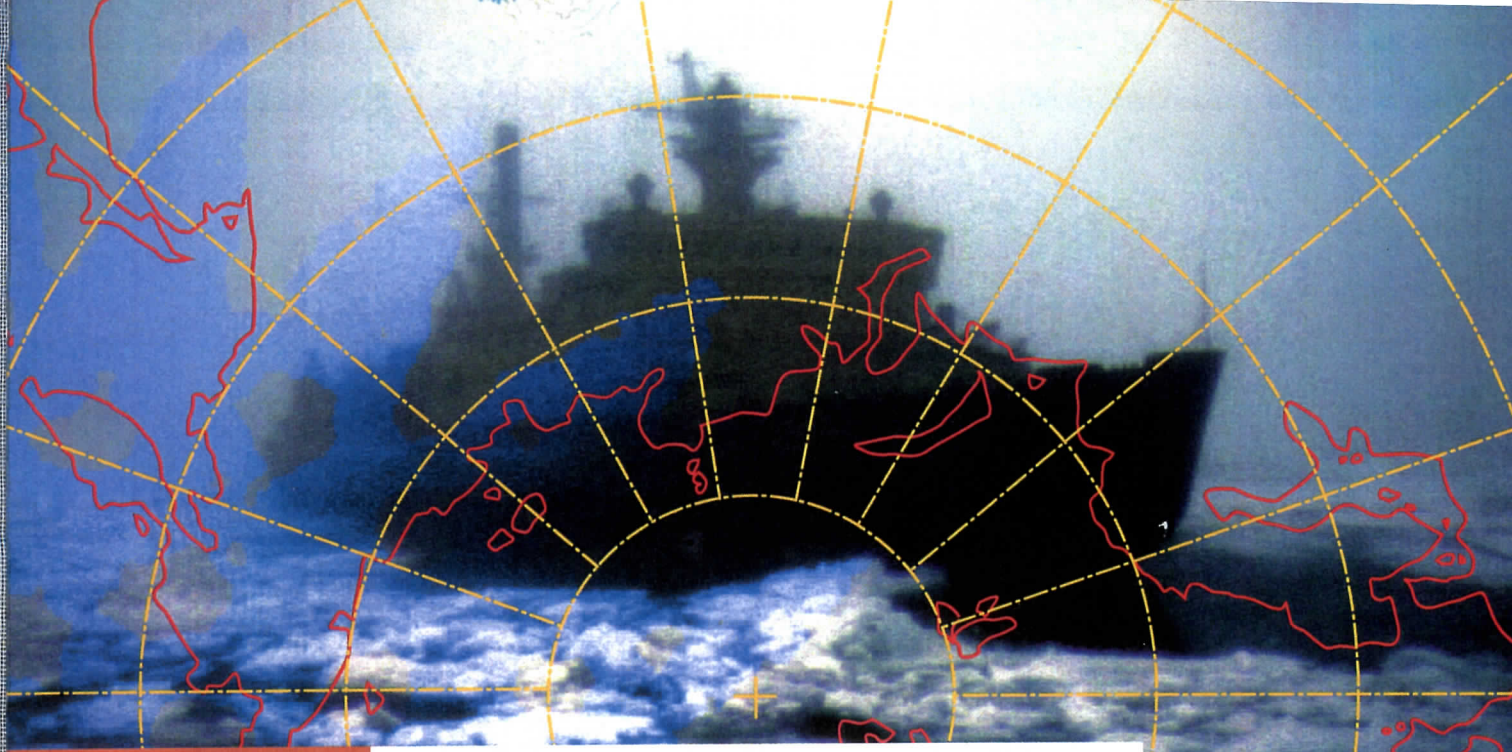

INSROP WORKING PAPER
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The Participation Rights under the World Trade Organization General Agreement on Trade in Services (GATS): The Case of International Northern Sea Route Shipping Transportation Services

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Supervisor:	Peter Ørebech
Title:	**The Participation Rights under the World Trade Organization General Agreement on Trade in Services (GATS): The Case of International Northern Sea Route Shipping Transportation Services**
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FOREWORD - INSROP WORKING PAPER

INSROP is a five-year multidisciplinary and multilateral research programme, the main phase of which commenced in June 1993. The three principal cooperating partners are **Central Marine Research & Design Institute (CNIIMF)**, St. Petersburg, Russia; **Ship and Ocean Foundation (SOF)**, Tokyo, Japan; and **Fridtjof Nansen Institute (FNI)**, Lysaker, Norway. The INSROP Secretariat is shared between CNIIMF and FNI and is located at FNI.

INSROP is split into four main projects: 1) Natural Conditions and Ice Navigation; 2) Environmental Factors; 3) Trade and Commercial Shipping Aspects of the NSR; and 4) Political, Legal and Strategic Factors. The aim of INSROP is to build up a knowledge base adequate to provide a foundation for long-term planning and decision-making by state agencies as well as private companies etc., for purposes of promoting rational decisionmaking concerning the use of the Northern Sea Route for transit and regional development.

INSROP is a direct result of the normalization of the international situation and the Murmansk initiatives of the former Soviet Union in 1987, when the readiness of the USSR to open the NSR for international shipping was officially declared. The Murmansk Initiatives enabled the continuation, expansion and intensification of traditional collaboration between the states in the Arctic, including safety and efficiency of shipping. Russia, being the successor state to the USSR, supports the Murmansk Initiatives. The initiatives stimulated contact and cooperation between CNIIMF and FNI in 1988 and resulted in a pilot study of the NSR in 1991. In 1992 SOF entered INSROP as a third partner on an equal basis with CNIIMF and FNI.

The complete series of publications may be obtained from the Fridtjof Nansen Institute.

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The Participation Rights under the World Trade Organization General Agreement on Trade in Services(GATS): The Case of International Northern Sea Route Shipping Transportation Services

A Project under the International Northern Sea Route (NSR) Programme (INSROP)

CONTENTS

PREFACE

The International Northern Sea Route (NSR), once established through the conversion of the Nordenskiöld North East Passage from an internal, closed Russian seaway, will be the third international sea route of the world. The establishment of the NSR presupposes an equal rights regime. Having previously discussed (INSROP Report no. 20, 1995) Community Port State safety jurisdiction vis-à-vis ships sailing along the NSR, I now address the regulations governing participation rights. The competition and safety issue is as fundamental as it is simple, because unequal safety requirements foster unequal conditions of competition. According to the World Trade Organization (WTO) General Agreement on Trade in Services (GATS), equal rights are offered to Treaty Member States that comply with basic legal specifications ("treatment no less favorable"), i.e. those who provide "like services or service suppliers" (Articles II and XVII). The focal point of the legal issue in question is the constraints that GATS places on nation states aspiring to become Members to this treaty. What protection does GATS offer? Do GATS provisions secure equal competition rights such that shipowners feel encouraged to choose the NSR instead of the Eastern (Suez) or Western (Panama) international seaways?

I am deeply indebted to the Nobel Institute in Oslo for the use of their study facilities, and to the institute librarian Anne Cecilie Kjelling for her tireless assistance, even when I continued my work at the University of Tromsö. I am also grateful to Paul Armitage for improving my English.

Bloomington, Indiana, October 1996
Peter Örebech

"Ultimately, measures designed to facilitate sustainable development and involving all economic actors through the application of a broad range of instruments should be self-enforcing".[1]

Chapter 1
A PRESENTATION
1.0 The problem in contention

The introduction of the Northern Sea Route (NSR) as the third international waterway is an inappropriate concept unless it has a sound legal foundation. Safe navigation through ice-covered areas is not a sufficient reason for realizing the project. As documented in my first report (INSROP Report no. 20, 1995), Community Port State environmental legislation provides substantial support towards that end. The self-enforcing approach, which relies on the self-interest of the "economic man", is the goal of sustainable development. However, sustainable development presupposes equal treatment to citizens of all participating states.

> "Non-compliance with EC and national legislation can result in damage to the environment ... it can also create distortion in competition between enterprises".[2]

As World Trade Organization (WTO) legislation currently stands,[3] the connection between the General Agreement on Tariffs and Trade (GATT) legislation and environmental objectives (including the Principle of Sustainability and the Polluter-Pays Principle), is vague. The reason is that the 1972 GATT Group on Environmental Measures and International Trade[4] was never implemented. Consequently, environmental measures never became part of the GATT provisions. This means that Panels examining a case in the light of the relevant GATT provisions (usually a standard formula included in the Panel's mandate) are not competent to examine the consistency of national legislation, provisions or requirements in relation to environmental objectives. However, environmental problems become significant when clarifying the meaning of equal participation rights implicit in the notion "like services or services supplier" (General Agreement on Trade in Services (GATS) Articles II and XVII), because transportation that does not fulfil the safe-sea obligations might not be regarded as "like services or services supplier" and will therefore be excluded from GATS' equal participation rights (see the discussion in Chapter 3).

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[1] Commission of the European Communities: Towards Sustainability. A European Community Programme of Policy and Action in relation to the Environment and Sustainable Development. Volume II COM(92) 23 final (Brussels, 27 March 1992) p.75.

[2] L.c. p.76.

[3] Things are changing - The Ministerial Decision of 14 April 1994 (Annex to the WTO Agreement) on Trade and Environment set up "a Committee on Trade and Environment" for the purpose of identifying the relationship between trade and environment and to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system were required.

[4] According to the mandate, the task was "to examine, upon request, any specific matters relevant to the trade policy aspects of measures to control pollution and protect human environment, especially with regard to the application of the provisions of the General Agreement" (L/3622/Rev.1 and C/M/74).

The equal participation right to transportation is one of the prerequisites for substandard ships from taking charter-parties. But how can shipping companies be prevented from resorting to sub-standard ships in order to counteract unequal participation rights?

> "In order to ensure that Community actions in the field of maritime safety for a coherent and effective ensemble, an approach is being developed based on three basic principles.
>
> First, requirements should to the maximum extent possible be worldwide in their application. The IMO should therefore continue to play its pre-eminent role in the development and adaptation to technical progress ... that will provide the necessary guarantees ... the general objective should be international standards guaranteeing high levels of safety throughout the world and at the same time avoiding distortion of the conditions for competition between shipping companies ..." [5]

Since the goal of INSROP is to bring the third international waterway into existence, a vital task is to stress the importance of justice, the rule of law, and equal competition and participation rights. No shipowner would ever dream of leaving the Eastern (Suez) or Western (Panama) international seaways for the NSR if the legal framework of the NSR were unsuitable or insufficient, which it would be if the principles of non-discriminatory treatment, i.e. the Most-Favored-Nation and National Treatment Clauses under GATT/WTO, were absent. What is required to ensure a suitable legal framework?

Of course, transit passage within the scope of international navigation through straits is subject to the laws and regulations of the bordering states. However, according to the International Law of the Sea Convention (UNCLOS) Article 42(2), such laws and regulations shall not

> "discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage".

While this Law-of-the-Sea obligation creates equal rights of transportation, it does not regulate the participation rights, e.g. the right to take charter-parties, cabotage, etc. between the EU or EEA and the Far East. Such participation rights fall within the domain of International Trade legislation.

Clearly, the problem with the NSR (besides ice and other harsh natural conditions[6]) is how to gain shipowners' recognition of the NSR as one of the three international seaways of the

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[5] Commission of the European Communities: Communication from the Commission: The Future Development of the Common Transport Policy. A Global Approach to the Construction of a Community Framework for Sustainable Mobility, COM(92) 494 final (Brussels, 2nd December 1992) p.70.

[6] See e.g. Eugene Makarov et al.: Operational Information on Nature Conditions (INSROP Working Paper no. 24 -1995).

world. Whether the NSR is classified as international straits[7] or internal Russian waters,[8] no discrimination between the world's shipping nations or between the Russian fleet and foreign fleets will be acceptable.

The principle of non-discriminatory treatment under GATT is the focal point of this dissertation. A guarantee of equal rights is required through the implementation of the GATS Most-Favored-Nation Treatment Clause (GATS Article II) and National Treatment standard (GATS Article XVII) to all transportation along this traffic scheme. However, such a guarantee is not an automatic consequence of GATS, as GATS protection is not valid for sectors where market-access commitments are not undertaken. Pending the conclusion of negotiations, no Most-Favored-Nation Treatment Clause is in effect.

This study presupposes the following: Negotiations on shipping transportation are successful; the market-access commitments are valid for shipping transportation services; and under GATS Article XVII:1, the INSROP countries (Japan, Norway and Russia) and Contracting parties like the European Community and the United States, do not disqualify National Treatment from their scheduled commitments. In the latter assumption, the treatment-no-less-favorable clause is limited to Most-Favored-Nation Treatment under Article II.

Whenever I refer to shipowner, service suppliers, service consumers, etc. by the expression "legal subjects protected by or enjoying the benefits of the GATS", I do not mean to say that these persons enjoy legal rights to or are the direct beneficiaries of the GATS provisions. The legal subjects according to the GATS are the parties, i.e. the Member States or International Organizations, who are offered membership. Natural or private juridical persons only indirectly enjoy the legal rights of the GATS. In terms of legal theory, we are dealing with "a reflexual right", "*eine rechtliche Reflexwirkung*" and so forth.[9]

The equal rights effort will be largely successful if INSROP States and important Port States become Members of the GATS, which embraces the trade in maritime transport services. Equalizing the NSR and the Suez and Panama routes means, in strict legal terms, establishing a treatment-no-less-favorable regime. Such a regime is part of the Most-Favored-Nation (MFN) clause (GATS Article II) as well as the National Treatment principle (GATS Article XVII).

1.1 Why GATT legislation?

The issue in question is whether international law establishes a system of equal participation rights to transportation irrespective of nationality. Does the General Agreement on Trade in

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[7] Douglas Brubaker: The Legal Status of Straits in Russian Arctic Waters (INSROP WORKING Paper, no. 37-1996.

[8] N.D. Koroleva, V. Yu. Markov & A.P. Ushakov: Legal Regime of Navigation in Russian Arctic Waters (INSROP Discussion Paper 12 October 1995).

[9] See Peter Örebech: Om allemannsrettigheter [On Public Property Rights] (Oslo 1991) pp.60-64.

Services[10], permit free access to ports and traffic routes, and does the Agreement give equal rights with respect to charter-parties? This report on maritime participation and competition rights relates to the International Northern Sea Route (NSR) between Europe and the Far East. As stated in the Community "white book" on the construction of a Community framework for sustainable transport policy,[11] the first of the three basic principles is the requirement that policy solutions should to the maximum extent possible be worldwide in their application. This worldwide participation approach is only possible within the framework of the World Trade Organization,[12] more specifically the General Agreement on Trade in Services.

It might be asked why we should scrutinize GATT and not, for example, the United Nations Conference on Trade and Development (UNCTAD)[13] Liner Code[14] and the provisions of Shipping Conferences themselves. Most of the answer lies in the fact that, even though on 31 December 1993 the number of parties amounted to 76, signatories 23 and Members 33,[15] including most of the important shipping nations with the exception of Japan and USA, from a Russian point of view the NSR is[16] an internal Russian shipping route[17] and not part of any Liner Conference.[18] Also important is the fact that the UNCTAD Liner Code does not seem to address the equal participation efforts ("conference practices should not involve any discrimination against the shipowner, shippers or the foreign trade of any country" - the preamble), cf. the observations of Christoph Engel:

> "Some services are the classical domain of specialized international organizations ... the UNCTAD with its Liner Code ... are the most important ones. They all traditionally are, or support, international cartels. Not surprisingly, intense battles

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[10] General Agreement on Trade in Services of 15 April 1994 and draft MTN.TNC/W/89/Add.1, p.10 ff.

[11] Commission of the European Communities: Communication from the Commission: The Future Development of the Common Transport Policy. A Global Approach to the Construction of a Community Framework for Sustainable Mobility, COM(92) 494 final (Brussels, 2 December 1992) p.70.

[12] See the Agreement Establishing the World Trade Organization of 15 April 1994.

[13] UNCTAD was instigated by the UN General Assembly on 30 December 1964 (Resolution 1995 XIX) and effectuated on 6 October 1983 in accordance with Article 49(1) as an organ of the General Assembly to meet at intervals of not more than three years. In short, UNCTAD was designed to promote the development of the Latin American countries, cf. F. Parkinson: The Year Book of World Affairs (London 1964) p.96.

[14] The Convention on a Code of Conduct for Liners Conference, 6 April 1974. Multilateral Treaties Deposited with the Secretary-General. Status as of 31 December 1993 (UN New York 1994) p.595.

[15] See the list of participants L.c.

[16] Anatoly Kolodkin and M. Volosov: "The legal regime of the Soviet Arctic" in Marine Policy (1990) p.158 and 163. See also Erik Franckx: Maritime Claims in the Arctic (Martinus Nijhoff Publishers 1993)

[17] See the UNCTAD Liner Code Article 1(1).

[18] See Article 2(1).

> between GATT and the aforementioned institutions have ensued".[19]

The current trend in trade in services seems to be multilateral development within the framework of WTO/GATT, and I will therefore focus my attention on issues involving GATS.

Since so many studies of GATT law are being undertaken,[20] one might ask whether yet another study could reveal anything new. The topic I address is trade in services, and some **factual** differences exist between trade in goods and trade in services.[21] In addition, attention must be drawn to the long period which has elapsed since the emergence of GATT studies related specifically to the National Treatment or MFN principle.[22] It is also significant that no writer seems to have made a systematic study of the panelist decisions regarding the treatment-no-less-favorable clause.[23] My intention is to analyze all such interpretation factors. GATT cases have *mutatis mutandis* relevance to analyses of GATS issues. As stated by Petersmann, since the

> "interpretations contributing to the achievement of GATT objectives have been preferred ... [t]he agreed GATT practice since 1974 (through references, for instance to previous panel reports) has become a generally recognized means of interpretation of GATT law".[24]

One might also ask why we should study the International Maritime Organization (IMO) Convention on the Carriage of Goods by Sea? Generally, this convention serves to establish technical standards for ships, technical equipment and manning, but does not regulate the

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[19] Christoph Engel: "Is Trade in Service Specific?" in Thomas Oppermann & Josef Molsberger (ed.): A New GATT for the Nineties and Europe '92 (Baden-Baden 1991) p.216.

[20] See Kenneth W. Dam: The GATT. Law and International Economic Organization (University of Chicago Press 1970); Gerard Curzon: Multilateral Commercial Diplomacy. The General Agreement on Tariffs and Trade and its Impact on National Commercial Policies and Techniques (London 1965).

[21] Terence P. Stewart (ed.): The GATT Uruguay Round: A Negotiating History (1986-1992) Vol. II. (Kluwer Law and Taxation Publishers 1993) p.2365. A more detailed analysis of differences between goods and services in this matter is given by H-D. Smeets, G. Hufner and A. Knorr: "A Multilateral Framework of Principles and Rules for Trade in Services" in Thomas Oppermann & Josef Molsberger (ed.): A New GATT for the Nineties and Europe '92 (Baden-Baden 1991) p.191.

[22] See Kenneth W. Dam: The GATT. Law and International Economic Organization (The University of Chicago Press 1970), which in a book of 389 pages discusses the "cornerstone of the agreement" on two pages (pp.18-19). The Snyder study (op.cit.) analyses the period 1919-1939 and consequently does not deal with the GATT MFN clause. John H. Jackson: World Trade and the Law of GATT (The Michie Company 1969) does, however, give closer attention to the problems associated with the MFN clause. This is also the case in Wolfgang Benedek: Die Rechtsordnung des GATT aus völkerrechtlicher Sicht (Springer-Verlag 1990).

[23] However, some cases from the early days of GATT are presented in Gerard Curzon: Multilateral Commercial Diplomacy. The General Agreement on Tariffs and Trade and its Impact on National Commercial Policies and Techniques (London 1965) pp.62-63.

[24] E.-U. Petersmann: Strengthening GATT Procedures for Settling Trade Disputes, The World Economy 11 (1988) p.65.

participation rights.[25] Consequently, the aforementioned convention is not an alternative to GATS.

Likewise, why not examine Shipping Conference decisions themselves? My reason for not doing so is that such decisions are private arrangements between companies of shipowners, aimed at restricting competition along particular trade routes.[26] These resolutions are not efficient means of converting the NSR into the third international sea route of the world.

1.2 The factual situation

Prior to analyzing the legal texts, we must look at some of the most obvious implications of the proper implementation of "treatment no less favorable ... to like services and service suppliers". Of course, we cannot go into detail here because the exact meaning of "treatment no less favorable" is not an *a priori* matter. The scope of this study embraces the exact implication of the implementation of GATS obligations. This implication will be explained thoroughly in the continuation.

First of all, a nation state or organization that is a Member of GATS is under no obligation to establish specific rules of competition or participation systems under GATS if that Member has so provided under its Schedule (see GATS Article XVI:1). As stated by a Panel of Conciliation under GATT:

> "The Panel fully recognized that there was nothing in the General Agreement which prevented Canada from establishing import and sales monopolies that also had the sole right of internal delivery".[27]

All that is required is for national legislation, of whatever character, to be consistently applied to citizens of all Member States, in order to avoid unequal treatment of like services or service suppliers. The equality requirement applies to citizens of nation states (according to the National Treatment principle - GATS Article XVII) as well as citizens of other contracting parties (according to the MFN clause - GATS Article II).

However, **unless otherwise specified in Members' Schedules**, in sectors where market-access commitments are undertaken, the prohibited measures according to Article XVI are defined as: limitations on the number of service suppliers, whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test (litra a); limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test, (litra b); limitations on the total number of service transactions or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test (litra c); limitations on the total number of natural persons that may be employed in a

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[25] US National study on Trade in Services (Dec. 1983) pp.75-85.

[26] See Herman: Shipping Conferences (London 1983).

[27] BISD S 39/27: US complaint about Canadian restrictions on the sale, import and distribution of beer, p.80.

particular service, or that a service supplier may employ anyone necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test (litra d); measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service (litra e); or limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shares or the total value of individual or aggregate foreign investment (litera f).

The implication is that Members can maintain previous monopolies if such a right is specified in their Schedules. If not, limitations on the number of service suppliers in the form of e.g. numerical quotas or monopolies, are prohibited under GATS. Thus the circumstance has changed in relation to the *de lege lata* situation under GATT 1947. If the aforementioned right **is** specified in a Member's Schedule, then the situation is as described in a previous panel decision:

> "The Panel fully recognized that there was nothing in the General Agreement which prevented Canada from establishing import and sales monopolies that also had the sole right of internal delivery. The only issue before the Panel was whether Canada, having decided to establish a monopoly for the internal delivery of beer, might exempt domestic beer from that monopoly ... Moreover, Articles II:4, XVII and Note Ad Articles XI, XII, XIII, XIV and XVIII clearly indicate the drafters' intention not to allow contracting parties to frustrate the principles of the General Agreement governing measures affecting private trade by regulating trade through monopolies ... For this reason the Panel **found** that Canada's right under the General Agreement to establish an import and sales monopoly for beer did not entail the right to discriminate against imported beer inconsistently with Article III:4 through regulations affecting its internal transportation".[28]

Another implication is that trade in services, in the case of shipping, does have a geographical and personal application. Geographically speaking, the right to conduct trade in services under GATS means to supply a service when situated in one Member State **from** the territory of that or any other Member State into the territory of a third Member State (e.g. the right to take charter-parties from Japan to an EU Member State); or to supply a service **in** the territory of one Member State to the benefit of consumers in any other Member State (e.g. internal transportation of EU goods in Norway to the benefit of industries in Japan).

Those benefiting from the GATS provisions for free trade in services are service suppliers **and** service consumers. The first category benefits through commercial presence in the territory of any other Member State, e.g. shipowner of Norway taking charter-parties from the EU to Japan. The typical situation is that the service-consuming Member sets restrictions on the import of services in order to protect domestic service suppliers. The implication of GATS liberties is that any shipowner from a GATS Member can provide service to consumers in the territory of another Member (this also applies to cabotage if cabotage is one of the GATS liberties); e.g. Russian shipowner (when Russian membership is accepted) providing shipping services along the coast of Norway or between Norway and Japan.

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[28] BISD S39/27 ff.: US complaint about Canadian restrictions on the sale, import and distribution of beer, p.80.

The benefit to consumers is also protected by the GATS provisions. Consumers have the right to use foreign services if that is their preference. Since GATS legislation does not protect consumers against measures by their own Member that contradict GATS, the situation is one in which restrictions set by third Members (neither the service-supplying Member nor the service consumer) affect the free trade of services. For instance, Russia might charge American, European Community, Japanese or Norwegian ships for ice-breaking surveillance, but does not charge domestic ships. In such a case, service-supplying and service-consuming Members might protest.

What exactly is the meaning of "no less favorable" and "like service and service suppliers"? At this stage I am in no position to provide an answer, but I shall elaborate on the issue in the continuation.

1.3 Shipping transportation as part of International Trade in Services

Shipping transportation is "service" per definition; see GATS Article I(2). Whether shipping is to be part of GATS is a question to be dealt with by the Negotiating Group on Maritime Transport Services (NGMTS).[29] We will not know the answer until negotiations are complete.[30] The legal situation under discussion is therefore of a *de sententia ferenda* and not a *de lege lata* character.[31]

I anticipate that negotiations on the shipping agenda will be successful, that the MFN clause as well as the National Treatment principle will become part of the shipping solution, and that two or more INSROP countries (Japan, Norway and/or Russia) and the EU (and its Member States) will become Members. If all these states take part in the forthcoming shipping annex to GATS (See Decision on Negotiations on Maritime Transport Services paragraph 6), the Convention area will cover the NSR and all important ports of departure and arrival. Most NSR freights between Europe and the Asian Far East will then be included.

If Japan, Russia and Norway becomes Members, shipowner from these Member States will enjoy equal competition rights. However, such rights are "balanced" by the Community safe-sea provisions, which apply to all ships docking in an EU Port State harbor. On the other

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[29] On 31 January 1996 the group of negotiating members consisted of 41 Member States, including the EU and its 15 Member States (counted as one State), Japan and Norway. The Russian Federation is among the group of 20 observers.

[30] According to an Agreement of June 28th 1996, between the 42 negotiating members of the Maritime Transport Group, the negotiation is suspended until year 2000 when the new round of comprehensive negotiations on trade in services is to take place.

[31] If Russia refuses to become member of WTO, GATS and the shipping service agreement, Russia seems to have no commitments towards foreign fleets and the prosperity of equal competition rights. In that situation, Shipping Conferences and the Convention on a Code of Conduct for Liners Conference, 6 April 1974 (see Multilateral Treaties Deposited with the Secretary-General, status as of 31 December 1993, UN New York 1994, p.595), and other international conventions might give some contribution. In addition the EU competition law might give some useful input on charter-parties closed in the EU or the European Economic Area (EEA). Within the framework of this dissertation, no detailed elaboration to these questions is however possible.

hand, national arrangements that apply only to transiting ships would no longer be valid; e.g. special taxes and charges specified by GATS provisions on National Treatment.

1.4 Accession and Original Membership. Introduction to the trade legislation framework

According to GATS legislation, there is a distinction between services operated by a "Member", "another Member" and "non-Member". Due to the use of several categories of "Members", the service notion seems a little unclear. Are states which are party to GATT 1947, GATT 1994 or the WTO Agreement also "Members" of GATS?

The World Trade Organization Agreement came into effect on 15 April 1994. The General Agreement on Tariffs and Trade of 30 October 1947 (GATT 1947) is an addendum to the GATT 1994[32] section of the WTO Agreement.[33] "Members" of GATT 1947 are not parties to GATS. To become Members of GATT 1994, one must be a Member of the WTO Agreement. Accordingly, Members of GATT 1994 and the WTO Agreement are one and the same group of participants. The question then is whether Members of the WTO Agreement gain automatic membership of GATS. According to WTO Agreement Article XII:1, the answer to this question is that those who accede to the WTO Agreement also become Members of the "Multilateral Trade Agreements annexed thereto". Original Membership relates to "this Agreement and the Multilateral Trade Agreements" (Article XI:1). The Multilateral Trade Agreement annexed to the WTO Agreement is - according to the List of Annexes, e.g. Annex 1B - the General Agreement on Trade in Services and its annexes. Therefore, by becoming a Member of the WTO Agreement, one also gains membership of GATS. Consequently, states that are not Members of the GATS cannot choose membership of either GATT 1994 or the WTO Agreement.[34] However, this was not the original position. During the negotiations, the position changed as portrayed by Terence P. Steward:

> "As the negotiations progressed, a general consensus emerged that a mechanism, separate from the GATT, would have to be set up to handle an agreement on service. A second consensus was developed that there would be no crossover between concessions in trade in services and concessions in trade in goods, meaning that negotiations in trade in services could not be held hostage to gain or withhold concessions in the GATT negotiations, and that there would be no cross-retaliation between goods and services. But it was not until the negotiations held during September 18-22, 1989, that virtually all of the participants agreed that a general

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[32] GATT 1994 para. 1(a). See GATT: The Results of the Uruguay Round of Multilateral Trade Negotiations. The Legal Texts (Geneva 1994) p.21.

[33] See GATT 1994 para. 1(d). Concerning the Uruguay Round negotiations, see Terence P. Stewart (ed.): The GATT Uruguay Round: A Negotiating History (1986-1992) Vol. I-III (Kluwer Law and Taxation Publishers 1993). For the problems with GATS, see p.116 ff. while p.2341 ff. provides more detail.

[34] The proposal of Less Developed Countries (LDC), which originally was to oppose the inclusion of trade in service in the negotiations, was to develop a Code on Services which would initiate the option of becoming a signatory at the end of the negotiations. A state's rejection of the option would not prevent that state from becoming a member of the treaty on goods.

> agreement on trade in services, a GATS, would be established separate from, but in tandem with, the GATT".[35]

As was made clear during the negotiations, the principle of a "single undertaking" was turned down. The outcome was that all Members of the WTO Agreement were to be Members of GATS, in keeping with the tandem approach.

As part of International Law obligations, GATS legal subjects are States or International Organizations that are entitled to GATS membership. The WTO Agreement and therewith the GATS (see below), are open to so-called "Original Membership" and "Accession". Original Members are the contracting parties to GATT 1947 as of the date of entry into force of the WTO Agreement, and the European Communities (WTO Agreement Article XI). Those not entitled to Original Membership may become Members through accession. This latter mode of membership embraces any state or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of other matters provided for in this Agreement (WTO Agreement Article XII). The European Communities, Norway and Japan enjoy Original Membership. Russia may become a Member through accession.

1.5 Shipping as part of Trade in Services

Maritime transport services are in principle part of the GATS,[36] but will be fully incorporated as an annex to the GATS if or when such a measure is decided upon by Member States, according to a draft from the Negotiating Group on Maritime Transport Services. From 1st January 1995 until such a decision is made, commitments scheduled by participants on maritime transport services shall enter into force on a most-favored-nation basis.

