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**Working Group on the Interaction between Trade and Competition Policy**

## THE FUNDAMENTAL WTO PRINCIPLES OF NATIONAL TREATMENT, MOST-FAVOURED-NATION TREATMENT AND TRANSPARENCY

Background Note by the Secretariat

1. This note has been prepared in response to a request made by the Group at the informal meeting which took place on Thursday, 28 January 1999, as an input to the Group's consideration of the relevance of the fundamental WTO principles of national treatment, transparency, and most-favoured-nation treatment to competition policy and vice versa (the first specific element incorporated in the General Council's decision regarding the work of the Group in 1999[1]). As agreed by the Group when the request was made, the paper is directed only toward one aspect of this work element, namely the relevance of fundamental WTO principles of national treatment, transparency, and most-favoured-nation treatment to competition policy, and not the "vice versa" aspect. In this regard, it was understood that the paper would be capable of evolution and that the latter aspect might be considered at a later stage, if the Group so requested.

2. With this background, the principal aim of this paper is to provide factual background on the purpose, content, location in the WTO Agreements and (in a summary fashion) experience with the application of the principles of national treatment, most-favoured-nation treatment and transparency. It does not seek to analyse the relevance of this for competition law and policy since that was not part of the mandate given to the Secretariat. Rather, it was understood that this was a task for Members in the Working Group.

3. The paper first summarizes the observations that have been made by Members on the issue of the relevance of basic WTO principles. The structure of the remaining parts of the paper is as follows: each of the three principles of national treatment, most-favoured-nation treatment and transparency is discussed in a separate section. For each principle, the paper first outlines the main provisions in which it is found and the purpose of the principle. The beneficiaries of the principle (i.e., persons, goods, services, etc.) and the types of measures to which it applies are then described. Select highlights of experience with the application of the principle and relevant exceptions to its application are noted.

## I. OBSERVATIONS BY MEMBERS

4. Interest in the relevance of fundamental WTO principles such as national treatment, most-favoured-nation treatment and transparency for competition law and policy appears to be motivated by several interrelated perceptions that have been mentioned in the Group. First, it has been suggested that adherence to such principles in the application of competition law and/or policy will stimulate trade and investment, and is important to facilitate the sound application of relevant

[1] WT/GC/M/32, p. 52

legal provisions and to ensure equal treatment of foreign and domestic firms in all jurisdictions.[2] Further to this point, it has been said that, in many cases, the provisions and application of competition legislation may, in fact, already be consistent with the principles under discussion.[3] Nonetheless, it has also been suggested that the matter is a complex one that merits further study. For example, it has been said that in reflecting on the general question of the consistency of competition law and policy with fundamental WTO principles, it would be important to consider a range of institutional questions, possibly including matters such as access to the courts and the exercise of enforcement discretion.[4]

5. The importance of the existence of a well-defined competition law to the application of the principles of national treatment and transparency in the field of competition policy is explored in a contribution to the Working Group by Switzerland (WT/WGTCP/W/89).[5] The contribution suggests that, in considering the application of these principles, a distinction should be made between two types of markets, namely markets in which there is a functioning competition law and markets in which there is no such legislation. It is suggested that the relevance of the principles of national treatment and transparency is clear in situations where competition legislation exists and is applied. Where no such legislation exists or is applied, their relevance is less clear.

6. A second major source of interest in the content and relevance of fundamental WTO principles *vis-à-vis* competition policy objectives concerns their potential contribution in addressing a range of governmental barriers to competition.[6] With reference to the matter of exceptions from the principles of national treatment and most-favoured-nation treatment, some Members have suggested that Article VI of the GATT and the Agreement on Anti-Dumping themselves constitute a significant exception to these principles, to the extent that such rules are applied selectively rather than to domestic producers and all foreign suppliers equally.[7] On the other hand, it has been pointed out that nowhere in the GATT is it stated that Article VI and measures to counter dumping or subsidization constitute exceptions to other provisions of the GATT. Rather, the non-discrimination provisions in the WTO system are intended to be applied only to fairly-traded imports.[8]

7. The importance of WTO principles such as national treatment and most-favoured-nation treatment with reference to competition-related aspects of multilateral and other agreements relating to foreign direct investment has also been noted in related discussions in the Group.[9]

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[2] Comments of the representatives of various Members, including Brazil, Canada, Australia, Switzerland, Nigeria and the European Community and its member States reported in WT/WGTCP/M/4, para. 14; WT/WGTCP/M/5, para. 64; and WT/WGTCP/M/6, paras. 55, 90 and 92.

[3] In this regard, in the Group's meeting of 27 and 28 November 1997, the representative of Canada said that a study of this question had been carried out with reference to the competition legislation of the three NAFTA partners (Canada, the United States and Mexico). The study had considered both the scope and content of the three countries' competition legislation, and had found that, in general, such legislation was consistent with the principle of national treatment. Comments of the representative of Canada reported in WT/WGTCP/M/3, para. 14 and written elaboration in document WT/WGTCP/W/57.

[4] Comments of the representatives of the European Community and its member States and Brazil reported in WT/WGTCP/M/3, para. 14 and WT/WGTCP/M/4, para. 14, respectively.

[5] Comments of the representative of Switzerland reported in WT/WGTCP/M/5, para. 78

[6] Comments of the representative of Hong Kong, China reported in WT/WGTCP/M/4, paras. 4 and 47 and WT/WGTCP/M/5, para. 14.

[7] Comments of the representatives of Korea and Hong Kong, China reported in WT/WGTCP/M/5, paras. 45 and 67, respectively, and related observations by the representatives of Japan and Norway in paras. 42 and 55, respectively.

[8] Comments of the representative of the United States reported in WT/WGTCP/M/5, para. 68.

[9] Comments of the representative of Norway reported in WT/WGTCP/M/6, para. 49.

