

National Treatment Rules in the EU Regional Trade Agreements

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Preliminary draft – August 2013

Abstract

Most favoured nation treatment and national treatment are two standards usually related to the general principle of non-discrimination. However, as the most favoured nation treatment is undoubtedly and clearly defined already in the negotiation of the General Agreement on Tariffs and Trade (GATT), the national treatment standard can be differently interpreted even by the GATT and World Trade Organization's (WTO) member states. In this paper we check whether the EU, well known as a partner of many RTAs, is using the same NT standard in all its agreements tying it also with the non-member states. Of our special concern is impact of the different NT standard on intensity of trade in goods with the states – parties of RTAs.

Analysis of clauses related to standards of treatment in the EU RTA is a starting point of our paper. We concentrate on a national treatment, as its content and scope may influence trade more than a scope of MFN granted. The national treatment is also subject to relatively rare analysis in comparison with other aspects of RTAs rules overlapping with the WTO law.

We mainly analyse what is a scope of national treatment granted in such areas as services and establishment and intellectual property. These areas are also covered by the GATS and TRIPS with its own national treatment and MFN clauses. MFN and national treatment are basic principles also in trade in goods, but contrary to the GATT's clauses, they do not cover all trade in services or intellectual property. This leaves plenty of fields to be covered by regional cooperation. We see different rules of national treatment in these areas potentially more disturbing (and more discriminating) therefore intensively differentiating rules of economic cooperation with different partners than in other fields of international economic contacts.

JEL: F13 F15

Key words: national treatment, RTA, European Union

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Introduction

MFN and NT are provisions granted in the framework of GATT/WTO. However proliferation of RTAs makes MFN rather exception than the general rule (TWTO proposes ironically to name it 'Least-Favoured-Nation - see The Future of the WTO, Geneva, 2004, 19). In this paper we analyse to what extent the NT clause remains universal facing the growing number of RTAs concluded by the EU.

According to the WTO database, the European Union notified over forty regional trade agreements (RTAs). Some of them are currently negotiated, others are in force for a long time. The degree of integration in these RTAs varies by region and time of concluding. There are also various standards of treatment granted in these RTAs. The most popular are national treatment (NT) and most favoured nation treatment (MFN) – two standards related to the general principle of non-discrimination. But the clauses related to those standards may differ in various RTAs influencing economic cooperation between partners and overlap with WTO law, as they are fundamental principles of the WTO legal system. The aim of this paper is to analyse the scope and wording of those standards, especially national treatment and its influence on international trade.

In the first part we present the European Union trade agreements, concentrating on its typology and classification, explaining which agreements have been taken into account in further analysis and why. It is a crucial part, as the type of an agreements determines type of treatment clauses used in it. Then we present briefly national treatment standard as well as clauses related to the national treatment in the WTO agreements. In the last part we analyse different clauses used as well as their influence on relations with different partners of the EU.

1. Classification and characteristics of the EU regional trade agreements

The European Union is itself a regional trade agreement in the meaning of the WTO law – article XXIV of the General Agreement on Tariffs and Trade (GATT), as it is a customs union, and art. V of the General Agreement on Trade in Services (GATS), and required notification under article XXIV of the GATT after conclusion of a Treaty establishing the European Economic Community. Beside that fact, the Union and its predecessors – European Economic Community and European Community has always been a great proponent of regional integration and has a long history of establishing free trade agreements.

Most of them has been concluded as association agreements. Association agreements are a special kind of international treaties concluded by the European Union (formerly by the EEC and EC) with especially close partners. It has a specially designed legal basis – currently it is an article 217 Treaty of functioning of the European Union (TFEU). As European Court of Justice said in case *Demirel* association agreements create “special, privileged links with non-member country which must, at least to a certain extent, take part in the Community system”².

Although association agreements cover very broad range of issues, it always has a trade part, which includes free trade agreement, but cover also trade in services and other trade related issues, which might be qualified as the WTO+. In consequence, association agreements can be qualified as economic integration agreement (EIA) within the meaning of the WTO law. Therefore association agreements almost always need to be notified to the WTO as FTA and EIA.

First association agreement has been concluded by the EEC³ shortly after the Community’s creation. It was an Agreement establishing an Association between European Economic Community and Turkey, signed in Ankara on 12th September 1963 (OJ L 361, 31.12.1977, p. 1). As its aim was to prepare Turkey to the EEC accession, it created (in three steps) the customs union with between Turkey and the EU. The full custom union has come into effect in the year 1995 on the basis of a Decision of the EC-Turkey Association Council of 22th December 1995 on implementing the final phase of the Customs Union (96/142/EC).

The EU has therefore a long tradition of concluding association agreements with states, who are intended to join the Union (therefore some of them expired after the respective country access the EC or the EU). The EU tendency to precede a full membership by an association agreement became especially visible in the nineties of the XX. century. The EC concluded so called Europe Agreements with the post-communist states. All these agreements established free trade areas (however with excluded or postponed “sensible” areas). The Europe Agreements has been concluded with Poland and Hungary in 1991, with Czech Republic, Slovakia, Bulgaria and Romania in 1993, with three Baltic States – Estonia, Latvia and Lithuania in 1995 and with Slovenia in 1996. The agreements had similar content. None of them is currently in force due to subsequent EU memberships of the then non-EU parties,

² 12/86, Meryem Demirel p..Stadt Schwäbisch Gmünd, [1987] ECR I-3719, par. 9.

