

Articles

MFN IN THE GATT AND THE WTO

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ABSTRACT

The object of this paper is to provide an analysis of the way in which MFN has been interpreted and applied in the context of GATT and the WTO agreements. In the first part emphasis is placed on MFN under the GATT. Firstly it discusses the inclusion of the MFN principle in the GATT, especially focusing on Article I:1 of the GATT with its exceptions. Secondly, it discusses the relationship between MFN principle and national treatment principle. Thirdly it points out the issues regarding the interpretation on the MFN principle through the analysis of various cases under the WTO. Fourthly it considers the MFN principle located in other covered agreements, such as GATS and TRIPS. Fifthly it discusses the interpretation on GATT Article I:1 though several cases that analyze the requirements of this Article, its exceptions and the core concept of the MFN principle, the determination of like product. In the second part, it discusses the MFN principle under GATS and TRIPS, as it still serves as a core concept in both agreements. In the last part, it provides an assessment of MFN under WTO jurisprudence, with several issues regarding several regional trade area and plurilateral agreements being raised.

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I. INTRODUCTION

The object of this paper is to provide an analysis of the way in which MFN has been interpreted and applied in the context of GATT and the WTO agreements. In the previous work of the International Law Commission, the role of MFN in GATT was considered in some depth.¹ This paper, therefore, focuses more on practice under the WTO agreements and in particular the interpretation of those agreements through WTO dispute settlement.

II. THE INCLUSION OF MFN IN GATT

The MFN principle, first embodied in treaties of friendship, commerce and navigation, was regarded even in the inter-war years as “an essential condition of the free and healthy development of commerce between States”.² In the negotiations for the International Trade Organization (ITO) the United States argued that an MFN provision was “absolutely fundamental”, and the MFN provision included in the draft charter for the ITO became the first paragraph of GATT Article I, essentially unchanged from the initial draft proposal of the United States.³

Article I of the GATT provides:

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.

There are two important aspects to this MFN provision, which distinguish it from the MFN provisions of past bilateral treaties. First, the

¹ See the treatment provided by the Special Rapporteur, Mr. Endre Ustor in his *Second Report on the Most-Favoured-Nation Clause*, 1970(2) Y. B. INT'L L. COMMISSION 199, 217-235.

² *The World Economic Conference: Final Report* 34, League of Nations Doc. C.356.M.129.1927.II (C.E.I.46) (1927).

³ JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF THE GATT* 252 (1969). A reference to government contracts for public works was excluded from both the ITO and the GATT.

inclusion of MFN in GATT made it a multilateral not a bilateral obligation as it had been under friendship, commerce and navigation treaties. Instead of having to conclude country-by-country treaties providing for MFN treatment, by becoming a party to the GATT a state could obtain MFN benefits from all other GATT Contracting Parties automatically. GATT applied MFN multilaterally. Second, GATT opted for unconditional MFN. According to the terms of GATT Article I:1, MFN treatment was to be provided “immediately and unconditionally”. GATT represented a clear break from any notion of conditional MFN where MFN would be provided only in exchange for some reciprocal benefit.⁴

The MFN principle is generally regarded as a “cornerstone” of the GATT.⁵ Although stated explicitly in Article I:1, it is also found directly and indirectly in a number of provisions of the GATT.⁶ It reflects the fact that a multilateral trading regime depends on non-discrimination — in that each party has to be able to ensure that its traders have equality of competitive opportunities.⁷ And that is what MFN provided. As the Appellate Body pointed out in *Canada-Autos*, the object and purpose of GATT Article I:1 “is to prohibit discrimination among like products originating in or destined for different countries.”⁸ Somewhat circularly, the Appellate Body went on to say, that “[t]he prohibition of discrimination in Article I:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis.”⁹ GATT Article I:1 provides more than an incentive; it contains an obligation to extend such benefits at all WTO Members.

The MFN obligation is repeated in GATT Article II, which relates specifically to tariff bindings. Each contracting party is required to “accord to the commerce of the other contracting parties treatment no less favourable than that provided for” in its schedule of tariff concessions. It is to be noted the form of the MFN provision in GATT Article II differed from that of GATT Article I. Under GATT Article I “advantages” had to be accorded “immediately and unconditionally”; under GATT Article II,

⁴ See International Law Commission [ILC], *Draft Articles on Most-Favoured-Nation Clauses with Commentaries*, at 33-9. While many major nations moved to an “unconditional MFN” policy prior to War World I, the United States changed to an unconditional policy in 1923.

⁵ Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 101, WT/DS246/AB/R (Apr. 20, 2004) [hereinafter *EC-Tariff Preferences* Appellate Body Report].

⁶ General Agreement on Tariff and Trade [GATT] arts. II, III (7), IV, V (2), (5) & (6), IX (1), XIII (1), XVII (1), and XX (j).