In this report I analyze the GATT provisions for non-discriminatory treatment that are relevant to maritime transportation, i.e. the MFN and National Treatment clauses. I will not be addressing issues relating to subsidies (GATS Article XV). Fees, such as the existence of any "cost of service" limitations,[37] are discussed under the MFN clause (Chapter 2). The INSROP countries Japan and Norway and important states of destination or designation, i.e. the EU and its Member States, are Members of the GATT and the WTO (since 1st January 1995). Russia will presumably become a Member in the near future.[38] If so, all national legislation on

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[35] Terence P. Stewart (ed.): The GATT Uruguay Round: A Negotiating History (1986-1992) Vol. II (Kluwer Law and Taxation Publishers 1993) p.2362.

[36] The General Agreement on Trade in Services, Article 1(3)(b): "'service' includes any service in any sector except services supplied in the exercise of governmental authority", cf. Annex on Negotiations on Maritime Transport Services. See GATT: The Results of the Uruguay Round of Multilateral Trade Negotiations. The Legal Texts (Geneva 1994) p.328 and 359.

[37] Parallel to the General Agreement Articles II:2(c) and VIII:1(a), cf. BISD 35S/245: United States - Customs user fee (L/6264) paras. 78-86.

[38] Since 1st January 1993 Russia has been a member of the GATT Customs Cooperation Council; see Alexander I. Frolov: Some aspects of the foreign trade regime of the Russian Federation (INSROP discussion paper of 20 April 1995). A Working Party was set up in 1993 to examine the request for accession from the

participation applicable to ships transporting along the International Northern Sea Route (NSR), or in ports, will be restricted by WTO/GATT provisions.

1.6 The National Treatment principle (1). GATS Article XVII

A basic instrument that reflects sailing and loading rights is the principle of National Treatment under GATS Article XVII. The meaning of this principle is treatment of a foreign carrier no less favorable than that granted to national flag carriers.[39] During the discussions of the Group of Negotiations on Services, it was agreed upon that service exporters be accorded rights "no less favorable" than domestic services in the same market sector. The basic principle renders all Member States liable to

> "accord to service and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like service and service suppliers", GATS Article XVII:1.

Every Member is responsible for providing every other Member with equal conditions of competition:

> "Formally identical or formally different treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to the like services or service suppliers of any other Member", GATS Article XVII:3.

The phrases used here are "treatment no less favorable" and "like service and service suppliers". We are clearly introduced to the basic principle of equality:

> "The words are to be found throughout the General Agreement and later agreements negotiated in the GATT framework as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given to other foreign products, under the national treatment standard of Article III".[40]

The principle doubtless holds its intentional meaning, but since the principle is unqualified, it must be understood through each individual case to which it is applied. The principle "clearly sets a minimum permissible standard as a basis".[41] However, in examining the same principle in different texts, one can rely on the interpretation of an identical or similar text that uses the same notion of equality, including other Agreements negotiated in the GATT

Russian Federation. GATT Activities 1993: An Annual Review of the Work of the GATT (Geneva 1994) p.104. See also Leah A. Haus: Globalizing the GATT. The Soviet Union's Successor States, Eastern Europe, and the International Trading System. (The Brookings Institution 1992) p.106 ff.

[39] See Notes from the Secretariat to the Group of Negotiations on Services in Transport, GATT-MTN.GNS/W/67.

[40] BISD 36S/345, 386: United States - Section 337 of the Tariff Act of 1930 (L/6439) para. 5.11.

[41] Op.cit.

framework; e.g. the Agreement on Government Procurement of 11 April 1979 - as amended on 15 April 1994 - Article III:1, which would then apply *mutatis mutandis*:

> "With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties treatment no less favorable than
> (a) that accorded to domestic products, services and suppliers; and
> (b) that accorded to products, services and suppliers of any other Party".

Similar to the GATS, the Government Procurement Agreement affects services as well. This was also the case under the Government Procurement Agreement before the WTO Agreement came into force:

> "services incidental to the supply of products if the value of these incidental services does not exceed that of the products themselves, but not the service contracts *per se*", Article I:1(a), as formulated before the latest amendment of 15 April 1994.

Consequently we might consult the panelist decisions made under the former Government Procurement Agreement. As will be seen later, neither the Agreement on Government Procurement nor the General Agreement defines the notion of "the like". This notion should be examined on a case-by-case basis,[42] as should the identical concepts under the GATS. The presupposition is that these MFN and National Treatment notions under the GATT and GATS, respectively, are identical. However, the more explicit interpretation may differ from one text to another, since the exact nature of the "like product" or "like service" varies greatly. For example, the notion of "like products" under GATT Article III:4 is not necessarily identical to the same expression under GATT Article VI:1 (anti-dumping):

> "The Panel recalled its earlier statement that a like product determination under Article III does not prejudge like product determinations made under other Articles of the General Agreement or in other legislative contexts".[43]

Since "treatment no less favorable" and "like products/services" are used under GATT as well as GATS provisions for National and General MFN Treatment Clauses, these principles are analyzed jointly.

1.7 The National Treatment principle (2). Member State competence

The National Treatment provision permits the imposition of an internal regulation on imported products or services provided that the like domestic products are regulated, directly or indirectly, at the same or a higher rate. According to GATT 1947 Annex I "Notes and

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[42] See e.g. BISD 34S/83: Japan - Customs duties, taxes and labelling practices on imported wines and alcoholic beverages (L/6216) 115, para. 5.6.

[43] BISD 39S/206: United States - Measures affecting alcoholic and malt beverages, p.293.

Supplementary Provisions ad Article III",[44] these regulations may be imposed on imported products at the time or point of importation. In the case of **tariff concessions**, the National Treatment obligation does not prevent the state from levying

> "a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part", GATT Article II (2(a)).

Thus, the core of the principle is the equality of measures accorded to domestic and foreign producers and service suppliers. The regulations imposed on third-country products or services should, whether they are formally identical or formally different, not "modify the conditions of competition in favor of services or service suppliers of the Member compared to like services or services suppliers of any other Member" (GATS Article XVII(3). What is meant by "equivalent treatment" will be explained more thoroughly in sections 2.4-2.10.

1.8 The Most-Favored-Nation Treatment Clause (1). A retrospect

The MFN clause, being "the cornerstone of all modern commercial treaties",[45] including the GATT Convention,[46] is not a GATT design but has been bilaterally implemented since the early 1700's if not earlier.[47] It is characterized as "highly complicated".[48]

Where shipping is concerned, a MFN clause had existed under a Trade Convention between

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[44] Still in force according to the Agreement Establishing the World Trade Organization, Article XVI(1).

[45] See Stanley Hornbeck: "The Most-Favored-Nation Clause" in American Journal of International Law 1909, p.395. See also the same writer: "The Most-Favored-Nation Clause in Commercial Treaties" in Bulletin of the University of Wisconsin 1910, p.331.

[46] Kenneth W. Dam: The GATT. Law and International Economic Organization (The University of Chicago Press 1970) p.18.

[47] See L. Glier: Die Meistbegünstigungs-klausel. Eine Entwicklungsgeschichtliche Studie unter besonderer Berücksichtigung der Deutschen Verträge mit den Vereinigten Staaten von Amerika und mit Argentinien (Berlin 1905). Arnold Ræstad: Mestbegunstigelsesklausulen i handelstraktater (Kristiania 1913) has traced the principle back to the Peace Treaty between France and Spain of 1659. John H. Jackson: World Trade and the Law of GATT (The Michie Company 1969) p.249 traces the principle back to 1417. Tullio Scovazzi confirms in his review the existence of a most-favored-nation clause in a treaty signed by Tunis and Venice of 5. October 1231(Ministro degli Affari Esteri. Trattati, convenzioni e accordi relativi all'Africa, preliminary vol. Rome 1941 p. 24).

[48] Tsung-Yu Sze: China and the Most-Favored-Nation Clause (New York, London, Chicago & Edinburgh 1925) p.11.

Prussia and the USA since 1828.[49] Earlier still, on a unilateral basis, the USA announced the use of a MFN principle for "vessels of foreign countries ... provided that such countries granted reciprocal treatment to American ships in their ports".[50] It has been commonly used ever since; see e.g. the Treaty between the UK and Spain of 31 October 1933 Article 2:

> "The Contracting Parties agree that, in all matters relating to commerce, navigation, and industry, any privilege, favor or immunity which either Contracting Party has actually granted or may hereafter grant, to the ships ... of any other foreign State, shall be extended simultaneously and unconditionally without request and without compensation to the ships ... of the other, it being their intention that the commerce, navigation and industry of each contracting party shall be placed in all respects on the footing of the most favored nation".

The clause under the GATT is an international law obligation. As such, it probably distinguishes between the many MFN clauses found in bi- or multilateral treaties and the clause of GATS Article II.[51] Such a comparative study is appropriate as regards the nature and purpose of MFN clauses, but seems less adequate when it comes to interpretation. I therefore restrict myself to the provisions of the GATS and the similar MFN provision under the GATT 1947.

1.9 The Most-Favored-Nation Treatment Clause (2). The purpose of GATS Article II

To understand the notion "treatment no less favorable", a study the *ratio* of the MFN clause is necessary. The MFN doctrine is not intended - as its title seems to indicate - to establish one state as the only favored nation. The doctrine's original meaning was, when two parties entered into a bilateral agreement, to ensure that no agreement carrying the MFN principle was "overlooked at the moment of treaty-making and to reduce the necessity of repetition. This device will enable the newly-contracting state to claim the benefits of concessions made previously or afterwards to a third state".[52] As Snyder states:

> "The fundamental point is equality based upon the treatment received **by any third**

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[49] See Richard Calwer: Die Meistbegünstigung der Vereinigten Staaten von Nordamerica. Akademisher Verlag für sociale Wissenshaften (Berlin - Bern 1902) p.17; the Convention of 1st May 1828 Article IX: "Wenn von einem der contrahierenden Teile in der Folge andern Nationen irgend eine besondere Begünstigung in betreff des Handels oder der Schiffahrt zugestanden werden sollte, so soll diese Begünstigung sofort auch dem anderen Teile mit zu gute kommen".

[50] The Congress provision of 3rd March 1815, as cited in Klaus Bonhoeffer: Die Meistbegünstigung in Modernen Völkerrecht (Verlag von Julius Springer 1930) p.11, the note.

[51] As in e.g. Schweinfurth: Die Meistbegünstigungs-klausul, eine völkerrechtliche Studie (Heidelberg 1911) or Richard Carlton Snyder: The Most-Favored-Nation Clause. An analysis with particular reference to recent treaty practice and tariffs (King's Crown Press 1948).

[52] Tsung-Yu Sze: China and the Most-Favored-Nation Clause (New York, London, Chicago & Edinburgh 1925) p.11.

> **country**. To secure this equality is the purpose for which the clause exists".[53]

MFN treatment is also a principle that prevents other states from receiving special treatment:

> "While each country individually would like to obtain such preferential position in the markets of its trading partners, it is even keener to put obstacles in the way of another country's obtaining such favored treatment".[54]

Since the focus is on inequality arising out of favorable **treatment**, equal rights in the form of written promises are not sufficient. The practical implementation of equal rights will be decisive, and the obligation of equal treatment will not be fulfilled if Member State shipowners exercise unfavorable treatment, for instance on the basis of domestic law.

The incorporation of the MFN notion into the GATT 1947 - for the first time on a multilateral basis - "has changed the nature of the most-favored-nation clause".[55] As regards the MFN clause, the aim is still to preclude discrimination between competitors (in this case GATT Contracting parties) so as to achieve equal conditions of competition. More important from 1947 onwards is the extension of almost all bilaterally negotiated advantages of one Member State to all the other GATT Contracting States.[56]

Another significant change is the deadlock in individual bilateral negotiations resulting from the fact that new lower tariffs are automatically extended to any other GATT Members. Let us then take a closer look at the text. GATT Article I(1) reads as follows:

> "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 and 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 paragraph 2 and 4 of Article III, any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded ... to the like product originating in or destined for the territories of all other contracting parties".

As stated by Gerard Curzon, the text is not the incarnation of perfection. It is not "altogether clear and inevitably leads to disputes over interpretation".[57] Before going into detail, let us sketch the main framework.

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[53] Richard Carlton Snyder: The Most-Favored-Nation Clause. An analysis with particular reference to recent treaty practice and tariffs (King's Crown Press 1948) p.10.

[54] Gerard Curzon: Multilateral Commercial Diplomacy. The General Agreement on Tariffs and Trade and its Impact on National Commercial Policies and Techniques (London 1965) p.57.

[55] Op.cit. p.62.

[56] With some limited exceptions mentioned in GATT 1947 Article I (2) and (3), cf. Annex A, B, C and D.

[57] Gerard Curzon l.c.

The GATT principle of MFN treatment does not exclude Member States from establishing specific rules governing the conduct of trade. However, any rule established does have to be generally applied to all like products originating from all other Member States.

The principle of equal rights, which applies to "importation or exportation" (Article I(1)), is applicable between traders in any GATT Member State conducting import or export sales. This means, for instance, that a national import agency taking in overtaxed products, or a foreign exporter selling overtaxed products, may claim reduced charges by pointing out the lower charges levied on a similar product ("the like product"[58]) originating in another GATT Member State. Since the notion "the like product" has a counterpart under the GATS, the interpretation of the phrase "to like services and service suppliers" will be given close attention later on (see Chapter 3).

Foreign traders subject to the MFN principle do not enjoy National Treatment concessions because these are rights emanating from Article III.[59] The equality rights relate to the treatment of foreign products and services. Consequently, important additional rights are associated with products or services defined as domestic. The distinction between domestic and foreign has previously received little attention (cf. GATT Article IX), but it is now highly topical thanks to the Agreement on Rules of Origin,[60] which states the specific criteria for determination of the "country of origin". Article 1(2) suggests that these rules are applicable to all items subject to MFN treatment under GATT 1994 Article I. As is evident in Article 1(1), the rules relate to the "origin of goods", not services.[61] The problem of the origin of international shipping is a flaw in other GATS rules (see paragraph 2.4).

Within the framework of GATT 1947, MFN treatment is restricted to "custom duties and charges of any kind", and therefore does not seem to relate to concessions granted to Contracting parties in general. Taxes of all kinds are obviously included.[62] Gerard Curzon raises the question of whether the expression is exclusive or just a matter of exemplification. The intentional meaning, according to Curzon, was "examples of the type of restrictions which was to be applied in a non-discriminatory way".[63] According to the 1955 revision of Article I(1), the possibility of extended interpretation was still present. However, the law in action

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[58] This notion is discussed in Peter Örebech: GATT-rett, EØS-rett eller EF-rett? (Osmundsson Publishers, Oslo 1992) p. 69-74.

[59] This problem is not dealt with in this dissertation.

[60] See GATT: The Results of the Uruguay Round of Multilateral Trade Negotiations. The Legal Texts (Geneva 1994) pp.241-254.

[61] See also the table of contents, Op.cit. p.vi, placing Agreement of Origin under Annex 1A: Multilateral Agreement on Trade in Goods.

[62] See BISD vol. II p.12 - Rulings by the Chairman on 24 August 1948 concerning Consular Taxes and Rebates on Internal Taxes.

[63] Gerard Curzon: Op.cit. p.63.

envisaged that, without any objections, "non-commercial favors are applied discriminatorily".[64] This clearly indicates that non-tariff domestic regulations are not subject to the MFN clause under GATT 1947.

We can draw further conclusions: For example, subsidies available from one GATT Member to external production in another GATT Member State does not give grounds for valid claims from concurring production within a third group of GATT Member States. *In concreto*: A citizen in GATT Member State X producing something in Member State Y, which is subsidized by state X, gives no grounds for producers in GATT Member State Z to claim MFN treatment.

As will be made clear in Chapter 3, MFN treatment under GATS is not restricted to taxes or any other pecuniary charges. The concept of "charges of any kind" is not a particularly important problem with GATS, so I will dwell no further on its interpretation.

The competence to grant a "waiver" under the GATT 1947 is also part of the GATS; see e.g. the Marrakech Agreement Establishing The World Trade Organization Article IX(3). Member States enjoy the right to apply for special exemptions from almost any of the GATT provisions, e.g. waivers decided by the Contracting parties relating to areas of customs unions or free-trade areas according to Article XXV. An example is the waiver granted to the United Kingdom in connection with items not bound by Schedule XIX and traditionally admitted free of duty from countries of the Commonwealth.[65]

The MFN clause is not absolute, since some minor differences in tariffs between GATT Member States are acceptable under GATT 1947 Article I(2), (3) cf. (4), without breaching the principle of MFN treatment. The differences allowed between MFN charges and the preferential rates are regulated under the Article I(4)(a) or (b). Such exceptions are made for imports from very specific areas defined under Annex A, B, C or D in Article 1(2) and (3), but are not prolonged under the GATS. Therefore I shall look no further into these exceptions.

1.10 Similarities between the GATT and GATS MFN clauses

Is there any difference between the **legal notion** of the GATT 1947 on the one hand and the GATS MFN clauses and National Treatment principles on the other? Looking first at the MFN clauses, expressions differ but some notions are similar (GATS Article II):

> "each Member shall accord ... to services and services suppliers of any other Member **treatment no less favorable** than that it accords to **like services and service suppliers** of any other country" (the emphasis is mine).

As indicated, the two basic 'stepping-stones' are the notions "no less favorable" and "like service and service supplier". These notions are parallel to the ones implicit in GATT 1947 Articles I, II and III:4. The relevant parts of these Articles read:

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[64] L.c.

[65] Decision of 24 October 1953, BISD supp.2 (1954) pp.20-22

> "any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded ... to **the like product** originating in or destined for the territories of all other contracting parties", Article I(1).
>
> "Each contracting party shall accord to the commerce of the other contracting parties **treatment no less favorable** than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement", Article II.
>
> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded **treatment no less favorable** 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, transport, distribution or use", Article III:4 (the emphasis is mine).

This similarity is not coincidental, but rather intended; cf. the expression "the **extension** of most-favored-nation treatment" to the GATS area.[66] Clearly the GATT and GATS clauses are identical. Since no agreement was reached as regards the proposed deviations from the MFN clause,[67] the use of the same expressions under the GATS is a strong indication of the incorporation of the GATT MFN clause.

> "The negotiations produced a consensus that the GATS should contain a MFN provision, but not on the wording of that provision as reflected by the various deviations from the basic MFN principle proposed by the parties".[68]

It is therefore essential to examine the proper meaning of the similar GATT principles.

According to GATS Article II, international shipping transportation is affected by the MFN principle. Since the MFN clause is said to be the "the cornerstone of all modern commercial treaties",[69] we might through interpretation take advantage of the intention of the principle. Since the principle is a framework, we have to take into consideration its *ad hoc* character. However, I do not deal with the problems to the fullest extent, since my topic covers services in maritime transportation. GATS Article II reads as follows:

> "1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and services suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country.

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[66] See Multilateral Trade Negotiations. The Uruguay Round. Progress of work in Negotiating Group: Stock-taking, Market Access. MTN.TNC/W/89/Add.1 7 November 1991 p.10.

[67] See Exemptions From The Most-Favored-Nation Treatment Clause (MFN) of the General Agreement on Trade In Services (GATS) (July 17, 1991 - Informal Note from the Secretariat).

[68] GATT Doc. No. MIN.DEC (Sept. 20, 1986) para. 10 - Ministerial declaration on the Uruguay Round. See Terence P. Stewart (ed.): The GATT Uruguay Round: A Negotiating History (1986-1992) Vol. II. Kluwer Law and Taxation Publishers (1993) p.2377.

[69] Stanley Hornbeck note 5.

> 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 Exceptions.
> 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", GATS Article II.

With this interpretation of the MFN clause, one should bear in mind the scope and definition of the GATS and the general exemptions from MFN treatment under the GATS Annex on Article II Exemptions,[70] the Area of Economic Integration (Article V) and the rules on special commitments for Developing Countries in Article IV, cf. parts III and IV.

In the continuation I discuss the following questions: First (Chapter 1.11), the problem of origin, i.e. the nationality of a specific shipping service; and second (Chapter 1.12), the problem of which Member can allege a breach of the GATS provisions. The key questions are: What defines a service or service supplier as being of "any other Member", and which Member is competent to initiate the dispute settlement and enforcement under Article XXIII? These problems are related because the nationality of the service supplier or service consumer is vital when deciding which Member is competent to apply for conciliation.

1.11 The problem of service origin

The scope of GATS provisions is the supply of a service either from the territory of one Member into the territory of any other Member (Article I:2(a)); in the territory of one Member to the service consumer of any other Member (Article I:2(b)); by a service supplier of one Member through commercial presence in the territory of any other Member (Article I:2(c); or by a service supplier of one Member through presence of natural persons of a Member in the territory of any other Member (Article I:2(d)).

How can we identify the origin of a particular service? Only the service or service supplier of "another Member" ("the second Member") and not those of the Member initiating measures ("the first Member"), enjoy the legal rights of the GATS. Due to this limitation, vessels resident in "the first Member" and services provided by countries that are non-Members of the GATS, are not protected by the Agreement. Of course, non-Members of GATS cannot protest on behalf of "their" natural or juridical persons vis-à-vis measures restricting these service suppliers' participation rights. Whether service suppliers resident in non-Members enjoy GATS free-trade protection while operating in a GATS Member, is a question to be discussed in connection with service consumer problems (Chapter 1.12).

The limitation in GATS legal protection of service suppliers or consumers of "another Member" or "any other Member" raises the problem of origin. Uniform rules for determining

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[70] GATT: The Results of the Uruguay Round of Multilateral Trade Negotiations. The Legal Texts (Geneva 1994) p.352.

nationality are not yet adopted for the classification of goods[71] under the Agreement on Rules of Origin,[72] but will be initiated and completed according to the Work Programme under this Agreement (Article 9:2(a)) within three years. Services would not be included because they are part of the GATT 1994, which relates to Trade in Goods. Thus for our purpose it is not necessary to pursue the Agreement on Rules of Origin any further.

As regards trade in services, the problem of origin is dealt with as a problem of definition in the use of the notion "service of another Member" under e.g. GATS Article XXVIII(f). The origin of the service production or supplier is the deciding factor. There is therefore no need in this connection to examine the problems associated with service consumption.

Since the scope of my study covers shipping transportation, I need not look into items of general trade in services. A shipping service which qualifies as "service of another Member" is the service which is supplied

> "by a vessel registered under the laws of that other Member, or by a person of that other Member which supplies the service through the operation of a vessel and/or its use in whole or in part", Article XXVIII(f)(i).

Before discussing details, let us look at the actual situation. Regulations govern the typical type of trade restriction where measures established by the consuming Member are favorable to domestic service production, which is bad news for imported service suppliers. However, as documented under Chapter 1.13, this is not the only conceivable situation.

As indicated, the vessel's nationality is decisive. For a service to qualify as a "service of another Member", the vessel providing the service must fly the flag of that other Member. However, if the nationalities of the ship and the operator are different, is it sufficient that the person running the ship is "of that other Member"? The answer is affirmative, cf. the conjunction "**or**". If the ship is flying a flag which is not of "that other Member", the service still has the origin of that other Member if the service is supplied by a person of that other Member through the operation of a vessel and/or its use in whole or in part. Whether or not a person is "of that other Member" depends upon whether the internal legislation of that Member identifies that person as resident there or not. In some legislation, citizenship is required. In others, habitation is sufficient. When considering the juridical persons involved, the location of the board or head office is often decisive. The establishment of a subordinate institution in that Member might be sufficient.

This leads to the following conclusions: Flying the flag or having membership of a society (cf. the notion "by a person of that other Member") qualifies the status of "another Member" according to GATS legislation. The service delivered by such a ship or such a person has the

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[71] GATT has not succeeded in introducing uniform rules of origin. However, some principles have been drafted in the Report by a Working Party on Nationality of Imported Goods adopted on 23 October 1953 (G/61). "The proposal was submitted for consideration as a future Recommendation of the CONTRACTING PARTIES and not as a proposal for a convention on the origin of goods". BISD 1954 (suppl. 2) p.54.

[72] See GATT: The Results of the Uruguay Round of Multilateral Trade Negotiations. The Legal Texts (Geneva 1994) pp.241-254.

origin of that Member. In GATS Article XXVII(b), it is explicitly stated that a Member may deny the benefits of this Agreement in the case of maritime transport service if it establishes that the service either is supplied by a vessel registered under the laws of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement, or by a person which operates and/or uses the vessel in whole or in part but which is of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement. This reservation means that a Member, even though the ship is flying the flag of another Member, can deny that Member the benefits flowing from GATS if a ship of that Member is operated and/or used in whole or in part by a person who is the habitant of a non-Member. The same applies if the ship is flying the flag of a non-Member, even though the operator or user is the habitant of another Member.

The use of the notions "services ... of any other Member" in Articles II and XVII indicates that the origin of shipping services is fixed according to the definition. For instance, the shipping of a charter-party from Leyden to Kobe is subject to GATS jurisdiction if transportation is made by a vessel flying the flag of any of the GATS Members. The shipowner does not have to be a citizen of that Member or any other Member, i.e. a citizen of a nation state which is not a Member of GATS may take charter-parties under GATS jurisdiction if the vessel providing the service is flying the flag of a Member.

The notion "suppliers" covers those providing services, which in the case of shipping might be the owner, charterer or operator. However, not all of these have the status of service supplier. According to the GATS obligations for trade in services (Article I:1), the supplier is the one actually providing the service. A shipowner of that Member is not protected if that shipowner is the one who concludes transportation contracts. For instance, a ship on bare-boat charter invokes the charterer's and not the owner's rights. A ship in use by an operator invokes that operator's equal competition rights. When determining the origin of a service, one must therefore focus solely on the person actually providing the service.

What is the connection between the residence of the supplier and GATS membership? This question, which seeks to determine which Member is competent to bring up a case for WTO conciliation, is dealt with in Chapter 1.12.

1.12 The Plaintiffs: Which Members are competent to bring up a case for conciliation? (1) The typical case of service supply

To determine which Member is competent to invoke GATS provisions, one must first find out which enterprise is providing the service, i.e. by the flag of the vessel or the residence of the service supplier, and identify which Member is competent to bring up a case for conciliation. The situation regulated here is the typical one in which the state of the service consumer is the Member which establishes discriminating measures vis-à-vis non-resident vessels.

Not all GATS Members have sufficient legal interest to bring up a case for conciliation or dispute settlement before a Panel. The contracting party involved is the Member whose GATS benefits are affected by the laws of another Member, cf. Article XXIII:3:

> "If any Member considers that any benefit it could reasonably have expected to acquire to it under a specific commitment to another Member".

The phrase "acquire to it" refers to benefits to the Members of GATS in accordance with their membership. The more exact meaning is dependent upon the provisions of GATS. Since my topic is MFN or National Treatment, I will address only these provisions. As stated in Article XVII:1,

> "each Member shall accord to services and service suppliers of any other Member ... treatment no less favorable than that it accords to its own like services and service suppliers".

What GATS acquires to "any other Member" is a promise that entities, enterprises, industries, etc. of that Member are given treatment no less favorable than the Member initiating measures accords to its own like services and service suppliers (Articles II and XVII). Thus, the framework of this provision gives that other Member the benefit that its service suppliers receive treatment no less favorable than that accorded to the service industries of any other Member. But what about others? Obviously a service which is not supplied by a vessel registered under the laws of that other Member or by a person of that other Member, does not have any rights under Article XXII:3, cf. Article XVII:1. Some domestic services are regarded as non-resident if they are local branches of a foreign company. In GATS Article XXVIII(g) note 12, it is explicitly stated that the service provided by a local branch or a representative office, e.g. a subordinate institution of a juridical person of another Member, shall nonetheless be accorded the treatment provided for service suppliers under the Agreement, despite its actual presence in the territory where the service is supplied.

The membership obligations are aimed at the "service ... of any other Member". The crucial point is the exact meaning of **the notion of services**. Obviously this notion is related to the service **contract**, not to the service as such, cf. the prohibition of "measures by Members affecting **trade** in services" (Article I:1) that discriminate between domestic and foreign services. A trade is an *inter partes* relationship between a salesman and a purchaser. To determine which "benefit it could reasonably have expected to acquire", one must first identify the *primae facie* rights and obligations under the provisions of the MFN and National Treatment clauses. The purchaser (i.e. the person that "receives or uses a service" - Article XXVIII(i)) and seller (i.e. "any person that supplies a service" - Article XXVIII(g)) of a service, do have similar rights to ensure that treatment no less favorable is accorded. Those private enterprises benefiting from that particular trade are the legal subjects which enjoy the GATS no less favorable treatment. Consequently, the seller **and** purchaser of those other Members enjoy the rights of MFN and National Treatment under the GATS.

As regards the legal subjects of the charter-party, it is likely that several persons are able to invoke the GATS provisions. The solutions will differ if the case at issue involves the purchase of loading capacity on a time-charter basis, or transportation by regular steamship lines. In the continuation I shall look into some of these cases.

Obviously, the Member empowered to invoke inconsistencies with GATS provisions does vary from case to case. Is it the Member of the merchandise provider, the operator, the charterer or the freight receiver? For instance, if the shipowner is Norwegian and the ship is flying the

Cypriot flag, chartered by a firm in New York, operated from Gdansk, and the provider is a chemical industry in Leyden and the receiver is a wholesaler in Kobe, then which Member enjoys GATS protection? Is it the Member of the beneficiary or the provider of a service? I will illustrate the limits and implications by using examples.

Can a case be brought up for conciliation by both the Member of ship registration and the Member in whose territory the operator is located?

Does any other Member whose industries are **buying** transportation services enjoy GATS legal protection? What is the connection between GATS Members and private enterprises? Is membership of a society (cf. the notion "by a person of that other Member" - see Article XXVIII:f) required in order to gain the status of "service of another Member" according to GATS legislation?

To answer these questions, one must examine the benefits which GATS Members acquire. For my purpose it is sufficient to look at shipping service and treatment no less favorable to the like service and service suppliers. The question is which kind of service is protected by Articles II (MFN Treatment) and XVII (National Treatment)? The obligation is to accord treatment no less favorable "to services and service suppliers".

In some cases, persons who are not parties to the service contract do enjoy GATS protection. For example, a shipowner having a third person operating the ship and therefore not being part of the charter-party affected, might invoke GATS protection if the reason for the Member's restrictions is related to the flag of the vessel and has nothing to do with the operator's status or nationality. Flying that particular flag represents a particular disadvantage, which obviously invokes that Member's competence under GATS.