8. Several suggestions have been put forward in the Working Group for further consideration of the relevance of fundamental WTO principles for competition law and policy. In this regard, it has been suggested that a way to deepen the discussion would be to consider the relevance of fundamental WTO principles for specific elements of competition law and policy that may be important at the international level.[10] It has been said, in addition, that in reflecting on the general question of the consistency of competition law and policy with fundamental WTO principles, it may be important to consider a range of institutional questions, possibly including matters such as access to the courts and the exercise of enforcement discretion.[11]

9. The related suggestion has also been made that, in the event that further analysis of the relevance of basic WTO principles for competition-related matters leads to the conclusion that these principles should be applied in relation to competition law and policy, the principles might have to be adapted to the specific needs of competition policy, as was done for services in the GATS and for intellectual property in the TRIPS Agreement.[12]

10. With regard to the perceived broader relevance of fundamental WTO principles to other aspects of the interaction between trade and competition policy, it has been suggested that, in addressing government measures that distort or limit competition, the Group should seek to draw upon, and enhance the role of, fundamental WTO principles and basic objectives of competition policy, including non-discrimination, economic efficiency and consumer welfare.[13]

## II. THE PRINCIPLE OF NATIONAL TREATMENT

### A. MAIN PROVISIONS IN WHICH THE PRINCIPLE IS FOUND

11. The principle of national treatment is set out in the following provisions of the three main WTO Agreements, dealing respectively with trade in goods, trade in services and intellectual property rights:

(i) GATT: Article III. Of particular relevance is Article III:4, which requires national treatment in respect of all laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of goods;

(ii) GATS: Article XVII;

(iii) TRIPS Agreement: Article 3.

The text of these provisions is reproduced in Appendix I to this paper.

12. The principle of national treatment is also incorporated in various other agreements that form part of Annex IA of the WTO Agreement – the part of the WTO that contains multilateral agreements on trade in goods, for example the Agreements on Technical Barriers to Trade and on the Application of Sanitary and Phytosanitary Measures. It is also a cornerstone of the plurilateral Agreement on Government Procurement.

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[10] Comments of the representatives of Brazil and the European Community and its member States reported in WT/WGTCP/M/6, paras. 90 and 92, respectively.

[11] Comments of the representatives of various Members reported in WT/WGTCP/M/3, para. 14 and WT/WGTCP/M/4, para. 14

[12] Comments of the representative of Switzerland reported in WT/WGTCP/M/5, para. 78 and WT/WGTCP/M/6, para. 103.

[13] Comments of the representative of Hong Kong, China reported in WT/WGTCP/M/4, paras. 4 and 47.

## B. BACKGROUND/PURPOSE OF PRINCIPLE

13. The essence of the principle of national treatment is to require that a WTO Member does not put the goods or services or persons of other WTO Members at a competitive disadvantage *vis-à-vis* its own goods or services or nationals. This having been said, it is important to note that the purpose and scope of the principle of national treatment differs as between the three main WTO Agreements.

14. The focus of the GATT, at least as originally negotiated in 1947, was on the control and liberalization of border measures restricting international trade. A key principle is that, as a general rule, any border measures to give a competitive advantage to domestic products should take the form of customs tariffs imposed at the border and that the level of such customs tariffs should be a matter for negotiation and binding in national schedules. Within this scheme of things, Article III on national treatment plays a critical role since, as its paragraph 1 makes clear, it is designed to ensure that all other measures, referred to as "internal" measures, are not applied to imported or domestic products so as to afford protection to domestic production. It thus serves the purpose of ensuring that internal measures are not used to nullify or impair the effect of tariff concessions and other multilateral rules applicable to border measures. The focus in the GATT on border measures, together with its historical background as replacing a proliferation of bilateral trade agreements with a multilateral one, explain why most-favoured-nation treatment is often referred to as the cornerstone of the GATT, notwithstanding the key role of national treatment in regard to internal measures.

15. The role and purpose of national treatment in the WTO agreement on services – the General Agreement on Trade in Services (GATS) – is somewhat different. This difference has its origin in the fact that, in the area of trade in services, it is generally not possible to make a distinction between border measures and internal measures, especially since, under the GATS, the supply of services through the commercial presence in the territory in question of a foreign service supplier is treated as a form of trade in services. Hence, the approach in the GATS is not to make national treatment a principle of general application but to provide for it to be applied when a specific commitment has been made and recorded in national schedules that form part of the Agreement. As is made clear in Article XIX of the GATS, the scope of the schedules is to be progressively enlarged through successive rounds of trade negotiations with a view to progressively higher levels of liberalization – in the same way as trade in goods has been progressively liberalized through successive tariff negotiations.

16. In the area of intellectual property, national treatment has traditionally been the cornerstone of the public international law in this area, notably as reflected in the Paris and Berne Conventions.[14] The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) is no different in this respect from the main pre-existing conventions, on which it builds and whose main substantive provisions it incorporates. With some relatively minor exceptions, national treatment applies to all aspects of the protection of intellectual property addressed by the Agreement.

## C. SCOPE OF THE NATIONAL TREATMENT PRINCIPLE

17. This section looks at two aspects of the scope of the national treatment principle as it is embodied in the three main WTO Agreements: the beneficiaries of national treatment; and the types of measures to which it applies.

[14] Article 2 of the Paris Convention for the Protection of Industrial Property and Article 5 of the Berne Convention for the Protection of Literary and Artistic Works.

*Beneficiaries*

18. In the case of Article III of the GATT, the subject-matter which must benefit from national treatment is not the persons of other Members but the products of other Members. While this is apparent on the face of Article III, it has also been emphasized in various panel decisions. For example, in *Canada – Administration of the Foreign Investment Review Act* (1984), the Panel noted that there was no basis, under the terms of Article III, to consider whether foreign investors were adversely affected by obligations imposed on them under the legislation at issue.[15] However, it should also be noted that it has been held that the mere fact that national measures at issue are applied to persons rather than to products does not mean that they escape the scope of Article III if the measures discriminate according to whether such persons are dealing in imported or domestically produced goods.[16]

19. In the case of trade in services, the potential beneficiaries of national treatment under the GATS are both the services of other Members and the service suppliers of other Members - although, as earlier mentioned, it should be recalled that whether they actually benefit will depend on a specific commitment to grant national treatment having been made in the relevant national schedule and on any conditions and qualifications set out therein. The definition of the service suppliers of other Members is to be found in Article XXVIII of the Agreement. It includes natural persons of other Members and, broadly speaking, local subsidiaries or branches of foreign-owned or controlled companies.

20. It should be noted that, while the above-noted GATT and GATS provisions have applicability (where other relevant elements are satisfied) to imported goods or services or foreign firms supplying services on the domestic market, they do not apply to the treatment of goods and services destined for the supply of foreign markets through exportation.

