RAIS RESEARCH ASSOCIATION for INTERDISCIPLINARY STUDIES
AUGUST 2020

DOI: 10.5281/zenodo.4006044

The Rise of Exceptions and the Eclipse of the Elemental Principle of Most-Favoured-Nation

Shubha Ojha

B.A. LL.B. (Hons.) National Law University Jodhpur, India, shubhaojha0698@gmail.com

ABSTRACT: It is often asserted that in one respect, the World Trade Organization is in fact fundamentally egalitarian. The term 'fundamentally egalitarian' throws light upon the commitment of the World Trade Organization ["**WTO**"] to an ideal of formal equality. According to this conception all the member states are entitled to offer and receive uniform and equal treatment. The WTO evinces this commitment to formal equality through the 'principle of Non-Discrimination'. The principle of Non-Discrimination is embodied in two elemental rules- Most-Favoured-Nation Treatment and National Treatment. As per the tenets of the Most-Favoured-Nation ["**MFN**"] rule, all the member states are required to refrain from treating any member states less favourably than they treat other member states. The principle is purportedly a misnomer. Though the term 'most-favoured-nation' suggests special treatment, in the context of the WTO, it is supposed to mean non-discrimination, that is, treating virtually everyone equally. The MFN rule had emerged as a fundamental principle of the General Agreement on Tariffs and Trade, 1947 ["**GATT 1947**"] but with time, multiple exceptions have come into picture that overshadow the fundamentality of this principle. This research paper ventures into the intricacies and implications of the MFN principle and analyses how the exceptions to the MFN principle have eclipsed the principle in the recent times and have ironically reduced its status from the status of a fundamental principle to that of an exception.

KEYWORDS: Fundamentally Egalitarian, Formal Equality, Non-Discrimination, Most-Favoured-Nation Treatment, National Treatment

Introduction

The main instrument by which the World Trade Organization ["**WTO**"] promotes and encourages trade is the most favoured nation principle ["**MFN**"], which is also considered by many as the central tenet of WTO. The MFN principle is considered as a misnomer because essentially all kinds of favourable treatments eventually become universal. In effect, the WTO requires all of its 164 member states to treat other member states as their 'most favoured' trading partner (Hathaway & Shapiro 2017). The principle finds applicability not only in international trade, but also in investment protection agreements (Schill 2009), protection of intellectual property, directs taxation etc. (Kofler 2005). The WTO upholds the principle of sovereign equality of all nations, and to that end it prohibits member states from indulging in any kind of discrimination with respect to customs duties and charges of any kind imposed on or in connection with importation, exportation or international transfer of payments for imports or exports. The MFN principle is embodied in the General Agreement on Tariffs and Trade, 1947 ["**GATT, 1947**"] under Article I of its text. The MFN Clause was regarded as the cardinal clause of the GATT, requiring that the best tariff and non-tariff conditions extended to any contracting party of the GATT had to be automatically and unconditionally extended to every other contracting party.

However, there exist impediments to the absolute achievement of this principle in practice. For example, Regional Trade Agreements ["**RTA**"], Preferential Trade Agreements ["**PTA**"], Free Trade Agreements ["**FTA**"], and the like are on the rise. The signatory parties to such agreements create parallel trading systems, wherein they can enjoy reduced tariff and other such incentives for trade. Further, the WTO Agreements contain certain special provisions which confer special rights upon the developing countries, and which grant developed countries the option to treat developing countries more favourably than other member states. This is referred to as the **Special and Differential Treatment**. These special provisions include, for example, longer time periods for implementing Agreements and commitments or measures to increase

trading opportunities for developing countries. In the November 2001 declaration of the 4th Ministerial Conference in Doha ["**Doha Declaration**"], member governments agreed that all special and differential treatment provisions are an integral part of the WTO Agreements, and that these provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. Therefore, within and outside of the WTO framework, there exist ways to sidestep the MFN principle. As a consequence, the MFN principle, which was originally the central organising principle of GATT, has almost become an exception (Sutherland et al. 2005, 90, para 60). The *first* part of this paper journeys through the historical background and the evolution of the MFN principle. The *second* part delves into the definition, purpose, and scope of MFN clauses. The *third* part deals the various exceptions to the MFN principle and how its existence as the central organising principle is being challenged by the mechanisms of RTAs, FTAs, PTAs, and Special and Differential Treatment. *Finally*, the last section analyses to what extent the WTO has drifted away from the MFN principle owing to the proliferation of RTAs, the spaghetti bow effect of the FTAs, PTAs, and other mechanisms.

