

NON-FISCAL DISCRIMINATION IN THE WTO AND EC LAW: RELATIONS AND SOLUTIONS

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I. Background

Using the term "non-fiscal discrimination" we can make reference to various rules of diverse range and content. While the principle of equity is usually configured by domestic laws as a right and/or principle that forces a State to remove as many obstacles as is necessary to achieve an actual situation of material equity, whether between nationals of the same State or between nationals and foreigners, the international non-fiscal discrimination principle implies only a negative requirement for the Contracting States not to discriminate which may be extended to foreign goods (GATT-WTO and other international integration processes) and to foreign persons (OECD).

On the other hand, in the European Union, prohibition of discrimination has traditionally meant the obligation to apply to goods and nationals from other Community States the same tax treatment applied to domestic goods and citizens. This principle cannot be attacked, directly or indirectly, either through the rules qualifying and quantifying a tax or through the administrative and judicial procedures applying such taxes.

Generally speaking, current western legal systems are governed by three features: (i) the presence of the non-discrimination principle in several domestic legislations as a guarantee, extended some times to foreigners; (ii) an increase in the number of Double Taxation Conventions containing, normally, a non-discrimination clause applicable to the nationals of either Contracting State and; (iii) the adoption, very often, of this principle in multilateral conventions, although reduced to the field of goods from a Contracting State.

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In addition, and although the European Court of Justice (hereinafter ECJ) and the Human Rights Committee have already used the interdiction of discrimination contained in Treaties and Human Rights Declarations in order to avoid discriminations through domestic tax provisions, up to now they have not used them to declare the existence of an internationally recognized proscription of nationality-based fiscal discrimination.

This is so because of the current status quo in international society where some States deny the existence of an international principle of non-discrimination and even declare this in the Commentaries to the OECD Model Convention and where, because it is a very powerful factor in international economic relations, the United States does not accept such proscription if it may be economically harmful to its interests (although the principle has developed very well in the international relations between the EC Member States).

We should also stress that the term "non-fiscal discrimination" is used in the context of international businesses in relation to foreign goods, regional agreements, free trade agreements, foreign persons, in relation to double tax treaties, but not for non-resident persons, whether individuals or legal entities. This is because admitting that residence-based discrimination is forbidden would put an end to a basic mechanism of tax systems: the difference between residents and non-residents. Therefore, non-discrimination has traditionally applied only in the field of direct taxes as a prohibition of nationality-based discrimination.

Against this traditional view, however, the ECJ has admitted the extension of the non-discrimination rule to residence rules. Such jurisprudence demands a reconsideration of the basic mechanisms of international taxation, and especially the distinction between residents and non-residents, as a result of the co-existence of numerous different sovereign tax powers.

An interesting problem caused by the different meaning of the non-discrimination rules in EC law and in international business is the compatibility of the EC rules with regional treaties, and especially with the GATT-WTO. However, before dealing with this problem, we will focus on some concepts related to the non-discrimination rules, such as the rule of national treatment and the most favoured nation clauses.

A. The Rule of National Treatment and Most Favoured Nation Clauses

In a strict sense, and according to the rule of national treatment, citizens of other States are normally subject to a treatment not less favourable than the one established for the citizens of the taxing State, which, in the tax world, is to say that foreign

citizens cannot be subject to worse tax treatment than the nationals of the taxing State.

In a broader sense, this clause can be extended to concepts other than citizenship, such as goods, companies and their establishments or even capital. Therefore, as a consequence of the principle of national treatment, a State cannot give preferential tax treatment to domestic goods with respect to foreign goods, cannot establish tax rules that discriminate against foreign companies and cannot increase the fiscal burden for foreign capital.

As for citizens, the national treatment clause prevents tax distinctions between nationals and foreigners, but it does not affect the distinction between residents and non-residents regardless of their condition as nationals, stateless persons or foreigners², and their different tax regimes. However, this clause is currently being considered from a new point of view in the EC field: as non-residents are mostly foreigners of the taxing State, the worse tax treatment of a non-resident implies a worse treatment of a foreigner and, as such, a violation of the national treatment principle.

Under the most favoured nation clause, Contracting States extend to another Contracting State the benefits granted to a third State, ensuring the automatic extension, excluding reservations specifically agreed by the contracting parties,³ of any preferential treatment granted by a Contracting State to another State (or group

² Certainly, and with the only exception of the United States and Philippines, the international tax provisions are usually based on different taxation of resident (taxed on their worldwide income) and non-resident taxpayers (taxed only on the income sourced in the national territory), regardless of their nationality. In the case of the United States, however, the system is based on the nationality of the non-resident taxpayer. Nationals are taxed on their worldwide income and foreigners are taxed only on their US sourced income. The foundation of such a system is the special protection granted to US citizens *in any State* and the possibility of claiming assistance from any State.

³ According to Amatucci, *Il principio di non discriminazione fiscale*, Cedam, Padova, 1998, at 35 and 36, the most important exceptions to this clause are preferential regimes, customs unions and free trade zones. On this clause, see Vignes: *La clause de la nation plus favorisée et sa pratique contemporaine*, in *Recueil des Cours*, 1970, at 237; Gross Espiell, *The most favoured nation clauses, and its present significance in GATT*, in *Journal of World Trade Law*, 1971, at 29; Castels, A., *La cláusula de nación más favorecida en las relaciones comerciales desarrollo/subdesarrollo*, 1974; Orrego Vicuña, F., *Derecho internacional económico*, Vol. I, *América latina y la cláusula de la nación más favorecida*, 1974; Triggian, *Il trattamento della nazione più favorita*, Naples, 1984; Forner Delaguna, J J, *La cláusula de la Nación más favorecida*, 1988.

of States).⁴ Thus, it is a provision aimed at the suppression of trading barriers, with a wide and undefined content and different wordings. In addition, it has not been understood in a consistent way every time, and these are several different types, unilateral, bilateral or multilateral, conditioned or unconditioned, general or restricted, etc.⁵

The efficacy of both principles, national treatment and most favoured nation, depends on how much they are used throughout the legislation of the different States and the international treaties, especially in the case of the EC, to ensure the suppression of unnecessary obstacles to the freedom of movement of goods.

Finally, and from a legal point of view, these clauses turn into an obligation upon States to create the necessary instruments and procedures in order to achieve their full effectiveness, which also implies an obligation of transparency in the legal rules and case law of those States.⁶

B. Non-Discrimination and Commercial and Economic Integration Agreements

Commercial integration is a practice through which some States sign agreements aimed at avoiding the administrative and fiscal obstacles established to protect

⁴ For instance, Art. 5 of the Trade Agreement between Spain and England of 1715 provides that «the said subjects shall be used in Spain in the same manner as the most favoured nation [...] and all the rights and privileges [...] which shall be granted [...] to any nation whatever, shall likewise be granted and permitted to the said [British] subjects», and in Art. 19 of the Trade Agreement between England and France of 1870 such clause says «each contracting Potency undertakes to grant to the other Potency every favour, privilege or cut in the tariffs of importation duties for the goods mentioned in the present Treaty, that such Potency may grant to a third Potency. In addition, they shall also undertake not to establish any prohibition of importation or exportation that was not applicable to all nations». Some more recent examples are the USA-Canada Tax treaty of 1980 according to which «citizens of a Contracting State, who are not residents of the other Contracting State, shall not be subjected in that other State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which citizens of any third State in the same circumstances (including the State of residence) are or may be subjected.»