³ Information concerning the EU agreements and trade relations based on:
<http://ec.europa.eu/trade/policy/countries-and-regions/>.

but they might serve as an example of a group of agreements. They should also be taken into account in further analyses as a certain step in the EU RTA evolution.

Currently the EU also has a group of association agreements negotiated and signed with the ultimate objective of full membership of the non-EU partner. The new generation of such EU agreements signed since 2000 are Stabilization and Association Agreements (SAA). They are concluded with Balkan states – in 2000 with Former Yugoslav Republic of Macedonia (FYROM), in 2005 with Croatia (no longer in force due to Croatia's accession to the EU this year), in 2006 with Albania, in 2008 with Serbia and in 2010 with Montenegro. In 2008 also a Stabilization and Association Agreement has been signed with Bosnia and Herzegovina, but is still not in force. The Interim Agreement with Bosnia and Herzegovina, which covers only trade in goods, has been operational since 2008 though.

Very special kind of free trade area, which has been notified by the EU, is Association with Overseas Countries and Territories (OCT). OCT are not independent states, but are closely related to some of the EU member states, with various degree of autonomy. The Association with OCT, although notified as an international agreement has been established on the basis of the EEC Treaty and its current legal basis is an article 198 of the TFEU together with the EU secondary legislation issued by the Council of the EU⁴. The EU notified also an agreement concluded with Faroe Islands, which is a dependent territory of Denmark. The Agreement has been signed in 1997, and replaced previous one from 1991.

EU has special agreements also with not-fully independent states in Europe, such as San Marino and Andorra. It is worth to mention, that in relation to San Marino, an exception from the GATT most-favour nation clause has been agreed already during a Havana Conference in 1945. Formally an agreement establishing customs union between EU and San Marino entered into force in 1992, while an agreement with Andorra in 1991.

It is overstated to say, that the above mentioned agreements are regular free trade agreements in the sense of the WTO law. They are rather natural consequence of complex relations between EU member states and some small, dependent territories. Their volume of exchange in goods with the EU (as well as their overall economic potential) is relatively small.

⁴ Currently it is *Council Decision 2001/822/EC* of 27 November 2001 on the *association of the overseas countries and territories with the European Community*, OJ L. 324, 7.12.2001, p. 1, which is soon going to be replaced by a new act.

Special relations, but based on a regular association agreement link the EU with a group of Africa, Caribbean and Pacific.(ACP) states. All of these ACP states are former EU member states' colonies and had preferential access to the European market granted originally on the basis of the OCT Association mentioned above. As a result of decolonization, these states gained independence and needed a separate international agreement to retain their preferences. ACP countries are linked by a series of international conventions establishing association with the EU (and previously EEC and EC), which has been signed every five years since 1963⁵. In 2000 a Cotonou Agreement has been signed. In the Cotonou Agreement a whole philosophy of granting preferences to the ACP states has been changed. The Agreement itself did not established free trade area or other form of economic integration in the meaning of WTO law. FTA (or FTA&EIA) was supposed to be covered by separate agreements, concluded with the groups of ACP states – so called Economic Partnership Agreements (EPA).

So far, beside the fact that the EU started to negotiate agreement shortly after Cotonou Agreement entrance into force, only one complete EPA has been concluded. In the 2008 EU signed an EPA with CARIFORUM – member states of CARICOM and Dominican Republic. It is the only full EPA concluded. It grants preferences not only in trade in goods, but also in trade in services and in some other trade related aspects of economic relations. Recently, in the year 2009 the EU concluded a few interim economic partnership agreements with ACP states – with Eastern and Southern Africa region, with Central Africa (signed only by Cameroon), with Pacific states (Papua and Fiji) and with Ivory Coast (representing a region of West Africa). An interim agreement with Ghana has been initiated in 2007, but has not been signed yet.

Contrary to the interim SAA with Balkan States, which were negotiated and signed together with the whole association agreement and where trade part of the association became operational before a completion of ratification procedure in every member state of the EU, interim EPAs are separate agreements, which were separately negotiated and require complete ratification procedure. They do not cover all aspect usually covered by a potential EPA. They

⁵ After Younde Convention, signed in 1963 there was a series of Lome Conventions. Younde Convention has been concluded only by African states, but a group of ACP was growing in time because of two simultaneous processes – further countries gained independence and a number of colonies has been descending and further member states joined the EU, enabling their former colonies to join the group entitled to preferences given on the basis of Lome Conventions.

name areas for future negotiations instead and liberalize only trade in goods⁶. They have been notified to the WTO only on the basis of article XXIV of GATT.