I now turn to some examples: If the Leyden chemical industry is transporting on its own keel along the NSR to Kobe, and the vessel is registered under the EUROS (European Register of Ships) or the Dutch register, then the Leyden industry is the supplier of the transport service. If Norway or Russia make restrictions affecting that trade, then the European Community qualifies as "another Member" under the status of service supplier, and may therefore bring the case before the WTO for conciliation.

If the Leyden industry buys the transportation services (due to a Cost Insurance Freight (CIF) Contract between Leyden and Kobe) from a US charterer, then the United States is the service-supplying Member, whose status becomes that of "another Member" in relation to the Norwegian or Russian measures restricting the Dutch chemical industry's access to the NSR. If the Gdansk operator is in charge, then Poland is the Member that has legal interest.

A third hypothetical case relates to transportation by regular steamship lines: The Leyden industry buys freight (the CIF situation again), and not time-chartered vessels. The contracting parties are, for instance, an American broker who has bought loading capacity from a Polish operator, and the producer of the chemicals. The Norwegian and Russian restrictions affect the service of the American broker, a situation which renders the United States a beneficiary under the GATS. The Polish operator is not part of the charter-party but, since that operator is running a regular steamship line, the restrictions affect the Polish enterprise capabilities in such a way as to invoke Polish competence under the GATS. If the regulation affects this

particular shipping service because the vessel is flying the Cypriot flag, then the Cypriot registry is at a particular disadvantage, which invokes Cypriot competence under the GATS.

In conclusion, the service of another Member is defined by the vessel register of that other Member, which lists all vessels flying the flag of that Member or operated by a person residing in that other Member. The notion "other Member" refers to another Member than that establishing the measures affecting the trade. This other Member is the subject of the legal protection of GATS provisions (see Chapter 2.xx).

1.13 The Plaintiffs: Which Members are competent to bring up a case for conciliation? (2) The special case of service consumption

We must now confront the following situation: Trade restrictions are not laid down by the service-importing Member, but by a third Member affecting the trade in service between the service-supplying and service-consuming Member. How can we judge the Member conciliation competence in this case?

Considering that the service consumer is not part of the charter-party, this person usually cannot invoke the GATS provisions. However, if the reason for the restrictions on a particular transportation does not lie with the consumer, then that Member probably enjoys competence of conciliation under the GATS.

In the case of the Leyden industry buying transportation services, the question arises as to whether the European Community is to be regarded as "another Member", cf. Article XXIII:3. Does the right of the European Communities' industries to buy shipping services from a shipping firm of any Member comprise a benefit which the Community could reasonably have expected "to acquire to it"? The answer is affirmative, as all traders in services enjoy GATS protection, not only the sales companies. Obviously the Community might invoke the GATS provisions. In the same way: If a wholesaler in Kobe buys the shipping service (a Free on Board (FOB) Contract between Leyden and Kobe), then the Norwegian or Russian restrictions invoke Japanese competence under the GATS.

If the Leyden industry buys freight from regular non-Russian steamship lines transporting along the NSR (the CIF situation once again), and Russian measures affect that particular line, then the Leyden industry's free-choice service consumption is offended. Accordingly, the European Community is competent to invoke the possible breach of the GATS National Treatment principle. In this case the buyer of the chemicals in Kobe is not a service-contracting party. If the reason for the restrictions on this particular transportation does not lie with Kobe, then Japan has no competence under the GATS.

If the Kobe industry is responsible for the transportation (the FOB clause situation), then Kobe is the direct service consumer. In the execution of the charter-party, Kobe takes part in the service contract and consequently is affected in the trade in services because of the Russian restrictions on the Leyden traffic. Therefore the Japanese Government is competent to bring up the case for WTO conciliation.

If the European Community restricts vessels flying the Cypriot flag, then the Leyden manufacturer, as a person of that Member (the European Community), would not be entitled to GATS protection.

1.14 The Panels: Legal sources for interpretation

Here I carry out a legal analysis of the GATS MFN clause and National Treatment principle as formulated in GATS Articles II and XVII, respectively, with special emphasis on shipping transport issues. Consequently I will not examine the economic or political issues in trade in services in general or in the MFN principle in particular.[73]

Textual analysis of the GATT and GATS legal regime is of fundamental importance, as is its drafting history, i.e. the United States "Suggested Charter for an International Trade Organization of the United Nations", negotiations at the London Conference of October-November 1946 and the Geneva Conference of 12 August 1947.[74]Since trade organization praxis reflects the present status of the international trade law, the primary source for interpretation is the GATT: Basic Instruments and Selected Documents (BISD), which have been issued every year since 1952. The practice referred to here is still valid under the GATT 1994, cf. the Agreement Establishing the World Trade Organization Article XVI(1):

> "Except as otherwise provided under this Agreement [WTO] or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947".

Also of some importance is legal theory. Literature is occasionally invoked.[75] For this study I have read through all annual issues of BISD from 1952 until the end of 1993 (supplement no. 40). GATT cases also apply, *mutatis mutandis*, to the GATS cases. The series contains the texts of Agreements, Decisions, Resolutions, Recommendations, Reports Rulings, etc. adopted by Panels, Working Parties, the Contracting Parties and special expert groups on the GATT. As stated in most prefaces to the BISD,

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[73] An analysis of the consequences of the MFN principle for the development of GATT as a multilateral trade organization can be found in Victoria Curzon Price: "Treating Protection as a Pollution Problem or how to prevent GATT's Retreat from Multilateralism" in Thomas Oppermann & Josef Molsberger (eds.): A New GATT for the Nineties and Europe '92 (Baden-Baden 1991) p.21 ff. She concludes as follows: "Multilateralism (i.e. application of the most-favored-nation clause) cannot work in a mercantilistic world where trade liberalization is deemed to be a 'concession' to be granted only against equivalent payment. To expect a government to liberalize trade is like asking a polluter, in the name of the public interest, to install scrubbers at his own expense. The MFN rule is far too idealistic in a world ruled by mercantilism: it asks free-riders to jump on board" (p.31).

[74] E/PC/TA/PV-37.

[75] See e.g. BISD 25S/68, 81: EEC - Programme of minimum import prices, licenses and surety deposits for certain processed fruits and vegetables; and BISD 39S/206, 285: US - Measures affecting alcoholic and malt beverages.

> "the Decisions and Reports which have been selected for publication are those which have continuing relevance to the interpretation and operation of the General Agreement".

Of special interest is the conciliation panelist reports that interpret the Non-discriminatory Treatment principle (which contains the MFN clause), the National Treatment principle and general understandings regarding these provisions. Panelist findings,

> "where the interpretation of the Agreement was in dispute ... once adopted by the Committee, would constitute guidance for future implementation of the Agreement by Parties".[76]

Thus panelist praxis is vital, also under the WTO regime, in accordance with the *"Elastizität der GATT-Normen"* [77]and *"Pragmatismus in der Rechtsanvendung"*.[78]

The importance of panelist reports will increase in the future because of the Marrakech Agreement Establishing the World Trade Organization, embracing the Dispute Settlement Body (DSB); see Article IV(3),[79] cf. Understanding on Rules and Procedures Governing the Settlement of Disputes[80] and the Decision on the Application of the Understanding on Rules and Procedures Governing the Settlement of Disputes,[81] giving decisive competence to the DSB ruling on the basis of panelist reports. This includes trade in services too; see GATS Article XXIII.

1.15 Panel competence[82]

The mandate of the Panel is usually to examine the case before it in light of the relevant GATT provisions, in order to give a ruling on any matter put before it, including

> "an objective assessment of the facts of the case and the applicability of and conformity with the General Agreement and, if so requested by the CONTRACTING PARTIES, make such

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[76] BISD 40S/319, 342: Panel on Norwegian Procurement of Toll Collection Equipment for the City of Trondheim.

[77] Wolfgang Benedek: Die Rechtsordnung des GATT aus völkerrechtlicher Sicht (Springer-Verlag 1990) p.393.

[78] L.c.

[79] GATT: The Results of the Uruguay Round of Multilateral Trade Negotiations. The Legal Texts (Geneva 1994) pp.6-18.

[80] Op.cit. pp.404-433.

[81] Op.cit. p.465.

[82] The suggestion of the reviewer, Professor Scovazzi was to summarize this section (and also section 3.1) due to its peripheral relevance. I have instead chosen to set the text in smaller point size. In my opinion, law is highly dependant upon procedural rights, and I found it necessary to describe the panelist system so that participating parties might see the seriousness by which the WTO is protecting participating rights under the GATS.

> other findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2".[83]

More explicitly the competence of Panels is, according to the Terms of Reference, set by the CONTRACTING PARTIES.[84] The CONTRACTING PARTIES act according to General Agreement Article XXIII, under which investigations and rulings may be implemented if no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time (Article XXIII:2). When deciding on the matter, the opinion of the contracting parties involved is of utmost importance because bilateral consultations, negotiations and possible adjustment is the principal solution; see Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979 paragraph 6:

> "Contracting parties should attempt to obtain satisfactory adjustment of the matter in accordance with the provisions of Article XXIII:1 before resorting to Article XXIII:2. If one of the litigants considered that consultations had not been exhausted, the CONTRACTING PARTIES would not invoke the Article XXIII:2 procedure, even though the other litigants strongly ask for it".[85]

However, the limitation is "within a reasonable time". When, according to a Council decision,[86] time runs out, a Panel might be established even though one of the parties involved is reluctant. According to the new Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the WTO-Agreement Article 6(1), the position of the complaining party is strengthened: A panel shall be established on the plaintiff's request at the latest at the DSB's meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel. At the request of the complaining party, such a meeting shall be convened within 15 days of the request, provided that at least 10 days' advance notice of the meeting is given (note 5).

The Panels may examine all the legal grounds proposed by the complaining party that are necessary to settle the case.[87] For instance, if state practice is inconsistent with the provisions on quantitative restrictions, the Panels will find it "unnecessary" to deal any further with the question of whether the Quantitative restriction is also discriminatory.[88]

> "Having found that the anti-circumvention duties are inconsistent with Article III:2 first sentence, the Panel saw no need for examining whether the anti-circumvention duties are also inconsistent with the obligation of the EEC under Article III:2 second sentence and Article

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[83] Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979 (L/4907) para. 15. As regards the contracting parties to the WTO, see Annex 2 to the Final Act on the Agreement Establishing the World Trade Organization of 15 April 1994 Article 3(1): "members affirm their adherence to the principles for the management of disputes heretofore applied under Article XXII and XXIII of GATT 1947 and the rules and procedures as further elaborated and modified herein".

[84] On the procedural system, see Peter Örebech: GATT-rett, EØS-rett eller EF-rett (Oslo 1992) pp.26-51.

[85] See e.g. BISD 34S/83, 84: Japan - Customs duties, taxes and labelling practices on imported wines and alcoholic beverages (L/6216) para. 1.2.

[86] Annex to Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979 on Agreed Description of the Customary Practice of GATT in the Field of Dispute settlement (Article XXIII:1) para. 1 note 1. See note 47.

[87] See e.g. BISD 37S/132, para. 5.10.

[88] BISD 30S/129, 140 : EEC - Quantitative restrictions against imports of certain products from Hong Kong (L/5511)

I:1".[89]

The reason for this is of course that the latter question depends upon the restrictions in action being consistent with the General Agreement, which they are not. To reach a decision of nullification and impairment of benefits acquired to Member States under the General Agreement, it is unnecessary to discuss the subsidiary matters.[90] Whether further elaboration is simply "unnecessary" or legally restricted, is debatable. This problem is related to the legal subsumption as well as to the factual situation. Regarding the latter, if a Member expressly declares that the issue before the Panel should not be compounded by broadening the scope of the Panel's factual examination, then the Panel is unable to examine the complaint in a broader context:

> "Canada's complaint was limited to the specific product known in North America and also in Japan as dimension lumber. Canada did not contend that different lumber species *per se* should be considered like products, regardless of the product-form they might take. Thus there appeared to be no basis for examining the issue raised by Canada in the general context of the Japanese tariff classification ... In these circumstances the Panel was not in a position to pursue further the questions relating to the concept of "like product" in the framework of Article I:1 of the General Agreement".[91]

In the case of the MFN clause or other non-discriminatory treatment principles, GATT practice confirms that once a measure has been found to be inconsistent with the General Agreement, whether or not it was applied discriminatorily, the question of its non-discriminatory administration is regarded as no longer legally relevant.[92] The Panel on Canada - Administration of the Foreign Investment Review Act (BISD 30S/163) -

> "saw great force in Canada's argument that only the most-favored-nation and not the national treatment obligations fall within the scope of the general principles referred to in Article XVII:1(a). However the panel did not consider it necessary to decide in this particular case whether the general reference to the principles of non-discriminatory treatment referred to in Article XVII:1 also comprises the national treatment principle since it had already found the purchase undertakings at issue to be inconsistent with Article III:4 which implements the national treatment principle specifically in respect of purchase requirements".

Therefore subsidiary, superfluous or potential questions not necessary to settle the case are not matters for panelist decisions. However, I am not sure that this is a valid interpretation: If additional questions raised by both parties are of great practical interest, or if the Panel "saw great force in" an argument, a Panel might then deal with such questions:

> "The Panel recognized that, given its finding that the EEC measures were a violation of Article XI:1 and not justified by Article XI:2(c)(i) or (ii), no further examination of the administration of the measures would normally be required. Nonetheless, and even though the Panel was concerned with measures which had already been eliminated, in view of the questions of great practical interest raised by both parties it considered it appropriate to examine the

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[89] BISD 37S/132: European Economic Community: Regulation on imports of parts and components (L/6657) para. 5.10.

[90] See e.g. BISD 35S/163: Japan - Restrictions on imports of certain agricultural products (L/6253) para. 5.4.2.

[91] BISD 36S/167: Canada/Japan: Tariff on import of spruce, pine, fir (SPF) dimension lumber (L/6470) para. 5.15.

[92] See e.g. BISD 35S/116: Japan - Trade in semi-conductors (L/6309).

administration of the EEC measures in respect of Article XIII".[93]

> "The Panel then examined the contention of the European Communities that the practices complained of were contrary to Article III... The Panel considered that it was not necessary to decide in this particular case whether the practices complained of were contrary to Article III:4 because it had already found that they were inconsistent with Article XI. However, the Panel saw great force in the argument that Article III:4 was also applicable to state-trading enterprises at least when the monopoly of the importation and monopoly of the distribution in the domestic markets were combined, as was the case of the provincial liquor boards in Canada. This interpretation was confirmed *e contrario* by the wording of Article III:8(a)".[94]

In this case the Panel's decision is an *opinio juris,* and consequently of limited effect. If parties declare expressly that the issue before the panel should not be broadened outside the scope of the complaint, the panel is "not in a position" to pursue further investigations.[95] This means that the Panel is not competent to deal with the matter at issue.

In conformity with GATT practice, panels do not examine exceptions under the General Agreement which have not been invoked by the contracting party complained against.[96]

> "In conformity with the practice of panels not to examine exceptions under the General Agreement which have not been invoked by the contracting party complained against ... and not to examine issues brought only by third parties ... the Panel decided not to examine whether the anti-circumvention duties could be justified under Article VI".[97]

Neither would a panel examine issues raised by third parties only.[98] If such an examination is conducted, a panel will not make formal findings on the issues raised by Member States that are not party to the dispute.[99] The competence of the Panel in the latter case seems to be dependent upon whether the two plaintiffs had raised no objection to the Panel dealing with that issue.[100] The reason for not making a formal finding is that none of the parties involved had the opportunity to oppose the legal claims. The principle of *contradictio* is not fulfilled and the case may not be as properly elucidated as it should.[101] That is also the case if a matter is raised only after the establishment of the Panel. The contracting parties had then no reason to expect that such questions would come before the Panel. The Panel is therefore prevented from dealing with the questions.

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[93] BISD 36S/93: EEC - Restrictions on imports of dessert apples complaint by Chile (L/6491) p.130 para. 12.20.

[94] BISD 35S/37: Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies, p.90 para. 4.26.

[95] See e.g. BISD 36S/167: Canada/Japan: Tariff on import of spruce, pine, fir (SPF) dimension lumber (L/6470) p.199 para. 5.16.

[96] See e.g. BISD 31S/74.

[97] BISD 37S/132: European Economic Community: Regulation on imports of parts and components (L/6657) para. 5.11.

[98] BISD 36S/331: United States p.344 - restrictions on imports of sugar. Panel report L/6514 p.15 and the reference therein.

[99] BISD 35S/245: United States - Custom user fee (L/6264) para. 124.

[100] See e.g. BISD 35S/245: United States - Custom user fee (L/6264) para. 121.

[101] BISD 35S/245: United States - Custom user fee (L/6264) para. 123.

1.16 The Panels: Some main principles of interpretation

In conformity with the Vienna Convention on the Law of Treaties of 23 May 1969, the panelists shall interpret GATT provisions in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose (Vienna Convention Article 31). This means that conventions, including GATT agreements, shall be interpreted on the basis of legal texts in the light of their drafting history,[102] the attainment of GATT policy objectives[103] and according to general considerations.[104] A basic principle of the latter kind is to promote solutions that would not weaken the GATT system of equal competition rights. Such a solution is to face the formal legal positions rather than consider a violation to be dependent upon potential trade effects. To give Member States the power to decide whether effects are significant or not when determining for themselves whether a *prima facie* violation had taken place, would be to undermine the GATT system of protection to other Member States.[105] Unless the opposite is stated under a specific provision, such trade effects must not be considered when deciding whether national measures are in conformity with GATT legislation; see the Annex to the 1979 Understanding on Dispute Settlement paragraph 4 and 5):

> "In the absence of a mutual agreed solution, the first objective of the CONTRACTING PARTIES is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement" (paragraph 4).

The scope of this paragraph is the inconsistency of national measures with the General Agreement. The impact of the inconsistent measures is not mentioned. This suggests that GATT practice - as stated in this description - is to make recommendations and rulings on measures found to be inconsistent with the General Agreement, independent of the impact of such measures. This becomes clear if we look at the Customary Practice described in paragraph 5:

> "A *prima facie* case of nullification or impairment would *ipso facto* require consideration of whether the circumstances are serious enough to justify the authorization of suspension of concessions or obligations, if the contracting party bringing complaint so requests. This means that there is normally a presumption that a breach of the rules has an adverse impact on other contracting parties, and in such

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[102] See e.g. BISD 36S/331, 343, para. 5.6.

[103] BISD 35S/245: United States - Custom user fee (L/6264) para. 85.

[104] See e.g. BISD 35S/163: Japan - Restrictions on imports of certain agricultural products (L/6253) para. 5.1.2.

[105] See the Mexican statement in BISD 34S/143: United States - Taxes on petroleum and certain imported substances (L/6175) para. 3.1.8.

> cases, it is up to the contracting parties against whom the complaint has been brought to rebut the charge" (paragraph 5).

Thus the 1979 Agreed Description does not refer to the adverse impact of a measure, and the possibility of a rebuttal, in connection with the power of the GATT to make recommendations or give rulings on measures inconsistent with the General Agreement. Such power is limited to the authorization of compensatory action, cf. the notion "authorization of suspension of concessions or obligations". Consequently, the impact of a measure inconsistent with the General Agreement is not relevant for a determination of nullification or impairment by the relevant GATT authorities.

One might ask whether such studies of effects are at all possible. As stated by the Panel in the Canadian Foreign Investment Review Act Report:[106]

> "The Panel carefully considered the effects of the purchase requirement on trade. The Panel concluded that an evaluation of these effects would entail scrutiny and analysis of the implementation of several thousands of often differently worded undertakings as well as speculation on what the purchasing behavior of foreign investors would have been in their absence. The Panel could not undertake such an evaluation and it is therefore not in a position to judge how frequently the purchase requirements cause investors to act differently than they would have acted in the absence of the undertakings and how frequently the purchase requirements cause investors to act differently than they would have acted in the absence of the undertakings and how frequently they therefore adversely affect the trade interests of other contracting parties. The Panel, however, believes that an evaluation of the trade effects was not directly relevant to its findings because a breach of a GATT rule is presumed to have adverse impact on other contracting parties".[107]

A principle of interpretation which has a strong position under GATT legislation is that an exception provision has to be construed narrowly:

> "The Panel agreed with the view that Article V:16 [of the Agreement of Government Procurement before the Uruguay Round amendment] must be regarded as an exception provision containing, as made clear in the last sentence of Article V:1, a finite list of circumstances under which Parties could deviate from the basic rules requiring open or selective tendering. Since Article V:16(e) was an exception provision, its scope had to be interpreted narrowly and it would be up to Norway, as the Party invoking the provision, to demonstrate the conformity of its action with the provision".[108]

A similar principle relates to the exception provisions under the General Agreement. For instance, the different interpretation underlying the identical notion of "like product" under GATT Articles I and III and the "like product" of GATT Article VI, XI:2(c)(i) and (ii), might

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[106] See BISD 30S/164,167.

[107] See also BISD 31S/113 and BISD 7S/66-67.

[108] BISD 40S/319: Panel on Norwegian Procurement of Toll Collection Equipment for the City of Trondheim, p.336 para. 4.5.

be explained by their being exception provisions or not:

> "It appears, that when used in Article VI and in Article XI, paragraph 2(c), "like products" is very narrowly defined. This may be because these provisions are exceptions to GATT obligations and therefore should be narrowly construed".[109]

It is up to the contracting party seeking to justify measures under the exception provision of GATT Article XX and GATS Article XIV to demonstrate that those measures are "necessary"[110] or justified[111] within the meaning of that provision. Accordingly that Member has not met its burden of proof for the exception claimed from the GATT or GATS requirement.

That is also the case in the Annex on Agreed Description of Customary Practice of the GATT in the field of Dispute Settlement paragraph 5: The party against whom the complaint has been brought has the opportunity of demonstrating conformity with GATT legislation by rebutting the allegation of nullification or impairment. For instance, a Member imposing a fee has the initial burden of justifying any government activity being charged for. Once a *prima facie* satisfactory explanation has been given, the onus is upon the plaintiff government to present further information that calls into question the adequacy of that explanation.

According to GATT practice, the burden of not having proved such conformity with the provision of GATT is on the Party invoking the provision.[112] As regards the treatment-no-less-favorable standard, the underlying objective of ensuring equal treatment encumbers the contracting party applying differential treatment with the need to prove that, despite such differences, the treatment-no-less-favorable standard of Article III is fulfilled:

> "The words 'treatment no less favorable' 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. Given that the underlying objective is to guarantee equality of treatment, it is incumbent on the contracting party applying differential treatment to show that, in spite of such differences, the no less favorable treatment standard of Article III is met".[113]

Having found that national decisions or legislation were not in conformity with GATT provisions,

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[109] John Jackson: World Trade and the Law of GATT (Bobbs, Merril 1969) p.263.

[110] BISD 30S/164: Canada - Administration of the Foreign Investment Review Act, p.393 para. 5.20. Another incident is referred to in Peter Örebech: GATT-rett, EØS-rett eller EF-rett (Oslo 1992) p.51.

[111] BISD 39S/206: United States - Measures affecting alcoholic and malt beverages, pp.287-88 paras. 5.51-5.52.

[112] See BISD 30S/140 para. 5.20 and BISD 37S/132 para. 3.56.

[113] BISD 36S/345, 386: United States - Section 337 of the Tariff Act of 1930 (L/6439) para. 5.11. On the same issue, see BISD 39S/206: United States - Measures affecting alcoholic and malt beverages, para. 5.52.

> "it was customary for panels to make findings regarding conformity with the General Agreement and to recommend that any measures found inconsistent with the General Agreement be terminated or brought into conformity from the time the recommendation was adopted. The provision of compensation had been resorted to only if the immediate withdrawal of the measure was impracticable and as a temporary measure pending the withdrawal of the measures which were inconsistent with the General Agreement".[114]

According to GATT practice one could say that the enactment of a provision contrary to GATT, and the application of measures pursuant to this provision, constituted an infringement of obligations assumed under the General Agreement, and was therefore considered a *prima facie* nullification and impairment of benefits acquired to Member States under the General Agreement, within the meaning of Article XXIII.[115] However, the party against whom the action had been brought could - according to the Annex on Agreed Description of Customary Practice of the GATT in the field of Dispute Settlement, paragraph 5 - rebut the allegation of nullification or impairment. From this one cannot draw the conclusion that the plaintiff is free to refrain from giving a satisfactory explanation of how the alleged inconsistency with Article I is challenged. Thus the initial responsibility of rebutting these claims is on the contracting party alleged to be upholding the inconsistent measure. Once that responsibility is fulfilled, the burden of evidence is with the other party.

However, one might ask whether the opportunity to rebut a presumption is present in all cases, for instance to what extent a demonstration that a measure inconsistent with the National Treatment standard (e.g. Article III:2, first sentence) has little or no effect on trade. Further, must we distinguish between nullification and impairment on the one hand, and suspension and compensatory action on the other?

Article XXII:2 authorizes the CONTRACTING PARTIES, after a claim of nullification or impairment is unresolved through consultations, to make recommendations or give a ruling on the matter and to suspend a concession if they consider that the circumstances are serious enough to justify such an action. This latter alternative will be addressed later. First we must examine the nullification or impairment alternative.

In the absence of a mutual agreed solution, the first objective of the CONTRACTING PARTIES is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement. The provision of compensation (as part of the suspension competence) should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement.[116]

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[114] BISD 40S/319, 336: Panel on Norwegian Procurement of Toll Collection Equipment for the City of Trondheim, p.341.

[115] Annex to Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979 on Agreed Description of the Customary Practice of GATT in the Field of Dispute Settlement (Article XXIII:2) para. 5 (BISD 26S/216).

[116] Annex to the 1979 Understanding on dispute settlement of Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement, para. 4.

There is no mention of any possible impact of the inconsistent measure in paragraph 4 of the Annex. This suggests that the practice of the CONTRACTING PARTIES is to make recommendations and rulings on measures found to be inconsistent with the General Agreement independent of the impact of such measures. When deciding on the matter of competence to rebut the complaint, we find some support in the same Annex, paragraph 5:

> "In practice, contracting parties have had recourse to Article XXIII only when in their view a benefit acquiring to them under the General Agreement was being nullified or impaired ... A *prima facie* case of nullification or impairment would *ipso facto* require consideration of whether the circumstances are serious enough to justify the authorization of **suspension** of concessions or obligations, if the contracting party bringing the complaint **so requests**. This means that there is normally a presumption that a breach of the rules has an adverse impact on other contracting parties, and **in such cases**, it is up to the contracting parties against whom the complaint has been brought to rebut the charge" (the emphasis is mine).

The 1979 Annex on the Description of Customary Practice does not refer to the adverse impact of a measure, and the possibility of a rebuttal, in connection with the power of the CONTRACTING PARTIES to make recommendations or give rulings on measures inconsistent with the General Agreement; it does so only in connection with the authorization of compensatory action. This indicates that the impact of a measure inconsistent with the General Agreement is not relevant for a determination of nullification or impairment by the CONTRACTING PARTIES. Such a conclusion is also supported by panelist praxis:

> "The Panel noted such claims had been made in a number of cases but that there was no case in the history of GATT in which a contracting party had successfully rebutted the presumption that a measure infringing obligations causes nullification and impairment".[117]

The situation then is that any presumption of illegal measures causing nullification or impairment might not be rebutted, unless authorization of suspension of concessions or obligations is granted.

1.17 Facts as evidence

Having established the proper legal interpretation, the factual situation must now be examined. Nothing can be regarded as evidence unless it provides sufficient proof:

> "It also noted the EEC argument that the general perception of the Japanese users and importers of semi-conductors might, under these special circumstances, be that they were expected to accord preference to United States products and would do so accordingly. The Panel considered this as a conjecture which therefore did not provide facts as evidence that preferences were accorded".[118]

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[117] BISD 34S/136, 156: United States - Taxes on petroleum and certain imported substances. See also BISD 7S/66-67, BISD 30S/167 and BISD 31S/113.

[118] BISD 35S/116: Japan - Trade in semi-conductors (L/6309).

To determine whether or not a national measure hinders a third country's exportation, the sales statistics can be consulted. If import statistics show that the growth of sales from sources other than the alleged favored Member had been higher than that of the sales originating in the beneficiary Member, then such facts verify that no inconsistency with the MFN Treatment Clause has occurred.[119] However, this is not conclusive because sales from those third countries may otherwise have been even higher.

In conformity with panel findings and the decision of the CONTRACTING PARTIES, the Member must terminate measures contrary to that Member's WTO obligation. If a Panel found that the Member's provisions were inconsistent with the treatment-no-less-favorable clause by e.g. the provision of subsidies conditional to the purchase of services, then that Member should abolish such payments to consumers. Suspecting that such a Member has neglected to do what is required, the applicant may bring up the case for further inquiries. For instance, if the United States (the applicant in the previous case) decides that European Communities payments to **processors** on the purchase of oilseeds of Community origin is inconsistent with the Communities' obligation according to GATT legislation, then the United States may bring the case before a Follow-up Panel.[120]

From which point in time should rectifications be made? Should it be the (later) date of the request for an injury determination, or the (earlier) date when the obligation for the Member to provide an injury determination entered into force? In a most-favored-nation treatment case under GATT 1947 Article I, the Panel

> "found that the United States failed to grant ... to products originating in contracting parties ... to like products ... that advantage being the automatic backdating of the revocation of countervailing duty orders issued without an injury determination to the date on which the United States assumed the obligation to provide an injury determination under Article VI:6. Accordingly the Panel concludes that the United States acted inconsistently with Article I:1".[121]

1.18 Further discussion

In the continuation I discuss the legal problems of the MFN Clause (GATS Article II) and the National Treatment principle (GATS Article XVII). As the basic legal notions are identical (though not the factual situation; see Chapter 2.0), I discuss both provisions collectively. First, I discuss the concept of "treatment no less favorable" (Chapter 2). Secondly, I deal with the

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[119] BISD 35S/116: Japan - Trade in semi-conductors (L/6309) para. 125.

[120] See e.g. BISD 39S/91: EEC - Follow-up on the Panel Report. Payment and subsidies paid to processors and producers of oilseed and related animal-feed proteins. Report of the Members of the Original Oilseed Panel. Since the actual Regulation (EEC no. 3766/91) did not provide for any subsidy payments to processors, and that the Community had stated that this Regulation had abolished intervention purchases and aids to processors for oilseed harvest, the Panel found that the changes made were consistent with the principle of treatment no less favorable (p.118).

