

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

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**MOST-FAVOURED-NATION TREATMENT AND NON-DISCRIMINATION
UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE**

Note by the Secretariat

At the meeting of the Group of Negotiations on Services on 18 May 1990, a request was made for the Secretariat to clarify the difference between the concepts of most-favoured-nation treatment and of non-discrimination. This note has been prepared in response to this request and attempts to clarify the distinction between these two concepts in the light of the provisions of the General Agreement on Tariffs and Trade.

Introduction

The central non-discrimination obligation of the contracting parties is contained in Article I, the most-favoured-nation clause of the General Agreement. This clause applies mainly to customs duties. Other clauses designed to ensure non-discrimination between products originating in or destined for different countries apply to cinema films (Article IV), internal mixing requirements (Article III), transit of goods (Article V) marks of origin (Article IX), quantitative restrictions (Article XIII) and state trading (Article XVII) and measures taken under general exceptions (Article XX). While all these clauses have the common objective of preventing discrimination between countries, they use different legal standards to attain that objective.

The next section briefly describes the content of the above provisions. The conclusions list the main differences between the most-favoured-nation standard and the other standards of non-discrimination used in the General Agreement.

The Standards of Non-Discrimination in the General Agreement

The standard applicable to customs duties and related matters is that of the treatment of the most-favoured like product, originating or destined for any country. Article I prescribes that

"any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties".

According to Article III:7, no internal quantitative regulations relating to the mixture, processing or use of products in specified amounts or proportions, shall

"be applied in such a manner as to allocate any such amount or proportion among external sources of supply".

A similar rule applies to screen time which - with the exception of screen time reserved for films of national origin - shall, according to Article IV(b)

"not be allocated formally or in effect among sources of supply".

To ensure freedom of transit, Article V prescribes that

"No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport."

These three provisions have in common that they attempt to achieve non-discrimination by forbidding distinctions as to origins or destinations altogether rather than by prescribing how the benefits from a distinction are to be extended.

As to marking requirements, each contracting party (Article IX:1) shall

"accord to the products of the territories of other contracting parties treatment ... no less favourable than the treatment accorded to like products of any third country."

The "no less favourable" standard is also used in Article III:4, the General Agreement's national treatment provisions applicable to internal laws, regulations and requirements. The recent Panel on "United States - Section 337 of the Tariff Act of 1930" interpreted the no less favourable treatment standard in that context as follows:

"The words "no less favourable" are to be found throughout the General Agreement and later agreements negotiated in the GATT framework as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given either to other foreign products, under the most-favoured-nation standard, or to domestic products, under the national treatment standard of Article III. The words "treatment no less favourable" in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis. On the one hand, contracting parties may apply to imported products different formal legal requirements if

doing so would accord imported products more favourable treatment. On the other hand, it also has to be recognised that there may be cases where application of formally identical legal provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in fact no less favourable ... In such cases, it has to be assessed whether or not such differences in the legal provisions applicable do or do not accord to imported products less favourable treatment. Given that the underlying objective is to guarantee equality of treatment, it is incumbent on the contracting party applying differential treatment to show that, in spite of such differences, the no less favourable treatment standard of Article III is met." (L/6439, pages 51-52)

The General Agreement's rules on the non-discriminatory administration of quantitative restrictions in Article XIII prescribe that

"no prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted".

Article XIII permits the allocation of quotas among countries but contracting parties shall, in making country allocations,

"aim at a distribution of trade ... approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions".

Article XIII:2(d) declares that, if a contracting party chooses to allocate shares in a quota among supplying countries, it shall either

"seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned"

or, in cases in which this method is not reasonably practicable,

"allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product."

One method to distribute the shares in a quota is to sell, either directly or by auctions, the import or export licenses. The recent panel report on "Republic of Korea - Restrictions on Imports of Beef - Complaint by

Australia" states that a contracting party acts consistently with the General Agreement if an import monopoly resells by auction products it has imported under a permitted quota (L/6504, pages 29-30). The reasoning of the Panel suggests that not only government auctioning of products imported under a quota but also the auctioning of licenses to import would be consistent with the General Agreement.

A state-trading enterprise, according to Article XVII, shall

"in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders."

This provision requires, according to Article XVII:1(b), such enterprises to

"make any such purchases or sales solely in accordance with commercial considerations".

Under the general exceptions of Article XX contracting parties may take measures related to certain public policy goals (protection of human health, exhaustive national resources, etc.)

"subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail".

Conclusion

The above suggests that all provisions designed to prevent discrimination between products originating in or destined for different countries, including the most-favoured-nation clause, can be described as non-discrimination provisions. Most-favoured-nation treatment is merely one legal standard among many others to realize the principle of non-discrimination.

Other requirements used in the General Agreement to ensure non-discrimination are:

- not to make distinctions between origins or destinations;
- to provide treatment no less favourable than that accorded to products from any third country (a standard which has been interpreted to require effective equality of competitive opportunities);
- to allocate shares in a quota by agreement with supplying countries or in accordance with the shares during a previous representative period;
- to act solely in accordance with commercial considerations;

- to avoid arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

The General Agreement's rules on non-discrimination make no distinction between measures taken autonomously and those taken as a result of negotiations and between advantages accorded to another contracting party and those granted to a non-contracting party.