III:2 need not, and indeed, cannot be replicated in interpreting Article III:4. Thus, we conclude that, given the textual difference between Article II:" and Article III:4, the 'accordion' of likeness stretches in a different way in Article III:4".

⁷⁷ See Appellate Body Report, *Japan - Alcoholic Beverages II* (n 41) [111]; *EC - Asbestos* (n 60) [98].

⁷⁸ *ibid*, 99-100.

given to a domestic product and there will not be an imported product that is in a competitive relationship.

Since the Act under review is relatively new, there has not been any legal challenge on its provisions just yet.⁷⁹ This makes it difficult to pick out a single 'like' imported product that has been discriminated against as a result of the application of the provisions of the Act. In trying to answer this question of likeness in relation to the Act under the circumstance, the approach will be hypothetical. If we take for instance a situation where Contractor X requires crane lifters for a particular project in Warri, Nigeria, he is faced with a choice of purchasing or hiring either locally produced crane lifters or an imported 'like'. The dictates of the Act are, that preference should be given to the domestic crane. This immediately puts the imported crane at a competitive disadvantage.

In this hypothetical circumstance, it then becomes an issue whether the two products can be classified as 'like products'. It will be recalled that in determining what will be seen as 'like products', we will consider the qualities and nature of the products, consumers' habits and tastes, the end uses of the product as well as the tariff classifications.⁸⁰ In the light of this consideration and the competitive relationship analysis above, it is safe to conclude that wherever it can be established that there are 'like' imported products available to compete with their domestic counterparts in the Nigerian oil and gas industry, the requirements of the second test have been met.

Is The Treatment Less Favourable?

The less favourable treatment test does not imply that no distinction should be made between imported products and domestic ones. Rather, it dictates that the distinction should not be such that accords a less favourable treatment to the imported product or puts it at a competitive disadvantage. Article III:4 has to be interpreted so as to ensure that there is 'effective equality of opportunities for imported products'.⁸¹ It is difficult to find a credible argument that will wriggle Sections 10 and 12 through the no less favourable treatment test.

The provisions clearly give preference and priority to domestic products, which will always ensure that 'like' imported products come second in

79 J Nwaokoro, 'Beyond Legislation: A Contract Alternative to Legislating Local Content in Nigeria' (2009)18 *Currents Int'l Trade Law Journal* 42.

80 Japan - Alcoholic Beverages (n 41).

81 US - Gasoline (n 72) [6.10]. See also, US - Malt Beverages (n 64) [5.30]; US - Section 337 (n 63) [5.11].

every circumstance. This measure obviously creates an inequality of opportunities against imported products. 'Like' domestic products enjoy an advantage under the Act. In providing that preference and priority should be given to Nigerian products, Sections 10 and 12 has not only made a distinction between domestic products and 'like' imported products, it has handed a competitive advantage to domestic products in the market. This amounts to discrimination based solely on the origin of the product. It amounts to a violation of Article III:1 and Article III:4 of the GATT. Also, since the Act does not make a distinction between products emanating from other member countries and products emanating from non-member countries, the Sections can be said to be in violation of the obligations of the Nigerian nation under the GATT regime.

The Existence of a Contractual Alternative to Legislation

It is indeed possible for the Nigerian Authorities to implement a viable local content policy, which will achieve all the objectives of the Nigerian Oil and Gas Industry Content Development Act and even more without the potential legal logjam that the new Act might create. Given that the Nigerian National Petroleum Corporation (NNPC) is a juristic person in law,⁸² an agreement it reaches with IOCs pursuant to the 1993 Model Production Sharing Contract should fall outside the purviews of the WTO/GATT regime and therefore should not amount to a violation of the non-discrimination obligations of the Nigerian state in International Trade Law. It is conceivable that the Nigerian Federal Government, through the NNPC, could mandate the contracting IOCs to give preference to Nigerian goods and services through the contractual vehicle of Production Sharing Contract. Such an arrangement will fall within the realm of private contracts between two competent 'persons' in law.⁸³

Revisiting decided cases one is tempted to hold the position that Article III sets out to prevent discriminatory treatment of imported goods for the purpose of protecting local production where the measure or regulatory in-

82 See Section 1 of the Nigerian National Petroleum Corporation Act, Chapter 320 LFN 1990. This Section establishes the 'Corporation' as a body corporate with the powers to hold and dispose of properties. Also, Section 6(c) empowers the Corporation to enter into any contract or partnership with any company, firm or person which will facilitate the discharge of the Corporation's duties under the Act.

83 See Section 38, Companies and Allied Matters Act, 2004, Chapter C20 LFN 2004. Under this Section, companies, as well as corporations in Nigeria are authorised to exercise the full powers 'of a natural person of full capacity'.

tervention complained of is direct.⁸⁴ However, where the measure is indirect and subtle, protectionist policies may not be seen to have violated Article III.⁸⁵ On the strength of this, the above-mentioned contractual arrangement might pass as an indirect and subtle regulatory intervention without breaching the obligations of the Nigerian state under Article III.

5. CONCLUSION

A vibrant local content policy is undoubtedly desirable for sustainable development and growth of the Nigerian oil and gas sector. Therefore, efforts made by Nigerian authorities towards actualising this objective are highly commendable. Given the huge investments made in the Nigerian oil and gas sector annually and the boundless prospects and potentials of the sector to create jobs and stimulate the Nigerian economy, the decision to enact a local content law becomes even more logical. However, key provisions of the Act flagrantly conflict with Nigeria's obligations under international trade regime to proscribe discriminatory trade policies and to remove local barriers to foreign participation in trade. This paper is a wake up call on the need for a review and reform of the Act to bring it in line with Nigeria's fair treatment and non-discrimination obligations under international trade law.

One key policy alternative is to indirectly regulate where and how IOCs procure materials to be used in the Nigerian oil and gas industry through contractual provisions. Contractual alternatives to legislation provide more practical and indirect alternative that must be explored. For example, the Nigerian 1993 Model Production Sharing Contract allows the NNPC to hold Oil Mining Lease (OML) in Nigeria while the IOCs work as contractors in a joint venture-like arrangement. There is however a clause in the contract that stipulates *inter alia*, how and where the contractor should obtain materials to be used in its operations. This stipulation mandates the contractor to make procurements locally where such is available and it meets industry standards. Again, the contractor is required to submit its work plan and budget to the joint venture management committee for approval periodically. The dominant role played by the NNPC on this committee ensures that it is in a position to exercise the power of veto over the proposals of the contractor where they fail to meet local content standards.

84 Van den Bossche (n 8) 328.

85 See Japan - Alcoholic Beverages II (n 41) [109].

This contractual approach, which will be based on already existing but unexplored legal framework contained in the 1993 Model Production Sharing Contract, is strongly recommended. Such expansive contractual provision will achieve the aim of stimulating interest in locally made oil and gas equipment. At the same time, since contractual provisions are based on mutual agreements, contractual provisions will arguably not come under the categorization of 'laws, regulations and any other requirement' that affect trade, which is the focus of Article III:4. This, observably, will place huge responsibilities on the shoulders of the NNPC and given the institutional stability that the body enjoys as well as the fact that it is under the supervision of the Nigerian Presidency through the Minister of Petroleum Resources, the task is not insurmountable.