⁷ For a discussion of the economic and non-economic rationales for MFN within the multilateral trading system, see JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 158-60 (2nd ed., 1997).

⁸ Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶ 84, WT/DS139/AB/R, WT/DS142/AB/R (May 31, 2000) [hereinafter *Canada-Autos* Appellate Body Report].

⁹ *Id.*

“treatment” that was “no less favourable” had to be provided to other contracting parties.

MFN under GATT was a provision relating initially to tariffs. The wording of GATT Article I expresses this: “with respect to customs duties and charges of any kind”. It related to border measures, and equality of competitive opportunities at the border was necessary for the operation of comparative advantage that underpinned the notion of free trade. Under the traditional GATT negotiating process, contracting parties would negotiate tariff concessions on a bilateral basis.¹⁰ State A would agree to lower tariffs on certain goods of interest to State B in exchange for State B agreeing to lower tariffs on goods of interest to State A. These tariff commitments would be included in the schedule of commitments of each contracting party and by virtue of the operation of the MFN provision all other contracting parties would be entitled to the benefit of those tariff concessions. Although the rationale of comparative advantage indicates that economic efficiency is promoted even where tariff concessions are granted to States that have not given anything in exchange for that benefit, States do not always view things that way. States that obtain such benefits without providing anything in exchange are often viewed as “free riders”.

However, even though MFN under GATT was pervasive in that most provisions, both tariff and non-tariff related, are covered by an MFN obligation, it was also circumscribed by numerous exceptions and these exceptions gained in importance as attention was directed to non-tariff barriers to trade. An important group of exceptions is found in GATT Article I itself, which “grandfathered” certain existing preferential arrangements.¹¹ Beyond this, the most prominent exception was that of Article XXIV, which permits GATT contracting parties to continue with existing or enter into new customs unions or free trade areas. Since such arrangements by definition grant preferences to some States that are not made available to others, they are in contravention of a general MFN provision. Article XXIV allows GATT contracting parties to lower tariffs in the context of a customs union or free trade area without having the obligation to lower those tariffs in respect of all other GATT contracting parties.

There were also other exceptions under the GATT. Article XX deals with general exceptions including regulations relating to public morals, health and safety regulation and environmental regulation. In all of these instances, if appropriate conditions are met, contracting parties may adopt measures that are discriminatory, and are relieved from their obligation to provide MFN treatment. Article XXI provides an exception in relation to

¹⁰ See D.M. McRae & J.C. Thomas, *The GATT and Multilateral Treaty Making: The Tokyo Round*, 77 AM. J. INT’L L. 51, 66 (1983).

¹¹ GATT art. I:2-4.

regulations protecting a contracting party's security interests. Equally GATT Article XIX permits derogation from MFN obligations in respect of safeguard measures designed to deal with temporary import surges and Articles XII and XIV provided exceptions to deal with balance of payments problems.

An exception was also developed under GATT to respond to the particular needs of developing countries. Under the "generalized system of preferences", GATT contracting parties were permitted to grant preferential tariffs to products from developing countries without being in contravention of their MFN obligations. This subsequently became formalized as the "Enabling Clause"¹² whose relationship to MFN has given rise to some controversy under the WTO.¹³

A further specific exception from the obligations of GATT Article I:1 was granted by the Lomé Waiver, under which the GATT contracting parties granted the European Communities a waiver from its obligations under GATT Article I:1 in respect of its obligations under the Lomé Convention. That waiver was later extended by the General Council of the WTO.¹⁴

III. RELATIONSHIP TO NATIONAL TREATMENT

The other arm of the non-discrimination principle under the GATT was the national treatment principle. While MFN prevented discrimination as between foreign products, the national treatment principle prevented discrimination as between domestic and imported products. While MFN would operate primarily at the border, the national treatment principle would prevent discrimination within the domestic market of a State.¹⁵

The national treatment principle is found specifically in two paragraphs of GATT Article III. Paragraph 2 requires that imported products 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". Paragraph 4 provides that imported products "shall be accorded treatment no less favourable than that accorded to like products of domestic

¹² Officially called the "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", the Enabling Clause was adopted under GATT in 1979. See World Trade Organization [WTO], WTO Trade and Development Committee, *Work on special and differential provisions*, available at http://www.wto.org/english/tratop_e/dev_e/dev_special_differential_provisions_e.htm (last visited Feb. 20, 2012).

¹³ *EC-Tariff Preferences* Appellate Body Report, *supra* note 5, ¶¶ 87-103.

¹⁴ See Decision of the WTO General Council of 14 October 1996, WT/L/186 (Oct. 18, 1996).

¹⁵ MFN would also operate within the domestic market if there was discrimination between foreign products even if there was no breach of the national treatment principle.

origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use”.

Each of these provisions uses a slightly different formula for prohibiting discrimination than that employed in GATT Article I:1, but they all use the common term “like product”. As will be seen, judicial interpretation of the term “like product” has been far more frequent in the case of national treatment than it has been in the case of MFN.

