XXXIV POLISH YEARBOOK OF INTERNATIONAL LAW
2014
DOI 10.7420/pyil2014j
PL ISSN 0554-498X

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NATIONAL TREATMENT RULES IN EU REGIONAL TRADE AGREEMENTS

Abstract

Most favoured nation (MFN) treatment and national treatment (NT) are two standards usually related to the general principle of non-discrimination. However, while the MFN treatment was undoubtedly and clearly defined already during the negotiation of the General Agreement on Tariffs and Trade in previous works and judgements of various international bodies, the NT standard needed to be clarified. An additional reason to concentrate on NT rules is that their content and scope may influence trade more than the scope of MFN granted. The concept of NT is also subject to relatively rare analysis in comparison with other aspects of regional trade agreements' (RTA) rules which overlap with WTO law.

The aim of this article is to analyse the scope and wording of the NT standard in various RTAs concluded by the European Union. In particular, it inquiries into the extent to which the NT clause remains universal across its different regional trade agreements, and examines the reasons (and consequences) for the differences, if any, in its formulation.

Keywords: EIA, EU, European Union, national treatment, regional trade agreement, RTA, WTO

INTRODUCTION

The Most Favoured Nation (MFN) and National Treatment (NT) principles are the cornerstones of the World Trade Organization (WTO). They are general non-discrimination rules constituting the world trade order constructed after World War II. However, the current proliferation of regional trade agreements (RTAs) as a form of institutionalization of economic integration,[1] causes the MFN today to be more the excep-

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[1] Economic integration is an exceptional reason for suspending the general non-discrimination rules of GATT/WTO and substituting them with discrimination in the form of preferences granted to the (usually

tion than the general rule.[2] All RTAs involve discriminatory liberalization of trade, concerning only chosen partners instead of all WTO Members.

The recent RTAs cover an ever broader range of subjects. Although their name contains the words "Regional" and "Trade", in fact their scope goes considerably beyond the international trade of goods and services.[3] They include, among other things, principles of international production cooperation, foreign direct investments and labour standards, environmental and intellectual property protection, thus becoming one of the main regulatory forms of economic cooperation on a global scale. RTAs have become inter-regional as well. As almost all geographically adjacent countries are already involved in RTAs (and have to fulfil their respective obligations), there are not many candidates for partners in a new agreement among neighbouring countries. Consequently, RTAs increasingly connect states from different continents (e.g. the USA and Israel). In addition, even geographically distant countries may be more desirable partners in RTAs if they have complementary economies and similar policy objectives.

According to the WTO database, the European Union (EU) has notified over forty RTAs. Some of them are currently being negotiated,[4] while others have been in force for a long time. The degree of integration within these RTAs varies by region and their time of conclusion. There are also various standards of treatment granted in these agreements. The most popular are NT and MFN clauses, both of which are standards related to the general principle of non-discrimination. But the clauses may differ among various RTAs, impacting on economic cooperation between the partners and overlapping with WTO law, as they are both fundamental principles of the WTO legal system.[5]

This bring us to the purpose of this article, which aims at analysing the scope and wording of the NT standard in various RTAs concluded by the EU. In particular, it inquires into the extent to which the NT clause remains universal across different

relatively small) group of particularly close economic partners. As especially intensive economic cooperation connects usually adjacent countries (belonging to the same geographic region), agreements constituting this form of preferential cooperation are called "regional".

[2] The WTO itself ironically proposed the name MFN rather LFN (Least-Favoured-Nation). *See* Report by the Consultative Board to the former Director-General Supachai Panitchpakdi, *WTO 10th Anniversary: The Future of the WTO*, WTO, Geneva: 2004, p. 19.

[3] Usually the term international trade means exchange of goods. Traditionally services were non-tradable because of their specificity (e.g. simultaneous production and consumption, constraints on the possibility of transfer). Together with technological progress (especially communication technology) and the increased openness of a growing number of countries, services become more and more a subject of international trade. For the same reason, trade liberalization was conventionally connected with the free exchange of goods. Given the increasing tradability of services, general international rules of liberalization of international trade in services have been introduced as well (*see* General Agreement on Trade in Services.

[4] They are notified on the basis on an early announcement procedure introduced by the General Council Decision of 14 December 2006 on Transparency Mechanism for Regional Trade Agreements,

[5] It is worth mentioning that the MFN and NT principles, both within the framework of the WTO as well as the preferences granted under RTAs, are club goods available only to the members of – respectively – the WTO or a given RTA. The willingness to take advantage of them can even be the main reason for participation in the WTO or an RTA.

regional trade agreements, and examines the reasons (and consequences) for the differences, if any, in its formulation.

The article is organized as follows: The first part presents the EU RTAs, concentrating on their typology and classification and explaining which agreements have been chosen for further analysis and why. This is a crucial part of the text, as the type of agreement determines the type of the NT clause used in it. The second part briefly describes the NT standard as well as clauses related to the NT principle in the WTO agreements. The third part analyses in more detail the different NT clauses used in the EU RTAs and assesses their influence on EU trade with different partners. The last part summarizes and offers conclusions.