21. Under the TRIPS Agreement, the beneficiaries of national treatment are the "nationals of other Members". Article 1.3 makes it clear that the term "nationals" is to be defined as those natural or legal persons that would meet the criteria for eligibility for protection under the main pre-existing intellectual property conventions, if all Members of the WTO were members of those conventions. This means that certain persons who are not nationals are assimilated to nationals for this purpose, for example, in the area of industrial property, persons who have a real and effective industrial or commercial establishment in a WTO Member and, in the area of copyright, persons who first publish a work in a WTO Member.

*Types of measures to which the national treatment principle applies*

22. With regard to the national treatment principle as embodied in the GATT, the provisions of Article III:4 are probably most relevant to the area of competition law and policy. The types of measures to which this provision applies are "all laws, regulations and requirements affecting [the] internal sale, offering for sale, purchase, transportation, distribution or use" of products of national origin. The significance of the term "internal" has already been discussed in paragraph 14 above. It might be noted that an interpretative note to Article III makes it clear that the national treatment standard contained in Article III applies to internal taxes and laws and regulations even where they are

[15] *Canada – Foreign Investment Review Act (FIRA)*, para. 6.5, BISD 30S/140, L/5504, adopted on 7 February 1984

[16] The Panel on *United States – Section 337 of the Tariff Act of 1930* held as follows: "Nor could the applicability of Article III.4 be denied on the grounds that most of the procedures in the case before the Panel are applied to persons rather than to products, since the factor determining whether persons might be susceptible to Section 337 proceedings or federal district court procedures is the source of the challenged products, that is whether they are of United States origin or imported", para. 5.10, BISD 36S/345, L/6439, adopted on 7 November 1989.

collected or enforced, in the case of imported products, at the point or time of importation. Thus, for example, the Panel on *United States – Section 337 of the Tariff Act of 1930* found that, because Section 337 was used as a means for the enforcement of United States patent law at the border and that patent law was to be regarded as an internal law within the meaning of Article III:4, Section 337 was subject to the provisions of Article III of the GATT.[17]

23. As regards the scope of the "laws, regulations and requirements" referred to in Article III:4 of the GATT, panels have tended to take a broad approach. One important factor in this regard has been that Article III:4 covers "laws, regulations and requirements *affecting* the internal sale, …" etc. of products (emphasis added). In an early dispute settlement case, the Panel on *Italian Discrimination against Imported Agricultural Machinery* emphasized that the application of Article III was not intended to be limited to measures that were overtly focused on regulating the conditions of trade. Rather, it was determined that the wording of the Article was intended to cover "any laws or regulations which might adversely modify the conditions of competition between … domestic and imported products on the internal market".[18] This interpretation has been upheld by subsequent GATT and WTO panels and the Appellate Body.[19] An example of this broad view of when a governmental action can be held to be a law, regulation or requirement within the meaning of Article III:4 can be found in the Panel on *Canada – Foreign Investment Review Act (FIRA)* which considered that written and legally binding purchase and export undertakings submitted by investors were covered, even though FIRA did not make their submission obligatory.[20] Another example can be found in the Panel on *EC – Parts and Components* which considered that requirements which an enterprise voluntarily accepts in order to obtain an advantage from the government come within the scope of Article III:4.[21] It might also be noted that Article III:4 has been understood to apply to procedural as well as substantive laws, regulations and requirements.[22]

24. In regard to import monopolies, Article II:4 of the GATT requires that, except where otherwise agreed, such monopolies shall not be operated so as to afford protection on the average in excess of the amount provided for in a country's tariff schedule for the product in question.[23] A number of panels have, in addition, made it clear that the practices of state trading enterprises are subject to the provisions of Article III of the GATT on national treatment when they concern internal laws, regulations or requirements affecting such matters as the imposition of a minimum price for the sale of imported products, the imposition of a six-pack configuration requirement for imported beer but not domestic beer, practices regarding the listing and de-listing of products by state-operated liquor stores and regulations affecting internal transportation.[24]

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[17] *United States – Section 337 of the Tariff Act of 1930*, paras. 5.8 and 5.10, BISD 36S/345, L/6439, adopted on 7 November 1989

[18] *Italian Discrimination against Imported Agricultural Machinery*, para. 12, BISD 7S/60, L/833, adopted on 23 October 1958

[19] See, for example, Panel Report on *EC – Regime for the Importation, Sale and Distribution of Bananas*, para. 7.175, WT/DS27/R

[20] *Canada – Foreign Investment Review Act (FIRA)*, para. 5.4, BISD 30S/140, L/5504, adopted on 7 February 1984

[21] *EC – Parts and Components*, para. 5.21, BISD 37S/132, 197

[22] *United States – Section 337 of the Tariff Act of 1930*, para. 5.10, BISD 36S/345, L/6439, adopted on 7 November 1989

[23] In this regard, it might be noted that import mark-ups imposed by such monopolies are assimilated for this purpose to customs duties. Interpretative note to Article II:4 of the GATT, providing that the provisions of this paragraph will be applied in the light of the provisions of Article 31 of the Havana Charter.

[24] *Canadian – Import Distribution and Sale of Certain Alcoholic Drinks by Provincial Market Agencies*, para. 4.26, BISD 35S/37, L/6304, adopted on 22 March 1988; *Canada – Import Distribution and Sale of Certain Alcoholic Drinks by Provincial Market Agencies*, paras. 5.4, 5.15 and 5.31, BISD 39S/27,

25. Under the GATS, the national treatment commitment, where it has been made, applies in respect of "all measures affecting the supply of services". A "measure" is defined by Article XXVIII to mean "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form". Furthermore, Article I:3 makes it clear that such measures mean measures taken by central, regional or local governments and authorities, and non-governmental bodies in the exercise of powers delegated by such governments or authorities. Article XXVIII(c) defines "measures by Members affecting trade in services" to include measures in respect of: (i) the purchase, payment or use of a service; (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally; and (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member. While there is less experience in applying this provision in particular cases than there is in respect of Article III (GATT), the Appellate Body has taken the view that the term "measures" as defined in the GATS must be given a broad scope of application, especially in view of the use of the word "affecting" in the definition and the way it has been interpreted under Article III:4 of the GATT.[25]

26. It should also be noted that Article VIII of the GATS requires Members to ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's specific commitments, and does not abuse its monopoly position to act in other markets in a manner inconsistent with such commitments. These provisions also apply to cases of exclusive service suppliers, where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory.

