Deep Dive Initiative Series

Moderator Hamid Mamdouh

Most-Favoured-Nation Treatment

Session 1.1: MFN – The Current Framework and Practice

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Presented by

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INTRODUCTION

The issues surrounding MFN are almost as old as the GATT itself

- **Belgium – Family Allowances, Report adopted (1952), para 3** : *"According to the provisions of paragraph 1 of Article I of the General Agreement, any advantage, favour, 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 product originating in the territories of all contracting parties. […] The consistency or otherwise of the system of family allowances in force in the territory of a given contracting party with the requirements of the Belgian law would be irrelevant in this respect, and* ***the Belgian legislation would have to be amended insofar as it introduced a discrimination between countries having a given system of family allowances and those which had a different system or no system at all****, and made the granting of the exemption dependent on certain conditions."*

MFN is a cornerstone of the GATT/WTO system

- **EC – Tariff Preferences (2004), AB Report, para 101:** *"It is well settled that the MFN principle embodied in Article I:1 is a "cornerstone of the GATT" and "one of the pillars of the WTO trading system", which has consistently served as a key basis and impetus for concessions in trade negotiations."*

Amendments to the provisions of Article I (MFN) shall take effect only upon acceptance **by all Members (art X:2 Marrakech)**

- *Amendments to the provisions of this Article and to the provisions of the following Articles shall take effect only upon acceptance by all Members:*

  Article IX of this Agreement;
  Articles I and II of GATT 1994;
  Article II:1 of GATS;
  Article 4 of the Agreement on TRIPS.

I. MFN in the GATT - on Goods

Scope of the MFN Provision

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

Application - origin neutral

- **Article I.1 of the GATT:** *"any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."*

Exceptions

- General Exceptions (these exceptions are applicable to all GATT provisions)
  - **Article XX of the GATT:** *"nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; […]"*
  - It is to justify an inconsistent measure with WTO agreements based on legitimate public policy interests.

- Chapeau of Article XX: *"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 the same conditions prevail, or a disguised restriction on international trade"*

- Security Exception (this exception is applicable to all GATT provisions)
  - **Article XXI of the GATT:** *"Nothing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests […]"*
  - It is to justify an inconsistent measure with WTO agreements based on essential security interests.
- Enabling Clause
  - 1971: GATT waiver permitting preferences for developing countries.
  - 1979: Enabling Clause formalized GSP: *"Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties."*
  - 1999: super enabling clause, allowed the poor to give preferences to the very poor.
- Waivers
  - **Article XXV:5 of the GATT:** *"In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement."*
  - **Article IX:3 of the Marrakech Agreement:** *"In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements."*
    - Example: **Kimberley Waiver on rough diamonds (2002)** *"Considering that, in light of the foregoing, exceptional circumstances exist justifying a waiver from paragraphs 1 of Article XIII, 1 of Article I, and 1 of Article XI of the GATT 1994 with respect to the trade in rough diamonds"*
- Regional Exception
  - **Article XXIV:5 of the GATT :** *"Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area"*
  - The duties and other regulations shall not be higher or more restrictive prior to the formation of a custom union, a free trade agreement or an interim agreement
  - The duties and other regulations are eliminated on substantially all the trade between the constituent territories.
  - And the inconsistent measure must have been necessary for the formation of the FTA,
- Regional exception in the Enabling Clause
  - *1 Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries*[*]*, without according such treatment to other contracting parties.*
    2 The provisions of paragraph 1 apply to the following:
    2(c) "Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of nontariff measures, on products imported from one another"
- Plurilateral Agreements (Annex 4 of the Marrakech Agreement)
  - **Article II:3 of the Marrakesh Agreement**: *"The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them."* (this is a transposition of Article 34 of the VCLT)
  - It can be argued that plurilateral agreements constitute an exception to the MFN principle. Under art 41 VCLT two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if the modification in question is not prohibited by the treaty and does not affect the enjoyment by the other parties of their

rights under the treaty or the performance of their obligations. The issue is whether MFN rights of non-participants are protected. The arbitration in Australia/India GATS SDR provides a interesting indication.

