*Page 1878 - 1883* **DOI:** *https://doij.org/10.10000/IJLMH.113011*

# INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

**Volume 5 | Issue 2**

**2022**

# Application of Most Favoured Nation Principle in Dispute Settlement Framework of WTO

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## ABSTRACT

*Most favoured Nation (MFN) Principle is one of the fundamental principles of WTO law. It basically gives the right to trading members not to be treated discriminately at the time of import or export for all "like products". The Article highlights the use of the Most Favoured Nation Principle in the WTO disputes and how different member nations used this principle in different case laws to protect their interests.*

*Most favoured Nation Principle have different meaning and definitions in various WTO agreements which indeed define its scope in the WTO framework. There are several occasions in which the member countries have approached the panel and appellate body to enforce this principle and interpret them in an effective manner. The panel and appellate body however are not always been successful to implement these provisions because of the vague language it has in WTO Agreements. Therefore, the Article determines the use of the MFN principle in different case laws and its interpretations.*

*Further, the article highlights an exception for developing nations and finally, the Article concludes that the MFN principle is less prevalent in practice because of its vagueness yet several member countries often take MFN as their most important right in imports and exports.*


## I. INTRODUCTION

"Unconditional Most-Favoured-Nation (MFN) treatment is a cornerstone of the multilateral trading system"[2]. The MFN treatment obligation has been referred to as a cornerstone and pillar of the World Trade Organization (WTO).[3]

MFN principle was first formally recognized in the GATT agreement in 1994 under Article 1 and then subsequently in other agreements and became an essential part of WTO. Most Favoured Nation treatment basically means that a member country cannot discriminate

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[2] Graeme Dinwoodie et al., International Intellectual Property 80 (2001) (citing GATT, Oct. 30, 1947, 55 U.N.T.S. 194, Article 1). The original GATT did not provide for the international treatment of the intellectual property. Id., citing GATT Article XX(d).

[3] EC-Tariff Preferences: Report of the Appellate Body (AB) (1 April 2004) WT/DS26/AB/R [8].

 [ISSN 2581-5369]

between their trading partners and cannot favour one member at the time of import or export of "like products" over all other Members. The members should be treated equally and impartially in the terms of trading in that particular country. It affirms the sovereign equality of states in terms of trade policy as a fundamental of public international law.[4]

The clause is designed to give each signatory certainty that any benefits gained would not be diminished or wiped out by a subsequent agreement between one of the partners and a third country. It protects the parties from being treated unfairly in favour of a rival.[5]

There are certain elements of MFN clause and its applicability in the WTO has been defined by a number of disputes aroused by the member states in different cases where the panel interpreted the MFN clause in several terms according to its essential elements. In certain cases, violation of MFN principle is the primary argument of the member country and tribunals have ruled in the favour of the same.

MFN principle however have a certain exception, for example in the case of developing countries members can grant relaxations in terms of taxes or other tariff and non-tariff measures or can provide special access to their markets which would not amount in the violation of MFN treatment.

## II. Definition of MFN in various WTO Agreements

GATT Article I:1 provides for WTO Members to extend MFN treatment to like products of other WTO Members regarding tariffs, regulations on exports and imports, internal taxes and charges, and internal regulations. In other words, "like" products from all WTO Members must be given the same treatment as the most advantageous treatment accorded the products of any state.[6] MFN is also a priority in the General Agreement on Trade in Services (GATS) (Article 2)[7] and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Article 4)[8], although in each agreement the principle is handled slightly differently. Together, those three agreements cover all three main areas of trade handled by the WTO.

[4] WTO GATS TRAINING MODULE: CHAPTER 1, Basic Purpose and Concepts,<https://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s6p1_e.htm >.
[5] Id.
[6] Chapter 1 Most-Favoured-Nation Treatment Principle, <https://www.meti.go.jp/english/report/downloadfiles/gCT0212e.pdf >.
[7] Article II: Most-Favoured-Nation Treatment - With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.
[8] Article 4, Most-Favoured-Nation Treatment-With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a member.

 [ISSN 2581-5369]

### 1) Scope OF MFN principle

MFN treatment is designed primarily for the purpose of regulating duties charged on imports, but specific provisions have extended the most-favoured-nation principle to other areas of international economic contact—for example, the establishment of enterprises of one country's nationals in the territory of the other; navigation in territorial waters; real and personal property rights; intangible property rights such as patents, industrial designs, trademarks, copyrights, and literary property; government purchases; foreign-exchange allocations; and taxation.

### 2) Application of MFN Clause in Dispute Settlement Process

However, in certain landmark judgements the member state has invoked the violation of MFN clause expressly provided in several Articles of WTO Agreements and the tribunals have ruled in the favour of the same. The MFN clause has been invoked individually and can also be invoked along with the other provisions, for example Fair and equitable Treatment, National Treatment, quantitative restrictions, TRIMs, Rules of Origin, Technical barriers to Trade and other provisions of certain agreements of WTO.

#### i) Landmark Cases

Under Article I:1 there are three questions that must be answered to determine whether there is a violation of the MFN treatment obligation of Article I:1, namely:

• Whether the measure at issue confers a trade 'advantage' of the kind covered by ArticleI:1;

• Whether the products concerned are ' like products'; and

• Whether the advantage at issue is granted 'immediately and unconditionally' to all like products concerned.

#### a) Canada- Autos case

In Canada-Autos case, the Appellate Body usefully clarified the scope of Article I:1 by ruling: Article I:1 requires that any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other members. The words of Article I:1 refer not to some advantages granted with respect to the subjects that fall within the defined scope of the Article, but to any advantage; not to some products, but to any product; and not to like products from some other Members, but to like products originating in or destined for all other Members.[9]

[9] Canada, Autos: Report of the AB (19 June 2000) WT/DS139/AB/R [82].

