



**AN ASSESSMENT OF THE MOST-FAVOURED NATION TREATMENT
OBLIGATION AS CENTRAL TO MULTILATERAL TRADING UNDER THE WTO
REGIME: THE AFRICAN PERSPECTIVE**

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Abstract

The World Trade Organisation (WTO) came into being on the January 1st, 1995⁶⁹. It is the only global International organisation (with more than 164 members) making rules on trade between countries.⁷⁰ Its Secretariat is in Geneva, Switzerland. Central to WTO are Agreements that are signed by the Members and ratified by their various parliaments. WTO aims and objectives are establishing a uniform institutional framework for smooth conduct of trade relationships between member states. It aims to ensure that trade between member states is being carried out efficiently, conveniently and without inhibition.⁷¹ In a nutshell, trade liberalisation is the 'core goal' of the WTO and this includes but is not limited to removal of trade barriers such as unfair trade tariffs, promoting fair treatment for international investors, promoting a non-discriminatory policy among Members, preferential treatment for the developing nations and implementing the Most-Favoured Nations Treatment (known as MFN) among member states.⁷² Article 11(2) of the WTO Agreement distinguished between Multilateral and Plurilateral agreements: while in the former is a binding agreement on every member of the WTO which must be consented to with the WTO Agreement at one or as a whole, in the latter, a country can decide to either ratify a particular agreement(s) or not, in other words, it is not binding.

Keywords: WTO, Africa, GATT, GATS, Most, MFN, Multilateralism

⁶⁹ John H Jackson *The World Trade Organisation Constitution and Jurisprudence* (Chatham House Papers 1998) 1

⁷⁰ <https://www.wto.org/english>

⁷¹ John H Jackson (n 1) 1

⁷² Article II: 1 *WTO Agreement* 1994

Most-Favoured Nation Treatment

Most-Favoured Nation (often called MFN) is one of the principles of the WTO. It can be found in virtually all the WTO legal frameworks:⁷³ I.e Article I(1) of the GATT 1994; GATT Part II (Article 11); TRIPS (Article 4); and it must be stated in the BIT for Foreign Investment. MFN principle applies to all trade of both goods and services, internal taxes, import regulations, customs duty, e.t.c. What then is Most-Favoured Nation Treatment?

According to the GATT, every WTO member must, due to the MFN obligation, confer without any condition to other Members any trade benefit given to another, regardless of whether the benefiting country is a member state or not.⁷⁴ MFN is, therefore, having an automatic, immediate, and unconditional advantage, favour, privilege or immunity on trade in 'like products' among WTO member states.⁷⁵ In another word, MFN means that WTO members should treat their fellow members equally and should not treat outsiders (non-WTO members) better than they treat insiders (WTO members) while trading on the same product.⁷⁶ MFN ensures that WTO members get the best possible trade treatment by their fellow WTO members by automatically and unconditionally according to all WTO member states any trade benefit given to another country, whether or not that nation is a WTO member or not.⁷⁷ MFN has been enshrined in the WTO legal frameworks such as the GATT, GATS, and TRIPS.⁷⁸

MFN clause, as we see it today, drew its inspiration from the League of Nations in the 1920s. However, it historically dates back to the late 17th century. In the 1900s, the provision appeared in many treaties across Europe. The famous 1860 Cobden-Chevalier Treaty between the UK and France is one example of where the MFN clause or obligation was included.⁷⁹

MFN and Multilateralism

MFN is central to multilateral agreements because it is significant to multilateral trade by promoting trade liberalisation and removal of all sorts of discrimination

⁷³ Daniel Bethlehem *et al* *The Oxford Handbook of International Trade Law* (OUP 2009) 23

⁷⁴ Article I (1) GATT

⁷⁵ Petros C Mavroidis *Trade in Goods* (2ndedn, OUP 2013) 129

⁷⁶ *ibid*

⁷⁷ Petros C. Mavroidis (n 15) 130

⁷⁸ As discussed earlier

⁷⁹ Anderson Robert *Reviewing the World Trade Progress to date and Ongoing Negotiations* (4 Public Procurement Law Review) 255

whether 'de Jure' or 'de facto' on 'like products'.⁸⁰ If, for instance, Nigeria imposes a 10% duty on milk imports from Portugal while charging 5% on the same product from France, it is 'de jure'. And also, if Nigeria imposes a 10% duty on imports of milk sourced from cows living mostly or permanently at a 2,500 metres altitude while charging 20% on imports from other cows not meeting such requirements, is discrimination 'de facto'.⁸¹ Both scenarios are one form of discrimination or another and are, therefore, contrary to the MFN principle.

