

INTERNATIONAL TRADE LAW

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Summary

Within the space available for this article, it is impossible to even summarize “international trade law” as such. Any attempt at completeness would have meant mere recourse to enumerating headings. The author therefore has opted to offer a slightly more detailed analysis of some core concepts of international trade law: the most-favored nation clause; national treatment; prohibitions of quantitative restrictions to trade; and generally allowed exceptions.

The analysis below focuses on the General Agreement on Tariffs and Trade (GATT), which is one of the agreements forming part of the World Trade Organization (see *International Trade Agreements*). The author is, of course, aware that international trade law cannot be accurately summarized by reference only to the GATT. Nevertheless, the GATT is the international trade agreement with the highest profile. Moreover, some of its concepts, including most-favored nation treatment, reflect common perceptions of international trade law. Readers may want to refer to *International Trade Agreements*, which includes a succinct summary of the most visible global and regional trade agreements. Taken together with this article, it provides at least a fair introduction to public international trade law.

1. The Most-Favored Nation Clause: GATT Article I

“Article I. General Most-Favoured-Nation Treatment. 1. 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 payments 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 to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party 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 contracting parties . . .”

1.1. Aim and General Nature of Most-Favored Nation Treatment

In public international law, a most-favored-nation (MFN) clause is a treaty provision whereby a state undertakes an obligation towards another state to accord MFN treatment in an agreed sphere of relations (see *International Law and Sovereignty in the Age of Globalization*). MFN treatment is treatment accorded by the granting state to the beneficiary state, or to persons or objects in a determined relationship with that state, not less favorable than treatment extended by the granting state to a third state or to persons or objects in the same relationship with that third state. MFN draws upon comparison between the treatment of various states by another state. It is different from “national treatment” (see *Section 2. National Treatment with Respect to Internal Taxation and Regulations: GATT Article III*), which compares the home state with other states.

The MFN clause of the General Agreement on Tariffs and Trade (GATT) Article I is one of the cornerstones of the international trade law regime. MFN has been described as a lever for economically less-powerful nations. Vis-à-vis powerful nations, it accords

them treatment equal to that accorded those nations that are treated most favorably.

The mentioning of “charges” next to “duties” is inserted to ensure that not just ordinary customs duties but all charges of any kind are included in the MFN protection.

1.2. Exceptions to Most-Favored Nation Treatment

Exceptions to MFN treatment are included throughout the GATT, for instance with respect to government procurement (Article XVII:2). Such provisions are exceptions to the MFN rule by application of the *lex specialis* principle. Article I:2 furthermore contains a number of exceptions to the MFN clause for some historical preferences, between states that are enumerated in Annex to the Agreement. Article I:4 includes specific calculations with a view to the application of I:2. Similar calculations are necessary to determine the margin of preferences that developing countries have agreed upon at the moment of their entry into the GATT (for those countries that joined GATT at a later date, for example after their independence).

A predominant exception to the MFN rule is the specific character of the developing countries, which GATT has taken into account. GATT has consistently granted favorable treatment to preferential agreements between developing countries and developed countries. A 1971 GATT council decision granted a waiver to a number of agreements that were finalized at the Second United Nations Conference on Trade and Development (UNCTAD) Conference in 1968 between developed and developing countries. This decision waived the provisions of Article I for 10 years, and was succeeded by the decision of the GATT contracting parties of November 28, 1979 on “Differential and more favourable treatment, reciprocity and fuller participation of developing countries” (generally referred to as the Enabling Clause). This decision is the GATT answer to the Generalized System of Preferences (GSP), which most industrialized countries use in their trade with developing countries. GSPs by their nature and by their design accord duty-free and/or low-duty status to certain products originating in certain developing countries only.

The Enabling Clause permits in its paragraph 2(a) “preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences . . .” It expressly limits such GSP to tariff preferences. GSP schemes had to be notified to the GATT secretariat. The Enabling Clause has been carried into the World Trade Organization (WTO).

Another notable exception to many of the GATT obligations is, of course, customs unions and free-trade areas. GATT rationale is that such areas will eventually lead to the creation of more free trade throughout the world economic order.

