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CONSEQUENCES OF 'MOST FAVOURED NATION' PRINCIPLE IN INTERNATIONAL TRADE

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Abstract: MFN principle, together with national treatment, is cornerstone of smooth and transparent international trade under auspices of WTO agreements. It has brought all member-States at equal footing pertaining to trade in goods, services and intellectual properties. It has declined protectionist and discriminatory measures of member-States. Nevertheless, it has recognized several exceptional conditions to permit member-States to establish protectionist and discriminatory measures. In this research paper, incorporation of MFN principle in WTO agreements, including GATT, GATS and TRIPS, and exceptions thereto, along with settled trade disputes, has been analyzed. Relevance of exceptions to MFN principle in the modern globalized economy has also been inquired. This research paper is divided into five sections. Section I is introduction; provisions related to MFN principle has been dealt in section II; section III examines the permissible exceptions to the States to decline from the MFN principle; settled disputes have been examined in section IV; and section V is summation.

Keywords: MFN Principle, Non-Discrimination, Equal Treatment, Like Products, WTO agreements, GATT, GATS, TRIPS and DSB**)**

1 .INTRODUCTION

The term 'Most Favoured Nation' (hereafter as MFN) could sound to a layman contrary to its legal meaning. A layman could understand that there is a bi-lateral or multi-lateral treaty between or among the States. Through it, they have created an inner circle of States excluding non-contracting States. Within this inner circle, they have minimized trade barriers by reducing or lifting up duties and increasing quotas in export and import among them. Thereby, they are enjoying trade benefits by establishing monopoly in export and import of goods and services. Such trade benefits are not available to non-contracting States. Whereas; under World Trade Organization agreements (hereafter WTO agreements) the MFN principle is most significant and carries meaning contrary to such literal senses. It connotes 'equal treatment' among the members of WTO agreements in international trades in goods, services and intellectual properties. It derecognizes protectionist measures of States. Free and smooth flow of international trade is being maintained. Equal participation of States is ensured in the international trade. It benefits to the economic interests of developing

and least developed countries, opening doors of world trade to them breaking monopoly of developed or larger countries in international trade. It encompasses the principle of 'non-discrimination' among the members. It makes mandatory to the countries to avail same treatment to other WTO members 'immediately and unconditionally' without any discrimination, as they have granted to a member or non-member of WTO. It reduces trade frictions among WTO member States by dispelling economic and political resentments of States, manufacturers, traders and workers, which are giving birth to the discriminatory trade policies of the States. It ensures stake of the people in international economic order generating jobs and incomes through international trade and thereby playing vital role to develop peace and stability in the life of people and nations as well. It reduces monitoring and negotiating costs of the WTO members and improves their economic efficiency.

The 'MFN' principle is one of the catalysts of WTO agreements, together with 'National Treatment'. The General Agreement on Tariffs and Trade (hereafter as GATT), General Agreement on Trade in Services (hereafter as GATS) and the Agreement on Trade Related Aspects of Intellectual Property Rights (hereafter as TRIPS) are based on this principle. The appellate Body Report states that this principle is 'the cornerstone of the GATT' as well as 'one of the pillars of the WTO trading system.'[1] Terms 'MFN clause' and 'MFN treatment' are running simultaneous to the term 'MFN principle'. Thus, it would be pertinent to distinguish among these terms. Distinction among these terms is clear from their definitions. MFN clause has been defined as 'a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured-nation treatment in an agreed sphere of relations.'[2] It includes advantages, benefits, franchises, immunities or privileges applied by a Contracting Party in respect of a product originating in or intended for consignment to any other country. However, the Montevideo treaty says that such advantages and benefits etc. shall be immediately and unconditionally extended to the other members of WTO, who are not parties in such treaty containing MFN clause, in similar products.[3] Whereas; the MFN treatment connotes grant of similar favourable advantages and benefits to all members of WTO what had been agreed and extended by

[1]Appellate Body Report, US-Section 211 Appropriations Act, Para.297, (as quoted by Moawiah Milhem (2013); Most-Favoured-Nations (MFN) and National Treatment (NT) principles Under GATT and GATS. https://www.academia.edu/5518155/Most-Favoured-Nations_MFN_and_National_Treatment_NT_principles_under_GATT_and_GATS ; Accessed on 7 December 2016.)

[2] Draft article 4 on most-favoured-nation clauses; Yearbook of the International Law Commission, vol. II, Part Two, 1978, Page No. 18; United Nations (2005). http://legal.un.org/ilc/texts/instruments/english/commentaries/1_3_1978.pdf . Accessed on 7 December 2016.

[3] Article 18 of Montevideo Treaty; Yearbook of the International Law Commission, vol. II, Part Two, 1978, Page No. 19; United Nations (2005). http://legal.un.org/ilc/texts/instruments/english/commentaries/1_3_1978.pdf . Accessed on 7 December 2016.

granting State to any other State.[4] The MFN principle, cornerstone of WTO agreements, by and large, incorporates MFN treatment in international trade in goods, services and intellectual properties. It sets non-discriminatory rules among the members and rejects their protectionist and discriminatory measures. It brings equality among the members regarding import, export, sale, use and reproduction of goods and services, irrespective of its origin, destination or transmission.