In the celebrated case of *Columbia-Ports of Entry (Columbia v Panama)*,⁸² Columbia (a WTO member) mandated Panama (another WTO member) to submit in advance, import declarations, and to pay customs duties on textiles and foot-wears. The WTO panel found Columbia's action towards Panama discriminatory. And, the WTO panel found, in the *Spain-Unfrosted Coffee*, the various types of unfrosted coffee to be 'like products'.⁸³

One fundamental role of trade agreements is to prevent a situation whereby trading becomes too costly to a third party (or negative externalities) from a country's trade policies.⁸⁴ This situation may arise in several ways. For example, changing the conditions of trade or making policy that affects import prices. MFN, therefore, come, among others, to address these externalities by way of trade agreements. This becomes significant because negotiations on tariffs address those externalities in trade even though are not too effective in solving some problems arising from other externalities.⁸⁵

MFN, due to the complexity of multi-country tariff negotiations, promotes trade liberalisation by way of agreements in trade becoming more reliable: the increasing cost associated with giving concession is making MFN not too preferable especially for a country that wants to thereafter a more favourable terms of trade to another (third) country known as concession diversion.⁸⁶ For instance, the value to A of concessions negotiated between Nigeria and Germany risks being eroded through subsequent negotiations between Germany and India, assuming Germany has 'conceded' to India more than it did to Nigeria. MFN is the insurance policy against similar behaviour and because of it, Nigeria and

⁸⁰ Jadish Bhagwati; Robert Hudec *Fair Trade and Harmonisation* (Cambridge 1996) 126

⁸¹ Choi Wong Mong *Like Products in International Trade Law* (OUP 2013) 277

⁸² 2009 DS366 WTO DSU Panel Report

⁸³ Spain Unfrosted Coffee case 1981 WTO Panel

⁸⁴ Petros (n 15) 131

⁸⁵ Petros (n 15) 135

⁸⁶ *Ibid*

Germany (like any other trading nation) will continue to have an incentive to negotiate and liberalize trade, therefore, MFN promotes multilateralism.⁸⁷

MFN becomes all the more important as the number of participants in trade deals increases. For instance, Nigeria and Canada have signed an agreement and included an MFN clause. Nigeria subsequently negotiated with the UK and knows that whatever benefit it will grant to the UK will have to be automatically extended to Canada as well. Canada, in other words, will be free-riding on Nigeria's negotiation with the UK.⁸⁸

Another important aspect of MFN is that ensuring tariffs discrimination between countries is hugely expensive for keeping track of where every product comes from would be costly; MFN is also simplifying customs procedures and reduce also the cost and complexity of agreements by a reduction in the number of likely outcomes of the bids.

Due to MFN, other (outsider) countries find it preferable to join an agreement that is already in place, for they would benefit from the low tariff package. Furthermore, the new entrants would have to also grant MFN, the participating members (insider countries) can easily access outsiders markets by entry incentives.

However, MFN is not without a few disadvantages. Main of which is that it makes giving concessions too costly because a WTO member would have to extend to all other WTO member states they have an MFN agreement with. MFN also is making bigger countries to be reluctant when it comes to making concessions especially to the smaller nations for doing so will make them (the bigger nations) extend the same for countries with high trade volume; MFN, therefore, discourages some countries from granting concessions knowing that same would have to be given to other nations.⁸⁹ And MFN also is promoting what is called 'free riding', whereby member states prefer to wait and benefit from an existing agreement due to MFN instead of making concessions themselves. MFN also prevents member states from liberalising trade beyond what is agreed upon (by the rest of the world).⁹⁰