IV. INTERPRETATIVE ISSUES UNDER GATT

GATT Article I:1 was not subject to frequent interpretation under GATT dispute settlement. Generally, panels took the view that any benefit accorded to a GATT contracting party not available to other contracting parties was an “advantage” and hence fell within GATT Article I:1. In *EEC-Imports of Beef*¹⁶ the fact that USDA — approved beef automatically met the requirements of the EEC quota for beef imports but Canadian-approved beef that met precisely the same specifications did not, meant that there was a violation of GATT Article I:1. In *US-MFN Footwear*¹⁷ a panel concluded that automatic backdating of the revocation of countervailing duties was an advantage which if not accorded on an MFN basis was contrary to GATT Article I:1. The effect was to cover both discriminatory treatment that was clear on its face as well as discriminatory treatment that existed in fact, even though apparently neutral.

In respect of the interpretation of the term “like product” in GATT Article I:1, no definitive approach emerged under GATT panels. In *Spain-Unroasted Coffee*,¹⁸ the panel took the view that unroasted, non-decaffeinated coffee was the same product regardless of where it was grown, how it was cultivated, or how the beans were processed. Essentially the panel relied on external characteristics and end use, noting that coffee “was universally regarded as a well-defined and single product intended for drinking.”¹⁹

However, what was never resolved under GATT was the extent to which the term “like product” under Article I:1 should be given the same meaning as the term “like product” in GATT Article III dealing with national treatment, or as the term “like product” used in the provisions

¹⁶ Report of the Panel, *European Economic Community – Imports of Beef from Canada*, ¶ 4.3, L/5099 (Mar. 10, 1981), GATT B.I.S.D. (28th Supp.) at 92 (1982).

¹⁷ Report of the Panel, *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, ¶ 6.17, DS18/R (June 19, 1992), GATT B.I.S.D. (39th Supp.) at 128 (1993).

¹⁸ Report of the Panel, *Spain – Tariff Treatment of Unroasted Coffee*, ¶ 4.9, L/5135 (June 11, 1981), GATT B.I.S.D. (28th Supp.) at 102 (1982) [hereinafter *Spain-Unroasted Coffee* GATT Panel Report].

¹⁹ *Id.* ¶ 4.7.

relating to antidumping or safeguards.²⁰ This remains an issue under the WTO, although more guidance is now available from decisions of the WTO Appellate Body.

V. MFN UNDER THE WTO

The WTO continued GATT as it was, so there was no change to the wording of GATT Article I:1. However, the WTO included a compulsory form of judicial dispute settlement, including an Appellate Body, providing thereby an opportunity for the provisions of the GATT to be interpreted and clarified.²¹ Moreover, trade in services and trade-related aspects of intellectual property rights were also brought within the framework of the WTO and in each of these areas obligations to provide MFN treatment are included.²²

VI. THE INTERPRETATION OF GATT ARTICLE I:1 UNDER THE WTO

A. General Approach

From the outset, the WTO Appellate Body has been prepared to give a broad interpretation to the scope of GATT Article I:1. In *EC-Bananas*, the Appellate Body concluded that the fact that certain procedural and administrative requirements applicable to the banana imports of particular States went “significantly beyond” those applicable to banana imports from third States constituted an “advantage” within the meaning of GATT Article I.²³ In coming to its conclusion, the Appellate Body noted that GATT panels had given a broad definition to the term “advantage”.²⁴

In *Canada-Autos*, the Appellate Body once again emphasized the breadth of the obligation in GATT Article I:1:²⁵

²⁰ GATT art. VI and art. XIX.

²¹ Art. 3(2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes [DSU] provides that one of the functions of the dispute settlement system is “to clarify the existing provisions of those (WTO) agreements in accordance with customary rules of interpretation of public international law.”

²² General Agreement on Trade and Service [GATS] art. II; Agreement on Trade-Related Aspects of intellectual Property Rights [TRIPS] art. 4. On the treatment of MFN under both GATT and GATS; see generally PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION, TEXT, CASES AND MATERIALS*, chapter 4 (2005).

²³ See Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶ 206, WT/DS27/AB/R (Sept. 9, 1997) [hereinafter *EC-Bananas III* Appellate Body Report].

²⁴ *Id.*

²⁵ *Canada-Autos* Appellate Body Report, *supra* note 8, ¶ 79.

We note next that Article I:1 requires that “*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*.” (emphasis added) The words of Article I:1 refer not to *some* advantages granted “with respect to” the subjects that fall within the defined scope of the Article, but to “*any advantage*”; not to *some* products, but to “*any product*”; and not to like products from *some* other Members, but to like products originating in or destined for “*all other*” Members.