Another group of states which have some special ties with the EU are Mediterranean states, located in north Africa. The EC signed Euro-Mediterranean Agreements establishing an Association with seven states of that region. Euro-Mediterranean Agreements were signed between 1995 (with Tunisia and Israel) and 2002 (with Algeria and Lebanon). In 1996 an agreement was signed with Morocco, in 1997 with Jordan and in 2001 with Egypt. Also an agreement with Palestinian Liberation Organization acting for the Palestinian Authority of the West Bank (signed in 1997). In 2008 an agreement with Syria was initialed, but have not been signed due to Syria's internal situation. As the deepening relations with Mediterranean states in ongoing process, the EU recently opened negotiations of a new, more modern agreement called "deep and comprehensive free trade" area with Morocco⁷, and what is more it intends to open negotiations also with Tunisia, Egypt and Jordan⁸. None of the Euro-Mediterranean Agreements have been notified as an EIA at the WTO⁹, which might be surprised, as they all cover trade in services chapter, although not every north African state is the WTO member states. On the other hand they all have been notified as RTAs.

Beside agreements with former colonies and future member states the European Union signed a few agreements with other partners, mainly from central and south America. In 1997 an agreement with Mexico has been signed. It was a framework agreement, which enters into force in 2000. On the basis of this two decisions of Joint EC-Mexico Council completed free trade rules. They were: Decision 2/2000¹⁰ establishing free trade area for goods and Decision 2/2001¹¹ establishing economic integration area with liberalization of trade in service. In 2002 the European Community signed an association agreement with Chile. The agreement, besides other field of cooperation covers also free trade in goods and services.

Recently, in 2012, the European Union concluded two more RTA-like agreements. One of them with Central American countries is a full association agreement. Its trade related part recently became operational with three¹² signatory central American states among of

⁶ Although preferential access to the EU market for All ACP states is granted on the basis of the Generalized System of Preferences for developing countries.

⁷ First round of negotiations took place in April 2013.

⁸ Based on http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf

⁹ <http://rtais.wto.org/UI/PublicSearchByCrResult.aspx>

¹⁰ OJ L. 157, 30.06.2000, p. 10.

¹¹ OJ L 70, 12.03.2011, p. 7.

¹² Honduras, Nicaragua and Panama.

six¹³. Another agreement is a free trade agreement with Peru and Columbia, which is also provisionally operational since 1 August 2013.

Majority of above listed agreements have been concluded with partners significantly less developed than the EU. However in 2010 r. the EU concluded its first free trade agreement with a developed country – South Korea. The agreement entered into force in 2011, being as well the first agreement concluded with an Asian state. In December 2012 another deep and comprehensive free trade agreement has been finalized, as the EU completed its negotiations with Singapore¹⁴.

Another group of countries which intent to establish closer ties with the EU are members of the EU Eastern Partnership. The EU concluded negotiations of an Association Agreement with Ukraine in 2012, but it has not been signed yet, due to some political tensions. Recently the EU informed about completing Deep and Comprehensive Free Trade Areas with Moldova, Georgia and Armenia¹⁵.

As the process of concluding agreements is extremely vivid in the EU, there are several agreements currently being negotiated with other developed countries, mainly with Asian and American ones. The EU opened FTA negotiations with other than Singapore ASEAN countries - Malaysia, Vietnam and Thailand. It negotiates with Japan and India as well. In 2009 negotiations with Canada were launched, but both partners did not manage to rich an agreement yet. Recently also largely commented negotiations with the United Nations started.

A table 1 below shows 25 agreements taken into a account in our study. We excluded from the study agreements and FTAs notified to the WTO which have been concluded with not independent countries. We also excluded member states of European Free Trade Agreement – Iceland, Norway and Switzerland. These states are linked with the EU with very special ties, which includes deeper integration, covering majority of the EU economic legislation. We also excluded Syria, with whom an agreement have been notified, but is not operational.

¹³ The other three are Guatemala, Costa Rica and El Salvador.

¹⁴ A text of the agreement is not accessible yet.

¹⁵ A text of the agreements is not accessible yet.