History and the Evolution of the MFN Principle

Post- World War I

Origins of the MFN principle as it stands today can be traced back to the World War I, wherein European trade alliances and their discriminatory practices were one of the major reasons of the war (Ustor 1969, 10-64). Countries realized the importance of the MFN clause and began to negotiate various bilateral and plurilateral agreements during the war. The birth of the League of Nations then saw the inclusion of an unconditional MFN clause to promote the principles of free trade (Ustor 1969, 65-106). Trade liberalization saw countries taking advantage of the new international economic order by exporting products and services they had an expertise over, and consequently importing products and services they were not so good at; making countries mutually interdependent over one another. As a result of the change in circumstances, and the new economic scenario, equality of treatment to importers became imperative. The drafting conferences on the GATT in London (1946) and in Geneva (1947) made MFN treatment the cornerstone of the Charter of the International Trade Organization ["**ITO**"]. With the failure of the ITO Charter, MFN treatment was successfully added in the form of Article I of the GATT 1947 to assure traders that they will be treated equally in the exports of 'like' products and that any concession granted to one Member, shall unconditionally be granted to another (Rubin 1981). Meanwhile, in the 1970s the International Law Commission ["**ILC**"] acknowledged the importance of MFN treatment in international law, by preparing the "Draft Articles on Most-Favoured-Nation" in 1978. The ILC recommended that the General Assembly of the United Nations adopt a Convention, which was however never done. This instrument attempted to both codify and develop the use of the MFN provisions contained in treaties between States. The most favoured nation status was awarded by one nation to another typically in bilateral treaties and after its multilateralization, any receiving nation was granted all trade advantages that any other nation also received. The effect was that nation with the most favoured nation status was not discriminated against and was not treated worse than any other nation with most favoured nation status (Bhala & Kennedy 1998, para 62).

Scenario after 1994

With the conclusion of the Uruguay Round negotiations in 1994 at the Ministerial Conference in Marrakesh on 15 April 1994, various Agreements were part of the new World Trade Organization as a new start to international trade law. Countries realized that there was more to trade in goods and due to new developments in technology and expertise in various services, countries began to export services like never before. With the mutual interdependence of Members, there was a need to assure trading partners that their services and service suppliers

would be given the same treatment as that of like services and service suppliers of other Members and hence MFN treatment was not limited merely to trade in goods, but also to trade in services. In matters of intellectual property, the Paris and Berne Convention did not consider it essential to include an MFN clause given the fact that the existence of the principle of national treatment made it imperative to provide benefits to nationals of other Members in case benefits were provided to nations of one Member. Discrimination would thus be justified only if nationals of another country were given more favourable treatment than nationals of its own country. The Agreement forming the Trade Related Aspects of Intellectual Property Rights ["**TRIPS**"] hence decided to include the MFN clause to address such scenarios. The scope of MFN is hence largely the same in services and intellectual property.