The MFN status could be granted by bi-lateral or multi-lateral international investment treaties. Such treaties are containing MFN clause to be applicable between or among the contracting parties. The recipient of MFN status enjoys low rate of duty and higher quota by the granting State. Nonetheless, other members are entitled for the same advantages 'immediately and unconditionally' from that granting State pertaining to trade of like goods, service and intellectual properties.[5] Any measure(s) of State(s) tempting to discriminate with other member(s) of WTO, which is non-contracting party(ies) to such bi-lateral or multi-lateral investment treaty(ies), would amount to violation of MFN principle and shall have to be brought in conformity with the WTO obligations through proper amendment in municipal instruments. Under the WTO agreements, equal footing to all State members in the international trades of like substances and products is guaranteed. However, there exist circumstances in which a State can deny equal treatment to others. Security of nation, protection of health and environment, regional interests, economic integrations, labour protections, State trading and emergency etc. are the circumstances. The WTO agreements enumerate and allow these exceptions.[6] Out of them some are pre-GATT/WTO and some are post-GATT/WTO. These enumerated exceptions have been extensively exercised by the members. Trade agreements on the basis of regional and economic integrations have been largely formed. To name few are APEC, the European Union, NAFTA, ASEAN, CEFTA, MERCOSUR and the Andean Community etc.

This research paper examines various provisions related to MFN principle in GATT, GATS and TRIPS and its exceptions with the help of settled disputes. Basic objective of this research paper is to trace the consequences of MFN principle enumerated in WTO agreements that how it has made international trades free from protectionist and monopolistic measures. In this research paper doctrinal research methodology has been applied using primary and secondary sources. This research paper has been divided into five sections. Section I is introduction; provisions related to MFN principle has

[4] Draft article 5 on most-favoured-nation clauses; Yearbook of the International Law Commission, vol. II, Part Two, 1978, Page No. 21; United Nations (2005). http://legal.un.org/ilc/texts/instruments/english/commentaries/1_3_1978.pdf . Accessed on 7 December 2016.

[5] See infra section 2.

[6] See infra section 3.

been dealt in section II; section III examines the permissible exceptions to the States to decline from the MFN principle; settled disputes have been examined in section IV; and section V is summation.

1. Provisions related to Most Favoured Nation (MFN) Principle-

The WTO agreements include GATT, GATS and TRIPS. These agreements begin with objective that all members shall make regulations, subject to their national policies, to drive their international trade and economic relations in a manner to eliminate discriminatory treatment in this field.[7] The purpose of these agreements is to raise living standards of the people ensuring full employment, to establish transparency in liberalized global economy, to facilitate economy of least-developed countries and to eradicate monopoly of developed countries in international trades. Consequently, the MFN principle has become integral base of WTO agreements. Consequences of this principle under these agreements are categorically discussed as below-

2.1. Under GATT- Signatories of this agreement have recognized significance of full employment and large and steadily growing volume of real income and effective demand, full use of world resources, expansion of production and exchange of goods to raise standard of living of people around the globe. Thus, they recognized to conduct their international trade and economic relationship to achieve these ends. As a means to this end, they agreed to enter into reciprocal and mutual advantageous arrangements / agreements through which tariffs and other barriers to international trade can be substantially reduced and discriminatory treatment in international commerce can be eliminated.[8] The signatory members agreed upon the principle of MFN to eliminate discriminatory treatment among the members. The provisions of GATT incorporating principle of MFN are discussed below-

(a) Levy of custom duties and charges- If any member has granted any advantages, favour, privilege or immunity to any other country, member or non-member, with respect to levy of custom duty or charges of any kind on import or export or transfer of payments therefor, such advantages, etc., have to be accorded immediately and unconditionally to all other members.[9]

(b) Strict adherence with schedule of concessions- Members are required to respect and treat no less favourable commerce of others. Nonetheless, subject to permissible schedule of concession, attached to GATT, members are permitted to establish monopoly in trade of certain products; provided such monopolizing measure is not in excess with the permissible limits of conces-

[7] For brief objectives of GATT, GATS and TRIPS, see infra sections 2.1, 2.2 and 2.3 respectively.

[8] Preamble of GATT. https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf. Accessed on 7 December 2016.

[9] Ibid. Article 1:1 of GATT

sion.[10] The MFN principle applies as to stop discrimination beyond the permissible limit.

(c) Internal taxes and regulations- To afford protection to domestic products, members shall not apply internal taxes, charges, laws, regulations and requirements to imported or domestic products which affect the internal sale, offering for sale, purchase, transportation, distribution or use of products. In this sequel, internal qualitative regulations could also not be applied to imported or domestic products requiring the mixture, processing or use of products in specified amounts or proportions.[11] Further, no internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied by any member in such a manner as to allocate any such amount or proportion among external sources of supply.[12] The MFN principle applies between domestic and imported products.

(d) Freedom of transit- Without any distinction as to flag of vessels, the place of origin, departure, entry, exist, destination, ownership of goods, vessels or means of transportation, there shall be freedom of transit through the territory of each members.[13] However, any member may reasonably require[14] entry of traffic in transit through its territory be at the proper custom house.[15] Nonetheless, except in violation of applicable custom laws and regulations, such traffics shall not be unnecessarily delayed or restricted, and shall be exempted from all duties and charges for transit, except charges for administrative expenses and cost of services.[16] Further, each member shall accord no less favourable treatment to other members than accorded to any other country, be it member or non-member of GATT, in relation to the traffic in transit[17], including products in transit.[18]

(e) Antidumping and Countervailing Duty- Dumping or subsidy upon the manufacturing, production or export of any merchandise, bestowed by any member, can be offset or prevented by importing member levying antidumping[19] or countervailing[20] duties, as the case may be. But, such duties cannot be greater in amount than the margin of dumping or subsidy in respect of such product.[21] This measure ensures equal treatment among the members in respect of putting their goods in the commerce of other members.