The Appellate Body also made clear that it was following the earlier GATT jurisprudence, which applied GATT Article I:1 to *de facto* as well as to *de jure* discrimination. It said:²⁶

[W]e observe first that the words of Article I:1 do not restrict its scope only to cases in which the failure to accord an “advantage” to like products of all other Members appears *on the face* of the measure, or can be demonstrated on the basis of the words of the measure. Neither the words “*de jure*” nor “*de facto*” appear in Article I:1. Nevertheless, we observe that Article I:1 does not cover only “in law”, or *de jure*, discrimination. As several GATT panel reports confirmed, Article I:1 covers also “in fact”, or *de facto*, discrimination. Like the Panel, we cannot accept Canada's argument that Article I:1 does not apply to measures which, on their face, are “origin-neutral”.

The Appellate Body ultimately found that the duty remission on imported vehicles provided by Canada under which only vehicles imported by certain manufacturers were eligible (essentially excluding exports from Japanese and German manufacturers) contravened GATT Article I:1.

In principle, then, GATT Article I:1 applies to all “advantages” granted by WTO Members unless they have been specifically excluded from the scope of MFN under provisions of the Agreement or by other of the WTO “covered” agreements. The application of MFN to specific areas of trade in goods under GATT (subsidies, antidumping, safeguards) is generally governed by the separate covered agreements applicable to those areas, which in some circumstances permit discriminatory action.²⁷

²⁶ *Id.* ¶ 78.

²⁷ *E.g.*, Agreements on Safeguards, art. 5(2)(b).

However, the extent to which GATT Article I:1 would apply to the provisions of agreements that are not part of the WTO “covered” agreements is less clear. The problem had already arisen under the GATT. During the Tokyo Round, a number of separate “Codes” were concluded, but not all GATT contracting parties had become parties to those Codes. The question therefore was whether GATT contracting parties that were not parties to a Code, could nevertheless get the benefit of the Code through the application of the MFN provision in GATT Article I:1. The United States specifically did not provide benefits of the Codes to which it was a party to GATT contracting parties that had not become a party to the Code. This was challenged by India, which considered that MFN should apply, although the matter was eventually settled by agreement.²⁸

The contemporary question is whether WTO Members who are not parties to the WTO “Plurilateral Agreements”²⁹ can claim the benefits of those agreements on the basis of GATT Article I:1. Some argue that in principle they can,³⁰ although the matter has yet to come before a WTO Panel. If they can, then the distinction between the WTO covered agreements, to which all WTO Members must become parties and the Plurilateral Agreements which WTO members can choose to become party to or not, is diminished, if not extinguished.

B. The Exceptions to MFN

Some insight into the scope of GATT Article I:1 can also be found in the way in which the exceptions to MFN have been applied. In interpreting the Lomé Waiver in *EC-Bananas* the Appellate Body focused on the specific wording of the waiver, which had been granted “to the extent necessary” to permit the EC to provide the preferential treatment “required” by the Convention.³¹ Thus, it was not prepared to allow derogations in respect of GATT Article I:1 in respect of measures that were not “required” by the Lomé Convention. Equally, the Appellate Body was not prepared to apply the Lomé Waiver to other MFN obligations under GATT, since the waiver stated expressly that it applied to GATT Article I:1.³²

²⁸ JACKSON, *supra* note 7, at 143-45.

²⁹ The WTO Plurilateral Agreements were originally negotiated in the Tokyo Round but are annexed to the WTO Agreements. However, not all WTO members became party to them. The four initial agreements were trade in civil aircraft, government procurement, international dairy agreement and international bovine meat agreement, though the later two agreements were terminated in 1997. See WTO, Understanding the WTO: The Agreements, *Plurilaterals: of minority interest*, available at www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm (last visited Feb. 20, 2012).

³⁰ VAN DEN BOSSCHE, *supra* note 22, at 314.

³¹ See *EC-Bananas III* Appellate Body Report, *supra* note 23, ¶ 74.

³² *Id.* ¶ 81.

In *EC-Tariff Preferences*,³³ the Appellate Body took the view that the relationship between GATT Article I:1 and the “Enabling Clause” was that of rule and exception. Thus, it first had to be established whether there had been a violation of GATT Article I:1, and if that was established, whether it could be justified under the Enabling Clause.³⁴ The complaint by India involved the way in which the EC applied its tariff preferences for developing countries — some developing countries were entitled to receive certain preferences whereas others were not.

The “rule/exception” analysis of the Appellate Body in *EC-Tariff Preferences* reinforces the primacy attached to the MFN provision in GATT Article I:1. The Appellate Body had reiterated that MFN was the “cornerstone” of the GATT, thus reasserting its priority, even though any preference given to developing countries by virtue of the Enabling Clause had by definition been excluded from the application of GATT Article I:1.³⁵ As will be seen, however, such assertions are to a certain extent symbolic. The potential scope of application of GATT Article I:1 is broad, but in practice the effect of the exceptions to it is to limit its ambit at the outset.

