New Developments in the Most-Favoured- Nation
Clause with Particular Reference to Trade

By
Rahma Abd Alla Bakhiet AbuAagla
Faculty of Law
University of Khartoum

Supervisor:
Professor Akolda Man Tier

Thesis submitted in Partial Fulfillment of the Requirements of the LL.M
Degree, Faculty of Law, University of Khartoum, December 2004
# Table of content

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dedication</td>
</tr>
<tr>
<td>Acknowledgement</td>
</tr>
<tr>
<td>Table of Cases (Including Panels Reports)</td>
</tr>
<tr>
<td>Table of international Conventions and other Legal Instruments</td>
</tr>
<tr>
<td>Abbreviations</td>
</tr>
<tr>
<td>Preface</td>
</tr>
<tr>
<td>Abstract (in English)</td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>

## Chapter One  
**Most-Favoured-Nation Clause before WTO**

1. Introduction ................................................................. 1

2. Purposes And Scope Of Most-Favoured-Nation Clause: .......... 4
   (i) History Of The Most-Favoured-Nation Clause : .............. 4
   (ii) Definition: .................................................................. 12
   (iii) Functions of Most-Favoured-Nation Clause: .............. 14
   (iv) Field of Application of the Clause: ............................. 15
   (v) Most-Favoured-Nation Clause in WTO Agreements:........ 16
   (vi) The Original Rationale for Non-Discrimination in GATT: .. 17

3. Types of Most-Favoured-Nation Clause: ............................. 18
   (i) Conditional Most-Favoured-Nation Clause: .................. 18
   (ii) Unconditional Most-Favoured-Nation Clause: ............. 18

4. Experience and Implementation: ........................................ 20
   (i) Most-Favoured-Nation Clause in Investment: ............... 20
   (ii) The Most-Favoured-Nation Clause in U.S.A: ............... 21
Chapter Two

The Most-Favoured-Nation Treatment (MFN) in WTO Agreements

1. Introduction.................................................................................................................. 26

2. The World Trade Organization Regime ..................................................................... 26
   (i) The WTO Constitution............................................................................................. 26
   (ii) The WTO System.................................................................................................... 27
   (iii) The Principles of the Trading System................................................................. 27
   (iv) Structure of WTO.................................................................................................. 28
   (v) The WTO Secretariat............................................................................................. 29
   (vi) Decision-making Process...................................................................................... 29
   (vii) The WTO Objectives ........................................................................................... 30
   (viii) Functions of WTO .............................................................................................. 30
   (ix) WTO Membership and Accession ........................................................................ 30

3. Most-Favoured-Nation Clause in the General Agreement on Tariffs and Trade (GATT) ......................................................................................................................... 31
   (i) The General Agreement on Tariffs and Trade (GATT 1994).............................. 31
   (ii) GATT 1948 and GATT 1994.................................................................................. 32
   (iii) The Main Rules of GATT 1994........................................................................... 33
   (iv) Most-Favoured-Nation in GATT Article 1......................................................... 34

4. The Most-Favoured-Nation Treatment (MFN) In the General Agreement on Trade in Services (GATS) ........................................................................................................... 41
   (i) Background ............................................................................................................ 41
   (ii) Definition of Services ............................................................................................ 43
   (iii) Differences between Goods and Services....................................................... 44
   (iv) Scope of The GATS ............................................................................................ 44
   (v) The Most-Favoured-Nation Treatment (MFN) In GATS ................................. 45
5. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) .................................................. 46
   (i) Background ................................................................…… 46
   (ii) Definition of Intellectual Property Rights ...................... 48
   (iii) Objectives for Protection of Intellectual Property .......... 48
   (iv) Scope of TRIPS Agreement ......................................... 49
   (v) The Most-Favoured-Nation Treatment under TRIPS Article 4. 49
6. Conclusion ............................................................................. 50

Chapter Three
Exceptions to the Most-Favoured-Nation Principle in WTO Agreements

1. Introduction ............................................................................ 52
2. Exception to the Most-Favoured-Nation in GATT ............ 52
   (i) Historical Preference under Article I paragraphs 2 and 3 .... 52
   (ii) General Exception GATT Article XX ............................ 53
   (iii) National Security Exception Article XXI ..................... 56
   (iv) Regional Integration Agreement Exception (Customs Unions Free Trade Areas) GATT Article XXIV ...................... 57
      (a) Historical Background of Article XXIV ..................... 58
      (b) The Provision of Article XXIV ................................. 58
(V) Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries .................. 62
      (a) Preferential Tariffs under the Generalized System of Preferences (GSP) .................................................... 62
      (b) Preferential Arrangements under Unilateral Agreement ...... 63
      (c) Non Tariffs Barriers (NTBs) ...................................... 63
      (d) Regional Preferences among Developing Countries ....... 64
      (e) Special Treatment for Least-Developed Countries (LDCs)... 64
      (f) Non-Reciprocity in Tariffs Negotiations ...................... 64
3. Exemptions to Most-Favoured-Nation principle in the General Agreement on Trade in Service (GATS) ............................................. 65
   (i) Exemptions under Article II (2) and the Annex on Article II..... 66
   (ii) Regional Economic Integration (Article v)......................... 66
   (iii) General Exception under GATS Article XIV..................... 67
   (iv) National Security Exception Article XIV bis .................... 68
   (v) Progressive Liberalization on Trade in Services (Article XIX). 69

4. Exception to the Most-Favoured-Nation Principle in TRIPS Agreement ........................................................................ 70
   (i) Exception Under Article 4 (d) of TRIPS Agreement............. 70
   (ii) National Security Exception (TRIPS Article 73)................... 70
   (iii) Special and Differential Treatment for Developing Countries. 71
       (a) Transitional Arrangement Article 65 (1) of TRIPS .......... 71
       (b) Technical Assistance: Article 67 of the TRIPS Agreement... 72
       (c) Transfer of Technology to Least-Developed Countries (LDCs)
           .................................................................................... 73
   (d) Compulsory Licenses .......................................................... 74
   (e) Doha Ministerial Declaration on TRIPS and Public Health
       (2001) .................................................................................. 75

5. Conclusion................................................................................. 77

Chapter Four
Conclusions and Recommendations
Conclusions and Recommendations .................................................. 78
BIBLIOGRAPHY ........................................................................ 90
Dedication

To all those whom I love,

   My parents
   Brothers
   Sister

Who motivated me to attain success
throughout my career.
Acknowledgement

I would like to express my sincere appreciation, thanks, gratitude and respect to Professor Akolda M. Tier, the supervisor of this thesis, for his supervision, guidance, assistance and patience in following this thesis.

Also I acknowledge Ustaza Amani Elzien from the Information Centre, Commission for WTO Affairs, for generously supplying me with very valuable books and materials on the subject matter of this study.

Special thanks are also extended to my friends and colleagues. Their help and encouragement here had a great role in completing this thesis.
Table of Cases (Including Panels Reports)

- Canada – Measures Affecting Exports of Unprocessed Herring and Salmon (L 6268/1988, 98, 113).


- Italy – Italian Discrimination against Imported Agricultural Machinery (BISD. 60 (1959)).

- Japan – Trade on Semi Conductors, complaint by EC (L 6309, May 1988).


- Thailand – Restriction on Importation of Internal Taxes on Cigarettes complaint by United States (DSIOR, adopted on November 1990, 375-200).

- United States prohibition of Import of Tuna and Tuna Product from Canada, Complaint by Canada (L/5198, adopted February 1982).
Table of international Conventions and Other Legal Instruments

Havana Charter 1947

The General Agreement on Tariffs and Trade (GATT) 1948.

The protocol to introduce part IV of GATT on trade development 1965.

Decision on Generalized System of Preferences 1971.

Kyoto Convention on Simplification and Harmonization of custom procedure 1974.

Tokyo Ministerial Declaration 1976.


Decision on Deferential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries 1979.

Agreement of Trade-Related Investment Measures TRIMs (1994).


General Agreement on Trade in Services (GATS) 1994.

General Agreement on Tariffs and Trade (GATT) 1994.


<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AALCC</td>
<td>Asian-Africa Legal Consultative Committee.</td>
</tr>
<tr>
<td>AIDS</td>
<td>Acquired Immune Deficiency Syndrome.</td>
</tr>
<tr>
<td>Arab.L.Q</td>
<td>Arab Law Quarterly.</td>
</tr>
<tr>
<td>Art.</td>
<td>Article.</td>
</tr>
<tr>
<td>ASEAN</td>
<td>Association of South-East Asian Nations.</td>
</tr>
<tr>
<td>BISD</td>
<td>Basic Instruments and Selected Document</td>
</tr>
<tr>
<td>COMESA</td>
<td>Common Market for Eastern and Southern Africa.</td>
</tr>
<tr>
<td>DSB</td>
<td>Dispute Settlement Body.</td>
</tr>
<tr>
<td>EEC</td>
<td>European Economic Community.</td>
</tr>
<tr>
<td>EU</td>
<td>European Union.</td>
</tr>
<tr>
<td>GATS</td>
<td>General Agreement on Trade in Services.</td>
</tr>
<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade.</td>
</tr>
<tr>
<td>GSP</td>
<td>generalized system of preferences.</td>
</tr>
<tr>
<td>HIV</td>
<td>Human Immune Deficiency Virus.</td>
</tr>
<tr>
<td>ILC</td>
<td>International Law Commission.</td>
</tr>
<tr>
<td>IMF</td>
<td>International Monetary Fund.</td>
</tr>
<tr>
<td>IPRs</td>
<td>intellectual property rights.</td>
</tr>
<tr>
<td>ITC</td>
<td>International Trade Centre (UNCTAD/WTO).</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
</tr>
<tr>
<td>ITO</td>
<td>International Trade Organization.</td>
</tr>
<tr>
<td>J.W.T.L</td>
<td>Journal of World Trade Law.</td>
</tr>
<tr>
<td>LDCs</td>
<td>least developed countries.</td>
</tr>
<tr>
<td>MFN</td>
<td>most-favoured-nation.</td>
</tr>
<tr>
<td>MTN</td>
<td>multilateral trade negotiations.</td>
</tr>
<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement.</td>
</tr>
<tr>
<td>NTBs</td>
<td>non tariffs barriers.</td>
</tr>
<tr>
<td>OECD</td>
<td>Organization for Economic Co-operation and Development.</td>
</tr>
<tr>
<td>REIO</td>
<td>regional economic integration organization.</td>
</tr>
<tr>
<td>TRIPs</td>
<td>Agreement on Trade-Related Aspect of Intellectual Property Rights.</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations.</td>
</tr>
<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development.</td>
</tr>
<tr>
<td>UR</td>
<td>Uruguay Round.</td>
</tr>
<tr>
<td>US</td>
<td>United States.</td>
</tr>
<tr>
<td>WHO</td>
<td>World Health Organization.</td>
</tr>
<tr>
<td>WIPO</td>
<td>World Intellectual Property Organization.</td>
</tr>
<tr>
<td>World Bank</td>
<td>International Bank for Reconstruction and Development.</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization.</td>
</tr>
</tbody>
</table>
Preface

International trade law and multilateral trade negotiations were based on the principle of sovereign equality of states. In spite of the existence of the principle of equality in international law, it does not impose a legal obligation on states to treat other states equally, especially, in the area of contractual relations. Therefore, differential treatment in matters of trade is usual. This led to the inclusion of the most-favoured-nation clause (MFN) in the General Agreement on Tariffs and Trade (GATT) and later in the World Trade Organization (WTO). Under this clause member states should treat their trade partners equally (favour one, favour all), or non-discrimination treatment. The clause is the foundation upon which the multilateral trading system is built, as it is an essential principle in traditional trade law.

This thesis tries to answer the question to what extent the existing WTO provisions on most-favoured-nation clauses could achieve equality among all WTO members. It tries to assist WTO Members to carry out their rights and obligations in order to enjoy the benefits of liberalization of trade. It explains the main characteristic, function, and fields of application of the clause in international trade law, discussing the clause in WTO trade agreements (GATT, GATs and TRIPS) by defining the WTO and its regime, and the existing provisions of most-favoured-nation treatment in WTO agreements, clarifying the circumstances which members are allowed to derogate their obligations under the most-favoured-nation clause, suggesting proposals to face the pressing challenge of inequality and poverty faced by many countries.

This thesis is divided into four chapters. Chapter One deals with the most-favoured-nation clause before WTO. Chapter Two deals with the most-favoured-nation clause in WTO trade Agreement. Chapter Three explains exceptions to the most-favoured-nation in WTO trade
agreements. Finally, Chapter Four sums up conclusions and makes recommendations.
Abstract (in English)

The reconstruction of the international trade relations after the Second World War (1939-1945) has been accommodated by means of multilateral trade negotiations. These negotiations insured the birth of GATT in 1948. The most-favoured-nation clause (non-discrimination) is the cornerstone of GATT, and it is well established in GATT subsequent trade rounds of negotiations. In the Uruguay Round (the last trade round 1986-1994) the principle was incorporated in WTO trade agreements.

The most-favoured-nation clause has for decades been a common feature of bilateral trade relations. Efforts have been undertaken in recent years to translate the clause in a multilateral framework, as it represents a suitable solution to the chaos in international trade relation after World War II.

This thesis contains four chapters. The method adopted in it is a historical, analytical and critical approach.

Chapter One deals with the most-favoured-nation clause before WTO. It shows the long history of the clause in international trade relations. Also it defines the notion of most-favoured-nation clause achieving equality is the main function of the inclusion of the MFN in the GATT. The chapter goes further and explains that there are many fields for applying the clause but it has origin in trade agreements. The chapter also deals with types of MFN clauses, and some experience of implementation of the clause.

Chapter Two deals with the most-favoured-nation clause in WTO agreements. It defines the WTO and its regime. The main MFN provisions in WTO trade agreements are Article I of GATT which governs trade in goods, Article II of GATS which governs trade in services, and Article 4 of TRIPS which governs IPR.
Chapter Three explains the exceptions to the MFN clause in WTO agreement. They include exceptions allowed for development purpose, protection of public order, and protection of national security.

Chapter Four deals with conclusions reached by this study and it makes recommendations to be observed in the future WTO trade negotiations.
الخليفة

تمت إعادة بناء العلاقات التجارية الدولية بعد الحرب العالمية الثانية (1939-1945م) أثناء ما يعرف بالمفاوضات التجارية متعددة الأطراف، وتحت مظلة هذه المفاوضات ولدت الاتفاقية العامة للتعريفات والتجارة (GATT) في عام 1948م. يمثل شرط الدولة الأكثر رعاية (المساواة بين الشركاء التجاريين) حجر الزاوية في القائمة، وهو مبدأ راسخ من المبادئ العامة في القائمة والمفاوضات التجارية متعددة الأطراف التي عقدتها والتي كانت جولة أورغواي أهمها وآخرا (1986-1994م) ومن ثم تم دمج الشرط في اتفاقيات منظمة التجارة العالمية المتعلقة بالتجارة والتي كانت أهم نتائج جولة أورغواي.

في حين يمثل شرط الدولة الأكثر رعاية سمة مشتركة من سمات اتفاقيات التجارة منذ عقود من الزمن، فقد بذلت في السنوات الأخيرة جهوداً لترجمة الشرط ضمن إطار التجارة متطوّر الأطراف كحل مناسب لمشاكل وقضايا العلاقات التجارية الدولية عقب الحرب العالمية الثانية.

تتكون هذه الأطراف من أربعة فصول كما أنها أخذت بمنهج البحث التاريخي والتحليلي والتقديمي.

تناول الفصل الأول شرط الدولة الأكثر رعاية قبل قيام منظمة التجارة العالمية معرفاً لمبدأ تاريخه، وأنواعه واستخداماته في القانون الدولي عموماً، فقد أضحى جلياً أن المساواة بين الشركاء التجاريين هو الغرض الأساسي من النص على شرط الدولة الأكثر رعاية كأحد المبادئ العامة للنظام التجاري متطوّر الأطراف الذي تطور عبر الجولات التجارية، كما تتناول الفصل بعض التدابير والشروط الدولة الأكثر رعاية.