(f) Marking requirements- Each members shall accord same marking requirements to the products of other members what they have accorded to any third party. By other saying, the MFN principle applied to treat products of members with marking require-

[10] Ibid. Article II of GATT
[11] Ibid. Article III:1 of GATT
[12] Ibid. Article III:7 of GATT
[13] Ibid. Article V:2 of GATT
[14] Ibid. Article V:4 of GATT
[15] Ibid. Article V:3 of GATT
[16] Ibid
[17] Ibid. Article V:5 of GATT
[18] Ibid. Article V:6 of GATT
[19] Ibid. Article VI:5 of GATT
[20] Ibid. Article VI:6 of GATT
[21] Supra notes 16 & 17

ments not less favourable than accorded to other country, member or non-member of GATT.[22]

(g) Quantitative Restrictions- No member shall prohibit or restrict importation or exportation of any product from other members, 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. [23] Though, a member can impose restrictions on import quota subject to the conditions rendered in article XIII of GATT.

(h) State Trading Enterprises- Any enterprise, which has been established or maintained by either member with exclusive or special privileges, shall, in its purchases or sale involving imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.[24]

2.2. Under GATS- As a means to expand trades in service under conditions of transparency and progressive liberalization and to promote economic growth of all trading partners and development of developing countries, this agreement has established a multilateral framework of principles and rules for trade in services. Admitting growing importance of trade in services for the growth and development of world economy, this agreement does, simultaneously, take account of serious difficulties of least-developed countries in view of their special economic situation, development and financial needs. Thereby, it recognizes rights of members to regulate, to introduce new regulations, on the supply of services within their territories to meet their national policy objectives. Its principles and rules are aiming at promotion of interest of all trade participants on a mutually advantageous basis; securing an overall balance of their rights and obligations giving due respect to their national policy objectives.[25] The MFN principle lies in the core of this agreement, which eliminates protective measures of members and applies principle of non-discrimination among the members. The provisions of GATS incorporating principle of MFN are discussed below-

(a) Most Favoured Nation Treatment- This agreement begins with principle of MFN and provides that no Member shall establish such measures as to discriminate among the members in international trades in services, and it shall accord such advantages to the services and service suppliers of all members 'immediately and unconditionally', without treating less favourable than, as it had accorded to the services and service suppliers of any third country, member or non-member to this agreement. This is ex-

[22] Article IX:1 of GATT. https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf. Accessed on 7 December 2016.
[23] Ibid. Article XIII:1 of GATT
[24] Ibid. Article XVII:1(a) of GATT. Though deviation from non-discriminatory principle is permissible; vide Paragraph 2 of article XVII of GATT.
[25] Preamble of GATS. https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm. Accessed on 7 December 2016.

pressed incorporation of MFN principle. However, such equal treatment is subject to the national policy objectives of the members, which has been covered under this agreement.[26] By other saying, a legal instrument of a member, which leads discrimination in the international trade in services or service suppliers among other members and it is covered under any of the provision of this agreements,[27] shall not be violative of the MFN principle of this agreement.

(b) Monopolies and Exclusive Service Suppliers- All members are obliged to ensure that in the supply of the monopoly service in the relevant market, any monopoly supplier of a service in its territory does not act in a manner inconsistent with that Member's obligations under Article II and specific commitments.[28] Members are also obliged to ensure that the monopoly supplier does not abuse its monopoly rights, either directly or through an affiliated company, to act in its territory in a manner inconsistent with such commitments.[29]

(c) Business Practices- Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating those business practices of service suppliers, other than falling under Article VIII, which may restrain competition and thereby restrict trade in services.[30]

(d) Energy Safeguard Measures- This agreement prescribes that the principle of non-discrimination shall be basis of all multilateral negotiations on the question of emergency safeguard measures established by either member, which give advantages to some countries in the trade of services but not to all.[31]

(e) Payments, Balance of Payments and Transfers- The agreement prohibits member(s) to apply restrictions international payments and transfers for current transactions relating to its specific commitments to other member(s).[32] However, a member may adopt or maintain restrictions on trade in services, including payments or transfers for transactions, if there is serious balance of payments and external financial difficulties or threat thereof,[33] provided such restrictions shall not discriminate among the members.[34] This rule applies principle of MFN in application of restrictive measures.

(f) National Treatment- Every member are required to accord same treatment to the services and service suppliers of other members as they have accorded to its own like services and service providers, without treating services and service suppliers of other

[26] Ibid. Article II:1 of GATS
[27] For detailed discussion of provisions of GATT which covers the discriminatory instruments of State members see infra section 3.2.
[28] Article VIII:1 of GATS. https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm. Accessed on 7 December 2016.
[29] Ibid. Article VIII:2 of GATS
[30] Ibid. Article IX:2 of GATS
[31] Ibid. Article X:1 of GATS
[32] Ibid. Article XI:1 of GATS
[33] Ibid. Article XII:1 of GATS
[34] Ibid. Article XII:2 of GATS

members less favourable than its own services and service providers.[35]

2.2. Under TRIPS- The basic objective of this agreement is to reduce distortions and impediments, created by measures and procedures of members, to international trade related to intellectual property rights.[36] To ensure equal footing of all members, this agreement incorporates principle of MFN in various provisions, as one of its cornerstones. Brief examination of these provisions are as under-

(a) National treatment- Each member shall accord to the nationals of other members' treatment no less favourable than that it accords to its own nationals with regard to the protection[37] of intellectual property.[38] However, there are certain exceptions to this national treatment provision which are provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits.[39]

(b) Most-Favoured-Nation Treatment- With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.[40] However, there are certain exceptions to this principle.[41]

2. Exceptions to MFN Principle-

The WTO agreements, including GATT, GATS and TRIPS, respect health of people, domestic needs, economy, regional economic integrations and emergency situations of the members. In these circumstances, WTO agreements allow to members to establish protective and discriminatory measures. Nonetheless, these circumstances are not seamless rather specified in these agreements. In these specified circumstances, the MFN principle does reach to the vanishing point. In other saying, these circumstances allow to members to deviate from the MFN principle, as exception. These circumstances are discussed as under.