27. Under the TRIPS Agreement, the national treatment obligation contained in its Article 3 applies to the "protection of intellectual property". A footnote to Article 3 defines the term "protection" as including "matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement".

## D. THE NO LESS FAVOURABLE TREATMENT STANDARD

28. In each of the three main WTO Agreements, GATT, GATS and TRIPS, the national treatment principle is expressed in terms of a no less favourable treatment standard. Thus, the language of Article III:4 of the GATT in this regard has also been used in Article XVII of the GATS and Article 3 of the TRIPS Agreement. In the case of the TRIPS Agreement, it might be noted that this was a conscious decision to prefer the no less favourable treatment standard over the "same protection" or "same rights" standards as found in the main pre-existing international intellectual property conventions.[26]

### *Equality of competitive opportunities*

29. There has been extensive interpretation of the no less favourable treatment standard as reflected in Article III:4 of the GATT. This interpretation has revolved around the concept that Article III:4 requires equality of competitive opportunities between domestically produced and imported products, that it protects expectations rather than specific outcomes in this regard and that it

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WT/DS17/R, adopted on 18 February 1998; *United States – Measures Affecting Alcoholic and Malt Beverages*, para. 5.63, BISD 39S/206, WT/DS23/R, adopted on 19 June 1992

[25] See Report of the Appellate Body in *EC – Regime for the Importation, Sale and Distribution of Bananas*, para. 220, WT/DS27/AB/R

[26] Article 3 of the Paris Convention for the Protection of Industrial Property and Article 5 of the Berne Convention for the Protection of Literary and Artistic Works.

prohibits measures that might adversely affect the conditions of competition facing imported products relative to domestically produced products on the internal market. Thus, an early panel stated that Article III:4 was intended to cover "any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market" and that "the intent of the drafters was to provide equal conditions of competition once goods had been cleared through customs".[27] A subsequent panel stated that the rationale of Article III was "to protect expectations of the contracting parties as to the competitive relationship between their products and those of other contracting parties" and went on to say that it served "to protect current trade but also to create the predictability needed to plan future trade".[28] Another panel stated that "the words 'treatment no less favourable' in paragraph 4 (of Article III) 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".[29] The reasoning of these earlier panels has been endorsed by WTO panels[30] and by the Appellate Body.[31]

30. In the case of the GATS, the interpretation of the no less favourable treatment standard as one of ensuring no less favourable conditions of competition is built into the national treatment provision of the Agreement itself. Paragraph 3 of Article XVII of the GATS states that:

> "Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member."

*Formally identical vs. formally different legal requirements*

31. A consequence of the notion that an effective equality of competitive opportunities must be available and also that this has to be seen as a minimum standard, i.e. that Members are free to grant more favourable treatment to imported products if they so wish, is that jurisprudence under the GATT has made it clear that, on the one hand, the existence of formally different legal requirements is not, in itself, dispositive in establishing a breach of the no less favourable treatment standard and, on the other, the existence of formally identical legal requirements is not, in itself, conclusive in establishing conformity with the no less favourable treatment standard. This was explained in the 1989 Panel Report on *United States – Section 337 of the Tariff Act of 1930* as follows:

> "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

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[27] *Italian Discrimination against Imported Agricultural Machinery*, paras. 11-13, BISD 7S/60, 64, L/833, adopted on 23 October 1958

[28] *United States – Taxes on Petroleum and Certain Other Imported Substances*, para. 5.1.9, BISD 34S/136, L/6175, adopted on 17 June 1987

[29] *United States – Section 337 of the Tariff Act 1930*, para. 5.11, BISD 36S/345, L/6439, adopted on 7 November 1989

[30] For example in the Panel Report on *Japan – Measures Affecting Consumer Photographic Film and Paper*, para. 10.379, WT/DS44/R

[31] For example in its Report on *Japan – Taxes on Alcoholic Beverages II*, the Appellate Body stated that "… Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products", p. 27, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 1 November 1996

> 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. For these reasons, the mere fact that imported products are subject under Section 337 to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4. 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."[32]

This finding was endorsed by a WTO panel.[33]

32. This GATT jurisprudence has been reflected in the text of the national treatment provision of the GATS. Paragraph 2 of Article XVII explicitly recognizes that the no less favourable treatment standard may be met by either formally identical or formally different treatment, provided, as made clear in its paragraph 3, no less favourable conditions of competition are accorded to the services or service suppliers of other Members.

E. LIKE PRODUCTS, SERVICES AND SERVICE SUPPLIERS

33. In the case of the GATT and the GATS, the no less favourable treatment standard has to be met in regard, respectively, to "like products" and "like services and service suppliers".

34. The question of what is a like product for the purposes of Article III of the GATT has given rise to a good deal of attention in dispute settlement panels and the Appellate Body. This has been, for the most part, in regard to the interpretation of Article III:2 concerning internal taxes and other internal charges. This discussion has been complicated by the fact that, in addition to the like products concept, this provision contains, in its interpretative note, the concept of a "directly competitive or substitutable product"; this has been held to have a broader meaning, for the purposes of this provision, than a like product.[34] The general approach taken by panels has been to emphasize that the interpretation of the term "like product" should be examined on a case-by-case basis. Criteria that have been used in this connection include the products' end-uses in a given market, consumers tastes and habits, the products' nature and quality and whether the products fall in question under the same tariff classification.[35] In regard to testing whether products are directly competitive or substitutable, a recent panel examined evidence of the direct competitive relationship between the products, including comparisons of their physical characteristics, end-uses, channels of distribution and prices, taking into account cross-price elasticities, evidence from the markets of other countries and potential as well as actual competition.[36]

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[32] *United States – Section 337 of the Tariff Act 1930*, para. 5.11, BISD 36S/345, L/6439, adopted on 7 November 1989

[33] *United States – Standards for Reformulated and Conventional Gasoline*, para. 6.25, WT/DS2/R

[34] It should be noted that in endorsing this finding, the Appellate Body has emphasized that the scope of the term "like", which is used in several GATT provisions, must be determined by the particular provision in which it is found as well as by the context and the circumstances that prevail in any given case to which that provision might apply (Report on *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R).