The breadth of the scope of MFN under GATT is also demonstrated by the way in which the Appellate Body has interpreted GATT Article XXIV, which provides an exception from MFN in respect of regional free trade agreements and customs unions. In *Turkey-Textiles*³⁶ the Appellate Body had to determine whether quantitative restrictions imposed by Turkey on the importation of certain textiles and clothing products from India was contrary to, *inter alia*, the MFN requirement of GATT Article XIII.³⁷ Turkey argued that it had imposed those measures in implementation of a customs union it had entered into with the EC, and thus was justified in its actions under GATT Article XXIV.

However, the Appellate Body took a somewhat restrictive approach to the scope of GATT Article XXIV as a means of avoiding the MFN obligation of GATT Article I:1. Relying in part on the terms of the chapeau to GATT Article XXIV:5, that the provisions of the Agreement are not to “prevent” the formation of a customs union or free trade area, the Appellate Body concluded that deviation from MFN under a customs unions was

³³ *EC-Tariff Preferences* Appellate Body Report, *supra* note 5, ¶ 40.

³⁴ *Id.* ¶ 40.

³⁵ *Id.*

³⁶ Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, ¶ 1, WT/DS34/AB/R (Oct.22, 1999) [hereinafter *Turkey-Textiles* Appellate Body Report].

³⁷ GATT Article XIII addresses obligations in regards to non-discriminatory administration of quantitative restrictions and provides in relevant part:1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

justified only if the formation of the customs union would have been prevented if the measure in question could not have been adopted.³⁸

In short, not all action taken under a customs union or free trade area will escape the MFN obligation of GATT Article I:1. It would have to be action that if not taken would prevent the establishment of the customs union. The effect of the Appellate Body decision in *Turkey-Textiles* is to establish a relatively high threshold for claims that measures that are inconsistent with MFN are in fact justified under GATT Article XXIV. This in turn reinforces the priority given to the MFN obligation under GATT.

The interpretation of the General Exceptions under GATT Article XX indicates that the Appellate Body gives a restrictive interpretation to these exceptions as well, and thereby enhances the status of the substantive non-discrimination obligations. While the instances that have arisen have been in the context of the interpretation of the national treatment obligation under GATT Article III, there seems no reason why such a restrictive approach would not apply when Article XX defences are raised with respect to other MFN obligations in GATT, including that in GATT Article I:1.

In *US-Shrimp* the Appellate Body stated that the exceptions in GATT Article XX were “*limited and conditional* exception(s) from the substantive obligations contained in the other provisions of the GATT 1994”³⁹ and spoke of a balance that is required between the right of a State to invoke an exception and its duty to respect the treaty rights of other States.⁴⁰ The consequence is that a hierarchy has been established between the substantive obligations of GATT and the exceptions to those obligations, with the latter being interpreted restrictively and the former not necessarily so.⁴¹ The result as far as GATT Article I:1 is concerned is that MFN can be given a broad meaning but the exceptions to it will be interpreted restrictively.

This restrictive approach to GATT exceptions is also evident in *Mexico-Soft Drinks*.⁴² Mexico had imposed a tax on the importation and the

³⁸ *Turkey-Textiles* Appellate Body Report, *supra* note 36, ¶ 16. It was also required that the customs union was one that met the requirements of GATT Article XXIV for the formation of a customs union.

³⁹ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 157, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *US-Shrimp* Appellate Body Report] (emphasis in the original).

⁴⁰ *Id.* ¶ 156.

⁴¹ See Donald M. McRae, *GATT Article XX and the WTO Appellate Body*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON* 219, 232 (Marco Bronckers & Rienhard Quick eds., 2000).

⁴² See generally Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (Mar. 6, 2006) [hereinafter *Mexico-Taxes on Soft Drinks* Appellate Body Report].

distribution of soft drinks containing artificial sweeteners and sought to justify the violation of the national treatment provision in GATT Article III (in that no tax was imposed on the like product soft drinks sweetened with sugar) on the ground that the measure was in conformity with GATT Article XX(d). That is to say, it was a measure “necessary to secure compliance [by the United States] with laws or regulations which are not inconsistent with this Agreement” as provided for in GATT Article XX(d). The “law or regulation” to which United States compliance was sought was allegedly the provisions of NAFTA. In short, Mexico wanted the Appellate Body to interpret “laws or regulations” to include international legal obligations. But the Appellate Body was not prepared to give GATT Article XX(d) such a broad interpretation, reading it as limited to the domestic legal obligations such as those set out in an illustrative list in paragraph GATT Article XX(d).⁴³

Thus, whenever the Appellate Body has had to interpret the scope of exceptions to the MFN provision in GATT Article I:1, it has done so by interpreting those exceptions restrictively. It has asserted the primacy of MFN over the exceptions and thus given the impression at least that MFN under the WTO agreements has a broad scope.