Table 1

Signatory	Association Agreement	Type of agreement	Year	EIA T/N	MFN – goods	MFN - services	NT - goods	NT - services
Albania	Y	SAA	2006	Y	N	Y	N	Y
Algeria	Y	Euromediterranean	2002	N*	N	Y = GATS	N	Y
Bosnia & Hercegovina	Y/N	Interim SAA	2008	N	N	N	N	N
Cameroon	Y/N	Interim EPA	2009	N	Y asymmetric	N	Y	N
CARIFORUM	Y/N	EPA	2008	Y	Y asymmetric	Y	Y	Y
Central America	Y	FTA/Association Agreement	2012	Y	N	Y	N	Y
Chile	Y	FTA/association	2002	Y	N	N	Y	Y
Columbia & Peru	N	FTA	2012	Y	N	N	Y	Y
Eastern & Southern Africa	Y/N	Interim EPA	2009	N	Y asymmetric	N	Y	N
Egypt	Y	Euro-mediterranean	2001	N*	N	Y= GATS	N	N
Israel	Y	Euromediterranean	1995	N*	N	Y= GATS	N	N
Ivory Coast	Y/N	Interim EPA	2009	N	Y asymmetric	N	Y	N
Jordan	Y	Euro-mediterranean	1997	N*	N	Y	N	Y
Korea	N	FTA	2010	Y	N	Y	Y	Y
Lebanon	Y	Euro-mediterranean	2002	N*	N	Y= GATS	N	N
FYROM	Y	SAA	2000	Y	N	Y	N	Y
Mexico	N	FTA	2000	Y	Y	Y	Y	Y
Montenegro	Y	SAA	2010	Y	N	Y	N	Y
Morocco	Y	Euro-mediterranean	1996	N*	N	Y= GATS	N	N
Pacific countries	Y/N	Interim EPA	2009	N	Y asymmetric	N	Y	N
Palestinian Authority	Y	Euro-mediterranean	1997	N	N	N	N	N
Serbia	Y	SAA	2008	Y	N	Y	N	Y
South Africa	N	Trade Development and Cooperation	1999	N	N	Y= GATS	N	N
Tunisia	Y	Euro-mediterranean	1995	N*	N	Y= GATS	N	N
Turkey	Y	Custom Union	1996	N	N	N	N	N

*agreements cover services but are not notified as EIA

Agreements listed above are the subject of the analysis of NT rules, however other agreements negotiated and signed by the EU are used as a comparison.

2. National treatment – history and characteristics of a clause

In our study we concentrate on a national treatment clauses comprised in the EU agreements. Such clauses, together with most-favoured nation treatment, are an essential part of economic integration, as they prevent discrimination. National treatment and MFN treatment are also central elements of the WTO legal system. But the national treatment standard, beside being far more complex and miscellaneous is more rarely discusses by academia then MFN standard.

National treatment and MFN treatment are both traditional standards of treatment in international economic law, though concept of national treatment was developed not earlier then in the nineteenth century. It resulted mainly from the fact, that states were then interested in diminishing duties rather than in lifting discrimination of foreigners. National treatment was primarily used to grant equal treatment for navigation¹⁶. It was perceived as a highest possible preference, as “no states grants foreigners better treatment then in grant to its own nationals”¹⁷.

National treatment has been classified as one of seven standards of international economic law in numerous classic works of G. Schwarzenberger¹⁸, though he undermines that standards compared to an MFN. He defines NT as a standard, which objective to grant internal parity of partners. He recommended it to be used by “countries with similar structure and complementary interests.”¹⁹. He also admits, it is mainly useful in the fields of establishment, in “personal and property rights of nationals abroad, their right of free access to local courts and equality regarding taxation and navigation.” What might be interesting, is that such a judgment was made after the GATT went in force.

Lack of broader analysis of the national treatment itself is is caused by the fact that it is less standardized then MFN clause. The wording and actual meaning may be very different

¹⁶ G. Butler, S. Maccoby, *The development of International Law*, Longman, 1928, p. 506.

¹⁷ R. Riedl, *La clause de la nation la plus favorisee*, Documnetation presentee au Comite Economique de la Societe des Nations et a la Chambre de Commerce International par le Comite National Autrichien de la Chambre de Commerce Internationale, Vienne, 1928, s. 4.

¹⁸ G. Schwarzenberger, *International Law and Order*, London, 1971, p. 157, *The Frontiers of International Law*, London, 1962, s. 220, *The Principles and Standards of International Economic Law*, Hague Academy of International Law, Leyden, 1966, p. 67.

¹⁹ Schwarzenberger, *The frontiers...*, s. 220.

depending upon the field in which the NT has been granted. On the other hand, authors writing about NT clearly did not imagine, that it can grant better treatment in some fields than to its own nationals.

Currently we can observe several kinds of formulating of NT clauses. First type is “treatment no less favourable than that accorded to like domestic” producers, services suppliers, procurement etc. (depending on a field). Such a wording does not exclude a situation, when foreigners are treated better than nationals.

Another type of clause stipulate that a party should “ensure the same treatment as compared to its own nationals”, or “most favourable treatment”²⁰ which implies that a treatment should be comparable. Neither foreigners nor nationals should be granted any preferences.

Both wordings have in common the fact, that so called *tertium comparationis* is always national company, operator, producer of goods or services. The crucial point in such a stipulation is a word “like”, as it does not have a clear meaning and leaves space for further interpretation. A presence of comparison with domestic situation is the most important element of a national treatment clause. It also enables to differentiate between classic NT clauses and non-discrimination clauses, although they are very similar and - what is probably the most important – have the same objective. Ordinary non-discrimination clause requires only that a state-party do not discriminate, without any references to treatment of domestic goods, services or companies. Therefore, it is weakened by the fact, that there is deprived of comparison and as a result further clarification of how not to discriminate,

3. National treatment in the WTO legal system

A benchmark for NT clauses in regional trade agreements are always clauses from the universal system, meaning the WTO. Especially, that almost all partners of the RTAs with the EU are the WTO member states. Only Lebanon is not the WTO member state, nor it has an observer status. Although Algeria, Bosnia and Hercegovina, Serbia and Bahamas (CARIFORUM) as well as Seychelles (East and Southern Africa) are not full members they obtained observer status at the WTO and are preparing themselves to a full membership.