[35] See, for example, Report of the *Working Party on Border Tax Adjustments*, para. 18, BISD 18S/97, L/3464, adopted on 2 December 1970, and Appellate Body Report on *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R

[36] *Korea – Taxes on Alcoholic Beverages*, pp. 171-192, WT/DS75/R

35. Another important issue that has arisen in determining whether products would be considered "like" for the purposes of GATT Article III:4 or directly competitive or substitutable for the purposes of GATT Article III:2, has been whether protective intent is relevant. Some have taken the view that this is an important consideration, interpreting the phrase in Article III:1 enjoining measures being applied "so as to afford protection to domestic production" in this light. This view has been influenced by the concern that the designation of imported and domestic products as "like" would make any regulatory product differentiation inconsistent with Article III, even if employed with legitimate public policy objectives, such as for environmental or standardization purposes. They have thus considered it important that the like product determination be made in such a way that it did not unnecessarily infringe upon the regulatory authority and domestic policy options of contracting parties.[37] However, a WTO panel explicitly rejected the taking into account of the legislative objective of an internal tax when determining the scope of "like products" or "directly competitive or substitutable products".[38] This approach was upheld by the Appellate Body. Further, in considering whether a measure has been taken "so as to afford protection to domestic production" in terms of Article III:2, the Appellate Body ruled that the issue of legislators' or regulators' intent is not a relevant consideration. Rather, with respect to tax differentials between domestic and imported directly competitive or substitutable products, the focus should be on objective factors underlying the tax measure in question, including its design, architecture and revealing structure.[39]

## F. KEY EXCEPTIONS TO THE PRINCIPLE

36. As outlined above, the scope of the national treatment obligations under the GATT and GATS is limited in various ways. In particular, the GATT requirement is limited to "internal" measures and the corresponding requirement in the GATS is dependent on specific commitments having been scheduled by the Member concerned. In addition, there are a number of permissible exceptions to the national treatment principle under these two Agreements. Without attempting to be fully comprehensive and without describing the often complicated experience with their application, the following exceptions should be noted:

(a) Government procurement of goods and services (Article III:8(a) of the GATT and Article XIII of the GATS). However, it should be noted that 25 WTO Members have made national treatment commitments towards each other in respect of a large proportion of their government procurement of goods and services under the plurilateral Agreement on Government Procurement.

(b) General exceptions covering such matters as measures necessary to protect public morals or maintain public order, to protect human, animal, or plant life or health and to secure compliance with laws and regulations not inconsistent with the provisions of the agreement in question (Article XX of GATT and Article XIV of GATS). Such general exceptions are subject to the requirement that measures taken pursuant to them are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same (GATT) or like (GATS) conditions prevail, or a disguised restriction on international trade. It should also be noted that the area covered by some of these exceptions to the GATT has

[37] *United States – Measures Affecting Alcoholic and Malt Beverages*, paras. 5.23 to 5.26 and paras. 5.71 to 5.74, WT/DS23/R and BISD 39S/206, respectively

[38] *Japan – Taxes on Alcoholic Beverages*, paras. 6.15-6.19, WT/DS8/R, WT/DS10/R and WT/DS11/R

[39] Appellate Body Report on *Japan – Taxes on Alcoholic Beverages*, p. 29, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R. However, in another case, in concluding that a measure had been taken "so as to afford protection", the Appellate Body relied on, in addition to the magnitude of tax differentials, the fact that the government of the respondent country had stated that the objective of the measure was to protect domestic production (Appellate Body report on *Canada – Certain Measures Concerning Periodicals*, pp. 30-32, WT/DS31/AB/R).

been regulated in greater detail by the WTO Agreements on Technical Barriers to Trade and on the Application of Sanitary and Phytosanitary Measures.[40] Also in regard to domestic regulation, the GATS' Annex on Financial Services allows exceptions for prudential reasons.

(c) Security exceptions (Article XXI of the GATT and Article XIV*bis* of the GATS).

37. As mentioned earlier, in terms of the scope of the TRIPS Agreement, the national treatment obligation in that Agreement is relatively comprehensive. However, where exceptions to this principle have been made under the main pre-existing intellectual property conventions, they are also permitted under the TRIPS Agreement, for example the so-called "comparison of terms" in the area of copyright and, subject to some additional safeguards in the TRIPS Agreement, provisions relating to judicial and administrative procedures in the area of industrial property. Moreover, in respect of performers, producers of phonograms and broadcasting organization, the national treatment obligation only applies in respect of the rights provided under the TRIPS Agreement.

## III. THE PRINCIPLE OF MOST-FAVOURED-NATION TREATMENT

### A. MAIN PROVISIONS IN WHICH THE PRINCIPLE IS FOUND

38. The principle of most-favoured-nation (MFN) treatment is contained in each of the three main WTO Agreements and is set out in the following provisions:

(i) GATT: Article I;

(ii) GATS: Article II;

(iii) TRIPS Agreement: Article 4.

The text of these provisions is reproduced in Appendix II to this paper.

39. Provisions requiring a WTO Member not to discriminate between other WTO Members can be found in various of the other agreements relating to trade in goods that form part of Annex IA of the WTO Agreement.

### B. BACKGROUND/PURPOSE OF THIS PRINCIPLE

40. As was mentioned earlier in this note, the focus in the GATT on border measures, together with its historical background as a replacement for a proliferation of bilateral trading agreements with a multilateral one, explain why most-favoured-nation treatment is often referred to as the cornerstone of the GATT. It serves a central role in ensuring the multilateral nature of the trading system embodied in the GATT and the multilateral rule of law in this area. The requirement that any change be automatically applied to all WTO Members is an important element of stability and predictability in the system, guaranteeing that all will benefit from trade liberalization measures and making it more difficult to reverse such measures. It also has an important element of economic logic in it, enabling each participating country to satisfy its import needs from the most efficient sources of supply (maximizing the scope for operation of the principle of comparative advantage). Furthermore, the basic rule of non-discrimination that it embodies is perceived to have an important foreign policy rationale.

[40] In the event of a conflict with the GATT, the provisions of these Agreements prevail. General interpretative note to Annex IA of the Marrakesh Agreement Establishing the World Trade Organization.

41. Similar considerations also apply to the other mains areas of the WTO - services and intellectual property. However, in these areas, the national treatment principle, actually or potentially, may be relatively more important. This is most obvious in the area of the TRIPS Agreement. In the pre-existing international intellectual property conventions, notably the Paris and Berne Conventions, a most-favoured-nation clause had not been considered necessary. This was because it was considered that the broad scope of the national treatment obligation contained in those Conventions greatly limited the likelihood that benefits accorded to the nationals of one country would not be accorded to the nationals of all others: apart from in the relatively limited areas where exceptions to national treatment are permitted in these Conventions, such discrimination between the nationals of other countries would only be possible if a country gives the nationals of another country more favourable treatment than it accords to its own nationals. The origin of the TRIPS MFN clause lay in the fact that, notwithstanding the inherent unlikeliness of such a course of action, some countries had taken measures to do so. The TRIPS MFN clause was largely motivated by a desire to deal with this rather exceptional situation.