تناول الفصل الثاني شرط الدولة الأكثر رعاية في اتفاقيات التجارة في منظمة التجارة العالمية معرفاً لمنظمة التجارة العالمية ونظامها الأساسي كما تتناول الفصول النصوص المتعلقة بشرط الدولة الأكثر رعاية في اتفاقيات التجارة في منظمة التجارة العالمية، موضحاً للشرط في اتفاقيات الفاتي التي تحكم التجارة في
السلع في المادة الأولى، والاتفاقية العامة للتجارة في الخدمات (GATS) التي تحكم التجارة في الخدمات (المادة الثانية) واتفاقية حقوق الملكية الفكرية المتصلة بالتجارة (TRIPS) المادة الرابعة.

تناول الفصل الثالث استثناءات شرط الدولة الأكثر رعاية في اتفاقياتمنظمة التجارة العالمية، تشمل هذه الاستثناءات استثناءات متعلقة بالتنمية، حماية الأمن القومي، كما تشمل استثناءات عامة متعلقة بالنظام العام، حماية الإنسان والحيوان والبيئة.

وحوى الفصل الرابع بعض النتائج والتوصيات والمقترحات لحل مشكلة الفقر والتنمية والمساواة بين الشركاء التجاريين.
Chapter One

Most-Favoured-Nation Clause before WTO

1. Introduction

The world trade organization (WTO) is the only international body, which deals with the rules of international trade. The WTO agreements provide the legal ground-rule for international commerce. They are contracts binding governments to keep their trade policies within agreed limits. They are signed by governments to help producers of goods, services, importers and exporters to conduct their business.

WTO was born in 1995, but its trade system is older. Since 1948 the General Agreement on Tariff and Trade (GATT) had provided rules for the system. The GATT developed over the years through several GATT’s trade rounds negotiations. The Uruguay round 1986 –1994 was the latest and the largest negotiations and led to the creation of WTO. GATT dealt with trade in goods only, whereas the WTO agreements cover trade in service and intellectual property rights.¹

The agreements of WTO are long and complex because they are legal texts which cover a wide range of activities e.g. agriculture, textiles and clothing, banking, telecommunication, government purchases, industrial standards, food sanitation regulations, intellectual property and much more. But simple fundamental principles run through all these documents. These principles are the multilateral trading system foundation. The multilateral trading system is the system operated by WTO. Most nations are members of the system including the main trading nations.²

² Id, at 4-5.
The non-discrimination principle is the main principle of the new trading system. In spite of the existence of the principle of equality in international law, it does not impose a legal obligation on states to treat all other states equally, especially, in the area where contractual obligations regulate rights and duties. Therefore, discrimination or differential treatment of other states in matters of trade is usual.\(^3\)

To assure non-discriminatory treatment, one can either grant national treatment which means treating foreigners and nationals equally, or most-favoured-nation treatment which means countries cannot discriminate between their trade partners, by granting someone special favour or privileges, such as lower customs duty rates for one of their products. It should grant the same treatment for all the products of the other member states.\(^4\)

The national treatment principle requires that imported goods should be treated equally with locally produced goods after the foreign goods have entered the market, i.e. after payment of customs duties and other charges the imported goods should receive a treatment not less favourable than that given to domestic products.\(^5\) Simply stated, national treatment means, “giving the others the same treatment as one’s nationals”. The national treatment is not only applied to foreign and domestic goods, but also it should be applied to foreign and domestic services, and to foreign and local trademarks, patent and copyright.\(^6\) Moreover, it is not open to a country to levy on imported goods or

---


\(^1\) WTO, *supra* note 1, at 5.

\(^2\) Id, at 6.

product, after it has crossed the border on payment of customs duties or sale taxes at higher rates than those applied to similar domestic products.\(^7\)

Lastly, national treatment applies in respect of internal taxation and regulation, i.e. internal taxes and other internal charges, and law, regulation affecting internal sale distribution and use of product.\(^8\) Thus national treatment addresses the issues of internal discrimination, while most-favoured-nation addresses issues of external discrimination.\(^9\) Therefore, charge of custom duty on an imported good does not constitute a violation of national treatment even if an equivalent tax is not charged to locally produced products.\(^10\) The function of giving most-favoured-nation clause is to establish equality, prevent non-discrimination and self-adaptation of treaties to changes in circumstances.\(^11\)

There are many fields for applying most-favoured-nation clause. The most important fields are trade, investment, diplomatic relations, establishing foreign judicial persons and recognition and execution of their judgements, foreign means of transportation and intellectual property. However, the origin of the clause was in trade.\(^11\)

Historically the use of most-favoured-nation clause refers to early twelfth century commercial treaties, such as an agreement between England and Continental Powers and Cities. In 1417 king Henry V of England and Duke of Burgundy and Count of Flanders signed a treaty

\(^{v}\) WTO, supra note 1, at 6.


\(^{v}\) WTO, supra note 1, at 6.


according to which English vessels were granted the right to use the harbours of Flanders in the same way as French, Dutch and Scots. Only in the seventeenth century did the inclusion of the most-favoured-nation in commercial treaties become a common practice. After the Second World War 1939–1945 when negotiating Havana charter the clause was revived. The failure of Havana Charter emphasized the birth of the General Agreement On Tariff And Trade (GATT 1948), where the most-favoured-nation clause was a key provision, but the GATT was revised several times and now it is incorporated into WTO.

The most-favoured-nation clause is customarily classified into conditional most-favoured-nation clause and unconditional ones.

2-Purposes And Scope Of Most-Favoured-Nation Clause:

(i) History Of The Most-Favoured-Nation Clause:

The history of most-favoured-nation clause referred back to the Middle Ages when merchants of Italian, French and Spanish trading cities attempted to secure monopolies for themselves on African and Levantine markets. When such efforts failed they tried to grant to themselves opportunities equal to that given to some or all other competitors.

The most-favoured-nation clause first appearance in commercial treaties was during the Twelfth Century in the agreement between England and Continental Powers and Cities. In August 1417 the king

---

13 Schwerzenber, supra note 11, at 130.
14 Edmond Mc Govern, supra note 8, at 197.
17 Endre Ustor, supra note 12, at 469.
18 Schwerzenber, supra note 11, at 130.
Henry V of England signed a treaty called treaty for mercantile intercourse with Flanders and Duke John of Burgundy. According to this treaty English vessels were given the right to use the harbours of Flanders as the same as the French, Dutch, Sealanders and Scots.\(^\text{19}\)

The clause began to play an important part at international stages in the first half of the seventeenth century.\(^\text{20}\) At that time the reference for most-favoured-nation clause (privileges granted to the beneficiary state) was no longer to limited named countries, but any third state. Also since that time the use of most-favoured-nation clause in commercial treaties has been common practice.\(^\text{21}\) In a treaty between Great Britain and Portugal 1642 the clause acquired its most permanent characteristic, whereby Great Britain was entitled to enjoy all the immunities accorded to the subjects of any nations whatsoever in treaty relations with Portugal.\(^\text{19}\) Cobden Treaty January 1860 between United Kingdom and France was the first modern trade treaty, which included an unconditional most-favoured-nation clause.\(^\text{23}\)

The commitment of governments to establish international trade rules in 1940s relied on the non-discrimination principle as the cornerstone of the system depending on most-favoured-nation principle. Also there was a determination not to repeat the costly policy errors of the period following 1914-1918 war.\(^\text{24}\)

The United Nations and the Bretton Wood policy framework stated the institutional context for the international order in post war years. This

\(^\text{19}\) UNCTAD, Most-Favoured-Nation Treatment, Geneva, 13 (1999).
\(^\text{1}\) Mc Nair, supra note 16, at 273.
\(^\text{11}\) UNCTAD, supra note 19, at 13.
\(^\text{11}\) Mc Nair, supra note 16, at 73.
\(^\text{17}\) UNCTAD, supra note 19, at 13.
\(^\text{14}\) WTO, supra note 15, at 8.
was initially by establishing International Trade Organization (ITO), International Monetary Fund (IMF) and International Bank for Reconstruction and Development. The United Nations Conference on Trade and Employment 1946 was the first discussion on the proposed ITO. Preparatory committee spent the next year and a half in drawing up the ITO charter.25

Finally Havana Charter emerged, covering not only trade but also it contains a chapter on employment and economic activities, economic development, and inter-governmental commodity agreements.

Although the ITO Charter was finally agreed at a United Nations Conference on Trade and Employment in Havana 1948, it was not ratified in some national legislatures. The most serious was in the United States Congress; even though the United States government has been one of the driving forces. In 1950, the United States government announced that it would not ratify the Havana Charter, and the ITO was effectively dead.

Neither the Havana Charter nor the ITO came into existence. But the failure of ITO ensured the birth of GATT 1948.26 After the Second World War 1939-1945 exactly in the negotiations of Havana Charter most-favoured-nation clause was revived. Furthermore, the General Agreement on Tariffs and Trade (GATT) 1948 contains the most classical most-favoured-nation clause in Article 1. In relation to investment the most-favoured-nation clause became common in the 1950, at the time of conclusion of international investment agreements. 27

The most-favoured-nation clause is the key provision in GATT. When drafting the agreement it was proposed that the clause should be

---

25 WTO, supra note 1 at 10.
26 WTO, supra note 15 at 8.
27 UNCTAD, supra note 19, at 13.
excluded from GATT since Havana Charter was not adopted. On the other hand it was stated that most-favoured-nation clause was fundamental and could not be excluded, so it was not incorporated in GATT.\textsuperscript{28}

The most-favoured-nation clause in GATT and the charter is based on the standard that was recognized by the Economic Committee of the League of Nations. After the lead of the League of Nations there has been a tendency among writers to view the clause as a rule of international relations.\textsuperscript{29}

Article 1 Paragraph 1 of the General Agreement on Tariffs and Trade (GATT) provides that “any advantages, 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 the other contracting party”.\textsuperscript{30} The most-favoured-nation clause is well defined in the Agreement and its subsequent rounds of negotiations.\textsuperscript{31}

In the years prior to the establishment of the GATT trade relations had been bilateral in nature, in spite of the fact that the most-favoured-nation clause (MFN) principle had been used in these bilateral agreement.\textsuperscript{32}


\textsuperscript{\textdegree} Id.

\textsuperscript{\textdegree} Hector Gross Espiell, “\textit{the Most-Favoured-Nation, its Present Significance in GATT}”, in Journal of World Trade Law, Volume 5, 29 at 29 (1971).


\textsuperscript{\textdegree} WTO, \textit{supra} note 15, at 8.
From 1948 to 1994 the GATT provided the rules for much of world trade and presided over the highest growth rates in international commerce. Although the GATT’s legal text remained as it was in 1948, there were some additions in the form of “plurilateral” agreements, and efforts to reduce tariffs further continued, through a series of multilateral negotiations known as “trade rounds”. The biggest leaps forward in liberalization of international trade have come through these rounds.33

The reduction of tariff was the main feature of the eight trade rounds held under the auspices of GATT,34 specifically in the first five trade rounds i.e. the Geneva Round, Annecy Round, Torquay Round, Geneva Round 1956, and Dillon Round (1960-1961). In the Kennedy Round 1964-1967), Part IV on Trade and Development was added to the original GATT. It reflects the increasing involvement of developing countries in the GATT trading system, and to elaborate better rules on anti-dumping. In the Tokyo Round (1973-1979) the GATT continued its tariffs cutting, “addressed of non tariffs measures, and development agreements on government procurement, technical barriers to trade, subsidies and countervailing duties, customs valuation, import licensing, and anti-dumping”. These agreements were also known as “Tokyo Round Codes”, because they were not accepted by the full GATT Contracting Parties. The Tokyo Round was also notable for its attempt to codify treatment of developing countries in the multilateral trading system.35 The decision on differential and more favourable treatment, reciprocity and fuller participation of developing countries which is known as the

---

33 WTO, supra note 1, at 9-10.
34 Id at 10.
“Enabling Clause”, was the one of the achievement of the Round. It recognized that developed countries should not expect full reciprocity from developing countries. It also legitimized some other exceptions to MFN principle.36

The Uruguay Round (UR) 1986-1994) was the largest trade negotiations in the history. It covered almost all trade. It brought about the biggest reform of the international trading system since the GATT was created in (1948). The need to launch a new trade round was sown at a ministerial meeting of GATT members in Geneva (1982). “Nevertheless, it took four more years of exploring, clarifying issues and painstaking consensus-building before ministers agreed to launch a new round”. In 1986, in Punta del Este, Uruguay the new round was started. The accepted negotiating agenda covers very outstanding trade policy issues. All the original articles of GATT were up for review.37 Unfinished business from Tokyo Round was only a small part of the negotiating agenda of the Uruguay Round.38

The Uruguay Round encompassed traditional tariffs-cutting revised many areas where rules needed clarifying and strengthening, tackled long-standing and intractable issues such as textiles and clothing and agriculture, refurbished the dispute settlement system, instituted the trade policy review mechanism for examining the trade policies of individual countries, and took new issues of trade in services and trade related intellectual property rights.39 “In view of the extraordinary comprehensiveness of this agenda, it is not surprising that the Uruguay Round proved nearly as difficult to close as it was to launch”.

36 Id.
37 Id at 12.
38 WTO, supra note 15, at 11.
39 WTO, supra note 15 at 11.
In the field of tariffs, the Uruguay Round “saw average cuts of 40 percent on industrial products. Prior to the Round, developing countries had on average only bound 21 percent of their tariff lines”. This figure rose to 73 percent after the Round. Developed countries increased their shares of binding in total tariff lines from 78 percent to 99 percent, and transition economies from 73 percent to 98 percent. “These commitments added significantly to security and predictability of trade”. Moreover, all the qualitative restrictions and other non-tariffs measures used against import were replaced by tariffs.\(^{40}\)

A new safeguards agreement was established in the Uruguay Round. This new agreement instituted strengthened procedures and public accountability, combined greater flexibility to allow governments to take the necessary temporary measures to deal with pressing adjustment problems. Moreover, the provisions relating to antidumping and countervailing duties were strengthened as were those on state trading and technical barriers to trade, custom valuation, and import licensing procedure. A new definition of subsidies was established for the first time, clarified rules and remedies. Article XXIV of the GATT (customs unions and free trade areas) was clarified. New agreements on sanitary and phytosanitary measure were drawn up, as were rules of origin and import licensing procedures. An agreement on trade-related investment measures (TRIMs) seeks to regulate the use of investment-linked measures that affect trade.\(^{41}\)

The Uruguay Round Agreement on trade in services, commonly known as the General Agreement on Trade in Services (GATs), represents the first attempt to bring a sector of ever-growing importance

\(^{40}\) Id.
\(^{41}\) Id., at 12.
into the multilateral trading system, “Built on the conceptual foundation of the General Agreement on Tariffs and Trade (GATT), the GATS is both a set of rules and mechanism for progressively pursuing trade liberalization”. An important difference between GATT and GATS arises from the difference in nature between goods and services.\(^{42}\)

The agreement on intellectual property rights, known as the Agreement on Trade Related Aspects of Intellectual property Rights (TRIPS), is as remarkable as that on trade in services. It is the most important multilateral agreement on intellectual property rights: copyright and related rights, trademarks, geographical indications, patents, industrial designs, layout designs of integrated circuits, and undisclosed information.\(^{43}\)

Finally, after more than four decades of legal limbo, during which the original GATT was essentially a provisional arrangement, it was transformed into WTO, “a permanent organization with a sound legal basis”. It covers not only trade in goods, but also trade in services and intellectual property.