1. CLASSIFICATION AND CHARACTERISTICS OF EU REGIONAL TRADE AGREEMENTS

The EU is itself a regional trade agreement within the meaning of WTO law. It is covered by Art. XXIV of the General Agreement on Tariffs and Trade (GATT[6]) as a customs union,[7] and Art. V of the General Agreement on Trade in Services (GATS). The Union as such and its predecessors – the European Economic Community (EEC) and European Community (EC) – has always been a great proponent of regional integration and has a long history of establishing free trade agreements.

Most of the RTAs have been concluded by the EU as association agreements (AA). Such agreements are a special kind of international treaty concluded by the EU (formerly by the EEC and EC) with especially close partners. It has a specially-designed legal basis, which currently is provided by Art. 217 of the Treaty of functioning of the European Union (TFEU). As the European Court of Justice said in the *Demirel* case, association agreements create "special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system."[8] This fact strongly influences both the mode and the very sense of granting NT to a given state. In some AAs a partner state is obliged to simply implement in its law the regulations

[6] Establishment of the EEC required notification under Art. XXIV GATT (after conclusion of the Treaty establishing the European Economic Community in 1957).

[7] RTAs described in WTO law differ considerably from the real RTAs. In GATT/WTO law only some aspects of real RTAs are considered. Art. XXIV GATT provides certain standards for free trade areas (FTAs) and customs unions (CUs). The Enabling Clause allows for the creation of preferential trade agreements connecting developing countries (with less restrictive rules than those constituting the basis for FTAs and CUs). At the same time many RTAs include rules of bilateral treatment of parties' investments (foreign property) not covered by the GATT/WTO law. The EU is still treated by the WTO as a customs union, even though it has achieved much deeper integration (if we consider the Eurozone then we come near to the highest stage of integration in the Balassa setting (*see* B. Balassa, *Economies of Scale in the European Common Market*, 14(2) Economia Internazionale 198 (1961). When the then-EEC was created, doubts were expressed whether it was really compatible with Art. XXIV GATT.

[8] Case 12/86, *Meryem Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR I-3719, para. 9.

and directives listed in annexes to the AA. Some AAs also copy provisions of the TFEU, which might be essential to the meaning of the NT clauses, such as, for example, general exceptions in relation to goods.

Although AAs cover a very broad range of issues, they always have a trade part, which includes the establishment of an FTA, but also covers trade in services and other trade-related issues, which might be qualified as the "WTO Plus" commitments.[9] Consequently, AAs can be qualified as economic integration agreements (EIAs) within the meaning of WTO law. Therefore AAs almost always need to be notified to the WTO as an FTA and EIA (and consisting of provisions on free trade in goods and services).

The first AA was concluded by the EEC[10] and Turkey shortly after the Community's creation.[11] As its aim was to prepare Turkey for EEC accession, it created (in three steps) a customs union between Turkey and the EU. The full customs union came into effect in 1995 on the basis of the Decision of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (96/142/EC).[12]

The deepest and broadest AA is the Agreement on the European Economic Area (EEA), which was signed in 1992 with the European Free Trade Association (EFTA), except for Switzerland, and entered into force in 1994. The EEA established not only a free trade area but also a common economic market. It is not a customs union though. The degree of integration, including common economic policies, is much higher than in any of the other RTAs concluded by the EU. The EEA agreement is supplemented by a separate agreement with Switzerland, signed in 2004 (which replaced the previous one from 1999). Formally, the agreement with Switzerland covers only trade in goods, but the EU and Switzerland concluded a series of sectoral agreements covering various services and, e.g., the free movement of persons. All of this makes the agreements with the EFTA states quite exceptional among typical RTAs. Hence analysis of these two agreements fall outside the scope of this article.

The EU also has a long tradition of concluding AAs with states which intend to join the Union (which usually expire after the respective country accedes to the EC or the EU). The non-discriminatory treatment granted in these agreements is their important part. The level of integration between future members and the EU is usually higher than with other partners. The NT granted tends to have a greater scope (i.e. in relation to services),

[9] Agreements designated as "WTO Plus" go beyond the GATT/WTO law concerning RTAs. They contain rules of economic cooperation not regulated in GATT/WTO law (e.g. foreign direct investment). As there is no international law regulating these issues, they are not internationally controlled. This can lead their conclusion based on arbitrarily chosen rules (usually set by the stronger partner) and make them very discriminative and – eventually – even welfare decreasing (they then become "WTO Minus").

[10] Information concerning the EU agreements and trade relations is based on: http://ec.europa.eu/trade/policy/countries-and-regions/ (accessed 30 March 2015).

[11] Agreement establishing an Association between European Economic Community and Turkey, signed on 12 September 1963, OJ L. 361, 31 December 1977, p. 1.

[12] This agreement violated the GATT rule of establishing free trade within a "reasonable" time (usually not more than 10 years after signing the agreement). *See* A. Estevadeordal, K. Suominen, *The Sovereign Remedy? Trade Agreements in a Globalising World*, Oxford University Press, Oxford/New York: 2009, p. 129.

or may not be necessary (in relation to goods) due to other provisions ensuring non-discriminatory treatment and lowering the level of barriers to trade. Because of the greater level of harmonization of legislation these potential barriers to trade can be lowered.

