

Most Favoured Nation Principle

Any advantage granted to the product of one country must be granted to the others.

Decline of the mercantilist principle trade is a matter of one nation winning over the others replaced by principle that trade leads to comparative advantage which benefits nations.

Advantages:

1. Efficient – Most efficient produces
2. world trading system more secure
3. simplifies protection
4. constitutional protection against special interest groups within country.
5. Access for new entrants.

Disadvantages:

Undermined by various exceptions, does not mean is useless simply less efficient.

1. Developing countries exception – GSP system (some systems of GSP are under challenge from India.
2. Free Trade exception Art. 24.
3. Art. 19 Agreement on safeguards,
4. art 6 Antidumping and subsidies.
5. Balance of payment Arts 12 ff.
6. Internal security art 21.
7. Retaliation (not on MFN basis)

Includes Customs duties, rules, regulations, taxation, methods of valuation. All of these are subject to MFN.

What is a “like product” in the context of Art. 1:

Japan Case: Held that the Agreement left a wide discretion to countries to classify product and the burden of proof is on the country alleging that there is a violation. Since there was not intl. classification it was gradually competence of the State to classify. There was no illness in this case.

Thus home country classification will be given consideration particularly where there is not intl classification.

Spain coffee case:

May look to geography, cultivation method + processing – but coffee is a single product. In fact most coffee sold as a blend of dif types.

Even if there is no infringement it may be argued that there is a non violation

German Sardine Case

Even though there may have been no violation but still not impairment. Thus were a country changes then competitive environment although there is no violation another country may have been removed of the reasonable expectation and thus is a case of non violation nullification.

US Brazil Footwear Case:

If you have general legislation which applies to all products then may have violation of like product principle.

Internal Measures:

Any internal regulation not only has to accord with MFN Treatment but also to MFN principle.

Belgian Family Allowances Case:

Give exemption to public bodies which bought from countries which presented similar family allowances, discriminating against countries which did not have it.

Tried to encourage the change of policy within other State. There was held to be in infringement of the MFN principle.

National Treatment : Art. III:

Requires non discrimination between foreign + domestic producers. Foreign products should be treated in the same way local products.

Art. III Structure- para (1) establishes general principle of national treatment. Other paragraphs state its application + different types of measures.

Para (2) internal tax

Para (4) sales regulation

Para (8) exceptions including government procurement subsidies to domestic producers.

Discrimination is usually described as 2 types:

- 1) Direct discrimination (...../ explicit)
- 2) Indirect discrimination –disguised/disa.....impact.

Most discrimination is Indirect/disguised and thus is difficult to identify.

Eg. Product content: based on ingredient of product but ingredient only available in domestic market.

Consumer protection require diff types of labelling.

Technical standards in regards to safety /environment.

Would be discriminatory but may be allowed as exception.

Relationship between Articles:

- 1) Internal Regulators subject to Art I - Art. III
- 2) Art. III also pressures tax value of the tariff binding Art. III.
- 3) **Art. III , Art. XI complementary as Art. XI relates to borders measures. Art. III are internal measures.**

A product banned at the borders which does not meet on internal measures is under Art III.

- 4) Relationship with Gatt coexist Canadian newspaper case.

Art III aimed at protecting expectatives of competitive relationship between export and domestic products. To avoid protectionism + to create equality of competitiveness between imports + competitive products.

- As a consequence, no need to show that legislation caused effects, simply that it is discriminatory.
- What is looked for is substantive equality not just formal equality (tries to reduce indirect discrimination) not simply on its forms. In effect it must not discriminate.
- Differences in treatment may not mean a violation if used to equalise competitive environment.
- Does not matter if it is a small difference once it is discriminatory it is a violation .

Italian Discrimination against imported machinery case.

Give benefits to legal persons who bought local machines. Italy stated that this was about helping local economic producers. Held this may be valid, but the help was given to purchasers, and was nonetheless discriminatory and a violation. Against III:4, and not exempted by III:8

US 337 Case:

Law that required that local patent infringement case would go to local court, but imported products would go to International Court. Local court. Protection was different, and therefore against NT.

Diff. dispute resolution methods could lead to a violation if they are discriminatory.

Art. III (2) contains to step test to discrimination:

- 1) Are they like products?
- 2) Is there a discrimination?

There are two sentences in Article III (2) that interprets discrimination in two different ways.

Japan Alcoholic Case:

Japanese liquors tax when imposed tax on local liquors and vodka .
No discrimination in the face of legislation- this taxes differently as different products. Japan argued that differ alcohol content and customers consumed Japanese liquors diff. Japanese tax lower.

Art.III (2) Reference by 2nd sentence to the general principle in the 1st sentence shows the principles/sentences diff. Both sentences can catch direct + indirect discrimination.

Art. III (4) see Asbestos Decision. French prohibited import of asbestos products suspected to cause cancer. Health consequences. Did the diff health consequences mean that France was justified in treating them as not “like product”?

Para. 8.1.28 Panel: Health consequences cannot be taken into account in determining likeness. But measure justified as an exception due to health risk.

AB: “like product” under art III (4) is diff than under art. III (3).

Accepted the criteria for “like” but rejected the view that health risk was excluded.

Health risk fits into 1st criteria. i.e physical qualities of the product and used to differentiate products.

Relationship between Art. XI and Art III :

See Lobster from Canada Case

Tuna Dolphin Case

Distinction made between product + process. Gatt panels stated that Art. III would not cover process but the product itself. Criticism on this position (Trebilcock & Howse).

Matter has not been dealt with by WTO panel.

Significant in relation to genetically modified food.

Held (1) panel reports are not binding but do create legitimate expectation

First Sentence discrimination: Test has two elements.

- 1) like products
- 2) In excess of

- 1) **Like Products:** Must be construed strictly. Factors include use, consumers taste properties nature + quality of the product. Tariff classification-not determinative as each developing countries may have wide brands of classification.
- 2) **In excess of:** not conditional on showing trade effects, even the smallest discrimination/ harm is sufficient.

Second sentence discrimination: Test has three elements:

- 1) Are they directly competitive or substitutable.
- 2) Are they not similarly taxed
- 3) Is the tax applied so as to different protection/protectionism to the domestic product.

Canadian Periodical Case WT/DS31?AB?R or DSR 1997 : Vol 1 449

Do the two products compete in the same segment of the market? not have to be substitutable) Mi. statements revealed protectionist aims fact.

Not similarly taxed:

- 1) Must prove that it is
- 2) Must be more than a de minimis amount
- 3) The Is separate from the third issue- would have should protectionism as a different element.

(panel had put the two together the App. Body separated those two elements-similarly taxed +protectionism=diff test)

So about protectionism: Intention of legislation is irrelevant. It will made objective analysis of design + structure of statute. Magnitude of dissimilar tax, diff methods of the tax.

Held (2) agreed with panel that tax was discriminatory against foreign whisky+ vodka. They were like product and had taxed them in excess in comparison with loal liquor, which were directly competitive. Violation as not similarly taxed so as to afford protection.