 [ISSN 2581-5369]

It was held that the MFN principle does not only prohibit de jure discrimination, like when a country's regulation expressly contains discriminatory trade provisions; it also prohibits de facto discrimination, where the application of a country's measure leads to the discriminatory treatment of foreign imported goods, even when the measure does not appear discriminatory on the face of the law[10]

**b) EC- Bananas case**[11]

Under the Lomé Convention, the European Union maintains measures that provide preferential treatment to imports of bananas from countries in Africa, the Caribbean, and the Pacific (ACP) in the form of tariff quotas (i.e., different tariffs are applied to set in-quota and out-of-quota amounts for the individual ACP countries). These measures have been before a panel twice under the GATT.[12]

In May 1997, the panel found that the EU's measures were inconsistent with the WTO agreements on several points. The report of the Appellate Body generally upheld the main findings of the panel. It held that allocating a portion of the quota regarding third-country and non-traditional ACP bananas to only operators who deal in the EU and traditional ACP bananas is inconsistent with Article I:1 (MFN) and Article III:4 (national treatment) of the GATT. The Lomé waiver does not waive the EU's obligations under Article I:1 with respect to licensing procedures applied to third-country and non-traditional ACP imports.[13] It covers 'any advantage, favour, privilege or immunity.'[14] the AB held that the article does not just cover advantages to WTO Members but 'any advantage.' In EC – Bananas III, an advantage is any measure that creates more favourable competitive opportunity to products of different origins.[15]

**c) Spain- Roasted Coffee**

The meaning of the phrase 'like products' in Article I: 1 was addressed in a number of GATT panel reports. In Spain- Unroasted Coffee case, the Panel has to decide whether various types of unroasted coffee ('Colombian mild', 'other mild', 'unwashed Arabica', 'Robusta' and 'other') were 'like products' within the meaning of Article I:1. In examining whether the various types of unroasted coffee were 'like products' to which the MFN treatment obligation applied, the

[10] Id at 6.
[11] 25 Sept 1997, WT/DS27AB/R.
[12] Chapter 1, MOST-FAVOURED-NATION TREATMENT PRINCIPLE, <https://www.meti.go.jp/english/report/downloadfiles/2013WTO/02_01.pdf >.
[13] Id.
[14] MJ Trebilcock & R Howse and A Eliason, The Regulation of International Trade (CUP 2017) 61
[15] Id at 9.

Panel considered:

- the characteristics of the products;
- their end-use and
- tariff regime of other members.

The Panel noted that no other contracting party applied its tariff regime in respect of unroasted, non-decaffeinated coffee in such a way that different types of coffee were subject to different tariff rates. In the light of the foregoing, the Panel concluded that unroasted, non-decaffeinated coffee beans listed in the Spanish Customs Tarif should be considered as like products within the meaning of Article I:1.[16]

Hence, despite the fidelity of GATT panels to the narrow formal approach, any interpretation which considers directly competitive or substitutable goods as unlike products, without more, may derail from the spirit of the MFN principle under GATT.[17] The formal approach was applied in EEC – Animal Feeds Proteins, while the functional approach was adopted in Spain – Unroasted Coffee[18]

**d) Indonesia- Autos case**[19]

it was held in this case that the MFN provision should be granted "unconditionally" and "immediately". Article I: 1 requires that any advantage granted by a WTO members to imports from any country must be granted 'immediately' and 'unconditionally' to imports form all other WTO Members.[20] Once a WTO Member has granted an advantage to imports from a country, it cannot make the granting of that advantage to imports of other WTO members conditional upon those other WTO Members. In a legal opinion of 1973 in the context of the accession of Hungary to the GATT, the GATT Secretariat noted that*: "the prerequisite of having a cooperation contract in order to benefit from certain tariff treatment appeared to imply conditional most favoured –nation treatment and would, therefore, not appear to be compatible with the General Agreement."*

## III. MFN PRINCIPLE AS AN EXCEPTION FOR DEVELOPING COUNTRIES

One of the exception of the MFN principle is the Special and Differential treatment provision of WTO given to developing countries which allow them to discriminate and grant some extra favours in trading such as tariff reductions, less quantitative restrictions, special access to their

[16] Report of the Panel adopted on 11 June 1981 (L/5135 - 28S/102).
[17] (1 Nov 1996) WT/DSB/M [20].
[18] Id at 26.
[19] (23 July 1998) WT/DS54/R.
[20] M Matsushita, The World Trade Organization: Law, Practice and Policy (OUP 2015) 167.

markets, etc. as compared to other developed member states. It is necessary for the developing nations to come forward and grow economically strong.

## IV. CONCLUSION

To conclude, MFN principle despite being the main pillar of WTO is less prevalent in practice than one might expect.[21] It can be due to the vagueness in the words of MFN clause and its different interpretations. Also, there are certain exceptions to the clause which however prevents any member to state to skip from the liability of MFN treatment. As the panel repeatedly interpreted the MFN clause in different cases it can be found that application of MFN has a different approach in different cases. Developed nations still find a way to indulge in "undercover protectionism."[22]

Hence there is a need to balance MFN treatment in a way that exceptions do not erode main principle, and MFN can be invoked as a basic right to all member state for international trading whether rich or poor, weak or strong.

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[21] P Van de Bossche & W Zdouc, The Law and Policy of the World Trade Organization (CUP 2017) 308.
[22] O Accominotti & M Flandreau, 'Bilateral treaties and the Most-Favoured-Nation Clause: The Myth of Trade Liberalization in the Nineteenth Century' (2008) 60 World Politics No 2 148.

 [ISSN 2581-5369]