The EU tendency to precede full membership by AAs became especially visible in the 1990s. The EC concluded so-called "Europe Agreements" with the post-communist states. All these agreements established free trade areas (however with exclusions or postponements for "sensitive" areas[13]). Europe Agreements were concluded with Poland and Hungary in 1991, with the Czech Republic, Slovakia, Bulgaria and Romania in 1993, with the three Baltic States (Estonia, Latvia and Lithuania) in 1995, and with Slovenia in 1996. All the agreements had a similar content. None of them is currently in force due to the subsequent accession to the EU by the then non-member states, but they serve as an example of a group of RTAs. They should also be taken into account in further analyses as a certain step in the evolution of EU RTAs.

The EU also currently has a group of AAs negotiated and signed with non-EU countries with the ultimate objective of full EU membership. The new generation of such EU agreements, signed since 2000, are called Stabilization and Association Agreements (SAAs). They have been concluded with the Balkan states – in the year 2000 with the Former Yugoslav Republic of Macedonia (FYROM); in 2005 with Croatia (no longer in force due to Croatia's accession to the EU in 2013); in 2006 with Albania; in 2008 with Serbia; and in 2010 with Montenegro. In 2008 a Stabilization and Association Agreement was also signed with Bosnia and Herzegovina, but it is still not in force, although the Interim Agreement with Bosnia and Herzegovina, which covers only trade in goods, has been operational since 2008.

A very special kind of free trade area, which has been notified by the EU, is the Association with Overseas Countries and Territories (OCTs[14]). OCTs are not independent entities. They have various degrees of autonomy, and are closely related to some of the EU Member States. The Association with OCTs, although notified as an international agreement, has been established on the basis of the EEC Treaty and its current legal basis is Art. 198 of the TFEU, together with EU secondary legislation issued by the Council of the EU.[15] The nature of the association with OCTs precludes granting them any sort of special treatment – there is only a general prohibition of discrimination

[13] *E.g.* the majority of Polish goods had free access to the EU market at the beginning of 1996. However, in the case of the sensitive goods the EU barriers were maintained much longer. Sensitive areas included especially labour- and raw material-intensive industries (i.e. steel, iron, chemicals, textiles and food products). Their products constituted at that time over 40% of Polish export to the EU countries. *See* E. Czarny, K. Śledziewska, *Polska w handlu światowym* (Poland in international trade), PWE, Warszawa: 2009, p. 177.

[14] Aruba, Anguilla, Bonaire, British Virgin Islands, Cayman Islands, Curaçao, Montserrat, Saba, Saint-Barthélemy, Saint Eustatius, Sint Maarten, Turks and Caicos Islands, Bermuda, Taaf, French Polynesia, New Caledonia, Pitcairn, Wallis and Futuna, Falkland Islands, Greenland, Saint Pierre and Miquelon, Saint Helena, Ascension, and the Tristan da Cunha Islands.

[15] Currently Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community¸ OJ L. 324, 7 December 2001, p. 1, which will soon be replaced by a new act.

included in the Council Decision. The EU also notified an agreement concluded with Faroe Islands, which is a dependent territory of Denmark. This Agreement was signed in 1997 and replaced the previous one from 1991.

The EU also has special agreements with miniature European states,[16] such as San Marino and Andorra. It is worth mentioning that in relation to San Marino an exception from the GATT most-favoured nation clause was agreed upon already during the Havana Conference in 1945. Formally, the agreement establishing a customs union between the EU and San Marino entered into force in 1992, while the agreement with Andorra entered into force in 1991.

It would be an exaggeration to say that the above-mentioned agreements are simple free trade agreements in the sense of WTO law (Art. XXIV GATT). They are rather the natural consequence of complex relations between the EU Member States and some small, dependent territories. Their influence is limited, and the volume of goods exchange which they cover (together with their overall economic potential) is relatively small.

The EU has special relations, but based on a regular AA, with a group of African, Caribbean and Pacific (ACP) states. All of these ACP states are former EU Member States' colonies and have preferential access to the European market, originally granted on the basis of the above-mentioned OCT Association. As a result of decolonization, these states gained independence and needed a separate international agreement to retain the existing trade preferences that they enjoyed. ACP countries are linked by a series of international conventions establishing association with the EU (and previously the EEC and EC), which were signed every five years following 1963,[17] until the Cotonou Agreement was concluded in 2000. This Agreement did not itself establish a free trade area or any other form of economic integration within the meaning of WTO law, but rather provided for preferential treatment of goods originating from ACP countries. FTA (or FTA and EIA) was supposed to be covered by separate agreements concluded with the groups of ACP states – the so-called Economic Partnership Agreements (EPAs). But so far only one complete EPA has been concluded. In 2008 the EU signed such an agreement with CARIFORUM – member states of CARICOM and Dominican Republic. In 2014[18] negotiations concerning an EPA with West African[19] states were

[16] They are perceived as independent states, even though they are partly dependent on their larger neighbours. *See* A. Przyborowska-Klimczak, *Ewolucja prawnomiędzynarodowej sytuacji europejskich państw miniaturowych* (Evolution of international legal situations of European miniature states), [in:] J. Menkes (ed.), *Prawo międzynarodowe – problemy i wyzwania*, Uczelnia Łazarskiego, Warszawa: 2006, pp. 444-48.