⁵ See Amatucci, F. *Il principio... op. cit.*, at 33 and 34, and the authors quoted therein. In the framework of the GATT 1947, confirmed in 1994, the most favoured nation clause is included in Art. I as multilateral and unconditional.

⁶ See, Fernández de la Gándara, L. *Los procesos de integración económica y la Ronda Uruguay del GATT*, in *MERCOSUR y la Unión Europea: dos modelos de integración económica* (coord.: Velasco San Pedro, L.A.), Lex Nova, Valladolid, 1998, at 87 et seq.

domestic economies from foreign competition⁷. So far, it has followed two different paths:

- (i) The signature of bilateral or multilateral commercial agreements whereby certain States, not necessarily with a common border, agree to abolish any existing obstacle to international trade in the form of tariffs, quotas, State trade and any other form of economic or administrative restriction.

The number of States signing these agreements and their geographical location makes it difficult to go beyond the mere acceptance of economic compromises on trade and freedom. They are only economic cooperation agreements forming part of an international system born after World War II as an institutional solution for the avoidance of future international conflicts. Some examples are the GATT agreements, replaced after the Uruguay Round by the WTO, in the field of trade of goods, and the IMF for currency and capital markets.

- (ii) The use of regional integration processes, in accordance with Art. XXIV GATT,⁸ through which some States, generally with a common border, take upon themselves the removal of any economic obstacle that can prevent free trade between the Contracting Parties, in order to establish a common market.

The actual establishment of such a market will give citizens of those States certain rights that appear to demand a certain geographical proximity between the States. In any case, this model of integration has two essential characteristics:

- (i) The agreements must be followed by institutional reforms aimed at securing the fulfilment of the compromises. This would not be possible without the foundation of a new political administrative authority with the power to impose compulsory rules on the Member States; and

⁷ See García Villarejo, A, *Los retos fundamentales de la integración económica: la experiencia Europea*, In *Mercosur y la Unión Europea...*, *op. cit.*, at 67 et seq.

⁸ Art. XXIV.4 GATT: "The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories".

- (ii) The combination of economic, political, administrative and fiscal reforms must be spread over several years, and this requires the successive completion of several necessary stages⁹.

Following this system, we will begin by analysing, first, the multilateral trade agreements and their most noteworthy examples GATT and WTO, not only because of their prominence, but also because they are the inspiration of all other trade agreements, and then, the regional integration agreements and their most representative examples: the American and, especially, European agreements.

C. Non-Discrimination in International and EC Law

The contents of the non-discrimination principle are not only diffuse and shifting, but also different depending on the legal field-national, international, regional or EC in which it projects its effects. As we have already mentioned, equity is a national principle, different from the non-discrimination principle, that affects the relations of various domestic tax systems. Thus, we are going to focus now on the implications of the non-discrimination principle in the field of international relations in comparison with its implications in EC Law, relations between citizens, Member States and organisations and institutions of a Union with normative powers.

First of all, we should take into account that in international relations, the non-discrimination principle has a smaller content and efficacy than in the EC field.

As for its normative efficacy, non-discrimination has only the efficacy that a State may be willing to grant it in its external relations despite the fact that its use is so general, it is not unanimous or uniform. Any State can avoid the obligations of a non-discrimination clause by refusing to sign the clause or terminating its application if it is in force. It is a generally acknowledged rule- there are exceptions, but a clause that is agreed bilaterally - basically in double tax conventions following the OECD Model or multilateral trade agreements, such as the GATT, or the regional integration agreements and conventions, must be enforced bilaterally.

On the other hand, in the EC field, the non-discrimination principle is a generally acknowledged rule, which no State can avoid, since it is a general principle that regulates intracommunity relations. With the exception of relations between EC Member States and third States, where such principle may not be in force,

⁹ Therefore, the processes can bring a very different kind of integration, depending on the number of stages to be completed by the Member States. See García Villarejo, A, *Los retos fundamentales... op. cit.*, at 70.

intracommunity relations must always respect it and understand it as a rule of compulsory fulfilment.

It is, therefore, a truly general principle of EC Law, since it is included in Art. 12 of the EC Treaty¹⁰ and it is directly inferred from Art. 90 et seq. of the same Treaty, for indirect taxation, and from Arts. 39, 43, 49, 56, etc., for direct taxation.

Secondly, there are some other differences with respect to the content, of the non-discrimination principle depending on its application in the international arena or on tEC Law.

In the field of international relations, and regardless of the adoption of measures that are closer to the national treatment or the most favoured nation clauses the non-discrimination principle refers generally to indirect taxation GATT-WTO and regional trade agreements or, in the case of direct taxation, to the interdiction of nationality-based discriminations.

In contrast, in the EC field, the principle has developed further in the field of indirect taxation, since it allows the removal of any protectionist measure of a Member State preventing the creation of a borderless space based on the freedom of movement of the economic agents. In this sense, the ECJ has expressly stated from the very first years of its activity that the prohibition of fiscal discrimination constitutes "the indispensable foundation of the Common Market (...)"¹¹

And, finally, the main particularity of the non-discrimination principle in the EC is that because of the ECJ jurisprudence of the Nineties, the principle has extended its scope to any situation where fiscal diversity derives from the different residence of the taxpayer. Thus, the non discrimination principle in the EC field is a principle of compulsory fulfilment that, taken to its logical consequences, forces the review of the basic foundations of international direct taxation: the distinction between residents, taxed on their worldwide income, and non-residents, taxed on their source of income.

¹⁰ Unless otherwise stated references the EC Treaty will refer to the current text of the Treaty signed in Rome on 25th March 1957 for the creation of the former EEC, as amended, especially, through the Acts of Luxembourg of 17th February 1986 and The Hague of 28th February 1986 –the Single European Act, in force as of 17th February 1987, the EC Treaty signed in Maastricht on 7 February 1992, in force as of 1st November 1993 (hereinafter MT), and the consolidated version of the treaty signed through the Treaty of Amsterdam (hereinafter AT), signed on 2nd October 1997 and in force as of 1st May 1999.

¹¹ Case 57/65. *Firma Alfons Lutticke GmbH v Hauptzollamt de Saarlouis* [1966] ECR 205 at p.210

II. Non Discrimination and Trade Agreements: GATT and WTO

In most cases the main purpose of trade agreements is the recognition in respect of traders resident in a Contracting State, of the same trade rights (non-discrimination) enjoyed by traders resident in the other Contracting State (national treatment clause), or the traders of a third State (most favoured nation clause). Both clauses may be agreed on an exclusive or accumulative basis¹², and are always signed under the condition of reciprocity.

However, unlike the position in respect of double tax conventions, there is no model trade agreement. It is, therefore, impossible to study a particular standard provision. It is possible, nevertheless, to reconstruct the main features of the non-discrimination principle in trade agreements by analysing its most common features in some examples.

Generally, the clause establishes that each Contracting State will grant *ex officio* to the nationals of the other Contracting State, whether individuals or legal entities carrying out an economic activity in the territory of the first-mentioned State, a fiscal treatment that is not less favourable than the treatment granted to its own nationals (national treatment) or to the nationals of a third State (the most favoured nation), with respect to any tax, duty, levy, deduction and exemption.