MFN Treatment of quotas (when quotas are WTO-accepted) in Article XIII and its exceptions

- Non-discriminatory Administration of Quantitative Restrictions
  - **Article XIII:1 of the GATT**: *"No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted."*
- Exceptions
  - **Articles XII, XIV and XVIII introduce possibilities of not applying import restrictions on an MFN in the context of balance of payment (with the participation of the IMF) and the development of infant industries** *designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of this Agreement."*
  - **Articles XX and XXI and even safeguards allow for import quotas not fully applied on an MFN basis**

MFN for traffic in transit

- Freedom of Transit
  - **Article V:2 of the GATT**: *"No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport."*
  - **Article V:5 of the GATT**: *"With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country."*
  - **Article V:6 of the GATT**: *"Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party."*
- Exceptions
  - **Article V:6 of the GATT**: *"Any contracting party shall, however, be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes."*
  - Other exceptions such as Article XX GATT

II. Examples of MFN in other WTO Agreements related to trade in goods

Technical Barriers to Trade

- **Article 2.1 of the Agreement on Technical Barriers to Trade**: "*Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country*"
- TBT authorizes any regulatory distinctions based on legitimate objectives so long as they are applied even-handedly

Trade remedies

- Trade remedies are an authorized exception to MFN as *"Article VI of the GATT 1994 permits the imposition of anti-dumping duties [as well as countervailing duties], which may otherwise be inconsistent with other provisions of the GATT 1994, such as Article I:1." (EC – Fasteners (2011), AB Report, para 392)*
- Although MFN is rarely invoked in trade remedies, article 9.2 of the Anti-dumping Agreement and 19.3 of the Agreement on Subsidies and Countervailing Measures provide that *"When an anti-dumping [or countervailing] duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury."*
- Safeguards:
    - There has been debate over whether Article XIX of the GATT should be applied on the basis of MFN treatment, but the Agreement on Safeguards has clarified the situation.
    - **Article 2.2 of the Agreement on Safeguards**: *"Safeguard measures shall be applied to a product being imported irrespective of its source"*
    - **Article 5.2(b) of the Agreement on Safeguards**: *"A Member may depart from the provisions in subparagraph (a) provided [...] that clear demonstration is provided to the Committee that (i) imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period"*
    - **Article 9.1 of the Agreement on Safeguards**: *"Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned."*

III. MFN in other WTO Agreements, not dealing specifically with goods, GATS and TRIPS

GATS is concerned with non-discrimination between services and service suppliers

- MFN is a general obligation (but NT is a specific obligation) - it applies to all transactions of services and service suppliers
    - **Article II:1 of the GATS:** *"With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country."*
- Exemptions
    - **Article II:2 of the GATS:** *"A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions."*
    - This is generally only about existing measures at the time of accepting the agreement. This is allowed only on a one-time basis.

- Exceptions
    - Exceptions for adjacent countries
        - **Article II:3 of the GATS:** *"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."*
    - General exceptions
        - **Article XIV of the GATS** (wordings are similar to the GATTs' general exceptions)
    - Security exception
        - **Article XIV Bis of the GATS** (wordings are similar to the GATTs' security exception)
    - Regional exceptions

        - **Article V:1 of the GATS**: *"This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement"*
        - Such an agreement shall have substantial sectoral coverage and eliminate substantially all discrimination among the parties
    - Prudential exception
        - **Paragraph 2(a) of the GATS Annex on Financial Services**
          2. Domestic Regulation
          (a) Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.

TRIPS is concerned with non-discrimination vis-à-vis IP rights holders

- General obligation
    - **Article 4 of the TRIPS Agreement**: *"With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members."*
- Exceptioons
    - There is no general RTA exception (like art XXIV GATT) in TRIPs
    - Many, in the treaties covered by TRIPs, for example, when other cross-referred IP agreements provide for reciprocity or preferences

Compensation and the suspension of concessions in the DSU

- Compensation:
    - ***Article 22.1 DSU:*** "Compensation is voluntary and, if granted, shall be consistent with the covered agreements [i.e. with MFN]."
- Suspension of concessions:
    - ***Article 22.2 DSU:*** "any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements."

IV. Some elements from the case law

a) The purpose and policy rationale for the MFN standard of treatment is to ensure a trading environment of fair competition and a level playing field.