3.1. Under GATT-

This agreement aims at promoting international trade in goods free from unreasonable hurdles bringing all members at same footing based on the principle of MFN. Nonetheless, in certain circumstances it allows members to deviate from the principle of MFN; these circumstances are as under-

(a) Historical Preferences- MFN principle for levy of uniform custom duty and other

[35] Ibid. Article XVII:1 of GATS
[36] Preamble of TRIPS. https://www.wto.org/English/docs_e/legal_e/27-trips_03_e.htm. Accessed on 7 December 2016.
[37] For the purposes of Articles 3 and 4 of TRIPS, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.
[38] Article 3 (1) of TRIPS. https://www.wto.org/English/docs_e/legal_e/27-trips_03_e.htm. Accessed on 7 December 2016.
[39] Ibid.
[40] Ibid. Article 4 of TRIPS.
[41] Vide infra section 3.3. (b).

charges[42] shall not impair the members from any historical preferences in respect of levy of custom duties or other charges, which are in force exclusively between two or more of the territories listed in annex A; two or more territories which on July 1, 1939 were connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D; United States of America and the Republic of Cuba; neighbouring countries listed in Annexes E and F. Such deviation from MFN principle is subject to fulfillment of certain conditions set forth therefor.[43] Alike historical preferential deviation from the MFN principle is allowed between the countries formerly a part of the Ottoman Empire and detached from it on July 24, 1923, provided such preferences are approved under Article XXV:5, which shall be applied in this respect in the light of Article XXIX:1.[44]

(b) Internal taxation and regulation exclusively for governmental purposes- The contracting parties are allowed to deviate from MFN principle to impose internal taxes and regulations on products procured by governmental agencies for governmental purposes, exclusively, and not for commercial sale or resale.[45]

(c) Internal quantitative regulations relating to exposed cinematograph films- Any contracting party may establish or maintain internal quantitative regulations relating to exposed cinematograph films in consonance with the requirements of article IV of GATT.[46]

(d) In favour of state trading enterprise- The general principle of non-discriminatory treatment (MFN principle) between state trading enterprise and private traders, in purchase or sale involving either imports or exports, shall not preclude any member to establish mechanisms to give preference to the State Trading Enterprise to do import of export for immediate and ultimate consumption in governmental use, but not for resale or use in production of goods for sale.[47]

(e) Governmental assistance to economic development- A member, economy of which can only support low standards of liv-

[42] Article I:1 of GATT. https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf. Accessed on 7 December 2016.
[43] Ibid. Article I:2 of GATT
[44] Ibid. Article I:3 of GATT
[45] Ibid. Article III:8 of GATT

[46] Ibid. Article III:10 of GATT. Article IV of GATT provides that if any contracting party establishes or maintains internal quantitative regulations relating to exposed cinematograph films, such regulations shall take the form of screen quotas conforming to the requirements that (a) Screen quotas may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized, over a specified period of not less than one year, in the commercial exhibition of all films of whatever origin, and shall be computed on the basis of screen time per theatre per year or the equivalent thereof; (b) With the exception of screen time reserved for films of national origin under a screen quota, screen time including that released by administrative action from screen time reserved for films of national origin, shall not be allocated formally or in effect among sources of supply; (c) Notwithstanding the provisions of sub-paragraph (b) of this Article, any contracting party may maintain screen quotas conforming to the requirements of sub-paragraph (a) of this Article which reserve a minimum proportion of screen time for films of a specified origin other than that of the contracting party imposing such screen quotas; Provided that no such minimum proportion of screen time shall be increased above the level in effect on April 10, 1947; (d) Screen quotas shall be subject to negotiation for their limitation, liberalization or elimination.
[47] Ibid. Article XVII:2 of GATT

ing and is in the early stage of development, can, in order to implement programmes and policies of economic development to raise the general standards of living of their people, take protective or other measures, including tariff protection required for the establishment of a particular industry and quantitative restrictions for balance of payments, affecting imports justiciable as for as they facilitate the attainment of the objectives of GATT.[48] Consequently, such member shall be free to deviate temporarily from the provisions of GATT,[49] notifying the contracting parties to this effect followed by negotiations.[50] It does include deviation from the MFN principle.

(f) Emergency actions on import of particular products- A contracting party (member) can suspend the obligations of GATT in whole or in part or can withdraw or modify the tariff concessions granted to other party(ies) when there arises injury to domestic producers in its territory to like or directly competitive products due to importation of like products under GATT.[51] In this respect, any tariff concessions with respect to preferences can also be withdrawn or suspended by the importing contracting party at the request of the exporting contracting party.[52] A contracting party (member) taking recourse of this facility has to give notice in writing to other contracting parties (members) as far in advance as practicable affording an opportunity of consultation in respect of proposed action, if delay in consultation would cause irreparable damage to domestic products, above action can be taken provisionally throughout period of consultation subject to the condition that consultation would have final effect.[53]

(g) General exceptions- Without prejudice, as to the arbitrary or unjusticiable discrimination between countries or a disguised restriction on international trade, any contracting party may deviate from the non-discriminatory (MFN) principle which is necessary to protect public morals, human, animal or plant life or health, gold or silver, products of prison labour, national treasures of artistic, historic or archeological value, conservation of exhaustible natural resources, etc.[54]

(h) Security exceptions- A member can deviate from non-discriminatory principle giving advantage to either party, if it considers necessary for the protection of essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations.[55]