The Contracting States, however, do not take into account any special tax advantage granted in accordance with double tax conventions, customs unions agreements, economic unions or analogous institutions, or under condition of reciprocity, with third States.¹³

The two main issues arising here are, first, whether or not the treatment in question has to be assessed considering only each tax or the measure of the overall taxation borne by the taxpayer, and in this latter case if the tax borne must be measured year by year or by reference to longer periods.¹⁴ And, second, whether or not the non-favourable treatment must be assessed considering all kinds of obligations and requirements related to the *an* and *quantum* of the main obligation – including tax exemptions, reductions and deductions, and other elements of the tax due, as well as

¹² As F. Amatucci points out, the difficulty of accumulative clauses is the need for an election that the clause apply in each case, although the Contracting State or the citizen enjoying the clause generally makes it. See Amatucci, F, *Il principio...*, *op. cit.*, at. 34.

¹³ See Adonnino P, *Non-discrimination rules in international taxation: general report*, in *Cah. Droit Fisc. Intern.*, Vol. LXXVIIIb, 1993, at 247.

¹⁴ See Van Raad, K.: *Non-discrimination in International Tax Law*, Kluwer Law and Taxation Publishers, Deventer, 1986, at 218.

any duty connected with the procedures of application of any kind of tax, or if something is excluded.

In any case, and although it is clear that this kind of clause covers not only customs duties and similar measures, but any other tax measure that may raise a barrier to international trade, such as the internal taxes of every State,¹⁵ unless the trade agreement in question covers explicitly one of the above-mentioned issues, its interpretation must be made in the context of the non-fiscal discrimination clauses agreed in the main framework agreements on international trade: the GATT and the WTO.¹⁶

¹⁵ According to Vega Borrego, customs duties have traditionally been the main protecting tools. However the progressive reduction of tariffs through bilateral and multilateral agreements has left an open space for new techniques, such as state aids, dumping, technical barriers, etc. and especially for internal taxes. See Vega Borrego, F.A., *La interdicción de la discriminación impositiva en la OMC: a propósito del asunto Japón-Impuestos especiales sobre bebidas alcohólicas*, RDFHP, n° 250/1988, at 789. Also, Jackson, J H I, *World trade and the Law of GATT* Bobbs Merrill Company, Indianapolis, 1969, at 8 and 275.

¹⁶ On the evolution of the multilateral trade system from GATT to WTO, see Coppola-d'Anna, *L'accordo generale sulle tariffe doganali e sul commercio*, Rome 1947; Curzon G, *Multilateral Comercial Diplomacy. The General Agreement on Tariffs and Trade and its Impact on National Trade Policies and Techniques*, London, 1965; Flory, T. *Le GATT. Droit international et commerce mondial*, Paris, 1968; Jackson, J H I, *World Trade...* op. cit.; Dam K W, *The GATT: Law and the International economic Organization*, Chicago, 1970; Middleton, *The GATT standard code*, Journal World Trade Law, 1980, at 201; Long, O., *La place du droit et ses limites dans le systeme trade multilatéral*, Recueil des Cours de l'Academie de la Haye, 1983-IV, Vol. 182, at 9-142; Venturini, *L'accordo Generale sulle tariffe doganali e sul commercio*, Milan, 1988; Jackson, J H *The World Trading System: Law and Policy of international Economic Relations*, Cambridge, 1989; Hudec, R E, *The GATT Legal System and World Trade Diplomacy*, Salem, 1990; Petersmann, E U and Hilf, M, *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems*, Deventer, 1993; Stern, R M, *The Multilateral Trading System. Analysis and Options for Change*, Hertfordshire, 1993; McGovern, E, *International Trade Regulation*, Exeter, 1995; Jackson, J H , Davey W J and Sykes, AO, *Legal Problems of International Economic Relations. Cases, Materials and Text of the National and International Regulation of Transnational Economic Relations*, St. Paul, Minneapolis, 1995; Messerlin, P, *La nouvelle Organisation Mondiale du Commerce*, Paris, 1995; Cottier T, *GATT Uruguay Round*, Berna, 1995; Hoekman, B and Kostecki, M, *The Political Economy of the World Trading System*, Oxford, 1995; Trebilcock, M J and Howse, R, *The Regulation of International Trade*, London, 1995; Irshner, O, *The Bretton Woods-GATT System. Retrospect and Prospect after Fifty Years*, New York, 1996; Martin W and Winters L A, *The Uruguay Round and the developing countries*, Cambridge, 1996; Societé Française Pour Le Droit International, *La réorganisation Mondiale des Échanges (Problèmes juridiques)*, in Colloque de Nice, Paris, 1996; and Sander H and Inotai A, *World Trade after the Uruguay Round*, London, 1996.

A. *The Most Favoured Nation Clause and its Exceptions Under the GATT System*

From the very beginning, the GATT was based on principles aimed at the general and progressive reduction of tariffs and the prohibition of quantitative restrictions, and especially on the principles of transparency and non-discrimination. This latter principle brought two consequences: one negative, the repudiation of protectionisms, and another one positive, the promotion of trade, trying to avoid the trade policies of the Member States resulting in discriminatory practices – especially in the field of tariffs, quantitative restrictions and exchange rates.

These goals were achieved, on one hand, through the elimination of tariffs (Art. II) and discriminatory aids granted to state companies (Art. XVII)¹⁷, and on the other hand, through the adoption of two other clauses that constitute the basic meaning of the non-discrimination principle in the GATT and WTO: the most favoured nation clause (Art. I, although modified through several exceptions) and the national treatment clause (Art. III). They will be the object of our immediate study.

We have already analysed the basic meaning of the most favoured nation clause and its possible relations with the non-discrimination principle. Its best expression at the present time is Art.I.1 GATT.¹⁸

Logically, this clause only has a full meaning in a system of preferential agreements with advantages shared by all the other Contracting States, since its purpose is to extend to the beneficiary all the advantages granted by a Contracting State to third States. However, the GATT includes the clause with a scope wider than in previous times. During the 19th century the commercial advantages on tariffs, the most frequent ones of any other granted by a Contracting Party to another one, were automatically extended to other parties, but GATT includes the clause with an important innovation, namely its “multilateralization”: The most favoured nation treatment is no longer applied only to tariffs, but also to regulations on internal trading of imported goods, the domestic taxation of such products and, finally, to

¹⁷ See *Analytical Index. Guide to GATT law and practice*, Vol. I., WTO, 1995, at 63 to 120. Art. XVII.1.(a) GATT 1947 reads as follows: “Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either importations or exportations, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting importations or exportations by private traders.”

¹⁸ See, Jackson J: *World Trade... op. cit.*, at 249 et seq.; Ardizzone: *L'efficacia del principio di non discriminazione sancito dal GATT rispetto alle disposizioni di diritto interno successive*, Riv. Dir. Fin. e Sc. Fin., 1975, at 220 et seq.; and Jackson, J, Davey, W J and Sykes A: *Legal Problems...op. cit.*, and *Analytical Index...op. cit.*, at 23 et seq.

any advantage, favour, principle or immunity that a State may grant to the goods from the other Contracting State.¹⁹

This clause has been very much criticised because by treating in the same way different subjects it causes unwelcome deviations. Thus, the GATT includes some exceptions that could be classified according to this scheme²⁰: (a) exceptions for certain products; (b) exceptions agreed during the Rounds; and (c) exceptions allowed by the Contracting States. This latter group may also affect general policies, such as public security or public health, may derive from economic development, or refer to economic integration.