EC – Bananas III (1997), AB Report, para 190: *"The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin."*

EC – Seal Products (2014), AB Report, para 5.87: *"Article I:1 thus prohibits discrimination among like imported products originating in, or destined for, different countries. In so doing, Article I:1 protects expectations of equal competitive opportunities for like imported products from all Members."*

EC – Bananas (1997), AB Report, para 183: *"although Articles I and XIII of the GATT 1994 are both non-discrimination provisions, their relationship is not such that a waiver from the obligations under Article I implies a waiver from the obligations under Article XIII."*

b) The standard of "no less favourable treatment" qualified by "likeness" of products and suppliers.

i) "likeness"

CE – Asbestos (2001), AB Report, para 99: *"As products that are in a competitive relationship in the marketplace could be affected through treatment of imports "less favourable" than the treatment accorded to domestic products, it follows that the word "like" in Article III:4 is to be interpreted to apply to products that are in such a competitive relationship. Thus, a determination of "likeness" under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products."*

EC – Asbestos (2001), AB Report, para 101-102: *"The Report of the Working Party on Border Tax Adjustments outlined an approach for analyzing "likeness" that has been followed and developed since by several panels and the Appellate Body. This approach has, in the main, consisted of employing four general criteria in analyzing "likeness": (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products. ...*
102. These general criteria, or groupings of potentially shared characteristics, provide a framework for analyzing the "likeness" of particular products on a case-by-case basis."

The case law on 'likeness' regarding article I:1 is less developed contrary to article III:2 and article III:4. Notwithstanding, in **EC – Seal Products (2014), AB Report, para 5.82 :** *"both of these provisions [art I and III] are concerned with 'prohibiting discriminatory measures' and ensuring 'equality of competitive opportunities' between products that are in a competitive relationship."*

Argentina – Financial Services (2016), AB Report, paras. 6.25: "*Thus, we consider that the concept of "likeness" of services and service suppliers under Articles II:1 and XVII:1 of the GATS is concerned with the competitive relationship of services and service suppliers. This is consonant with the Appellate Body's understanding of "likeness" in the ambit of trade in goods."*

ii) "no less favourable treatment"

Canada – Autos (2000), AB Report, para 79: *"Article I:1 requires that 'any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.' [emphasis added] The words of Article I:1 refer not to some advantages granted 'with respect to' the subjects that fall within the defined scope of the Article, but to 'any advantage'; not to some products, but to 'any product'; and not to like products from some other Members, but to like products originating in or destined for 'all other' Members."*

c) Covering de jure and de facto discrimination (conditions of competition)

EC – Bananas III (1997), AB Report, para 234: *"For these reasons, we conclude that "treatment no less favourable" in Article II:1 of the GATS should be interpreted to include de facto, as well as de jure, discrimination. We should make it clear that we do not limit our conclusion to this case. We have some difficulty in understanding why the Panel stated that its interpretation of Article II of the GATS applied "in casu"."*

Canada – Pharmaceutical Patents (2000), Panel Report, para 7.101: *"de facto discrimination is a general term describing the legal conclusion that an ostensibly neutral measure transgresses a non-discrimination norm because its actual effect is to impose differentially disadvantageous consequences on certain parties, and because those differential effects are found to be wrong or unjustifiable."*

Canada – Autos (2000), AB Report, Para 78: *"In approaching this question, we observe first that the words of Article I:1 do not restrict its scope only to cases in which the failure to accord an "advantage"*

to like products of all other Members appears on the face of the measure, or can be demonstrated on the basis of the words of the measure. Neither the words "de jure" nor "de facto" appear in Article I:1. Nevertheless, we observe that Article I:1 does not cover only "in law", or de jure, discrimination. As several GATT panel reports confirmed, Article I:1 covers also "in fact", or de facto, discrimination. Like the Panel, we cannot accept Canada's argument that Article I:1 does not apply to measures which, on their face, are "origin-neutral".

EC – Seal Products (2014), AB Report, para 5.95: *"We note that, in these disputes, the Panel concluded that the measure at issue, although origin-neutral on its face, is de facto inconsistent with Article I:1. The Panel found that, while virtually all Greenlandic seal products are likely to qualify under the IC exception for access to the EU market, the vast majority of seal products from Canada and Norway do not meet the IC requirements for access to the EU market. Thus, the Panel found that, "in terms of its design, structure, and expected operation", the measure at issue detrimentally affects the conditions of competition for Canadian and Norwegian seal products as compared to seal products originating in Greenland. Based on these findings, the Panel considered, correctly in our view, that the measure at issue is inconsistent with Article I:1 because it does not, "immediately and unconditionally", extend the same market access advantage to Canadian and Norwegian seal products that it accords to seal products originating from Greenland.*