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

[18] Information on the dates and stages of conclusion of various agreements is based on: http://ec.europa.eu/trade/policy/countries-and-regions/ (accessed 30 March 2015).

[19] Benin, Burkina Faso, Cape Verde, Ivory Coast, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

claimed to be concluded, and subsequently the agreement was backed by the Economic Community of West African States, but is has not yet been signed. In July 2014 the EU announced the conclusion of negotiations with the Southern African Development Community[20] (SADC), but none of the texts have been revealed yet. What is clear is that a full EPA grants preferences not only to trade in goods, but also to trade in services and in some other trade-related aspects of economic relations.

In addition, in 2009 the EU concluded a few interim economic partnership agreements with some ACP states. These are less developed agreements, creating only free trade areas. Such an interim EPA was signed with the Eastern and Southern Africa region,[21] with Central Africa (signed eventually only by Cameroon), with the Pacific states (Papua and Fiji), and with Ivory Coast from the West Africa region. An interim agreement with Ghana (also from West Africa) was initialled in 2007, but has not been signed yet. Contrary to the EPA with Western Africa, the text of this agreement was published, hence it is covered by my further analysis. An agreement with the East African Community[22] was initialled in 2007, but never signed.

In contrast to the interim SAAs with the Balkan States, which were negotiated and signed together with an entire association agreement, and where the trade part of the association became operational before completion of the ratification procedure in every EU Member State, interim EPAs are separate agreements which are separately negotiated and require a complete ratification procedure. They do not cover all aspects usually covered by a potential EPA. They name areas for future negotiations instead, and liberalize only trade in goods.[23] They have been notified to the WTO on the basis of Art. XXIV GATT.

Another group of countries which have some special ties with the EU are Mediterranean states located in North Africa and the Middle East. The EC signed Euro-Mediterranean agreements establishing an association with seven states of that region. Euro-Mediterranean agreements were signed between 1995 (with Tunisia and Israel) and 2002 (with Algeria and Lebanon[24]). In 1996 an agreement was signed with Morocco, in 1997 with Jordan and in 2001 with Egypt. An agreement with the Palestinian Liberation Organization acting for the Palestinian Authority of the West Bank was signed in 1997. In 2008 an agreements with Syria was initialled, but have not yet been signed due to Syria's internal unrest. As the deepening relations with Mediterranean states is an ongoing process, the EU recently opened negotiations on a new, more modern

[20] Botswana, Lesotho, Mozambique, Namibia, South Africa and Swaziland. South Africa agreed to replace its current agreement by an EPA.

[21] Madagascar, Mauritius, the Seychelles, and Zimbabwe.

[22] Kenya, Uganda, Tanzania, Burundi, and Rwanda.

[23] Although preferential access to the EU market for all ACP states is granted on the basis of the Generalized System of Preferences (GSP) for developing countries. The GSP was introduced in 1970 by the UNCTAD. It was a form of one-sided preferences granted by the developed countries. The EEC established its GSP in July 1971.

[24] Lebanon is not a member of the WTO, but the RTA with Lebanon has been notified to the WTO as an FTA.

agreement called "Deep and comprehensive free trade area" with Morocco,[25] and it intends to open negotiations also with Tunisia, Egypt and Jordan.[26] None of the Euro-Mediterranean Agreements have been notified as an EIA to the WTO,[27] which might be surprising as they all cover trade in services. On the other hand they all have been notified as FTAs.

Beside agreements with former colonies and future member states, the EU has signed a few agreements with other partners, mainly from Central and South America. A framework agreement with Mexico was signed in 1997 (it entered into force in 2000). A Free Trade Agreement and liberalization of trade in services were introduced subsequently, in two decisions of the Joint EC–Mexico Council: Decision 2/2000 establishing a free trade area for goods[28] and Decision 2/2001 establishing an EIA with liberalization of trade in services.[29] In 2002 the EC signed an association agreement with Chile. This agreement, besides other fields of cooperation, covers trade in goods and services. In 2012, the EU concluded two more RTA-like agreements. One of them, with Central American countries, is an association agreement. Its trade-related part recently became operational with three of the six signatory central American states (i.e. Honduras, Nicaragua and Panama; the other three being Guatemala, Costa Rica and El Salvador). Another agreement is a free trade agreement with Peru and Columbia (referred to in the agreements as the Andean Community), which is also provisionally operational since 1 August 2013. In July 2014 Ecuador also joined the agreement,[30] but the formal process of conclusion is not finished yet.

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

Another group of countries which intend to establish closer ties with the EU are member states of the EU Eastern Partnership. The EU concluded negotiations of an AA with Ukraine in 2012, but the agreement was signed only two years later, in June 2014, due to the political tensions. The Deep and Comprehensive Free Trade Areas

[25] The first round of negotiations took place in April 2013.