The dispute settlement mechanism is the major achievement of the Uruguay Round. It is the central pillar of the WTO trading system, and the “WTO’s most individual contribution to the stability of global economy”. A procedure for settling disputes existed under the old GATT, but it had no fixed timetables, and rulings were easily blocked. The Uruguay Round Arrangement introduced more defined stages of procedures. It introduced the length of time a case should take to be settled, with set of flexible deadlines in various procedural stages.

\(^{42}\) Id., at 12.
\(^{43}\) Id.
The Uruguay Round Arrangement was signed in April 1994 by ministers from most of the 123 participating governments at a meeting in Marrakech. Then the WTO came into effect on 1st of January 1995.44

(ii) Definition:

The most-favoured-nation clause is a treaty provision under which the granting state undertakes the obligation towards the beneficiary state to accord to it or to persons or things in a determined relationship, with its most-favoured-nation treatment in an agreed sphere of relations. The most-favoured-nation treatment means treatment not less favourable than that extended by the granting state to any persons or things in the same relations with that third state.45

The United States Friendship Commerce Navigation Treaties (FCN Treaties) defined the most-favoured-nation treatment as: “treatment accorded within the territories of a party upon terms no less favourable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other object, as the case may be, of any third party”.46

The International Law Commission defines the MFN as treatment “Accorded by the granting state to the beneficiary state, or to persons or things in a determined relationship with that state, not less favourable than treatment extended by the granting state to a third state or to persons or things in the same relationship with that third state”.47 Moreover, the

44 Supra note 1 at 13.
45 Endre Ustor, supra note 12, at 469.
47 E. M. Govern, supra note 8, at 197.
commission emphasizes that the obligation under most-favoured-nation clause gives rise for the mere fact that treatment is being extended to a third State.\textsuperscript{48}

The name most-favoured-nation clause means something very different from what the clause prima facie suggests. It suggests some kind of preferential treatment for one particular country, but the clause actually means non-discrimination or treating every one equally.\textsuperscript{49}

The most-favoured-nation clause is inter-states undertaking. Usually nationals, ships, products and so forth enjoy most-favoured-nation treatment through the beneficiary states, i.e. not an individual treatment.\textsuperscript{50} The parties to GATT are called “contracting parties” which should be understood to mean government or states applying the provision of this agreement, and any custom territory having full autonomy in conducting its external commercial relations.\textsuperscript{51} A custom territory is defined in Article XXIV (2) of the GATT as “any territory in which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such a territory with other territories”. It is important to note that absolute political sovereignty is not necessary for an entity to become a contracting party.\textsuperscript{52}

However, not all the treatment given by host countries to foreign investors or traders is covered by most-favoured-nation scope. In order to be covered the treatment had to be general treatment, usually provided to

\textsuperscript{48} Id.

\textsuperscript{49} WTO, \textit{supra} note 1, at 5.

\textsuperscript{50} Endre Ustor, \textit{supra} note 12, at 469.

\textsuperscript{51} Article XXXII of GATT.

\textsuperscript{52} V. A. Seyid Muhammad, \textit{supra} note 28, at 142.
specific foreign country traders. Therefore, there is no obligation under most-favoured-nation clause to treat foreigners equally, if a host country granted special privileges to individual investors in a contract for investment between it and the host country.

The most-favoured-nation clause could be considered as a limitation on states’ sovereignty, i.e. the rights of states to choose their economic system. Since the essential attitude of sovereignty is that a sovereign state should possess jurisdiction over all persons and things within its territorial limits.

(iii) Functions of Most-Favoured-Nation Clause:

The functions of the most-favoured-nation clause have been stated by the International Court of Justice in the case of United States Nationals in Morocco. In this case the court stated that the intention of the clause is to “establish and maintain at all times fundamental equality without discrimination among all of the countries concerned”.

The main function of most-favoured-nation clause is to establish an agency of equality of opportunities, and to prevent discrimination, i.e. to minimize discrimination and maximize favours given to any third states. Moreover, most-favoured-nation clause enables a country to enjoy treatment equal to that most-favoured third country, i.e. most-favoured-
nation clause leads to a permanent self-adaptation of treaties, and it contributes in rationalization of international economic relations.\textsuperscript{58}

The most-favoured- nation (MFN) principle pursues the aim of creating “fundamental equality without discrimination”. Its essential idea is that equality of legal treatment should be attained through the application. It transposes the equality under international law into the economic field corresponding closely to the ideas generally held when GATT was drafted. At that time it was believed that all the errors of the past could be corrected by liberalizing international commerce and applying the principle of equality among states which implies the corollary that each one should enjoy homogeneous and identical treatment.\textsuperscript{59}

This characteristic makes the most-favoured- nation clause a primary instrument for establishing of standard and equal rights in both legal and economic field.\textsuperscript{60}

Thus, the function of most-favoured-nation clause can be stated as establishing equality and avoiding of discrimination, self-adaptation of treaties to changes in circumstances. The elasticity of the clause and its automatic operation facilitate the continuous and universal application of the clause.\textsuperscript{61}

\textbf{(iv) Field of Application of the Clause:}

The areas in which the most-favoured-nation clause are used can be classified as follows:

\textsuperscript{6a} Schwerzenber, supra note 11, at 132-133.
\textsuperscript{5a} Hector Gross Espiell, supra note 30, at 35.
\textsuperscript{7a} Id.
\textsuperscript{71} Id, at 134.
(a) Trade and payment international regulation, e.g. export, import, custom tariffs.
(b) Transport generally and treatment of foreign means of transport, e.g. merchant ships, railways, aircraft and in particular motor vehicles.
(c) Establishing of foreign physical and judicial persons, their obligation and personal rights.
(d) Establishment of diplomatic agent and missions, their diplomatic immunities and privileges.
(e) Intellectual property, e.g. literary and artistic rights, and industrial property rights. In the license contracts most-favoured-nation clause is provided to ensure that the licensee will enjoy the most-favourable condition that may be granted to a second licensee.
(f) Justice administration, e.g. courts and tribunals access, and recognition and execution of foreign judgement.

These are the fields in which the most-favoured-nation clause is used, but the clause origin is widely used in international trade agreements. This international trade is central to human health, prosperity, and social welfare. Many of the goods we buy, the services we use and foods we eat depend on international trade.

(v) Most-Favoured-Nation Clause in WTO Agreements:

Under WTO agreements the most-favoured-nation principle is so important that it is the first article of the General Agreement on Tariffs and Trade (GATT) 1994, which governs trade in goods. In the General

\[ ^{17} \] Endre Ustor, supra note 12, at 468- 469.
\[ ^{17} \] WIPO, Background Reading Material on Intellectual Property, Geneva, 289 (1994).
\[ ^{17} \] Endre Ustor, supra note 12, at 469.
Agreement on Trade in Services (GATS) 1994 the most-favoured-nation clause is provided in Article II. Furthermore, the most-favoured-nation clause is stated in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) 1994, Article 4. These three agreements cover the main areas of trade handled by the WTO. This means that the WTO treats all countries alike, whether they are rich or poor, big or small, strong or weak. The WTO system is based on rules not on power. These rules apply to every one even the most powerful economic in the world.

(vi) The Original Rationale for Non-Discrimination in GATT:

After the Second World War 1939-1945 there was a need for reconstruction of world trade. Also there was a belief that world peace required healthy, realist flourished international economy. Moreover, government policies dictated only by domestic consideration, and the chaos in international trade in the inter-war years, for all these reasons there was strong intention to establish economic system based on non-discrimination and freest possible exchange of goods and services and most-favoured-nation clause will serve these aims. It should be emphasized that the most-favoured- nation clause “was conceived as the best means of upholding the principle of non discrimination and thereby

---

11 WTO, supra note 1, at 5.
17 Hector Gross Espiell, supra note 30, at 29.
68 WTO, supra note 65, at 4.
11 Hector Espiell, supra note 30, at 34.
of ensuring equality of competition within an economic framework inspired by the ideals of free trade”. 70

3. Types of Most-Favoured-Nation Clause:

Although there is great variety in the wording of the clause in treaties it has been customarily classified as of two main types: 71

(i) Conditional Most-Favoured-Nation Clause:

A state is entitled to claim for its nationals the best treatment, the greatest privileges granted by the other contracting parties to any third state in return for equivalent concessions, i.e. each state must give compensation in order that its nationals shall be entitled under the clause to the benefits of concession made to other states. 72 This form of the clause aims to treat the beneficiary state upon the same footing as the favoured third state. This model was used in the United States commercial treaties until 1923. 73 According to the International Law Commission’s (ILC’s) opinion, the conditional clause has been generally abandoned, although it is still used in consular relations. 74

(ii) Unconditional Most-Favoured-Nation Clause:

Under the unconditional clause a state is entitled to claim for its nationals, the most-favoured-nation treatment, granted by the other

---

70 Id.
71 Id., at 273. Some treaties grant privileges without condition or reciprocity, specialized reciprocal treatment only to favours mentioned in the treaty, qualified simple reciprocal and imperative of course the contracting parties are free to use appropriate language to make clear which type of the clause it applies.
72 Id. at 275.
73 Id., at 275.
74 Endre Ustor, supra note 12, at 469.
75 Ewa Butkiewicz, supra note 31, at 195.
contracting parties to the nationals of any third state, whether or not these privileges, and favours have been granted to a third state in return of equivalent concessions, i.e. immediately without being required to give any compensation.\textsuperscript{75} In practice the conditional most-favoured-nation clause lacks this automatic operation. “While no rule of international law prohibits states from including a conditional MFN clause in their treaties this form of clause has definitively fallen into disuse.\textsuperscript{76}

The British government and most other governments have maintained that in the absence of express provision to the contrary the clause must be regarded as unconditional.\textsuperscript{77} The clearest example of such a form is Article 1 of GATT which states “any advantage granted by any contracting party to any product shall be accorded immediately and unconditionally to the like product of the another contracting party”. Thus if country A agrees with country B (in trade negotiations), to reduce custom duties on imports of coffee from 15\% to 10\% this reduction must be extended to all WTO members.\textsuperscript{78}

The unconditional most-favoured-nation clause is the model required in multilateral trade negotiations, so that the benefits of the clause will be extended automatically to any member of multilateral group, whether they have participated in particular negotiation or not, i.e. if a WTO member grants to another country any tariff or other benefit to any product, this tariff or benefit must immediately and unconditionally be extended to the like product of the other members.\textsuperscript{79}

\textsuperscript{v} Mc Nair, \textit{supra} note 16, at 273.

\textsuperscript{76} Endre Ustor, \textit{supra} note 12 at 469.

\textsuperscript{vv} Mc Nair \textit{supra} note 16 at 273.

\textsuperscript{vA} ITC, Commonwealth Secretariat, \textit{supra} note 6, at 59.

\textsuperscript{v} Michael M. Hart, \textit{supra} note 9, at 39.
4. Experience and Implementation:

(i) Most-Favoured-Nation Clause in Investment:

In the matters concerning investment, the most-favoured-nation clause has the same basic structure. They are usually reciprocal, unconditional and apply to all investment related matters. But this does not mean that these clauses use identical language. Most agreements when defining the most-favoured-nation clause standard refer to “treatment no less favourable”, e.g. the General Agreement on Trade in Services (GATS) Article II. The North American Free Trade Agreement (NAFTA) includes the qualification that such treatment is applicable only in “like circumstances”\(^8\)

However, using different words gives no evidence that the parties to such agreements intended to give the most-favoured-nation clause a different meaning. Whatever the terminology used it does not change the most-favoured-nation non-discriminatory character among foreigners.\(^9\)

Also there are variations concerning the scope of application of the standard, for example the treatment sometimes covers specific mentioned goods. However, in other times it covers all goods without any limitation. The GATS applies the most-favoured-nation clause to all the measures covered by the agreements.\(^8\)

In spite of the application of the most-favoured-nation treatment in both trade and investment fields, the sphere of operation is different in each field. In trade, the most-favoured-nation clause applies to measures

---

\(^8\) UNCTAD, *supra* note 19, at 5-6.

\(^9\) Id, at 6.

at the borders (tariffs), while in investment the standard is applied in treating investors after their entry.\textsuperscript{83}

Furthermore, the most-favoured-nation treatment does not mean absolute equality between investors irrespective of their activities in a host country. Different objective situation justifies different treatment vis-à-vis investors from different foreign countries. NAFTA for example applies the most-favoured-nation clause only to investors and investment, which are in “like situation”.\textsuperscript{84} Thus the most-favoured-nation clause does not prevent giving different treatment to different sectors of economic activity, or enterprises of different sizes. Therefore, granting subsidies by a host country only to investment in, say high-technology industries does not constitute a violation to the most-favoured-nation treatment.\textsuperscript{85}

The most-favoured-nation clause prevents discrimination among investors from different foreign countries. Moreover, the clause helps to establish equality of competitive opportunities among them. But the most-favoured-nation clause has some exceptions.\textsuperscript{86}

(ii) The Most-Favoured-Nation Clause in U.S.A:

In the United States of America the most-favoured-nation standard has been used for a long time in Friendship, Commerce and Navigation Treaties. United States of America trade agreements before 1922 applied most-favoured-nation treatment to specific goods that were mentioned in the agreements. However, after that time it applied the unconditional most-favoured-nation clause. It is clear that the main aims of the

\begin{itemize}
\item\textsuperscript{At} UNCTAD, supra note 19, at 8.
\item\textsuperscript{A1} Id, at 7.
\item\textsuperscript{A2} Id.
\item\textsuperscript{A3} Id, at 8. The major exceptions to most-favoured-nation treatment are in Article XXIV of GATT, which allows members to form custom unions and free trade areas.
\end{itemize}
inclusion of the clause is to encourage trade and trade exchange between United States of America and other countries to the maximum level.\textsuperscript{87}

(iii) The Most-Favoured-Nation Clause in Sudan:

This clause of treatment is recognized expressly by the Sudan German Investment Protection Treaty (The Sudan-Federal Republic of Germany Encouragement of Investment Treaty 1963), to indemnify or compensate for losses resulting from revolution or war in the territory of each party. In fact this clause gives highest protection for German investors in the Sudan. If they were given national treatment in this treaty, they would get no protection, because the Sudanese who suffer losses to their property as a result of war or revolution receive no compensation.\textsuperscript{88}

Also the Sudan Swiss Investment Protection Agreement 1974 and the Investment Treaty between the Sudan and France 1979 refer to most-favoured-nation treatment in general terms.\textsuperscript{89}

These treaties “focus on protection of property against expropriation and other governmental measures affecting private property”.\textsuperscript{90}

(iv) The most-favoured-nation clause and Development:

The most-favoured-nation principle constitutes one of the basic legal rules designed to prevent economic discrimination between GATT Contracting Parties, and presupposes equality of states in their commercial dealings.

\textsuperscript{AV} Salah El Dien Nasigh, supra note 82, at 426.

\textsuperscript{AA} Fath El Rahman Abdalla Elshiekh, supra note 46, at 113.

\textsuperscript{A}\textsuperscript{A} Id.