[121] BISD 39S/128: United States - Denial of Most-Favored-Nation treatment as to non-rubber footwear from Brazil, p.154.

concept of "like services and service supplier" (Chapter 3). The concluding chapter (Chapter 4) points out some of the most important implications of implementing GATS legislation with regard to NSR transportation. Chapter 4 may also be called a summary

Chapter 2
"TREATMENT NO LESS FAVORABLE"

A basic element of the General Agreement on Trade in Services is the obligation not to discriminate between citizens of Member States according to the MFN clause (GATS Article II), or against foreigners according to the National Treatment principle (GATS Article XVII). However, the latter protection is not valid for sectors where market-access commitments are not undertaken. Yet my presupposition is that market-access commitments are valid for shipping transportation service and that the INSROP countries Japan, Norway and Russia and Contracting parties like the European Communities and the United States, under GATS Article XVII:1, do not disqualify National Treatment from their scheduled commitments. In that case, the treatment-no-less-favorable clause is limited to MFN Treatment under Article II.

Naturally, we have an intuitive understanding of the true meaning of "treatment no less favorable". However, legal interpretation is not a matter of instinct, but rather the outcome of systematic studies based on legal texts and contextual associations, taking into account all GATT panelist decisions from the year 1952 onwards.

2.0 A starting point

The treatment-no-less-favorable obligation affects all measures influencing like services or service suppliers. National legislation which provides special credit facilities to some categories of service suppliers for the purchase of domestic shipping service might be inconsistent with the obligations of that Member under GATS Articles II and XVII. But what is the treatment-no-less-favorable standard all about?

In the GATT 1947, Article III:4 provides that the products imported into the territory of any other Contracting party shall be accorded treatment no less favorable than that accorded to the like products of national origin. The fact is that special credit facilities reserved exclusively to the purchaser of domestic products possibly represent a discrimination which might involve an inconsistency with the provisions of Article III.

It is arguable whether the treatment-no-less-favorable clause is perhaps too limited in its scope. Since its objective is to establish an instrument for governing trade, one may assert that the text of Article III:4 applies only to such laws, regulations and requirements that are concerned with the actual conditions for sale, transportation, etc. and should not be interpreted in an extensive way. In particular, that the commitment undertaken by the CONTRACTING PARTIES under that paragraph is limited to qualitative and quantitative regulations to which goods were subjected, with respect to their sale or purchase on the domestic market. It might then be asserted, for instance, that the improvement in the employment of labor was not related to questions of sale, purchase or transportation of imported and domestic products which were the only matter dealt with in Article III. It could further be claimed that the text of Article III:4 was not construed in such a way as to prevent the Members from taking the necessary measures to assist the economic development of the country.

2.1 The distinction between tariffs and internal taxes

Each Member of the GATS is competent to decide on which terms, limitations and conditions a trade in services is available in that Member. Since there are no limitations regarding which obligations might be laid down, a Member is competent to make Market Access dependent upon the import charges being paid (GATS Article XVI:1). Even though individual scheduled solutions are the possible outcome of the negotiations in the Group on Maritime Transport Services, and not knowing the exact content of such reservations, I anticipate that INSROP participating Members and important shipping contracting parties such as the USA and the European Communities will not make any scheduled reservations.

Before analyzing "treatment no less favorable" in detail, we must make a vital distinction between import duties and internal charges. This is of fundamental importance because the General Agreement regulates ordinary customs duties, other import charges and internal taxes differently. The imposition of "ordinary customs duties" for the purpose of protection is allowed unless they exceed tariff bindings. All other duties or charges of any kind imposed on or in connection with importation are in principle prohibited in respect of bound items (GATT 1947 Article II:1(b)). In contrast, internal taxes that discriminate against imported products are prohibited, whether or not the items concerned are bound (GATT Article III:2). If a charge is imposed on imported products or services at a higher rate than that imposed on domestic products, and the charge is not classified as import duty, that charge would still seem to represent an internal tax on imported products in excess of the tax applied to like domestic products. Such a measure is inconsistent with GATT Article III:2 or GATS Article XVII:

> "The Panel agreed that the question of the consistency of the effects of the Italian Law with the provisions of the General Agreement raised a problem of interpretation ... The French text which had been submitted to the Italian Parliament for approval provided that the imported products *ne seront pas soumis à un traitement moins favorable* whereas the English text read: "the imported product shall be accorded treatment no less favorable". It was clear from the English text that any favorable treatment granted to domestic products would have to be granted to like imported products and the fact that the particular law in question did not specifically prescribe conditions of sale or purchase appeared irrelevant in the light of the English text. It was considered moreover, that the intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given".[122]

This distinction is elucidated in the GATS provisions on MFN Treatment (Article II) and National Treatment (Article XVII): Breaching the treatment-no-less-favorable obligation under Article II is to discriminate either on the grounds of import charges or internal charges, or both. Breaching the treatment-no-less-favorable obligation under Article XVII is to discriminate between domestic services or service suppliers and imported services and service suppliers with regard to internal charges (or any other internal measures).

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[122] BISD 7S/60 (1958): Italian Discrimination against imported Agricultural Machinery.

What are internal taxes? Where do we draw the line between import duties and all other duties or charges? A common situation is that of charges imposed on a fully prepared service supplied from abroad, which is a matter of tariffs and consequently subject to justification under GATS Article II only. A difficult situation would arise if a Member were to impose duties on services yielded or assembled in that Member from parts of services imported. The provision of shipping services is a mixture of several components. The transportation service is comprised of: persons involved, e.g. a broker, owner, charterer, operator, contracting parties, crew, pilots, etc.; technical equipment, i.e. a ship, gear, auxiliary components, etc.; external elements such as navigation support from the shore, ports, ports facilities, etc. Shipping transportation sales is comprised of an offer of a "total package" which includes all service components. Can charges imposed on internal handling of shipping transportation be considered as internal taxes? If so, then such measures are subject to justification under GATS Article XVII.

If charges are levied on the internal manifestation of services and only the service or service supplier of **one** Member is offended, then such charges violate the principle of MFN treatment laid down in Article II:1 in that they were imposed on a discriminatory basis on parts imported from a specific country.

Furthermore, if measures do provide that the value of parts or materials used in the assembly operation and originating in the country of export of the finished product subject to duty must exceed the value of all materials used, then this criterion for the application of duties might be inconsistent with Article II:1 of the GATS. The reason is that parts imported from a specific country received less favorable treatment than parts imported from third countries. Such a criterion might also be inconsistent with GATS Article XVII:1, the inconsistency arising from the fact that it entails a treatment of parts imported from a specific country which is less favorable that the treatment of domestically produced parts.

The implementation of import charges is justified under the principle of National Treatment. To distinguish between internal charges and import charges, we might begin by looking at the policy purpose of a charge and at the issue of whether the charge is imposed in connection with importation. The distinction between MFN and National Treatment cases under the GATS is parallel to the distinction between identical concepts under the GATT. In order to clarify the distinction, I must therefore analyze the legal situation under the GATT.

The text of GATT Articles I, II, III, and the Note to Article III refer to charges "imposed on importation", "collected ... at the time or point of importation", "on or in connection with importation" and applied "to an imported product and to the like domestic product". The relevant fact, according to the text of these provisions, is not the policy purpose attributed to the charge but rather **whether it is collected internally**. The reading of Articles II and III is supported by their drafting history and by previous panel reports.[123] A panel report which has examined the provisions of the General Agreement governing tax adjustments applied to goods entering into international trade (among them Articles II and III), stated that

> "the tax adjustment rules of the General Agreement distinguish between taxes on

[123] See e.g. BISD 1S/60 and BISD 25S/49,67.

> products and taxes not directly levied on products; they do not distinguish between taxes with different policy purposes".[124]

That Panel further noted that the policy purpose of charges is frequently difficult to determine objectively. Many charges could be regarded as serving both internal purposes and purposes related to the importation of goods. Only at the expense of creating substantial legal uncertainty could the policy purpose of a charge be considered to be relevant in determining whether the charge falls under Article II:1(b) ("on or in connection with importation") or Article III:2 ("internal taxes or other internal charges"). The Panel therefore concluded that the policy purpose of the charge is not relevant in determining the issue of whether the charge is imposed "in connection with importation" within the meaning of Article II:1(b).

The question then is whether all enforcement of internal legislation at the border does provide an escape from the applicability of the National Treatment standard under Article XVII:1. Such charges at the border are necessary, but are they sufficient reason for the aforementioned avoidance? Do some charges collected at the border still qualify as internal taxes?

In an attempt to answer these questions, Annex I in GATT 1994 (and 1947), Notes and Supplementary Provisions to Article III (the National Treatment standard), may offer some support with respect to interpretation. According to this provision any law, regulations or requirement affecting the internal sale of products that is enforced in the case of the imported product at the time or point of importation is nevertheless subject to the provisions of Article III.

As regards shipping services, we understand that the distinguishing factor is whether the charge imposed on such services is collected internally. Collection of charges at the border by customs authorities, port authorities or others **might** be justified under the National Treatment provision. If the charge affects the internal sale of the shipping service, then the charge is to be subsumed under the National Treatment standard of GATS Article XVII regardless of its point of collection. Charges collected during transportation or when in harbor are internal and are consequently subject to justification under the National Treatment clause.

Where I deal with pecuniary measures under the National Treatment clause in the continuation, the focus is on internal taxes. Where I address the MFN Treatment clause, tariffs also come into focus.

2.2 Protected service contracts

My task here is to discuss shipping transportation services, which covers all manner of transportation from regular steamship liners to spot-market operated or chartered vessels. The type of cargo being transported is of no importance. The objective of the GATS is to limit "measures by Members affecting trade in services" (GATS Article I:1). The focus is on **trade** in services, not the service as such, i.e. the execution of services. What is protected is the equal right to offer, request, negotiate and conclude service contracts. Therefore I concentrate

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[124] BISD 34S/136: United States - Taxes on petroleum and certain imported substances, p.161.

on the right to provide services by concluding international contracts. Through the GATS provisions, service contracts in the WTO area are protected.

Undoubtedly, **private** service contracts and the public regulation of private trade contracts are part of the GATS regime. A Member's obligations with respect to private service contracts include all MFN obligations under the GATS.

Procurement contracts for public products are regulated by the Agreement on Government Procurement, which is part of the Tokyo Round Agreements of 12 April 1979. Under the broadened and improved Agreement on Government Procurement amended by the Uruguay Round Agreements of 15 April 1994, service contracts are also included. This relates only to State trading entities. To what extent is Government procurement included?

State trading enterprises usually carry out government procurement in conformity with GATT Article XVII obligations. It has previously been discussed whether this Article on state trading includes the National Treatment obligation under the GATT.[125] Panelist praxis does confirm that public product procurement does come under the requirements of the GATT 1947 MFN clause, including the National Treatment obligations:

> "the Panel saw great force in the argument that Article III:4 [National Treatment on Internal Taxation and Regulation] was also applicable to state-trading enterprises at least when the monopoly of the importation and monopoly of the distribution in the domestic markets were combined, as was the case of the provincial boards in Canada".[126]

What are the obligations binding on such state trading enterprises? According to paragraph 2 of Article XVII, obligations under paragraph 1 shall not apply to imports of products for immediate or ultimate consumption in governmental use. As stated by a former panel that examined issues related to this paragraph:

> "as regards the exception contained in paragraph 2 of Article XVII, it would appear that it referred only to the principles set forth in paragraph 1 of that article, i.e. the obligation to make purchases in accordance with commercial considerations and did not extend to matters dealt with in Article III".[127]

Are the rules of the Agreement on Government Procurement fully applied when extended to service contracts, e.g. the procurement of shipping transportation? The answer is negative: GATS Article XIII on Governmental Procurement explicitly states that neither the MFN nor the National Treatment standards relate to measures governing the procurement by governmental agencies of services purchased for governmental purposes if that procurement is neither intended to initiate commercial resale nor intended for use in the supply of service

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[125] EPCT/A/SR.10.

[126] BISD 35S/37, 89-90: Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies.

[127] BISD 1S/60: The Panel report on Belgian Family Allowances.

for commercial sale. If procurement does have a commercial purpose, then government procurement of services is included and the tendering procedure therefore applies.

The main rule is the open tendering procedure under the Agreement on Government Procurement Article VII. No single tendering of the procurement is justified under any of the provisions of Article V:16 unless the following conditions are met: First, the contract must be a prototype developed in the course of, and for a particular contract whose objective was research and development, and did not apply to contracts for which the supplier would have to conduct research and development, and did not apply to contracts for which the supplier would have to conduct research and development in order to deliver the product sought by the procuring entity; second, the so-called "prototypes" in the contract must be prototypes and not a final product; and third, the contract must require the performance of genuine research and development on the part of the supplier in order to be fulfilled.[128] If not, a single tendering procedure is not valid and that Member must follow the open procurement system of Article VII.

The words "contract for research .. or original development" in Article V:16(e) had to be interpreted from the perspective of the procuring entity.[129] The relevant perspective was what the procuring entity was procuring, not the nature of the work that would have to be undertaken by the supplier to supply the goods and services being procured. It was the output of suppliers that the Agreement dealt with and that procuring entities were interested in purchasing, not the input of factors or production necessary to produce that output. The same reasoning must also apply if research and development were to constitute an input into the production of products being procured and were not itself the object of the procurement.

Having failed to meet the general requirement of the Agreement on Government Procurement, that Member has unjustifiably neglected the products or supplier of other Parties in order to be accorded "treatment no less favorable" than "that accorded to domestic products and suppliers" (Article II:1).

In the continuation, I make the assumption that negotiations under the shipping agenda, the Negotiating Group on Maritime Transport Services (NGMTS) will be successful, that the MFN clause (Article II) and the National Treatment principle (Article XVII) will become part of the shipping solution, and that two or more INSROP countries (Japan, Norway and/or Russia) and the EU and its Member States will participate. If the Russian application for membership is rejected, the INSROP area that comprises part of the WTO/GATT legal regime will be limited.

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[128] Such a case is described in the Panel Report BISD 40S/319: Panel on Norwegian Procurement of Toll Collection Equipment for the City of Trondheim.

[129] BISD 40S/319: Panel on Norwegian Procurement of Toll Collection Equipment for the City of Trondheim, p.337 para. 4.8.

2.3 The legal subjects involved

I now turn to the question of legal subjects, i.e. the persons bound by GATS obligations or having direct or indirect rights under GATS provisions. The beneficiaries are the other Contracting parties of which the service suppliers are citizens or in which they have the right of domicile. Obviously the legal subjects of the trespassing Member, typically the importer, have no legal rights under the GATS provisions. Perhaps surprisingly, however, the importer is occasionally reported to be the person offended.[130]

The subjects 'of duty' are the "Members", i.e. the states or international organizations that are entitled to membership. Their legal obligations are limited to public decisions because it is the "Members" which must accord treatment no less favorable. "Members" are defined under GATS Article I:3(a) as including central, regional or local governments and authorities and non-government bodies in the exercise of delegated powers. Consequently one cannot bring private enterprises to discriminate against foreign service suppliers. However, if private enterprises do enjoy legislative competence, then such power is part of the State obligation according to the GATS.

Do all contracting parties have obligations towards all other contracting parties whether or not the latter category of Members has undertaken tariff commitments to the service in question? A GATT Working Party addressing this question concluded that

> "a contracting party was bound by the provisions of Article III whether or not the contracting party in question had undertaken tariff commitments in respect of the goods concerned".[131]

In other words, the benefits under GATT Article III are acquired regardless of whether there is a negotiated expectation of market access or not.

Concerning shipping services, we presume that every ship registered under the laws of a GATS Member enjoys the right of equal "conditions of competition" in the territory of any other GATS Member. Under GATS Article XXVIII(f)(i), the supplier offering shipping services enjoys protection on the condition that the flag state or the state of domicile of the shipowner, charterer or operator has obtained GATS membership (see Chapter 1.11). The GATS provisions are granted to that supplier as reflexual rights. These rights do not depend upon whether that Member in its Schedule has undertaken tariff commitments in respect of the specific service.

2.4 The purposes of the provision

I will now deal with more specific interpretations of the provisions of the General Agreement on Trade in Services. The scope of this section encompasses the equal participation rights under GATS Article II (MFN Treatment Clause) and Article XVII (National Treatment

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[130] See e.g. BISD 30S/140, 160-61: Canada - Administration of the Foreign Investment Review Act, with particular reference to the phrase "Canadian agent or importer would normally be less advantageous".

[131] BISD Vol. II/182.

standard). The basic principle of treatment no less favorable makes all Members liable to

> "accord to service and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like service and service suppliers", GATS Article XVII:1.

Further, it is stated that

> "Formally identical or formally different treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to the like services or service suppliers of any other Member", GATS Article XVII:3.

These two provisions have slightly different perspectives and therefore some different objectives. While paragraph 1 relates to trade effects, paragraph 3 relates to the notion of equal treatment to the conditions of competition. Yet some perspectives do have general application. The basic principle of the treatment-no-less-favorable clause is the obligation to promote equal competition rights:

> "The Panel noted that, as far as the issues before it are concerned, the "no less favorable" treatment requirement set out in Article III:4, is unqualified. The words are to be found throughout the General Agreement and later agreements negotiated in the GATT framework as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given to other foreign products, under the national treatment standard of Article III".[132]

With respect to interpretation, a closer examination of the GATS treatment-no-less-favorable clause could gain support from GATT Articles I and III. First I will investigate the drafting history of GATT Article III:2, which is clearly a parallel to GATS Article XVII:3. Then I turn to Article III:4 which has similarities with GATS Article XVII:1.

1. The drafting history confirms that Article III:2 was designed with "the intention that internal taxes on goods should not be used as a means of protection".[133] As stated, "the philosophy behind these provisions was the ensuring of a certain trade neutrality".[134] This concurs with the broader objective of Article III "to provide equal conditions of competition once goods had been cleared through customs",[135] and to protect thereby the benefits acquiring from tariff concessions. The object and purpose of Article III:2 of promoting non-discriminatory competition among imported and like domestic products could not be achieved if Article III:2 were construed in a manner allowing discriminatory and protective internal taxation of imported products in excess of like domestic products.

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[132] BISD 36S/345, 386: United States - Section 337 of the Tariff Act of 1930 (L/6439) para. 5.11.

[133] UN Conference on Trade and Employment, Reports of Committees 1948, p.61.

[134] BISD 18S/99: The 1970 Working Party Report on Border Tax Adjustments in respect of the various GATT provisions on taxation.

[135] BISD 7S/64.

The principle of equality under the treatment-no-less-favorable clause calls for effective equality of opportunities for imported products and services in respect of the application of measures, laws, regulations, requirements, etc. affecting the sale, offering for sale, purchase, transportation, distribution or use of products or services. Obviously one might not accept an argument that measures which have only an insignificant effect on the volume of exports do not nullify or impair benefits acquiring under Article III:2 first sentence. Such a view would imply that the basic rationale of this provision - the benefit it generates for the Contracting parties - is to protect expectations of export volumes. That, however, is not the case. Article III:2, first sentence, obliges contracting parties to establish certain competitive conditions for imported products in relation to domestic products. The objective of GATS Article XVII:3 is clearly the same.

Unlike some other provisions in the General Agreement, such as GATT Article III:4, GATT Article III:2 does not refer to trade effects. The provisions of Article III:2, first sentence,

> "were equally applicable, whether imports from other contracting parties were substantial, small or non-existent".[136]

The regulations imposed on third-country products or services, should - whether they are formally identical or formally different - not

> "modify the conditions of competition in favor of services or service suppliers of the Member compared to like services or services suppliers of any other Member", GATS Article XVII:3.

The treatment-no-less-favorable requirement under GATS Article XVII:3 is - as is the case under GATT Article III:2 - aimed at relative competitive opportunities created by the government in the market, not to the actual choices made by enterprises in that market. Suppliers located in the states in question have the opportunity to choose their preferred method of marketing. Through established panelist praxis on the National Treatment standard, it is stated that it is the very denial of this opportunity in the case of imported products which constitutes less favorable treatment.[137] One might then say that the purpose of the first sentence of the National Treatment standard is to protect "expectations on the competitive relationship between imported and domestic products".[138] This is indeed its purpose insofar as it applies to internal taxes, other internal charges and the charge-free elements of internal legislation.

The nature of equivalent treatment is explained by GATT's draftsmen in the following manner:

> "If a charge is imposed on perfume because it contains alcohol, the charge to be imposed must take into consideration the value of alcohol and not the value of the

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[136] BISD Vol. II/185: Working Party on Brazilian Internal Taxes.

[137] See e.g. BISD 39S/206: United States - Measures affecting alcoholic and malt beverages, para. 5.31.

[138] BISD 34S/136: United States - Taxes on Petroleum and Certain Imported Substances (L/6175) para. 5.1.9.

> perfume, that is to say the value of the content and not the value of the whole".[139]

As demonstrated here, the *ratio* for initiating a regulation is critical when evaluating potential differences between foreign and domestic products or services. Drawing a parallel between the above example and the case of service suppliers, it will be seen that a tax imposed on imported services **because** they are dependent upon coastal auxiliary services subject to an excise tax in the country of importation, might be extended to imported products or service suppliers and expanded by an amount dependent upon the extent of use of the coastal services and not upon the value of the foreign service purchased. *In concreto*: If the operation of shipping services is subject to internal national taxes because of standby facilities such as an icebreaker escort, weather forecast or navigational aids from port authorities, then such taxes may also be levied on foreign service suppliers if they use the same coastal auxiliary services, or at least if they are dependent upon the preparedness of coastal services. The tax rate should be fixed in relation to the kind of services required and the length of time they are employed, and not in relation to the value of the service afforded. For instance: If, in the case of purely transit operations, no port of call is part of the service offered according to the charter-party, then no handling by a Port Authority is required and consequently no Port Authority taxes should be imposed on the services in operation. If the foreign service supplier transports along a short stretch of the entire NSR, then the taxes imposed must be balanced in relation to the service supplier's use of the NSR. The charge should not be related to the value of the service, but to the value of the auxiliary coastal services involved in the shipping-trade services as defined by the charter-party.

The fiscal burdens on the like service or service suppliers should not afford special treatment to domestic products. Concerning the National Treatment standard under GATT Article III:2, a panelist decision stated that

> "the wording of the prohibition of tax discrimination was strict. It had been applied in GATT practice also in a strict manner, for instance as prohibiting even very small tax differentials amounting to US dollar 0.0002 per liter of imported petroleum ... The Panel further found that the wording "directly or indirectly" and "internal taxes ... of any kind" implied that, in assessing whether there is tax discrimination, account is to be taken not only to the rate of the applicable internal tax but also of the taxation methods ... and the rules for tax collection".[140]

The main purpose of the treatment-no-less-favorable clause under Articles II and XVII is to provide "equivalent" conditions for all foreign services and service suppliers as well as between foreign and domestic services and service suppliers. Differences contravening the principle of MFN Treatment or National Treatment arise either from the rate of applicable internal tax, the taxation methods or the rules for tax collection.

The equivalence requirement is fulfilled if the purpose of regulation applies equally to foreign services or service suppliers. *In concreto*: If a tax is imposed on shipping services because of

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[139] EPCT/TAC/PV/26 p.21.

[140] BISD 34S/83: Japan - Customs duties, taxes and labelling practices on imported wines and alcoholic beverages (L/6216) p.118.

the risk of oil pollution (e.g. due to a substandard hull), then such a tax cannot be imposed on foreign transportation of merchandises other than oil or if a cargo of oil is carried in a high-standard ship with a double hull.

2. We now turn to the motives of GATT Article III:4, the provision which is parallel to GATS Article XVII:1. All laws, regulations and requirements **affecting** internal sale, purchase, etc., are included in the provision, and not only the laws, regulations and requirements governing the conditions of sale or purchase. This very broad purpose entails that all measures modifying the conditions of competition become part of that Member's obligation under the GATT/GATS.

> "The selection of the word 'affecting' would imply, in the opinion of the panel, that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions for sale or purchase but also any law or regulation which might adversely modify the conditions of competition between the domestic and imported products on the internal market".[141]

It might be asked whether the provisions of Article III:8(b) showed that the intention of the drafters was to limit the scope of Article III to laws directly related to the conditions of sale, purchase, etc., including for instance any measure of subsidization. This question was debated in the Italian agricultural Machinery case:

> "If such a contention were correct it would have been unnecessary to include the provisions contained in paragraph 8(b) since they would be excluded *ipso facto* from the scope of Article III. The fact that the drafters of Article III thought it necessary to include this exemption for production subsidies would indicate that the intent of the drafters was to provide equal conditions of competition once goods had been cleared through customs...
>
> Moreover, the Panel agreed with the contention of the United Kingdom delegation that in any case the provision of paragraph 8(b) would not be applicable to this particular case since the credit facilities provided under the Law were granted to the purchasers of agricultural machinery and could not be considered as subsidies accorded to the producers of agricultural machinery...
>
> The Panel also noted that if the Italian contention were correct, and if the scope of Article III were limited in the way the Italian delegation suggested to a specific type of laws and regulations, the value of the bindings under Article II of the Agreement and of the general rules of non-discrimination as between imported and domestic products could be easily evaded".[142]

The possibility of side-stepping the GATT obligations is small because the GATT interpretation principles propound that the exception provisions be construed narrowly (Chapter 1.16).

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[141] BISD 7S/60 (1958): Italian Discrimination against imported Agricultural Machinery, para. 12.

[142] BISD 7S/60 (1958): Italian Discrimination against imported Agricultural Machinery, paras. 13-15.

2.5 The diachronic perspective

In the event of a breach of the treatment-no-less-favorable principle, when should the breach be investigated? In my opinion the National Treatment standard and MFN Treatment Clause would not serve their purpose if a law, regulation or requirement (under GATT) or measure (under GATS) could only be challenged in dispute settlements after the event as a means of rectifying less favorable treatment of non-domestic services rather than as a means of forestalling it. A new national legislation establishing, for instance, a charge for the administrative handling of foreign shipping transportation through the coastal area of a Member, must be published promptly in accordance with GATS Article III on transparency. Once informed, the other Members can respond quickly and challenge the new legislation before a WTO Panel.

The effectiveness of the protection offered by of GATS Articles II and XVII hinges on the possibility of challenging alleged breaches of the provision before a real conflict arises. For instance, national procedures presumed to be less advantageous for non-domestic services may be assessed whether or not the procedural provisions in themselves may lead to the application to imported services of treatment less favorable than that accorded to services of domestic origin. The *de lege lata* situation confirms that decisions on the distinctions made by measures, laws, regulations or requirements should themselves be considered in relation to their potential impact, rather than on their actual consequences for specific imported products.[143]

Under these circumstances a conciliation or dispute settlement procedure may be accomplished in advance of an actual conflict that might adversely affect the service suppliers of another Member. The principle of transparency under GATS Article III would make such precautionary action available and give the best protection possible to contracting parties to the GATS (and Shipping Transportation Annex).

2.6 All measures?

The items included under Article III are wide-ranging, but does the word "measures" include all types of laws, regulations and other requirements?

> "The Panel wishes to stress that this undertaking to extend an exemption of an internal charge unconditionally is not qualified by any other provision of the Agreement. The Panel did not feel that the provisions of paragraph 8(a) of Article III were applicable in this case as the text of the paragraph referred only to laws, regulations and requirements and not to internal taxes or charges..." [144]

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[143] BISD II/184-5: Working Party on Brazilian Internal Taxes; BISD 7S/63-64, BISD 25S/65: EEC - Measures on Animal-Feed Proteins, para. 4.10; BISD 30S/167: Canada - Administration of the Foreign Investment Review Act; and BISD 34S/136: United States - Taxes on Petroleum and Certain Imported Substances (L/6175), paras. 5.1.1-5.1.9.

[144] BISD 1S/59, 60 (1953): The Panel on Complaints Report on Belgian Family allowances, para. 4.

Also, public claims which only have indirect implications on international trade, are part of the obligations. For example, the establishment of a system of acceptance of domestic undertakings for the purpose of limiting the use of imported parts and services, constitutes a "requirement" that accords treatment to imported products less favorable than that accorded to domestic products. Therefore, such a system would be inconsistent with GATS Article XVII.

The scope of the Article covers a specific individual trade in service, not an average of regulations affecting trade in services between two Members. A Member could not defend its strongly discriminating regulations vis-à-vis foreign services by drawing attention to the fact that other regulations relating to foreign services are more lax than the domestic ones. As stated by several Panels,

> "the "no less favorable" treatment requirement of Article III:4 has to be understood as applicable to each individual case of imported products. The Panel rejected any notion of balancing more favorable treatment of some imported products against less favorable treatment of other imported products. If this notion were accepted, it would entitle a contracting party to derogate from the no less favorable treatment obligation in one case, or indeed in respect of one contracting party, on the ground that it accords more favorable treatment in some other case, or to another contracting party. Such an interpretation would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III".[145]

Neither could the defence be founded on the fact that domestic suppliers, by their own free choice, would often set up an arrangement to which foreign suppliers are forced to adapt:

> "The Panel considered as irrelevant to the examination under Article III:4 the fact that many - or even most - in-state beer and wine producers "preferred" to use wholesalers rather than to market their products directly to retailers".[146]

As mentioned earlier, the objective of the GATS is to restrict "measures by Members affecting trade in services" (GATS Article I:1). The equivalence requirement relates to "conditions of competition" (Article XVII:3) and "any measure covered by this agreement" (Article II:1). One can neither adopt nor maintain such measures or conditions (Article XVI(2)). "Conditions" are not defined, but the notion is clearly extensive and includes every threshold that restricts services or service suppliers in foreign countries. "Measure" is defined under GATS Article XXVIII:a and means any measure by a Member,

> "whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form".

This concept clearly embraces quantitative restrictions, i.e. limitations on the number of service suppliers, cf. Article XVI: Limitations on the number of service suppliers whether in

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[145] BISD S 36/345 ff.: United States - Section 337 of the Tariff Act of 1930, p.387 para. 5.14; see also BISD 39S/155: United States - Restrictions on imports of tuna, p.194.

[146] BISD 39S/206: United States - Measures affecting alcoholic and malt beverages, para. 5.31.

the form of numerical quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test (litera a); limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needed test, (litera b); limitations on the total number of service transactions or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test, (litera c); limitations on the total number of natural persons that may be employed in a particular service or that a service supplier may employ anyone necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test, (litera d); measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service, (litera e); or limitations on the participation of foreign capital in terms of maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment, (litera f).

Even though it is specified in a Member's Schedule that some quantitative restrictions might be implemented and that no exceptions are made under GATS Article XVI:1, these regulations must be justified under the treatment-no-less-favorable clause. A quantitative restriction applied should therefore not discriminate against shipping services provided by certain, and not other, Members.

> "The Panel noted that Commission Regulation 984/88 of 12 April 1988 suspended the issue of import licenses in respect only of apples originating in Chile, eight days before the publication of import quotas. The Panel found that this measure constituted a prohibition in terms of Article XIII:1, and that it was applied contrary to that provision since the like products of all third countries had not been similarly prohibited".[147]

In addition to these quantitative restrictions come tariffs, taxes, charges, other legislation, regulation or requirements **of any kind** affecting the equal rights, cf. the phrase "or any other form" (Article XXVIII:a).