[48] Ibid. Article XVIII:2 of GATT.
[49] Ibid. Article XVIII:4 (a) of GATT.
[50] Ibid. Article XVIII:7 (a) of GATT. For more details vide Article XVIII of GATT.
[51] Ibid. Article XIX:1(a) of GATT
[52] Ibid. Article XIX:1 (b) of GATT
[53] Ibid. Article XIX:2 and 3 (b) of GATT
[54] Ibid. Article XXI of GATT
[55] Ibid. Article XXI: (b) of GATT

(i) Obligations under UN Charter- A member is allowed to deviate from non-discriminatory (MFN) principle in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[56]

(j) Regional trading agreements- Regional trade unions and free trade areas created by particular agreements are free from the non-discriminatory principle of GATT. The parties within such unions or areas can establish special tariffs, duties and regulations for free flow of trade among them keeping contracting parties out of it which are not falling within these unions or areas. Nonetheless, trade restrictions can be neither established against those outsider contracting parties nor enhanced as was applicable in the constituent territories prior to the formation of such unions or areas.[57]

3.2. Under GATS-

This agreement promotes international trade in services through eliminating discriminatory measures established by members. Simultaneously, it does honour domestic challenges of members. Keeping into account, this agreement recognizes certain situations wherein members are free from the obligations arising out of MFN principle. Brief outlines of these situations are as below-

(a) Annexed exemptions- 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.[58]

(b) Services locally produced and consumed for contiguous frontier zones- The MFN provisions of this Agreement shall not 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.[59]

(c) Economic Integration- Members of this agreement, having substantial sectoral coverage, may do agreement liberalizing trade in services between or among them excluding others from it; provided such agreement negates or eliminates substantially discriminations between or among them.[60]

(d) Labour Markets Integration Agreements- Members of this agreement can do an agreement to establish full integration of the labour markets between or among them; provided such agreements entails exemptions to the citizens of these members from requirements of residency and work permits and is notified to the Council for Trade in Services.[61]

(e) Government Procurement- The principle of most favoured nation regarding non- discrimination among the nations shall not apply to the laws, regulations and require-

[56] Ibid. Article XXI: (c) of GATT
[57] Ibid. Article XXIV of GATT

[58] Article II:2 of GATS. https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm. Accessed on 7 December 2016.
[59] Ibid. Article II:3 of GATS
[60] Ibid. Article V of GATS
[61] Ibid. Article V bis of GATS

ments governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.[62]

(f) General exceptions- The GATS contains a list of circumstances wherein any member can adopt or enforce discriminatory measures; provided such measures are neither arbitrary or unjustifiable as to discriminate among the countries. Some of these circumstances are (a) protection of public morals or to maintain public order; (b) protection of human, animal or plant life or health; (c) prevention of deceptive and fraudulent practices, protection of the privacy of individual in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts and safety.[63]

(g) Security exceptions- The members could disrespect MFN principles contained in this agreement in interest of its essential security in (a) non-furnishing of information disclosure of which it considers contrary to its essential security interests; (b) taking any action relating to- (i) supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment; (ii) fissionable or fusionable materials or the materials from which they are derived; (iii) war or other emergency in international relations; or (c) taking any action in pursuance of its obligations under the United nations Charter for the maintenance of international peace and security.[64]

3.3. Under TRIPS-

This agreement is also not free from exception. It also incorporates the circumstances wherein any member to this agreement can waive MFN principle off. Some of them are being discussed here as below-

(a) Exceptions allowed in Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.[65]

(b) Exception to MFN treatment- Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member: (a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property; (b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country; (c) in respect of the rights of performers, produc-

[62] Ibid. Article XIII of GATS
[63] Ibid. Article XIV of GATS
[64] Ibid. Article XIV bis of GATS
[65] Article 3 of TRIPS. https://www.wto.org/English/docs_e/legal_e/27-trips_03_e.htm. Accessed on 7 December 2016.

ers of phonograms and broadcasting organizations not provided under this Agreement; (d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.[66]

(c) Multilateral Agreements on Acquisition or Maintenance of Protection- General Principles of non-discrimination under TRIPS relating to MFN does not apply to procedures provided in multilateral agreements concluded under the auspices of WIPO relating to the acquisition or maintenance of intellectual property rights.[67]

(d) Protection of public health and nutrition- It is allowed to the members to adopt measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance to their socio-economic and technological development provided such measures are consistent with the provisions of this agreement.[68]

(e) Miscellaneous exceptions- Though with regard to the protection of intellectual property all members are to be treated equally as to any benefit like, advantage, favour, immunity or privilege, except such benefits are (i) deriving from international agreements on judicial assistance or law enforcement of a general nature and not restricted to the protection of intellectual property; (ii) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country; (iii) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement; (iv) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.[69]

3. Analysis of settled disputes relating to the MFN Principle-

A dispute arises when either member adopts any measure, such as any advantage, favour, immunity or privilege, in his favour or in favour of any other country imposing certain trade restrictions, which fellow members consider to be infringement of WTO agreements or failure to observe obligations thereunder. Such is the case of infringement of MFN principles. Settling disputes is the cornerstone of multilateral trading system. It is highest contribution of WTO to the stability of global economy by settling international trade disputes through structured and clear-

[66] Ibid. Article 4 (a) to (d) of TRIPS
[67] Ibid. Article 5 of TRIPS
[68] Ibid. Article 5 (1) of TRIPS
[69] Ibid. Article 4 of TRIPS

ly defined stages of procedures. The Uruguay Round Agreement, 1994 completed with 'Understanding on rules and procedures governing the settlement of disputes' as Annex 2 of WTO Agreement.[70] This 'Understanding' prescribes several procedures for the settlement of disputes between or among the parties, including consultation[71], conciliation or mediation,[72] establishment of panel,[73] adoption of final report of panel by the Dispute Settlement Body, [74] review of panel's report by the Appellate Body[75] and Arbitration.[76] The losing party has to comply with the reports, recommendations and rulings of the dispute settlement body, appellate body or arbitration within stipulated period of time otherwise has to undergo compensations, retaliations etc.[77]