The principle, by its nature is weighted in favour of rich developed
countries and hardly serves the development efforts of poor countries and
their effort to achieve growth through trade.\textsuperscript{91} Universal recognition to
this conclusion was produced by the First World Conference on Trade
and Development. The Secretary General’s Report to the conference
noted that: “... However valid the MFN principle may be in regulating
trade relations among equals, it is not a suitable concept for trade
involving countries of vastly unequal economic strength”.\textsuperscript{92}

This idea was emphasized by the representative of India at the
ninth session of GATT Contracting Parties in November 1964. He stated
that “equality of treatment is equitable only among equals”.\textsuperscript{93}

Thus, the most-favoured-nation clause as a means of achieving
equality cannot perform the function of stimulating international trade
between countries with different levels of development. On the contrary
its application leads to deepening the development between gap partners
and does not provide the weaker countries with equality.\textsuperscript{94}

In recognition of the inequality occasioned by the most-favored-
nation clause the GATT Part IV on Trade and Development and
Differential and More-favourable Treatment for Least-developed
Countries was introduced. It recognizes preferential tariffs as a permanent
feature of the multilateral trading system.\textsuperscript{95}

\textsuperscript{91} Esohe Aghanlise, \textit{Services and Development Process: Legal Aspect of Changing
Economic Determinants}, 24 JWTL, 103 at 106.
\textsuperscript{92} Hector Gross Espiell, \textit{supra} note 30, at 29.
\textsuperscript{93} Id, at 37.
\textsuperscript{94} Ewa Butkiewicz, \textit{supra} note 31, at 195.
\textsuperscript{95} Esohe Aghanlise, \textit{supra} note 91, at 110, More detailed information about GATT
Part IV and Differential and More favorable Treatment will come in chapter 3 of
thesis,
If it is agreed that members of international community have different levels of economic development, this difference should be taken into consideration when evolving rules to govern international trade among them. Such rules must provide for each group of member according to its development needs, in order to achieve the objectives of international trade as states in the preamble of the UN Charter.96

Thus the most-favored- nation clause as an expression of formal equality of countries cannot perform the function of stimulating international trade between countries with different stages of development. On the contrary, its application leads to deepening the development gaps between trade partners.97

5. Conclusion

The most-favoured-nation clause is a basic rule in international trade agreements. It requires that if a signatory member accords more favourable treatment to another country such as custom reduction it has to do the same for all the other members.

The clause has a long history in commercial treaties. It first appeared in the twelfth century, in an agreement between England and Continental Cities. In modern times the most-favoured-nation is the cornerstone of the GATT trading system.

The main function of the clause is to establish and maintain a fundamental equality among all the countries concerned. There are two main types of most-favoured-nation clause: conditional and unconditional. The most-favoured-nation clause applies in the areas of trade, investment, diplomatic relation, transportation, the recognition and

---

96 Id at 113.
97 Ewa Butkiewicz, supra note 31, at 195.
establishing foreign judicial person and intellectual property. Moreover, the principal sphere of most-favoured-nation clause is commerce.98

The trading system should be non-discriminatory. A country should not discriminate between its partners. They are all given most-favoured-nation treatment, and it should not discriminate between its local products, and foreign ones. More fundamentally the principle of non-discrimination ensures universality as central objective of the trading system.99 Finally, the most-favoured-nation clause is important to trade relations so as to help trade flow as freely as possible, not only trade in goods but also trade in services and intellectual property.

---

98 Mc Nair, supra note 16, at 273.
99 WTO, supra note 15, at 8.
Chapter Two

The Most-Favoured-Nation Treatment (MFN) In WTO Agreements

1- Introduction

The World Trade Organization (WTO) “is the only international organization dealing with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible”.¹

At the heart of WTO Multilateral Trading System is the WTO Agreement. A number of simple, fundamental principles run throughout these agreements. The most-favoured-nation clause constitutes a basic principle designed to prevent trade discrimination between states besides the national treatment. It is incorporated in the three main trade agreements handled by WTO. It is the first article in the General Agreement on Tariffs and Trade (GATT) which governs trade in goods. Also it is in the General Agreement on Trade in Services (GATS Article II) and in the General Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Article 4).

2. The World Trade Organization Regime

(i) The WTO Constitution

The WTO was established on 1 January 1995. It was created as a result of the Uruguay Round (1986-1994). It is the only international body which deals with rules of international trade. The WTO

---

Agreements, which are signed by the bulk of the world’s trading nations, provide the legal ground-rules for international trade.\(^2\)

**(ii) The WTO System**

The system of WTO consists of the following substantive agreements “Multilateral Agreements on Trade in Goods including the General Agreement on Tariffs and Trade (GATT 1994) and its associated Agreements; General Agreements on Trade in Services (GATS); Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); and other WTO legal instruments”.\(^3\)

These agreements provide the legal ground rules for international trade. The ability of industries and business enterprises to benefit fully from this rule-based system in today’s globalizing economy depends on their understanding of these detailed rules. Actually, these rules are voluminous and complex. It is difficult for business persons to understand these legal texts.\(^4\)

**(iii) The Principles of the Trading System**

The WTO Agreements are long and complex because they are legal texts, which cover a wide range of activities, but simple fundamental principles run through these agreements. These principles are:

\(^1\) Id.


(1) Non-discrimination principle including the most-favoured-nation and national treatment.

(2) Progressive liberalization, by lowering barriers to trade gradually, through negotiations.

(3) Predictability, that is, some WTO Agreements require governments to disclose their policies and practices publicly (transparency), “to ensure that trade barriers should not be raised arbitrarily”.

(4) Promoting fair competition, that is, the WTO system of rules are dictated to open, fair and undistorted competition. “The rules try to establish what is fair or unfair”.

(5) Preferential treatment for developing and least-developed countries, “by giving them more time to adjust and implement the agreements, flexible obligations and technical assistance”.

(iv) Structure of WTO

The Ministerial Conference is the highest authority in WTO. It has to meet at least once every two years. It can take decisions on all matters of WTO agreements. The General Council works during the two years between meetings. It acts on behalf of the Ministerial Conference in all WTO affairs. The General Council meets as Dispute Settlement Body and Trade Policy Review Body for settling disputes between members and to analyze members’ trade policy. The Council for Trade in Goods, Council for Trade in Services, and Council for TRIPS assist the General Council to carry out its work.

---

6 WTO, the Understanding the WTO, 10-11(3 rd ed. 2003).
(v) The WTO Secretariat

WTO is located in Geneva, Switzerland. The Director-General, who is appointed by the Ministerial Conference, is the head of it. He is instructed to review all matters relating to cooperation with the international organization.7

(vi) Decision-making Process

The WTO continues the GATT tradition of making decision by consensus. This enables all members to ensure that their interests are properly considered. The WTO Agreement Article IX allows voting by a majority of votes, and on the basis of “one country, one vote”. WTO here is different from some other international organizations such as World Bank and International Monetary Fund, which delegated its powers to a board of directors or the organization head.8 However there are four situations where specific voting is required. These are:

1- The interpretation of the provisions of any of the agreements require three-quarters of majority.
2- Amendments for provisions of multilateral Agreements can be adopted by all members or two-thirds majority.
3- Requests to waive an obligation imposed on a member require a three-fourths majority.
4- Decision to admit a new member is taken by a two-thirds majority.9

---

7 WTO, supra note 1, at 1. See WTO Agreement Article IX.
8 WTO, supra note 6, at 100-103.
9 Id at 103. See WTO Agreement Article IX and X.
(vii) The WTO Objectives

The preamble of the Marrakesh Agreement Establishing the World Trade Organization provides that the WTO reiterates the objectives of GATT. These are members economic relations should be conducted with a view to raising standards of living, ensuring full employment and steadily growing volume of real income and effective demand, developing the full use of resources of the world and expanding the production and exchange of goods.\(^\text{10}\)

Simply stated, the main goals of WTO are to improve the welfare of the people of the member countries.\(^\text{11}\)

(viii) Functions of WTO

The WTO’s functions are mentioned in the Article III of the WTO Agreement as follows: “WTO shall facilitate the implementation, administration and operation of the WTO agreements; it shall provide a forum for further negotiations, in matters dealt with in the Agreements of the WTO, and their implementation; handling trade disputes and; it shall administer the Trade Policy Review Mechanism; and it shall carry out cooperation with international organizations.\(^\text{12}\)

(ix) WTO Membership and Accession

WTO has 148 members.\(^\text{13}\) Any state or custom territory having full autonomy in conducting its trade policy may accede to the WTO. A country applying for membership has to describe all aspects of its trade and economic policy, and bring its national legislation in conformity with

\(^{1}\) Zeinab Jaffer Mohamed Ali, supra note 3, at 15. See GATT Preamble.

\(^{11}\) WTO, supra note 1, at 1.

\(^{11}\) Id. See WTO Agreement Article III.

\(^{17}\) WTO home page on the Internet (http://www.wto.org), WTO Members.
the rules of the WTO Agreements. It has to make commitments to open its market for foreign goods and services. These are the price or the ‘entry ticket’ to accede to WTO.14 Finally the Ministerial Conference by two-thirds majority votes in favour of the applicant, and then the applicant can accede WTO.15

Obviously accession procedure to the WTO are too complicated. Countries that are negotiating accession to the WTO (observers) are not granted rights that they are entitled to and which are already enjoyed by the Members of the WTO.16

There are other negotiating memberships (observers). The Sudan is one of them. It has presented its application since 1994 but has not become a member yet.17

The accession procedure should be simplified. The WTO should work expeditiously towards bringing the candidates awaiting accession into the multilateral trading system.

3. Most-Favoured-Nation Clause in the General Agreement on Tariffs and Trade (GATT)

(i) The General Agreement on Tariffs and Trade (GATT 1994)

It is better to clarify that the General Agreement on Tariffs and Trade (GATT 1994) has two things: (I) an international agreement, i.e. a document law setting out the rules for conducting international trade in

---

15 WTO, supra note 6, at 105.
17 Internet, supra note 13.
goods, and (2) an ad hoc international organization created to support the agreement. It is a parliament and a court combined in a single body.¹⁸

GATT, the international organization of 1948 no longer exists. It has been replaced by the World Trade Organization (WTO). Although the GATT and WTO are not the same, WTO is GATT plus much more, i.e. the GATT system is now replaced by the WTO and the agreements in the Uruguay Round package.¹⁹

The General Agreement on Tariffs and Trade (GATT 1948) always dealt with trade in goods and still does. It has been amended and incorporated into the WTO agreements. The updated version is called GATT 1994. It lives along side the new agreements: the General Agreements on Trade in Services (GATS) and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); and other WTO legal instruments.²⁰

Those responsible for drafting the GATT did their best to base the new system on principles of non-discrimination, and their endeavours are reflected at many points in the text of the Agreement. The first well-known concern is discrimination between foreign countries, and the principal means used by GATT to achieve equality is the standard of the most-favoured-nation treatment. The second kind of discrimination is that against foreign countries (national treatment).²¹

(ii) GATT 1948 and GATT 1994

The GATT 1948 as negotiated among its 22 original participants (Contracting Parties) laid down central principle which guided national

---

¹⁸ WTO, supra note 1, at 14.
¹⁹ WTO, GATT Introduction, at 5.
²⁰ WTO, supra note 1, at 14.
trade polices and stated the basis on which governments were able to extend their multilateral trade cooperation. From 1948 to 1994 the General Agreement on Tariffs and Trade provided rules for much of the world trade and presided over, the highest growth rates in international trade.

The GATT 1994 “is a basic set of trade rules, largely taken over from the GATT 1948, that in conjunction with the other agreements in Annex 1A to the WTO Agreement now represents the goods-related obligation of WTO member”. Most of the provisions of GATT 1948 are incorporated in GATT 1994 by reference; the GATT 1948 is no long in effect. The GATT 1994 emerged from Uruguay Round; it was signed by 123 member countries.

(iii) The Main Rules of GATT 1994

The entire edifice of GATT’s liberal and open multilateral trading system is based on four simple rules. The first rule, permits members to protect domestic production from foreign competition. Protection is extended only through tariffs and is kept at reasonably low levels. The principle of protection by tariffs prohibits member countries from using quantitative restrictions on imports. However, this rule has some exceptions.

The second rule provides, tariffs should be reduced and bound against further increases. This rule requires countries to protect their

---

11 WTO, GATT Introduction, at 5.
12 WTO, supra note 1, at 9.
13 Id at 6-7.
14 ITC, Commonwealth Secretariat, supra note 4, at 56. The most important exception is that permits countries “that are in balance-of-payments difficulties to restrict imports in order to safeguard their external financial position”.

33
domestic products by reducing tariffs and where possible, eliminating it through negotiations among member countries and that tariffs so reduced should be bound against further increases.\textsuperscript{26}

The third rule stipulates that trade should be practiced according to most-favoured-nation clause. This principle means that if a member country gives to another country any tariff or other benefit to any product, it must immediately and unconditionally extend it to the like product of the other members. All export and import barriers logically are governed by this rule.\textsuperscript{27}

The fourth rule provides for National Treatment. The national treatment complements the most-favoured-nation principle. It requires member countries to treat imported product on the same footing as similar locally produced goods. This rule is helpful to secure equality in issues of internal taxes and regulations.\textsuperscript{28}

**(iv) Most-Favoured-Nation in GATT Article 1**

The most-favoured-nation clause is vital to the international trade regulations. It is the third rule of GATT. Moreover, the rules requiring non-discriminations treatment are found in many places of the Agreement. The most important one is Article 1 Paragraph 1 of the GATT. It states that:

> 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 method of levying

\textsuperscript{17} Id at 57. See GATT Preamble and Article XXVIII.

\textsuperscript{19} E. M. Govern, \textit{supra} note 21, at 187.

\textsuperscript{18} Id. See GATT Article III.
such duties and charges, and with respect to all rules and formalities in connection with importation or exportation, and with respect to all matters referred in paragraph 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 territory of all other Contracting Parties.

The obligation to extend most-favoured-nation treatment applies to imports as well as exports. Thus, “if a country levies duties on export of a product to one destination, it must apply it at the same rate to exports to all destinations.” Moreover, the obligation under Article 1:1 to give most-favoured-nation treatment is not confined to tariff. It also applies to interpretation and application of Article 1:1 (a) “Custom duties and any kind of charges imposed in connection with importation and exportation”.

The Chairman of the Contracting Parties gave a ruling that the most-favoured-nation obligations “extended to any advantage, favour, privilege or immunity granted with respect of internal taxes”. He also gave a ruling that the Consular Taxes were included in scope of the word “charge of any kind”.

\textsuperscript{11} ITC, Commonwealth Secretariat, \textit{supra} note 4, at 60.
\textsuperscript{12} Id.
It has been argued that Article 1:1 might not be applicable to countermeasure against unfair trade practices. “such as countervailing duties imposed on subsidies import, because these are inherently discriminatory”, and the only applicable Anti discriminatory rule is that of Article XX(d).\(^{32}\)

(b) The method of levying tariffs and such charges. At the Twenty-Fifth Session, the Director-General was asked for a ruling on whether parties to the Agreement when implementing Article VI of the GATT have a legal obligation under most-favoured-nation treatment of Article 1 of the General Agreement on Tariffs and Trade to apply the provisions of Anti-Dumping Code in their trade with all the Contracting Parties of Agreement. The Director General replied that

In my judgment the words of Article 1. “the method of levying duties and charges (of any kind) and ‘all rules and formalities in connection with importation’ covers many of the matter dealt within the Anti-Dumping codes, such as investigation to determine normal value or injury and the imposition of anti dumping duties...”.\(^{33}\)

(c) All rules and formalities in connection with importation and exportation. The Panel Report on United States Denial of Most-Favoured-Nation Treatment as to Non-rubber Footwear from Brazil\(^{34}\) includes the following finding: “the Panel considered that the rules and formalities applicable to countervailing duties,

\(^{32}\)E. M. Govern, supra note 21, at 199. 57.\(^{33}\)See GATT Article XX (d).
\(^{34}\)WTO, Guide to GATT Law and Practice, volume1, 30 (1995).
\(^{35}\)Id.
including that applicable to the revocation of countervailing duty order are rules and formalities imposed in connection with importation, within the meaning of Article 1:1.

(d) Matters referred to in Paragraphs 2 and 4 of Article III in other words internal taxes and charges on imported goods, and laws, regulations and requirements that affected their sale. In 1948 Chairman of the Contracting Parties ruled that the most-favoured-nation obligations extended to any advantage, favour, privilege or immunity granted with respect of internal taxes. He also ruled that the consular taxes were included in scope of the word “charges of any kind”.35

Paragraph 2 of Article III is applicable to taxes imposed on products (such as sale and purchase taxes), i.e. indirect taxes, whereas Paragraph 4 of Article III applies the principle of non-discrimination to serve kind of internal regulation.

The product of the territory of any contracting party imported into the territory of any other Contracting Party shall be accorded treatment not less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirement affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provision 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.