Definition, Purpose and Scope of MFN

Definition

MFN treatment is defined by the Draft articles on MFN as the-

"*[…] 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 that treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.*" (Art. 5, Draft Articles on MFN)

MFN clause is defined as:

"*[…] a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured treatment in an agreed sphere of relations.*" (Article 4, Draft Articles on MFN)

Article I of the GATT 1947 deals with 'general most favoured nation treatment'. In EC – Seal Products (Appellate Body Report, DS400, para 5.86), the Appellate Body ["**AB**"] explained that based on the text of Article I:1, the following elements must be demonstrated to establish an inconsistency with the provision:

(i) that the measure at issue falls within the scope of application of Article I:1;
(ii) that the imported products at issue are 'like' products within the meaning of Article I:1;
(iii) that the measure at issue confers an 'advantage, favour, privilege, or immunity' on a product originating in the territory of any country; and
(iv) that the advantage so accorded is not extended 'immediately' and 'unconditionally' to 'like' products originating in the territory of all Members. Thus, if a Member grants any advantage to any product originating in the territory of any other country, such advantage must be accorded 'immediately and unconditionally' to like products originating from all other Members.

Purpose

For more than fifty years, the obligation to provide most-favoured-nation treatment in Article I of the GATT 1994 has been both central and essential to assuring the success of a global rules-based system for trade in goods (Appellate Body Report, US – Section 211 Appropriations Act, para. 297). In Canada- Autos (Appellate Body Report, DS139, para 84), in support of its interpretation of Article I:1 of GATT, the AB explained that the object and purpose of Article I "is to prohibit discrimination among like products originating in or destined for different countries." In EC- Seal Products the AB explained that "the obligation set out in Article I:1 has been described by the AB as 'pervasive', a 'cornerstone of the GATT', and 'one of the pillars of the WTO trading system'." (Appellate Body Report, DS246 EC-Tariff Preferences, para 101) The 'elimination of discriminatory treatment in international trade relations' is identified as one of the two main means by which the objectives of the WTO may be attained (Preamble to the Marrakesh Agreement establishing the WTO).

Scope and Application

(i) Scope of Discrimination under the MFN Principle

In EC- Bananas III, in support of the proposition that Article II of General Agreement on Trade in Services [hereinafter, "**GATS**"] prohibits de facto discrimination as well as de jure discrimination, the AB noted that GATT Article I applies to de facto discrimination (Appellate Body Report, DS27 EC- Bananas III). In Canada- Autos, the AB found the prohibition of discrimination under Article I:1 to include both de jure and de facto discrimination-
"*[T]he words of Article I:1 do not restrict its scope only to cases in which the failure to accord an 'advantage' to like products of all other Members appears on the face of the measure, or can be demonstrated on the basis of the words of the measure. […] Article I:1 does not cover only 'in law', or de jure, discrimination. As several GATT panel reports confirmed, Article I:1 covers also 'in fact', or de facto, discrimination. Like the Panel, we cannot accept Canada's argument that Article I:1 does not apply to measures which, on their face, are 'origin-neutral'.*" Hence, discrimination that is either is the form of explicit provisions of laws or regulations, or by means of a conduct is prohibited. The Belgian Family Allowances dispute comprehensively elucidates the scope of discrimination, and the phrase "any advantage, favour, privilege or immunity" for the purpose of understanding the nature and scope of discrimination prohibited by the MFN principle (Panel Report, Belgian Family Allowances (Allocation Familiales), adopted 7 November 1952, BISD 1S/59).

(ii) Types of Measures covered under Article I:1

The MFN principle under Article I:1 of the GATT covers the following types of measures:

- Customs duties and charges of any kind (for example, transport or warehouse charges) which are requisite for free and fair trade; and such type of customs duty or charge that is imposed on or is applied in connection with the importation and exportation of products.
- The charge imposed on the internal transfer of payments for imports or exports. Hence, suppose a Member charges a different exchange rate or service charge on the importation or exportation of goods only for a particular WTO Member in a discriminatory manner, the measure is in violation of Article I:1.
- "*Method of levying such duties and charges*"- This measure refers to the method used to calculate the duties and charges; and in turn refers to the application of ad valorem versus specific duties. Accordingly, if a WTO Member applies ad valorem duties on the 'like' products imported or exported to some Members, while imposing specific duties on similar products; the same would be considered as a different method of levying duties and charges.
- "*Other rules and formalities in connection with importation and exportation*"- This means that rules and formalities with respect to importation and exportation of like products must be uniform for all Members so as to maintain a level playing field.
- "*All matters referred to in paragraphs 2 and 4 of Article III*"- This means all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use must be uniform for like products, destined to or coming from another Member's territory. This phrasing was inserted during the Geneva session of the Preparatory Committee in 1947, in order to extend the grant of MFN treatment to all matters dealt under these paragraphs regardless of whether national treatment is provided for in respect of such matters (US proposal at EPCT/W/146; annotated agenda, EPCT/W/150; EPCT/A/PV/7, p. 14).