⁸⁷ Petros (n 15) 138

⁸⁸ Hudec Robert E *Developing Countries in the GATT Legal System* (Gower Publishing Company 2007) 188

⁸⁹ Winters Alan *Regionalism versus Multilateralism* (CEFR London 1996) Discussion Paper No. 1525

⁹⁰ Abdel Motaal *The Multilateral Scientific Consensus and the World Trade Organisation* (38 *Journal of World Trade*) 76

The Exceptions

MFN principle is not absolute, it has some exceptions. These exceptions are provided in the GATT⁹¹ and are classified into: a) special relationship between sub-groups, this is a special relationship between 2, 3 or more countries like what exists among G7 (i.e USA and the UK) members; b) Another exception is the relationship between customs union or free trade agreements, i.e between Nigeria, Ghana and Senegal under the ECOWAS⁹² or Nigeria, Ethiopia, and Rwanda under the AfCFTA,⁹³ the EU (Belgium and Denmark), NAFTA (between Mexico and Canada), e.t.c.; c) the preferential treatment for the developing countries.⁹⁴ Preferential treatment in favour of the developing nations may be seen as a 'carrot' to encourage the developing countries to join the WTO. It is altogether, a good idea; and finally d) Members can with two-thirds majority votes give a special waiver to a member state(s).⁹⁵

There is also a general exception to all GATT obligations⁹⁶ which MFN is one of. They include taking any measure necessary, by a member state, to protect public morals; human, animal, or plant health; the trade in gold or silver; measures necessary in complying with a law that is consistent with the GATT Agreement; measures to protect national treasures (i.e Museum); and dealing with the product of prison labour.⁹⁷

Conclusions

This paper is an attempt to analyse the view that MFN is central to Multilateral trading under the various WTO legal frameworks. The essay briefly traced the history of the principle from pre to post WTO era. The study also looked at the application of the MFN obligation, its merits (which can not be exhausted here) and a few demerits. MFN, we have also seen, is not without some exceptions. We have equally seen how the principle promotes trade liberalisation, remove restraints in trade and attempt to eliminate trade discrimination between WTO member states (more than 164 countries as earlier mentioned countries). Worthy of reiterating also is the principle's good attempt in according

⁹¹ Article XXIV

⁹² Economic Community of West African States established on 28 May 1975 comprising the 15 West African countries

⁹³ *African Continental Free Trade Area* came into force on 1st January 2021.

⁹⁴ Article XVIII: I GATT, 1994

⁹⁵ Abdel Motaal (n 30) 77

⁹⁶ Article XX GATT 1994

⁹⁷ General Exceptions GATT

preferential treatment to the developing countries for them to catch up. This is of course a welcome idea for poverty somewhere is a threat to prosperity everywhere. However, a deeper looking into this noble and commendable ambition, to this writer's mind, the world in which the WTO is among its most important institutions, can do more in helping the developing countries, especially the ones in Africa beyond this. Economy and politics most often go together, one of the best ways to help Africa catch up economically is to stop the developed countries from the undue and unnecessary political interference in the continent of Africa and other parts of the world. Africa is blessed with both human and natural resources,⁹⁸ however, outside interference is one of the factors dwarfing the continent economically, especially. What happened to Africa's patriotic leaders with the interest of their people and their countries and the continent at heart is known to virtually everyone. Leaders such as the Congo's Patrice Lumumba, Ghana's Kwame Nkrumah, Burkina Faso's Thomas Sankara, and recently Libya's Mu'ammar Ghaddafi; and ironically, there are in Africa sitting Presidents such as Equatorial Guinea's Teodoro Nguema (since 1979); Cameroun's Paul Biya (since 1982); Congo Brazzaville's Sassou Nguesso (1979 to 1992 and returned in 1997); Uganda's Yoweri Museveni (since 1986); and Eritrea's Isaias Afwerki (since 1993).⁹⁹ Nothing exposes the developed countries' double standard on the African continent than this.

⁹⁸ Duncan Clark *Crude Continent: The Struggle for Africa's Oil Prize* (Main edn, Profile Books 2008) 2