A panel reported in 1958 on Italian subsidies to purchase domestic produced tractors “insure that by using the word ‘affecting’ this provision

---

35 E. M. Govern, supra note 21, at 199.
36 Id at 192.
covered any law or regulations which might adversely modify the condition of competition between domestic and imported goods, such laws did not have to govern sale ...”.

(e) Any advantage, favour, privilege or immunity granted by any Contracting Party…”.

“Duty waiver conditional on certification by particular government was considered by 1981 Panel Report on European Economic Community (EEC) imports of Beef from Canada is inconsistent with principle in Article I of GATT.

The 1988 Panel Report on “Japan Trade in Semi Conductors” examined the argument of EC that the system of “third country market monitoring instituted by the Japan-USA Agreement on Trade in Semi Conductors was inconsistent with Article I of GATT since it was applied to export of Japan to 16 countries, 14 of which were members of GATT. The system violates Article I since Japan granted immunity to 14 Contracting Parties.

(f) Originating in or country of origin: Word originating in is used in the Agreement to exclude the concept of Provenance. As stated at London Session of Preparatory Committee, “what you need to obtain the benefit of the minimum rates is to prove the origin and those rates would apply even if the product entered the importing country by the way of third party.

38 WTO, supra note 33, at 29
39 Id.
40 Id at 32-33.
The national origin of goods is significant for trade regulation notably those where preferences are given to the goods of particular countries. The Annex of Kyoto Convention on Simplification and Harmonization of Custom Procedure 1974 set out exclusive list of goods originating in the country by the reason that they are “wholly produced” there, for example:
- mineral products extracted from its soil.
- vegetable products harvested in that country.
- live animal born and raised in that country and their products.
- product obtained from hunting or fishing conducted in that country.
- maritime fishing and other product taken from the sea by a vessel of that country and product aboard factory ship of the country.\(^{41}\)

Where the production of the goods has taken part in two or more countries the origin is to be determined according to “substantial transformation” i.e. the country where the last substantial processing has been carried out. Accessories, spare parts and tools for the use of machine have the same origin as the machine.\(^{42}\)

(g) Shall be Accorded Immediately and Unconditionally: The International Law Commission ensure that it is the mere fact of treatment being extended to a third state which gives rise to the obligation. Any other surrounding circumstances or obligations are irrelevant. However, where a third state is in situation to claim certain treatment the assumption is that a beneficiary state may also claim that treatment even if the third state has not yet actually exercised its claim.\(^{43}\)

\(^{1}\) E. M. Govern, supra note 21, at 126.
\(^{1}\) Id at 127.
\(^{1}\) Id at 197.
Furthermore, the 1952 Report of the Working Party of GATT noted that “a reciprocity clause was considered by the majority of Members of the Working Party to be inconsistent with Article I of the General Agreement”.44

(h) Like Product: The notion of like product is an essential part of any non-discrimination rule.45 At Havana Conference, it was suggested that the method of tariff classification could be used to determine whether product were “like product” or not.46 The simple criterion of likeness is the one which relies on physical characteristic, whereas more realistic test to determine likeness is one that takes account of economic functions.47 GATT Working Party and Panel relating to the test of likeness have adopted a pragmatic approach. In the Panel Report on “EEC Measures on Animal Feed Proteins” examined EEC measures requiring domestic producers or importers of oil seeds, cakes and meals, dehydrated fodder and compound feed. The Panel conclude that “these various protein could not be considered as like product within the meaning of Article I and Article III”.48 In the Panel Report on Spanish Tariff Treatment of raw coffee been imported it was decided that the different kinds of coffee (Colombian mild, other mild, and

---

45 E. M. Govern, supra note 21, at 188.
46 WTO, supra note 33, at 35.
47 WTO, supra note 33, at 188.
unwashed Arabicas) were like product. So requirement of GATT Article I:I applied to all coffee beans.49

4. The Most-Favoured-Nation Treatment (MFN) In the General Agreement on Trade in Services (GATS)

(i) Background

“During the 1970s the traditional focus on the worldwide trade in merchandise goods began to give way to a more comprehensive approach which recognized the importance of trade in services as well as goods”. This has occurred, because of, firstly, the growing realization that services comprise a significant part of international trade, although few policy makers have recognized that the world trade services market has expanded dramatically in the past ten years. Secondly, trade in services has been left untouched by international negotiating forums. The major trading initiative focused on the problems of trade in agricultural products and manufactured goods. Still there is no recognized international regulatory framework for the world trade in services. And few rules governing trade in services have been developed. Moreover, many governments have created barriers restricting the market access of foreign services industries to their countries. Only in 1980s was there a beginning of a consensus among nations to contribute in liberalization of the international trade in services. Developed countries had taken such liberalization measures under agreement reached under the auspices of the Organization for Economic Co-operation and Development (OECD).50

---

49. E. M. Govern, supra note 21, at 189.
Moreover, the recent achievement in the field of trade in goods has led to the recognition that services constitute a large and important part of international transaction. Consequently, more attention is being paid to trade in services especially by developed countries.\textsuperscript{51}

The United States had been the leader in recognizing the importance of services industry in its own domestic and international foreign trade. This is not surprising because it has the largest portion of its economy involved in the production of services and international trade of services.\textsuperscript{52}

Services constitute a sensitive body of transaction which border on national security and sovereignty of states. Thus, if GATT rules of trade in goods are to be applied to services, this would result in serious infringement on the rights of some countries, on their sovereignty, national security and other sensitive issues. As a result of this fear, the Declaration on the launch of the Uruguay Round decided that trade in services would not be placed within GATT Framework, even though its practices and procedures would govern the negotiations.\textsuperscript{53} The launch negotiations on trade in services was declared to aim at establishing a multilateral framework of principles and rules for trade in service.\textsuperscript{54}

Prior to the Uruguay Round, international trade in services was not subject to any discipline. The General Agreement on Trade in Services (GATS), which was negotiated in the round, takes a first major step

\begin{thebibliography}{9}
\bibitem{Benz} Steven F. Benz, \textit{supra} note 50, at 97.
\bibitem{Benz1} Id, at 103.
\bibitem{Benz2} Id, at 104.
\end{thebibliography}
towards bringing the trade in services gradually under international
discipline.55

(ii) Definition of Services

Theoretically, it is difficult to define services. One definition
depends on the output of the production process and the invisible or
intangible nature of the service product.56 However, this description is
limited as more as some services are visible such as consultant report on
diskette57 and construction and engineering services.58 Another definition
defines services as “being any production activity that is not
manufacturing, mining or agriculture. This is a negative definition which
attempts to define services by what they are not.59

Practically, we must define services as a very diverse group of
economic activities “that often has little in common with one another”,
other than the fact that their primary outputs for the most part of them are
intangible products.60 The WTO Secretariat has divided these divergent
economic activities into the following 12 sectors including business
services; communication services, construction services; distribution
services; education services; environmental services; financial services
(insurance and banking); health services; tourism and travel services;
recreational services; transport services; and other services not included
elsewhere.61

---

55 ITC, Commonwealth Secretariat, supra note 4, at 194.
56 Steven F. Benz, supra note 50, at 95.
57 ITC, Commonwealth Secretariat, supra note 4, at 192.
58 Steven F. Benz, supra note 50, at 96.
59 Id.
60 Id.
61 ITC, Commonwealth Secretariat, supra note 4, at 192.
The GATS Agreement recognizes that trade in services takes place in the following modes:

1- Cross-border movement of services products from the territory of one member into that of another;
2- Movement of Consumers to the country of importation: e.g. tourism;
3- The establishment of commercial presence (e.g. branches or subsidiary) in the export market; and
4- Temporary movement of natural persons to another country in order to provide services there.

(iii) Differences between Goods and Services

The main characteristic of services is that they are intangible and invisible, whereas, goods are tangible and visible. Furthermore, services unlike goods cannot be stored. While the international trade in goods involves the physical goods movement from one country to another, only few service transactions entail cross-border movements, such as services that can be transmitted by telecommunications (e.g. transfer of money through banks) or services imbedded in goods (e.g. a report by technical consultant or software on a diskette).

(iv) Scope of The GATS

The Agreement covers all internationally-traded services in any sector except services supplied in exercise of governmental authority.

---

62 Id., at 193.
and most of the air transport sector, traffic right and services related to it are also excluded from GATS’ coverage.\textsuperscript{65}

\textbf{(v) The Most-Favoured-Nation Treatment (MFN) In GATS}

In trade of goods, the MFN principle requires a country to extend any “advantages, favours or privileges” it grants to another country to all other countries (unconditional treatment).\textsuperscript{66}

GATS imposes the MFN principle in Article II (1) of the Agreement which provides: “with respect to any measure covered by this Agreement, each member shall accord immediately and unconditionally to services and services suppliers of any other member treatment no less favourable than that it accords to like services and services suppliers of any other countries.”.\textsuperscript{67} The MFN obligation in Article II (1) of the Agreement requires members to grant to all other WTO members the best treatment that they give to services and services suppliers of any other country.\textsuperscript{68} Newly acceding countries have the same right. “The obligation to extend such treatment applies on both de jure and de facto basis”.\textsuperscript{69}

The most-favoured-nation principle is a powerful means of liberalization and guarantee of market access in trade in services.\textsuperscript{70} However, the principle is not unqualified. Article II of GATS recognizes that not all countries may be able to assume such an obligation

\textsuperscript{66}Id.
\textsuperscript{67}WTO, \textit{supra} note 64, at 99.
\textsuperscript{69}ITC, Commonwealth Secretariat, \textit{supra} note 4, at 198.
\textsuperscript{70}WTO, \textit{supra} note 64, at 99.
immediately. Moreover the Article permits members to maintain exemption to MFN principle. Under this exemption more favourable treatment is given to some trading partners. Moreover, the GATS provides that a country could, if it so wishes, maintain measures that are inconsistent with MFN principle for a maximum transitional period of ten years. They are to be abolished after the ten years, (i.e. by January 2005).

The GATS Agreement applies MFN treatment in respect of any measure affecting trade in service directly or indirectly. This means that irrespective of the concrete wording, the aim is to cover all possible investment of operation”. Thus, the scope of most favoured nation clause is very broad; it should be applied to non-schedule and schedule services.

The unconditional MFN clause is a main pillar of the GATS. It insures that the benefit of any agreement negotiated elsewhere on services should be granted to all WTO Members.

5. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

(i) Background

The subjects of trade-related aspects of intellectual property rights (IPRs) were included in the Punta del Este Ministerial Declaration (1986)

---

71 ITC, Commonwealth Secretariat, supra note 4, at 198.
72 WTO, supra note 64 at 6, also see GATS Article II (2).
73 ITC, Commonwealth Secretariat, supra note 4 at 198, see GATS Annexes on Article II.
74 UNCTAD, supra note at 63 at (6), see GATS Article I(3).
75 WTO, supra note 68 at, p.9.
76 Id.,
as one of the new issues to be negotiated in the Uruguay Round.\textsuperscript{77} Moreover, “the gradual shift towards high value based industries has made intellectual property an important issue in international trade relations”\textsuperscript{78} The outcome of the negotiations is contained in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).\textsuperscript{79} Thus, intellectual property has become a part of the multilateral trading system handled by the WTO.\textsuperscript{80}

The starting point of the WTO Agreement on (TRIPS) is the obligation of the main international agreements of the World Intellectual Property Organization (WIPO) which existed before WTO, namely, the Paris Convention on Protection of Industrial Property (1967), the Berne Convention for Protection of Literary and Artistic Works (1971), the Rome Convention for Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961), and the Washington Treaty on Protection of Integrated Circuits (1989).\textsuperscript{81}

The TRIPS Agreement is an attempt to narrow the gaps in the way intellectual property rights are protected which vary widely from one country to another.\textsuperscript{82} The Agreement provides for minimum international standard of protection of intellectual property rights. It also contains provisions aimed at the effective enforcement and reduces distortions of

\textsuperscript{77} UNCTAD, supra note 63, at 165.
\textsuperscript{78} Id, at 165.
\textsuperscript{79} UNCTAD, supra note 63, at 165.
\textsuperscript{80} WTO, Electronic Commerce and the Role of the WTO, at 59 Geneva (1998).
\textsuperscript{81} ITC, Commonwealth Secretariat, supra note 4 at 240 Actually, almost all the substantive provision of the Paris convention and the Berne are incorporated in the TRIPS by reference.
\textsuperscript{82} WTO, WTO Policy Issues for Parliamentarians, at 23, Geneva (2001).
these rights,\textsuperscript{83} taking into account the need to ensure that measures and procedures to enforce intellectual property rights “do not themselves become a barrier to legitimate trade”.\textsuperscript{84}

**(ii) Definition of Intellectual Property Rights**

Intellectual property objects are the creation of human mind, the human intellect, thus the designation of intellectual property. It include copyright and related rights and industrial designs.\textsuperscript{85} Intellectual property rights (IPRs) are the legal rights which result from intellectual activities in industrial, scientific, literary and artistic fields.\textsuperscript{86} The creator has the right to use and to prevent others from using their creation, and to negotiate payment in return for the others using them.\textsuperscript{87}

**(iii) Objectives for Protection of Intellectual Property**

Countries protect intellectual property for two reasons: one, to give statutory expression to the moral and economic rights of creators in their creations and the rights of the public in access to these creations. The second is to promote creativity and publication of its result, and to encourage fair trading which would contribute to social and economic welfare.\textsuperscript{88} According to TRIPS Agreement provisions the protection and enforcement of IPRs should contribute to promotion of technology

\textsuperscript{83} WTO, \textit{supra} note 64 at 102.

\textsuperscript{84} UNCTAD, \textit{supra} note 63, at 167, see the TRIPS Agreement Preamble.

\textsuperscript{85} ITC, Commonwealth Secretariat, \textit{supra} note 4 at 238.


\textsuperscript{87} WTO, \textit{supra} note 64 at 39.

\textsuperscript{88} WIPO, \textit{supra} note at 86 at p.3.
innovation and to the transfer of technology, and “the balance of rights and obligations”. 89

(iv) Scope of TRIPS Agreement

The TRIPS Agreement covers: copyright and related rights, trade marks, geographical indications, patent, industrial designs, integrated circuit and undisclosed information. 90

(v) The Most-Favoured-Nation Treatment under TRIPS

Article 4

The TRIPS Agreement contains the most-favoured-nation principle, which has not been provided for in the context of intellectual property right on the multilateral level, i.e. treaties on intellectual property are silent on most-favoured-nation treatment. Their focus is on national treatment. 91 The principle states that if the protection conferred on the nationals of member country were more favourable than those granted to the nationals of other countries whether a member or not, such higher protection would have to be immediately and unconditionally extended to the nationals of the latter members by virtue of the most-favoured-nation treatment. 92

Article 4 provides that “with regard to the protection of intellectual property any advantage, favour, privilege or immunity granted by a

89 UNCTAD, supra note 63 at 167.
90 Id, at1p.65.
91 WIPO, supra note 86 at 374.
member to the nationals of the other country shall be accorded immediately and unconditionally to the nationals of the other members.”

The most-favoured-nation obligation of the Agreement became applicable to all members from 1 January 1996, even to those members that avail themselves of the transitional periods in the TRIPS Agreement.93

The obligation under Article 4 of the TRIPS Agreement is that a member must give effect to the provision and accord the most-favoured-nation treatment provided for in the Agreement to the national of other member. “A national” is understood as meaning those natural and legal persons who would be eligible for protection if all WTO Members were also bound by the Paris, Berne, Rome Convention and the Washington Treaty on Protection of Integrated Circuits.94

One of the permitted exceptions to the most-favoured-nation treatment under Article 4 of TRIPS relates to the international agreement made before entry into force of the WTO Agreements, and notified to the Council of TRIPS, namely, Paris, Berne, Rome and WIPO Conventions.95

6. Conclusion

The WTO Agreements provide the legal framework of the multilateral trading system, a forum for negotiations, dispute settlement, monitoring national trade policy and technical assistance for developing countries.