[26] Based on European Commission, *Overview of FTA and Other Trade Negotiations*, available at: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (accessed 30 March 2015).

[27] *Cf.* Regional Trade Agreements Information System, available at: http://rtais.wto.org/UI/PublicSearchByCrResult.aspx (accessed 30 March 2015).

[28] OJ L. 157, 30 June 2000, p. 10.

[29] OJ L. 70, 12 March 2011, p. 7.

[30] The agreement was prepared as an agreement with the "Andean States", even though originally only Columbia and Peru were parties. In 2014 Ecuador notified its willingness to become a party as well. This required the introduction of some changes related to concessions, but the basic provisions remain the same. The modified agreement was prepared, but has not been signed yet.

with Moldova and Georgia were signed on the same date. They are all full association agreements, but also include so-called Deep and Comprehensive Free Trade Agreements (DCFTAs) covering trade in goods as well as trade in services. The trade parts of the agreements with Moldova and Georgia became operational from 1 January 2015, but for Ukraine this entry into force was postponed until 1 January 2016.

Recently the EU and Canada announced that they finally concluded negotiations of the Comprehensive Trade and Economic Agreement (CETA). The agreement was not formally initialled, but it has been published. Hence it is included the in the further analysis.

As can be seen, the process of concluding agreements is extremely vivid in the EU, and there are several other agreements currently being negotiated with other developed and developing countries, mainly with Asian and American ones. The EU opened FTA negotiations with some ASEAN countries (Malaysia, Vietnam and Thailand) and it is negotiating FTAs with Japan and India as well. Negotiations on the much-commented-upon Transatlantic Trade and Investment Partnership (TTIP) with the United States were launched in 2013.

Table 1 (attached as Appendix no. 1) shows the 31 agreements taken into account in this study. I excluded from the study agreements notified to the WTO which have been concluded with non-independent countries. I also excluded some EFTA member states – Iceland, Norway and Switzerland. These states are linked to the EU by very special ties, which include deeper integration, covering the majority of EU economic legislation. I also excluded Syria, with which an agreement has been notified, but is not operational. The agreements listed in the Table 1 are the subject of my analysis of NT rules, however other agreements negotiated and signed by the EU are commented on as well for comparison.

2. NATIONAL TREATMENT – HISTORY AND CHARACTERISTICS OF THE CLAUSE

The NT clause, together with MFN, is essential in the context of economic integration as it prevents discrimination. Both are therefore central elements of the WTO legal system. But the NT standard, besides being far more complex and miscellaneous, is less discussed by academia than the MFN standard.

The NT and MFN are both traditional standards of treatment in international economic law. Although the concept of national treatment was developed no earlier than in the nineteenth century, nevertheless some scholars trace its origins back to agreements within the Hanseatic League in the twelfth and thirteenth centuries.[31] This results main-

[31] *See e.g.* A. Newcombe, P. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International, Austin: 2009, p. 152; A. Bjorklund, *The National Treatment Obligation*, [in:] K. Yannaca-Small (ed.), *Arbitration under International Investment Agreements: A Guide to the Key Issues*, Oxford University Press, Oxford: 2010, pp. 412-13; but they refer to G. Schwarzenberger, *The Principles*

ly from the fact that states were then more interested in diminishing duties than in lifting discrimination against foreigners. National treatment was primarily used to grant equal treatment for navigation.[32] It was perceived as the highest possible preference, as "no state grants foreigners better treatment than it grants to its own nationals."[33]

NT has been classified as one of seven standards of international economic law in the numerous classic works of Schwarzenberger,[34] although he underestimated that standard compared to the MFN. He defined the NT as a standard which has as its objective to grant internal parity of partners. He recommended it to be used by "countries with a similar structure and complementary interests."[35] He also admitted that it was especially useful in the fields of establishment, in "personal and property rights of nationals abroad, their right of free access to local courts and equality regarding taxation and navigation." It is interesting to note that such a judgment was made after the GATT entered into force.

The lack of broader analysis of NT under international law is caused by the fact that it is less standardized than the MFN clause. Contrary to the MFN, NT was not a subject of discussion in the International Law Commission or in theoretical analysis (except within the framework of the WTO legal system). The vast literature concerning the national treatment standards concentrates on its three main usages and not on its general construction which may differ depending on the usage. In the older literature national treatment is analyzed in the context of the Calvo doctrine and general discrimination of foreigners. More modern works analyze NT in WTO law, and recently in investment agreements. The wording and actual meaning may be very different depending upon the field in which NT has been granted. Simultaneously, the authors writing about NT clearly did not imagine that it can grant better treatment in some fields to foreigners than to its own nationals.

Nowadays we can observe several ways of formulating NT clauses. The first type is "treatment no less favourable than that accorded to like domestic" products, producers, services suppliers, procurement etc. (depending on the field). Such a wording does not exclude a situation in which foreigners are treated better than nationals. Another type of clause stipulates that a party should "ensure the same treatment as compared to

and Standards of International Economic Law, Hague Academy of International Law, Leyden: 1966, pp. 18-26 and P. Verloren van Themaat, *The Changing Structure of International Law*, Hague: 1981, pp. 19-21, who both write about the general development of standards of treatment and the principle of non-discrimination as developing since the Hanseatic League, seeking general routes of standards of treatment in international economic law rather than in national treatment as such.