NT clauses can be found in both GATT and GATS, as well as in other WTO agreements, such as Trade-Related Aspects of Intellectual Property Rights (TRIPS),

²⁰ See A. Reinisch, *Standards of Investment Protection*, Oxford, 2008, s. 54.

Agreement on Government Procurement (GPA). The basic national treatment clause is an article III of the GATT. Its aim is to prevent discrimination versus domestic goods and producers against non-tariff, internal measures. It stipulates that internal taxes and regulations should not be applied so as to afford protection to domestic goods. The main obligation of national treatment is closely linked to many other GATT obligations such as art I (MFN), and article XI (elimination of quantitative restrictions) or article XX (general exceptions).

The article III of the GATT was interpreted by the GATT and the WTO Panel and an Appellate Body (AB) in numerous cases. Besides problems with objective and scope of the national treatment clause, the vast majority of the WTO jurisprudence concerning the clause concentrates on a notions of “like products” and likeness of treatment. Panels and the Appellate Body worked out certain criteria of interpretation that might potentially be used for the same notion in RTAs, but it is not possible to use the interpretation automatically.

Issues debated in the GATT/WTO concerned also the objective of the national treatment. The judgments of GATT and WTO adjudicating bodies made it clear that the principal aim is to avoid protection and to assure “equality of competitive conditions”²¹. Panel’s reports also made it clear that a national treatment obligations cover not only de jure treatment but de facto equal treatment as well. In the Korea – Various Measures on Beef a Panel stated clearly, that “the object of Article III:4 is, thus, to guarantee effective market access to imported products and to ensure that the latter are offered the same market opportunities as domestic products.”²²

Such an analysis is closely related to Panel and AB analysis of the notion of “less favorable treatment”, which is crucial element of every NT clause. Already in a judgment in *US-Section 337* the GATT Panel stated that treatment less favourable “call for effective equality of opportunities” for foreign goods²³. Thus, it is quite clear that to comply with the national treatment obligation the means might not be identical, but they should not differentiate the conditions of market access.

²¹ See for example: Japan - Taxes on Alcoholic Beverages - Report of the Panel, WT/DS8/R, WT/DS10/R, WT/DS11/R, par. 5.5; Korea - Taxes on Alcoholic Beverages - Report of the Appellate Body, WT/DS75/AB/R, par. 119.

²² Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef - Report of the Panel, WT/DS161/R ; WT/DS169/R, par. 627.

²³ United States – Section 337 of the Tariff Act of 1930, Report by the Panel adopted on 7 November 1989, L/6439 - 36S/345, par. 5. 11.

The comparable clauses granting national treatment can be found in the GATS, in its article XVII. The nature of the GATS NT clause is though different then in the GATT article III. First of all its scope is limited only to commitments expressly granted by a certain member of the WTO. It can be limited by mode and by a sector. The key element here are member specific lists of commitments. Before starting to verify if there is a breach of GATS article XVII an adjudicating body must check, whether a defendant party has undertaken a commitment in a relevant sector and mode of supply; has adopted or applied a measure affecting the supply of services in that sector and/or mode of supply and finally whether a measure accords less favourable treatment to foreign services or service suppliers²⁴.

The wording of the national treatment clause in GATS is also different that the one in the GATT. It covers not only services, but services suppliers as well. It also covers “all measures”, and not only those named in the provisions (as in GATT’s article III), which means that there are no national measures falling outside the scope of the NT clause once granted²⁵.

The GATS’s NT clause is, like the one from the GATT, a “no less favourable” clause, which means that theoretically it prohibits only negative discrimination of foreign services and services suppliers. Also the test used by the Panel and the Appellate Body seems a little bit similar in construction to the one used in relation to trade in goods – firstly the Panel or the AB has to verify whether a measure at issue is a measure affecting trade in services, secondly it has to check whether domestic and foreign services are “like” services or services’ suppliers are “like”, and finally it has to state whether foreign services or services’ suppliers are treated no less favourable than the domestic ones²⁶.

Unlike in relation to GATT’s article III, panels and the AB did not need to analyze whether measures must be formally identical or nor, or whether a discrimination must be only de jure or also de facto. It has been determined in the article XVI itself. It stipulates in para. 2 and 3 that requirements may be met by “either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers” and that

²⁴ European Communities - Regime for the Importation, Sale and Distribution of Bananas, (EC – Bananas III), Report of the Panel, WT/DS27/R/ECU, par. 7.314, see also G. Verhoosel, *National Treatment and WTO Dispute Settlement, Adjudicating the Boundaries of Regulatory Autonomy*, Oxford, 2002, p. 20 on the meaning of “affecting”.

²⁵ M. Krajewski. *National Regulation and Trade Liberalization In Services*, Kluwer Law International, Hague, London. New York, 2003, p. 96.