- "*Any advantage, favour, privilege or immunity granted by any contracting party*"- The following items fall under this phrase as per the GATT 1994 Analytical Index:

  a) Duty waiver conditional on certification by a particular government (Panel Report, European Economic Community - Imports of Beef from Canada, 7L/5099, adopted 10 March 1981, 28S/92, 98, paras 4.2-4.3).
  b) Export price monitoring schemes (Panel Report, L/6309 Japan - Trade in Semi-Conductors, adopted 4 May 1988, 35S/116, 159, para 122).
  c) Exemption from charges (Panel Report, United States - Customs User Fee, L/6264, 2 February 1988, 35S/245).
  d) Actions with respect to countervailing duties (Panel Report, DS18/R - 39S/128, para 6.9).

(iii) Unconditional and Immediate Advantage

Article I:1 requires that any advantage granted by a WTO Member to imports from any country must be granted 'immediately and unconditionally' to imports from all other WTO Members. Once a WTO Member has granted an advantage to imports from one country, it cannot make the granting of that advantage to imports of other WTO Members conditional upon those other WTO Members 'giving something in return' or 'paying' for the advantage. The granting of an advantage within the meaning of Article I:1 may not be conditional on whether a Member has certain characteristics, has certain legislation, or undertakes certain action. In the *Belgium – Family Allowances* case, concerning a Belgian law providing for an exemption from a levy on products purchased from countries which had a system of family allowances similar to that of Belgium, the Panel held that the Belgian law at issue introduced a discrimination between countries having a given system of family allowances and those which had a different system or no system at all, and made the granting of the exemption dependent on certain conditions. The Panel concluded that the advantage, that is the exemption from a levy, was not granted 'unconditionally' and that the Belgian law was, therefore, inconsistent with the MFN treatment obligation of Article I:1.

(iv) "Like" Products

In order to prove that the principle of MFN has been violated, the aggrieved party must first prove that the products are "like". The jurisprudence of the concept of "likeness" evolved in the case of EC Asbestos wherein the Panel laid down the guidelines to determine "like" goods by following three general criteria: a) the property, nature and quality of the products; b) the end uses of the product; c) tariff classification of the products. Furthermore, in Spain – Unroasted Coffee, it was states that a WTO panel examining whether products are 'like' within the meaning of Article I:1 would now definitely also consider consumers' tastes and habits. Hence, the physical properties, the extent to which the product may be perceived as serving the same end use, the extent to which consumers perceive and treat the products as an alternative and the international classification of the products for tariff purposes is what ought to be taken into account (Appellate Body Report, European Communities - Measures affecting Asbestos and Asbestos containing products, WT/DS145/AB/R, ¶ 102). The Japan-Alcoholic Beverages case is also known for its jurisprudence on the concept of "like products". However, no clear guidelines as to the circumstances in which goods may be considered as "like" were laid down.

Challenges to the Central Organising Principle of MFN

There are certain exceptions to the MFN principle that have altered the landscape of the GATT 1994 mechanism and have posed challenges before the MFN rule, which was introduced as the central organising principle of GATT.