In this research paper, few cases of dispute settlements have been analyzed to make clearer to the MFN principle contained in WTO agreements. It is as below-

(a) Indonesian National Car Programme (DS 54, 55, 59, 64))[78]- The government of Indonesia announced 'National Car Development Programme' in 1996 with an objective to foster development of domestic automobile industry. It had provided number of advantages to the 'pioneer companies,'[79] such as exemption from luxury tax, duty free importation of parts and equipment used in the assembly or manufacture of a national motor vehicle. In June 1996, the Indonesian government announced modifications to this programme making importation of national car in fully built form free of duty and luxury tax on a one time basis for a one year period.[80] The Kia Motor Corporation ("Kia") of Korea, partner of PT Timor Putra Nasional ("TPN"), owned by son of Indonesian President, only could qualify to be pioneer company. This announcement turned impugned on the ground that it discriminates among the exporters of alike products, such as Japan, European Communities and United States.

The Dispute Settlement Board (DSB) established panel on June 12, 1997, which circulated its report in 'Indonesia – Certain Measures Affecting the Automotive Industry' on July 02, 1998 and latter on adopted by DSB on July 23, 1998. The panel found that the 'Indonesian National Car Development Programme, 1996' stood inconsistent or in contravention with the non-discriminatory principles of WTO agreements contained in

[70] https://www.wto.org/english/docs_e/legal_e/28-dsu.doc. Accessed on 7 December 2016.
[71] Ibid. Article 4 of Annex 2 of WTO Agreement.
[72] Ibid. Article 5 of Annex 2 of WTO Agreement.
[73] Ibid. Article 6 of Annex 2 of WTO Agreement.
[74] Ibid. Article 16 of Annex 2 of WTO Agreement.
[75] Ibid. Article 17 of Annex 2 of WTO Agreement.
[76] Ibid. Article 25 of Annex 2 of WTO Agreement.
[77] Ibid. Article 21 and 22 of Annex 2 of WTO Agreement.
[78] https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds55sum_e.pdf. Accessed on 8 December 2016.

[79] An automobile company could qualify to be a 'pioneer company' if it is satisfying the test for 'national motor vehicle' viz., the vehicle (a) be domestically produced using facilities owned by national industrial companies or Indonesian statutory bodies with total shares belonging to Indonesia citizens, (b) use trademarks not yet registered in Indonesia and owned by Indonesians, and (c) be developed with technology, designs and engineering based on national capacity. http://www.commercialdiplomacy.org/case_study/case_carA.htm. Accessed on 8 December 2016.
[80] Ibid.

article 2.1 of TRIMS agreement, relating to the national treatment and para 1 of article I and para 2 of article III of GATT relating to the most favoured nation and national treatment respectively.[81] The programme of 1996 was designed to promote indigenous automobile industries; nevertheless the measures taken for this purpose were discriminating among the exporters of alike products. Thus, Indonesia modified its scheme and implemented recommendations and rulings of DSB.

(b) US – Gasoline Imports case (DS2) - The United States amended US Clean Air Act in 1990 and inserted 'Gasoline Rule' setting out the rules for establishing baseline figures for gasoline sold on the US market with the purpose of regulating the composition and emission effects of gasoline to prevent air pollution.[82] The baseline figures were different for domestic and imported gasoline. Venezuela (and later Brazil) contended it to be unfair because US gasoline did not have to meet the same standards; and argued that it violated the "national treatment" principle and could not be justified under exceptions to normal WTO rules for health and environmental conservation measures. The dispute panel agreed with Venezuela and Brazil and found that these measures (1) treated imported gasoline "less favourably" than domestic gasoline in violation of paragraph 4 of Art. III of GATT, as imported gasoline effectively experienced less favourable sales conditions than those afforded to domestic gasoline, and (2) violated general principle of national treatment under paragraph 1 of Art. III of GATT.[83] The Appeal Body upheld the panel's conclusions modifying panel's reasoning that the measure was "related to" (i.e. "primarily aimed at") the "conservation of exhaustible natural resources" and thus fell within the scope of general exceptions contained in Art. XX (g) of GATT. However, the measure was still not justified by Art. XX because the discriminatory aspect of the measure constituted "unjustifiable discrimination" and a "disguised restriction on international trade" under the chapeau of Art. XX of GATT.[84] The United States agreed with Venezuela that it would amend its regulations within 15 months and on August 26, 1997 it reported to the Dispute Settlement Body that a new regulation had been signed on August 19, 1997.[85]

(c) Colombia Textiles case (DS 461) - Colombia imposed compound tariff, on 23 January 2013, on imports of textiles, apparel and footwear, consisting of (i) a 10 % ad valorem component and (ii) a specific com-

[81] Arbitrator Christopher Beeby. https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0ahUKEwjQ9PK2sOTQAhUKL48KHaw-ARoQFggtMAM&url=http%3A%2F%2Fwww.tripsagreement.net%2Ftrips_files%2Fdocuments%2FWTDS54-15.DOC&usg=AFQjCNE0rOQQMooyzU6UlK9pXGADcj3M1A&sig2=xSGD01cpQqjJ20fjEXIEXA&bvm=bv.140915558,d.c2I&cad=rja. Accessed on 8 December 2016.

[82] https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds2sum_e.pdf. Accessed on 9 December 2016.