²⁶ Based on P. van den Bosshe, *The Law and Policy of the World Trade Organization, Text, Cases and Materials*, , Cambridge, 2011, pp. 393-395.

decisive is whether a measure “modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.”

GATT’s article III and GATS’s article XVI are not the only NT clauses among the WTO agreements. Among others the most imports from the point of view of RTAs are those included in the article 3 of the TRIPS and in the article III of the GPA. The TRIPS NT clause is unconditional and mandatory for all of the WTO member states. There are exceptions provided by the clause, which arise directly from various international agreements listed in the provision²⁷.

The most significant disadvantage of the GPA’s NT clause arises from a nature of that agreement. As it is plurilateral agreement, therefore not every member of the WTO is automatically a signatory of the GPA. There are only 43 parties of the GPA, including 28 members states of the EU and the European Union itself. Among the partners of the EU of RTA which are already operational²⁸ and are a subject of our analysis²⁹ only Israel and Korea are GPA members. The clause itself has relatively broad scope. It covers products, services and suppliers, that should be treated not less favourably than domestic ones. But the second paragraph stipulates national treatment also to locally-established supplier on the basis of foreign ownership.

4. National treatment in the EU regional trade agreements

First of all we have to observe, that the EU’s RTAs usually cover broader range of issues than just trade in goods. Even these RTAs which have not been notified at the WTO as EIA sometimes cover also trade in services and establishment of companies³⁰. The EU RTA’s usually consist also in other issues such as maritime transport or public procurement and intellectual property. Therefore in the following analysis all possible clauses will be taken into account.

²⁷ The Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits.

²⁸ Among those who negotiate or finished negotiations also: Armenia, Canada, Japan, Singapore and United States.

²⁹ GPA members are also: Iceland, Norway and Switzerland (together with Lichtenstein), as well as the Netherlands with respect to Aruba.

³⁰ Term “establishment” is often used in the EU RTAs. It is taken from the TFEU (and its precessors), means the right to establish a company, a branch or subsidiary of a company in a given state. It aligns mode 3 of the GATS and sometime also mode 4.

As can be seen in the table 1 among 25 agreements taken into account only nine contains NT clauses in relation to trade in goods. Among these agreements are all Economic Partnership Agreements and Interim EPAs concluded with ACP countries. The wording of all these clauses is very similar and is obviously inspired by the article III para 1, 2 and 4 of the GATT. The scope and listed internal measures are exactly the same. Paragraph 1 of relevant NT clauses in EPA and Interim EPA mirrors par. 2 of the article III of the GATT and concerns internal taxation, paragraph 2 mirrors article III par. 4 and paragraph 3 mirrors article III par. 1 of the GATT. Also exceptions are the same and cover internal subsidies and public procurement as well as trade defence instruments.

The differences in wording are not significant, beside of one exception. Article 18 par. 6 of the EPA concluded with Eastern & Southern Africa stipulates, that African states, especially these which are least developed countries (LDC), can departure from NT obligation “to promote the establishment of domestic production and protect infant industry”. The decision is taken by an EPA Committee, but some exceptions have been listed directly in the Annex III to the Interim EPA.

Beside ACP countries being signatories of EPA, only in two other agreements are very similar clauses. An article 13 of the decision establishing free trade area with Mexico and article 77 of the EU – Chile Association Agreement also a wording mirroring exactly article III of the GATT

The actual meaning of these clauses both in EPAs and American agreements is debatable, with an unclear value added. On one hand it may be seen as a step forward in regional trade agreements and a proof of growing significance of non-tariff measures in international trade. As all agreements that comprise NT clauses are inspired by the GATT’s clause except these with Chile and Mexico that were concluded very recently, it might be a sign of a new trend in the EU strategy against next RTAs. On the other hand almost all partners of the EU in these agreements are the WTO member states, which are obliged to grant national treatment for exactly the same measures on the basis of the GATT.

It is worth to underline that none NT clause in relation to trade in goods has been included into the agreement with the only non-WTO member or observer – Lebanon. The same objective seems to be attain in the agreement with Lebanon through different clauses that prohibit quantitative restrictions and discrimination, but the full NT is still absent.

There are only two other agreements which include clauses granting national treatment in relation to trade in goods, although with different wordings. The core element of these clauses is a direct recall of the article III of the GATT. In the EU – Peru and Colombia Agreement not only the article III has been recalled, but also its interpretative notes which should be *mutatis mutandis* applied to the EU – Peru and Colombia Agreement. Also some additional clarification was made, that the NT should be granted by any level of government or authority and to “like, directly competitive or substitutable domestic goods”. The last statement might be difficult to interpretation, because on one hand, according to the same article it should be read exactly the same way as article III of the GATT. On the other hand, in the GATT article we can find only “like” product, what is explained in a numerous judgments as the same as “directly competitive or substitutable”.

Another agreement is the one with South Korea. It also directly recalls GATT and the fact, that national treatment should be granted in accordance with the GATT. In this agreement “non-tariff measures” are especially underlined and its confirmed, that they should be a subject of national treatment.