This survey shows that the most-favoured-nation principle is so important that it has been incorporated in the main three trade agreements of WTO. It is the first article of GATT, which governs trade in goods.

94WIPO, supra note 86, at 346.
95 UNCTAD, supra note 63 at p. 169.
Also the principle has a priority in the GATS and TRIPS, although the principle is handled differently in each agreement.
Chapter Three

Exceptions to the Most Favoured Nation Principle in WTO Agreements

1. Introduction

In spite of the existence of the most-favoured-nation (MFN) principle in the main three trade agreements carried under WTO (GATT, GATS, and TRIPS), countries are allowed, in limited circumstances, to discriminate between their trade partners. But the Agreement only permits these exceptions under strict conditions.

In this chapter I will discuss and explain the exceptions to the most-favoured-nation (MFN) principle allowed under WTO trade agreements. The provisions permitting the exception can be categorized as follows:

(a) Exception concerning protection of public order, public health or public morality.
(b) Exception based on development and regional development purposes; and
(c) Exception to protect national security.

2. Exception to the Most-Favoured-Nation in GATT

The General Agreement on Tariffs and Trade (GATT) provides the following exceptions to the most favoured nation standard:

(i) Historical Preference under Article I paragraphs 2 and 3

Paragraphs 2 and 3 of GATT Article 1 provide for the continuation of certain existing preferential trade arrangements in force at the time the
GATT came into effect, (the grandfathers). These include the existing British Imperial Preferences, preferences granted by the French Union, preferences given by the Benelux countries and the United States, exchange between Chile and its neighbours, and the preferences given by Libnano-Syrian Customs Union to Palestine and Jordan. In fact it was agreed that the grandfathers exemption to the most -favoured- nation principle refers only to tariffs margin and has nothing to do with quotas. However, many of the above mentioned preferences were terminated, and their significances reduced in the course of multilateral tariffs cutting exercised, although some of them still exist.

(ii) General Exception GATT Article XX

The preamble to Article XX states a MFN obligation that “national measures must not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail”. The above principle came up in 1982 panel report on the case of United States Prohibition of Import of Tuna and Tuna products from Canada (US V. Canada). The panel examined US prohibition on imports of tuna and tuna products from Canada. The panel noted that “the US action has been taken exclusively against imports of tuna and tuna products from Canada but similar action had been taken against imports from Costa-Rica, Ecuador and Mexico for similar reasons”. The panel

1 WTO, Regionalism and the world Trading System, at 7 (1995), see Art. 1 para 2.  
3 WTO, Supra note 1, at 7, for the full text of the grandfathers preferences read GATT Art. 1 para 2 and 3 and the Annexes on this article.  
4 See GATT Article XX.  
concluded that the discrimination of Canada in this case might not necessarily have been arbitrary or unjustifiable.

Moreover, Article XX of GATT allows a member to derogate from the most-favoured-nation (non discrimination principle) if the measure taken is:

(a) Necessary to protect public morals. For example United States law prohibits the import of any book, writing, advertisement containing any matter advocating treason, immoral articles, and drugs or other articles used for causing unlawful abortions.⁶

(b) Necessary to protect human, animal or plant life or health whether it relates to food and drugs law, or animal and plant conservation.⁷

The Panel Report on “Thailand-Restrictions on Importation of Internal Taxes on Cigarettes”⁸ examined measures by Thailand prohibiting imports of cigarettes. Thailand claimed the restrictions granted were justified under Article XX(b) because this measure had been adopted by Thailand to control smoking and because additives in United States cigarettes make them more harmful than locally produced ones. The panel heard an expert of the World Health Organization (WHO). In agreement with the expert from WHO the panel accepted that smoking constitutes a serious risk to human health, and consequently measures taken to reduce consumption of cigarettes fell within the scope of Article XX (b). However, for a measure to be covered by this article it had to be “necessary”.⁹

⁷ Id., at 302-303. See GATT Art. XX(b).
⁹ In the above mentioned Report the panel stated that “a contracting party can not justify a measure inconsistent with other GATT provisions as “necessary” if an
(c) Relating to the importation and exportation of gold or silver, including gold coins.  

(d) Necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of GATT, including those relating to custom enforcement, the protection of patent, trade marks, and copyright, and the prevention of deceptive practices. 

(e) Relating to the product of prison labour, e. g. laws that prohibit entry of convict-made goods or the product of forced labour.  

(f) Imposed for protection of national treasures of artistic, historic or archaeological values, such as Paris Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.  

(g) Relating to conservation of exhaustible natural resources, if such measures are made effective in conjunction with restriction on domestic production or consumption. In the panel Report 1988 On Canada- Measures Affecting Export of unprocessed Herring and Salmon, the panel “agreed with the parties that salmon and herring stocks are exhaustible natural resources”. 

alternative measure that consistent with other GATT provisions is available. WTO, supra note 2, at 266. See Art. XX. 

10 WTO, supra note 2, at 573. also see Art. XX(c) of GATT. 

11 Id., 

12 Edmond Mc Govern, supra note 6, at 313. Also see GATT Art. xx(f). 

(iii) National Security Exception Article XXI

The Treaty Establishing the European Community refers to “public policy, security or health”.\(^{14}\) Also the national security exception is found in GATT in Article XXI. According to this Article nothing in the GATT shall be construed:

a) To require any member to furnish any information the disclosure of which is considered contrary to its “essential security interests”; or prevent a member from taking an action it considers necessary to protect its essential security; or

b) To prevent a member from taking an action to meet its obligation under the United Nations Charter for the maintenance of international peace and security or for the protection of its essential security interest:\(^{15}\)

i. Relating to fissionable materials or the materials from which they are derived;

ii. Relating to traffic in arms, and implementation of war and to such traffic in other goods and material as is carried on directly or indirectly for the purpose of supplying military establishment;

iii. Taken in time of war or other emergency in international relations.

c) To prevent a member from taking an action to meet its obligation under the United Nations Charter for maintenance of international peace and security.

Accordingly, nothing in the GATT prevents a member from taking an action it considers necessary to protect its essential security interest or


\(^{15}\) GATT Art. XXI.
meet its obligation under the UN Charter. Moreover the measures covered by article XX (d) must secure compliance with laws that are consistent with the General Agreement.¹⁶

**(iv) Regional Integration Agreement Exception**

*(Customs Unions Free Trade Areas) GATT Article XXIV*

In spite of GATT unconditional most-favourable-nation principle it also tolerates, and even encourages, the formation of customs unions and free trade areas. Paragraph 4 of article XXIV provides that “… the contracting parties recognize the desirability of increasing freedom of trade by development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreement.”¹⁷

The GATT rules on customs unions and free trade areas reflect the desire of the drafters of the agreement to provide for such arrangements, while, at the same time ensuring that trading interest of third countries are respected. For this reason, Article XXIV establishes a number of conditions which should be satisfied when forming custom unions and free trade areas, as well as transparency requirement in order to monitor whether these conditions are being met.¹⁸

---


¹⁸ WTO, supra note 1, at 6.
(a) Historical Background of Article XXIV

The introduction of most-favoured-nation principle, laid the foundations for future growth of world trade on the basis of non-discrimination. Most of the contracting parties of GATT including USA opposed trade preferences at first, and only at the GATT contracting parties first session (1948) a recognition was given to the concept of a free trade areas and customs unions.19

(b) The Provision of Article XXIV

Article XXIV of GATT permits members to form customs unions and free trade areas and to exchange preferences among themselves without having adverse effect to the interests of third countries.20 Paragraph 4 sets out the parameters of trade liberalization. It states: “The purpose of custom unions or free trade areas should be to facilitate trade between the constituent territories and not to raise barriers to trade of other contracting parties with such territories.”21 Paragraph 8 of Article XXIV defines the characteristic of customs unions and free trade areas. Simply it states that parties to custom unions and free trade areas must eliminate duties and other restrictive regulations of commerce with respect to “substantially all trade” between their constituent custom territories. However, this rule is not absolute. Members may still, where necessary, exercise their right to maintain duties or restrictions under GATT Articles XI (quantitative restrictions), XII (restrictions for balance of payment purposes), XIII (non-discrimination administration of

19 Id., 8.
20 Id.,
21 Art XXIV (4)
quantitative restrictions), XIV (exception to the rule of non-discrimination), and XX (general exceptions).  

Moreover, the GATT rules on custom unions, recognize that tariffs and other barriers to trade can be reduced on a preferential basis by countries under regional arrangement. The lower or duty-free rates are applicable only to trade amongst members of the regional arrangements. Thus, GATT lays down strict conditions for forming regional preferential agreement. These conditions are:

1. Members countries of regional agreement must remove tariffs and other barriers to trade among themselves, and
2. The regional arrangement should not result in the imposition of new barriers to trade with other countries.

In both custom unions and free trade areas, trade among member states takes place on duty-free basis while trade with other countries is subject to most-favoured-nation tariffs rates.

Article XXIV paragraph 8 (a) (ii), stipulates that a customs union member must apply “… substantially the same duties and other regulations of commerce” with non-member i.e a common custom tariffs must be installed”, and this is the sole difference between custom unions and free trade areas. Indeed, free trade areas do not lead to the formation of common external tariffs, free trade areas members simply eliminate internal tariffs duties but maintain separate tariffs vis-à-vis third parties.

---

22 WTO, supra note 1, at 8.
24 Id.
25 Youri Devyst, supra note 17, at 20. Also see Art. XXIV (8) (a) (ii).
But Article XXIV provides no guidance on the feature that differentiates a free trade area from a custom union, namely, “the rules of origin.”

Paragraph 7 of Article XXIV contains the requirements to ensure transparency of proposed regional agreements. This paragraph obliges those who have decided to enter into custom union to notify the contracting parties of GATT for examination by them, and make available to them “such information regarding proposed union”, so as to make sure that the proposed union satisfies the requirements of Article XXIV. The contracting parties may also make recommendations. The agreement is not to be maintained or come into force unless it is amended according to such recommendations.

The GATT rules on regional agreements were little used in most of its first decade of existence and remained so till the creation of European Economic Community (EEC) (1957). Then the importance of Article XXIV increased.

Now there are over 100 regional preferential trade agreements distributed all over the world: the Common Market for Eastern and Southern Africa (COMESA), the North American Free Trade Agreement (NAFTA), the Association of South-East Asian Nations (ASEAN), and the European Economic Union are the obvious examples of regional trade agreements.

26 WTO, supra note 1, p8

27 Youri Devuyst, supra note 17, at 21.

28 WTO, supra note 1, at 9.

29 Id at 11, the EEC was established by the Treaty of Rome 1957 is the world’s prime customs union.
agreements that cover a high proportion of the world trade.\textsuperscript{30} Specifically, free trade areas and customs unions among developing countries are expanding and deepening in Asia, Latin America and Africa. UNCTAD stressed that regional groupings greatly enhance the negotiating leverage of their member in trade negotiations. They also provide an economic space, sort of training ground for their manufacturing and services industries.\textsuperscript{31}

In other words, regional and sub-regional integration among developing countries are essential to reversing developing countries process of marginalization “and constitute a dynamic building block for their effective integration into the multilateral trading system (MTS).\textsuperscript{32}

The Draft Final Act of the Uruguay Round on Article XXIV clarifies provisions and reinforces the criteria and the procedure for the review of a new custom unions and free trade areas and for the evaluation of their effect on third parties.\textsuperscript{33}

\textsuperscript{30} ITC, Commonwealth Secretariat, \textit{supra} note 23 at 60-62. The COMESA remains the largest regional entity in Africa. It has 20 members including Angola, Burundi, Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, Somalia, Sudan, Swaziland, United Republic of Tanzania, Uganda, Zaire, Zambia and Zimbabwe.


\textsuperscript{33} See \textit{The Final Act of the Uruguay Round} (December 1992 at (12)).
(V) Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries

During the Tokyo Round the decision on differential and more favourable treatment, reciprocity and fuller participation of developing countries was negotiated. This decision was adopted under GATT in 1979 and is commonly known as “enabling clause”. Under these arrangements developed countries have introduced one-way free trade, under which imports from either all or limited number of developing countries enter their markets on a duty-free basis.  

More favourable treatment is to be applied in the following specific areas:

(a) Preferential Tariffs under the Generalized System of Preferences (GSP)

The Generalized System of Preference (GSP) was adopted by United Nations Conference on Trade and Development (UNCTAD) II Conference 1968. These were covered by GATT waiver) Part IV of GATT which was not sufficient to satisfy developing countries special needs, but it permits developed countries to derogate from most favoured nation principle in granting preference to developing countries. The

34 The WTO categorizes its members into four groups, developed, developing, least developed and transitional economics (Eastern and Central Europe and the Former Soviet Union which takes steps to adopt free market system). There are many criteria to categorize a member into different group including income, trade, and trade competitiveness. See Zeinab Jaffer Mohamed Ali, Special and Differential Treatment for Developing Countries in the WTO, 14 LL.M. Thesis, University of Khartoum, Law Library, (2003). p 19-20.
35 ITC, Commonwealth Secretariat, supra note 23, at 62.
Tokyo Round 1979 gave the enabling clause GSP full legal status under GATT.\footnote{Mc. Govern, supra note 6 at 215-216.}

Under the generalized system of preference all developed countries may allow import from developing countries on preferential and duty-free basis\footnote{ITC, Common Wealth Secretariat, supra note 23 at 62.}. This system is generalized in the sense that “preference would be granted by all developed countries to all developing ones.”\footnote{Endre Ustor, “Most Favoured Nation Clause”, in 3 Encyclopedia of Public International Law, 468, at 470 (1997).}

(b) Preferential Arrangements under Unilateral Agreement

These arrangements include the Lome Convention under which the European Union Members allow imports from Africa, the Caribbean, Asia and Pacific (ACP) countries on a duty-free basis, in addition to the Caribbean Basin Initiative under which the United States allows imports from Caribbean countries on preferential duty free basis. The arrangements have no legal basis under GATT. They are covered by GATT waivers.\footnote{ITC, Common Wealth Secretariat, supra note 23 at 63.}

(c) Non Tariffs Barriers (NTBs)

There is no provision in GATT on non-tariffs. Paragraph 2 (b) of the enabling clause permits developed countries to accord developing countries differential and more favourable treatment with respect of the provisions of the general Agreement concerning non-tariffs measures governed by the provision of instrument which is multilaterally negotiated under the auspices of GATT.
Zeinab Jaffer mentioned that non-tariffs barriers were concluded in GATT instruments which include Agreement on Subsidies and Countervailing Duties, Agreement on Custom Valuation, Agreement on Government Procurement, Agreement on Import Licensing Procedures and Agreement on Anti-Dumping.⁴⁰

(d) Regional Preferences among Developing Countries

Paragraph 2 (c) of the enabling clause permits developing countries and least developed countries to form regional or global arrangement amongst themselves and to exchange preferences on product imported from one another.⁴¹ Zeinab Jaffer stated that “the position of developing countries under the enabling clause concerning the exchange of preference among themselves is better than that set out in Article XXIV of GATT”.⁴²

(e) Special Treatment for Least-Developed Countries (LDCs)

Paragraph 2 (d) of the enabling clause provides for special treatment for the least developed countries in the context of any general or specific measure taken in favour of developing countries taken during the negotiations of Tokyo Round.⁴³

(f) Non-Reciprocity in Tariffs Negotiations

The Non-reciprocity clause was incorporated in Article XXXVI (8) of GATT. Paragraph 5 of the enabling clause provides for this principle as follows: “the developed countries do not expect reciprocity for

---

⁴⁰ Zeinab Jaffer supra note 34, at 43.
⁴¹ Mc. Goven, supra note 6 at 215.
⁴² Zeinab Jaffer supra note 34 at 45.
⁴³ Mc. Govern, supra note 6 at 210.
commitments made by them in negotiations to reduce or remove tariffs and other barriers to trade of developing countries.\textsuperscript{44}

At the beginning of 1980s, developing countries began to perceive that positive discrimination received under special and differential treatment had become out weighted by increasing negative discrimination against their trade, such as the extension of free-trade agreements and customs unions among developed countries, higher MFN tariffs on product of export interest to developing countries compared to those of interest of developed ones; and the diminishing effectiveness of any GATT rules governing trade in agricultural products. At the UNCTAD VI (Belgrade 1983), all countries recognized that the international trading system founded on most-favoured-nation clause needs to be strengthened.\textsuperscript{45}

3. Exemptions to Most-Favoured-Nation principle in the General Agreement on Trade in Service (GATS)

The most-favoured-nation treatment under GATS applies to all services but some temporary exemptions have been allowed. The maintenance of already existing preferential agreement in services is the main objective of countries in making exemption whether these agreements are bilateral or in small group\textsuperscript{46}. For example Nordic countries exempt from MFN principle measures promoting Nordic co-operation.\textsuperscript{47}

The WTO Members gave themselves the right to give more favourable treatment to particular countries in particular services sectors

\textsuperscript{44} Id 217.