US – Tuna II (Mexico) (2015), Panel Report under Article 21.5, para 7.450: *"Where a condition attached to an advantage is found to detrimentally modify the competitive opportunities of imported like products, the fact that the disadvantaged Member could modify its practices so as to conform to the condition in question in no way changes the fact that the condition has upset the competitive equality that Article I:1 protects. […] Article I:1 of the GATT 1994, like Article 2.1 of the TBT Agreement, is concerned with the conditions of competition as they exist, and not as they might exist if the Member whose like products have suffered a detrimental impact were to somehow modify its practices."*

d) Examples of exceptions and Exemptions

US – Gasoline (1996), AB Report, p 22 : *"The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned."*

US – Shrimp (1998), AB Report, para 156: *"we consider that it embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand."*

EC – Tariff Preferences (2004), AB Report, paras 98-99: *"the characterization of the Enabling Clause as an exception in no way diminishes the right of Members to provide or to receive "differential and more favourable treatment". […] Members' rights under the Enabling Clause are not curtailed by requiring preference-granting countries to establish in dispute settlement the consistency of their preferential measures with the conditions of the Enabling Clause. Nor does characterizing the Enabling Clause as an exception detract from its critical role in encouraging the granting of special and differential treatment to developing-country Members of the WTO.*
99. In the light of the above, we uphold the Panel's finding, in paragraph 7.53 of the Panel Report, that the Enabling Clause is an "exception" to Article I:1 of the GATT 1994."

EC – Tariff Preferences (2004), AB Report, para. 173: *Having examined the text and context of footnote 3 to paragraph 2(a) of the Enabling Clause, and the object and purpose of the WTO Agreement and the Enabling Clause, we conclude that the term "non-discriminatory" in footnote 3 does not*

prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause. In granting such differential tariff treatment, however, preference-granting countries are required, by virtue of the term "nondiscriminatory", to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the "development, financial and trade needs" to which the treatment in question is intended to respond.

Brazil – Retreaded Tyres (2007), AB Report, para 225: *"Analyzing whether discrimination is arbitrary or unjustifiable usually involves an analysis that relates primarily to the cause or the rationale of the discrimination."* (even though it was applied for a violation of Art III:4 and XI:1)

Colombia – Ports of Entry (2009), Panel Report, paras 8.5-8.7 : *"The Panel upholds Panama's claims that the ports of entry measure is inconsistent with Article I:1, the first and second sentences of Article V:2, the first sentence of Article V:6, and Article XI:1 of the GATT 1994. […] 8.7 The Panel further rejects Colombia's defence that the ports of entry measure is justified under Article XX(d) of the GATT 1994."* (In this case, the Panel has considered that the Colombian measure was inconsistent with Article I:1 and other provisions of the GATT and that the invocation of Article XX(d) couldn't justify such an inconsistency)

US – Poultry (China) (2010), Panel Report, paras 8.3-8.4 : *"The Panel further finds that Section 727 is inconsistent with: (a) Article I:1 of the GATT 1994 because the United States is not extending an advantage immediately or unconditionally to the like products originating from China, advantage that it has extended to all other WTO Members; (b) Article XI:1 of the GATT 1994, because during the time it was in operation, Section 727 imposed a prohibition on the importation of poultry products from China. 8.4 The Panel finds Section 727 is not justified under Article XX(b) of the GATT 1994 because we have found that it is inconsistent with Articles 2.2, 2.3, 5.1, 5.2 and 5.5 of the SPS Agreement."*

Argentina – Financial Services (2016), AB Report, para 6.255: *"The fact that paragraph 2(a) covers violations of obligations under "any other provisions of the Agreement" means that it could be invoked to justify inconsistencies with all of a Member's obligations under the GATS. These include, for example, a Member's most-favoured-nation treatment obligation under Article II, market access commitments under Article XVI, or national treatment obligation under Article XVII."*

US – Tuna II (2017), Panel Report under Article 21.5, paras 7.729-7.730 : *"we agree with the parties and find that the 2016 Tuna Measure is inconsistent with Articles I:1 and III:4 of the GATT 1994. 7.730. Both parties also agree that the Measure is provisionally justified under subparagraph (g) of Article XX. Bearing in mind the findings on this issue made by the panel1237 and the Appellate Body in the first compliance proceedings, we agree with the parties and find that the 2016 Tuna Measure is provisionally justified under subparagraph (g) of Article XX. Thus, the disagreement between the parties centres around the issue of whether the 2016 Tuna Measure is applied in a manner that would constitute a means of "arbitrary or unjustifiable discrimination" within the meaning of the chapeau of Article XX."*