[32] *See* G. Butler, S. Maccoby, *The Development of International Law*, Longman, London: 1928, p. 506.

[33] *See* R. Riedl, *La clause de la nation la plus favorisée. Documentation présentée au Comité économique de la Société des nations et à la Chambre de commerce internationale par le Comité national autrichien de la Chambre de commerce internationale*, Vienne: 1928, p. 4.

[34] *See* G. Schwarzenberger, *International Law and Order*, Stevens & Sons, London: 1971, p. 157; G. Schwarzenberger, *The Frontiers of International Law*, Stevens & Sons, London: 1962, p. 220; Schwarzenberger, *supra* note 32, p. 67.

[35] *See* Schwarzenberger (*The Frontiers*), *supra* note 34, p. 220.

its own nationals", or "most favourable treatment,"[36] which implies that the treatment should be comparable. Neither foreigners nor nationals should be granted any preferences. Both wordings have in common the fact that the so-called *tertium comparationis* is always a domestically-produced good, national company, operator or producer of goods or services. The crucial point here is the word "like", as it does not have a clear meaning and leaves space for further interpretation. The possibility of comparison with the domestic situation is the most important element of the NT clause. It also enables to differentiate between classic NT clauses and non-discrimination clauses, although they are very similar and – what is probably most important – have the same objective. Ordinary non-discrimination clauses require only that a state-party does not discriminate, without any references to treatment of domestic goods, services or companies, and without defining exactly which *tertium comparationis* should be taken into account. Therefore, it is weakened by the fact that it is deprived of comparison, and as a result of further clarification on how not to discriminate.

3. NATIONAL TREATMENT IN THE WTO LEGAL SYSTEM

A benchmark for NT clauses in regional trade agreements are always the clauses from the WTO, especially because almost all partners of RTAs with the EU are WTO Members (only Lebanon is not a WTO member state, nor does it have observer status, while Algeria, Bosnia and Hercegovina, Serbia and Bahamas (CARIFORUM) are not members but have obtained observer status at the WTO and are preparing for full membership).

NT clauses can be found in both GATT and GATS, as well as in other WTO agreements, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Agreement on Government Procurement (GPA). A separate NT clause is included in the Agreement on Technical Barriers to Trade (TBT), even though it is supplementary to the GATT as it relates to trade in goods. The basic NT clause is Art. III GATT 1994. Its aim is to prevent discrimination of imported goods with respect to non-tariff barriers. It stipulates that internal taxes and regulations should not be applied so as to afford protection to domestic goods. The main obligation of NT is closely linked to many other GATT obligations, such as Art. I (MFN), Art. XI (elimination of quantitative restrictions) or Art. XX (the general exceptions).

Art. III GATT 1994 has been interpreted by GATT/WTO panels and the Appellate Body (AB) in numerous cases. Recently, this vast and well-established jurisprudence has been supplemented by interpretation of the TBT NT clause. The great majority of the WTO jurisprudence concerning the clause concentrates on the notions of "like products" and likeness of treatment, as well as the concept of products that are "competitive and directly substitutable" (as added in the explanatory notes to para. 2 of Art. III GATT 1994).

[36] *See* A. Reinish, *Standards of Investment Protection*, Oxford University Press, Oxford: 2008, p. 54.

Panels and the AB have worked out certain criteria of interpretation that might potentially, but not automatically, be applied to the same notion in RTAs. Although the AB underscored that it is not possible to define firm criteria for the "likeness" of products,[37] WTO dispute settlement bodies usually use a test elaborated by the Working Group on Border Tax Adjustment,[38] using criteria such as the end-use of a product, stating simply that two product are "like" or "competitive and directly substitutable" if they are perceived as such by consumers.[39] The GATT/WTO case law has made it clear that the aim of NT is to avoid protectionism and to assure "equality of competitive conditions".[40] It was also confirmed that an NT clause covers not only *de jure* but also *de facto* discrimination. In *Korea – Various Measures on Beef*, the panel stated clearly that "the object of Article III:4 is, thus, to guarantee effective market access to imported products and to ensure that the latter are offered the same market opportunities as domestic products."[41]

Analysis of the notion of "likeness" is closely related to the panels' and the AB's analysis of the notion of "less favourable treatment", which is a crucial element of every NT clause. Already in the *US – Section 337* report, the GATT panel stated that the prohibition of less favourable treatment "calls for effective equality of opportunities" for foreign goods.[42] Thus it is quite clear that compliance with the NT does not require identical treatment of domestic and foreign goods. The state simply should not differentiate the conditions of market access for foreign goods.