The area of public encroachment is extensive due to the fact that "all measures" are included under the National Treatment and MFN Treatment principles. However, the identical National Treatment provision regarding trade in products under GATS 1994, Annex I (Notes and Supplementary Provisions Ad Article III), must be related to the product as such:

> "Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product".

This has been interpreted in the following manner:

> "The Panel concluded ... that the Note Ad Article III covers only those measures that are applied to the product as such. The Panel noted that the MMPA [Marine Mammal Protection Act] regulates the domestic harvesting of yellowfin tuna to reduce the incidental taking of dolphin, but that these regulations could not be regarded as being

[147] BISD 36S/93: EEC - Restrictions on imports of dessert apples complaint by Chile (L/6491) para. 12.21.

> applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product. Therefore, the Panel found that the import prohibition on certain yellowfin tuna and certain yellowfin tuna products of Mexico and the provisions of the MMPA under which it is imposed did not constitute internal regulations covered by the Note Ad Article III".[148]

In the case of trade in services, a national provision affected by the GATS clause on National Treatment relates to trade in services as such, not to other parts of the service production, e.g. the establishment of service industries or the purchase of equipment necessary to conduct trade in services. However, this does not mean that regulations directing legal subjects and therewith products are only indirectly excluded from the GATT and GATS Member liability. The Panel of the United States Tariff Act of 1930 stated that the applicability of treatment no less favorable could not

> "be denied on the ground that most of the procedures in the case before the Panel are applied to persons rather than 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. For these reasons, the Panel found that the procedures under Section 337 come within the concept of "laws, regulations and requirements" affecting the internal sale of imported products, as set out in Article III of the General Agreement".[149]

It is of no importance whether that national provision directly or indirectly regulates trade in services as such. Consequently there is no limitation as to the items of regulation included. All kind of measures which affect trade in services invoke GATS protection (see Chapter 2.3); e.g. more complicated rules of procedure that are disadvantageous to non-domestic services or service suppliers are in themselves contrary to the treatment-no-less-favorable clause:

> "The central and undisputed facts before the Panel are that, in patent infringement, proceedings before the USITC [United States International Trade Commission] under Section 337 are only applicable to imported products alleged to infringe a United States patent; and that these proceedings are different, in a number of respects, from those applying before a federal district court when a product of United States origin is challenged on the grounds of patent infringement".[150]

The use of mandatory versus discretionary legislation has been debated because it has been asserted that the very existence of discretionary legislation is under no circumstances contrary to GATT Members' obligations. Recent panels addressing this issue in the context of both GATT Articles III:2 and III:4 concluded that legislation mandatorily requiring the executive authority to take action would be inconsistent with Article III, whether or not the legislation were being applied, whereas legislation merely giving the executive authority the possibility to act inconsistently with Article III would not, by itself, constitute a violation of that

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[148] BISD 39S/155: United States - Restrictions on imports of tuna, p.195

[149] BISD S 36/345 ff.: United States - Section 337 of the Tariff Act of 1930", p.385 para. 5.10

[150] BISD 36S/345: United States - Section 337 of the Tariff Act of 1930 (L/6439) para. 5.4.

Article.[151]

As regards shipping services, the implementation of GATS means that a specific charter-party is accorded treatment no less favorable. A Member cannot offset unfavorable treatment in one area by more favorable elements of treatment elsewhere. The provision must be oriented towards the product, i.e. the trade in services, for instance a charter-party. All kinds or mandatory restrictions, regulations, taxes and public legislation are included, even such provisions which are not intended to discriminate against foreign services (see Chapter 2.3).

2.7 All kinds of measures affecting trade in services

Does the lack of negative foreign trade effects disqualify any complaint of inconsistency with the treatment-no-less-favorable clause? As indicated in Chapter 1.16, studies into possible effects cannot rebut such charges when nullification or impairment is the case. If justification of suspension of concessions or obligations is the case, then plaintiffs are rebuttable.[152] The question raised in this chapter is whether a formal equal solution satisfies the requirements of the MFN and National Treatment standards. I also illustrate some of the implications of the interpretation of the notion "measures affecting".

The formal appearance of the GATS provisions applied to "measures affecting" seems to be of lesser importance. Formally identical and formally different treatment is allowed, though not if "conditions of competition" under GATS Article XVII:3 are modified in favor of domestic services or service suppliers:

> "[I]t also has to be recognized that there may be cases where application of formally identical legal provisions would in practice accord less favorable 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 favorable".[153]

Neither GATT nor GATS prohibits Members from applying different legal provisions to imported products or services to ensure that the treatment accorded them is in fact no less favorable. I therefore draw the conclusion that formal equality is not sufficient. It is the *de facto* treatment which is the chief factor. Member State action initiating formally equal conditions is insufficient if the arrangements imposed, implemented, effectuated, etc. result in unequal treatment to the disadvantage of foreign service or service suppliers.

The very broad notion of "all measures affecting" is a basis for strong protection against

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[151] See BISD 37S/200, 227: Report of the Panel on "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes; BISD 37S/132, 198: EEC - Regulation on Imports of Parts and Components; and BISD 34S/136, 160: United States - Taxes on Petroleum and Certain Imported Substances.

[152] See BISD 34S/136; BISD 30S/167; BISD 31S/167 and BISD 7S/66-67.

[153] BISD S36/345 ff.: United States - Section 337 of the Tariff Act of 1930, para. 5.11; see also BISD S39/27 ff.: US complaint on Canadian sales, import and distribution restrictions on beer, p.78.

insufficient national treatment and MFN treatment. The scope of the regulation is not decisive, but the effect of it is. GATS legislation affects a wide range of national provisions.

1. An important question is whether only requirements which an enterprise is legally bound to fulfil[154] constitute "requirements" within the meaning of that provision, or does "requirements" also embrace those requirements which an enterprise voluntarily accepts in order to gain an advantage from the government? As stated in a Panel Report, the term "requirement" as used in Article III paragraphs 1 and 4, was given a wide interpretation.[155] For instance, a Member grants an advantage, namely the suspension of certain oppressing proceedings dependent on undertakings to limit the use of services of foreign origin. The answer to the above question is affirmative if such measures are established without imposing similar limitations on the use of like products of that Member or of other origin, hence dependent on undertakings to accord treatment to imported products less favorable than that accorded to like products of national origin in respect of their internal use.[156]

2. Another important question is whether these effects have to be manifest, or is it sufficient that the regulations are capable of giving rise to discrimination against imported services though they may not necessarily do so in the case of each individual purchase? Is a purchase regulation which does not necessarily discriminate against imported products but is incapable of doing so, inconsistent with National Treatment Clause? The answer is affirmative:

> "The Panel noted that the exposure of a particular imported product to a *risk* of discrimination constitutes, by itself, a form of discrimination. The Panel therefore concluded that purchase regulations creating such a risk must be considered to be according less favorable treatment within the meaning of Article III:4. The Panel found for these reasons that the payment to processors of Community oilseeds are inconsistent with Article III:4".[157]

3. A further question is whether only substantive laws are part of GATS Member obligations? The answer is negative as procedural laws might influence MFN treatment in different ways. Let me point out some important procedural features which might subject imported services (and goods) to less favorable treatment. It could be claimed that inadmissibility of counterclaims by respondents, the effect of protective orders denying access to documents classified as confidential, a short time limit on proceedings for non-domestic service suppliers, or insufficient opportunity to bring proceedings immediately to the ordinary courts, are all in themselves contrary to the treatment-no-less-favorable clause.[158]

Not only substantive laws, regulations and requirements but **also procedural laws** can be

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[154] See BISD 30S/140, 158: Canada - Administration of the Foreign Investment Review Act.

[155] BISD 30S/140: Canada - Administration of the Foreign Investment Review Act.

[156] See BISD 37S/132, 199: EEC - Regulation on Imports of Parts and Components.

[157] BISD 37S/86: EEC - Payments and Subsidies paid to Processors and Producers of Oilseed and related Animal-Feed Proteins, para. 141.

[158] For such a case, see BISD 36S/345: United States - Section 337 of the Tariff Act of 1930 (L/6439)

regarded as "affecting" the internal sale of imported products.[159] Nothing in the drafting history suggests that such a distinction should be made,[160] and neither does the Panelist praxis:

> "[T]he selection of the word 'affecting' would imply ... that the drafters of the Article intended to cover in paragraph 4 [GATT Article III] not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market".[161]

Consequently,

> "In the Panel's view, enforcement procedures cannot be separated from the substantive provisions they serve to enforce. If the procedural provisions of internal law were not covered by Article III:4, contracting parties could escape the national treatment standard by enforcing substantive law, itself meeting the national treatment standard through procedures less favorable to imported products than to like products of national origin".[162]

This leads to the conclusion that **procedural regulations** are also part of Member liability under the GATS and GATT provisions for treatment no less favorable. This means that regulations used as a means of enforcing national law at the border do not provide an escape from the applicability of the treatment-no-less-favorable clause under the GATT or GATS provisions. Analysis of the interpretative note to Article III will reveal that any law, regulation or requirement affecting the internal sale of products that is enforced in the case of an imported product at the time or point of importation is nevertheless subject to the treatment-no-less-favorable clause.

4. Undoubtedly, all kinds of **substantive** law **affecting trade** are included. There is an abundance of panelist praxis available for a study of **pecuniary** measures which more or less directly affect imported goods or services. For instance, **taxes** levied on foreign products, transportation, containers, etc. according less favorable treatment to imported suppliers than that accorded to domestic suppliers, would often be inconsistent with the non-discriminatory treatment requirements under the GATT and consequently also under the GATS.[163] However, not all kinds of pecuniary measures are included.

A licensing fee which exceeds the fee applied to the domestic like product constituted either an internal charge inconsistent with Article III:2 or inconsistent with a requirement for the application of treatment no less favorable to imported products than to like domestic products with respect to their offering for sale within that Contracting party.

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[159] BISD 36S/345: United States - Section 337 of the Tariff Act of 1930 (L/6439)

[160] BISD 36S/345: United States - Section 337 of the Tariff Act of 1930 (L/6439) p.385 para. 5.10.

[161] BISD 7S/60 (1958): Italian Discrimination against imported Agricultural Machinery, para. 12.

[162] See also BISD 36S/345: United States - Section 337 of the Tariff Act of 1930 (L/6439) p.385 para. 5.10.

[163] BISD S39/27 ff.: US complaint on Canadian sales, import and distribution restrictions on beer, p.74.

If the same wholesaler licensing fees are charged, regardless of whether the product originates in-state or is imported, then the measure itself does not constitute a breach of the treatment-no-less-favorable principle. But in the case of domestic services or products that are not required to be sold through wholesalers, no wholesaler licensing fee is payable to the state, whereas foreign producers which may only sell through wholesalers must pay the wholesaler fee. Under these circumstances, this case must be subsumed under the non-pecuniary items (see paragraph 4 of this chapter). The discriminatory requirements would then be that the measures adversely affect the conditions of competition by enabling in-state producers, but not foreign producers, to avoid the higher licensing fees on sales of beer and wine through wholesalers. The conclusion would be the same even though domestic suppliers currently choose to sell their services or products through wholesalers.

> "It appears to the Panel, therefore, that with respect to Alaska, the inconsistency with Article III arises not from the levying of the wholesaler license fees as such, but from imposing an obligation on foreign producers of beer and wine to sell only through wholesalers".[164]

5. Another instance is Members **fixing compulsory price levels**:

> "The Panel noted that the price affirmation measures apply with respect to sales of alcoholic beverages to wholesalers, and that in-state producers are not required to sell through wholesalers whereas out-of-state and foreign producers are required to do so ... The Panel considered that the price affirmation measures of Massachusetts ... prevent the imported alcoholic beverages from being priced in accordance with commercial considerations in that imported products may not be offered below the price of these products in neighboring states".[165]

Often such price affirmation measures involve the minimum prices which have been fixed in relation to the prices at which domestic services or products were supplied. The minimum price itself does not constitute a breach of the treatment-no-less-favorable clause. However, a minimum price applied equally to imported and domestic services does not necessarily accord equal conditions of competition if the minimum price prevents imported services from being supplied at a price below that of the like domestic service. In fact such minimum prices measures accord treatment to imported services less favorable than that accorded to the like domestic services when those prices are set at the level at which domestic transporters supplied services. In the above case the imported beer, which could otherwise be supplied below the minimum price, was given no opportunity to compete with its domestic counterpart. Since one of the basic purposes of the National Treatment clause was to ensure that the contracting parties' internal charges and regulations were not frustrating the effect of tariff concessions granted under GATT Article II, "the main value of tariff concessions is that it provides an assurance of better market access through improved price competition".[166] That being the case, **minimum price practice** does represent a breach of GATS obligations:

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[164] BISD 39S/206: United States - Measures affecting alcoholic and malt beverages, p.288 paras. 5.53-5.54.

[165] BISD 39S/206: United States - Measures affecting alcoholic and malt beverages, p.290 para. 5.59.

[166] BISD 39S/91: EEC - Follow-up on the Panel Report. European Economic Community - Payments and Subsidies paid to Processors and Producers of Oilseed and related Animal-Feed Proteins (L/6627) para. 148.

> "The Panel **concluded** for these reasons that the minimum prices imposed by the liquor boards ... were inconsistent with Article III:4 to the extent that they were fixed in relation to the prices at which domestic beer was supplied".[167]

Thus, price affirmation measures do affect trade by scuppering effective price competition. Due to fixed prices, foreign low-cost service suppliers are forced to sell at a rate that suits domestic suppliers, such that no price competition is possible.

6. Another case of price-distorting measures is **subsidies** to domestic producers. The less favorable treatment in this instance arises from national measures that provide substantial incentives for domestic processors to purchase products or services of domestic origin in preference to imported products or services. Among other benefits, payments are given to processors in excess of their costs of purchasing higher-priced domestic products.[168]

7. Similarly one could ask whether treatment policy of unequal taxation is contrary to the treatment-no-less-favorable clause. If tax is applied to imported services or products at a higher rate than that applied to like domestic products, then the question is whether the tax differential is so small that its commercial effects are insignificant. However, such an argument is not a valid legal defence, as was recognized in 1949:

> "that whether or not damage was shown, taxes on imported products in excess of those on the like domestic products were prohibited by Article III, and that the provisions of Article III were intended to prevent damage and not merely to provide a means of rectifying such damage" and that "the provisions of the first sentence of Article III, paragraph 2, were equally applicable whether imports from other contracting parties were substantial, small or non-existent".[169]

8. Non-pecuniary limitation measures are also covered in the treatment-no-less-favorable clause. For instance, a purchase or *succession* system of foreign services and goods might have a negative impact on the sales rates for the foreign trade.

> "The Panel recognized that these requirements might in a number of cases have little or no effect on the choice between imported and domestic products. However, the possibility of purchasing imported products **directly** from the foreign producer would be excluded and as the conditions of purchasing imported products through a Canadian agent or importer would normally be less advantageous, the imported product would therefore have more difficulty in competing with Canadian products (which are not subject to similar requirements affecting their sale) and be treated less

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[167] BISD S39/27 ff.: US complaint on Canadian sales, import and distribution restrictions on beer, p.85.

[168] For such a case, see BISD 37S/86: EEC - Payments and Subsidies paid to Processors and Producers of Oilseed and related Animal-Feed Proteins.

[169] BISD Vol. II/184-185: Working Party on Brazilian Internal Taxes. See also Panel on "Spain - Measures Concerning Domestic Sale of Soybean Oil" (L/5161 and C/M/152).

favorably" (emphasis in the original text).[170]

The difficulty arising from the creation of an additional level of distribution is that lower sales figures may result from both the increased expenses and the reduced access for in-state retailers to imported products, relative to like products manufactured in-state. The requirement that imported products or services be sold only through domestic wholesalers or other middlemen, while permitting domestic products to be sold directly to retailers, is inconsistent with the treatment-no-less-favorable clause. Obviously such diverse solutions for domestic and foreign service suppliers may provide such domestic industries with competitive opportunities denied to the like imported products.[171]

9. Another possible limitation is the introduction of a special compulsory transportation service for foreign products.

> "The Panel then considered whether or not this common carrier measure could be justified, as claimed by the United States, under Article XX(d). In this regard the Panel recalled the arguments of the United States that this measure was necessary because it ensured independent record-keeping for shipments of out-of-state alcohol. The United States maintained that such an independent source of records was necessary because the state authorities did not have access to the out-of-state producers' shipping records with which to verify information provided by in-state wholesalers...
>
> In the view of the Panel, the United States has not demonstrated that the common carrier requirement is the least trade restrictive enforcement measure available to the various states and that less restrictive measures, e.g. record-keeping requirements of retailer and importers, are not sufficient for tax administration purposes. In this regard, the Panel noted that not all fifty states of the United States maintain common carrier requirements. It thus appeared to the Panel that some states have found alternative, and possibly less trade restrictive, and GATT-consistent, ways of enforcing their tax laws. The Panel accordingly found that the United States has not met its burden of proof in respect of its claimed Article XX(d) justification for the common carrier requirement of the various states".[172]

Again, the special carrier arrangement, not compulsory for domestic products, made transportation of foreign products more complicated and more expensive than the transportation of domestic products. Thus the effects of such an arrangement defeat the very purpose of free trade.

10. Other particular difficulties arise from conditions and formalities in connection with public listing and delisting practices designed to place certain restrictions on services or products

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[170] BISD 30S/140, 160-61: Canada - Administration of the Foreign Investment Review Act, para. 5.10.

[171] For a similar case, see BISD 39S/206: United States - Measures affecting alcoholic and malt beverages, p.278.

[172] BISD 39S/206: United States - Measures affecting alcoholic and malt beverages, pp.287-88 paras. 5.51-5.52.

which can be sold within the state. Such restrictions are based on the perceived need, quantitative assessments and expected profitability of the imported product or service, and might affect the supply of a foreign service in a more onerous way than those restrictions applied to domestic suppliers. Consequently, those restrictions on foreign products or services are prohibited under the treatment-no-less-favorable clause. This conclusion is obvious even though the listing and delisting practices at issue do not affect importation as such. As stated by the Panelists in the Canadian Liquor case,

> "The Panel considered that the result of these measures is that imported wine is necessarily subject to the listing/delisting procedure of the liquor control board whereas domestic like product can be sold without regard to such requirements ... The Panel considered that the listing/delisting requirements ... deny Canadian wine competitive opportunities accorded to United States like products, inconsistent with Article III:4".[173]

This would be the case if domestic products or services had access to points of sale while the same access was denied to imported suppliers, e.g. by authorizing the private delivery of national but not of imported products or services. In such a situation a Member would be according domestic suppliers competitive opportunities that are not available to foreigners.

11. Sales restrictions such as a requirement that imported products or services should be sold in gross, e.g. a six-pack of beer and not single bottles or cans,[174] while no such requirement is imposed on domestic delivery, is inconsistent with the National Treatment standard. The decisive factor is not whether sales restrictions of this kind affect the importation of services as such, but rather its offering for sale in certain liquor-board outlets. If the latter is the case, the regulation conflicts with treatment-no-less-favorable obligation.

2.8 General Exceptions

Every inconsistency with the GATS might, under specific conditions, be justified under Article XIV(c). Interpretations reveal that the provision on general exceptions under GATT Article XX is important, as this provision has been effectuated under the GATS according to Article XIV. Through a slight transformation, the important provision of GATT Article XX(d) has become GATS Article XIV(c). The text of the relevant part of this provision reads as follows:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
> ...
> c) necessary to secure compliance with laws or regulations which are not inconsistent

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[173] BISD 39S/206, United States - Measures affecting alcoholic and malt beverages, p.292 para. 5.63.

[174] BISD S39/27 ff.: US complaint on Canadian sales, import and distribution restrictions on beer, p.89.

with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of default on services contracts..."

Since the main part of the provision is identical under GATT and GATS, GATT praxis is relevant for interpretation of the GATS provision. What are the conditions specified in Article XX(d) to justify measures otherwise inconsistent with the GATT? These conditions are that the "laws or regulations" with which compliance is being secured are themselves "not inconsistent" with the General Agreement; that the measures are "necessary to secure compliance" with those laws or regulations; that the measures are "not applied in a manner which would constitute a means of arbitrary or unjustified discrimination between countries where the same conditions prevail, or a disguised restriction on international trade". Since these conditions are cumulative, each of them must be met if an inconsistency with another GATT provision is to be justified under Article XX(d) and consequently under GATS Article XVI(c).

1. As a starting point, we can see that Article XIV refers to "measures" in its introductory sentence and to "laws or regulations" in subparagraph (c). It is clear that the "measure" referred to in Article XIV is the measure requiring justification under Article XIV and that, therefore, the imposition of requirements or duties inconsistent with "treatment no less favorable" is the measure in the present case. It must further be considered that the "laws or regulations" to be examined under sub-paragraph (d) are the laws or regulations with which the contracting party invoking Article XIV(c) claims to secure compliance.

For the qualification of the phrase "to secure compliance with laws or regulations", two interpretations are possible. In the light of the purpose of Article XIV(c), the qualification might be interpreted to mean "to enforce obligations under laws and regulations", and the main function of Article XIV(c) would then be to permit contracting parties to act inconsistently with the General Agreement. If the qualification is interpreted to mean "to ensure the attainment of the objectives of the laws and regulations", the function of Article XIV(c) would be substantially broader. Whenever the objective of a law consistent with the General Agreement cannot be attained by enforcing the obligations under that law, the imposition of further obligations inconsistent with the General Agreement could then be justified under Article XIV(c) on the grounds that this secures compliance with the objectives of that law. It is my opinion that this cannot be the purpose of Article XIV(c) as each of the exceptions in the GATS recognizes the legitimacy of a policy objective but at the same time sets out conditions as to the obligations which may be imposed to secure the attainment of that objective. These conditions would no longer be effective if, under Article XIV(c), it were possible to justify the enforcement of obligations that may not be imposed consistently with these exceptions on the grounds that the objective recognized to be legitimate by the exception cannot be attained within the framework of the conditions set out in the exception. Therefore, Article XIV(c) covers only measures related to the enforcement of obligations under laws or regulations consistent with the GATS.

Consequently, a requirement or duty according to one set of rules does not serve to enforce the payment obligation of a different set of rules. Thus a Member cannot establish measures limiting the total value of a service transaction under Article XVI:2(b) to "secure compliance

with" obligations under that Member's subsidies legislation (GATS Article XV). For these reasons the quantitative restrictions cannot be justified under Article XX(d).

2. Another important issue is whether the inconsistencies with Article III:4 are "necessary" to secure compliance with these laws. It is clear that a contracting party cannot justify a measure inconsistent with another GATS provision as "necessary" in terms of Article XVI(c) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATS provisions, is available to it. By the same token, in cases where a measure consistent with other GATS provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions. Obviously this does not indicate that a Member could be asked to change its substantive law or its desired level of enforcement of that law, provided that such law and such level of enforcement are the same for imported and domestically produced products. However, it does mean that, if a contracting party could reasonably secure that level of enforcement in a manner that is not inconsistent with other GATT provisions, then it would be required to do so.

3. What exactly does the adjective "necessary" qualify? One point of view is that "necessary" is not related to the rebutted provision at issue but rather to the system of which the provision is a part. That system is then "necessary" for the enforcement of the laws or regulations in action. Yet such a view is inconsistent with panelist praxis:

> "The Panel did not accept this contention [of system justification] since it would permit contracting parties to introduce GATT inconsistencies that are not necessary simply by making them part of a scheme which contained elements that are necessary. In the view of the Panel, what has to be justified as "necessary" under Article XX(d) is each of the inconsistencies with another GATT Article found to exist, i.e. in this case, whether the differences between Section 337 and federal district court procedures that result in less favorable treatment of imported products within the meaning of Article III:4, as outlined above (paragraph 5.20), are necessary".[175]

2.9 Particular issues of the Most-Favored-Nation Treatment Clause

I now turn to some special problems related to the MFN Treatment Clause. As stated under GATS Article II:1, any Member must accord treatment no less favorable to like service and service suppliers of any other country, which means that every national measure must be generally applied to all GATS Members. The application of a national measure to only some and not to all GATS Members, is incompatible with GATS obligations under Article II:1. This was also the situation under GATT 1947 Article I. See, for instance, the application of the Belgian law on the levy of a charge on foreign goods purchased by public bodies:

> "According to the provisions of paragraph 1 of Article I of the General Agreement, any advantage, favor, privilege, or immunity granted by Belgium to any product originating in the territory of any country with respect to all matters referred to in paragraph 2 of Article III shall be granted immediately and unconditionally to the like

[175] BISD 36S/345: United States - Section 337 of the Tariff Act of 1930 (L/6439)

> product originating in the territories of all contracting parties. Belgium has granted exemption from the levy under consideration to products purchased by public bodies when they originate in Luxembourg ... If the General Agreement were definitely in force in accordance with Article XXVI, it is clear that exemption would have to be granted unconditionally to all other contracting parties (including Denmark and Norway)".[176]

Some exemptions do occur, however: Agreements establishing Economic Communities or Free Trade Areas granting special treatment to Members and not to non-Members may be established under GATS Article V. Further, according to measures listed (Article II:2) in Schedules of Specific Commitments under Article XVI:1, any GATS Member may make exemptions to the MFN Treatment Clause, provided such exemptions meet the conditions of the Annex on Article II Exemptions. The Member shall notify the Council for Trade in Services of its list of exemptions. Until the conclusion of the shipping group (NGMTS) negotiations, MFN treatment and paragraphs 1 and 2 of the Annex on Article II Exemptions are suspended in their application to the shipping sector, which means that it is unnecessary to list MFN exemptions. At the conclusion of the negotiations Members will, under the Decision on Negotiations on Maritime Transport Services paragraph 5, be free to improve, modify or withdraw any commitments made, notwithstanding the provisions of Article XXI of the GATS Agreement, i.e. the provisions on the Modification of Schedules.

In making such an improvement, modification or withdrawal of commitments, Members are entitled to maintain a measure inconsistent with the MFN Treatment Clause. The Annex on Article II Exemptions paragraph 5 states that these exceptions must terminate at a date specified by that Member in its list of exemptions. In principle, however, exemptions may not exceed a period of 10 years. In any case, every five years the Council for Trade in Services shall review all exemptions granted, the first review being no later than five years after the entry into force of the WTO Agreement. Yet listed exemptions are not everlasting. The Council for Trade in Services shall first review all exemptions granted for a period of more than 5 years. If the conditions which created the need for exemption no longer prevail, the Council may - under Annex on Article II Exemptions paragraph 3:4(a) - suggest that the exemptions in question terminate before the date indicated by that Member.

Under Annex on Article II Exemptions paragraph 2, Members may apply for new exemptions after the entry into force of the WTO Agreement. Such request for waivers should only be granted in exceptional circumstances (WTO Agreement Article IX:3). In the continuation I do not take these exemptions into account.

There are several questions to be asked about MFN treatment. First, does MFN treatment relate to formal or factual equality (paragraph 1)? Second, is preferential market access for one particular Member contravened to Article II (paragraph 2)? Third, is the imposition of individual fees adjusted to each particular transportation service inconsistent with the MFN obligation of Article II:1 (paragraph 3)?

1. Is the exemption of minor markets for the sake of administrative efficiency constrained

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[176] BISD 1S/59, 60 (1953): The Panel on Complaints Report on Belgian Family allowances, para. 3.

only by administrative feasibility, in conformity with the MFN Treatment Clause? Let us say, for example, that the list of countries subject to export monitoring covers in practice 99% of total export volume, i.e. virtually all exports. Are national requirements that do not monitor the few remaining exporters (having 1 % of trade volume) inconsistent with the MFN Treatment Clause?

The answer to this is affirmative, since equal treatment is a question of *de facto* implications. Equal rights are accorded to "any other country", and there is no limitation on the volume of exports.

2. Are advantages to the benefit of one particular Member inconsistent with the MFN Treatment Clause? Such advantages do not contravene the MFN Treatment Clause if the measures concerned are not restrictive in nature. A bilateral agreement does not in itself represent discriminatory treatment. If the bilateral agreement provides for non-discriminatory treatment, which clearly is the case if the challenged bilateral agreement improves access on a non-discriminatory basis, i.e. reflexual rights benefiting others or an agreement with a third party, then there is no inconsistency with the MFN Treatment Clause. Neither is the bilateral agreement contrary to the MFN treatment if nothing in it prevents the challenged Member from implementing its market-opening provisions on a most-favored-nation basis.[177]

If the bilateral arrangement establishes domestic measures in favor of a special shipping service conducted by one of the bilateral contracting parties (party A) within the other's (party B) domestic market, it might be argued that such a commitment is as an indication of an intent by party B to favor imports from party A. This is only the case if there is evidence of companies from other countries being prevented from establishing themselves in the market of party B on the same terms as party A.

3. An exemption to general processing fees might be construed as an "advantage, favor, privilege or immunity" from a "charge imposed on or in connection with importation" within the meaning of Article I:1, which consequently should be extended unconditionally to all other contracting parties. A selective, preferential exemption might therefore constitute a breach of the obligation of non-discrimination under GATT Article I:1. This is also the case under GATS Article II:1, as this MFN Treatment Clause stipulates identical solutions for all Members.

As mentioned, exemption from a general fee can be authorized by a waiver granted to a Member to accord duty-free treatment to the beneficiaries.[178] Further, such individual exceptions can be authorized by the "Enabling Clause", the relevant provisions of which authorize preferential tariff and non-tariff measures for the benefit of developing countries.[179] The condition is that such measures conform to the Generalized System of Preferences or to instruments multilaterally negotiated under the auspices of GATT.

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[177] See e.g. BISD 35S/116: Japan - Trade in semi-conductors (L/6309).

[178] See e.g. BISD 31S/20: Caribbean Basin Economic Recovery Act.

[179] BISD 26S/203: Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries. Decision of 28 November 1979 (L/4903).

> The "Enabling Clause" is not open to all developing countries. It does not authorize the preferential exemption from a service or service processing fee from least developed developing countries unless these measures were permitted if under paragraph 2 litra d, taken "in the context of any general or specific measures in favor of developing countries".

Since these provisions forbid special treatment to any Member under GATS Article II:1, such exemptions should be terminated (see Chapter 1.16). A Member is then not entitled to impose a different fee on vessels flying a different flag, simply because of their different nationality.

2.10 Particular issues of the GATS National Treatment Standard

If a Member had caused fees to be levied in excess of the "cost of service rendered" within the meaning of Articles II:2(c) and VIII:1(a), then that Member's service-processing fee had to be considered *prima facie* in order to nullify or impair benefits acquiring from the GATT. The textual situation under GATS Article XVII does not indicate any change in this legal situation as all measures, without modification, affecting service suppliers of any other Member by modifying the conditions of competition in favor of domestic services, are contrary to that Member's GATS. Since charges of any kind qualify as "measures" under the GATS, handling or processing fees for transportation services must be limited to an amount not exceeding the approximate cost of service rendered.