EC – Palm Oil (Indonesia) (2025), Panel Report, para 8.1: *"With regard to the EU measures at issue, the Panel finds that : […] q. the high ILUC-risk cap and phase-out is inconsistent with Article I:1 of the GATT 1994 because it does not accord an advantage to palm oil-based biofuel from Indonesia that is accorded to like products imported from third countries; […] s. with respect to Article XX of the GATT 1994: i. the high ILUC-risk cap and phase-out is a measure relating to the conservation of exhaustible natural resources that is made effective in conjunction with restrictions on domestic production or consumption within the meaning of Article XX(g); ii. the high ILUC-risk cap and phase-out is a measure necessary to protect human, animal or plant life or health within the meaning of Article XX(b); […] iv. the high ILUC-risk cap and phase-out has been administered in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail, because the European Union failed to conduct a timely review of the data used to determine*

which biofuels are high ILUC risk, and because there are deficiencies in the design and implementation of the low ILUCrisk criteria and certification procedure"

US – Steel and Aluminum (Norway) (2022), Panel Report, para 8.1 : *"Regarding Article XXI of the GATT 1994, the Panel does not find that the measures at issue were "taken in time of war or other emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994. The Panel therefore finds that the inconsistencies of the measures at issue with Articles I:1, II:1, and XI:1 of the GATT 1994 are not justified under Article XXI(b)(iii) of the GATT 1994."* (The Panel Report is subject to a pending appeal).

e) Preferential bilateral and regional agreements providing for higher levels of trade liberalization are allowed under certain conditions.

Turkey – Textiles (1998), AB Report, para 58 : *"Accordingly, on the basis of this analysis of the text and the context of the chapeau of paragraph 5 of Article XXIV, we are of the view that Article XXIV may justify a measure which is inconsistent with certain other GATT provisions. However, in a case involving the formation of a customs union, this "defence" is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, both these conditions must be met to have the benefit of the defence under Article XXIV."*

Peru – Agricultural Products (2017), AB Report, para 5.113: *"we consider that the proper routes to assess whether a provision in an FTA that may depart from certain WTO rules is nevertheless consistent with the covered agreements are the WTO provisions that permit the formation of regional trade agreements – namely: Article XXIV of the GATT 1994, or the Enabling Clause as far as agreements between developing countries are concerned, in respect of trade in goods; and Article V of the General Agreement on Trade in Services (GATS) in respect of trade in services."*

Two types of agreements between a sub-group of Members may be distinguished:

- **Preferential agreements that discriminate between parties and non-parties**, where preferential treatment is reserved for the RTA parties. Such agreements may be compatible with WTO law if they satisfy the relevant conditions under Article XXIV of the GATT 1994, Article V of the GATS, or, where applicable, the Enabling Clause, as clarified by WTO case laws below.
    - **Example: Exemples : NAFTA/USMCA; EU-India FTA, EFTA…**
    - According to the WTO RTA database: 391 RTAs are in force, with 356 notifications under Article XXIV of the GATT, 227 under Article V of the GATS, and 65 under the Enabling Clause.
- **Sub-group Agreements implemented on an MFN basis**, where the benefits are extended to non-parties without discrimination.
    - **Exemples : Agreement on Climate Change, Trade and Sustainability, Article 1.5:** *"The Parties affirm their intention to apply this Agreement in accordance with their obligations under paragraph 1 of Article I of GATT 1994 and paragraph 1 of Article II of GATS."*

CONCLUSION

- MFN is not customary international law**.** It exists solely by treaty provisions.

- MFN is present in all WTO Agreements covering trade in goods, services and protection of intellectual property rights.

- In the WTO, MFN, in and by itself, does not force any particular level of market openness. Its policy rationale is to provide a basis for a level playing field with equal conditions of competition among Members.

- WTO Agreements also provide for multiple exceptions to MFN obligations to allow Members to pursue legitimate policy objectives. They also provide for trade remedies to ensure fair competition and a level playing field among Members.

- MFN should not diminish the policy space that Members are entitled to use to implement legitimate regulatory distinctions. MFN would call for the non-discriminatory application to all Members of those regulatory distinctions.

- MFN works best when there is a balance of rights and obligations among Members. It is there for necessary in trade negotiations to manage the risk of "free riding". This calls for ensuring "critical mass" participation in certain situations where such risk is eminent.

- As the global trade landscape evolves and new challenges arise, some situations might call for more flexibility (or exceptions) in the application MFN to allow governments to respond accordingly without violating their treaty obligations.

- A formal amendment to MFN, however, would enter into force only with Members' unanimity.