The logic of Art. III, based on the concept that "modification of the conditions of competition" as an objective criterion for establishing less favourable treatment obligation, was modified by recent TBT case law. In its interpretation of the TBT NT

[37] *See* the famous AB Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, p. 21, later confirmed in Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R, 2 September 2011, para. 7.2. For discussion in the literature, *see e.g.* O.K. Fauchald, *Flexibility and Predictability under the World Trade Organization's Non-Discrimination Clause*, 37(3) Journal of World Trade 443 (2003), p. 452.

[38] It referred to product's end-use on a given market and consumers' tastes and habits, which may change from country to country, as well as a product's properties, nature and quality; but also stated that this list is not exhaustive (*Report of Working Party on Border Tax Adjustment*, BISD 18S/97, 2 December 1970, para. 18).

[39] *See* AB Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, 12 March 2001, WT/DS135/AB/R, para. 111, *see also* G. Grossman, H. Horn, P. Mavroidis, *The Legal and Economic Principles of World Trade Law: National Treatment*, IFN Working Paper No. 917, 2012; p. 57; J. B. Goco, *Non-Discrimination, "Likeness", and Market Definition in World Trade Organization Jurisprudence*, 40(2) Journal of World Trade 315 (2006). On the other hand in some cases we can also find references to formal classification of products from tariff codes: Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, 12 June 2007, WT/DS332/R, WT/DS332/R, para. 7.415.

[40] *See e.g.* Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, 1 November 1996, para. 5.5; AB Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, 17 February 1999, para. 119.

[41] Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R; WT/DS169/R, 10 January 2001, para. 627.

[42] GATT Panel Report, *United States – Section 337 of the Tariff Act of 1930*, 7 November 1989, L/6439 – 36S/345, para. 5.11.

clause, the AB stressed the importance of "even-handedness" in how the distinction in treatment was designed and applied.[43] Although related to a much narrower scope of application, the regime of Art. 2.1 TBT is similar to that of Art. III GATT. Art. III GATT does not leave space for even a legitimate difference in treatment, unless it is justified under Art. XX GATT.[44] Despite the fact that the only requirement of Art. 2.1 is the even-handedness of a measure, the interpretation of this notion is broad and covers also the necessity test of a measure, as well as lack of arbitrary discrimination taken from Art. XX GATT.

A similar clause granting NT can be found in Art. XVII GATS. The nature of the GATS NT clause is, however, different than the GATT one. First of all, its scope is limited only to commitments expressly granted by specific WTO Members. It can be limited by mode and by sector. The key elements here are Member-specific lists of commitments. Before examining whether there is a breach of Art. XVII GATS, the dispute settlement body must check whether a defendant has undertaken a commitment in a relevant sector and mode of supply; has adopted or applied a measure affecting the supply of services in that sector and/or mode of supply; and finally whether the measure under examination accords less favourable treatment to foreign services or service suppliers.[45] The wording of the GATS NT is also different compared to GATT. Contrary to the GATT's Art. III, Art. XVII GATS does not differentiate between types of measures (such as taxes and regulatory actions in relation to goods). It covers not only services, but service suppliers as well. It also covers "all measures", without any further clarifications, which means that, once granted, there are no national measures which fall outside the scope of the NT clause.[46]

On the other hand, the GATS NT clause is, like the one from GATT, a "no less favourable" clause, which means that theoretically it prohibits only negative discrimina-

[43] AB Reports, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, 24 April 2012, paras. 182 and 215; *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, 16 May 2012, paras. 216 and 225; *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R WT/DS386/AB/R, 29 June 2012, paras. 271, 272, and 341, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R WT/DS401/AB/R, 22 May 2014, paras. 5.307-5.308; for critical assessment *see* B. Natens, D. Geraets, *Modification of the Conditions of "Competition for Goods and Services" Has "Treatment No Less Favourable" Lost its Meaning*, KU Leuven Working Paper No. 142 (July 2014).

[44] *See* AB Report, *EC - Seal Products*, para. 5.311, for comments *see* S. Hartmann, *Comparing the National Treatment Obligations of the GATT and the TBT: Lessons Learned from the EC-Seal Products Dispute*, 40(3) North Carolina Journal of International Law and Commercial Regulation 629 (2015).

[45] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, (EC – Bananas III)*, WT/DS27/R/ECU, para. 7.314; *see also* G. Verhoosel, *National Treatment and WTO Dispute Settlement, Adjudicating the Boundaries of Regulatory Autonomy*, Hart Publishing, Oxford: 2002, p. 20 (on the meaning of "affecting").

[46] *See* M. Krajewski. *National Regulation and Trade Liberalization In Services*, Kluwer Law International, Hague, London. New York: 2003, p. 96; B. Hoekmann, A. Matoo, *International Trade: Trade in Services*, [in:] A. Guzman, A. O. Sykes (eds.), *Research Handbook in International Economic Law*, Edward Elgar, Cheltenham: 2007, p. 122.

tion of foreign services and service suppliers. Also the test used by panels and the AB seems quite similar in construction to the one used in relation to trade in goods. Firstly, a panel/the AB has to verify whether a measure at issue is a measure affecting trade in services, secondly it has to check whether domestic and foreign services are "like" services or service suppliers are "like", and finally it has to examine whether the foreign services or service suppliers are treated no less favourably than the domestic ones.[47] Unlike in relation to GATT's Art. III, panels and the AB do not need to analyze whether or not a measure is formally identical, or whether a discrimination is only *de jure* or also *de facto*. This has been already explicitly determined in Article XVII itself, which stipulates in paras. 2 and 3 that the requirements may be met by "either formally identical treatment or formally different treatment that it accords to its own like services and service suppliers" and that what is decisive is whether a measure "modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member." The change in wording though, does not change the substance of both provisions, as they should be interpreted in a similar manner. The wording of Article XVII GATS seems to implement the already-existing interpretation of the notion of discrimination.