B. The National Treatment Clause

This clause is included in Art. III GATT, and demands that the provisions affecting trading and "indirect trading policies" especially those policies of a fiscal character and any others affecting sales, purchase, transportation, distribution or use of products, are applied in a way that does not discriminate between national and imported goods, once these latter have gone through customs.²¹ It forces States to apply competence conditions (including tax conditions) that are not worse for imported goods than for similar national goods. Thus, once customs duties are paid, the foreign products are assimilated to the similar national products.

The GATT tries to avoid, therefore, the use of quantitative restrictions, discriminatory exchange rates, internal taxes, etc. The Contracting States can only use transparent instruments such as custom duties, as a means of product protection. In this way, economic agents will have some measure of certainty on their

¹⁹ See Carreau, D, Flory T. and Juillard P, *Droit économique international*, LGDJ, Paris, 1990, and Díaz Mier M, *Del GATT a la Organización Mundial del Comercio... op. cit.*, at 58: The treatment as most favoured nation in the GATT does not apply only to tariffs, but also to any other charges levied or connected to importations or exportations, to charges levied on international transfers of currencies made as payment of importations or exportations, to the methods of levy, to the regulations and formalities, to the internal taxes applied on imported goods and to other aspects connected with the internal trading of such products.

²⁰ See Díaz Mier M, *Del GATT... op. cit.*, at 60 et seq.

²¹ On this concept, the reader can consult Jackson, J, *World Trade... op. cit.*, at 273 to 304; Jackson J, Davey, W J and Sykes A, *Legal problems... op. cit.*, at 501 et seq. and Vega Borrego F A, *La interdicción de la discriminación impositiva en la Organización Mundial del Comercio... op. cit.*, at 801 to 816.

calculations, just by adding to the product price, the custom duties to be applied in the markets of the State of destiny, and not other additional charges.²²

This provision raises different consequences. First of all, as *a conditio sine qua non*, it is necessary to have like products of national and foreign origin. This implies that in addition to finding out the origin of the products and in order to justify the prohibition of discriminatory treatments, it is essential to determine two other concepts: first, the concept of "product" covered by the clause, and then, the concept of "like".

As for the first concept, although customs measures (Art. II) are only applied on the products explicitly mentioned by GATT, the obligations derived from Art. III are applicable to any kind of product²³.

As for the concept of "like", the wording "like product" is mentioned seventeen times in the GATT, however, since it does not have the same range in every case it cannot be interpreted in a uniform way. In relation to Art. III, such wording must be interpreted according to criteria such as the final use of the product in a certain market, the preferences of consumers and the properties, nature and quality of the products to be compared.²⁴

²² Therefore, the GATT does not avoid the adoption of measures at the border. It just demands that they are applied in a clear and non-discriminatory way, assuring the existence of actual and loyal competence and a real access to the markets.

²³ This is the opinion of some scholars, based on the fact that, first of all, Art. III does not restrict explicitly the concept of products covered by the clause to any specific category, and, that, neither GATT nor WTO have ever considered another interpretation of this article. Finally, the rule of Art. 31 of the Vienna Convention on the Law of Treaties (rule of the useful effect) calls for a treaty to be interpreted according to the "object and purpose" of the provision, in this case the national treatment clause. See Jackson, J., *World Trade... op. cit.*, at. 280.

²⁴ Thus, it is necessary that both products are direct competitors or may replace each other in the market. This is one of the conclusions of the Report of the GATT Special Group of 11 June 1981, in the case Spain/tariffs of non-toasted coffee. One of the criteria available for determining the similarity is the "elasticity in the substitution of products" relating not only to the characteristics of the products in question, but to the common final uses and the market quotas for each of them. A last subsidiary criterion is the *customs classification* of the products; however, as this kind of classification uses criteria generally descriptive and normally insufficient, it constitutes a weak and arbitrary parameter. In any case it is the claiming State who must prove that the products in question are direct competitors or may replace each other. On the contrary, when a Member State intends to claim that a measure is covered by Art. XX the article establishing exceptions to Art. III, it must prove it so. See, Vega Borrego FA, *La interdicción... op. cit.*, at 806 et seq.

Second, as for the legal consequences of the provision, Art. III provides for the prohibition of discriminatory treatments, i.e. those treatments that (a) treat more onerously foreign products; and (b) consequently, protect the national production.

The first condition is found in Art. II.2 GATT, which forbids the fiscal burden to be higher for imported goods. This means that any excess in the amount of tax levied on foreign goods, no matter what its actual amount is contrary to Art. III GATT.²⁵ But, in addition, GATT Member States may opt for any tax regime they consider to be suitable enough, as long as they do not apply higher taxes on foreign products than on national products. However, as Art. III.4 GATT forbids a treatment less favourable for imported goods, we should take into account not only the amount of tax due, but also the formal requirements derived from the application of the taxes, that in some cases may represent a higher cost than the payment of the tax due.²⁶

Again, the discriminatory treatments forbidden by Art. III GATT are those that imply a more burdensome treatment of imported products and have as a consequence the protection of the national production. This means that the requirement of a protectionist character for the tax provision is different from the requirement of higher taxation of foreign products.

The actual effects on trading produced by the difference in taxation do not matter at all, because what this article protects is not the expectation of a certain trading volume, but the expectation of competition on the same conditions between national and foreign products. In other words, in order to fulfil the condition of "protection of the national products" it is enough that there be a potential initial disadvantage for the foreign products, even if such initial disadvantage does not involve a restriction in the market share²⁷. Likewise, it is irrelevant that the tax measure in question has been created with a discriminatory purpose: the point is not the intention of the legislator, but the actual protectionist effect.²⁸

Finally, we should point out the main specific exceptions to the national treatment clause at (a) Art. XIV GATT, especially its first two sections, allowing discriminatory quantitative restrictions in case of difficulties in the balance of

²⁵ See Vega Borrego FA, *Ibidem*, at 808.

²⁶ See Vega Borrego FA, *Ibidem*, at 812 to 813.

²⁷ See Jackson J, *World Trade... op. cit.*, at 273 and 278.

²⁸ See Jackson J, *Ibidem*, at 284, and Vega Borrego, FA, *La interdicción... op. cit.*, at 805 and 814. At the heart of these considerations is the difficulty of proving the actual purpose of a measure. By making an intention to discriminate irrelevant the condition tries to insert an objective factor to the concept of protectionism, presuming *iuris et de iure* that the mere aptitude for protection is enough to fulfil it.

payments;²⁹ (b) the already mentioned Art. XX GATT, and (c) the application of different fees on internal transportation, based only on the economic use of the transport means and not on the origin of the product (Art. III.4), although this latter is an exception, almost irrelevant for obvious reasons.

C. Non-Discrimination and WTO

In addition to the principles of universality, globality, permanence, transparency or continuity, non-fiscal discrimination has, in the WTO, a wider and more solid presence as an inspiring principle of the agreement than in the GATT, thanks to certain innovations that strengthen its legal regime.

First, we highlight the fact that the action of the Dispute Settlement Body (DSB) has increased the binding effect of the agreement³⁰ and the principle of integrity, the impossibility of establishing reservations to any part of the agreement strengthen the prohibition of discrimination and the national treatment and most favoured nation clauses.