The EU-South Korea agreement contains also another specific provision, that might be classified as an NT clause. It requires that both partners grant national treatment in the access to public participation in decision making process for issuing technical standards. National treatment should be granted to “economic operators and other interested persons”. It proves how important technical measures became to international trade in goods.

In all of the Interim EPAs, the NT clauses in relation to trade in goods are the only one, because Interim EPAs by definition cover only trade in goods. The only exception is the Agreement with Central Africa (Cameroon), which stipulates also national treatment to products in transit. Similar clauses, with a slightly different wordings, are included into the agreements with Peru and Colombia (article 63) and with Central America (article 165). All of these clauses are in chapters covering trade in goods.

The greater variety of national treatment clauses can be found in relation to trade in services. First, it must be observe, that the majority of the EU RTAs did not follow the GATS model of liberalization of trade in services and do not belong to any of agreement “families”³¹. As a consequence, in the majority of the EU RTAs liberalization of trade in services is not

³¹ Typology after P. Latrielle, J. Lee, *Services Rules in Regional Trade Agreements, How Diverse and How Creative as Compared to the GATS Multilateral Rules?*, WTO Staff Working Paper, 2012.

described by modes. Usually they contain separate provisions concerning services and services' suppliers (mode 1 and partly also mode 2 of services' supply) and establishment which is close to the GATS mode 3 (commercial presence). Only two of the EU RTAs have been classified as GATS-like – agreements with Mexico and with Chile.

The GATS-like construction of these agreements influences also wording of the NT clauses. The EU-Chile Agreement and the Decision 2/2001 of the EU Mexico Joint Council contain both a national treatment clause which exactly mirrors article XVI of the GATS. It must be noted though, that the EU-Chile Agreement comprises two NT clauses in relation to trade in services. There is a separate clause, with exactly the same wording, granting national treatment to establishment. The same separate clauses have been used in the EU-CARIFORUM Agreement and recently concluded agreement with Central America. Also not yet signed agreement with Ukraine replicates this model. The agreement with South Korea is also based on the same model, though beside granting NT for establishment of ... only, it covers also investors.

Unlike an NT clause replicated from the GATT, here – in relation to services, repeating clauses from the GATS have its legal significance. In all of these above mentioned agreements, the key element of liberalization of services is a list of commitments, broadened compared to GATS commitments. In such a situation also a scope of national treatment have been broadened – it might be used in a bigger variety of services and situations.

A slightly different clause have been used in the EU- Colombia and Peru Agreement. Here, we also have two separate articles – one related to a right to establishment and investors and the other to services and service suppliers. Both articles contain three analogical provisions – each for a different party of the Agreement. The wording is precise in defining a scope of application, but does not contain any additional explanations. As a result it mirrors only first paragraph of the article of XVI of the GATS, concentrating mainly on a scope of concessions made by parties in annexes to the Agreement.

Here a question may arise whether such a change and lack of interpretative paragraph in the EU- Colombia and Peru agreements really influences its actual legal meaning. In my view it is not. If we use GATT's article III as a comparison, it is obvious that "treatment less favourably" refers to both factual and legal treatment. Also an answer to the question whether formally different treatment is in conformity with that provision is in my view affirmative. There are situations when formally identical treatment of domestic and foreign services and

suppliers may not be possible. The decisive should be though an actual market access for foreigners.

Another group of the EU agreements, that comprises an NT clause are stabilization and association agreements (SAAs). All of them, except an interim SAA with Bosnia and Herzegovina, have been notified as EIA to the WTO and all contain chapters related to cross border supply of services and establishment, but none of them contain a pure national treatment clause in these areas.

All SAAs contain a clause related exclusively to establishment and operation of subsidiaries and branches of companies. The clauses stipulates that parties grant each other treatment no less favourable than that accorded by a partner to their own companies (branches or subsidiaries) or to any company of any third country, whichever is the better. It makes a combination of MFN treatment and national treatment in one clause.

In every SAA the combination of MFN and NT is granted in relation only to commercial presence (mode 3), but there is also a possibility of widening the scope of the clause, so it covers also self-employed persons. Such a decision is going to be taken by the Stabilisation and Association Council a few years after entry into force of a given agreement. It is five years for FYROM and Albania and four years for Serbia and Montenegro. No such a decision has been taken yet.

The clauses granting NT in SAAs are supplemented by additional provisions, that enable parties of the Agreements to introduce some additional requirements to the other party concerning establishment and operation of a company, which are justified by legal or technical differences. It seems to be a crucial provisions as it may serve as legal basis for introducing measures which may seriously impair market access.

What differs SAA from other RTAs with the EU described above is the fact, that they do not contain a specific list of commitments. Therefore a scope of NT for establishment is very broad and may be applied to all sectors. It might be explained by the purpose of SAAs, which is full membership of non-EU party. The same model has been used in the past in the European Agreements. The right to establishment has been only limited by legal and technical differences between partners.