It is debatable whether any kind of charge could exceed the specific transportation handling cost, e.g. expenses for guiding ships through an ice-covered stretch of the NSR. GATT Article VIII:1(a) regarding Fees and Formalities connected with Importation and Exportation, reads as follows:

> "All fees and charges of whatever character ... imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes"

Article II:2(c) reads as follows:

> "Nothing in this article shall prevent any contracting party from imposing at any time on the importation of any product ... (c) fees or other charges commensurate with the cost of services rendered".

In contrast to the GATT solution, we have no legislation under the GATS that covers the provisions of GATT Articles II:2(c) and VIII:1(a) regarding fees or other charges. However, the use of the term "any measure" under the GATS would indicate that fees and charges are included. Interpreting the GATS obligations, the treatment-no-less-favorable obligation does validate the praxis under GATT Articles II and VIII. In the continuation I shall address the following questions: First, what is meant by the notion "service rendered" and what kinds of service are included (paragraph 1)? Second, is the basis for fee valuation justified under GATT Article VIII (paragraph 2)? Third, does a national tax system satisfy the need for taxation to take into account the ability of the tax-bearers to pay tax? I.e. the question of "tax-

bearing ability" (paragraph 3).

1. According to drafting history and subsequent praxis, the notion "service rendered" means consular fees,[180] custom fees[181] and statistical fees.[182] The notion is purely legal and has nothing to do with service in an economic sense. Domestic "service" imposed on imported merchandise or service has to be of at least one of the kinds of aforementioned fees. Whatever Members might choose to call such fees is of no importance. Many "services" offered are not desired by importers since they do not add value to the goods or service in any commercial sense.

> "It must be presumed, therefore, that the drafters meant the term "services" to be used in a more artful political sense, i.e., government activities closely enough connected to the processes of customs entry that they might, with no more than the customary artistic license accorded to taxing authorities, be called a "service" to the importer in question. No other interpretation can make Articles II:2(c) and VIII:1(a) conform to their generally accepted meaning".[183]

The purpose of the fees is, according to GATT obligations, to fund customs services.[184] Consular fees, custom fees or statistical fees must consequently be meant for that purpose. For instance, fees rendered to fund social payments to agricultural workers is inconsistent with GATT obligations.[185]

Charges outside that purpose or definition are taxes on imports, which are inconsistent with GATT Articles II:2(c) and VIII:1(a). A service-processing fee imposed on imports and not on domestic service is still consistent with the National Treatment provision, provided that this fee is either a consular fee, customs fee or statistical fee and does not exceed the "cost of services rendered" (see paragraph 2), which otherwise might represent an indirect protection of domestic products. If a Member does not impose customs fees on services, then the only service taxes which might be applied are consular and statistical fees. As consular fees are related to immigration or work permits, such consular service is not provided for trade in shipping services because crews are not considered as immigrants. If the transport service is passenger transportation, the cost of passenger customs processing must not be taken into account when evaluating the cost of shipping transportation as such. Neither is that Member entitled to include passenger customs costs when evaluating the cost of service rendered for

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[180] CP.2/SR.11 pp.7-8 and BISD 1S/25.

[181] SR.9/28 pp.4-5 and L/245.

[182] BISD 18S/89: Report of the Working Party on the Accession of the Democratic Republic of Congo (Zaire).

[183] See e.g. BISD 35S/245: United States - Customs user fee, p.276 para. 77.

[184] SR.10/5 pp.51-52.

[185] SR.8/7 p.10.

handling goods through customs.[186]

Since the activity authorizing that Member to impose a service fee must at least have some relationship to the cost of processing commercial service imports, ship handling fees for vessels docking in a harbor are not considered part of fees and formalities connected with the importation. Neither does the collection and forwarding of import documentation have any association with the merchandise being transported. Such costs do not qualify as "cost of services rendered" and are consequently inconsistent with the National Treatment standard under GATS Article XVII.

As regards *de minimis* costs (net purchase price to cover transportation service costs), we might ask whether trade in services could be encumbered with a *pro rata* part of the general costs of maintaining the customs functions. Even though Customs Services do not process trade in services on a tariff basis, they might in harbors be provided with other tasks related to transportation, e.g. control of certification for monitoring sub-standard ships. Such contributions to the maintenance of Services might be acceptable under certain circumstances. However, if adjustments to budgets designed to reallocate any challenged unacceptable cost are not very great, then

> "the better solution would be to adhere to the legal requirements and to recommend that the government in question make the necessary budgetary correction. If costs were known well enough to support a claim of de minimis, they should be known well enough to permit moving the estimated cost of the challenged activity to another budget item".[187]

2. If entitled by customs legislation, might the fee or charge be settled on an *ad valorem* basis? The critical factor regarding the size of the fee or charge is the "approximate cost of service rendered", which must be interpreted as referring to the appropriate cost of customs processing for the individual entry in question. A fee or charge settled on an *ad valorem* basis instead of the actual costs in each case, might be inconsistent with the obligations of Articles II:2(c) and VIII:1(a) insofar as it causes fees to be levied in excess of these approximate costs.[188] Is a method of calculating an importation fee by dividing the total costs of customs processing by the total value of the imports processed, contrary to GATT or GATS obligations? The main question is whether the *ad valorem* method as such is justified under the GATT. The Working Party examining the Zaire legislation at the date of accession, asked the applicant to

> "re-examine its present method of application of the statistical tax".[189]

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[186] See e.g. BISD 35S/245, 284: United States - Customs user fee.

[187] BISD 35S/245, 284: United States - Customs user fee.

[188] See e.g. BISD 35S/245: United States - Customs user fee.

[189] BISD 18S/89: Report of the Working Party on the Accession of the Democratic Republic of Congo (Zaire).

According to recent established praxis, there is no fact supporting the point of view that the *ad valorem* method is invalid:

> "The Panel shared the view expressed by both parties that Article III:2 does not prescribe the use of any specific method or system of taxation. The Panel was further of the view that there could be objective reasons proper to the tax in question which could justify or necessitate differences in the system of taxation for imported and for domestic products. The Panel found that it could be also compatible with Article III:2 to allow two different methods of calculation of price for tax purposes. Since Article III:2 prohibited only discriminatory or protective tax burdens on imported products, what matters was, in the view of the Panel, whether the application of the different taxation methods actually had a discriminatory or protective effect against imported products".[190]

Thus it is not a question of methods, but rather of equality in tax levels. If a "mixed regime" were implemented, the system as such would not be inconsistent with GATS Article III:2. However, an *ad valorem* method imposed without upper limits would automatically make the fee exceed the average cost of importation processing. If domestic products are usually at the bottom of the price scale and the imported products at the top, a system of implementing specific taxes according to manufacturing price for products below a certain threshold, and *ad valorem* tax for more expensive products, might result in treatment less favorable:

> "The Panel concluded from the preceding findings that - since liquors above the non-taxable threshold were subjected to *ad valorem* taxes in excess of the specific taxes on "like" liquors below the threshold (e.g. *ad valorem* tax rates up to 8 times higher than the specific tax rates on wines, 4 times higher than the specific tax rates on liquors and 2 times higher than the specific rates on spirits) - the imposition of *ad valorem* taxes on wines, spirits and liqueurs imported from EEC, which are considerably higher than the specific taxes on "like" domestic wines... was inconsistent with Article III:2, first sentence".[191]

3. In connection with the *ad valorem* taxation system, it might be asked whether a national tax system which pursues the objective that taxation should be made according to the ability of tax-bearers to pay tax, i.e. the question of "tax-bearing ability", is inconsistent with the National Treatment standards. Due to the high value of Western currency and abundance of wealthy Western shipowner, it would not be inconceivable for Russian authorities to contemplate establishing such a system.

Obviously (see Chapter 2.3) such a taxation system is not justified under the National Treatment standard.

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[190] BISD 34S/83: Japan - Customs duties, taxes and labelling practices on imported wines and alcoholic beverages (L/6216) p.120.

[191] BISD 34S/83: Japan - Customs duties, taxes and labelling practices on imported wines and alcoholic beverages (L/6216) p.119.

2.11 The implication of being accorded "treatment no less favorable". Some conclusions

Generally speaking, being granted the right of "treatment no less favorable" means to enjoy equal rights. Equality is measured by comparison with other traders and not vis-à-vis the legislation as such, which means that each Member is competent to uphold a legislation of its own, within the limitation of GATS, especially Article XVI. The equality requirements are partly related to traders from other contracting parties (the Most Favorable Treatment Clause under GATS Article II) and to the domestic industries (the National Treatment Standard under GATS Article XVII).

As demonstrated in Chapter 2.3, the group of beneficiaries involved are the other contracting parties of which the service suppliers are citizens or in which they have the right of domicile. The private traders of the exporting country enjoy the reflexual right flowing from that Member's legal rights under the GATS. Related to the shipping services we reckon that every ship registered under the laws of a GATS' Member, does enjoy the right of equal "conditions of competition" in the territory of every other country being Member to the GATS. The supplier offering shipping services does under GATS Article XXVIII(f)(i) enjoy protection provided that the flag-state or the state of owners, charterers or operators habitation have obtained GATS membership (see Chapter 1.11). The GATS-legislation is allowed that supplier as reflexual rights. These rights do not depend upon whether that Member in its Schedule has undertaken tariff commitments in respect of that specific service.

2. An important distinction is between import duties and internal charges. This is of fundamental importance because the General Agreement regulates ordinary customs duties, other import charges and internal taxes differently: the imposition of "ordinary customs duties" for the purpose of protection is allowed unless they exceed tariff bindings; all other duties or charges of any kind imposed on or in connection with importation are in principle prohibited in respect of bound items (GATT 1947 Article II:1(b)). By contrast, internal taxes that discriminate against imported products are prohibited, whether or not the items concerned are bound (GATT Article III:2).

Since importation charges are prohibited, the division between importation and internal charges is important. In deciding which charge is an import-restriction a starting point seems to be the policy purpose of a charge. A more distinct division between these two categories refers to charges "imposed on importation", collected ... at the time or point of importation", "on or in connection with importation" and applied "to an imported product and to the like domestic product" (GATT Articles I, II, III, and the Note to Article III). The relevant fact, according to the text of these provisions, is not the policy purpose attributed to the charge but rather whether it is collected internally. Therefore, such charges at the border is necessary, but is it sufficient? Do some charges collected at the border, still qualify as internal taxes? The answer is in the affirmative as any law, regulations or requirement affecting the internal sale of products that is enforced in the case of the imported product at the time or point of importation is nevertheless subject to the provisions of Article III (c.f.Annex I under GATT 1994 (and 1947); Notes and Supplementary Provisions to Article III (the National Treatment standard).

3. Private service contracts and the public regulation of private trade contracts are part of the

GATS-regime. The Member's private service contracts obligations include all GATS most favored treatment obligations. So do the public products procurement and service contracts (c.f. Agreement on Government procurement of 12 April 1979 as amended by the Uruguay Round Agreements of 15 April 1994).

4. The drafting history confirms that the National Treatment Standard was designed with "the intention that internal taxes on goods should not be used as a means of protection" and that "the philosophy behind these provisions was the ensuring of a certain trade neutrality".

Measures which have only an insignificant effect on the volume of exports do still nullify or impair benefits occurring under **Article III:2**. Firm panelist praxis on the National Treatment standard, states that it is the very denial of competitive opportunities in the case of imported products which constitutes less favorable treatment. There is no indication that the National Treatment Standard under GATS is different. So, if the conduct of shipping services is subject to internal national taxes due to different kind of Port Authorities' services, such taxes may also be levied on foreign service suppliers if using the same coastal auxiliary services, or at least being dependent upon such coastal services being in proper shape (the *de minimis* costs). The tax rate should be fixed in relation to the kind and time period of services required and not in relation to the value of the service afforded.

The requirement of equal treatment is related to the "conditions of competition" (Article XVII:3) and "any measure covered by this agreement" (Article II:1). One might neither adopt nor maintain such measures or conditions (Article XVI(2)). "Conditions" is including every threshold limiting services or services suppliers in foreign country. "Measure" is defined under GATS Article XXVIII:a meaning any measure by a Member,

> "whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form".

Obviously quantitative restrictions, tariffs, taxes, charges, other legislation, regulation or requirements **of any kind** affecting the equal rights, c.f. the expression; "or any other form" (Article XXVIII:a), are included, however limited to those measures that are applied to the product or service as such, not to regulations of production methods in the forefront of the trade in services or products. As the treatment no less favourable clause relates to all kind of measures, it is irrelevant whether these are applied to persons or products. I.a. regulations allowing nationals favorable court procedures when dealing with the challenged products, are contrary to the equal treatment requirement. A quantitative restriction applied should therefore not discriminate against shipping services provided by certain and not other, Members.

Legislation mandatorily requiring the executive authority to take action would be inconsistent with Article III, whether or not the legislation were being applied, whereas legislation merely giving the executive authority the possibility to act inconsistently with Article III would not, by itself, constitute a violation of that Article.

Requirements which an enterprise is legally bound to carry out and those which an enterprise voluntary accepts in order to obtain an advantage from the government, do constitute "requirements" within the meaning of National Treatment Standard under the GATT. GATS measures do most obviously include such requirements.

5. Are the motives of National Treatment Standard different when it comes to the regulations under GATT **Article III:4** - the provision being parallel to the GATS Article XVII:1? All laws and regulations and requirements **affecting** internal sale, purchase, etc, are included, and not only legislation governing the conditions of sale or purchase, but also all measures which might adversely modify the conditions of competition between the domestic and imported products on the internal marked.

Dealing with the GATS "measures affecting" provisions, the formal appearance of the regulation, seems to be of lesser importance. Formally identical and formally different treatment is allowed, however not if "conditions of competition" under GATS Article XVII:3 is modified in favor of domestic services or services suppliers: It is the *de facto* treatment which is the main point. Member State action initiating formally equal conditions is insufficient if the arrangements imposed, implemented, effectuated etc. do result in unequal treatment to the disadvantage of foreign service or services suppliers. Included are obviously:

- regulations which are capable of giving rise to discrimination against imported services though they may not necessarily do so in the case of each individual purchase. It is not required that these effects have to be manifest.

- substantive laws as well as procedural laws which might influence the most favored treatment requirement.

- pecuniary measures for instance, taxes, fixation of compulsory price levels levied on foreign products, subsidies to the benefit of domestic producers, which more or less directly affect imported goods or services, transportation, containers etc.

- a compulsory distribution system (i.a. wholesalers or other middlemen) solely for the imported products or services.

- a public listing and delisting practice for the purpose of placing restrictions on services or products which might be sold domestically.

- sales restrictions related to quantities, valid solely for imported products or services, i.a. six-pack size of beer.

6. The "no less favorable" treatment requirement of Article III:4 has to be understood as applicable to each individual case of imported products. There is no position balancing more favorable treatment of some imported products or services against less favorable treatment of other imported products or services.

7. The break of treatment no less favorable principle might under the National Treatment standard as well as the Most Favored Nation Treatment clause, be examined in advance of the implementation of it. Obviously these principles would not serve its purpose if a law, regulation or requirement (under GATT) or measure (under GATS) could only be challenged in dispute settlements after an actual event *de facto* hindering exporters, as a means of rectifying less favorable treatment of non-domestic service rather than as a means of forestalling it.

8. Inconsistencies under the GATS might be justified under Article XIV(c) c.f. the general exceptions under GATT Article XX which slightly changed, has become GATS Article XIV(c). It is clear that

- the "measure" referred to in Article XIV is the measure requiring justification under Article XIV and that, therefore, the imposition of requirements or duties inconsistent with "treatment no less favorable" is the measure in the present case.

- a requirement or duty according to one set of rules, does not serve to enforce the payment obligation of quite a different set of rules. A Member could, therefore, not establish measures limiting the total value of service transaction under Article XVI:2(b) to "secure compliance with" obligations under i.a. that Member's subsidies legislation (GATS Article XV). For these reasons the quantitative restrictions could not be justified under Article XX(d).

- inconsistencies with Article III:4 must be "necessary" to secure compliance with these laws. A contracting party cannot justify a measure inconsistent with another GATS provision as "necessary" in terms of Article XVI(c) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATS provisions, is available to it.

9. Some important Most Favored Nation Treatment exemptions do occur: Agreements establishing The Economic Communities or Free Trade Areas granting special treatment between Members, not available to non-Members might under GATS Article V, be established. Further, any GATS Member might according to measures listed (Article II:2) in Schedules of Specific Commitments under Article XVI:1 make exemptions to the Most Favored Nation Treatment, meeting the conditions of the Annex on Article II Exemptions. The Member shall notify the Council for Trade in Services the list of exemptions. Until the conclusion of the shipping group (NGMTS) negotiations, MFN-treatment and paragraphs 1 and 2 of the Annex on Article II Exemptions are suspended in their application to the shipping sector, which means that it is unnecessary to list MFN exemptions. At the conclusion of the negotiations, Members shall under the Decision on Negotiations on Maritime Transport Services paragraph 5, be free to improve, modify or withdraw any commitments made, notwithstanding the provisions of Article XXI of the GATS Agreement, i.e. the provisions on the Modification of Schedules. Doing so, that Member is entitled to maintain a measure inconsistent with the Most-Favored-Nation treatment clause.

Studying the details one will see that MFN-treatment is related to factual equality (paragraph 1), that specially granted preferential market access to the benefit of one particular Member is contravened to Article II with the exception of incidents where the measures concerned are not restrictive in nature. A bilateral agreement is, in itself no sign of discriminatory treatment (paragraph 2) and that the imposition of individual fee adjusted to each particular transportation service, is not inconsistent with the MFN obligation of Article II:1 if authorized by a waiver extending that Member to provide duty-free treatment to these beneficiaries or by individual exceptions authorized by the "Enabling Clause",(paragraph 3).

10. Finally I come to some special issues under the GATS National Treatment Standard. Since charges of any kind do qualify as "measures" under the GATS, transportation services handling or processing fees similarly, must be limited in amount not exceeding the

approximate cost of service rendered. Obviously, charges of different kinds could exceed that specific transportation handling cost i.a. the expenses for guiding ship through the icy part of the NSR.

According to drafting history and subsequent praxis, by the notion "service rendered" is meant consular fees, custom fees and statistical fees. The notion is purely legal and has nothing to do with service in an economic sense. Domestic "service" imposed at imported merchandise or service has to be of at least one of these kinds. Whatever Members might choose to call them, is of no importance. An import Member service processing fee which is not imposed on domestic service, is still consistent with the National Treatment provision, provided that this fee is either consular fees, custom fees or statistical fees and does not exceeded the "cost of services rendered" (see paragraph 2), which otherwise might represent an indirect protection to domestic products. If that Member does not practise custom fees on services, the only service taxes which might apply are the consular and statistic fees.

Some service costs might be - under the view of *de minimis* costs - justified on a *pro rata* part basis, upholding the customs functions. Even though Customs Service do not process trade in service on a tariff basis, Customs Service at harbors might be provided with other tasks related to transportation i.a. the control of certifications to monitor sub-standard ships.

Since the critical point of amount is the "approximate cost of service rendered", which must be interpreted to refer to the appropriate cost of customs processing for the individual entry in question, an *ad valorem* basis fee instead of facing the actual costs in each case, might be inconsistent with the obligations of Articles II:2(c) and VIII:1(a) to the extent it causes fees to be levied in excess of these approximate costs. Obviously taxation might not be made according to the ability, on the part of the tax bearers, to pay tax i.e. the question of "tax-bearing ability".

Chapter 3
"LIKE SERVICE AND SERVICES SUPPLIERS"

A discussion of the GATS phrase "like service and service suppliers" must begin with the initial meaning of the parallel notion under GATT, i.e. "like products". The opinions and remarks of Working Groups or Panels in the GATT cases also apply, *mutatis mutandis*, to the GATS cases. Since neither the GATT nor the GATS texts define the notion "the like", it should be examined on a case-by-case basis,[192] which is also the situation under the GATS. My presupposition is that these MFN and National Treatment notions carry the same intentional meaning, even though the limitations are probably not identical. The explicit interpretation differs from one text to another, as the meaning "like product" and the "like service" varies depending on the angle of approach.

3.1 GATT: "like products"[193]

Obviously there is a connection between GATT Articles I (MFN Treatment Clause) and III (National Treatment Standard) in respect of the "like product" concept. In several of the past "like products" cases, the respective panels, and notably the Animal Feed Proteins Panel[194] cf. Panel Report on "Australian Subsidy on Ammonium Sulphate[195] and Panel Report on "Treatment by Germany of Imports of Sardines[196]", have dealt with both provisions jointly. Just as Article III of GATT imposed an obligation concerning the competitive conditions between like products inside the market, so the like-product concept of Article I imposes an obligation concerning the competitive conditions between like products at the border. From the procedural situation, however, one cannot draw the conclusion that the notions of the two "like products" are identical:

> "The Panel recalled its earlier statement that a like product determination under Article III does not prejudge like product determinations made under other Articles of the General Agreement or in other legislative contexts".[197]

In attempting to understand the notion of "like products", the distinction between like and unlike products may become apparent if we look at some previous GATT praxis, textual and contextual analysis and the Customs Cooperation Council Nomenclature.[198] The GATT drafting history confirms that "the expression had different meanings in different contexts of the Draft Charter".[199] Subsequent GATT practice indicates that, as stated in respect of GATT Article I:1 in the 1981 Panel Report on the Tariff Treatment applied by Spain to imports of Unroasted Coffee, "neither the General Agreement nor the supplement of previous cases gave any definition of

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[192] See e.g. BISD 34S/83: Japan - Customs duties, taxes and labelling practices on imported wines and alcoholic beverages (L/6216) 115, para. 5.6.

[193] See Section 1.15 for Professor Scovazzi's comment also applying to this section.

[194] BISD 25S/49, 63: EEC Measures on Animal-Feed Proteins.

[195] BISD II/188.

[196] BISD 1S/53.

[197] BISD 39S/206, 294: United States - Measures affecting alcoholic and malt beverages.

[198] Op.cit. p.115.

[199] EPCT/C II/65 p.2.

such a concept".[200] The very narrow definition for the purpose of anti-dumping proceedings of the notion of "like product" in Article 2:2 of the 1979 Anti-dumping Agreement,[201] was not suitable for the different purpose of GATT Article III:2. The "like products" should therefore be investigated on a product-by-product basis using the above-mentioned criteria as well as others recognized in previous GATT practice,[202] such as the Customs Cooperation Council Nomenclature (CCCN)for the classification of goods in customs tariffs.

As will be demonstrated in the continuation, the initial interpretation of the term "like products" as meaning "more or less the same product" was considered too strict an interpretation.[203]

1. Beginning with an analysis of the text of GATT Articles I and III, I must mention that the notion "like product" was the subject of a Report by Groups of Experts analyzing the intentional meaning of that notion under the provisions of Anti-dumping and Countervailing Duties.[204] In discussing the meaning of the term "like product", the Group agreed that this term should be interpreted as a product which is identical in physical characteristics subject, however, to such variations in the presentation which are due to the need to adapt the product to special conditions in the market of the importing country (i.e., to accommodate different tastes or to meet special legal or statutory requirements). Some Members drew attention to the fact that such an approach was also in conformity with the note concerning the term "like product", referred to in Article VI, in the Analytical Index of the General Agreement where it is stated that "'like product' means in this instance the same product". For the purpose of an adjustment, however, downward or upward corrections of the price of the like product should be permitted so as to take into account the differences in the type of the products destined for the home market and for the various export markets.

The Group pointed out that the meaning of "like product" as agreed by them should neither be interpreted too broadly so as to cover products of a different kind with higher prices on the internal market, nor too stringently so as to elude the application of paragraph 1(a) of Article VI. During the discussion of the term "like product" the Group found some discrepancy in the English and French texts of paragraph 1 of Article VI. In the English text the words "**the** like product" are used, while the French text contains the words "**un** produit similaire", a slightly vaguer phrase. The Group nevertheless thought that this slight discrepancy between the two texts would have no practical effect if the term "like product" were interpreted as suggested by the Group.

According to the Uruguay Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade of 15 April 1994 Article 2.6, the term "like product" ("produit similaire")

> "shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration".[205]

However, the interpretation of "like products" under GATT Article VI is limited to the Anti-Dumping Code, cf. the expression "Throughout this Code". At the utmost, therefore, it is a question of some similarities which might be applied on a *mutatis mutandis* basis. However, the Panel in the Japanese liquor case

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[200] BISD 28S/102, III.

[201] BISD 26S/172.

[202] See BISD 25S/49, 63.

[203] C/M/152 p.16.

[204] BISD 8S/145, 149: Trade and Custom Regulations - Anti-dumping and Countervailing Duties. Report by Groups of Experts, adopted 13 May 1959.

[205] The text is identical to the Tokyo Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade of 12 April 1979 Article 2:2.

> "did not consider this very narrow definition for the purpose of antidumping proceedings to be suitable for the different purpose of GATT Article III:2. The Panel decided, therefore, to examine the table of "like products" ... on a product-by-product basis using the above-mentioned criteria as well as others recognized in previous GATT practice".[206]

The notion "like products" under GATT Articles I and III[207] is something other than "directly competitive or substitutable products" which include a substitute that fits the notion "directly substituted" under Article XI (2c). The latter concept suggests that different products might be classified as "like products":

> "The provisions of paragraph 1 of this Article shall not extend to ... [i]mport restrictions ... necessary ...to restrict the quantities of the like domestic product permitted to be marketed or produced, or if there is no substantial domestic production of the like product, of a domestic production for which the imported product can be directly substituted".

According to the Panel investigating "the skimmed milk powder case",

> "The Panel noted ... such factors as the number of products and tariff items carrying different duty rates and tariff bindings, the varying protein contents and the different vegetable, animal and synthetic origin of the protein products before the Panel - not all of which were subject to the EEC measures. Therefore, the Panel concluded that these various protein products could not be considered as "like products" within the meaning of Articles I and III".[208]

Consequently, substitute products having the same end-uses do not qualify as "like products" under GATT Articles I and III. We cannot therefore draw any conclusion from the interpretation of the anti-dumping notion of "like products" with respect to the same concept under the MFN Treatment Clause, nor the National Treatment standard.

2. I intend to look for regularities by carrying out a product-by-product analysis. The main problem is whether Members disqualify merchandises from being "like products" by establishing nationally specified tariff positions. Does the practical use of the products have any significance? Do we face an identical situation in GATT Articles I and III? When investigating the explicit meaning, one must take into account the drafting history of Article I and the interpretation of the "like products" concept.[209]

In my opinion, GATT Article I:1 on the MFN Treatment Clause is not intended to seek out an ideal tariff classification in which those products given an identical commodity number under the Harmonized Commodity Description and Coding System of 12 July 1983 Ch. 1-97,[210] have the status of like product. Where there was doubt or disputes concerning "like products", past panelist deliberations had focused on whether or not most-favored-nation treatment was extended to the products concerned, irrespective of countries of origin, and whether or not the tariff classification of the country in question had been examined to see if it was discriminatory.

The tariffs referred to in the General Agreement are, quite evidently, those of the individual contracting parties.

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[206] BISD 34S/83, 115: Japan - Custom duties, taxes and labelling practices on imported wines and alcoholic beverages.

[207] According to the Panel of BISD 34S/83, 115 (Japan - Custom duties, taxes and labelling practices on imported wines and alcoholic beverages), the phrase "like products" is used on sixteen occasions in the General Agreement.

[208] BISD 25S/49: EEC - Measures on animal-feed proteins (L/4599) p.63.

[209] See UN: EPCT/C/II/65 p.2; EPCT/C.II/PV.12 p.7 (1946); EPCT/C.II/36 p.8 (1946); E/Conf. 2/CIII/SR.5 p.4 (1947); GATT/CP/4/39 para. 8; IC/SR.9 p.2 (1953); BISD 25S/49-53; and BISD 28S/92-98.

[210] See GATT L/5470/Rev.1.

It followed that, if a claim of likeness was raised by a contracting party in relation to the tariff treatment of its goods on importation by some other contracting party, then such a claim should be based on the classification of the latter, i.e. the importing country's tariff.[211] That Member enjoys extensive competence to enter sub-items under the tariff headings, within the framework of the Harmonized Coding and Tariff System:

> "The adoption of the Harmonized System ... had brought about a large measure of harmonization in the field of customs classification of goods, but this system did not entail any obligation as to the ultimate detail in the respective tariff classifications. Indeed, this nomenclature has been on purpose structured in such a way that it leaves room for further specifications".[212]

The name used for classification does not constitute legally relevant circumstances for bestowing upon two products the status of unlike products:

> "United States ... agreed to accept Canadian grades A2, A3 and A4 as meeting the definition of high quality beef eligible for entry under TSUS 107.61".[213]

As regards particular national tariff characterizations or conceptions, we might ask whether a Member's competence to specify national tariffs can disqualify two items of merchandise from receiving no less favorable treatment? Obviously, attempts to determine likeness in an *a priori* manner, without adequate attention to tariff classification, would cause confusion in the existing tariff classification system because the national classification as such might not be decisive.

So what factors should instead be used to determine likeness? According to previous panelist decisions, the essential criteria include the practices of other contracting parties; the physical origin and properties of the products; treatment of the products through internal regulations in the importing country; commercial interchangeability, commercial value and price, purchaser preferences and physical characteristics (including the products' properties), nature and quality, and the "end-use" of the product.[214]

The above criteria constitute the framework only, while the more precise boundaries must be determined by consulting the panelist decisions. Thus, the question of "like products" must be examined on a **case-by-case** basis, taking all these *mementos* into consideration. All we can do at this stage is to determine the boundary between "like" and "unlike" products through panelist decisions. For example, is beef the "like product" or is it fillets, T-bone steaks and so forth? Is there any limit to a Member's competence of tariff specification? Under the Tariff Commodity Description and Coding system, there are some limitations on such national specification, and this has consequences for the GATT "like product" classification. Several Panel decisions relate to this problem: e.g. the Brazilian-Spanish coffee case (L/5135);[215] the Japanese liquor case (L/6216);[216] the EEC Measures on animal-

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[211] BISD 36S/167: Canada/Japan - Tariff on import of spruce, pine, fir (SPF) dimension lumber (L/6470).

[212] Op.cit. p.198.

[213] BISD 28S/92, 98: EEC - Import of beef from Canada (L/5099).