Secondly, these two clauses are also *included in several agreements of the Uruguay Round*, such as the General Agreement on Trade in Services (GATS (Art. XVII)), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),

²⁹ Both sections read as follows:

1. A contracting party which applies restrictions under Article XII or under Section B of Article XVIII may, in the application of such restrictions, deviate from the provisions of Article XIII in a manner having equivalent effect to restrictions on payments and transfers for current international transactions which that contracting party may at that time apply under Article VIII or XIV of the Articles of Agreement of the International Monetary Fund, or under analogous provisions of a special exchange agreement entered into pursuant to paragraph 6 of Article XV.

2. A contracting party which is applying import restrictions under Article XII or under Section B of Article XVIII may, with the consent of the Contracting Parties, temporarily deviate from the provisions of Article XIII in respect of a small part of its external trade where the benefits to the contracting party or contracting parties concerned substantially outweigh any injury which may result to the trade of other contracting parties.

³⁰ In addition, any lack of agreement in the pre-panel phase is filtered through the constitution of a Special Group, that must issue a report on the controversy. Such report may be appealed to the Appellate Body, and depends on the DSB for validity. Once the DSB approves it, it is binding for the affected Member States. Perhaps the best example of the effectiveness of the non-discrimination principle is in relation to Japanese excise duties on alcoholic drinks. See, Vega Borrego, FA, *La interdicción... op. cit.*, at 789 et seq.

the Agreement on Technical Barriers to Trade, on Application of Health Measures and the Agreement on Public Contracting.

Finally, the GATT 94 reworded certain articles changing slightly the non-discrimination regime on non-tariff concessions, tariffs (whether on agriculture or not), customs valuations and the safeguard clause of Art. XIX GATT. But the characteristics of the principle are the same as are mentioned with respect to the GATT.³¹

To sum up, we could say that the current globalisation and interdependency of world trade has founded a new international order, based on the increase of trade agreements aimed at removing barriers to the movement of goods and on the parallel strengthening of regional integration and co-operation between trade blocks, with its own institutional system, integrated by different States usually located in the same geographical area. In both cases, the concept of non-fiscal discrimination is fundamental together with the tariff reductions, although the former concept is very wide and does not have a constant meaning and scope.

Although the first commercial agreements did not cover tax issues, non-fiscal discrimination was indirectly prohibited, through the provisions on equity. Currently, on the contrary, the non-discrimination clause is included, in one way or another, in all such agreements, including friendship, commerce and navigation treaties, and it forbids any kind of fiscal discrimination as it may harm the commercial relations and the economic development of the Contracting States.

Unlike in the case of double tax conventions, there is no model commercial agreement, thus there are numerous variants of non-discrimination clause. Nevertheless, the provisions of GATT act as guidelines for the interpretation of practically all the agreements.

We should also reiterate that in lots of cases, the GATT does not avoid (but promotes as much as possible) the use of measures at the border. Its purpose is that these measures are applied in a clear and non-discriminatory way, ensuring real competition and security in the access to markets. The GATT tries to avoid the use of quantitative restrictions or discriminatory variations in the exchange rates so that the States can only use transparent measures in order to protect their products, and especially customs duties. However, the prohibition of discrimination by the GATT only binds the Contracting States, without entitling taxpayers to any special rights, unlike in the case of the EC, where taxpayers can appeal to Court.

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For more information on the WTO and the changes in the concept of most favoured nation clause, see Díaz Mier M, *Del GATT... op. cit.*, at 233 to 356, and the authors quoted therein.

Since the birth of the WTO in 1995, as the successor of the GATT, it has been a fundamental institution in the formation of binding multilateral trade rules, as well as for promoting the liberalization of international trade. Although the WTO has been a fundamental step and has caused the strengthening of the principles of transparency and non-discrimination, the adaptation of these rules to the complex reality of international trade has not yet been solved. Some measures that could be adopted in relation to the most favoured nation clause would be, e.g., the protection of investments in case of expropriation or nationalisation, and the broadening of its scope by not restricting it only to goods, which would increase the legal protection of the less favoured States. This would also expand the range of the national treatment clause.

In addition to the double tax conventions and commercial agreements based on the GATT and WTO, non-fiscal discrimination finds its main support in the development of regional commercial and economic integration, whose main forms have arisen in America and Europe. Apart from the EC, America stands out because of the variety of processes (ALALC-ALADI, Andean Pact, MERCOSUR, Centro-American Integration, CARICOM-AEC, Group of Three, NAFTA, etc.).

In all these cases, the non-discrimination principle is usually restricted to the field of taxation of foreign goods, although there are important differences developed not only from the diversity of Treaties but also from the asymmetrical applications of the non-discrimination principle by every Contracting State. Likewise, the number of different cases, and the complexity and diversity of the national treatment and most favoured nation clauses are increased due to the effects of so-called "open regionalism": i.e. sub-regional treaties, new generation or economic complementation agreements and the simultaneous presence of States and/or economic entities in several processes of integration with differing geographical scope.

Finally, the numerous and varied expressions of the non-fiscal discrimination principle in relation to goods in the non-European commercial and regional agreements have, generally, two limitations. On one hand, they do not entitle taxpayers to any rights, so that they cannot apply the principle in any Court of a Contracting State, and on the other hand, and unlike the WTO, there is no institutional framework available to force the Contracting States to respect the relevant Treaty clauses, so that any solution must be found through the use of dispute-settlement bodies of a political nature and not by the use of criteria that are strictly legal, as would be the case if the dispute was solved by a Court.

In contrast, European Community Law offers a more advanced model applicable not only to indirect taxation (taxation of supplies of goods and services compatible with

the free movement of goods and services) but also to direct taxation (taxation of income and capital according to the fundamental freedoms).

III. Non-Discrimination and EC Law

In International Law the principle of non-fiscal discrimination has, generally speaking, two forms: a) in the field of indirect taxation, the trade and economic integration agreements contain the most favoured nation clause, allowing the enhancement of the freedom of movement of goods; and b) in the field of direct taxation, the bilateral double tax conventions contain the national treatment rule, avoiding discrimination between residents and foreigners.

In the EC field, however, the principle of non-fiscal discrimination is conceived in two different ways. There is: (i) an approach based on the application of the above mentioned two expressions of the non-discrimination principle in the international field to the relations between the EC or its Member States on one hand and other international organizations or non-EC States on the other hand; and (ii) an approach, applicable to relations of the different tax systems of the Community Members³² which, unlike the above mentioned expressions of the principle in the international field, gives the non-discrimination principle a greater effectiveness and a wider content.

The first approach usually follows the general rules, while the second one, the EC prohibition of non-fiscal discrimination, has some features that justify a detailed analysis.

EC law cannot forget, however, the introduction of the process of European construction in an international society. This implies the necessity of harmonizing the general rules on non-fiscal discrimination with possible EC attributes, trying to solve problems that may arise either from an international or EC perspective.

From an international point of view, the possible problems may have their origin in two different situations: (a) the dissonance between EC Law and a double tax convention signed between EC Members and third States; or (b) the contradiction

³² The expression "Community" has been traditionally used for referring to the so-called European Economic Community (EEC), the more developed European Community configured by the Treaties before the entry into force of the Treaty on European Union, and nowadays the European Community (EC). The other two *European Communities*, the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (EAEC) constitute, together with the EC, one of the three pillars (the other two being the Common Foreign and Security Policy and the Justice and Internal Affairs Cooperation) that integrate the *European Union* designed in Maastricht.

between EC Law and the commercial agreements between EC Members and third States.