The Regional Integration Trade Mechanism [RTAs/FTAs/PTAs]

"*I think that it would be fair to say that proliferation is breeding concern — concern about incoherence, confusion, exponential increase of costs for business, unpredictability and even unfairness in trade relations.*" -Pascal Lamy

The above statement highlights the recent proliferation of RTAs between the WTO member states that poses an apparent contradiction against the background of the original charter of the WTO, that is, to promote multilateral trade arrangements via MFN treatment. The original mandate of the WTO, with the end of WW2 in sight, was one of actively discouraging bi and plurilateral agreements in favour of multilateral agreements which would promote global free trade through consensus between all member states. However, just the opposite has happened, and MFN has been discarded in favour of more expedient RTAs. Although the RTA mechanism is legal in terms of the loose interpretation of GATT rules and weakness of the WTO as an administrative instrument, it is certainly not in the spirit of MFN treatment on the basis of which GATT was founded (Trost 2008, 43). As of 1 June 2020, 303 RTAs were in force which corresponds to 490 notifications from WTO members, counting goods, services, and accessions separately.

There are many terms used to describe trade agreements outside of the WTO multilateral trading system. These include '**regional**', '**preferential**' or '**free**' trade agreements as well as '**Customs Unions**' i.e. countries employing common customs policies such as the EC. The WTO defines RTAs as having "both a more general and a more specific meaning: more general, because RTAs may be agreements concluded between countries not necessarily belonging to the same geographical region; more specific, because the WTO provisions which relate specifically to conditions of preferential trade liberalization with RTAs." (50) The specific conditions with respect to the regional integration mechanism are spelled out in three sets of rules:

- Paragraphs 4 to 10 of Article XXIV of GATT provide for the formation and operation of customs unions and free-trade areas covering trade in goods ;
- The Enabling Clause refers to preferential trade arrangements in trade in goods between developing country Members. It allows derogations to the MFN treatment in favour of developing countries. In particular, its paragraph 2(c) permits regional or global arrangements among developing countries in goods trade. It has continued to apply as part of GATT 1994 under the WTO (Differential and more favourable treatment reciprocity and fuller participation of developing countries, Decision of 28 November 1979 (L/4903)); and
- Article V of GATS governs the conclusion of RTAs in the area of trade in services, for both developed and developing countries.

While the term 'regional' denotes close geographical proximity of partners such as European Commission members or Closer Economic Relations ["**CER**"] there is a trend to expand such agreements far more widely. The expression is used "both to accommodate 'extra-regional' agreements and to emphasise the preferential (and discriminatory) nature of such arrangements." (Goh 2006) RTAs now cover, not only trade, but also "services, investment, intellectual property, technical barriers to trade, dispute settlement, supra-national institutional arrangements and so on" (Crawford & Laird, 4) and contain such disciplines as may limit the "use of quantitative restrictions and subsidies." (*Id.*) There are several rules in GATT 1994 that permit WTO members to enter into RTAs. The Sutherland Report outlines the two principle classes by which MFN may be exempted under an RTA- (1) for "functional reasons" and (2) "those that exempted certain classes of contracting parties from the rules accepted by all the others (or modified the rules for them)." (Sutherland 2005, para 67) Under the first class there exists Article XXIV of the GATT rules that permits rules that permits the formation of RTAs and Customs Areas (*Id.* at para 68) and the second class permits developing countries preferential trading rules such as those under Article XVIII of

GATT 1947 and under Article I:2 which permitted pre-existing colonial trading arrangements to continue (*Id.* at para 69).

It was never envisaged that Article XXIV would be much used; indeed, the architects of GATT expected it to be implemented quite judiciously and prudently. Just the opposite has happened. RTAs created under this exemption must "above all be trade-creating as opposed to trade-limiting" and seek to reduce duties and tariffs on 'substantially all trade'. The trade creating and tariff/duty reducing aspects of RTAs finds expression in Article XXIV:4 of GATT 1947 and finds further elaboration in the Understanding on the Interpretation of Article XXIV of the GATT 1994 which re-affirmed "that the purpose of such agreements should be to facilitate trade between the constituent territories." Earlier, it was a requirement of the rules of GATT that RTAs be 'notified' to the WTO and subjected to examination by the Council for Trade in Goods (CTG). Given that the problem with the interpretation of the rules was so problematic, in 1996, the WTO created a Committee on Regional Trade Agreements ["**CRTA**"] to give coherence to these discussions (Nataraj 2007).

