# COMPLICATIONS IN INTERPRETATION OF 'MOST-FAVOURED-NATION (MFN) TREATMENT' CLAUSE WITH REFERENCE TO GENERAL AGREEMENT ON TRADE IN SERVICE (GATS)

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## INTRODUCTION

"Most Favoured Nation" ("MFN") treatment generally speaks to "accord the most favourable tariff and other regulatory treatment given to the article of one Member country at a particular time during the process of import or export of "like products".[1] Thus in simple word it speaks about the equality of treatment to all like products, imported or exported from different member countries. MFN treatment is one of the two pillars of Non-discrimination Obligation with National Treatment (NT)[2].

The MFN treatment standard has its elongated annotation, in back twelfth century. And it is phrased and incorporated in bilateral trade agreements in the late seventeenth century[3]. Later on United States integrated an MFN clause in a former treaty in the year 1778. This held amid US and France.[4] Then prior to World War 2, in GATT, one of the important treaty on

[1] MOST-FAVOURED-NATIONTREATMENT PRINCIPLE (last visited Jun 13, 2017).

[2] Nellie Munin, Kluwer Law International Legal Guide to GATS 105 (1st ed. Wolters Kluwer Law & Bus. 2010).

[3] Oecd, Most-Favoured-Nation Treatment in International Investment Law Papers - OECD iLibrary (2004), http://www.oecd-ilibrary.org/finance-and-investment/most-favoured-nation-treatment-in-international-investment-law_518757021651 (last visited Jun 13, 2017).

[4] Id. at 4 also refer Treaty of Amity and Commerce, February 6, 1778, France-United-States, Article 3, 8 Stat. 12 ("The Subjects of the most Christian King shall pay in the Ports, Havens, Roads, Countries, Islands, Cities or Towns, of the United States or in any part of them, no other or greater Duties or Imposts . . . than those which the Nations most favoured are or shall be obliged to pay; and they shall enjoy all the

international economic relation has included the provision of MFN treatment provisions in Article I (General Most-Favoured-Nation Treatment) of GATT[5]. This is the most important turning point. Later on, in same foot step General Agreement on Trade in Service (GATS)[6] also included Article II, the Most-Favoured-Nation Treatment clause.[7]

The General Agreement on Trade in Service (GATS) was institutionalised under the Frame work of World Trade Organisation (WTO), resulting from the Uruguay Round in 1994. GATS came in force in January 1995. GATS was the newest and earliest multilateral agreement which endeavour the concept of "liberalisation of International Trade in Service"[8] .

This paper has address one of the important obligation of GATS embodied in Article II[9] i.e. Most Favoured Nation (MFN) standard. According to Philip Raworth, the Article II of GATS contains the customary MFN principle. MFN obligation is general in nature and applies to all measure whether it is subjected to particular commitment or not[10]. It is noted by UNCTAD that in 2011 World Development Indicators has shown that the services sector accounts for almost 71% of global GDP in 2010 and is expanding at a quicker rate than the agriculture and the manufacturing sectors.[11] In order to liberalise trade among member and non member countries, it is essential that the proper interpretation of the MFN provision is done. The paper intended, to deal with different issues related to interpretation of MFN. First of all the paper has addressed why there is an ambiguity among the members of the GATS relating to the interpretation MFN

Rights, Liberties, Privileges, Immunities and Exemptions in Trade, Navigation and Commerce . . . which the said Nations do or shall enjoy."); see also id. Art. 4 (similar provision with respect to U.S. nationals in France).

[5] Oecd., Supra at 4

[6] The General Agreement on Trade in Service,1992

[7] Id., though in the case of the GATS, a member may maintain a measure inconsistent with this obligation provided that such measure is listed in, and meets the conditions of, the Annex on Article II Exemptions

[8]Nicolas F. Diebold, Non-Discrimination in International Trade in Services 1 (1st ed. Cambridge Univ. Press 2010).(f m1)

[9] The General Agreement on Trade in Service,1992

[10]Philip Marc Raworth, Trade in Services 47(Oxford Univ. Press, U.S. 2005).