42. As regards GATS, the potential broad scope of the national treatment commitments, covering as they may all measures affecting the supply of services (and not just "internal" measures, as in the GATT), also has implications for the relative importance of the MFN rule. However, it has, of course, to be recalled and emphasized that national treatment is not a rule of general application in the GATS but is dependent on a specific sectoral commitment having been made and on any conditions and qualifications set out therein.

## C. SCOPE OF THE MFN PRINCIPLE

43. With regard to the beneficiaries of most-favoured-nation treatment, the description of this matter in relation to national treatment (paragraphs 18-21 above) broadly holds good also for most-favoured-nation treatment. However, with respect to the GATT, it should be noted that this principle must also be applied to exports and any product destined for the territories of other WTO Members.

44. With regard to the types of measures to which the MFN obligation applies, the description under national treatment is once more broadly applicable. However, there is an important additional area covered in the case of the GATT. The GATT MFN obligation covers not only the internal taxes and regulations referred to in the GATT national treatment provision but also border measures.[41] In regard to state enterprises and enterprises enjoying exclusive or special privileges, Article XVII of the GATT requires that such enterprises shall, in their purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment described in the GATT for governmental measures affecting imports or exports by private traders. This is understood to mean that such purchases or sales should be made in accordance with commercial considerations and that the enterprises of other contracting parties shall be afforded adequate opportunity to compete, in accordance with customary business practices.

45. In regard to the GATS, an important difference is that, whereas the national treatment obligation only applies where a specific commitment has been made, the MFN obligation contained in Article II is one of general application, albeit subject to a once-off list of exceptions (discussed further below). In respect of monopolies and exclusive service suppliers, the provisions of Article VIII require that any such enterprise, in the supply of a monopoly service in a relevant market, not act in a manner inconsistent with a Member's MFN obligation.

[41] That is to say "Customs, duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation …". Article I:1 of the GATT.

## D. THE MFN STANDARD

46. The standard of most-favoured-nation treatment is described somewhat differently in the three main WTO Agreements. The GATT uses traditional language in referring to the obligation to extend "immediately and unconditionally" to all WTO Members "any advantage, favour, privilege or immunity" granted by a Member. A WTO panel has confirmed GATT case law to the effect that any such advantage cannot be made conditional on any criterion that is not related to the imported product itself.[42] The TRIPS Agreement uses the same formulation as the GATT.

47. The GATS uses a "treatment no less favourable" standard for expressing its MFN obligation. The meaning of this standard was the subject of a finding in the Panel Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*. The question was whether the language clarifying the no less favourable treatment standard contained in the GATS national treatment obligation, in regard to formally identical or formally different treatment and conditions of competition (see paragraphs 30 and 32 of this note above), should also be understood to be relevant to the interpretation of the MFN obligation of Article II of the GATS. The Panel held that the same broad scope should be given to the "treatment no less favourable" standard in Article II, which it thus interpreted as requiring no less favourable conditions of competition.[43] This result was essentially upheld by the Appellate Body, although on different grounds.[44]

## E. LIKE PRODUCTS, SERVICES AND SERVICE SUPPLIERS

48. As in the case of the national treatment provisions of the GATT and the GATS, the basis of comparison for determining discrimination under their MFN clauses is like products or like services and service suppliers. However, it was clear in the drafting of the GATT[45], and has been upheld since, that the expression could have different meanings in the different contexts in which it is used. On the whole, it would seem that GATT panels have tended to adopt a relatively narrow construction of this term under Article I where tariff issues are concerned.[46] In doing so, they have had greater regard for the relevance of tariff classification, although this has been treated as not necessarily dispositive in itself.[47] A consideration appears to have been that the issue of how broadly the benefits from a tariff concession negotiated for a specific product area are construed can have implications for the incentive to make such commitments.

## F. KEY EXCEPTIONS TO THE PRINCIPLE

49. There are a number of important exceptions or qualifications to the application of the MFN principle. These include the general exceptions and security exceptions discussed above in relation to national treatment. In addition, in regard to the GATT, important exceptions to the MFN principle are permitted for customs unions and free-trade area agreements (Article XXIV), and preferences in favour of and between developing countries (the Enabling Clause).[48]

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[42] *Indonesia – Certain Measures Affecting the Automobile Industry*, paras. 14.143-14.144, WT/DS54/R, WT/DS55/R, WT/DS59/R and WT/DS64/R

[43] WT/DS27/R/USA, paras. 7.298 to 7.304

[44] Report of the Appellate Body on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R

[45] Guide to GATT Law and practice, 1995 Vol. I, p. 35

[46] *Japan – Tariff on Imports of Spruce, Pine, Fir Dimension Lumber*, BISD 36S/167, L/6470, adopted on 19 July 1989

[47] *Spain – Tariff Treatment of Unroasted Coffee*, BISD 28S/102, L/5135, adopted on 11 June 1981

[48] Decision of 28 November 1979 on "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", BISD 26S/203

50. Under the GATS, Members are allowed to register a once-off list of exemptions from the MFN treatment standard. These exemptions are subject to review five years after the entry into force of the WTO and, in principle, should not exceed a period of ten years.[49] The GATS also allows an exception from MFN treatment for economic integration agreements, subject to certain conditions, (Article V) and exempts from its rules air transport traffic rights and services directly related to their exercise as well as measures taken for prudential reasons in the financial services sector.[50]

51. The main exceptions to MFN treatment permitted under the TRIPS Agreement relate to international agreements on judicial assistance or law enforcement of a general nature and not particularly confirmed to the protection of intellectual property; situations where permissible exceptions to national treatment allow treatment to be accorded on the basis of material reciprocity; the rights of performers, producers of phonograms and broadcasting organizations not provided in the Agreement; and treatment under pre-existing international agreements that have been notified and do not constitute an arbitrary or unjustifiable discrimination. Furthermore, an exception is allowed for international registration systems concluded under the auspices of WIPO.