The first of these problems is partially solved through Art. 307 of the EC Treaty (formerly Art. 234), according to which:

"The rights and obligations arising from agreements concluded before the entry into force of their Treaty, between one or more Member States on the one hand and one or more third countries on the other hand shall not be affected by the provisions of this Treaty."

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States."

As for double tax conventions signed after 1st January 1958³³ (the vast majority) and the second problem, the solutions come both from International and EC Law. From an international point of view, the already mentioned Art. XXIV of the GATT admits the possibility of signing regional integration agreements, establishing a system of harmonization between the general international trade and the specific circumstances of the regional integration processes.

From the EC point of view, Art. 310 of the EC Treaty (formerly Art. 238) provides that:

"the Community may conclude with one or more States or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure." Also, Art. 302 of the Treaty (formerly Art 229) provides that:

"It shall be for the Commission to ensure the maintenance of all appropriate relations with the organs of the United Nations and of its

specialised agencies. The Commission shall also maintain such relations as are appropriate with all international organizations." Both provisions are complemented by Art. 300 of the EC Treaty (formerly Art. 228 MT) according to which:

"1. Where this treaty provides for the conclusion of agreements between the Community and one or more States or international organizations, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations (...). 7. *Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States.*³⁴." The Treaties constituting the ECSC and the EAEC also follow this trend.

Another problem could arise from the point of view of intra-community relations: the clash of International and EC Law. In these cases, Art. 292 of the EC Treaty (formerly Art. 219) provides that:

"Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein"; i.e. when there are problems of incompatibility between EC Law and the tax systems of Member States, or even the tax provisions of regional agreements signed by Member States, or double tax conventions, such conflicts must be solved through the ordinary EC settlement procedure, via the European Court of Justice (ECJ), whose decision will be based on the principles of autonomy, primacy and direct effect. This explains why the non-fiscal discrimination in the EC is applied only to those situations where the tax system of a Member State is opposed to EC Law.

To sum up, in the field of relations between the Member States or the EC on one hand and third States or international organizations, on the other, the non-discrimination problems must be solved in the GATT-WTO (the EC being a member), while in the relations between the tax systems of the Member States, the non-discrimination principle may enter into conflict with the domestic law of the Member States or with the double tax conventions between Member States, and only the ECJ may solve the conflicts. We will focus on these issues.

A. Non-Discrimination in the EC Treaties: With Special Attention to Art. 12 (formerly Art. 6)

In International Law, a non-discrimination clause signed by two or more States forbids discrimination on the basis of the nationality of taxpayers "in the same circumstances, in particular with respect to residence" (Art. 24.1 OECD). Thus, the criterion determining if a different tax treatment is legitimate is the residence and not the nationality unless there is no non-discrimination clause between the States in question. This criterion causes non-residents (whether nationals or foreigners) to be subject to different tax treatment than residents (whether nationals or foreigners) of the taxing State.

In the EC field, Art. 12 of the EC Treaty (formerly Art. 6) appears to follow the criterion of forbidding only nationality-based discriminations, by providing that "within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited".

This article is the main expression of the non-discrimination principle in the EC field, and is included in the first part of the EC Treaty: EC Principles. As such, it is applicable in all the actions of the EC³⁵. It has three limits³⁶: (i) it cannot exceed the range of the EC Treaty, so *a sensu contrario* its application is legitimate only in those cases covered by the Treaty; (ii) its application is subsidiary³⁷ with respect to

³⁵ See Papadopoulou R E, *Principes généraux du Droit et Droit Communautaire. Origines et concrétisation*. Bruylant, Brussels, 1996, at 59; and García Prats F A, *Imposición directa, no discriminación y Derecho comunitario*. Edit. Tecnos, Madrid, 1998, at 19.

³⁶ See García Prats F A, *Ibidem*, at 33 et seq.

³⁷ See García Prats F A *Ibidem*, at 37. According to this author, this is the position of the ECJ when, asked about the compatibility of a provision with Art. 12 or with specific provisions, only examines the compatibility of these latter and not Art. 12. See Case 270/83 *Commission v French Republic* [1986] ECR 273, Case C-330/91 *The Queen v Inland Revenue Commissioners, ex parte Commerzbank AG* [1993] ECR I 4017, Case C-1/93 *Halliburton Services BV v Staatssecretaris van Financiën* [1994] ECR-I 1137. Some authors regret the existence of a subsidiary principle that does not bring any new element to the prohibition of discrimination in specific provisions. See Malherbe J, *L'égalité en matière fiscale dans la jurisprudence de la Cour de Justice des Communautés Européennes* in "Protection des Droits Fundamentaux... op. cit., at 103.

Nevertheless, and on the autonomous application of this rule, without a specific relation with the Treaty, Joined Cases C-92/92 and C-92/92 *Phil Collins v Imtrat Handelsgesellschaft mbH and others v EMI Electrola GmbH* [1993] ECR I-5145, Case C-43/95 *Data Delecta Aktiebolag and Ronny Forsberg v MSL Dynamics Ltd* [1996] ECR I-4661, Case C-323/95 *David Hayes and another v Kronenberger GmbH* [1997] ECR I-1711.

other provisions of the EC Treaty regardless of some specific provisions included therein; and (iii) it is applied to all nationality based discriminations (subject to the two previously mentioned limits).³⁸

This general principle is repeated later in Arts. 39 and 43 EC Treaty (formerly Arts. 48 and 52) for the freedom of movement of persons, and it is further regulated through Regulation 1612/68, of 15th October 1968 (Official Diary L 257/2, 19th October), Art. 7 of which demands the application of the same tax benefits for national workers and for workers who are nationals of other Member States. Alongside this prohibition, however, the ECJ has repeatedly stated, "the difference in treatment because of the residency may be considered as a hidden restriction on the grounds of nationality", since non-residents are often foreigners,³⁹ so not all the discriminations based on residency are in conformity with EC Law.

This criterion could be revolutionary if it was applied strictly, since it questions a basic element of the tax systems of the Member States and of International Law, such as the different tax treatment of residents and non-residents. In these cases, the ECJ is walking on a tightrope, conscious on one side of the impossibility of repealing the double tax conventions, (whose signature is promoted through Art. 293 AT (formerly Art. 220)), and on the other of the necessity of avoiding harm to the integration of the single market through fiscal discriminations.

In fact, and though the Community does not have taxing powers or explicit competence to harmonize direct taxation⁴⁰, it is not possible to use this lack of rules to deny the EC competence in this field, since according to the ECJ: "there are several provisions in the Treaties that demand indirectly the prohibition of direct taxes that produce discriminations on the grounds of residence". If the fulfilment of a single market is based on the freedom of movement of goods, persons, services and capital (Art. 3 EC Treaty), any tax measures that obstruct any of these freedoms, will be contrary to EC Law. This is the "instrumental character of the non-discrimination principle".

Finally, on the prevalence of the special provisions of the Treaty over Art. 12, see García Prats FA, *Imposición directa...* *op. cit.*, at 37 et seq.

³⁸ On the concept of nationality for the purposes of this rule, see García Prats, F A, *Imposición directa...* *op. cit.*, at. 46 et seq. and the authors quoted therein.