C. The Concept of “Like Product”

The term “like product” in GATT Article I:1 has yet to be interpreted by WTO panels or the Appellate Body. However, the term “like products” appears in numerous places in GATT and has been the subject of significant discussion in the context of GATT Article III National Treatment. In *Japan-Alcohol* when interpreting GATT Article III, the Appellate Body made its often-quoted statement:⁴⁴

The concept of “likeness” is a relative one that evokes the image of an accordion. The accordion of “likeness” stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term “like” is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.

⁴³ This included customs, monopolies, patent and trade mark enforcement and the prevention of deceptive practices.

⁴⁴ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, at 21, WT/DS8/AB/R (Oct. 4, 1996) [hereinafter *Japan-Alcoholic Beverages II* Appellate Body Report].

The Appellate Body concluded that in the particular context of the first sentence of GATT Article III:2, the term “like products” should be interpreted narrowly. Since GATT Article I:1 does not have the complexity of GATT Article III, which relates not just to “like products” but also to “directly competitive or substitutable products”, it is not clear that the restrictive interpretation applicable in the context of GATT Article III would be applied to what constitutes “likeness” under MFN in GATT Article I:1.

Nevertheless, the objective factors that are taken into account in determining likeness under GATT Article III — external characteristics, end use, consumer tastes and preferences and the way they are dealt with in tariff regimes — would appear to be relevant to any determination of “like product” under GATT Article I:1. Indeed, the GATT case of *Spain-Unroasted Coffee*, which dealt with the issue of “like products” under GATT Article I:1, considered many of these factors.⁴⁵ More interesting is the question whether the statement of the Appellate Body in *EC-Asbestos*⁴⁶ that the health risks of a product are relevant to determining its likeness to other products would also apply in considering “likeness” under GATT Article I:1.⁴⁷

D. “Immediate and unconditional” application

In respect of the requirement that any advantage granted to a product be accorded to like products “immediately and unconditionally”, there has been some discussion in the jurisprudence on the meaning of “unconditionally”. In the GATT case *Belgium-Family Allowances*,⁴⁸ the fact that an exemption from levies on products was available only to countries that had a system of family allowances similar to Belgium was treated as a conditional grant of MFN. Countries could only get those exemptions if they adopted a particular system of family allowances. In *Indonesia-Autos* customs duties and tax benefits for imported vehicles were “conditional on achieving a certain level of local content value for the finished car.”⁴⁹ This, the Panel said, was inconsistent with the provisions of

⁴⁵ *Spain-Unroasted Coffee* GATT Panel Report, *supra* note 18, ¶ 4.7.

⁴⁶ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 113, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC-Asbestos* Appellate Body Report].

⁴⁷ In fact, the impact of this may not be great since under the SPS Agreement WTO Members can impose border restrictions on products that pose health risks provide they meet the requirements of that Agreement.

⁴⁸ Report of the Panel, *Belgian Family Allowances*, ¶ 3, G/32 (Nov. 6, 1952), GATT B.I.S.D. (1st Supp.) at 59(1953).

⁴⁹ Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, ¶ 14.146, WT/DS54/R (July 2, 1998) [hereinafter *Indonesia-Autos* Panel Report].

GATT Article I:1, which required that advantages be accorded immediately and unconditionally.⁵⁰

A similar approach was taken by the Appellate Body in *Canada-Autos*, which noted that “the import duty exemption to certain motor vehicles entering Canada from certain countries” was granted to “a limited number of designated manufacturers who are required to meet certain performance conditions”.⁵¹ Thus, the Appellate Body said, “In practice, this measure does not accord the same import duty exemption immediately and unconditionally to like motor vehicles of *all* other Members, as required under Article I:1 of the GATT 1994.”⁵²

In effect, then, a finding that an advantage has not been accorded immediately and unconditionally is consequential on a determination that it has been granted to a Member or to some Members, but not to others. Once it has been established that an advantage has been granted to certain Members products but not to other Members products, the conclusion that it has not been accorded immediately and unconditionally to the products of all Members seems to follow as a matter of course.

VII. MFN IN GATS

Just as it is under GATT Article I, MFN is regarded as a core obligation under GATS. Each WTO Member must provide MFN treatment to all services and service suppliers of another WTO Member. GATS Article II paragraph 1 provides: “With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than treatment it accords to like services or service suppliers of any other country.”

Yet this blanket provision for MFN is not as broad as it might appear. Paragraph 2 of Article II allowed Members to annex exceptions to which MFN would not apply and thus the extent of the obligation is significantly circumscribed.

The difference in wording between GATT Article I and GATS Article II is that whereas the former relates to any “advantage” granted to a contracting party, the latter relates to “measures affecting trade in services”. Moreover, the wording of GATS Article II uses the language of “treatment no less favourable” found in of GATT Article II and GATT Article III. However, this does not mean that GATT Article I and GATS Article II are to be interpreted differently. In the first case to consider GATS Article II, *EC-Bananas*, the panel had noted that the wording of GATS Article II

⁵⁰ *Id.*

⁵¹ *Canada-Autos* Appellate Body Report, *supra* note 8, ¶ 85.