1.3. Nature and Application of the Most-Favored Nation Clause: Individuality and Unconditionality

The granting of MFN treatment is unconditional. GATT members must not discriminate against imports from another member based on country practices in the other member. The MFN requirement applies individually, and no balancing between various products

and/or countries can take place. A similar prohibition of balancing applies as in GATT Article III:4 (see *Section 2.4. Article III:4*). Whether a member's behavior is inconsistent with MFN treatment depends on the circumstances of the case. It is impossible to assess (aspects of) Article I:1 *a priori*, without knowing the exact measure in question, or the way in which it is operated.

1.4. Origin of Goods

MFN applies only to the like products “originating in or destined for” any other member. The Uruguay Round resulted in the first ever agreement on rules of origin. It requires WTO members to ensure that their rules of origin are transparent; that they do not have restricting, distorting, or disruptive effects; that they are administered in a consistent, uniform, impartial, and reasonable manner; and that they are based on a positive standard (i.e. that they should state what does confer origin and what does not). That agreement also foresees that work in the Committee on Rules of Origin of the WTO, and in the Technical Committee on Rules of Origin should lead to a set of principles that would make the rules of origin of WTO members objective, understandable, and predictable. Work in these committees was to be finalized by July 1998 but has not yet been completed.

1.5. “Like Products” under Most-Favored Nation

GATT members have never adopted a general definition of the term “like products” in GATT articles or in any other agreement adopted in the framework of the GATT. Some panels have stated that “like products” has the same meaning in Article I and Article III. The WTO appellate body seems to adhere to another view, stating that even in the various paragraphs of Article III; the term “like product” may have a different meaning. The following elements, derived from GATT practice, merit attention.

The importance of tariff classification: Considering the likeness on the basis of a comparison between various members' tariff qualifications meets members' approval. Overall, however, panels adopt a cautious approach, by not giving too determining a role to tariff and customs classification.

There is no GATT obligation to follow any particular system for classifying goods. Tariff qualification is a legitimate means of trade policy, and a member has the right to introduce in its customs tariff new positions or sub-positions, as it deems appropriate. However, it is settled GATT practice to look at tariff qualification as just one element, albeit an authoritative one, in determining likeness.

Sometimes the authority of tariff qualification is illustrated by imposing the burden of proof on the member who claims that a particular tariff qualification has been diverted from its normal purpose so as to become a means of discrimination in international trade. This move seems to have been influenced by international attempts to harmonize tariff qualification, namely through the 1983 “harmonized system” (HS) of the World Customs Organization (entered into force in 1988). Some members object to this role of the HS, since it was not designed with Article I:1 of GATT in mind. The WTO appellate body agreed that, whilst tariff classification nomenclature may give an indication of

likeness, statements relating to any relationship between tariff bindings and likeness must be made cautiously.

The importance attached to tariff qualification is a result of one of the primary goals of the GATT/WTO, namely realizing international free trade *inter alia* through the multilateral reduction of tariffs. Countries may rely on other states maintaining their tariff structure, resulting from the international negotiations leading to tariff bindings.

Other criteria that have been taken into account: A 1970 working group on border tax adjustments (BTA) concluded that problems arising from the interpretation of the terms “like” or “similar” products, should be examined on a case-by-case basis, using, *inter alia*, the following criteria: the product’s end uses in a given market; consumers’ tastes and habits, which change from country to country; and the product’s properties, nature, and qualities. The only steady guideline that panels have followed is to limit the factors that can be taken into account to the properties of the products itself, and to the reception of such products by consumers. Panels’ likeness tests have confined likeness to physical properties of the products themselves. Production processes and methods (PPM) that are not reflected in the final properties of the product, what are known as “unincorporated PPMs,” are in this view excluded from influencing the likeness of products.

1.6. Discrimination Violating Most-Favored Nation Treatment

Article I:1 requires members to grant the same treatment to like products of all other members with respect to import and export. GATT uses a *de jure* concept in this respect, not a *de facto* concept. Somewhat of a white raven in GATT jurisprudence is the (unadopted) 1994 panel report on *U.S. Taxes on Automobiles*. In a case involving the application of GATT Article III, this panel stated that the first step of determining the relevant features common to domestic and imported products (likeness) would have to include, in all but the most straightforward cases, an examination of the aim and effect of the particular (tax) measure. This indicated a shift towards a more *de facto* approach. We shall come back to this below.

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Biographical Sketch

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