## IV. THE PRINCIPLE OF TRANSPARENCY

### A. MAIN PROVISIONS IN WHICH THE PRINCIPLE IS FOUND

52. The concept of transparency as reflected in WTO agreements can be understood as having two component parts:

(i) the obligation to publish, or at least make publicly available, all relevant regulations, and, as a general rule, not to apply or enforce them until this has been done. Often linked with this are provisions relating to the impartial administration of such regulations and the right of review of decisions taken under them; and

(ii) provisions on the notification of various forms of governmental action to the WTO and other Members.

53. With regard to publication, the provisions of the three main WTO Agreements containing this obligation are:

(i) GATT: Article X;

(ii) GATS: Article III;

(iii) TRIPS: Article 63.

The text of these provisions is reproduced in Appendix III to this paper.

54. Many of the other agreements that make up Annex IA of the WTO Agreement, relating to trade in goods, also contain a publication obligation.

55. Article X of the GATT also contains provisions on the uniform, impartial and reasonable administration of trade measures and the right of review of action taken pursuant to them. Provisions of this nature can be found in many other WTO Agreements, including the GATS (in particular Article VI), the TRIPS Agreement (in particular Articles 41-42 and 62) and in various Annex IA

[49] Most of the exemptions listed are in the areas of maritime, transport and audiovisual services.
[50] Annexes to the GATS on Air Transport Services and Financial Services.

Agreements, such as those on Subsidies and Countervailing Measures, Anti-Dumping Measures, Customs Valuation, Import Licensing Procedures and Pre-Shipment Inspection.

56. In regard to notification, the main GATS and TRIPS provisions are those contained in the Articles referred to above, although in both cases there are other provisions calling for notifications in particular instances. The notification provisions contained in the GATT and other agreements relating to trade in goods are numerous and diverse. A Secretariat note prepared for the Working Group on Notification Obligations and Procedures, established pursuant to a Decision taken by the Uruguay Round Trade Negotiations Committee, lists 165 different notification obligations and procedures in the trade in goods area.[51] Some of these are of broad application; for example, most WTO rules-based agreements require the notification of implementing legislation and any changes to such legislation. Some of these provisions call for notifications on a periodic basis, such as biannual reports on countervailing and anti-dumping actions. Some notifications only have to be made when a particular trade action is taken or contemplated, such as a safeguard action. Still others only have to be made on a "one-time" basis, for example at the time of the coming into force of the WTO Agreement. Apart from such notification provisions, use is also made of other devices for ensuring that the WTO and its Members have adequate information about the practices of Members; these include requirements to make available enquiry or contact points, the possibility for "reverse" notifications to be made by an affected Member about another Member's practices, and obligations to provide information on request.

## B. BACKGROUND/PURPOSE OF THIS PRINCIPLE

57. The underlying purpose of these rules can be summarized in four points:

(i) First, to promote a rules-based approach to trade policy and measures at the national level. A basic condition for the rule of law in this area is that of publication of all legal requirements and, wherever possible, their non-enforcement before persons subject to them have had a chance to become acquainted with them. The provisions concerning the impartial administration of such legal requirements and the scope for review by an independent body of decisions concerning their application also serve this function.

(ii) Second, to provide information to economic actors so that they can take maximum advantage of the opportunities created by WTO rules and commitments, whether this concerns market access, protection of intellectual property or other relevant matters.

(iii) Third, to facilitate monitoring of compliance with obligations under the WTO and, through this means, the avoidance of disputes.

(iv) Fourth, to facilitate future trade negotiations with a view to further liberalization of international trade.[52]

58. While, as stated above, publication and administration provisions serve to foster a rules-based approach to trade policy, the function of transparency obligations is perhaps relatively most important in areas where the role of WTO rules of general application is limited. One such case concerns areas where the scope for discretionary government measures is large, either because of their actual or

[51] G/NOP/W/2. The most recent paper setting out information on compliance with these procedures is G/L/223/Rev.1 of 27 January 1999.

[52] The basic GATT principle that, if protection is to be accorded, it should take the form of a customs tariff can be understood to have an important transparency function. It makes clear and quantifies the margin of protection given to domestic products. This not only provides valuable information to actors in the market but also facilitates negotiations on the reduction of such duties on the basis of reciprocity.

potential direct control over specific economic transactions affecting trade, such as in the areas of government procurement and state trading[53], or because national laws of general application allow for considerable executive discretion in establishing trade measures.[54] The second domain that might be particularly identified in this connection is that of those areas of essentially internal governmental regulation that have as their principal objects the promotion of legitimate public policy objectives, such as public health or protection of the environment, but where the regulations in question can have an important impact on the conditions of international competition and, indeed, can be abused with this objective in mind. The problem in this area is how to find a proper balance between, on the one hand, the need to ensure that such policy instruments are not used as disguised restrictions on trade and, on the other hand, the need for the WTO not to be overly intrusive into areas where trade considerations are not paramount. The WTO Agreements on Technical Barriers to Trade and on the Application of Sanitary and Phytosanitary Measures approach this issue by first providing for some broad rules of general application, revolving around the concept that regulations should be drawn up and applied on a national treatment basis and should be no more trade-restrictive than necessary to fulfill their legitimate objectives, and then putting a great deal of emphasis on transparency, especially in situations where Members deviate from international standards or where they are not available. In such situations, as a general rule, Members are required to provide opportunities for other Members and interested parties to express their views in advance, notably by prior publication and notification to the WTO of proposals to introduce regulations.

## C. TYPES OF MEASURES TO WHICH THE PRINCIPLE APPLIES

59. The publication obligation in each of the three main WTO Agreements is broad, covering "laws, regulations, judicial decisions and administrative rulings of general application" pertaining, in each area, to the full range of issues covered by the agreement in question. They also include an obligation to publish relevant international agreements. Panels and the Appellate Body have generally taken a liberal interpretation of these elements, emphasizing the duty to provide information in a comprehensive and timely manner.[55] The *Japan – Film* case dealt with a claim regarding an alleged violation of Article X of the GATT relating to a claimed failure to publish certain enforcement actions taken by the Japan Fair Trade Commission and local fair trade councils as well as administrative "guidance" given by regional offices of the Ministry of Trade and Industry, prefectural governmental and local authorities concerning the Large Stores Law and relevant local regulations. In reviewing the complaint, the Panel noted that, on the plain meaning of Article X:1 of the GATT, the requirement of publication does not extend to administrative rulings addressed to specific individuals or entities. It noted further that "inasmuch as the Article X:1 requirement applies to all administrative

[53] Thus, the plurilateral Agreement on Government Procurement contains detailed provisions for both *ex ante* transparency in regard to procurement opportunities and *ex post* transparency in regard to decisions taken to award procurement contracts as well as provisions for possible subsequent review at the domestic level. It also contains significant notification procedures, for example of a statistical nature. The important role that transparency can play in this area has also been recognized through the establishment of a multilateral work programme on transparency in government procurement at the 1996 Singapore WTO Ministerial Conference. This work programme is still under way. The area of state trading is another one where transparency is the focus of multilateral efforts, notably through the establishment of a Working Party to review notifications and counter-notifications and make recommendations regarding the adequacy of the notification obligations.