⁵² *Id.* emphasis in the original.

resembled that of GATS Article XVII dealing with national treatment.⁵³ Accordingly, the panel concluded, the language of the two articles should be interpreted in the same way. However, the Appellate Body pointed out that Article II was an MFN provision and the interpretation of a national treatment provision was not necessarily relevant to the interpretation of an MFN provision.⁵⁴

Instead, the Appellate Body said, the MFN obligation in GATS Article II should be compared with the MFN obligations in GATT, and as a consequence interpreted it in line with that provision.⁵⁵ GATT Article I:1 applied to both *de jure* and *de facto* discrimination, and the Appellate Body concluded that even though GATS Article II was worded differently from GATT Article I:1, this did not mean that it was limited only to *de jure* discrimination.⁵⁶ Thus, whether an MFN clause is worded as requiring that “any advantage” accorded to one contracting party must be “immediately and unconditionally” accorded to all contracting parties, or as requiring that treatment accorded to a contracting party must be “no less favourable” than treatment accorded to other contracting parties, in the view of the Appellate Body the result is the same. Both *de jure* and *de facto* discrimination are covered.

The interpretive issues in relation to GATS Article II relate to what constitutes a “measure”, what constitutes “like services or service providers” and what constitutes “no less favourable treatment”.

The concept of a measure appears to be quite wide under GATS. “Measure” is defined in GATS Article XXVIII as meaning “any measure by a Member, whether in the form of a law, regulation, rule procedure, decision, administrative action, or any other form”. However, in *Canada-Autos*, the Appellate Body pointed out, the term used in GATS Article II:1 is “any measure covered by this Agreement” and by virtue of GATS Article I:1, a measure must be one “affecting trade in services”.⁵⁷ Thus, the enquiry under GATS Article II:1 is twofold; was there a trade in services, and did the measure affect that trade?⁵⁸

Trade in services is defined in GATS Article I:2 by the various ways in which cross-border services can take place.⁵⁹ In *EC-Bananas*, the Appellate

⁵³ Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.301, WT/DS27/R/ECU, WT/DS27/R/MEX & WT/DS27/R/USA (May 22, 1997).

⁵⁴ *EC-Bananas III* Appellate Body Report, *supra*, note 23, ¶ 231.

⁵⁵ *Id.*

⁵⁶ *Id.* ¶¶ 233-34.

⁵⁷ *Canada-Autos* Appellate Body Report, *supra* note 8, ¶ 152.

⁵⁸ *Id.* ¶ 155.

⁵⁹ GATS art. I:2: For the purposes of this Agreement, trade in services is identified as the supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; (d) by a service

Body indicated that the concept of “affecting a service” can be quite broad. It said:⁶⁰

In our view, the use of the term “affecting” reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word “affecting” implies a measure that has “an effect on”, which indicates a broad scope of application. This interpretation is reinforced by the conclusions of previous panels that the term “affecting” in the context of Article III of the GATT is wider in scope than such terms as “regulating” or governing”.

A “service supplier” is defined, rather unhelpfully, in GATS Article XXVIII as “any person that supplies a service”. However, the Appellate Body has yet to clarify the meaning of “like services or service suppliers” in GATS Article II.1. In *Canada-Autos* the Panel simply noted that to the extent that services suppliers supply the same services, they should be considered “like”.⁶¹

With respect to the meaning of the term “treatment no less favourable”, as pointed out earlier, the Appellate Body concluded in *Canada-Autos* that GATS Article II.1 included *de facto* as well as *de jure* discrimination.⁶² However, given the reluctance of the Appellate Body to link GATS Article II with the national treatment provision of GATS, whether guidance can be drawn from the concept of “treatment no less favourable” in respect of national treatment in GATS Article XVII is an open question.

VIII. MFN IN TRIPS

Article 4 of the TRIPS Agreement provides: “With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.”

The inclusion of an MFN provision in relation to intellectual property is quite new⁶³ and is designed to ensure that advantages granted bilaterally

supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

⁶⁰ *EC-Bananas III* Appellate Body Report, *supra* note 23, ¶ 220.

⁶¹ Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶ 10.247, WT/DS139/R, WT/DS142/R (Feb. 11, 2000).

⁶² *Canada-Autos* Appellate Body Report, *supra* note 57 and accompanying text.