The Sutherland Report notes that governments need to take consider the damage being done to the multilateral trading system before embarking on new discriminatory initiatives and urges them to refrain from pursuing such initiatives simply out of an instinctive desire to "catch up" with others. And if the existing PTAs cannot be scrapped and new ones cannot be prohibited, the long-term remedy to the "spaghetti bowl" problem would be through the effective reduction of MFN tariffs and non-tariff measures in multilateral trade negotiations. The report proposes that another approach to PTAs is to clarify the language of Article XXIV and to improve the means of administering its provisions. Although the report calls for countries to restrain their urge to "catch up" with others by joining FTAs, in reality it is difficult to deter them. When a group of countries conclude an RTA, it inevitably generates a domino effect that compels those outside to follow suit and seek similar preferences so as to offset the negative impact of the RTA. At the same time, however, concluding an RTA is no easy task and negotiations often drag on, as has been the case with the Free Trade Area of the Americas ["**FTAA**"] and the EU-Mercosur free trade agreement. Meanwhile, many developing countries are left outside the RTAs. Faced with all these problems, both developed and developing countries may now be coming to recognize once again the importance of the Doha Round (Asako 2005).

General Exceptions

Article XX of GATT 1994 lists general exceptions, under which countries may undertake measures that are in the interests of their legitimate policy objectives- protection of public morals, human, animal or plant life or health. The Appellate Body Report has ruled that, under the GATT 1994, it is within the authority of a WTO Member to set the public health or environmental objectives it seeks to achieve (Appellate Body Report, US- Gasoline, p. 30); as well as the level of protection that it wants to obtain, through the policy it chooses to adopt (Appellate Body Report, Brazil – Retreaded Tyres, para 140). It also includes measures relating to importations or exportations of gold and silver; necessary to secure compliance with law; necessary to secure compliance with laws or regulations which are consistent with the provisions of the Marrakech Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices. It further covers measures relating to the products of prison labour; imposed for the protection of national treasures of artistic, historic or archaeological value; relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; undertaken in pursuance of obligations under any intergovernmental commodity agreement, involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a

governmental stabilization plan; essential to the acquisition or distribution of products in general or local short supply.

The chapeau of Article XX is an instance of exceptions in the GATT, which take into account the prevalent international conditions at the time when it was drafted. The AB in its report on US-Shrimp case (Appellate Body Report, DS58 United States - Import Prohibition of Certain Shrimp and Shrimp Products, decided 21 November 2001) laid down the standards for compliance with Article XX:

1. Not amount to an arbitrary discrimination between countries where the same conditions prevail;
2. Not amount to an unjustifiable discrimination; and
3. Not to be a disguised restriction to trade.

The AB observed that because US had offered international negotiations to resolve problems encountered by the enactment of US Section 609 to some countries but not all, this was found to be inconsistent with Article XX and subsequently, US had to give the same opportunity to all other shrimp exporters as well. As for the clause "disguised restriction of trade", the panel in its report on EC - Asbestos held that the term effectively outlaws interventions that aim to promote interests that are not mentioned in the sub-paragraphs in the guise of protection of one of the grounds mentioned in the sub-paragraphs of Article XX of GATT and emphasised that the key to understanding the clause is in the word "disguise" rather than "restriction" and therefore, any measure that falls within the purvey of Article XX would be scrutinized as a restriction if it attempts to abuse the Article.