[83] Ibid.

[84] Ibid.

[85] https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp3_e.htm. Accessed on 9 December 2016.

ponent, varying according to the import value and customs classification of the merchandise. Panama claimed that the measures taken by Colombia are inconsistent with Article II: 1 (a) and (b), VIII: 1 (a) and X: 3 (a) of the GATT, 1994. At the request of Panama, the Director-General composed the panel on January 15, 2014. Colombia argued that the imports affected by the compound tariff constitute 'illicit trade' and article II of GATT does not apply to illicit trades, moreover compound tariffs are protected under article XX (a) of GATT, as a measure to protect public morals, and under article XX (d) of GATT, as a measure to secure compliance with Colombia's laws against money laundering. The panel refrained from issuing finding on whether article II of GATT, 1944 applies to 'illicit trade' or not. But, the panel noted that Colombia's compound tariff applies to all imports of the products at issue without any distinction as to licit or illicit trade or for money laundering. The panel found that the compound tariff is no way satisfying the justification under articles XX (a) and XX (d) of GATT, 1994. Colombia has, the panel found, failed to demonstrate that how compound tariff could protect the public morals or fight against the money laundering, and held it inconsistent with Article II: 1 (a) and (b) of the GATT, 1994. Colombia appealed against finding of panel. The Appellate Body summarily reversed that finding of panel as to issue finding on whether article II: 1 applies to 'illicit trade' or not, and held that it applies to all kind of trades including 'licit' and 'illicit'. However, to combat against money laundering, the Appellate Body ruled, a member may exhaust exceptions contained in article XX of the GATT, 1994. Thus, finding of panel, as to violation of article II of GATT, 1994, was upheld in appeal. Non-justiciability of article XX (a) and (d) in the instant case, the panel's findings were upheld upon slight different grounds. To respect its WTO obligations, Colombia submitted to DSB on July 21, 2016 to implement its recommendations and rulings within a reasonable period of time, which has been determined to be 7 months by the arbitrator which shall expire on January 22, 2017.[86]

(d) Ukraine- Definitive Safeguard Measures on Certain Passenger Cars (DSB468)- Ukraine imposed certain definitive safeguard measures on import of certain passengers cars and investigation procedure therefor to safeguard indigenous automobile industry. It resulted into increased import duty on those definite passenger cars. Japan's challenge was upheld by the panel with finding that measure in issue is inconsistent with article XIX: 1 (a) of GATT, as there was no demonstration of circumstances proving unforeseen developments leading adverse effect on economy of Ukraine and article II: 1 (a) of GATT, as to national treatment. Panel recommended for revision of above measure to bring in consistency with WTO agreements. Accordingly, Ukraine revoked safeguard

[86] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds461_e.htm. Accessed on 9 December 2016.

measures on import of passenger cars on September 10, 2015.[87]

(e)Japan- Alcoholic Beverages II (WT/DS8, 10, 11)- Japan amended its Liquor Tax Law, 1953 establishing a system of internal taxes applicable to all liquors at different tax rates depending on which category they fell within. The tax law at issue taxed 'shochu' (Japanese liquor) at a lower rate than the other liquors, such as vodaka, liqueurs, gin, genever, rum, whisky and brandy (exported from other countries, such as Canada, European Communities and United States).[88] At the request of affected parties the issue reached to DSB, which established Panel. The Panel's report was circulated to the WTO members on July 11, 1996 with conclusion that (i) Shochu and vodka are like products and Japan, by taxing the latter in excess of the former, is in violation of its obligation under Article III:2, first sentence, of the General Agreement on Tariffs and Trade 1994 and (ii) Shochu, whisky, brandy, rum, gin, genever, and liqueurs are "directly competitive or substitutable products" and Japan, by not taxing them similarly, is in violation of its obligation under Article III:2, second sentence, of the General Agreement on Tariffs and Trade 1994.[89] The Panel recommended that Japan be asked to bring its Liquor Tax Law into conformity with its obligations under the General Agreement on Tariffs and Trade 1994.[90] In appeal, the Appellate Body upheld findings of the Panel. Accordingly, Japan amended its taxing law to bring into conformity with WTO's obligation relating to MFN principle.

(f) Japan –Film (WT/DS44) - Japan took certain measures which affected the distribution, offering for sale, and internal sale of imported consumer photographic film and paper, imposing restrictions on large retail stores and promotions. Affected products were consumer photographic films and papers imported from US, EU and Mexico. US claimed that Japan has treated imported films and papers less favour than its own and nullified/ impaired benefits accruing to the US, violating its obligations under WTO agreements under Articles III, III:1, III: 4, X, X: 1, X: 3, XXIII: 1 (a) and XXIII: 1 (b) of GATT, 1994.[91] In appeal, the Appellate Body upheld the findings of the Panel and ruled that (i) there had been no violation of articles XXIII: 1 (a) and XXIII: 1 (b) of GATT, 1994, since US couldn't establish that measures at issue had nullified or impaired benefits accruing to the United States within the meaning of Art. XXIII: 1 (a) and (b);[92] (ii) there had been no violation of articles III, III:1, III: 4,

[87]https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds468_e.htm. Accessed on 9 December 2016.
[88]https://www.wto.org/english/res_e/booksp_e/dispu_settlement_e.pdf. Accessed on 9 December 2016.
[89] Panel Report, para. 7.1. http://www.mofa.go.jp/policy/economy/wto/cases/WTDS8ABR.pdf. Accessed on 9 December 2016.
[90] Ibid. Panel Report, para. 7.2.
[91]https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds44_e.htm . Accessed on 9 December 2016.
[92] The panel concluded that a complaining party must demonstrate three elements under Art. XXIII: 1(b): first, application of a measure by a WTO Member; secondly, a benefit accruing under the relevant agreement: and thirdly, nullification or impairment of the benefit as the result of the application of the measure. https://www.wto.org/english/res_e/booksp_e/dispu_settlement_e.pdf. Accessed on 9 December 2016.