[214] See Panel Report on "EEC Measures on Animal-Feed Proteins" BISD 25S/49 (1978); Panel Report on "Australian Subsidy on Ammonium Sulphate" BISD II/188 (1950); Panel Report on "Treatment by Germany of Imports of Sardines" BISD 1S/53 (1952); Panel Report on "Spain - Tariff Treatment of Unroasted Coffee" BISD 28S/102 (1981); and the Report of the Working Party on Border Tax Adjustments BISD 18S/102, para. 18.

[215] Op.cit. p.102.

[216] GATT: Basic Instruments and Selected Documents. Thirty-fourth Supplement (August 1988) p.83 ff.

feed proteins (L/4599);[217] and the Canadian-Japanese lumber case (L/6470).[218] Yet nobody has defined the notion of "like product":

> The Panel did not feel that it was called upon to give a definition of "like products".[219]

Even though an all-round judgement is necessary, the decision cannot evade the barriers arising from the importing Member's tariff classification. In the Japanese lumber case, the Panel noted that the Canadian concept of "dimension lumber" was extraneous to the Japanese Tariff.

> "It was a standard applied by the Canadian industry which appeared to have some equivalent in the United States and in Japan itself, but it could not be considered for that reason alone as a category for tariff classification purposes, nor did it belong to any internationally accepted custom classification. The Panel concluded therefore that reliance by Canada on the concept of dimension lumber was not an appropriate basis for establishing "likeness" of products under Article I:1 of the General Agreement".[220]

Consequently, the problem for panelist consideration under the MFN clause (but probably not the National Treatment Standard?) relates to the actual tariff classification of the Member against which a complaint of treatment less favorable has been made. Therefore the tariff categories in question cannot be ignored or isolated from discussion.

3. Concerning the relevant cases that illustrate the issue at hand, I first address the question of Members' competence to specify tariffs and list sub-items in a manner that distinguishes between merchandises which otherwise might have been regarded as "like products". Through their internal competence of further tariff specifications, do Members have the right to alter the notion of "like products"? The answer to this is negative:

> "It must however be borne in mind that such differentiations may lend themselves to abuse, insofar as they may serve to circumscribe tariff advantages in such a way that they are conducive to discrimination among like products originating in different contracting parties".[221]

Products which must be classified as "like products" according to a Member's unilateral sub-items list under the Harmonized Commodity Description and Coding System, still remain "like products" despite the special commodity description by that Member.

We turn now to cases: Spain, in the coffee case (L/5135),[222] disagreed that the notion of "like product" included "all the products falling within the same tariff heading" under the International Convention on the Harmonized Commodity Description and Coding System of 14 June 1983.[223] Spain, which was the only Member maintaining this category of "unroasted, non-decaffeinated coffee beans", admitted that its domestic tariff praxis disqualified unroasted coffee from receiving the same treatment as other coffee. Thus, the Panel decided that systematic differences can result from

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[217] BISD 25S/49.

[218] See GATT: Basic Instruments and Selected Documents. Thirty-sixth Supplement (July 1990) p.167.

[219] BISD 1S/53, 57 (1952): Panel Report on "Treatment by Germany of Imports of Sardines".

[220] BISD 36S/167, 199: Canada/Japan: Tariff on import of spruce, pine, fir (SPF) dimension lumber (L/6470).

[221] Op.cit. p.198 para. 5.9.

[222] Op.cit. p.102.

[223] BISD 28S/102, 107: Panel Report on Spain - Tariff Treatment of Unroasted Coffee.

> "geographical factors, cultivation methods, the processing of the beans, and the genetic factor. The Panel did not consider that such differences were sufficient reason to allow for a different tariff treatment. It pointed out that it was not unusual in the case of agricultural products that the taste and aroma of the end-product would differ because of one or several of the above-mentioned factors.
>
> The Panel furthermore found relevant to its examination of the matter that unroasted coffee was mainly, if not exclusively sold in the form of blends, combined various types of coffee, and that coffee in its end-use, was universally regarded as a well defined and single product intended for drinking".[224]

Therefore, the group of "like products" remained intact despite the Spanish sub-item of unroasted coffee. The same applies to the Panel decision on Japanese alcoholic beverages which are considered to be like products, e.g. Japanese "sochu" and vodka. The Panel stated further that

> "gin, vodka, whisky, grape brandy, other fruit brandy, certain "classic" liquors, still wine and sparkling wine, respectively, were recognized not only by governments for purposes of tariff and statistical nomenclature, but also by consumers to constitute "each in its end-use ... a well defined and single product intended for drinking" ... The Panel also agreed in this respect with the finding of an earlier panel report adopted by the CONTRACTING PARTIES that minor differences in taste, color and other properties did not prevent products qualifying as like products".[225]

One important conclusion then is that no Member, by listing tariff sub-items, can disqualify something which is otherwise regarded as a "like product" under the GATT provisions.

4. From the Japanese alcoholic beverages case, one can also draw some conclusions regarding the essential criteria for determining which merchandise comprises "like products". The criteria vital to classification are the appearance of the finished products, the raw materials used and their end-uses:

> "The Panel examined the tax on petroleum in the light of the obligations of United States .. The tax on petroleum is an excise tax levied on imported and domestic goods ... The imported and domestic products are thus either identical or, in case of imported liquid hydrocarbon products, serve substantially **identical end-uses**. The imported and domestic products subject to the tax on petroleum **are therefore** in the view of the Panel "like products" within the meaning of Article III:2. The rate of tax applied to the imported products is 3.5 cents per barrel higher than the rate applied to the like domestic products. Article III:2, first sentence, applies whether or not the products concerned are subject to a tariff concession and whether or not adverse trade effects occurred (see paragraph 5.1.9 below). The tax on petroleum is for these reasons inconsistent with the United States obligations under Article III:2, first sentence".[226] (the emphasis is mine)

Differences in production, place of cultivation, processing, mixture, taste, etc. is of no importance when, as in these cases, the end-uses of "like product" are identical. All such merchandises, regardless of differences in the formal tariff heading and the wording of an item and its sub-items, are considered to be "like products".

However, one cannot say that identical end-uses suggest "like products" under all circumstances. The EEC

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[224] BISD 28S/102, 112: Spain - Tariff treatment of unroasted coffee, para. 4.7

[225] BISD 34S/83, 116: Japan - Customs duties, taxes and labelling practices on imported wines and alcoholic beverages.

[226] BISD 34S/136: United States - Taxes on petroleum and certain imported substances, pp.154-155 para. 5.1.1.

Measures on animal-feed proteins (L/4599)[227] were not found to be aimed at the "like product" under Articles I and III, even though these had the same end-use, i.e. protein fodder:

> "The Panel noted, in this case, such factors as the number of products and tariff items carrying different duty rates and tariff bindings, the varying protein contents and the different duty vegetable, animal and synthetic origins of the protein products before the Panel ... Therefore, the Panel concluded that these various protein products could not be considered as "like products".[228]

Consequently the same end-use is, in itself, insufficient. The Panel did not accept that the protein products could be regarded as "like products". The way in which this case disassociates itself from the first two cases is by the origin of the merchandises. The protein fodder had different origins (vegetable, animal and synthetic). However, the different kinds of coffee, wine, brandy, gin, vodka, etc. were respectively based on identical raw materials.

Yet identical raw material is in all circumstances an insufficient reason for a "like product" situation which would bring into consideration the principle of treatment no less favorable.

5. However, if tariff classification really does reflect substantial differences in products, then we are not dealing with "like products". Similarities in name despite substantial differences do not make the merchandise a "like product":

> "[T]he Brazilian delegate explained that this amendment concerned beverages containing aromatic or medical substances and known as tar, honey or ginger **conhaque**, which were quite different from French cognac ... The Members of the working party accepted this explanation".[229]

6. Which agricultural products are "like products"? The question put before "The Herring Panel"(G/26)[230] was whether *clupea pilchardus* (sardine), *clupea sprattus* (sprat) and *clupea harengus* (herring) were "like products". The Panel stated that

"it would be sufficient to consider whether in the conduct of the negotiations at Torquay [the first round of negotiations under GATT] the two parties agreed expressly or tacitly to treat these preparations as if they were "like products" for the purpose of the General Agreement ... The evidence produced before the Panel shows that in the course of the Torquay negotiations the German delegation has consistently treated the preparation of the various types of clupea as if they were separate products ... The Norwegian delegation tried without success to obtain that preparations of sprat and herrings should be treated as sardines for marketing purposes and, failing that, was content with assurances that equality of treatment in customs matters would be continued. It would seem, therefore, that the Norwegian Government, in order to secure the extension of advantages or privileges granted to preparations of clupea pilchardus to preparations of clupea sprattus and clupea harengus, relied on assurances which it considered it has obtained in the course of negotiations rather than on the automatic operation of the most-favored-nation clause".

Consequently, the Norwegian interpretation that all kinds of herring should be regarded the "like products" was not warranted under GATT Article I. I understand this to mean that all kinds of products prepared from sardine, sprat or herring would still be that respective product and unlike the others; e.g. smoked herring is herring nonetheless, and smoked sardine is not a "like product". The differential treatment was not based on the origin of the goods but on the assumption that preparations of *clupea pilchardus, clupea sprattus* and *clupea harengus*

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[227] BISD 25S/49.

[228] BISD 25S/49, 63.

[229] See GATT: Basic Instruments and Selected Documents. Volume II (May 1952) pp.182-83.

[230] See GATT: Basic Instruments and Selected Documents. First Supplement (March 1953) p.57.

are not "like products" within the terms of Article I and Article XIII.

8. To sum up the discussion about the notion of "like products", the fact that products have the same end-use is in itself important but is not sufficient reason for those products to be regarded as "like products". In the context of Article III it is essential that the "like product" determinations be made not only in the light of such criteria as the products' physical characteristics but also in the light of the purpose of Article III, which is to ensure that internal taxes and regulations "not be applied to imported or domestic products so as to afford protection to domestic production". The purpose of Article III is not to harmonize the internal taxes and regulations of contracting parties, which differ from country to country. On the other hand it is imperative that the like product determination in the context of Article III be made in such a way that it does not unnecessarily offend the regulatory authority and domestic policy options of contracting parties.

As indicated, the CONTRACTING PARTIES had never developed a general definition of the term "like products" in Article III:2. Past decisions on this question have been made on a case-by-case basis after examining a number of relevant factors. The working party report on border tax adjustments, adopted by the CONTRACTING PARTIES in 1970, concluded that problems arising from the interpretation of the terms "like" or "similar" products, which occurred some sixteen times throughout the General Agreement, should be examined on a case-by-case basis using *inter alia* the following criteria: the product's end-uses in a given market; consumers tastes and habits, which vary from country to country; and the products' properties, nature and quality.

The context of Article III:2 shows that Article III:2 supplements, within the system of the General Agreement, the provisions on the liberalization of customs duties and of other charges by prohibiting discriminatory or protective taxation against certain products from other GATT contracting parties. As indicated by several panels, this context had to be taken into account in the interpretation of Article III:2. For instance, the prohibition under GATT Article I:1 of different tariff treatment for various types of "like" products could not rematch participation rights fall within the domain of International Trade legislation.

Clearly, the problem with the NSR (besides ice and other harsh natural conditions[231]) is how to gain shipowners' recognition of the NSR as one of the three international seaways of the world. Whether the NSR is classified as international straits[232] or internal Russian waters,[233] no discrimination between the world's shipping nations or between the Russian fleet and foreign fleets will be acceptable.

The principle of non-discriminatory treatment under GATT is the focal point of this dissertation. A guarantee of equal rights is required through the implementation of the GATS Most-Favored-Nation Treatment Clause (GATS Article II) and National Treatment standard for instance if products serve substantially identical end-uses.

3.2 GATS; "like services and service supplier"

Past decisions have been made on a case-by-case basis after examining a number of relevant factors, using inter alia, the following criteria: the product's end-uses in a given market; consumers' tastes and habits and the products' properties, nature and quality. The legal situation is uncertain still pending the shipping solution and lack of panelist praxis: To the fullest extent; we are here within the *de sententia ferenda* situation. The description made in

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[231] See e.g. Eugene Makarov et al.: Operational Information on Nature Conditions (INSROP Working Paper no. 24 -1995).

[232] Douglas Brubaker: The Legal Status of Straits in Russian Arctic Waters (INSROP Discussion Paper, 2nd August 1995 and 5 February 1996).

[233] N.D. Koroleva, V. Yu. Markov & A.P. Ushakov: Legal Regime of Navigation in Russian Arctic Waters (INSROP Discussion Paper 12 October 1995).

the continuation, is pointing at *momentous* which ought to be taken into consideration when deciding which protection flows from the GATS and which *opinio juris* might be recommended for the justification of future conflicts.

The framework of the past, the GATT "like product"-praxis, is at least illustrating the problems to come, and solutions which - *mutatis mutandis* - might be chosen under the auspices of the WTO Dispute Settlement Body. However, as the service situations are more "clean-cut" than the product situations, the factual possibilities are fewer and more perspicuous.

Under GATS Article XXVIII a broad spectrum of definitions are made. The notion of "like service and service suppliers" are however not defined. The drafters obviously have felt that it was not called upon to give a definition of "like services and services suppliers". From this I draw the conclusion that this concept should be investigated on a product-by-product basis using the previously developed "like products"-criteria recognized under GATT practice. My intention is to illustrate borderline between "like" and "unlike" services by means of previous panelist decisions.

1. As indicated under Chapter 3.1 the initial interpretation of the term 'like products' as meaning 'more or less the same product' was regarded too strict an interpretation. On the other hand; substitute products having the same end-uses, does not always qualify as "like products" under GATT Articles I and III even though they enjoy that status under the provisions of anti-dumping. In the case of "like services"; obviously the shipping services solely, might qualify as the "like services" I.a. the transportation of a merchandise from Antwerpen to Kobe might be effectuated by air or by ship. Even though air- and shipping transportation have the same end-uses, these kind of services do not qualify as "like services".

Transformed into the terminology of the shipping-services, "like service and service supplier" being the more or less same transport service, which means that service and service supplier of that other Member does enjoy the protection of Most Favored Nation Treatment or National Treatment. For instance the service does qualify as the like service without regard to the transportation technic being implemented, i.a. general goods- or container transportation. Even more different methods of transportation might qualify as "like services": I.a. tramp-ship and passenger ferries also transporting goods, as regards the goods-transportation part of it. Whether that ship is operating the spot-marked or fixed routes, as a regular steamship liner, is of minor significance.

2. Is the notion of "like services and services suppliers" set under the GATS-legislation or might each contracting party for its own home-market, define more specifically which items are the "like". Do Members have the authority, by establishing national specified tariff positions or other charges classification systems, to redefine group of commodities having consequences for the "like service"-rights and obligations. A *ratio* for Members enjoying the competence of tax legislation is the rule of law. Legislation as instrument, therefore does determine likeness in an *a priori* manner. Lack of adequate attention to fee classification systems would cause confusion as to which services do qualify as like services and are subsequently contrary to the system of rule of law.

Obviously, rule of law is vital. However, rule of law at the international law level is - through

the GATS legislation - established. These obligations prevent contracting parties from initiating inadequate national solutions. None of the provisions under the GATS provide Members with unilateral classification competence with regard to the fixation of "like services". Members making specific national sub-items under tariffs, fees or charges headings, does not in itself constitute new categories of "like services".

The Members' competence to invent national names under national fee- or tariff classification systems, does obviously not constitute legally relevant circumstances for giving two services the status of being non-like. For instance; making foreign transportation the classification of "international traffic" while domestic fleet transporting along the same route which competes for the same charter-parties, enjoying "local traffic" status, due to lower charges, would not be consistent with the GATS obligations. On the opposite side; textual similarities describing substantially different services does obviously not make the merchandise considered to be "like services.[234]

3. Since national classification is not decisive, what is then a "like service"? According to previous panelist decisions regarding "like products", the vital criteria do include the practices of other contracting parties; the physical origin and properties of the products; treatment of the products in internal regulations by the importing country; commercial interchangeability, commercial value and price to the similar product, purchaser preferences and physical characteristics (including the properties of the product), nature and quality, and the product "end-use". Some of these elements are obviously relevant in the case of services.

Bringing up the shipping transportation services, other Members' practice regarding the classification of services i.a. in relation to fees, charges or taxes, is an important variable. Another is the properties of the transportation: For instance freight by special refrigerator vessels not by ordinary bulk-carrier or cargo-ships. A third is the possibility of choosing alternative transportation. Being easily substituted, ought such transportationto be regarded as "like services"?

Let us first exclude some cases of non-relevance to the like services classification. Systematic differences being a result of culture i.a. language of the crew, from diverse technic such as equipment, the processing and storing of goods, does not give any sufficient reason to allow for a different fee or tariff treatment. Such underlying factors might vary without destroying the status of like product as long as the end-use, is a well defined and single service product intended for the same purpose.[235] Being recognized not only by governments for purposes of tariff and statistical nomenclature, but also by consumers to constitute each in its end-use a well defined and single service intended for a single purpose, differences in hull, equipment and other vessel properties might not prevent services from qualifying as "like services".[236] The formal list of fee or tariff heading, wording of item and its sub-items, is not decisive. All

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234 See GATT: Basic Instruments and Selected Documents. Volume II (may 1952) s. 182-83.

235 See i.a. BISD 28S/102, 112 at paragraph 4.7 Spain - Tariff treatment of unroasted coffee.

236 BISD 34S/83, 116 Japan - Customs duties, taxes and labelling practices on imported wines and alcoholic beverages.

such substantially like commodities are considered the "like product" despite different tags.

The appearance of the delivered service and the equipment used - in addition to the consumption end-uses - might influence on the justification. If the imported and domestic service are either identical **or** serve substantially identical end-uses,[237] we are facing two items of the "like services" categories. Consequently, commodities might either be identical or if not identical, serve the same end-uses. In both cases, "like services" classification might be appropriate.

An identical type of ship or shipping technical equipment, does not invoke the "like service"-classification. Then, the principle of treatment no less favorable, is not available.[238] The "product" for consideration is the trade in shipping services, not the ship as such. I do not think that factors related to the technical equipment should disqualify the "like services"-classification, if end-uses are identical. In this relation the situation under GATS is different from the GATT under which the same end-use, in itself, might not be sufficient.[239]

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[237] BID S/136 United States - Taxes on petroleum and certain imported substances p. 154-155 at paragraph 5.1.1.

[238] See BISD 25S/49 The EEC-Measures on animal feed proteins (L/4599).

[239] BISD 25S/49, 63.

Chapter 4
SHIPPING TRANSPORTATION SERVICES UNDER THE GATS. CONCLUSIONS

The European Community, in its "white book" on the construction of a Community framework for a sustainable transport policy, states that the first of the basic transport policy principles is the requirement that solutions should, as far as possible, be worldwide in their application. This worldwide participation approach is only possible within the framework of the World Trade Organization (WTO), which includes the General Agreement on Trade in Services (GATS).

In this chapter I outline the most important implications of the WTO/GATS legislation relating to shipping services (chapter 4.1) as well as transportation along the Northern Sea Route (NSR).

My task here is to make a legal analysis of the Most-Favored-Nation Treatment (MFN) clause and the National Treatment principle as formulated in GATS Articles II and XVII, respectively, with emphasis on shipping transportation issues. The legal situation is uncertain because the shipping solution is not yet prepared and there is a lack of panelist praxis. Here, to the fullest extent, we are facing a *de sententia ferenda* situation.

The situation I deal with is the typical one in which an importing Member initiates service-consumption restrictions on the importation of services in order to protect domestic service suppliers. The implication of GATS liberties is that any shipowner from a GATS Member can provide services to consumers in any of the territories of other Members when operating any of the Members (this covers cabotage, if cabotage is one of the GATS liberties). In other words, for example, Russian shipowner can (when Russian membership is accepted) provide services along the coast of Norway and between Norway and Japan.

4.1 Shipping transportation services

My task is to discuss shipping transportation services, which includes all manner of transportation from regular steamship liners to spot-market operated or chartered vessels. The type of cargo being transported is of no importance to this presentation, but is of course significant for the classification of "like services and service supplier" (chapter 4.17).

1. Maritime transport services are in principle covered by GATS, but will be fully incorporated as an Annex to the GATS if and when such is decided by Member States according to a draft by the Negotiating Group on Maritime Transport Services (NGMTS). From 1st January 1995 and until such a decision is made, commitments scheduled by participants on maritime transport services shall enter into force on a most-favored-nation basis. The Member shall notify the Council for Trade in Services of its list of exemptions. Until the conclusion of the shipping group (NGMTS) negotiations, MFN treatment and paragraphs 1 and 2 of the Annex on Article II Exemptions are suspended in their application to the shipping sector, which means that it is unnecessary to list MFN exemptions. At the conclusion of the negotiations, Members will, under the Decision on Negotiations on Maritime Transport Services paragraph 5, be free to improve, modify or withdraw any commitments

made, notwithstanding the provisions of Article XXI of the GATS, i.e. the provisions on the Modification of Schedules. In doing so, Members are entitled to maintain a measure that is inconsistent with the MFN Treatment Clause.

2. Private international service contracts and public service procurement are included, and there is no limitation on private contracts. However, the rules relating to private contracts, extended under the Agreement on Government Procurement to the procurement of shipping transportation, are not fully applied: GATS Article XIII on Governmental Procurement explicitly states that neither the MFN nor the National Treatment standards relate to measures governing the procurement by governmental agencies of services purchased for governmental purposes if that procurement is not intended to initiate commercial resale or for use in the supply of service for commercial sale.

4.10 The purpose of this study

In view of harsh weather conditions and ice-covered waters, the NSR transportation provisions must be given close attention. One crucial task is to prevent shipping companies from resorting to sub-standard ships to counterbalance unequal participation rights. GATS legislation may be just such a legal instrument if countries transporting along the NSR become GATS Members (see chapter 4.12).

The objective of the GATS is to limit "measures by Members affecting trade in services" (GATS Article I:1). The focus is on **trade** in services, not the service as such, i.e. the execution of services. What is protected is the equal right to offer, ask for, negotiate and conclude service contracts. Consequently, I focus on the right to provide services by concluding international contracts. Service contracts are protected by the GATS provisions.

4.11 Trade in shipping services: A definition

Since the scope of my study covers shipping transportation, I need not look into issues associated with general trade in services. Shipping transportation is a "service" per definition (GATS Article I:2). Shipping services, which qualify as "service of another Member" is the service which is supplied

> "by a vessel registered under the laws of that other Member, or by a person of that other Member which supplies the service through the operation of a vessel and/or its use in whole or in part", GATS Article XXVIII(f)(i)

The provision of shipping services is a mixture of several components. The transportation service is comprised of: persons involved, e.g. a broker, owner, charterer, operator, contracting parties, crew, pilots, etc.; technical equipment, i.e. a ship, gear, auxiliary components, etc.; external elements such as navigation support from the shore, ports, ports facilities, etc. Shipping transportation sales is comprised of an offer of a "total package" that includes all service components.

Consequently, the service of another Member is defined by the vessels register of that other

Member, which includes all vessels flying the flag of that Member or owned by a person residing in that other Member. The notion "other Member" refers to another Member than that establishing the measures affecting the trade. This other Member is the subject of the legal protection of GATS provisions.

4.12 Some prerequisites

I anticipate that negotiations on the shipping agenda will be successful, that the MFN clause as well as the National Treatment principle will become part of the shipping solution, and that two or more INSROP countries (Japan, Norway and/or Russia) and the EU (and its Member States) will become Members. If all these states take part in the forthcoming shipping annex to GATS (See Decision on Negotiations on Maritime Transport Services paragraph 6), the Convention area will cover the NSR and all important ports of departure and arrival. Most NSR freights between Europe and the Asian Far East will then be included. If the Russian application for membership is rejected, the INSROP area that comprises part of the WTO/GATT legal regime will be limited. However, WTO legislation may still play a considerable role as far as ports of departure and arrival are concerned, i.e. in the EU, Norway and Japan. Russian seaways would then become a transit passage, having limited effect on the conditions of competition. Since Russia is not a Member of the WTO/GATS, Russian shipowners gain no benefit from the principle of treatment no less favorable, which limits the possibilities to be considered when competing for charter-parties.

The presupposition is further that shipping Members, under GATS Article XVII:1, do not disqualify National Treatment from their scheduled commitments. In this connection, the treatment-no-less-favorable clause is limited to MFN Treatment under Article II.

4.13 Implications (1). An introduction

If Japan, Russia and Norway becomes Members, shipowner from these Member States will enjoy equal competition rights. However, such rights are "balanced" by the Community safe-sea provisions, which apply to all ships docking in an EU port state harbor. On the other hand, national arrangements that apply only to transiting ships would no longer be valid; e.g. special taxes and charges specified by GATS provisions on National Treatment. The trade in shipping services has implications affecting the geographical dimension, personal dimension and substantive law dimension. The first of these, the geographical dimension (chapter 4.14), is mainly a question of the area covered by legal rights. The other two dimensions are related to GATS limitations on national legislation in two ways: Firstly, in terms of the legal persons involved, the subjects of rights and duties (chapter 4.15); and secondly, in terms of the substantial content of the protection provisions (chapter 4.16).

4.14 Implication (2). The geographical dimension

Another implication is that trade in services - in the case of shipping - does have a geographical and personal application. Geographically speaking, the right to conduct trade in services under GATS means to supply a service when situated in one Member State **from** the

territory of that or any other Member State into the territory of a third Member State (e.g. the right to take charter-parties from Japan to one of the EU Member States); or to supply a service **in** the territory of one Member State to the benefit of consumers in any other Member State (e.g. internal transportation of EU goods in Norway for the benefit of industries in Japan).

Concerning shipping services, we presume that every ship registered under the laws of a GATS Member enjoys the right of equal "conditions of competition" in the territory of any other GATS Member. Under GATS Article XXVIII(f)(i), the supplier offering shipping services enjoys protection on the condition that the flag state or the state of domicile of the shipowner, charterer or operator has obtained GATS membership (see Chapter 1.11). The GATS provisions are allowed that supplier as reflexual rights. These rights do not depend upon whether that Member in its Schedule has undertaken tariff commitments in respect of the specific service.

4.15 Implication (3). The legal persons involved

1. GATS embraces "Members", not Member States. This implies that Contracting parties might be States or International Organizations, cf. WTO Agreement Article XI:1 concerning the status of the European Communities according to GATT 1947; and Article XII:1, which gives membership opportunities to any "separate customs territory possessing full autonomy in the conduct of its external commercial relations and of other matters provided for in the Agreement and the Multilateral Trade Agreements".

2. The question is: Which Member enjoys GATS legal protection, and which Member is subject to GATS obligations? The Member entitled to GATS provisions depends upon which private legal subjects are offended. Are service suppliers and service consumers among the legal subjects under GATS legal rights?

Whether service-consuming Members are entitled to GATS protection is a question of the origin of the service at issue. In other words, which Member does the phrase "service ... of any other Member" refer to (GATS Articles II and XVII)? The text focuses on the service as such, which indicates that a contract is involved. Since trade in services relates to contracts and since contracts represent an *inter partes* relationship, service providers and purchasers must be included. Thus, beneficiary Members are service-supplying or service-consuming Members, or both, depending on which Member is restricting the trade in shipping services. If the importing Member is the Member making restrictions, then the consumer does not enjoy any GATS reflexual legal protection.

In some cases, persons who are not parties to the service contract do enjoy GATS protection. For example, a shipowner having a third person operating the ship and therefore not being part of the charter-party affected, might invoke GATS protection if the reason for the Member's restrictions is related to the flag of the vessel and has noting to do with the operator's status or nationality. Flying that particular flag represents a particular disadvantage, which obviously invokes that Member's competence under GATS.

This leads to the following conclusions: Flying the flag or having membership of a society

(cf. the notion of "by a person of that other Member") qualifies the "another Member" status according to GATS legislation. The service delivered by such a ship or such a person does have the origin of that Member. In GATS Article XXVII(b), it is explicitly stated that a Member may deny the benefits of this Agreement in the case of maritime transport service if it establishes that the service either is supplied by a vessel registered under the laws of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement or by a person which operates and/or uses the vessel in whole or in part but which is of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement. This reservation says that a Member, even though the ship is flying the flag of another Member, can deny that Member the benefits flowing from GATS if a ship of that Member is operated and/or used in whole or in part by a person who is the habitant of a non-Member. The same applies if the ship is flying the flag of a non-Member, even though the operator or user is the habitant of another Member.

4.16 Implication (3). Treatment no less favorable

What is the implication of enjoying GATS legal protection? To answer this question, one must examine the benefits which GATS Members acquire with special regard to shipping service and treatment no less favorable to the like service and service suppliers. The question is which kind of service is protected by Articles II (MFN Treatment) and XVII (National Treatment)? The obligation is to accord treatment no less favorable "to services and service suppliers".

The intention of the GATS provisions is to make it possible for entities, companies, etc. of a GATS Member to buy shipping services from a shipping firm of any Member. National legislation which provides special credit facilities to some categories of service suppliers for the purchase of domestic shipping service might be inconsistent with the obligations of that Member under GATS Articles II and XVII. But what is the treatment-no-less-favorable standard all about? Several questions arise.

1. The implementation of GATS means that a specific charter-party is accorded treatment no less favorable. A Member cannot offset unfavorable treatment in one area by more favorable elements of treatment elsewhere. The provision must be oriented towards the product, i.e. the trade in services, for instance a charter-party. All kinds or mandatory restrictions, regulations, taxes and public legislation are included, even such provisions which are not intended to discriminate against foreign services (see Chapter 2.4).

2. If the bilateral arrangement establishes domestic measures in favor of a special shipping service conducted by one of the bilateral contracting parties (party A) within the other's (party B) domestic market, it might be argued that such a commitment is an indication of an intent by party B to favor imports from party A. This is only the case if there is evidence of companies from other countries being prevented from establishing themselves in the market of party B on the same terms as party A.

3. Import fees (where such fees are charged) must be proportional to the cost of services rendered. According to drafting history and subsequent praxis, the notion "service rendered" (Articles II:2 (c) and VIII:1 (a)) means consular fees, customs fees and statistical fees. As

consular fees are related to immigration or work permits, such consular service is not provided for trade in shipping services because crews are not considered as immigrants. If the transport service is passenger transportation, the cost of passenger customs processing must not be taken into account when evaluating the cost of shipping transportation as such. Neither is that Member entitled to include passenger customs costs when evaluating the cost of service rendered for handling goods through customs.

4. If the operation of shipping services is subject to **internal** national taxes (which the Member is competent to impose according to GATS Article VI) because of various kinds of services provided by port authorities, then such taxes may also be levied on foreign service suppliers if they use the same coastal auxiliary services, or at least if they are dependent upon the preparedness of coastal services (the *de minimis* costs). The tax rate should be fixed in relation to the kind of services required and the length of time they are employed, and not in relation to the value of the service afforded.