[54] An example of this is the area of import licensing, in particular that of a discretionary nature, which is the focus of the WTO Agreement on Importing Licensing Procedures. This has, as one of its principal aims, to ensure that import licensing, particularly non-automatic import licensing, is implemented in a transparent and predictable manner.

[55] *Japan – Trade in Semiconductors*, BISD 35S/116, L/6309, adopted on 4 May 1988, and *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R

rulings of general application, it should also extend to administrative rulings in individual cases where such rulings establish or revise principles or criteria applicable in future cases".[56]

## D. KEY EXCEPTIONS TO THE PRINCIPLE

60. The main transparency provisions of the GATT, GATS and TRIPS Agreement contain exceptions making it clear that Members are not required to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.[57] Similar clauses are to be found in many of the other WTO agreements that form part of Annex IA of the WTO Agreement.

[56] *Japan – Measures Affecting Consumer Photographic Film & Paper*, para. 10.388, WT//DS44/R
[57] GATT Article X:1, GATS Article III*bis* and TRIPS Article 63.4

## APPENDIX I

Main Provisions Relevant to the Principle of National Treatment

## GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)

### Article III*

*National Treatment on Internal Taxation and Regulation*

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*

3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, l947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.*

6. The provisions of paragraph 5 shall not apply to any internal quantitative regulation in force in the territory of any contracting party on July 1, 1939, April 10, 1947, or March 24, l948, at the option of that contracting party; *Provided* that any such regulation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.

* Asterisks mark portions of the various provisions which should be read in conjunction with notes and supplementary provisions in Annex I of the Agreement (these are not reproduced here).

7. No internal quantitative regulation 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.

8. (*a*) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

(*b*) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

9. The contracting parties recognize that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.

10. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV.

## GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

*Article XVII*

*National Treatment*

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.[58]

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

[58] Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

**AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)**

*Article 3*

*National Treatment*

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection[59] of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.

2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.

[59] For the purposes of Articles 3 and 4, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.

## APPENDIX II

Main Provisions Relevant to the Principle of Most-Favoured-Nation Treatment

## GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)

### Article I

*General Most-Favoured-Nation Treatment*

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* 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.

2. The provisions of paragraph 1 of this Article shall not require the elimination of any preferences in respect of import duties or charges which do not exceed the levels provided for in paragraph 4 of this Article and which fall within the following descriptions:

(*a*) Preferences in force exclusively between two or more of the territories listed in Annex A, subject to the conditions set forth therein;

(*b*) Preferences in force exclusively between two or more territories which on July 1, 1939, were connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D, subject to the conditions set forth therein;

(*c*) Preferences in force exclusively between the United States of America and the Republic of Cuba;

(*d*) Preferences in force exclusively between neighbouring countries listed in Annexes E and F.

3. The provisions of paragraph 1 shall not apply to preferences between the countries formerly a part of the Ottoman Empire and detached from it on July 24, l923, provided such preferences are approved under paragraph 5† of Article XXV, which shall be applied in this respect in the light of paragraph 1 of Article XXIX.

4. The margin of preference* on any product in respect of which a preference is permitted under paragraph 2 of this Article but is not specifically set forth as a maximum margin of preference in the appropriate Schedule annexed to this Agreement shall not exceed:

* Asterisks mark portions of the various provisions which should be read in conjunction with notes and supplementary provisions in Annex I of the Agreement (these are not reproduced here).

† The authentic text erroneously reads "sub-paragraph 5 (*a*)".

(*a*) in respect of duties or charges on any product described in such Schedule, the difference between the most-favoured-nation and preferential rates provided for therein; if no preferential rate is provided for, the preferential rate shall for the purposes of this paragraph be taken to be that in force on April 10, l947, and, if no most-favoured-nation rate is provided for, the margin shall not exceed the difference between the most-favoured-nation and preferential rates existing on April 10, 1947;

(*b*) in respect of duties or charges on any product not described in the appropriate Schedule, the difference between the most-favoured-nation and preferential rates existing on April 10, 1947.

In the case of the contracting parties named in Annex G, the date of April 10, 1947, referred to in sub-paragraph (*a*) and (*b*) of this paragraph shall be replaced by the respective dates set forth in that Annex.

## GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

*Article II*

*Most-Favoured-Nation Treatment*

1. 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.

2. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.

3. The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.

## AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

*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:

(a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;

(b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;

(c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;

(d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

## APPENDIX III

Main Provisions Relevant to the Principle of Transparency

## GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)

### Article X

*Publication and Administration of Trade Regulations*

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.

3. (*a*) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

(*b*) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

(*c*) The provisions of sub-paragraph (*b*) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this sub-paragraph.

## GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

*Article III*

*Transparency*

1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.

2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.

3. Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.

4. Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the "WTO Agreement"). Appropriate flexibility with respect to the time-limit within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations.

5. Any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement.

## AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

*Article 63*

*Transparency*

1. Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published.

2. Members shall notify the laws and regulations referred to in paragraph 1 to the Council for TRIPS in order to assist that Council in its review of the operation of this Agreement. The Council shall attempt to minimize the burden on Members in carrying out this obligation and may decide to waive the obligation to notify such laws and regulations directly to the Council if consultations with WIPO on the establishment of a common register containing these laws and regulations are successful. The Council

shall also consider in this connection any action required regarding notifications pursuant to the obligations under this Agreement stemming from the provisions of Article 6*ter* of the Paris Convention (1967).

3. Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1. A Member, having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements.

4. Nothing in paragraphs 1, 2 and 3 shall require Members to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.