⁶³ DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 104 (2003). However, national treatment is a common provision in intellectual property agreements, including the Paris, Berne and Rome Conventions.

will be accorded to all WTO Members. However, the range of application of the provision is significantly limited because it does not apply to agreements concluded before the WTO entered into force unless such agreements constitute a means of arbitrary or unjustifiable discrimination against WTO members.⁶⁴ There are also exceptions in respect of agreements relating to judicial assistance and law enforcement as well as advantages granted under the Berne and Rome Conventions.⁶⁵

Nevertheless, the concept of “protection” for which MFN is to be granted, is quite broad. Footnote 3 to Article 3 (National Treatment) provides: ‘For the purposes of Articles 3 and 4, “protection” shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.’

In *US-Section 211*, the Appellate Body described MFN as “fundamental”⁶⁶ to the TRIPS Agreement, just as it is fundamental to GATT. The Appellate Body also demonstrated that it was continuing its broad approach to the scope of MFN. Any difference in treatment between Cuban national trademark holders and non-Cuban national foreign trademark holders constituted an MFN violation even though the possibility of it occurring was very limited.⁶⁷ Moreover, in that case claims were made in respect of both MFN and national treatment, and the Appellate Body found that what constituted a violation of one was equally a violation of the other.⁶⁸

IX. MFN IN THE WTO: AN ASSESSMENT

In all of the areas of the WTO agreements to which MFN applies — goods, services and intellectual property — MFN treatment has been treated as essential, fundamental, or as the cornerstone of the agreement. It has been interpreted in a way to give it maximum effect. Advantage in GATT Article II:1 has been emphasized as applying to “any advantage”. Similarly in respect of trade in services, and trade-related aspects of intellectual property, MFN has been treated as having a broad application. This broad application appears to draw no distinction between procedural and substantive benefits. As the Appellate Body said in *Canada-Autos*, “any advantage” means “any advantage” and procedural rights have been

⁶⁴ TRIPS Agreement art. 4(d).

⁶⁵ *Id.* arts. 4(a) and (b) respectively.

⁶⁶ Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, ¶ 297, WT/DS176/AB/R (Jan. 2, 2002) [hereinafter *US-Section 211 Appropriations Act Appellate Body Report*].

⁶⁷ *Id.* ¶¶ 316-17.

⁶⁸ *Id.* ¶ 310.

included in within the scope at least of national treatment provisions.⁶⁹ There is nothing in the jurisprudence relating to MFN under GATT to suggest that procedural rights would be excluded from the application of MFN.⁷⁰

The application of MFN under the WTO seems to be the same regardless of the different ways in which the principle has been formulated. The requirement to accord any advantage provided to one state immediately and unconditionally to other states has been interpreted to mean the same as the requirement to accord a state treatment no less favourable than that accorded to other states. In this respect, the interpretation of MFN clauses under the WTO has been influenced more by a perception of the object and purpose of the provision, rather than by its precise wording.

At the same time, the scope of MFN is significantly curtailed by exceptions, both in general terms, for example those relating to customs unions and free trade areas and, specifically as in the case of the carve-out in respect of trade in services that WTO Members were able to annex to GATS Article II. The breadth of these exceptions means that the range of application of MFN can be in fact quite limited. This is true, for example, in respect of tariffs, the original object of MFN treatment in trade agreements. As a result of the burgeoning of customs unions and free trade areas, the majority of tariffs today are not applied on an MFN basis. They are applied under regional and other preferential GATT-exempt arrangements.

It is true that the approach of the Appellate Body has been to interpret many of these exceptions narrowly. The approach taken to GATT Article XXIV in *Turkey-Textiles*, and to the chapeau to GATT Article XX, in *US-Shrimp*, are evidence of this. But even with such a restrictive interpretation of individual applications of the exceptions, the substantive scope of the exceptions is far ranging and thus MFN under the WTO has more limited substantive application than the statement of the principle and its characterization as “fundamental” would suggest.

Nevertheless, a note of caution should be sounded. There is as yet insufficient jurisprudence on the interpretation of the MFN provisions under the WTO to be too definitive. The cases so far have been concerned with the interpretation of MFN within the relatively confined framework of the WTO covered agreements. Questions about benefits arising under other agreements have dealt with under the framework of regional trade agreements and GATT Article XXIV. The difficult question is whether

⁶⁹ Report of the Panel, *United States Section 337 of the Tariff Act of 1930*, ¶ 5.10, L/6439 (Jan. 16, 1989), GATT B.I.S.D. (36th Supp.) at 345 (1990).

⁷⁰ Arguably, in the case of TRIPS this might be seen to flow from the broad meaning given to the term “protection” under TRIPS arts. 3 & 4.

WTO Members who are not parties to the Plurilateral Agreements can claim the benefits under those Agreements by application of GATT Article I:1. If that issue were to arise, only then would the Appellate Body be faced by the kind of issue confronting the investment tribunals, epitomized in the *Maffezini* case.⁷¹

⁷¹ *Emilio Agustín Maffezini v. The Kingdom of Spain* (Decision on Objections to Jurisdiction of 25 January 2000) ICSID Case No ARB/97/7 (2002) 5 ICSID Rep. p. 396.

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