Special and Differential Treatment

Special and differential treatment ["**SDT**"] is premised on the notion that developing countries have different needs than developed countries, and that WTO disciplines should be modified to reflect those different needs. Many developing countries face difficulties in implementing the WTO agreements, dealing with the adjustment costs of trade liberalization, and engaging in international trade to reap the full benefits of WTO membership (Lewis 2007). Thus, the preamble to the Marrakesh Agreement recognized that there is need for positive efforts designed to ensure that developing countries ["**DCs**"], and especially the least developed countries ["**LDCs**"] amongst them, secure a share in the growth in international trade commensurate with the needs of their economic development." Doha declaration reiterated this and confirmed that "in this context, enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programs have important roles to play." The WTO secretariat has identified six categories of SDT provisions. Although these categories overlap, they provide a useful way of classifying and assessing the provisions (69). The categories are:

a) Provisions aimed at increasing the trade opportunities of DCs, such as exemption from MFN by providing preferential tariff treatment to products from DCs pursuant to **Generalized System of Preferences** ["**GSP**"] schemes (70).
b) Provisions under which WTO members should safeguard the interests of DCs, such as the requirement that members explore the possibility of constructive remedies before imposing antidumping duties on developing country members (71).
c) Flexibility of commitments and actions, and use of policy instruments, such as the understanding that DCs "do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to trade" of DCs (72).
d) Transitional time periods- For example, the prohibition on import substitution subsidies does not apply to DCs for five years or to LDCs for eight years from the creation of the WTO (73).
e) Technical assistance

f) Provisions relating to LDCs- For example, members agree to exercise "due restraint" in bringing dispute settlement actions against LDCs (74).

Conclusion: The Threat of MFN-Erosion

The MFN principle, which is considered as a misnomer, is under the threat of being eroded owing to the increasing exceptions. However, echoing the beliefs of Arvind Panagariya and Isaiah Frank, we should not be too quick to give up on MFN (Baldwin, McLaren, Panagriya 2000, 289). The RTA mechanism has emerged as the most alarming reason for the erosion of the MFN principle. As Gavin Goh asserts, "commentators have expressed concerns that RTAs undermine the multilateral trading system and reduce global welfare by eroding the MFN principle, by diverting trade from non-parties and by diverting attention and resources from WTO negotiations." Encouraging multilateral trade represented the spirt and cardinal norm of GATT, but the fact that bilateral RTAs have now become the norm can be attributed to wide application of RTAs to not just trade but also non-trade issues such as labour rights, environmental protections, protection of intellectual property rights, etc (Trost 2008, 65). It becomes difficult to encourage member states to take part in multilateral trade negotiations because through RTAs, these non-trade issues become 'boiler-plate' template requirements in future WTO negotiations (Sutherland 2005, para 87). For instance, EC has only 9 MFN agreements while all the other trade agreements are preferential in nature (Asako 2005). The resulting convoluted 'spaghetti bowl' of RTAs has made MFN an exception rather than the rule to such an extent that it is now being described as the "least favoured nation principle" (*Id.*). Negative consequences of the regional integration trade mechanism gives rise to 'bilateral opportunism' whereby countries disregard the MFN norm in order to enhance their own well-being at the expense of third countries excluded from bilateral renegotiations (Bown 2004, 679). For instance, Japan and EC have been formally accused of engaging in bilateral opportunism (*Id.*, 680). Thus, RTAs/FTAs/PTAs can sabotage the multilateral trading system as they have "poor trade-liberalising outcomes and trade distorting effects." (Goh 2006)

Another important exception is that of SDT. Michael Finger (2008) has described the endeavour to concretise SDT as "heartfelt but ill-defined and ultimately fruitless." This raises the question- Whether the WTO has anything useful to do in this area? SDT was introduced for the purpose of achieving 'substantive equality' and to provide DCs and LDCs with a platform to fulfil their obligations at their own pace keeping in mind their respective development needs, however, too much reliance on SDT will shake the foundations of the central tenet of non-discrimination, prevent the member states from assimilating into the international market, disrupt effective WTO negotiations and impede the continued expansion of international trade (Mitchell & Voon 2009, 344). Certain general and security exceptions may still be valid exceptions, provided they fulfil the necessary tests. But the increasingly complex framework of non-WTO agreements and the SDT mechanism is leading to an erosion of the MFN rule.

References

Asako, Ueno. 2005. "Erosion of the Non-discrimination Principle Through Waves of Preferential Trade Agreements: A Warning from the Sutherland Report." *RIETI*. Accessed July 7, 2020 https://www.rieti.go.jp/en/columns/a01_0163.html.