³⁹ See Case C -221/89, *The Queen v Secretary of State for Transport ex parte Factortame Ltd and others* [1991] ECR I-3905

⁴⁰ The only explicit reference to taxation, besides Art. 293, is found in Arts. 90 in the EC Treaty 93 (formerly, Arts. 95 to 99) which refer only to indirect taxation.

Art. 90 of the EC Treaty refers to the prohibition of fiscal discrimination in respect of goods, based on their origin in order to ensure a perfect freedom of movement. In the same way, the provisions referring to the other EC freedoms must also be extended to the tax field, so any tax measure that restricts the freedom of movement of workers (Art. 39, formerly Art. 48), the freedom of establishment (Art. 43, formerly Art. 52), the freedom of supply of services (Art. 49, formerly Art. 59) and the freedom of movement of capital (Arts. 56 and 294, formerly Arts. 73B and 221 respectively), may be held discriminatory. We will now focus on the fundamentals and history of the evolution in the ECJ doctrine.

B. General Characteristics of the Non-discrimination in the EC Field

Unlike non-discrimination in the general international field, in the EC field this principle is not just a clause whose efficacy depends on its prior acceptance by the Contracting States. From a legal point of view, it has a double nature: on one hand, it is a treaty-based rule of EC Law and on the other, it is a general principle of EC Law.⁴¹

As it is a rule directly mentioned in the EC Treaties, it constitutes an autonomous rule, directly applicable and has primacy over any other provision of EC Law or any other rule or act of any of the Member States.

On the other hand, the general principles of EC Law have two functions: on the one hand, it is a criterion that inspires and limits the creation of law by any power of the EC or of a Member State⁴², and on the other, it is a source of law, directly applicable in the absence of a specific provision.

Another consequence, derived from this double nature, is that the rule binds the EC institutions, organisations and Member States as against the other Member States, and also before other EC institutions and EC citizens. This means that any EC institution, Member State or citizen may claim the observance of the non-fiscal discrimination principle before the courts, in the same way as if it could under

⁴¹ See Joined Cases C-103 and 145/77, *Royal Scholten-Honig v Intervention Board for Agricultural Produce etc* [978] ECR 2037. This character of general rule explains why the non-fiscal discrimination principle is nowadays an element of harmonization used by the ECJ even in fields whose competences have not been expressly transferred by Member States, such as direct taxation.

⁴² See, Case 114/76 *Bela-Mühle Josef Bergmann KG v Grows-Farm GmbH & Co KG* [1977] ECR 1211; Joined Cases 80 and 81/77 *Société Commissionnaires Réunis SARL v Receveur des Douanes etc* [1978] ECR 927 and Case 15/81 *Gaston Schull BV v Inspector of Customs and Excise, Roosendaal, Netherlands* [1982] ECR 1409.

domestic law. Furthermore, the ECJ is competent to exercise jurisdictional control of this in different ways.

As for the contents of the non-fiscal discrimination principle in EC Law, it is worth pointing out that unlike in International Law (where it can be summarised as the requirements of treatment as a national (for persons, whether individuals or legal entities) or as the most favoured nation (for foreign goods)), it extends its range also to any conduct that may, directly or indirectly, hinder the free movement of persons, goods, services and capital. This implies, at least, the review of at least two basic ideas of International Taxation.

On the one hand, the International non-fiscal discrimination principle applies to the taxation of nationals and foreigners, so the latter cannot be discriminated against if all the circumstances (usually determined through the criterion of residence) are identical. However, in EC Law, a different tax treatment based on residence may affect the freedom of movement of persons or be a hidden restriction, since most non-residents are also foreigners i.e. the different tax treatment of residents and non-residents, the starting point of international taxation, may be incompatible with the principle of double tax conventions and non-fiscal discrimination in the EC.

On the other hand, the non-fiscal discrimination principle in the EC may be affected by double tax conventions. This would be the case if Member State A agrees on certain tax measures with State Member B, that are less advantageous than those agreed between A and a third Member State C. In this situation, the nationals of C, could be considered as discriminated by A, with respect to the nationals of B, horizontal discrimination. In these cases, the item to be compared, is not a resident or national of the taxing State, but a person, goods, capital, etc. of a third Member State. This new concept of discrimination is forcing a search for new solutions, and alternatives to the traditional bilateral double tax conventions based on the OECD Model.

In addition to our opinions, it is enough to read the Preambles of the Rome and Maastricht Treaties, as well as the First Part of the EC Treaty, to grasp the transcendence of this principle in the European process of integration.

The special relevance of the non-discrimination principle has justified, the large number of decisions of the ECJ, which has built an autonomous principle on the base of EC Law: the principle of non-fiscal discrimination in the EC.

C. Relations between the Law of the WTO and EC Law⁴³

After the initial transitional period, and from 1st January 1969, the European Commercial Policy was an exclusive competence of the European Community, which began to participate as a customs union in the successive GATT Rounds. If Art. 131 EC Treaty (formerly Art. 110) assigns to the common commercial policy the objective of the "harmonious development of world trade" and the "progressive abolition of restrictions on international trade, the contents of this common policy are, however, only briefly mentioned in Art. 133 (formerly Art. 113), which states that it "shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies"⁴⁴.

On the other hand, the ECJ has also acknowledged the achievement of competences by the Communities, whether in the field of negotiation of new agreements or in the

⁴³ On this section, see Ortiz-arce De La Fuente A and García López, J A, *Referencia a las relaciones entre la Comunidad Europea y GATT y la incidencia de las reglas del sistema multilateral de comercio sobre el Derecho comunitario Europeo*, in *Prólogo...op. cit.*, at 31 et seq.; Bourgeois, *Effects of International Agreements in European Community*, in *Michigan Law Review*, 1984, at 1250 et seq.; Van Bael I and Bellis J P, *International Trade Law and Practice of the European Communities: EEC Anti-dumping Law and Other Trade Protection Laws*, London, 1985; Hilf M, Jacobs F G and Petersmann E, *The European Community and GATT*, Deventer, 1986; Various Authors, *Les réglementations commerciales de l'Europe avec les pays développés: Organisation et résultats*, Luxembourg, 1987; Demaret P, *Relations Extérieures de la Communauté Européenne et Marché Intérieur: Aspects juridiques et fonctionnels*, Brugge, 1988; García López J A, *La crisis del sistema GATT y el Derecho Antidumping Comunitario*, Madrid, 1993; Eeckhout, P, *The European Internal Market and International Trade. A legal analysis*, Oxford, 1994; Flory T, *La Communauté ECropéenne et le GATT. Évaluation des accords du Cycle d'Uruguay*, Rennes, 1995; Emiliou N and O'Keeffe D, *The European Union and World Trade Law*, Sussex, 1996; Macleod I, Hendry L D and Hyett S, *The External Relations of the European Communities. A manual of law and practice*, Oxford, 1996; Various Authors, *Legislación Comercial Internacional. El sistema multilateral de Comercio y su incidencia en el Derecho Comunitario Europeo*, Biblioteca de Textos Legales, Tecnos, Madrid, 1997; Brenton P, Scott H, and Sinclair P, *International Trade. A European Text*, Oxford, 1997; Amatucci F, *L'operatività del GATT nell'ordinamento comunitario*, in *Il principio di non discriminazione...op. cit.*, at 179 et seq. and authors quoted therein.