because the distribution measures were generally origin-neutral and did not have a disparate impact on imported film or paper and the United States couldn't proved that the distribution measures were inconsistent with these Articles; (iii) the publication requirements under articles X, X: 1, X: 3 extends to two types of administrative rulings: first, administrative rulings of "general application"; and secondly, "administrative rulings addressed to specific individuals or entities" that establish or revise principles or criteria applicable in future cases. Thus, Japan was not in violation of these Articles too, because the United States failed to demonstrate that Japan's administrative rulings at issue in this case amounted to either of these administrative rulings in respect of which the publication requirement under Art. X: 1 should be applied.[93] The dispute ended in favour of Japan.

(g) EC – Asbestos (WT/ DS135)- On December 24, 1996, pursuant to the Labour Code and the Consumer Code, the French Government adopted Decree No. 96-1133 banning manufacture, processing, sale, import, domestic marketing and transfer under any title of all varieties of asbestos fibres or product containing asbestos fibres, except existing materials, products or devices containing chrysotile fibre.[94] Thus, Canada complaint to EC that this law of France violates Arts. III: 4, XX and XXIII: 1 (b) of GATT discriminating imported asbestos (and products containing asbestos) from certain domestic asbestos substitutes, such as PVA, cellulose and glass (PCG) fibres and products containing such substitutes.[95] Reversing findings of Panel that products in issue were 'like products' and measure was inconsistent with Art. III: 4 of GATT, the Appellate Board held that, emphasizing a competitive relationship between products as an important factor in determining likeness in this context, either product was not 'like product'.[96]

(h) The Appellate Board upheld the finding of Panel that the ban on import of asbestos is justified to protect human life and health and satisfy the conditions of the Art. XX chapeau, as the measure neither led to arbitrary or unjustifiable discrimination, nor constituted a disguised restriction on international trade.[97] The Appellate Body further rejected Canada's claim and held that these measures didn't result in non-violation nullification or impairment under Art. XXIII: 1 (b) of GATT, because the Canada had had reason to anticipate a ban on asbestos.[98]

4. CONCLUSION AND SUGGESTIONS-

The MFN principle is cornerstone of WTO agreements, including GATT, GATS and TRIPS. It has been respected by all mem-

[93] Ibid.
[94] https://docs.wto.org/dol2fe/Pages/FE_Search/MultiDDFDocuments/44321/Q/WT/DS/135R-00.pdf;Q/WT/DS/135R-01.pdf;Q/WT/DS/135R-02.pdf. Accessed on 9 December 2016.
[95] https://www.wto.org/english/res_e/booksp_e/dispu_settlement_e.pdf. Accessed on 9 December 2016.
[96] Ibid.
[97] Ibid.
[98] Ibid.

bers. It is playing significant role in the establishment of orderly international trading system recognizing equality among the members and their nationals too. It has augmented development of national economy, living conditions of people, job opportunities and full employment, eliminating discriminatory administrative practices and measures of members based on geographical, economic, cultural and political differences. No member is allowed to go against the MFN principle set in the WTO agreements, including GATT, GATS and TRIPS.[99] Whenever, any member-country's administrative practices or measures have been found in violation of MFN principle, that have been amended by the concerned members, followed by negotiations and decisions of Dispute Settlement Body, to accord with the MFN principle as obligations of WTO agreements. [100] Simultaneously, the WTO agreements do respect economic, morality, health of people, labour market, environmental, security, regional and domestic concerns of the members. Thereby, these agreements contain certain provisions, [101] which are contrary to the MFN principle, permitting members to establish administrative and legislative measures in these concerns.[102]

Nevertheless, few permitted exceptions to MFN principles have been obsolete and have lost its significance as far as international trade is concerned in the modern globalized world. Interdependence of the countries in goods, services and intellectual properties has become inseparable demand in the present world. Equal opportunity to the countries to contribute in the growth of world economy and development of humanity has become inevitable. It can be ensured only through the compliance of MFN principle by the all member-countries. Thus, such exception to MFN principle, which has become obsolete and meaningless, must be revisited and repealed. Such exceptions are increasing rift between the developed and developing member-countries. To count, historic preferences, regional trading agreements, economic integration, state trading enterprises and government procurement are few of these exceptions, which are requiring revisit.

In my opinion, historic preferences, regional trading agreements and economic integrations have been made permissible exceptions to MFN principle under the WTO system of international trade due to particular nature of economy of members falling in that sphere; whereas, exceptions to MFN principle in the favour of State trading enterprises and government procurements have been based on the quality of products. Now much water has passed under the

[99] Brief discussion of provisions of GATT, GATS and TRIPS have been presented in supra section 2, which incorporate MFN principle.
[100] Few matters have been discussed in supra section 4.
[101] These provisions operate as exception to MFN principle.
[102] The provisions of WTO agreements allowing members to establish measures contrary to MFN principle have been discussed under supra sections 3 within the title 'Exception to MFN Principle.'

bridge. Economy of either member- States has no longer remained with particular nature and States have decentralized its trading enterprises and procurements into several private enterprises. In addition, economic integration based exception to the MFN Principle has emerged as noodle bowl. Hence, these exceptions to the MFN principle under WTO agreements must be revisited and revised to expand the sphere of MFN principle in the international trades. Minimum exceptions to the MFN principle under WTO agreements would favour maximum flow of international trade free from protectionist hurdles.

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