[11] Global Service Forum, Global importance of services ,<http://unctad.org/en/conferences/gsf/2013/pages/importance-of-services.aspx> (last visited Jun 13, 2017).

clause.[12] Secondly, the paper has addressed the reason why, there is uncertainty concerning the application of MFN principle in connection with the issue of 'likeness' in respect to 'service' and 'service supplier'[13]. And thirdly, the paper has addressed how the 'Treatment No Less Favourable' shall be interpreted in milieu of 'Most Favoured Nation' principle under GATS.[14]

**PROBLEM**

The General Agreement on Trade in Service (GATS) has been concluded in the year 1992. This treaty primarily aims for the liberalisation international trade of service. However from the date of enforcement of Treaty, till today more than twenty years passed but not many cases came before WTO dispute settlement body, which actually deals violation of GATS principles[15],[16] The Appellate Body while delivering its judgement in Canada – Autos case, was of opinion while deciding one issue of GATS, that the substance require unique consideration and so it leaves it's interpretation for some other case where the substance will be chiefly regarding GATS obligation violation.[17] Similar issues have also risen in EC Bananas III case, but in both the cases the chief issue was regarding the violation GATT not GATS.[18] The interpretation of MFN treatment under Article II of GATS is pretty complicated. It is principally because of the want for suitable jurisprudential contemplation. The character of service operation is intangible so it is tricky to evaluate it in regard to a physical component. This is the reason why 'like service' and 'like service supplier' frame work in GATS principle has become complex in comparison to tangible like product under the periphery of GATT. Lastly inseparability of service and service supplier also escort to uncertainty while interpreting

[12]Sayashi Saha, "Difficulties in interpretation of M F N under GATS", 7 (Sep, 25 2014) (unpublished manuscript) (assignment submitted in the partial fulfilment of the requirement for degree of LLM, at WBNUJS)

[13] Id.

[14] Id.

[15] Reference of only 5 cases are there Canada- Autos(2000), EC-Bananas III(1992),Mexico-Telecoms(2004), US- Gambling (2005), and China Publication and Audio visual Product(2009)

[16] Difficulties in interpretation of M F N under GATS , supra at 7

[17] "Given the Complexity of the subject-matter of trade in services, as well as the newness of the obligation under the GATS" (Para. 184) Appellate Body Report, Canada-Certain Measure Affecting the Automotive Industry,¶ 184, WT/DS139 & 142/R ( May. 31, 2000)

[18] Difficulties in interpretation of M F N under GATS , supra at 7

the MFN principle (i.e. whether likeliness of service or likeliness of service supplier, which should be taken into consideration)[19].

Apart from this, there is another issue relating to non-inclusion of Para graph 2 and 3 in Article II of GATS which has been done in Article XVII. This paragraph deals with the meaning of 'No Less Favourable Treatment'. This has lead to difficulty in interpretation of 'MFN clause'. It raised various questions, like whether 'it is a lacuna' or a 'deliberate omission'. These questions has give the condition some other meaning rather than what given in the text of Article XVII.[20]

## SCOPE AND LIMITATION

The paper has primarily dealt with the queries such as, whether there is conjunctive or disjunctive interpretation of the expressions 'service' or 'service supplier'. And second whether the notion of 'treatment no less favourable' in Article II and Article XVII of GATS ought to be construed to comprise 'de facto' and 'de jure' discrimination, While the Article XVII talk about only one notion. The scope of this paper is limited to the relevant MFN provisions of the General Agreement on Trade in Service, (GATS) 1992[21]and General Agreement on Tariff and Trade (GATT).

## UNDERLINED PRINCIPLE IN MOST FAVOURED NATION (MFN) TREATEMENT WITHIN THE CONTEXT OF ARTICLE II OF GATS AND ITS SCOPE OF APPLICATION

To promote GATS as a multilateral compact, the principle of Most Favoured Nation Treatment is fundamental.[22] It is preserve in Article II of the GATS[23]. This principle has its roots in the

[19] Id.

[20] Id.

[21] i.e. Article II and XVII

[22]World Trade Organisation, UNDERSTANDING THE WTO: BASICS: Principles of the trading system http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm(last visited Sept. 19, 2014).

[23] MFN principle is enshrined in Article II of GATS which provides:-

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

early Treaties of Friendship, commerce and navigation. Its germs are also there in Inter War years. MFN treatment is vital for the free flow of inter-state Trade and commerce.

In the intercession of International Trade Organisation (ILO), the US argued for the Most Favoured Nation Principle provision is "absolutely fundamental". It has been interpreted in the draft charter of ITO[24].

Most Favoured Nation Treatment is one of the principles along with the national treatment of the Non Discrimination, which is the key concept of WTO law and Policy. This principle is one of the core provisions of GATS, 1992.[25]

MFN standard incorporate following notions:

First, every nation should be treated equally. All mandates for WTO members needed to be followed by every member nation.[26]

Second, every member state will give equal favour to other member states in regards to trade policies (including tariff, quotas etc).

Third, the member nation should not any way distinguish between the foreign and domestic product and services.[27]

MFN standard guarantees that each member nation shall treat all services and service supplier equally in case of like imported service and service supplier of other state, whether or not the source imported service and service supplier is from WTO Member. This principle of MFN

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

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

[24] J. JACKSON AND W. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 252 (2d ed. 1986) also Walter Kolligs, The United States Law of Countervailing Duties and Federal Agency Procurement after the Tokyo Round: Is It GATT Legal, 23 Cornell International Law Journal 553, 562 (1990), http://scholarship.law.cornell.edu/cilj (last visited Jun 14, 2017).

[25] WTO, INTRODUCTION TO WTO BASIC PRINCIPLE AND RULE ecampus.wto.org, https://ecampus.wto.org/admin/files/Course_385/Module_1562/ModuleDocuments/BP-L1-R1-E.pdf (last visited Jun 14, 2017).

[26] WORLD TRADE ORGANIZATION, WTO | Understanding the WTO - principles of the trading system, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Jun 13, 2017).

[27]"Dispute Settlement" (United Nations Conference on Trade and Development, World Trade Organization, 2003) http://unctad.org/en/docs/edmmisc232add31_en.pdf(last visited Sept. 19, 2014).

balances interests which emanate from the fact that each member has at the same time a double role in GATS context of right provider and that of beneficiary.[28]

Article II of GATS has mentioned about brought aspect. It forbids biasness amid like services and service suppliers from diverse countries.[29] The scope of the MFN commitment elucidate, that all services are covered by the market access obligations. The aspect of the GATS has broadens its periphery as compare to GATT.[30]

This article runs in correspondence with GATT[31], and it pertain to,*'any measure covered by this Agreement'. 'Measure'* at this juncture means what is distinct in *The GATS, Article XXVIII(a)"Measure" here is any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;"*[32]

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[28]Nellie Munin, Kluwer Law International Legal Guide to GATS 105 (1st ed. Wolters Kluwer Law & Bus. 2010).

[29] Article II of GATS reads as:

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

[30] Id. Also refer Lazarus Garakara, GATT/GATS MFN and National Treatment!! Academia.edu, http://www.academia.edu/3055003/GATT_GATS_MFN_and_National_Treatment_ (last visited Jun 14, 2017).

[31]Mitsuo Matsushita et al., The World Trade Organization 61 (10th ed. OUP Oxford 2012).

[32] "This Agreement applies to measures by Members affecting trade in services."

And "For the purposes of this Agreement, trade in services is defined as the supply of a service:

(a) from the territory of one Member into the territory of any other Member;

(b) in the territory of one Member to the service consumer of any other Member;

(c) by a service supplier of one Member, through commercial presence in the territory of any other Member;

(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member." Article 3 says "For the purposes of this Agreement:

(a) "measures by Members" means measures taken by:

(i) central, regional or local governments and authorities; and

(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;

(b) "services" includes any service in any sector except services supplied in the exercise of governmental authority;

Thus if the most favoured nation standard is considered then the stipulation will have a narrow application. This will not serve the ultimate purpose of GATS's commitment. Only when the broader stipulation of GATS will be taken into consideration than only the ultimate purpose of GATS will be served.[33]

## THREE TIER EXAMINATION OF CONSISTENCY FOR GATS VIOLATION

In the process of adjudicating different dispute, World Trade Organisation Adjudicating Bodies has prepared a three tier examination of consistency. To proof particular breach of the MFN stipulation of GATS, 3 phase test need to fulfil:

First, to verify whether the measure in issue is roofed by GATS or not, that is "affecting trade in service"

Second, to verify whether the service or service supplier mentioned are like service or service supplier

Third, to verify whether, less favourable treatment is in concurrence to service or service supplier of a member.[34] But the application of these tests has following constraint.

- The very character of the service operation is intangible and it cannot be evaluated considering the product which has a tangible character. It is the reason why 'like service and like service supplier' structure has become tricky[35].
- The non-parting nature of service and service supplier has elevated the issue whether likeness of service and service supplier is apposite consideration for interpretation of provision.[36]
- The non- insertion of the Paragraph 2 and 3 after Article II which recites "No Less Favourable Treatment" which was done in the National Treatment clause has elevated interpretative intricacy. The bewilderment has raised in this regard, i.e.

(c) "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers." Also refer id.

[33]Nellie Munin, Supra. at 107

[34]Peter Van den Bossche, The Law and Policy of the World Trade Organization 336 (2nd ed. Cambridge Univ. Press 2005).

[35] Id. Also Difficulties in interpretation of M F N under GATS Supra at 14

[36] Id.

Whether this step is a conscious exclusion to make the provision stretchier or is just a lacuna in respect of the MFN stipulation[37].

## 'LIKENESS'ACROSS SERVICE AND SERVICE SUPPLIER

In GATT imperative on Most Favoured Nation Principle essentially limited to product not the producer but under GATS the responsibility extended to both service and service supplier, it is may be because of the intangibility and inseparability between the service and service supplier. Like in commercial presence and temporary movement of natural person i.e. in Mode 3 and Mode 4 in order to supply service into the importing country.[38]

They require entering in territory of importing country. Here separating both service and service supplier is difficult. Thus bearing in mind the highlighted reasons the negotiator in GNS (Group on Negotiation) acknowledged the early need to take into account the' Service Supplier'.

This part of the paper is mainly concerned with the issue 'why there is an ambiguity among the members of the GATS relating to the interpretation MFN clause'. In order to address the issue it is need to understand, "Whether there is conjunctive or disjunctive interpretation of the term service or service supplier?" this part has been addressed different section. That is to state the meaning of 'service and Service Supplier'. Second to explain the hitches this may arise in construction of phase "like service and service supplier". Third, to mention the "Different Approaches to construe "like service and service supplier"[39]

## SERVICE AND SERVICE SUPPLIER- MEANING

The concept of service supplier is defined in the GATS under Article 28(g)[40]. This definition itself not really makes sense until and unless, reference is made of Article 28(b) of GATS.[41] Conglomerate effect of these two provisions will help in defining 'supplier of service'.

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[37] Id.

[38] WORLD TRADE ORGANIZATION, WTO | Services: Movement of natural persons, https://www.wto.org/english/tratop_e/serv_e/mouvement_persons_e/mouvement_persons_e.htm (last visited Jun 14, 2017).

[39]Nicolas F. Diebold, Non-Discrimination in International Trade in Services 204 (1st ed. Cambridge Univ. Press 2010).

[40] "*A service supplier is any person who supplies a service"*

[41] "Supply of service includes, the

A supplier of service includes following:

- Natural person
- Artificial person
- Service suppliers providing their service in forms of 'commercial presence', such as a branch or a representative office.[42]

**Understanding of 'like service' and 'like Service Suppliers' under the setting of GATS**

Service and service supplier from other member are entitled to the MFN standard treatment by other member, if they are 'like' in character with the other countries like service or like service supplier. Thus in order to proof more favourable treatment toward one country, one has to proof 'semblance between the service and service supplier of one country with another'. That is to say likeness between the two is deciding factor. However the word "like" has not been delineated nowhere in GATS. So we do not have any apparent instruction to decide the likeness of service and service supplier. There is only handful of cases before the Dispute settlement body on the subject of the interpretation of likeness of product under GATT. The term 'like'-ness has been constructed on the basis of different case laws taking into account the aspects like: customs, end use, physical characteristics, and consumption habits etc.[43]

In case of GATS the matter is slightly different. In case of service and service supplier there is no relevant case law to determine the issue of likeness. The determination of likeness is based on the other relevant factors like:

- Feature of the service and service supplier.
- categorization of the service in the United Nations Central Product Classification system (CPC)

- Production
- Distribution
- Marketing
- Sale and
- Delivery of service"

And Article 1:3(c) states that 'service' includes 'any service in any sector except service supplied in exercise of governmental authority'

[42] Peter Van den Bossche, Supra at 382

[43] Nellie Munin, Supra at 122

- Consumer behaviour and preferences regarding the service or the service supplier.[44]

Two service suppliers that supply a like service are not necessarily "like service supplier" there are other factors which are needed to be determined like size of service supplier, their assets, their use of technology and the nature and extend of expertise are taken account of. In order to determine the like service and service supplier for the purpose of article II: 1 of the GATS, it is necessary to decide the competitive relationship between the service and service supplier concerned.[45] Thus in this respect the help of the decided case regarding GATT, 1994 has to be taken into account but, it is doubtful how much these case help in determining the issue of likeness in respect to services.

**Complications in interpretation of phase "service and service supplier"**

The language of the Article II concentrate on the *'like service and service supplier'*. As for service suppliers, it is difficult to appraise likeness, taking into account individual disparity. Distinction of quality of the service provided, in character, skill, attitude, talent, experience, and reputation of the service suppliers compared.[46]While construing, 'service and service supplier' mentioned in the Article II: 1 escort us to numerous interpretative complications:

1. Whether the focus is on the textual interpretation i.e. the use of conjunction '*and'* or will consider it a separate element I.e. service and service supplier ;
2. Whether focus is on the inter se (between them-selves) by taking into consideration '*or*' i.e. to say one has to proof that likeness is either between service and service supplier.
3. Whether focus is on both service and service supplier and read them to en bloc (as a whole or all to gather)

Thus it bestow three probable approaches

1. Cumulative analysis
2. Alternative analysis
3. Merged analysis.

[44] Nicolas F. Diebold Supra, at 340

[45] Id.

[46]Nellie Munin, Supra at 123

### 1. Cumulative analysis[47]

According to Nicolas F. Diebold,[48] The textual interpretation of Article II emphasise on the conjunction between service and service suppliers. If we go by the text we get two separate elements. In order to proof discrimination one has to proof both the elements cumulatively.
In order to work by this analysis, it is necessary to assume that a measure which directly treat the service less favourably at the same time indirectly treat the supplier less favourably, and vice versa, otherwise it is not possible to proof MFN treatment has been violated.[49]
Suppose two banks of country A and country B supplying service in India. But if Indian Government says that they will not issue any licence to bank of country B. in such a situation though the measure was imposed in supplier directly but it indirectly affect the service[50].

Thus MFN obligation would only be violated if likeness can be established not only between services but also between the suppliers or vice versa.
But this test basically narrows the scope of GATS application which may be contradictory to purpose of non-discrimination principle in GATS[51].

### 2. Alternative analysis:[52]

Alternative Test says that service and service supplier are two separate and alternative elements. But this will raise a question whether the alternative approach will go with the texts of the provision?
When we closely examine the text we can find that though there is a conjunction '*and'* but it does not also resist the alternative analysis of literature.[53]

[47] Nicolas F. Diebold Supra at 204

[48] Id.

[49] Id. 206

[50] Difficulties in interpretation of M F N under GATS Supra at 19

[51] Nicolas F. Diebold Supra at 204 also Id.

[52] Id.

[53] For instance GATS, Article II states that:

Now considering the phase "services and service suppliers" in a different line, as alternative obligations

1. To treat foreign service *no less favourably*
2. To treat foreign service supplier no less favourably[54]

It is nowhere said that one measure at the same time need to be less favourable treatment of service and its service supplier.

The alternative analysis can be separated into two sub-approaches. They are

a. Combined Approach
b. Disjunctive Approach

### *a. Combined Approach*

This approach says that WTO adjudicating body need to analyse between whether there is no less favourable treatment

- between like services
- or between like service supplier.

In this approach answer to either of two questions would lead the conclusion that GATS non-discrimination obligation has been violated.[55]

For instance a measure required by a bank to maintain reserve different from those maintain by a insurance company before making a loan, based on likeness of the service and despite the unlikeness of the supplier.

In above situation this will lead to problem. And if we apply the combined approach to the said case then it will lead to unsatisfactory result. The mutually dependent analysis of likeness would result in breach of the non-discrimination obligation, if it discriminate between like service, even if the suppliers are unlike, and vice versa.[56]

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

[54]Id.

[55] Nicolas F. Diebold Supra 210-217

[56]Id.

### *b. Disjunctive Approach*[57]

This approach says that WTO adjudicating bodies should limit their scrutiny to either the service or the supplier. In other words, if the adjudicating body analyses whether there is less favourable treatment between like services, they have no possibility to additionally look at the situation of the supplier, and vice versa.

This approach treats if there is unlike supplier differently, for valid reasons could not be invalidly based on the sole reason that they supply like services. To determine whether a particular case the service or supplier of service should be subjected to likeness and less favourable treatment, there are two criteria to determine it:

#### i. Based on mode of supply:

In order to determine the comparator under this approach is to look at

- ✓ whether the measure in question applies directly to the supplier or
- ✓ Whether it governs the supply of the service.

If the measure directly affects the treatment of supplier, the non-discrimination analysis requires that the two suppliers are alike and vice versa.

#### ii. Based on mode of service supply:[58]

Article 1; 2 of the GATS provide for four modes of supply, they are:[59]-

a. Cross border supply :
b. Consumption supply;
c. Commercial presence
d. Temporary movement of Natural Person

[57] Nicolas F. Diebold Supra at 210-17

[58] Supra note 13, at 215-16

[59] WORLD TRADE ORGANIZATION, WTO | Services - CBT - Basic Purpose and Concepts - Definition of Services Trade and Modes of Supply - 1, https://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s3p1_e.htm (last visited Jun 14, 2017)

Cross border supply :(Mode 1)[60]

Here the consumer located in a country receives service from a foreign country by measure of telecommunication or post.

Consumption supply: (Mode 2)[61]

It refers to national of the importing country who moves to abroad in order to consume a service in another country for instance a tourist.

In mode 1 and 2 the service supplier are located outside so, in case of importing member no movement of factors is required thus, according to disjunctive approach likeness is necessary between the services.

Commercial presence: (Mode 3)[62]

It refers to the foreign supplier who establishes and controls an affiliate, subsidiary or representative office within the territory of the importing member. Examples are like Banks, hotels etc.

Temporary movement of Natural Person: (Mode 4)[63]

It refers to a foreign individual who in his capacity of an independent service supplier or employee of Foreign Service Company temporarily moves to the importing member in order to provide service.

Thus in modes 3 and 4 the 'supplier' are needed to be 'like' under this approach.

3. Merged analysis:

The MFN provision of GATS says that:

"…. each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country"

Allows the notion the "service and service supplier" to be read on en bloc or as a whole. Thus, in merged analysis one require to look at 'supplier/service' situation as a whole as

[60]General Agreement on Trade in Services, art.1:2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

[61] WORLD TRADE ORGANIZATION, WTO | Services – CBT supra

[62] Id.

[63] Id.

like or unlike. This test allows a likeness analysis to be conducted based on the factors relating to both the service and service supplier.

For example, in the case of a bank and an insurance company supplying the same service, the adjudicating bodies would take into account

- Service related factors
- Supplier related factors

In case of service related factors it is likeness and in case of supplier related factors it is unlike. Then in the second step balance of these factors are taken into account in the light of the measure at issue in order to determine whether the service or service supplier situation of one country (suppose A) is like-unlike the service and service supplier of another country (country B).

This analysis take into account the in -separability between supplier and service and that any measure disturbing trade in service affect both service and supplier.

It has some advantage like

- It does not narrow the scope of MFN as it done in Cumulative test
- It allows measure to be upheld that make supplier based distinction for valid reason, even though supplier provide like service.
- Merged test take into account of the inseparatibility between service and supplier.
- It does not let the adjudicating body make a choice between service and supplier of service.[64]

## NO LESS FAVOURABLE TREATEMENT STANDARD

This part of the paper has taken into account, second issue i.e. "Whether the concept of 'treatment no less favourable' in Article II and Article XVII of GATS should be understand to include de facto as well as de jure discrimination. Although only Article XVII mentioned it explicitly[65]

While addressing violation of GATS commitment in respect to "*treatment no less favourable"* accord is on like service and service supplier.

[64] Nicolas F. Diebold Supra at 217-18

[65] Difficulties in interpretation of M F N under GATS Supra at 19

Thus the treatment no less favourable is basically a common standard for both GATT and GATS but it has not been defined in any of the agreement.[66] This resulted in many difficulties. This part is divided into three sub parts.

First part deals with the meaning of "No less Favourable Treatment" though it was not given in the GATS but under Article XVII certain guiding principle has been provided.

In second part has discussed, difficulties arise in interpretation of "No less Favourable Treatment".

In the last part the issue that whether the de facto or de jure discrimination which has to be adopted in two famous cases i.e. EC Banana – III[67] and Canada- Autoes[68] has been discussed.

## "No less Favourable Treatment"- Meaning

The definition of No Less Favourable Treatment has not been given anywhere in the Agreements. Article XVII of GATS which deals with National Treatment obligation, contains the guidance for the meaning of the 'No Less Favourable'. Article XVII: 3 stipulate "No less Favourable Treatment" taking into consideration few criterions

a. Measure
b. Modifies the condition of competition[69]

But the similar provision is not there in the Article II of the GATS containing MFN treatment it leads to a number of confusion, this lead to many interpretative questions.

[66] WORLD TRADE ORGANIZATION, WTO | Services: Guide to reading the GATS schedules of specific Commitments and the list of article II (MFN) exemptions, https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (last visited Jun 14, 2017).

[67]WT/DS139 & 142/R ( May. 31, 2000)

[68]WT/DS139 & 142/R and WT/DS139&142/AB/R( May. 31, 2000)

[69]General Agreement on Trade in Services, art.17, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS]. "Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member"

### Difficulties arise in interpretation

- The language of the GATS Article II uses the general term measure which has broaden the scope of the provision
- Article II does not include the paragraphs of 2 and 3 of Article XVII specifying that such treatment could formally identic or formally different.
- The lack of these provisions in Article II leads to an interpretative question whether this is a lacuna or a deliberate omission.

On the basis of these difficulties following interpretative questions may arise before:

1. Whether this omission is a lacuna of the MFN provision i.e. Article II?
2. Whether this is a deliberate omission which is made with a intention to give the provision a different line of interpretation?
3. Whether the MFN provision under GATS is interpreted to include either de facto or de jure discrimination?

### Preventing Discrimination- de facto and de jure

There is no particular definition in respect to the de facto or dejure description, generally what we understand by De jure discrimination is a kind of distinction which a country adopt in trade which is directly or formally discriminate between two countries. That means in case of de jure discrimination we can directly analyse that a measure is favouring one country on the face of the other country.

While in case of de facto discrimination in trade one cannot directly find the discriminatory measure but if we look into the measure substantially, it is creates indirect discrimination which may seems to be origin neutral to its face. It can be said that de facto discrimination are like colourable measure (which cannot be done directly cannot be done indirectly)[70] which try to discriminate indirectly which they cannot do directly[71].

### EC-Bananas-III case

These question raised in EC-Bananas-III case where European Communities argued that Article II of GATS did not cover De facto discrimination. In this regard they claimed that: “if

[70] Difficulties in interpretation of M F N under GATS Supra at 27

[71] WTO, INTRODUCTION TO WTO BASIC PRINCIPLE AND RULE supra at 17

the drafter of GATS wanted make modification of competitive condition which is essential for no less favourable treatment test under MFN clause, they would have do so explicitly"

But this argument was rejected by the Penal. In this respect penalsaid:-

'(I) Nothing in the Article XVII is meant to provide for less favourable condition of competition regardless of whether that is achieved though the formally identical and formally different measure'

Thus the absent of similar language in Article II is not a justification of giving different ordinary meaning in terms of Article 31(1) of Vienna Convention to the word treatment No Less Favourable"[72]

which was denied in Article II and XVII.

(II) If the Article II were to be interpreted narrowly to require only formally identical treatment, it may lead in many situations to the frustration of objective behind Article II.'

But the Appellate Body rejected the arguments of penal but accepted the fact that Art. II of GATS applies to de facto Discrimination.

Appellate Body contended that:

"(I) there may be more than one way of writing de facto non-discrimination provision and Art. XVII of GATS is merely one of many provisions in the WTO Agreement.

(II) the possibility that the two Articles may not have exactly the same meaning does not imply that the intention of the drafter of the GATS was that de jure or formal standard should apply in Article II of the GATS. Is that were the intention, why does Article II not say as much?

The obligation imposed by Article II is unqualified. The ordinary meaning of this provision does not exclude de facto discrimination"[73]

On the basis of the above reason it is concluded

i. The Appellate Body has widened the ambit of Penal's ruling in this respect by pointing out that all forms of de facto discrimination not only the one mentioned in the Art. XVII are covered in Art. II of GATS. Thus Art. II covers more space than XVII of GATS.

ii. It also made clear by the Appellate Body that they don't want to limit their conclusion the above case only.

[72]Penal Report, EC- Bananas III,¶ 7.381, WT/DS27/R

[73]Appellate Body, EC-Bananas III ,¶48,WT/DS27/AB/R,

iii. The Appellate Body also is of opinion that: they have some difficulty in understanding why the Panel stated that its interpretation of Article II of the GATS applied 'in casu'.[74]

Canada- Autos Case

In this case the determinative question raised were that a situation where measure reserve access to duty free goods (cars) to a close category of service suppliers, which were not mentioned in the Canada's list of MFN exemptions, "allowed some wholesale trade service supplier to import and resale under more favourable conditions, while putting at acompetitive disadvantage. Other supplier who have to pay the tariff or buy licence out of the tariff quota"[75]

The Penal find out that there is de facto discrimination exists due to:-

- A measure which on one hand involves certain limitation on certain importers of an advantage granted in connection with the importation of a product
- But which on the other hand does not impose condition regarding the origin of the product which gets benefit from this advantage.[76]

Penal in this respect rejected the argument and held that:

- The denial of an import benefit on the basis of origin would lead to a narrow interpretation of the provision.
- And in this respect penal contended alternatively and opined that the provision should apply in where limitation of the benefit "…may by itself have a discriminatory impact ……." If discrimination has been made on the ground of different origin.
- Penal also held that "… de facto discriminating importers were not entitled to the benefit.

This conclusion was also upheld by the Appellate body.[77]

Thus it is well evident that MFN prohibits both de facto and de jure discrimination.

[74]Appellate Body, EC-Bananas III ,¶231, 233-234,WT/DS27/AB/R,

[75]Appellate Body Report, Canada-Certain Measure Affecting the Automotive Industry,¶ 10.37,10.40,10.47, WT/DS139 & 142/R ( May. 31, 2000)

[76]WTO ANALYTICAL INDEX: AGREEMENT ON GOVERNMENT PROCUREMENT General Agreement on Trade in Serviceshttp://www.wto.org/english/res_e/booksp_e/analytic_index_e/gats_01_e.htm (last visited Sept. 19, 2014)

[77]Appellate Body Report, Canada-Certain Measure Affecting the Automotive Industry,¶78, WT/DS139 & 142/AB/R,( May. 31, 2000)

## CONCLUSION

Since the very inception of GATS, a fair number of issues rose regarding the GATS violation but only in few cases, Most Favoured Nation Provision has been interpreted in true sense by WTO Adjudicating Body. Considering the importance of MFN principle as one of the "core obligation of GATS"[78], it has need of time that, the WTO Adjudicating Body satisfactorily addresses the construction MFN clause. There are various ambiguous texts which claimed to exist in MFN provision which need clarification, for the member countries.

And it has also been claimed by many writers that these ambiguities makes the provisions weak. So the provision continues to remain the prey of the adjudicating bodies to interpret the same. As in the previous few cases it has been evident that the adjudicating bodies made least effort to interpret the MFN provision. Like in the Canada-Autoes case where appellate body left the interpretation of Article II of GATS "to another case and another day but that another day and another case never came"[79].

Thus on the basis of the above situation it can be said that there are still many points which needs clarification by adjudicating bodies in regard to the MFN provision. Unless they are clarified, the unclear texts will remain to be considered as one of the lacunas of the provision and may also create a barrier in the achievement "Non- discrimination objective" of GATS.

[78]Nellie Munin, Supra at 124 (2010)

[79] Appellate Body Report, *Canada-Certain Measure Affecting the Automotive Industry*,¶184, WT/DS139 & 142/R and WT/DS139&142/AB/R( May. 31, 2000)