⁴⁴ Apart from Art. 133, the EC has admitted issues related to the suppression of tax and commercial differences between Member States, Joined Cases 37 and 88/73 *Sociaal Fonds voor de Diamantarbeiders v NV Indiamex et Assoc etc* [1973] ECR 1609 the regulation of the customs value and the customs law in general – Case 8/73 *Hauptzollamt Bremerhaven v Massey-Ferguson GmbH* [1973] ECR 897.

execution of the compromises derived from GATT⁴⁵. From the EC point of view, and in accordance with its consistent jurisprudence, the GATT rules are binding for the Communities⁴⁶, and since it is a function of the ECJ to ensure the uniform application of the EC Law, its jurisdictional competence must include the determination of the scope and effects of the GATT rules in the EC.⁴⁷

The fulfilment of such ideas, synonymous with the previously mentioned Art. 292 of the EC Treaty, has gradually developed into an EC system for judicial protection of particular interests against the discretionary application of commercial policies. Thus, if one of the basic functions of GATT and of the Codes negotiated under its framework, has been to give security in respect of the conditions on which a rule for commercial protection may interfere in the correct exchange relations, the result would be that the powers of the EC authorities to modify arbitrarily such relations could be limited by invoking a violation of the GATT.

This development has gone through different phases, from an initial denial of such possibility, to the latest phase in which the ECJ has recognised that such provisions bind the Community and its determination as a matter of EC Law.⁴⁸

We should also point out that the theoretical possibility of obtaining the annulment of a rule of EC Law because of it being contrary to the GATT has been, however, very limited by other means, since it was generally understood that the plaintiffs did not qualify for the application of Art. 230 of the EC Treaty (formerly Art. 173) because they were not affected "in a direct and individual way" by the rule questioned. In such cases, the Tribunal has gradually acknowledged the possibility that an exporter

⁴⁵ See, Cases 267-269/81, *Amministrazione delle Finanze dello Stato v SPI and SAMI* [1983] ECR 801.

⁴⁶ Joined Cases 21-24/72, *International Fruit Co NV v Produktschap voor Groenten en Fruit* [1972] ECR 1219

⁴⁷ See, Cases 267-269/81, *Amministrazione delle Finanze dello Stato v SPI and SAMI* [1983] ECR 801.

⁴⁸ In the beginning, the Court stated that GATT provisions "are not valid for granting rights that may be exercised before Tribunals to the Community citizens" Joined Cases 21-24/72 *International Fruit Co NV Produktschap voor Groenten en Fruit* [1972] ECR 1219. Subsequently, however, and building on its new opinion on Art. 173 (currently Art. 230), the Court stated that a violation of GATT allows an appeal to ECJ and pleads Art. 173: the violation of the Treaty or of a rule regarding its application" (Case 69/89, *Nakajima All Precision Co v Council* [1989] ECR 1689. Anyway, and because of the current wording of Art. 230, any polemic on the direct effect of this provision would be useless, and GATT may be invoked as a fundament of illegality of any rule of derivative EC Law.

fulfils the conditions for qualification, but has been very reticent to do so with respect to EC importers⁴⁹.

With respect to the GATT 1994, we would call attention to two points. First, the important changes in the abilities of the WTO, and in EC harmonization. Legal opinion 1/94, of 15th November 1994 has fixed the capacity between the Community and the Member States, for the signature of "international agreements on services and protection of intellectual property", affirming that while "only the Community is competent according to Art. 113 of the EC Treaty (currently Art. 133 AT) in order to sign the Multilateral Agreements on Trade in Goods", the Community and its Members have a joint power to sign the General Agreement on Trade in Services and the Intellectual Property Agreements. The new Art. 133.5, introduced by the Amsterdam Treaty, states that "The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on services and intellectual property insofar as they are not covered by these paragraphs".

Secondly, the correlation between, on one hand, the provisions of EC Law, and, on the other, the provisions of the Multilateral Agreements on Trade in Goods, Plurilateral Commercial Agreements and others such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The EC has repeatedly declared that its commercial rules have been adopted in accordance with the existing international obligations and, in particular, because of GATT, but in the new circumstances there have been some important changes due to the new demands of the situation created by the WTO.

Regulations 3286/94, of 22nd December 1994 (OJEC, L 349/71, 31st December 1994) and 356/95, of 20th February 1995 (OJEC L 41/3, 23rd February 1995) established "communitarian procedures in the field of common commercial policy with the purpose of ensuring the exercise of the Community rights according to the international commercial rules, and in particular to those established under the WTO". These regulations expressed the correlation between the common commercial policy and the new situation, and have been followed by several decisions. Finally, and despite the Agreement on Subsidies and Countervailing Measures (ASCM) having been considered as equivalent to Art. 87 EC Treaty

⁴⁹ Up to the *Case C-358/89 Extramet Industrie SA v Council* [1991] ECR I-2501, the ECJ had accepted only those appeals where the importers were related to the exporter through an agreement or cooperation contract. In the said case, the ECJ accepted an appeal of an independent importer, and after stating that the Regulations may be challenged by the economic agents "individually affected", it said that the plaintiff fulfilled such condition because it had proved the existence of the elements constituting a particular situation, that individualizes it before any other economic agent, in relation to the questioned rule".

(formerly Art. 92), the main developments, have arisen in relation to the subordination of the normative structure of the EC to that of the Multilateral Commerce System, and the GATT.

To sum up, and from an EC point of view, the GATT principle of non-fiscal discrimination is used in the form of national treatment or most favoured nation clauses in the commercial agreements signed between several Member States, or even the EC, on one hand and third States or international organizations on the other side, and it must be subject to EC Law. In this sense, if the particularities of the non-fiscal discrimination principle in the EC are considered in the WTO as a development of Art. XXIV GATT, the non-discrimination clauses agreed in the GATT and WTO are considered, from an EC point of view, as a development of the European Treaties, so the ECJ is the competent body to look after its fulfilment. Finally, and in the case of clauses agreed on in other commercial agreements that may be opposed to EC Law, the already mentioned Art. 307 of the EC Treaty may be applied.

IV. Conclusions

On one hand, the GATT has influenced very much the EC common commercial policy forming the foundations on which the negotiations on commercial liberalization have been built, especially during the Tokyo and Uruguay Rounds, during which the Community has acted as a Contracting Party, replacing the Member States.

On the other hand, the prohibition of fiscal discrimination is essential in the process of European construction in order to get the full benefit of the basic objectives, such as the freedom in the movement of persons, goods, services and capital, the right of establishment and EC citizenship. Thus, the principle of non-fiscal discrimination is not the only prohibition binding for all the Member States and its subdivisions (whether at the state, regional or local levels), but it also represents a fundamental guideline and limit for any normative measure of the EC bodies or Institutions.

From an EC point of view, the non-fiscal discrimination clauses of any agreement or treaty must respect EC Law. This latter tries to look for an intermediate position based on respect for those clauses and, especially, on the non-distortion of the relations between Member States and the Community Institutions. But we should not forget that in the EC field there is also a concept of non-fiscal discrimination, applicable only when all the legal systems in question are part of the EC field. In such cases, the possible conflicts are solved through Art. 292, of the EC Treaty which guarantees the primacy of the EC non-discrimination principle rather than the general international non-discrimination clause.