\textsuperscript{45} UNCTAD, \textit{supra} note 31 at 75.

\textsuperscript{46} WTO, \textit{Understanding the WTO}, 3\textsuperscript{rd} ed at 43, Geneva, (2003).

\textsuperscript{47} ITC, \textit{Commonwealth, Secretariat}, \textit{supra} note 23, at 199.
by listing MFN exceptions” along-side their first sets of commitments. Moreover, the Annexes to the GATS provide some other exemptions.

(i) Exemptions under Article II (2) and the Annex on Article II

When GATS came into force in January 1995, members were allowed a “once-only opportunity” to make an exemption from the MFN treatment between a member’s trading partner. These exemptions should be listed in the exemption’s list, indicating to which member the more favourable treatment applies, and its specific duration. Members are allowed to benefit from such exemptions for a maximum transitional period of ten years. They are to be abolished after it (i.e by 1st January 2005). All these exemptions should be reviewed to examine whether the conditions which created the need for these exemptions still exist.

(ii) Regional Economic Integration (Article v)

Article V of the GATS allows Members to form regional integration agreements, and to give preferential treatment among themselves. Thus, members of regional economic integration organizations (REIO) are exempted from the obligation to grant MFN treatment to non-members of the REIO, by granting them the so-called

48 WTO supra note 46, at 34, also see the GATS Article 11 (2).
50 WTO, supra note 46 at 37.
51 ITC, Commonwealth Secretariat, supra note 23, at 198.
52 WTO, supra note 46, at 37.
53 See GATS Article V.
“REIO clause”, under which REIO members are exempted from granting MFN treatment to non-members.\(^{54}\)

Furthermore, regional arrangements require “substantial sectoral coverage, and reduction or elimination of all discrimination among the parties in the sectors covered, i. e. the requirement of GATS Article V are similar to those of Article XXIV of the GATT.\(^{55}\)

(iii) General Exception under GATS Article XIV

Article XIV of the GATS provides for exception concerning the necessary measures for protection of public order. The footnote on this Article states “the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interest of the society”.\(^{56}\) An exception can also be granted if it is necessary to protect human, animal, or plant life or health, or to secure compliance with regulations or laws which are inconsistent with the provisions of GATS, including those related to the prevention of deceptive and fraudulent practice, protection of privacy of individuals; and safety.\(^{57}\)

However, the preamble to article XIV provides that “such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services”\(^{58}\). Likewise, the Organization for Economic Co-operation and Development (OECD)

\(^{54}\) UNCTAD, supra note 14, at 20.

\(^{55}\) UNCTAD, supra note 49, at 154. Also see the GATT Art. XXIV and the GATS Art. V.

\(^{56}\) See the GATS Art. XIV (a).

\(^{57}\) UNCTAD supra note 14, at 16. Also see GATS Article XIV.

\(^{58}\) id
Codes on Liberalization of Capital Movement allows members to take measures they consider necessary for maintenance of public order, or the protection of public health, morality and safety.\textsuperscript{59}

Article XIV(d) permits a member to take measures inconsistent with Article XVII (national treatment). It provides that the difference in the treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services and services supplier of other members.\textsuperscript{60}

(iv) National Security Exception Article XIV bis

An explicit national security exception is provided for in GATS in article XIV bis (1). It states that “nothing in this agreement shall be construed:

a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

b) To prevent any member from taking action which it considers necessary for protection of essential security interest:

(i) Relating to supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment.
(ii) Relating to fissionable and fusionable material or the materials from which they are derived;
(iii) Taken in times of wars or other emergency in international relations, or

\textsuperscript{59} Id.

\textsuperscript{60} See GATS Articles XIV(d).
c) To prevent any Member from taking any action in pursuance of its obligation under the United Nations Charter for the maintenance of international peace and security.

Thus, nothing in GATS prevents a member from taking measures it considers necessary in its national security interest or meet its obligations under the United Nations Charter for maintenance of international security.61

(v) Progressive Liberalization on Trade in Services (Article XIX)

The GATS in principle agrees to liberalize trade in services progressively in successive negotiations. Part IV of the GATS provides guidelines for future negotiations on trade in services. It contains three articles: Article XIX (negotiations of specific commitments); Article XX (Schedules of specific Commitments); and Article XXI (Modification of schedules). Article XIX specifies the objectives of further negotiations, and that “The process should take place with a view to promoting the interest of all participants on mutually advantageous basis”.62

Article XIX (2) of the GATs states that the negotiation on liberalization of trade in services should take place with due respect for national policy objectives and the level of development of individual Members. Towards this end, flexibility should be granted to individual developing countries for opening fewer services sectors and liberalizing fewer types of transaction and “progressively extending market access in line with their development”.63 Under this article “developed countries

61 UNCTAD, supra note 14 at 17.
62 UNCTAD, supra note 49 at 157.
63 Id.
should strengthen developing countries domestic services capacity, efficiency and competitiveness through access to technology on a commercial basis”.  

4. Exception to the Most-Favoured-Nation Principle in TRIPS Agreement

(i) Exception Under Article 4 (d) of TRIPS Agreement

This Article permits exception to Most-Favoured-Nation clause in relation to international agreements made before the entry into force of the WTO agreement, and notified to the TRIPS Council (The Berne Convention (1971), the Rome Convention (1961) and the Washington Treaty on Integrated Circuits (1989)), provided that they “do not constitute an arbitrary or unjustifiable discrimination against nationals of other members”. But any new regional or sub-regional agreement on intellectual property rights (IPRs) would be subject to the most-favoured-nation treatment.  

(ii) National Security Exception (TRIPS Article 73)

Article 73 of TRIPS Agreement provides a general exception for matters deemed to be essential to the protection of national security interests; “a Member is not required to furnish any information if it considers disclosure to be contrary to its essential security interests”. Also, it may take any action which it considers necessary for its essential security interests protection which relates to fissionable material or the materials they are derived from, relating to traffic in arms, implement of

---

64 Zeinab Jaffer, supra note 34, at 56.
65 UNCTAD, supra note 49, at 169, see Article 4 (d) of TRIPS.
66 TRIPS Article 73.
war and to such traffic in other goods and material carried on for the purpose of supplying a military establishment or taken in war time or other international relations emergency. In addition, it may take any action to meet its obligations under the United Nations Charter for the maintenance of international peace and security.67

(iii) Special and Differential Treatment for Developing Countries

The TRIPS Agreement gives preferential treatment for developing countries only in relation to technical assistance (Article 67), transitional arrangements (Article 65) and promotion of the transfer of technology in respect of least-developed countries (LDCs) (Article 66 (2)). Special and differential treatment relating to transfer of technology appears in several provisions in GATS and TRIPS.

(a) Transitional Arrangement Article 65 (1) of TRIPS

When the WTO Agreement on TRIPS entered into force on 1st of January 1995, developed countries were given one year to implement their obligations under it, i.e. by January 1996. Article 65(1) gives developing countries five years until January 2000, whereas least developed countries have 11 years, up to 2006 now extended to 2016 in respect of pharmaceutical patent.68

The application of transitional periods is automatic (does not require declaration or reservation by the concerned countries)69. Despite these transitional periods, many developing countries still find great

68 WTO, supra note, 46, at 44. see TRIPS Article 65 (1) (2)
69 UNCTAD, supra note 49 at 170.
difficulties in implementing their obligations under the TRIPS Agreement, due to weak institutional structures, and the lack of the required expertise and financial resources.\textsuperscript{70}

There are many provisions in the TRIPS Agreement, which reduce utility of transitional arrangement and make special and differential treatment ineffective.\textsuperscript{71} Article 65 (4) of the TRIPS gives developing countries the right to delay patent protection in respect of pharmaceutical and agricultural chemicals sector up to 2005.\textsuperscript{72} This flexibility is subject to the restrictions of Article 70 (8) concerning the application of the so called “mail-box”, which obliges the WTO member to provide a system that “preserves the novelty and priority of the patent applications for pharmaceuticals and agricultural products”. Thus developing countries are obliged to establish the mail-box system during the transitional periods. Article 70 (9) of the TRIPS goes further and requires developing countries to give exclusive marketing right (that is the power to prevent third parties form using, producing or commercializing the protected invention) for the product that are subject to application of the mail-box system.\textsuperscript{73}

(b) Technical Assistance: Article 67 of the TRIPS Agreement

The technical and financial cooperation for developing and least-developed countries includes assistance in the preparation of laws and regulations on the protection of intellectual property rights (IPRs) as well


\textsuperscript{71} Zeinab Jaffer M. Ali, \textit{supra} note 34 at 101.

\textsuperscript{72} ITC, Commonwealth Secretariat, \textit{supra} note 23, at 251. See Article 70 (8)

as on the prevention of their abuse and the establishment and reinforcement of domestic offices, including the training of personnel. On many occasions the Council for TRIPS has reviewed the information on cooperation and assistance provided to developing and least-developed countries. But the provisions regarding technical assistance is on request and subject to “mutually agreed terms and conditions”. In other words no specific obligations or operative mechanisms are provided for in the Agreement. The main objectives for technical assistance provision are to improve the institutional and legal framework and capacities to implement the Agreement.

(c) Transfer of Technology to Least-Developed Countries (LDCs)

Under Article 66 (2) developed countries are obliged to provide incentives under their legislation to enterprises and institutions in their territories so as to promote and encourage the transfer of technology to Least-developed countries “in order to enable them to create a sound and viable technological base”. But little effort has been made to implement Article 66 (2) of TRIPS.

74 UNCTAD, supra note 49 at 171.
75 Zeinab Gaffer M. Ali, supra note 34, p 74.
76 UNCTAD, supra note 49 at 171.
77 Id, at 170
78 Zeinab Jaffer, supra note 34, at 97. As stated in South Centre, Trade Related Agenda, Development and Equity. (T.R.A.D.E.) working paper 5, Intellectual Property Rights and the use of Compulsory licenses: Option for Developing Countries (1999) at p3, a compulsory license is “an authorization given by the national authority to a person, without or against the consent of the title-holder, for exploitation of a subject matter protected by a patent or other intellectual property rights”. Also see the Berne Convention Articles 8-9, and the Appendix of Berne Article II and III. According to South Centre, Trade, the exclusive marketing right is “the power to
Moreover, this provision (Article 66(2)) does not create any obligation on developed countries for providing the incentives, promoting and encouraging transfer of technology. However, it is difficult to determine whether or not such an effort was made by developed countries.\textsuperscript{79} The Council for TRIPS in its new decision states that developed countries shall submit annual reports on actions taken or planned in pursuance of their commitments under this article.\textsuperscript{80}

(d) Compulsory Licenses

Some international conventions dealing with protection of intellectual property rights, namely, the Rome Convention 1961 and the Berne Convention (1971) allow members to derogate from the obligation of most-favoured-nation (MFN) standard in respect to acquisition and content of certain intellectual property rights, specially, copyrights.

Article 9 (1) of TRIPS Agreement requires Members to comply with Article 1-21 except Article 6 bis (moral rights) of the Berne Convention 1971 and its Appendix. Under this Appendix developing countries are allowed to give compulsory licenses for translation and reproduction (subject to a number of notification procedures). However, these provisions are more affordable in the area of education. Article 31 of the TRIPS lays down strict conditions for granting compulsory licenses for translation and reproduction which prevent third parties from using, producing or commercializing the protected inventions”.

\textsuperscript{79} Venkatachala G. Hegde, “Special and Differential Treatment to Developing Countries”, in AALCC Secretariat, Report of Seminar Relating to Certain Aspect of Functioning of WTO Dispute Settlement Mechanism and other Allied Matters, India, 85, at 89 (1998).

licenses, so as to insure that such licenses are issued only in exceptional situation and on objective basis.\(^{81}\)

In the Doha Ministerial Conference, Ministerial Declaration, clarifies some flexibilities available in granting compulsory licenses in respect of pharmaceutical patent\(^{83}\). Moreover, the TRIPS council “has to find solution to the problems countries may face in making use of compulsory licenses if they have too little or no pharmaceutical manufacturing capacities”.\(^{84}\)

(e) Doha Ministerial Declaration on TRIPS and Public Health (2001)

In Doha Ministerial Conference in the ministerial declaration ministers emphasized that it is important to implement and interpret the TRIPS Agreement in a way that supports public health, by promoting both access to existing medicines and the creation of new ones. Furthermore, the declaration stresses that the TRIPS provisions do not and should not prevent member countries from acting to protect public health.\(^{85}\)

\(^{81}\) South Centre, South Centre Trade Related Agenda, Development and Equity. (T. R. A. D. E) working paper 5, intellectual property Rights and the use of compulsory license: option for Developing Countries, p.3 (1999), compulsory license is an authorization given by the national authority to a person without or against the consent of the title holder for exploitation of subject matter protected by IPRs.

\(^{82}\) ITC, Commonwealth Secretariat, supra note 23, at 243.

\(^{83}\) WTO, supra note 46, at 83. Also see WTO, Ministerial Conference, Fourth Session, Doha Ministerial Declaration, WTO home page, on the internet (http://www.wto.org) WT/MIN (01) DEC/ 1), 2 (2001).

\(^{84}\) Id.

\(^{85}\) WTO, supra note 46, at 82, see WTO, Ministerial Conference, Fourth Session, Doha, Ministerial Declaration, WTO, supra note 83, (wt/min (01)/ Dec/1)2 (2001).
In addition the Declaration recognizes the right of each member to determine the existence of national emergency or other circumstances of extreme urgency. “Thus public health crises such as HIV/AIDS, tuberculosis, malaria can represent national emergency”\(^{86}\).

Paragraph 5 of the Ministerial Declaration recognizes that “under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health of the environment …”\(^{87}\). Paragraph 6 of Doha Declaration provides that “we recognize that WTO Member with insufficient or no manufacturing capacities in pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expedition solution to this problem and to report to the General Council before the end of 2002”.

This paragraph recognizes that countries with insufficient or no manufacturing capacities in the pharmaceutical sector cannot use compulsory license effectively.\(^{88}\) It affirms governments right to use flexibility of the agreement in order to avoid any reticence which may be felt by the government. Moreover, the Declaration extends the deadline for least-developed countries, to apply provisions on pharmaceutical patent up to January (2016).\(^{89}\)


\(^{87}\) See Article 6 of Doha Ministerial Declaration at 2. Also WTO, *supra* note 46, p 82

\(^{88}\) Prof. Akolda M. Tier, *supra* note 86.