Contrary to the establishment, the right to provide services has not been granted nor in Europe Agreements in the past nor in SAA. They all contain chapters related to supply of

services, but without granting NT treatment. NT treatment was granted only in explicitly specified sectors – in maritime transport (operating of ships) in the EU – Albania, the EU-Serbia and the EU-Montenegro agreements. The three partners should grant NT also to the EU members nationals in relation to real estate acquisition, but Albania should do it in accordance with its GATS's list of concessions. Such a difference is a result of only Albania being the WTO member state. Above mentioned concessions related to supply of services have not been comprised in the EU-FYROM Agreement, perhaps the SAA was signed with FYROM a few years earlier.

Although liberalizations of services is often only an additive to FTA or CU, what might be interesting is, that although agreements with Mediterranean states have not been notified as EIA to the WTO, they all comprise chapters concerning trade in services. They all prohibit discrimination based on nationality in relation to workers and working conditions, but the clauses stipulating it do not have a characteristics of NT clauses. Nonetheless, two of them – with Algeria and Jordan – contain clauses exactly the same as SAAs. They provide a combination of MFN and national treatment, whichever is better, in relation to establishment. Such a wording is more preferable to foreigners, because they can be entitled to a better treatment than nationals on the basis of MFN. Probably such a clause has been used by the European Community for the first time in the EC-Jordan Agreement, as it is earlier than any of SAAs. In the EU-Algeria Agreement also a similar clause has been used in relation to a maritime transport.

Separate clauses granting the NT in relation to maritime transport services are quite common in the EU agreements. Also a few other agreements contained such clauses – the EU-Peru and Colombia, the EU-Central America, decision 2/2002 of EC-Mexico Joint Council and the EU-South Korea Agreement. Also an future Association Agreement with Ukraine contains such a clause, supplemented by the exception of special right arising from bilateral agreements concluded with the EU member states.

In agreements with Central America and South Korea there are national treatment clauses in relation to some aspects of telecommunication services. In agreements with south Korea and Mexico there are NT granted for financial services.

As it was mentioned above the EU RTAs very often cover broader scope of issues than trade in goods and services. The geographical scope of the GPA is seriously widened by the EU RTAs. Majority of agreements which covers trade in services cover contain also a

chapter related to public procurement. As there are only two GPA members among the EU partners of agreements, they often comprise a provision that grant national treatment to public procurement. The clauses itself mirrors article III of the GPA. Such a clauses can be found in the EU agreements with Albania, FYROM, Serbia and Montenegro (in all SAAs), with Peru and Colombia, with Chile and Central America. Also an agreement with Ukraine comprise such a provision.

Only two agreement contain national treatment clauses in relation to intellectual property right – with Peru and Colombia as well as with Central America. In both cases though, the clauses recall TRIPS - NT and MFN that are comprised there. As a result they cannot be treated as clauses which grant national treatment.

Conclusion

National treatment standard is often used in the EU RTAs, although not every agreement relate to that standard, A benchmark is always the WTO law with its national treatment clauses in the article III of the GATT and article XVI of the GATS. Both in trade in goods and in trade in services clauses used in the EU agreements mirrors the ones from the WTO agreements, An actual legal meaning of such a clause varies depending on an area – it is bigger in services. In case of trade in goods it can limit a scope application the GATT and competence of the WTO Dispute Settlement Body.

The GATT/WTO wording of NT holds only for the WTO members and is still not universal. It means that for the EU partner countries from outside the WTO the NT granted in the framework of the RTAs with the EU is the only way to enjoy this sort of preferences (which, by the way, can be easier to obtain than through membership in the WTO). On the other hand though, there are only few partners of the EU RTAs which are not the WTO member state at the same time.

We can clearly observe an evolution in the EU way of formulating NT. First, the number of clauses is increasing. In older RTAs the NT clause has been rarely used. We can see two reasons: one – stronger belief that the GATT NT clause is enough and secondly closer integration with these partners with whom services were liberalized (it resulted in mirroring the EU treaties relevant clauses rather than the GATS).

NT clauses are almost always present in the newest RTs concluded by the EU. It probably is the sign of a growing importance of non-discrimination, but primarily it is a sign of growing importance of non-tariffs measures as a shaping factor of the international trade. In case of goods, granting NT is not for discriminations rather.

It is much more complicated in case of trade in services, Here, the EU uses different kind of nomenclature. It rarely use “modes”, but have its own system of naming areas in which preferences are granted. It usually refers separately to services and service suppliers and to “establishment”. It is not always clear what is a scope of preferences, although usually it is broader than on the basis of GATS.

The way of wording NT clauses shows as well, that the EU is a strong negotiator, who often concludes agreements with weaker partners. There are a sort of families of treaties with almost identical clauses (not only those related to the NT). There is an EPA family and SAA family, although SAA family evolve in time. First agreement with FYROM is clearly influenced by former Europe Agreement with Central and Eastern Europe. There is a bigger variety in Euro-Mediterranean Agreement, which can be explained by the fact, the they were concluded in two waves, as a time factor is also very important in the EU RTA's.