When do charges imposed on the internal handling of shipping transportation have to be subsumed as internal taxes? Such taxation measures must be justified under GATS Article XVII. We understand that the distinguishing factor is whether the charge imposed on such services is **collected internally**. Collection of charges at the border by customs authorities, port authorities or others **might** be justified under the National Treatment provision. If the charge affects the internal sale of the shipping service, then the charge is to be subsumed under the National Treatment standard of GATS Article XVII regardless of its point of collection. Charges collected during transportation or when in harbor are internal and are consequently subject to justification under the National Treatment clause.

If the operation of shipping services is subject to internal national taxes because of standby facilities such as an icebreaker escort, weather forecast or navigational aids from port authorities, then such taxes may also be levied on foreign service suppliers if they use the same coastal auxiliary services, or at least if they are dependent upon coastal services being on constant standby.

5. How should fees be calculated? The tax rate should be fixed in relation to the kind of services required and the length of time they are employed, and not in relation to the value of the service afforded. For instance: If, in the case of pure transit operations, no port of call is part of the service offered according to the charter-party, then no handling by a Port Authority is required and consequently no Port Authority taxes should be imposed on the services in action.

If a tax is imposed on shipping services because of the risk of oil pollution (due to e.g. a sub-standard hull), then such a tax cannot be imposed on foreign transportation of merchandises other than oil or if a cargo of oil is carried in a high-standard ship with a double hull.

6. A new national legislation establishing, for instance, a charge for the administrative handling of foreign shipping transportation through the coastal waters of a Member, must be published promptly in accordance with GATS Article III on transparency. Once informed, the other Members can respond quickly and challenge the new legislation before a WTO Panel.

7. A quantitative restriction applied should, according to the MFN principle under GATS

Article II, not discriminate against shipping services provided by certain, and not other, Members. As regards the National Treatment principle, detailed rules apply under GATS Article XVI.

8. Special requirements specifying that foreign shipping services must follow other routes than domestic shipping, call at certain checkpoints, etc., cannot apply as these measures bring about a disadvantage to foreign shipping industries. The grounds for such unequal treatment are of no significance. It may be maintained, for example, that an independent source of records was necessary because the state authorities did not have access to the out-of-state producers' shipping records with which to verify information provided by in-state agents on the transportation at issue.

In general, any measure must be justified under the treatment-no-less-favorable clause. A quantitative or other restriction applied should therefore not discriminate against shipping services provided by certain, and not other, Members.

4.17 The "like services and services supplier"

1. The treatment-no-less-favorable obligation relates to those service suppliers and services known as "like services". In the case of shipping, only shipping services qualify as "like services". For instance, the transportation of goods from Antwerp to Kobe may be conducted by air or by sea. Yet, although air and sea transportation have the same end-uses, these kinds of services do not qualify as "like services".

2. What, then, is a "like service and service supplier"? Since former panelist praxis is unavailable, and since "like products" cannot be compared with "like services", an attempted answer would be premature and based more on *de lege ferenda* than the *de lege lata* situation. Therefore I limit my discussion to the main conditions that will most likely be part of the justification of the forthcoming panel.

If we consider that everything applicable to "like products" is also applicable to "like service and service suppliers", with particular emphasis on shipping services, then the methods of transportation in question must be more or less the same kind of transport service. Also, the merchandise being transported must be of the same kind. For instance, a shipment of oil and transportation of cars are not "like services". Cargo shipping and bulk transportation of a chemical or liquid are by no means "like services". The problem, therefore, is whether the services qualify as "like" services without regard to the transportation method involved, e.g. general goods transportation or container transportation.

One important factor of interpretation could be Member practice. Panels have laid emphasis on products that are to be regarded as "like" among all Members. Member practice with respect to the classification of services, e.g. in relation to fees, charges or taxes, may be an important variable. Another vital factor is the properties of the transportation: For instance, freight transported by special refrigerator vessels and not by ordinary bulk-carriers or cargo ships. A third factor is interchangeability, the possibility of choosing alternative transportation. Since different kinds of transportation can be easily substituted, they ought all to be regarded as "like services".

On this point, justification may be difficult. By analogy to "like products" practices, even more methods of transportation might qualify as "like services"; e.g. tramp-ships and passenger ferries that are also transporting goods might be considered a "like service" as regards the goods transportation. Another possible variable is whether the ship is operating on the spot-market or fixed routes as a regular steamship liner. As long as the merchandise transported is the same kind of goods, it is my firm opinion that slight differences in transportation method are of minor significance for "like services" classification.

On the other hand, an identical type of ship or technical shipping equipment is not sufficient reason to be called a "like service" and thereby bring the principle of treatment no less favorable into consideration. The "product" under consideration is the trade in shipping service, not the ship as such.

4.2 The Northern Sea Route

From a Russian point of view the Northern Sea Route (NSR) is an internal Russian shipping route. With regard to the prospective NSR international law classification, the introduction of the Northern Sea Route (NSR) as the third international waterway is an improper concept that lacks a just legal foundation. Equalizing the NSR with the Suez and Panama routes means, in strict legal terms, establishing a treatment-no-less-favorable regime.

The problem with the NSR (besides ice and other harsh natural conditions) is how to gain shipowners' acknowledgement of the NSR as one of the three international seaways of the world. Since Russia will presumably become a WTO Member in the near future, NSR transportation will come under WTO jurisdiction. If all NSR states take part in the forthcoming shipping annex to GATS (See Decision on Negotiations on Maritime Transport Services paragraph 6), then all national legislation on participation that relates to ships transporting along the NSR or in port is restricted by WTO provisions. Most NSR freights between Europe and the Asian Far East will then be included.

To see the implications for NSR transportation, some illustrations of real situations would be appropriate. I presume that the transportation comes under GATS jurisdiction if transportation is made by a vessel flying the flag of any of the GATS Members, or by a person of any GATS Member which supplies the service through the operation of a vessel and/or its use in whole or in part. For instance, if the shipowner is Norwegian and the ship is flying the Cypriot flag, chartered by a firm in New York, operated from Gdansk, and the provider is a chemical industry in Leyden and the receiver is a wholesaler in Kobe, then which Member enjoys GATS protection? Is it the Member of the beneficiary or the provider of a service? I will illustrate the limits and implications by using examples.

1. Since charges of any kind qualify as "measures" under the GATS, handling or processing fees for transportation services must be limited to an amount not exceeding the approximate cost of service rendered. According to drafting history and subsequent praxis, the notion "service rendered" means consular fees, customs fees and statistical fees. The notion is purely legal and has nothing to do with service in an economic sense. Domestic "service" imposed on imported merchandise or service has to be of at least one of the kinds of aforementioned fees.

Different kinds of charges could, by analogy to GATT Article VIII:1 (a), not exceed the handling cost of the transportation in question, e.g. expenses for guiding ships through an ice-covered stretch of the NSR. If the foreign service supplier transports along a short stretch of the entire NSR, then the taxes imposed must be balanced in relation to the service supplier's use of the NSR. The charge should not be related to the value of the service, but to the value of the auxiliary coastal services involved in the shipping-trade services as defined by the charter-party.

2. Turning now to the question of which Member is competent to invoke GATS provision, the situation differs from case to case:

- If the Leyden chemical industry is transporting on its own keel along the NSR to Kobe, and the vessel is registered under the EUROS (European Register of Ships) or the Dutch register, then the Leyden industry is the supplier of the transport service. If Russia make restrictions affecting that trade, then the European Community or the Netherlands qualify - under the status of service supplier - as "another Member", and may consequently bring the case before the WTO for conciliation.

- If the Leyden industry buys the transportation services (due to a Cost Insurance Freight (CIF) Contract between Leyden and Kobe) from a US charterer, then the United States is the service-supplying Member, whose status becomes that of "another Member" in relation to the Norwegian or Russian measures restricting the Dutch chemical industry's access to the NSR. If the Gdansk operator is in charge, then Poland is the Member that enjoys legal interest.

- A third case relates to transportation by regular steamship lines: The Leyden industry buys freight (the CIF situation again), and not time-chartered vessels. The contracting parties are, for instance, an American broker who has bought loading capacity from a Polish operator, and the producer of the chemicals. The Russian restrictions affect the service of the American broker, a situation which renders the United States a beneficiary under the GATS. The Polish operator is not part of the charter-party but, since that operator is running a regular steamship line, the restrictions affect the Polish enterprise's capabilities in such a way as to invoke Polish competence under the GATS.

If the regulation affects this particular shipping service because
the vessel is flying the Cypriot flag, then the Cypriot registry is at a particular disadvantage, which invokes Cypriot competence under the GATS.

SUMMARY - WITH A SPECIAL EMPHASIS ON THE GATS IMPLICATIONS FOR THE NORTHERN SEA ROUTE TRANSPORTATION

The introduction of the Northern Sea Route (NSR) as the third international waterway is an improper concept that lacks a just legal foundation. Equalizing the NSR with the Suez and Panama routes means, in strict legal terms, establishing a treatment-no-less-favorable regime. The problem with the NSR is how to gain shipowners' acknowledgement of the NSR as one of the three international seaways of the world. Since Russia will presumably become a WTO Member in the near future, NSR transportation will come under WTO jurisdiction. If all NSR states take part in the forthcoming shipping annex to GATS (See Decision on Negotiations on Maritime Transport Services paragraph 6), then all national legislation on participation that relates to ships transporting along the NSR are restricted by WTO provisions. Most NSR freights between Europe and the Asian Far East will then be included. The presupposition is that Japan, Russia, EU, Norway and other shipping Nations become members of GATS and that Members, under GATS Article XVII:1, do not disqualify National Treatment from their scheduled commitments.

The implication of GATS liberties is that any shipowner from a GATS Member can provide services to consumers in any of the territories of other Members when operating any of the Members. This includes all manner of transportation from regular steamship liners to spot-market operated or chartered vessels. In view of harsh weather conditions and ice-covered waters, the NSR transportation provisions must be given close attention. One crucial task is to prevent shipping companies from resorting to sub-standard ships to counterbalance unequal participation rights.

1. Maritime transport services are in principle covered by GATS, but will be fully incorporated as an Annex to the GATS if and when such is decided by Member States according to a draft by the Negotiating Group on Maritime Transport Services (NGMTS). From 1st January 1995 and until such a decision is made, commitments scheduled by participants on maritime transport services shall enter into force on a most-favored-nation basis. The objective of the GATS is to limit "measures by Members affecting trade in services" (GATS Article I:1). The focus is on **trade** in services, not the service as such, i.e. the execution of services. What is protected is the equal right to offer, ask for, negotiate and conclude service contracts. Private international service contracts and public service procurement are included, and there is no limitation on private contracts.

2. The provision of shipping services is a mixture of several components. The transportation service is comprised of: persons involved, e.g. a broker, owner, charterer, operator, contracting parties, crew, pilots, etc.; technical equipment, i.e. a ship, gear, auxiliary components, etc.; external elements such as navigation support from the shore, ports, ports facilities, etc. Shipping transportation sales is comprised of an offer of a "total package" that includes all service components. Consequently, the service of another Member is defined by the vessels register of that other Member, which includes all vessels flying the flag of that Member or owned by a person residing in that other Member. The notion "other Member" refers to another Member than that establishing the measures affecting the trade. This other Member is the subject of the legal protection of GATS provisions. The following implications are manifest:

3. National arrangements that apply only to transiting ships as is the case of Russia, would no longer be valid; e.g. special taxes and charges specified by GATS provisions on National Treatment.

4. The right to conduct trade in services under GATS means to supply a service when situated in one Member State **from** the territory of that or of any other Member State into the territory of a third Member State or to supply a service **in** the territory of one Member State to the benefit of consumers in any other Member State. We presume that every ship registered under the laws of a GATS Member enjoys the right of equal "conditions of competition" in the territory of any other GATS Member.

5. GATS "members" are States or International Organizations, cf. WTO Agreement Article XI:1 concerning the status of the European Communities according to GATT 1947. The Member entitled to GATS provisions depends upon which private legal subjects are offended. Are service suppliers and service consumers among the legal subjects under GATS legal rights? Whether service-consuming Members are entitled to GATS protection is a question of the origin of the service at issue. In other words, which Member does the phrase "service ... of any other Member" refer to (GATS Articles II and XVII)? The text focuses on the service as such, which indicates that a contract is involved. Since trade in services relates to contracts and since contracts represent an *inter partes* relationship, service providers and purchasers must be included. Thus, beneficiary Members are service-supplying or service-consuming Members, or both, depending on which Member is restricting the trade in shipping services. If the importing Member is the Member making restrictions, then the consumer does not enjoy any GATS reflexual legal protection.

In some cases, persons who are not parties to the service contract do enjoy GATS protection. For example, a shipowner having a third person operating the ship and therefore not being part of the charter-party affected, might invoke GATS protection if the reason for the Member's restrictions is related to the flag of the vessel and has noting to do with the operator's status or nationality. Flying that particular flag represents a particular disadvantage, which obviously invokes that Member's competence under GATS.

Flying the flag or having membership of a society (cf. the notion of "by a person of that other Member") qualifies the "another Member" status according to GATS legislation. The service delivered by such a ship or such a person has the origin of that Member. In GATS Article XXVII(b), it is explicitly stated that a Member may deny the benefits of this Agreement in the case of maritime transport service if it establishes that the service either is supplied by a vessel registered under the laws of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement or by a person which operates and/or uses the vessel in whole or in part but which is of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement. This reservation says that a Member, even though the ship is flying the flag of another Member, can deny that Member the benefits flowing from GATS if a ship of that Member is operated and/or used in whole or in part by a person who is the habitant of a non-Member. The same applies if the ship is flying the flag of a non-Member, even though the operator or user is the habitant of another Member.

6. What is the implication of enjoying GATS legal protection? To answer this question, one must examine the benefits which GATS Members acquire with special regard to shipping service and treatment no less favorable to the like service and service suppliers. The question is which kind of service is protected by Articles II (MFN Treatment) and XVII (National Treatment)? The obligation is to accord treatment no less favorable "to services and service suppliers". The intention of the GATS provisions is to make it possible for entities, companies, etc. of a GATS Member to buy shipping services from a shipping firm of any Member.

National legislation which provides special credit facilities to some categories of service suppliers for the purchase of domestic shipping service might be inconsistent with the obligations of that Member under GATS Articles II and XVII.

The implementation of GATS means that a specific charter-party is accorded treatment no less favorable. A Member cannot offset unfavorable treatment in one area by more favorable elements of treatment elsewhere. The provision must be oriented towards the product, i.e. the trade in services, for instance a charter-party. All kinds or mandatory restrictions, regulations, taxes and public legislation are included, even such provisions which are not intended to discriminate against foreign services (see Chapter 2.4). Russian special taxes for the NSR transiting ships which do not represent due payment for harbor services, are contrary to these GATS provisions

If bilateral arrangement establishes domestic measures in favor of a special shipping service conducted by one of the bilateral contracting parties (party A) within the other's (party B) domestic market, it might be argued that such a commitment is an indication of an intent by party B to favor imports from party A. This is only the case if there is evidence of companies from other countries being prevented from establishing themselves in the market of party B on the same terms as party A.

Import fees must be proportional to the cost of services rendered. According to drafting history and subsequent praxis, the notion "service rendered" (Articles II:2 (c) and VIII:1 (a)) means consular fees, customs fees and statistical fees. As consular fees are related to immigration or work permits, such consular service is not provided for trade in shipping services because crews are not considered as immigrants. If the transport service is passenger transportation, the cost of passenger customs processing must not be taken into account when evaluating the cost of shipping transportation as such. Neither is that Member entitled to include passenger customs costs when evaluating the cost of service rendered for handling goods through customs.

If the operation of shipping services is subject to **internal** national taxes (which the Member is competent to impose according to GATS Article VI) because of various kinds of services provided by port authorities, then such taxes may also be levied on foreign service suppliers if they use the same coastal auxiliary services, or at least if they are dependent upon the preparedness of coastal services (the *de minimis* costs). The tax rate should be fixed in relation to the kind of services required and the length of time they are employed, and not in relation to the value of the service afforded.

When do charges imposed on the internal handling of shipping transportation have to be subsumed as internal taxes? Such taxation measures must be justified under GATS Article XVII. We understand that the distinguishing factor is whether the charge imposed on such services is **collected internally**. Collection of charges at the border by customs authorities, port authorities or others **might** be justified under the National Treatment provision. If the charge affects the internal sale of the shipping service, then the charge is to be subsumed under the National Treatment standard of GATS Article XVII regardless of its point of collection. Charges collected during transportation or when in harbor are internal and are consequently subject to justification under the National Treatment clause.

If the operation of shipping services is subject to internal national taxes because of standby facilities such as an icebreaker escort, weather forecast or navigational aids from port authorities, then such taxes may also be levied on foreign service suppliers if they use the same coastal auxiliary services, or at least if they are dependent upon coastal services being on constant standby.

How should fees be calculated? The tax rate should be fixed in relation to the kind of services required and the length of time they are employed, and not in relation to the value of the service afforded. For instance: If, in the case of pure transit operations, no port of call is part of the service offered according to the charter-party, then no handling by a Port Authority is required and consequently no Port Authority taxes should be imposed on the services in action.

If a tax is imposed on shipping services because of the risk of oil pollution (due to e.g. a substandard hull), then such a tax cannot be imposed on foreign transportation of merchandises other than oil or if a cargo of oil is carried in a high-standard ship with a double hull.

A new national legislation establishing, for instance, a charge for the administrative handling of foreign shipping transportation through the coastal waters of a Member, must be published promptly in accordance with GATS Article III on transparency. Once informed, the other Members can respond quickly and challenge the new legislation before a WTO Panel.

A quantitative restriction applied should, according to the MFN principle under GATS Article II, not discriminate against shipping services provided by certain, and not other, Members. As regards the National Treatment principle, detailed rules apply under GATS Article XVI.

Special requirements specifying that foreign shipping services must follow other routes than domestic shipping, call at certain checkpoints, etc., cannot apply as these measures bring about a disadvantage to foreign shipping industries. The grounds for such unequal treatment are of no significance. It may be maintained, for example, that an independent source of records was necessary because the state authorities did not have access to the out-of-state producers' shipping records with which to verify information provided by in-state agents on the transportation at issue.

In general, any measure must be justified under the treatment-no-less-favorable clause. A quantitative or other restriction applied should therefore not discriminate against shipping services provided by certain, and not other, Members.

7. The treatment-no-less-favorable obligation relates to those service suppliers and services known as "like services". In the case of shipping, only **shipping** services qualify as "like services". If we consider that everything applicable to "like products" is also applicable to "like service and service suppliers", with particular emphasis on shipping services, then the methods of transportation in question must be more or less the same kind of transport service. Also, the merchandise being transported must be of the same kind. For instance, a shipment of oil and transportation of cars are not "like services". Cargo shipping and bulk transportation of a chemical or liquid are by no means "like services". The problem, therefore, is whether the services qualify as "like" services without regard to the transportation method involved, e.g. general goods transportation or container transportation.

One important factor of interpretation could be Member practice. Panels have laid emphasis on products that are to be regarded as "like" among all Members. Member practice with respect to the classification of services, e.g. in relation to fees, charges or taxes, may be an important variable. Another vital factor is the properties of the transportation: For instance, freight transported by special refrigerator vessels and not by ordinary bulk-carriers or cargo ships. A third factor is interchangeability, the possibility of choosing alternative transportation. Since different kinds of transportation can be easily substituted, they ought all to be regarded as "like services".

On this point, justification may be difficult. By analogy to "like products" practices, even more methods of

transportation might qualify as "like services"; e.g. tramp-ships and passenger ferries that are also transporting goods might be considered a "like service" as regards the goods transportation. Another possible variable is whether the ship is operating on the spot-market or fixed routes as a regular steamship liner. As long as the merchandise transported is the same kind of goods, it is my firm opinion that slight differences in transportation method are of minor significance for "like services" classification.

On the other hand, an identical type of ship or technical shipping equipment is not sufficient reason to be called a "like service" and thereby bring the principle of treatment no less favorable into consideration. The "product" under consideration is the trade in shipping service, not the ship as such.

8. To see the more specific implications for NSR transportation, some illustrations of real situations would be appropriate. I presume that the transportation comes under GATS jurisdiction if transportation is made by a vessel flying the flag of any of the GATS Members, or by a person of any GATS Member which supplies the service through the operation of a vessel and/or its use in whole or in part. For instance, if the shipowner is Norwegian and the ship is flying the Cypriot flag, chartered by a firm in New York, operated from Gdansk, and the provider is a chemical industry in Leyden and the receiver is a wholesaler in Kobe, then which Member enjoys GATS protection? Is it the Member of the beneficiary or the provider of a service? I will illustrate the limits and implications by using examples.

Since charges of any kind qualify as "measures" under the GATS, handling or processing fees for transportation services must be limited to an amount not exceeding the approximate cost of service rendered. According to drafting history and subsequent praxis, the notion "service rendered" means consular fees, customs fees and statistical fees. The notion is purely legal and has nothing to do with service in an economic sense. Domestic "service" imposed on imported merchandise or service has to be of at least one of the kinds of aforementioned fees.

Different kinds of charges could, by analogy to GATT Article VIII:1 (a), not exceed the handling cost of the transportation in question, e.g. expenses for guiding ships through an ice-covered stretch of the NSR. If the foreign service supplier transports along a short stretch of the entire NSR, then the taxes imposed must be balanced in relation to the service supplier's use of the NSR. The charge should not be related to the value of the service, but to the value of the auxiliary coastal services involved in the shipping-trade services as defined by the charter-party.

Turning now to the question of which Member is competent to invoke GATS provision, the situation differs from case to case:

- If the Leyden chemical industry is transporting on its own keel along the NSR to Kobe, and the vessel is registered under the EUROS (European Register of Ships) or the Dutch register, then the Leyden industry is the supplier of the transport service. If Russia make restrictions affecting that trade, then the European Community or the Netherlands qualify - under the status of service supplier - as "another Member", and may consequently bring the case before the WTO for conciliation.

- If the Leyden industry buys the transportation services (due to a Cost Insurance Freight (CIF) Contract between Leyden and Kobe) from a US charterer, then the United States is the service-supplying Member, whose status becomes that of "another Member" in relation to the Norwegian or Russian measures restricting the Dutch chemical industry's access to the NSR. If the Gdansk operator is in charge, then Poland is the Member that enjoys legal interest.

- A third case relates to transportation by regular steamship lines: The Leyden industry buys freight (the CIF situation again), and not time-chartered vessels. The contracting parties are, for instance, an American broker who has bought loading capacity from a Polish operator, and the producer of the chemicals. The Russian restrictions affect the service of the American broker, a situation which renders the United States a beneficiary under the GATS. The Polish operator is not part of the charter-party but, since that operator running a regular steamship line, the restrictions affect the Polish enterprise capabilities in such a way as to invoke Polish competence under the GATS.

If the regulation affects this particular shipping service because the vessel is flying the Cypriot flag, then the Cypriot registry is at a particular disadvantage, which invokes Cypriot competence under the GATS.

LIST OF GATT PANEL AND WORKING PARTY DECISIONS

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Alexander I. Frolov: Some aspects of the foreign trade regime of the Russian Federation (INSROP discussion paper of 20 April 1995)

GATT Doc. No. MIN.DEC (Sept. 20, 1986) para. 10 - Ministerial declaration on the Uruguay Round

GATT Activities 1993: An Annual Review of the Work of the GATT (Geneva 1994) p.104

Review of the discussion paper by Prof. Orebech on "The Northern Sea Route - Conditions for Participation According to WTO/GATT Legislation"

In my opinion, the paper gives a broad and careful picture of the topic discussed. The author masters the difficult and subtle legal questions arising from the new and fast-changing WTO/GATT regime. This regime is based on some general principles, as the national treatment and the most-favoured-nation clause, whose application is complicated by the numerous exceptions allowed. In the paper, the analysis of some complex issues, as the concept of "shipping service of another member" (p. 23) or "equivalent treatment" (p. 48), is very good indeed.

Some additional work could however be done in order to semplify the text and focus it on the issues which are more specifically connected to shipping services and the NSR (see infra, sub 3 and 4). This would produce a text more easily accessible to a reader who is not a specialist in international trade law.

General Remarks

1) Although English is not my mother tongue, I notice some linguistic mystakes that must be corrected. For example:

- P. 41, 2nd para., "an vital";
- P. 41, 3rd para., "ne seron" (instead of "ne seront", in French);
- P. 64, 1st para., the third sentence is not understandable;
- P. 69, 4th para., there are 4 errors;
- P. 71, 3rd para., "manifestly" (should be "manifest");
- In a few sentences there is no consistency between plural and singular, as in the last sentence at p. 70: "All laws and regulations and requirements affecting internal sale, purchase, etc. is included, and not only ditto governing the conditions of sale or purchase". The word "ditto" is also mysterious for me (and, as an Italian, I should now Latin!).

2) There are also some taping errors which need correction. For example:

- P. 18, 5th para., "of" must be added between "in the form" and "written promises";
- P. 44, last para., some words are repeated twice;
- P. 93, 4th para., "states take part" are repeated twice.

3) The paper gives a thorough analysis (with the appropriate quotations) of the practice arising from the decisions of Panels established under the GATT system. However, the decisions which have no direct relevance for shipping services or the NSR could be summarized in short sentences or in the footnotes.

4) For the same reason (i.e. lack of direct relevance for shipping services or the NSR) some of the topics considered in

detail could be summarized. This could be said for the procedural aspects of the competence of the Panels (chap. 1.15 at p. 29) or the analysis of "like-products" (chap. 3.1 at p. 74).

5) The paper necessarily considers de lege ferenda (see p. 12) a positive future situation, i.e. that GATS negotiations on shipping transportation are successful (I still do not know the outcome) and Russia becomes a party to WTO/GATS. Some elaboration could however be devoted to the case where this could not be achieved.

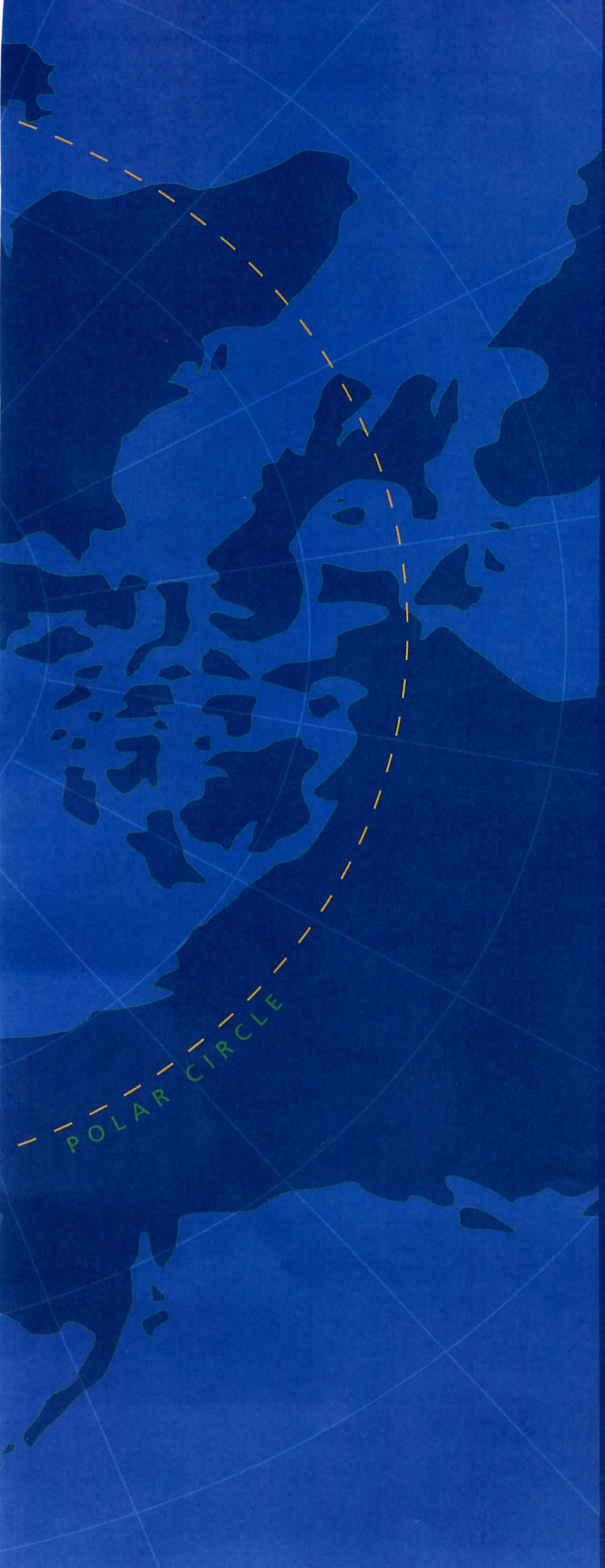
Specific Remarks

P. 17, last para.: We are sure that the most-favoured-nation clause has been included in international treaties earlier than in the 1700's. For instance, it was already included in a treaty signed by Tunis and Venice on 5 October 1231 (text in Ministero degli Affari Esteri [= Italian Ministry of Foreign Affairs], Trattati, convenzioni e accordi relativi all'Africa, preliminary volume, Rome, 1941, p. 24).

P. 55, 6th para.: The paper says: "The answer is affirmative". But, considering the whole context, I doubt that the sentence should be: "The answer in negative".

P. 67, 3rd para.: The author could explain what are "de minimis costs".

Nerina Boschiero



The three main cooperating institutions of INSROP

Ship & Ocean Foundation (SOF), Tokyo, Japan.

SOF was established in 1975 as a non-profit organization to advance modernization and rationalization of Japan's shipbuilding and related industries, and to give assistance to non-profit organizations associated with these industries. SOF is provided with operation funds by the Sasakawa Foundation, the world's largest foundation operated with revenue from motorboat racing. An integral part of SOF, the Tsukuba Institute, carries out experimental research into ocean environment protection and ocean development.

Central Marine Research & Design Institute (CNIIMF), St. Petersburg, *Russia*.

CNIIMF was founded in 1929. The institute's research focus is applied and technological with four main goals: the improvment of merchant fleet efficiency; shipping safety; technical development of the merchant fleet; and design support for future fleet development. CNIIMF was a Russian state institution up to 1993, when it was converted into a stock-holding company.

The Fridtjof Nansen Institute (FNI), Lysaker, Norway.

FNI was founded in 1958 and is based at Polhøgda, the home of Fridtjof Nansen, famous Norwegian polar explorer, scientist, humanist and statesman. The institute spesializes in applied social science research, with special focus on international resource and environmental management. In addition to INSROP, the research is organized in six integrated programmes. Typical of FNI research is a multi-disciplinary approach, entailing extensive cooperation with other research institutions both at home and abroad. The INSROP Secretariat is located at FNI.