Baldwin, Richard E., McLaren, John & Panagariya, Arvind. 2000 "Regulatory Protectionism, Developing Nations, and a Two-Tier World Trade System." *Brookings Trade Forum*.

Bhala, R., Kennedy, K. 1998. World Trade Law: The GATT-WTO System, Regional Arrangements, and U.S. Law. Charlottesville. Lexis Law Publishing.

Bown, C. 2004. "Trade Policy under the GATT/WTO: Empirical Evidence of the Equal Treatment Rule." 0008-4085/04/678-720, *Canadian Journal of Economics* 37(3): 678-720.

Crawford, Jo-Ann & Laird, Sam. "Regional Trade Agreements and the WTO." *Centre for Research in Economic Development and International Trade (CREDIT)*, Research Paper No. 00/3, University of Nottingham.

Ferguson. 2008. *The Ascent of Money: A Financial History of the World*. New York: Penguin.

Finger, Michael J. 2008. "Developing Countries in the WTO System: Applying Robert Hudec's Analysis to the Doha Round", *World Economy* 31(7):887-904.

Goh, Gavin. 2006. "Regional Trade Agreements and Australia: A National Perspective." *Australian APEC Study Centre, Monash University*.

Hathaway, Oona & Shapiro, Scott. 2017. *The Internationalists and their Plan to Outlaw War*. London: Penguin.

Kofler, George W. 2005. "Most-Favoured-Nation Treatment in Direct Taxation: Does EC Law Provide for Community MFN in Bilateral Double Taxation Treaties." *Houston Business & Tax Law Journal*. 5 Hous. Bus. & Tax L.J. 1.

Lamy, Pascal. 2007. "Proliferation of Regional Trade Agreements "Breeding Concern", Conference on Multilateralizing Regionalism." *World Trade Organization (WTO)*. Accessed 3 July 2020 https://www.wto.org/english/news_e/sppl_e/sppl67_e.htm.

Lewis, Meredith Kolsky. 2007. "WTO Winners and Losers: The Trade and Development Disconnect." *Georgetown Journal of International Law*, G.J.I.L. 39, no. 1 (Fall 2007): 165.

Litonjua, M.D. 2010. "International Free Trade, the WTO, and the Third World/Global South." *Journal of Third World Studies*, Vol. 27, No. 2. Chapter in *Third World Problems and Issues in Historical Perspective*. University Press of Florida.

Mitchell, Andrew D. & Voon, Tania Voon. 2009. "Operationalizing Special and Differential Treatment in the World Trade Organization: Game Over?" *Global Governance*, Vol. 15, No. 3, p. 344.

Nataraj, Geethanjali. 2007. "Regional Trade Agreements in the Doha Round: Good for India?" Accessed July 2, 2020. Tokyo: Asian Development Bank Institute. Available at https://www.adb.org/sites/default/files/publication/156705/adbi-dp67.pdf.

Rubin, Seymour J. 1981. "Most-Favored-Nation Treatment and the Multilateral Trade Negotiations: a Quiet Revolution." *Maryland Journal of International Law*. 6 Md. J. Int'l L. 221.

Schill, Stephan W. 2009. "Mulitilateralizing Investment Treaties through Most-Favored-Nation Clauses." kley *Journal of International Law*. 27 Berkeley J. Int'l Law 496.

Sutherland, Peter, et al. 2005. "The Future of the WTO: Addressing Institutional Challenges in the New Millennium. Accessed July 5, 2020. http://archive.ipu.org/splz-e/wto-symp05/future_WTO.pdf.

Trost, Fred. "Reconciling Regional Trade Agreements with the Most Favoured Nation Principle in WTO-GATT." *Macquarie Journal of Business Law*, 5 Macquarie J. Bus. L. 43 (2008).

Ustor, Endre. "First Report on the Most-Favored-Nation Clause", *Yearbook of the International Law Commission 1969*, Volume II, A/CN.4/213.