\(^{89}\) WTO, *supra* note 46, at 83.
5. Conclusion

Exceptions and derogation from the most-favoured-nation principle is provided for in the three trade agreements handled by WTO (GATT, GATS, and TRIPS). These provisions allow WTO members to take measures that are inconsistent with their most-favoured-nation obligations. A large number of WTO trade provisions allow countries to deviate from the non-discrimination principle (MFN Treatment) and to pursue their policies. An assessment of most-favoured-nation standard concludes that the MFN principle is itself flexible in the sense that it allows a number of exceptions to the most-favoured-nation clause would only and exceptionally be justified for development purposes, protection of public order, health, and morals, and protection of national security in very restrict conditions. Clearly the GATT, GATS and TRIPS have followed very similar approach with regard to these exceptions.

Finally, the success of Doha Ministerial Conference of multilateral trade negotiations is crucial for improving market access for export of developing countries.\(^\text{90}\)

---

Chapter Four

Conclusions and Recommendations

The most-favoured-nation clause is the foundation upon which multilateral trading system handled by the WTO is built. Its application is being limited only by the provisions of the WTO Trade Agreements themselves. The clause constitutes one of the basic rules designed to prevent economic discrimination between states in their commercial and economic dealings whether they are poor or rich.

The most-favoured-nation clause is at the heart of the multilateralism, and indeed it is an essential principle of international trade agreements. The Most-favoured-nation clause provisions should be re-examined, strengthened, and reviewed in order to enhance development objectives of international trade law as stated in the UN Charter, and in the light of the long experience of the GATT.

An examination, analysis and evaluation of the new development in most-favoured-nation clause in trade agreement, supported by judicial decisions, writings of jurist and articles in law journals and reports, highlights the following conclusions:

First, the most-favoured-nation is a basic rule in international trade agreement. It simply means that a country should not discriminate between its trading partners. They are all equally granted most-favoured-nation clause. Moreover, the benefits of the unconditional most-favoured-nation clause will be extended to any member of the multilateral group automatically. It need not be claimed.

It should be noted that the name most-favoured-nation clause sounds like a contradiction. It seems as if the clause suggests some kind of favourable treatment for a particular country, but it, actually, means
non discrimination or treating virtually every one equally. Consequently the most-favoured-nation clause helps smaller trading nations realize their desire to be treated equally in their economic relations with their more powerful trading partners.

The most-favoured-nation clause has a long history in commercial treaties. It should be emphasized that after the Second World War the principle was revived (when negotiating the GATT) as a means upon which the reconstruction of the world trade was intended to be based, given that the clause was conceived as a best means of upholding non-discrimination in trade relation, remedy chaos in the international trade in the inter-war years and achieving growth and welfare. Thus unconditional Most-Favoured-Nation (MFN) clause (one of the two types of the clause) was provided for in the GATT Article 1.

The main function of the clause is to establish and maintain a fundamental equality among all countries concerned. More fundamentally, the most-favoured-nation clause insures universality, equality of competition and predictability as a main objective of the multilateral trading system. Thus the non-discrimination principle forms the essence of rule based of international trading order.

The most-favoured-nation clause is widely used in international law but it has been traditionally linked with international trade agreements.

Secondly, the Uruguay Round took eight years (1986-1994). It covered almost all trade matters. It was the largest negotiations of any kind in the history. Whereas GATT dealt with trade in goods, the round extended the multilateral trade agreement into several new areas, notably, trade in services, intellectual property, and all the original GATT articles were up for review. Furthermore, establishment of the disputes settlement system and the trade policy review mechanism were the major features of
the Uruguay Round. And finally the Uruguay Round creates WTO which came into existence on the 1st January 1995. Its establishment places the international trading system on a firm constitutional footing.

Thirdly, the WTO is the only international organization dealing with the global rules of trade between nations. The WTO Agreement provides the legal ground-rules for international trade. Actually, the WTO agreements provisions are long, complex, and they are expressed in vague general terms, but simple fundamental principles run through these agreements. These are: Non-discrimination (MFN and national treatment), progressive liberalization, predictability, fair competition and preferential treatment for developing and least-developed countries.

Any state and custom territory having the full autonomy in conducting its trade policy may accede to WTO. Clearly, the accession procedures to WTO are too complicated. Bringing the national legislation of applicant in conformity with the rules of the organization and opening its markets to foreign goods and services are the “entry ticket” to accede WTO. Finally if the Ministerial Conference by two-thirds majority vote in favour of the applicant, then it becomes a member of WTO.

Notably, the structure and the decision-making process of WTO can obstruct the accession of applicant countries. I wish to mention that Sudan application for accession to the organization was in 1994 but up to the time of writing, it is not a member yet. A state must qualify for admission and the Sudan does not qualify so far WTO should facilitate accession of all countries that are willing to join.

Fourthly, the importance of the most-favoured-nation principle is underlined by the fact that it is the first Article in the General Agreement on Tariffs and Trade (GATT) which governs international trade in goods. The principle has a priority in the General Agreement on Trade in Services (GATS) (Article II), and the Agreement on Trade-Related
Aspects of Intellectual Property Rights (TRIPS) (Article 4). These agreements cover all three major areas of trade handled by the WTO.

Article 1 paragraph 1 of the GATT states in regard to specific subjects it lists and with general reference to all rules and formalities concerning the imports and export that any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other countries shall be granted immediately and unconditionally to the like product of all other contracting parties. Clearly the most-favoured-nation treatment under GATT Article 1 paragraph 1 is granted to any product originating in or destined for any other countries. Thus, in trade in goods the most-favoured-nation clause requires a country to extend any advantage favour or privileges it grants to another country, in lowering tariffs or applying the rules and formalities relating to importation or exportation to all other member countries. This obligation is unconditional.

Under GATS, Article II(1) the most-favoured-nation treatment requires a member to grant to all other WTO members “treatment no less favourable than that they give to like services and services suppliers of any other country. Notably the GATS applies the most-favoured-nation treatment in respect of any measure affecting trade in services directly or indirectly. Thus the scope of the clause is very broad. The obligation to extend such a treatment applies on both de jure and de facto basis.

As in GATT and GATS the most-favoured-nation clause is a major principle in TRIPS Article 4 of which states that any advantage, favour, privilege or immunity granted by a member to the national of other country, shall be accorded immediately and unconditionally to the national of the other members. But there is no reference to the most-favoured-nation principle in the international convention governing protection of intellectual property rights before the TRIPS. The most-
favoured-nation principle became applicable to all members from 1 January 1996 even to those who avail themselves of the transitional period in the TRIPS Agreement. In fact the coverage of the most-favoured-nation principle in WTO is far broader: it relates to any advantage, favour, privilege or immunity, but handled slightly differently in each agreement.

Fifthly, the exceptions to the most-favoured-nation clause in GATT, GATS and TRIPS are allowed in limited circumstances. These are: exception concerning development and regional development objectives, i.e. preferential treatment for developing and least-developed countries, custom union and free trade areas, protection of public order, health and morality, and protection of national security.

Preferential treatment for developing countries and least-developed countries in WTO agreement remains an essential element for issues concerning trade and development. The GATT, GATS, and TRIPS provide for this exception from the most-favoured-nation obligation. Moreover GATT and GATS encourage regional and sub-regional arrangement and giving preferential treatment and exchange of preferences among themselves.

Exceptions relating to protection of public order, health and morality “must not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade…” In the panel report on United States Prohibition of Import of Tuna and Tuna Product from Canada mentioned before, the panel concluded that “since the same measure is imposed on the other countries so the action could not be said as being disguised restriction”.

The GATT, GATS and TRIPS allow a member to derogate from the non-discrimination principle on taking an action it considered
necessary to protect its essential security interest or meet its obligation under the UN Charter for the maintenance of international peace and security. It is not necessary for the party to be in actual state of war. It is sufficient to consider national security.

Sixthly, international trade has become an essential factor for development and progress (as stated in the preamble of UN Charter). In the first session of the United Nations Conference on Trade and Development (UNCTAD 1964) the Secretary General’s report to the conference noted that: “However valid the most-favoured-nation principle may be in regulating trade relation among equals, it is not a suitable concept for trade involving countries of vastly unequal economic strength”\(^1\).

Thus Part IV of GATT on Trade and Development recognizes that developed countries might enable less-developed countries to use special measures to promote their development and trade. Moreover, this Part requires least developed countries to take appropriate action in implementing the provisions of GATT Part IV. The decision on differential and more favourable reciprocity and fuller participation of developing countries, known as “enabling clause” 1979, under which developed countries have to introduce one way free trade to import of developing countries was the next significant step in GATT legislation towards satisfying the development needs. Clearly, these two parts added to GATT have suspended most-favoured-nation treatment in relation with developing countries. They had to be regarded as self-evident that the most-favoured-nation clause is no longer suitable for development of all

GATT Members that are at different stage of development, in the sense that the principle -by its nature- involves implicit discrimination against developing and least developed ones, i.e. unequally. Thus the principle only offers a formal non-discrimination. In addition the principle does not serve the development effort of developing countries and least developed countries and their wishes to achieve development through trade, in other words the most-favoured-nation clause cannot be a means to combat least-developed countries, nor an instrument of development and welfare of developing countries.

Clearly, this acknowledged inequality of GATT and WTO Members can only be corrected through unequal treatment (preferential treatment for least developed and developing countries), taking into account special development needs of each group in order to obtain effective equality at the end.

Thus, the inclusion of GATT Part IV on Trade and Development and Deferential and More Favourable treatment non-Reciprocity and Fuller Participation of Developing Countries (enabling clause) were significant step in GATT towards satisfying the development needs of developing countries on one hand, and on the other hand the enabling clause stresses the special needs of least developed countries.

Ewa Butkuwicj from the Research Institute for Developing Countries is of opinion that the most-favoured-nation clause cannot perform the function of stimulating international trade between countries with different levels of development, as I have mentioned in Chapter One.

Seventhly, the vast amount of regional and sub-regional free trade areas and customs unions which have expanded all over the world, (more than 100 regional trade arrangements are currently in place). This vast
amount underscores the view that regional and sub-regional economic integration are essential for all countries.

Regional arrangements are provided for under GATT Article XXIV. This Article not only allows forming of custom unions and free trade areas but also it encourages them. Also the “enabling clause” which is covered by GATT waivers offer unilateral preferential arrangement. Similarly Article V of GATS gives preferential treatment to members of regional economic integration on the same requirements of Article XXIV GATT i.e. substantial sectoral coverage; and elimination of all discrimination among the parties.

Regional trade arrangements are essential for developing and least developed countries marginalization, and it constitutes some sort of training to reversing the process of marginalization ground for their manufacturing and services industries to build up their capacities in order to facilitate their integration into the multilateral trading system. Throughout my study it is obvious that no reference was made to regional agreement in the TRIPS Agreement.

Eighthly, the scope of the most-favoured-nation clause in GATS is very broad. It covers the services and services suppliers. The Agreement and the negotiation under it are one of the least controversial issues of WTO work. This is because it offers remarkable flexibility in the application of the clause, which allows Governments to determine the level of obligation they will assume.

Member states can define their obligation through the commitments undertaken in their schedules commitments. In addition, governments may limit, withdraw and renegotiate their commitments, because it is of the Agreement basic principle that developing countries are expected to liberalize fewer sector and transactions in-line with their economic development situation and national policy objectives.
Moreover, the Agreement allows some flexibility in granting more favourable treatment to certain trading partners by taking listed most-favoured-nation exception according to article II. Again member states can choose their exemption’s list according to their development situation and national policy objectives. In other words GATS, specifically, concedes the rights of members to regulate and introduce new regulation on supply of services in their territories in order to meet objectives of national policy.

Furthermore, the TRIPS Agreement has recognized the special needs of least developed countries in having maximum flexibility in the application of the most-favoured-nation clause. The Agreement also provides that developed countries members should offer incentive under their legislation to enterprises and institutions in their territories, so as to promote and encourage technology transfer and know how to least-developed countries. Also developed countries are to provide, on request and on agreed terms and conditions, technical and financial cooperation for developing and least developed WTO members. Special and differential treatment relating to transfer of technology appears in many provisions e.g. GATS Article IV, and TRIPS Article 66(2). Unfortunately Article 66(2) does not specify any obligation on developed countries to promote and encourage transfer of technology. Similarly Article 67 of the Agreement provides no specific obligation or operative mechanism. Furthermore, the TRIPS Agreement offers transitional arrangement to implement the obligation relating to intellectual property protection. Therefore, developed countries had to implement them by January 1996. The developing countries have to implement the obligation by January 2000. Least developed countries are permitted up to January 2006 (due to their special need for flexibility to create “viable technological base”).
This term is extended for pharmaceutical patent to 2016 as I mentioned before.

Ninthly, despite the automatic application of transitional periods mentioned before in Chapter Three, many developing countries are still facing great difficulties in implementing their obligations under the Agreement. Also there are many restrictions in the TRIPS which reduce the benefits of the transitional arrangement. The application of the “mail box” during the transitional period\(^2\) is an obvious example. This means that the flexibility available to developing and least-developed countries under Article 65 is subject to this restriction.

Finally, the Doha Ministerial Conference (2001) emphasized the importance of implementing and interpreting the TRIPS Agreement in a way that supports public health. Compulsory licenses should be available for medicines and on ground of national emergency and extreme urgency and it is for each country to determine the existence of such circumstances. Thus malaria may be regarded as national emergency. Notably, the Conference recognizes the rights of WTO Member to take measures to provide access to medicines at affordable prices and to promote public health and nutrition, specially, in the face of serious diseases such as HIV/AIDS.

From the above conclusions this study suggests proposals to remedy the weaknesses of MFN clause and its exceptions in WTO Trade Agreement and it makes recommendation to be observed in WTO future trade negotiations. These can be summarized as follows:

(1) The most-favoured-nation clause in the GATT Article 1 should be re-examined, reinterpreted and linked with the development need for each group of countries, with the view of giving binding force

---

\(^2\) for the definition of the “mail-box” refer to Chapter Three, p. 71.
of GATT Part IV and the enabling clause, and with due respect of the objectives of the international trade law (achieving development and growth) as stated in the UN Charter and the preamble of agreement establishing WTO. In addition, there is a need to monitor and examine and strengthen Part IV of the GATT. Clearly, some of its provisions are expressed in non binding language. Article XXXVI paragraph 1(f) states that the contracting parties “may enable less developed contracting parties to use special measure to promote their trade and development”. These non binding provisions should be formed in adequate and binding legal language.

(2) Globalization is now a fact of life. WTO should address the pressing challenges of development, poverty and inequality faced by many countries all a round the world taking into account the contribution that can be made to development by new information technologies and electronic commerce.

(3) The accession procedure to WTO should be simplified. The WTO should facilitate the accession of all countries that are willing to join, by providing fast accession track.

(4) Article XXIV of GATT and Article V of GATS should be clarified in order to remove the ambiguities facing its interpretation. A new similar provision on regional arrangement should be introduced in the TRIPS Agreement on intellectual property and regional agreements that cover intellectual property rights protection.

(5) The flexibility allowed under the GATS and the unlimited freedom given to Members to choose the services on which they will make commitments, granting effective market access to foreign supplier

---

should be maintained in the new round of negotiation, in order to achieve the aim of negotiations under GATS, specifically, “promoting the interests of all the participants…” and with due respect of national policy objective and the level of development of individual members. (Article XIX:1 of GATS). Moreover, the capacities of developing nation in procuring higher quality services as well as their access to market of developed countries should be enhanced.

(6) Special and differential treatment to developing and least developed countries in WTO Agreement should be linked with development needs. More effective special measures should be provided for to promote development and to achieve economic progress and welfare through trade.

(7) The provisions of technical assistance should be expressed in binding language (Article 66(2) and Article 67 of TRIPS).

(8) WTO should facilitate transfer of technology to developing countries and least developed countries. This may need additional mechanism to oblige developed countries to provide incentives to firms and institutions in developing countries to encourage and promote transfer of technology. In other words developed countries should honour their obligations towards developing countries.
BIBLIOGRAPHY

Books


WTO, *Introduction to the WTO, Trading into the Future*, WTO, (Geneva (2nd ed 2001)).


Articles


**Papers and Documents**


Thesis:
