

FEATURES OF THE PRINCIPLE OF NON-DISCRIMINATION IN INTERNATIONAL TRADE AND ECONOMIC LAW

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Abstract. The article is devoted to the research of the features of the non-discrimination principle in international trade and economic law. This principle promotes international cooperation despite any differences in political, economic, and social systems. States could not be put in worse conditions concerning other states, with a difference in socio-economic system or level of development, etc. The principle of non-discrimination in trade and economic law contributes to the process of gradual convergence of economic, political, and legal differences between different social systems. Considering that trade and economic relations are aimed at reducing and eliminating tariff and non-tariff barriers in international trade, creating more transparent and predictable terms of trade, simplifying trade procedures, and counteracting unfair trade practices, the principle of non-discrimination is an integral principle of international trade. The principle of non-discrimination is a special principle of trade and economic law. Detailed attention in the article is given to the historical prerequisites for the development and implementation of the non-discrimination principle in international trade and economic law. The authors analyze the features of this principle from the moment of its appearance to the time when it was enshrined in numerous international treaties and when it acquired a custom character. The article defines the modern international legal basis of the principle of non-discrimination. This principle has been classified into two components, namely the most favoured nation principle and the principle of national treatment. The article compares the general and distinctive characteristics of the most favoured nation principle and national treatment. These principles complement and reinforce each other to achieve a common goal, in particular ensuring non-discrimination in trade. However, unlike the most favoured nation principle, the principle of national treatment is applied only after the goods have passed customs control and entered the market of the corresponding state. The authors also analyze the practice of the WTO Dispute Settlement Body in the context of violations of the principle of most favoured nation principle and the principle of national treatment.

Keywords: most favored nation principle, national treatment principle, international trade law, international economic law, World Trade Organization, WTO Dispute Settlement Body.

INTRODUCTION

The aim of the system of international economic relations that emerged after the Second World War was to reconcile the conflicting interests of states and to develop common rules of conduct, enshrined, in particular, in international agreements (Kharchuk, 2010 p. 5). The result is a set of special legal principles that form the basis of international economic law.

Given that the destabilization of world trade usually leads to negative socio-economic consequences and mutual losses of the parties to the conflict (Mazaraki, Goncharova, 2020, p.6), states need to adhere to the principles of international economic law, which are the basis for stable trade and economic relations.

One of the key special principles of international trade and economic law is the principle of non-discrimination. The importance of the principle of non-discrimination formulated in the 1940s as a basis for building a new system of trade and economic relations in the world cannot be overestimated. Even though this principle was known earlier, it affected only a limited number of countries - those that concluded the corresponding, usually bilateral agreements.

Nowadays, the principle of non-discrimination constitutes a cornerstone in different fields of international economic law, notably international trade in goods and services as well as intellectual property and investment protection (Diebold, 2011, p. 831). It should be noted, that the principle of non-discrimination is the foundation on which the entire system of the World Trade Organization is built.

In particular, this principle prohibits discrimination based on differences in socio-economic systems. It promotes non-discriminatory international cooperation regardless of any differences in political, economic, and social systems. This means that no one state, regardless of its belonging to a particular socio-economic system or level of development, should be placed in worse conditions in comparison with other states.

The non-discrimination principle protects the value of concessions granted by countries against future erosion through discrimination (Odio, 2020, p. 7). As a factor opposing protectionism, the principle of non-discrimination contributes to the establishment of *de facto* equality of opportunity in international trade for the development of competition on equal principles and conditions (Report of the High Commissioner, 2004). The principle of non-discrimination is a means of liberalizing bilateral and multilateral trade relations between states.

METHODOLOGY

The authors used a combination of various general scientific techniques and methods in the article. At the same time, the theoretical and methodological basis of the study is fundamental research, the dialectical method of cognition, a systematic approach to the analysis of the principle of non-discrimination in trade and economic law, the works of scientists, domestic and foreign theory and practice in the field of features of the principle of non-discrimination in trade and economic law.

The methodological basis of this study is a set of general scientific and special legal methods of cognition. Among the general scientific methods, the authors used the method of analysis and synthesis, deduction, induction, prediction, modeling, analogy, the method of dialectics, and so on.

Thus, to comprehensively analyze the topic of the study, the method of systematic analysis and synthesis was used, which helped to identify the main features of the principle of non-discrimination.

The methodological significance of the dialectical method in the study of the principle of non-discrimination in trade and economic law lies in the fact that it serves as a means of searching for new results, a method of moving from the already known to the still unknown. This means that in the study, not only the transformation of previously created theoretical knowledge takes place, but also the formation of their new modification by systematic addition of new theoretical provisions.

In addition, special legal methods were used in the article: historical-legal, comparative-legal, formal-legal, and others. Using the historical-legal method, the evolution of the principle of non-discrimination in trade and economic law was analyzed. The formal-legal method was used in determining the content of basic concepts, and systematization of material to obtain generalized conclusions within the stated issues. The comparative-legal method helped to identify common and distinctive features of the most favorable principle and the principle of national treatment.

System-structural, complex, and holistic research approaches were also used in the work. Formulation and substantiation of theoretical provisions, proposals, practical recommendations, and conclusions are based on the above methods and approaches.

RESULTS

1. History of the principle of non-discrimination in trade and economic law

The principle of non-discrimination has a long-standing history in international trade relations and it has become a central pillar of modern international economic law (Diebold, 2011, p. 831). At the same time, however, the pivotal role that non-discrimination clauses play in contemporary international trade and investment law, traces back to the 19th and 20th centuries when intensified international treaty practice made such clauses prevalent (Risvas, 2017, p. 81).

World War I marked a decisive change in international economic relations. No doubt, after a period of strong state intervention caused by the war, the idea of free trade seemed to prevail again in the years following 1920. But after a few years of apparent consolidation of the economic situation, the worldwide economic crisis of the early thirties led to a definitive departure from the gold standard and to renewed strong state intervention into this area of international relations (Kewenig, 1967, p. 377).

Trade protectionism, authoritarian tendencies, and international monetary turmoil have played a decisive role in the spread, deepening, and duration of the crisis. It was the impact of the lessons of the Great Depression and the Smoot-Hawley Act of the 1930s, under which tariffs were raised on more than 20 thousand imported goods in the United States, and as a result of which there was a response from other states that raised duties on American goods, which led to a sharp drop trade turnover between the United States and European countries and finally pushed the economy into the Great Depression (Irwin, 1998, p. 326). These events have largely led to the need to formulate the principle of non-discrimination in international trade.

For the first time, the principle of trade and economic non-discrimination was enshrined in the Atlantic Charter, which the United States and Great Britain signed in August 1941, and in September of the same year, the Soviet Union joined it (Atlantic Charter, 1941). Of the nine paragraphs of the document, two were devoted to trade and economic issues and indicated, respectively, the reduction of trade barriers and global economic cooperation, which implied the creation of a world organization. Based on these points, in particular, the principle of non-discrimination was developed, which after the war formed the basis of the General Agreement on Tariffs and Trade, the predecessor of the World Trade Organization.

Nowadays, the importance of eliminating discrimination is highlighted in the Preamble to the Marrakesh Agreement Establishing the World Trade Organization, 1994 (Marrakesh Agreement Establishing the WTO, 1994), which defines the elimination of discriminatory treatment in international trade relations as one of two means of achieving the objectives of the World Trade Organization. At the same time, it should be noted, that the principle of non-discrimination was designed specifically to prohibit protectionism and to ensure equal treatment of foreign and domestic products (Cottier, 2011, p. 3).

2. Concept and components of the principle of non-discrimination in trade and economic law

An important problem of modern international trade and economic relations is the use of discriminatory trade in foreign economic activity, which is a violation of the basic principles of international trade and economic law. Trade discrimination is related to the existence of discriminatory import barriers, i.e. a higher level of customs duty on goods or services of one country, or their complete prohibition. As a result, there are conflicts between the economic interests of countries, which can even lead to trade wars. Also, sometimes to support national producers and protect the national interests of the state do not allow certain goods into the domestic market, unreasonably raise customs rates, impose quotas, use dumping, embargoes, and so on (Sych, 2012).

That is why modern trade and economic relations should be aimed at reducing and eliminating tariff and non-tariff barriers in international trade, creating more transparent and predictable conditions for trade, simplifying trade-related procedures, and countering unfair trade practices.

At the same time, the realities of international trade relations represent a search for a balance between national economic interests and the global interconnection of the economies of all countries. According to J. Tsanko and Y. Kozynets, the implementation of international trade cooperation between the states is impossible to imagine without the established principles of international cooperation (Tsanko, 2015, p.121). Therefore, today, the principle of non-discrimination is one of the basic principles on which trade relations are built within the framework of the global trade and economic system.

It should be noted that scholars have differing views on the principle of non-discrimination in international trade and economic law. For example, some of them call the principle of non-discrimination the basic structural principle of the GATT. T. Cottier and M. Oesch referred to the most favored nation and national treatment, which are components of the principle of non-discrimination, among the “constitutional principles” of the WTO (Cottier, 2005, p. 346).

V. Vedkal emphasized that the principle of non-discrimination implies the need to create the most equal conditions for free competition, regardless of the country of origin. Thus, no country should make exceptions for another or discriminate against it (Vedkal, 2018, p. 205).

K. Yurchenko noted that the principle of non-discrimination means that all contracting parties - members of the WTO are obliged to provide each other with equally favorable conditions. Therefore, no country should make exceptions for another or discriminate against it (Yurchenko, 2009, p. 61).

The principle of non-discrimination in international trade and economic law is customary and therefore binding. According to O. Vodyanikov, providing for the principle of non-discrimination in the text of the agreement, states can not deviate from the meaning given to it in general international law, i.e. the meaning underlying the legal regime of this principle, which has become customary. Therefore, the recommendatory nature can be discussed only at the stage of concluding the agreement, when the issue of including this principle in the text of the agreement is considered, and from the moment of its establishment in relations between two or more states regime and become mandatory for them (Vodyanikov, 2016, p.26). In WTO practice, non-discrimination in trade is understood as the absence of differential treatment between WTO members (Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain, 2004).

For example, in the dispute “Australia - Measures Affecting Imports of Salmon”, the panel pointed to three elements that make up the principle of non-discrimination in trade in the field of sanitary and phytosanitary regulation: 1) the sanitary and phytosanitary measure is a means of discrimination between the territories of members other than another member, the imposing member, or between the territory of the member imposing the measure and the territory of another member; 2) the discrimination is unjustified or arbitrary; 3) similar or identical conditions prevail in the territory of the compared members (Australia – Measures Affecting Importation of Salmon, 1995).

Thus, the principle of non-discrimination, as one of the special principles of international trade and economic law, comes from the principle of the sovereign equality of states in international law. This principle implies that one state is provided in the trade and economic field on the territory of another state with the same conditions, benefits, and advantages that are provided to any other state.

The principle of non-discrimination was specified in the General Agreement on Tariffs and Trade of 1947 and was later inherited by the World Trade Organization through inclusion in the package of the WTO Agreements and embodied directly in the WTO law.

The importance of eliminating discrimination is emphasized in the Preamble of the Marrakesh Agreement Establishing the World Trade Organization, where “the elimination of discriminatory treatment in international trade relations” is defined as one of two means of achieving the goals of the WTO. It means that all contracting parties to the WTO are obliged to provide each other with equally favorable conditions. Therefore, no country should make exceptions for another or discriminate against it (Yurchenko, 2009, p. 61).

Discrimination in international trade is most manifested in two directions - discrimination between countries and discrimination between national and foreign goods, services, and firms. Accordingly, within the framework of the

multilateral system, the non-discriminatory nature of the application of trade policy instruments is ensured based on two essential principles: the principle of most favored treatment and the principle of national treatment.

However, bilateral and multilateral trade agreements tend to deal with two main types of discrimination. The first is the unequal treatment of one country by two different trading partners, when goods, services, sellers, or investors from one country have a less favorable trade regime than similar goods, services, sellers, or investors from another country. This type of discrimination is prohibited by the most favored nation treatment, which requires the country to provide an equally favorable treatment for goods, services, sellers, or investors, regardless of the country of origin.

The second type of discrimination is to provide an unfavorable regime to imported goods and services compared to similar domestic goods and services already on the national market. There can be many forms of such discrimination. The prohibition of this form of discrimination is enshrined in the principle of national treatment, which requires that the regime applied to imported goods be no less favorable than that applied to domestic goods.

3. The most favoured nation principle

The most favoured nation principle is an international custom, guided by which the parties contractually grant each other the most favored nation treatment. This rule allows one party to demand that the state be allowed to claim for itself such benefits that are already established for any third state. The second state is obliged to satisfy such requirements.

Provisions on the most favoured nation principle in some form existed in the treaties of the eleventh century. During the fifteenth and sixteenth centuries, the use of this provision increased as a result of trade expansion, and by the seventeenth century, it was enshrined in most trade agreements, covering the issue of preferences in trade. In the treaties of the eighteenth and nineteenth centuries, this provision was usually conditional - if the first state preferred a third state and received from the latter a certain concession (compensation), the second state could receive the same advantage only by giving the first a similar concession (compensation). Following the signing of a trade treaty between Great Britain and France in 1860, the unconditional form of the most favored nation provision became more popular. It provided that any advantages granted by the first State to a third State shall automatically, without any conditions, extend to the second. By the 1940's, this form was practically the only one used by states. The expediency of applying the unconditional form of the most favored nation provision on customs duties and trade conditions was confirmed in the recommendations developed during the International Economic Conference held under the auspices of the League of Nations in Geneva in 1927. The unconditional form was also supported in the Resolution of the Institute of International Law, adopted at the 40th session in Brussels in 1936. The use of the most favored nation principle continued after the end of World War II (Shemshuchenko, 2012, p. 533).

The most favored nation treatment was enshrined in Article 1 of the GATT. A situation where any benefit or preference for import or export is granted to any country automatically extends to all GATT contracting parties, effectively performing a prohibitive function, making it impossible to create individual preferences. This was the key to trade liberalization and the creation

of a modern multilateral trading system aimed at maximizing the openness of countries' markets and eliminating discrimination between goods originating in different countries (Kormych, 2012, p. 25). Nowadays, the normative basis for establishing this principle are the provisions of the GATT-1994. The principle of the most favored nation in the field of international trade has become a universal principle; it ties together the vast majority of the member states of the World Trade Organization (Shumilov, 2019, p. 35).

According to the International Court of Justice in the Case Concerning Rights of the Nations of the United States of America in Morocco, the purpose of the most favored nation clause is to establish and maintain at all times conditions of fundamental equality between all States concerned (Case Concerning Rights of the Nations of the USA in Morocco, 1952).

If such a clause is included in the contract, then it aims to equalize the position of the parties, gradually expanding the list of rights that are given to the party. Thus, the parties are aligned in their statuses.

Following the GATT, the WTO can establish the most favorable treatment for customs duties and fees that are imposed on imports and exports, as well as for transfers abroad of payments made for exports and imports. GATT also allows for the most favored nation to establish the rules of regulation and compliance with import and export formalities for all participants. This agreement also defines uniform guarantees for both domestic and foreign-made goods and a rejection of quantitative regulation measures and export subsidy policies.

According to V. Chubarev, the clause containing the most favored nation treatment can be conditional or unconditional (absolute). The stipulated clause shall take effect only when the beneficiary State receives confirmation from the other State of its readiness to provide equivalent benefits or services. However, the unconditional clause takes effect automatically. That is, the difference between these forms of most favored nation treatment is that in the first case, the equality of legal regimes established under this clause is achieved only when the benefits or concessions are actually mutual, which is not formally required in the second (Chubarev, 2009, p.158).

It should be noted, that the principle of the most favored nation is not unconditional. Exceptions are provided from it. In particular, the following exceptions are possible: neighborhood reservation (if there is a common border, the beneficiary receives benefits for its goods, which the beneficiary state provides to a third border state in the area); preferences for developing countries (to equalize their economic development); preferences for landlocked countries; for member countries of customs unions, etc.

At the same time, the following arguments could be highlighted in favor of this principle: the most favored nation makes it possible to multilateralize the mutual reduction of tariffs, which states could agree on bilaterally; the most favored nation allows minimizing the distortion of "market" principles: if the policy pursued by the state puts foreign suppliers on an equal footing, importers and consumers have the opportunity to choose a foreign supplier offering the lowest (or the best combination of various characteristics) price; the most favored nation protects weaker states from discrimination by economically more developed states, does not allow the practice of "ruining a neighbor"; the most favored nation enforces the rules set by multilateral agreements and raises costs if a WTO member country deviates from its obligations (for

example, if a country raises a tariff, it is obliged to apply this changed tariff to all WTO members, which increases the political loss from this measure); the most favored nation reduces the costs associated with rule-making, since the development of many bilateral agreements in the negotiation process can turn out to be very costly; in the absence of the most favored nation, states may have an incentive to unite in closed discriminatory international groups.

4. The principle of national treatment

The potential research of WTO national treatment provisions is hard to overestimate: they cover virtually all governmental policies of all Members of the WTO, whether be they taxes, laws, regulations, etc., which affect the conditions for sale and distribution, widely interpreted, of imported products and services (Horn, 2004, p. 40).

According to S. Osyka, the scope of the principle of national treatment includes all “laws, rules and requirements” relating to domestic sales; offers for sale; buyers; transportation; distribution; use of goods; as well as internal taxes and various fees (including direct and indirect). Thus, the scope of the principle of national treatment includes all domestic legislation in terms of the circulation of foreign goods and domestic trade in them, as well as taxation of foreign goods - almost the entire tax sphere (Osyka, 2019, p. 170).

The reason for the existence of the principle of national treatment is the prevention of governments from negatively influencing the possibilities of competition from imported goods in favor of domestic goods. It is believed that the outcome of competition between imported and domestic goods should be determined by market forces, not by government intervention, and through them the theory of comparative advantage. This should guarantee fair competition, and economic efficiency and reduce consumer prices. As a result, general well-being should increase.

The national regime is enshrined in Article 3 GATT is one of the pillars of the WTO system. According to the rule of national treatment, WTO members should not discriminate against imported goods compared to similar domestic ones (except for the collection of import duties). This rule prohibits countries, on the one hand, from taking discriminatory measures against imports and, on the other hand, from compensating for the effect of tariffs through non-tariff instruments (Poedynok, 2011, p. 63).

It should be noted that while the most favoured nation principle applies to all trade policies: both frontier measures and intra-market measures; the principle of national treatment is applied only after the goods have passed customs control and entered the market of the relevant country.

It should be noted that in a number of cases considered by the WTO Dispute Settlement Body, the provision on the principle of national treatment was specified. For example, the Japan-Alcoholic Beverages case (Japan – Taxes on Alcoholic Beverages, 1998) found that a national treatment obligation required WTO members to ensure that imported goods were treated on an equal footing in terms of competitive conditions concerning domestic goods, and it also articulated the general principle that domestic measures should not be applied in such a way to protect domestic production.

In the case of Italy – Discrimination against imported agricultural machinery (Italy – Discrimination Against Imported Agricultural Machinery, 1958), it was formulated that any violation of the obligation to grant national

treatment automatically leads to the annulment or reduction of state benefits, which is a violation of article 23 of the GATT 1994, and also clarified the forms that a violation could take.

The US-Gasoline case (U.S. – Gasoline, 1996) found that the national treatment provision of GATT 1994 did not refer to an effect on trade. For this reason, whether imports from other contracting countries were substantial, insignificant, or non-existent, there would still be a breach of national treatment.

DISCUSSION

The principle of non-discrimination operates in two components: the most favored nation principle and the principle of national treatment. These principles - components are complementary in nature and complement and reinforce each other to achieve one goal, *inter alia*, to ensure non-discrimination in trade.

However, it should be noted that there are the following conceptual differences between them: in scope - the principle of national treatment covers more aspects (domestic taxation, rules of sale, transportation, use of goods in the domestic market, etc.); with the possibility of exceptions - due to the principle of *inter alios acta* and the very nature of the principle of most favored nation treatment (i.e. clause reserve), special regimes limited to bilateral relations or trade regimes with a limited number of participants cannot be taken into account when determining the most favored nation principle, while the national regime does not provide for such exceptions. Both principles are relative, i.e. they do not establish specific rule but instead refer to existing practice.

The principle of non-discrimination does not apply to all issues in bilateral or multilateral relations but applies only to those issues that relate to the subject of the agreement. Due to the concept of *ejusdem generis*, which has been recognized in the practice of international and national courts, the national regime applies only to the areas defined in the relevant treaty (Vodyanykov, 2016, p. 35).

CONCLUSION

WTO member countries interact within a non-discriminatory trading system, where each country receives guarantees of fair and consistent treatment of its exports in the markets of other countries, pledging to provide the same conditions for imports to its market.

The basic rules and principles of the WTO are reflected in multilateral trade agreements that affect trade in goods and services, as well as trade aspects of intellectual property rights, dispute resolution and the trade policy review mechanism.

In this context, it should be noted that at the present stage of socio-economic development, the principle of non-discrimination, as a tool to ensure equality in international trade and economic policy, is very important. It is the key principle of international trade and economic law. At the same time, the principle of non-discrimination is the foundation on which the entire WTO system is built, which plays a significant role in the process of economic globalization. Although the legal regulation of trade and economic issues is the prerogative of states and states have exclusive powers in this area, it is

increasingly eroded by international trade and economic law, which imposes significant restrictions on discrimination against states in trade and economic spheres.

Adherence to the principle of non-discrimination at the appropriate level contributes to increased investment, lower prices, and a wider choice of goods and services available to consumers. In addition, adherence to this principle avoids the chaotic creation of trade barriers.

Summing up, it is worth noting that the obligations of the most favoured nation and national treatment, based on the principle of non-discrimination, are fundamental concepts of WTO law. Their non-compliance has serious consequences, both for the offending state and for all WTO member states. Unfortunately, despite the effective and multilateral implementation of the generally recognized principle of international law within the framework of the WTO, this fact does not exclude the existence of its violations in practice. That is why, the main direction of reforming the international legal mechanism of trade is to improve the legal basis of trade relations, in particular, on the basis of the principle of non-discrimination.

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