The NT clauses in GATT's Art. III and GATS's Art. XVII are not the only NT clauses in WTO agreements. The most important are those included in Art. 3 TRIPS and in Art. III GPA. The TRIPS NT clause is mandatory for all WTO Members. There are exceptions provided by the clause which arise directly from various international agreements listed in the provision.[48] With respect to the GPA's NT clause, the most significant disadvantage arises from the nature of that agreement. As it is a plurilateral agreement, not every WTO Member is automatically a signatory of the GPA. There are only 43 parties of the GPA, including the 28 Member States of the EU and the European Union itself. Among the partners in European Union RTAs which are already operational[49] and are the subject of my analysis,[50] only Israel and Korea are parties to the GPA. The clause itself has a relatively broad scope. It covers products, services and suppliers, who should be treated not less favourably than domestic ones. In addition, Art. III:2 GPA stipulates that there should not be any differences in treatment between locally-established suppliers on the basis of their ownership. Locally established suppliers owned by foreign investors should not be discriminated against.

[47] Based on P. van den Bossche, *The Law and Policy of the World Trade Organization, Text, Cases and Materials*, Cambridge University Press, Cambridge: 2011, pp. 393-395.

[48] The Paris Convention for the Protection of Industrial Property (1967), the Berne Convention for the Protection of Literary and Artistic Works (1971), the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961) and the Treaty on Intellectual Property in Respect of Integrated Circuits (1989).

[49] Among those who are negotiating or have finished negotiations are: Armenia, Canada, Japan, Singapore and the United States.

[50] GPA members also include: Iceland, Norway and Switzerland (together with Liechtenstein), as well as the Netherlands with respect to Aruba.

4. NATIONAL TREATMENT IN THE EU REGIONAL TRADE AGREEMENTS IN RELATION TO GOODS

First of all we must keep in mind that the EU RTAs usually cover a broader range of issues than just trade in goods. Even these RTAs which have not been notified to the WTO as EIAs sometimes cover cross border supply of services and establishment of companies as well.[51] The EU RTAs usually consist other issues, such as maritime transport, public procurement and intellectual property protection. Therefore in the following analysis all possible clauses will be taken into account.

As can be seen in Table 1, among the 31 agreements taken into account for the purposes of this article, only thirteen contain NT clauses in relation to trade in goods. This lack of a directly-granted NT does not seem to be connected with a lack of trust in the relations with partners. It is quite significant that agreements with especially close partners (which concluded SAA and Euro-Mediterranean agreements) do not include NT clauses in relation to goods. One may suppose there are two reasons for this. Firstly, the lack of an NT clause is probably compensated for by other provisions which provide for non-discriminatory treatment. It must be noted though, that these might be weakened by the lack of a defined benchmark (*tertium comparationis*). Secondly, the lack of an NT clause in an agreement may be to some extent compensated for by the GATT NT clause with respect to relations between the EU and a given partner.

Art. III GATT is quite clearly the most important benchmark and inspiration for the NT clauses. Since the majority of the EU's RTA partners are WTO Members, less favourable treatment of goods as well as discriminatory taxation is prohibited by that article. Technical requirements are also governed by the TBT Agreement. Hence there is not much need for an additional grant of national treatment or other means to provide for non-discrimination. Despite that fact the EU and its partners decided to grant NT or at least invoke NT from the GATT.

Among the agreements that explicitly grant NT are all EPAs and Interim EPAs concluded with ACP countries. The wording of all these clauses is very similar and is obviously inspired by Art. III GATT. The scope and listed internal measures are exactly the same. Paragraph 1 of the NT clauses in these EPAs and Interim EPAs mirrors Art. III:2 GATT and concerns internal taxation; paragraph 2 mirrors Art. III:4; while paragraph 3 mirrors Art. III:1 of GATT. The exceptions are also the same and cover internal subsidies and public procurement as well as trade defence instruments. But the NT clauses in these agreements do not fully mirror the entire Art. III GATT and only pick internal taxation and internal regulation, leaving internal quantitative restrictions relating to process and production methods (Art. III:5) outside the scope of the NT granted on the basis of an RTA. Although the problem with requirements related to process and

[51] The term "establishment" is often used in the EU RTAs. It is taken from the TFEU (and its predecessors), and means the right to establish a company, a branch or subsidiary of a company in a given state. It aligns mode 3 of the GATS (commercial presence) and sometime also mode 4 (presence of natural persons).

production methods is widely discussed (mainly in relation to environmental impact and the likeness of products[52]), they are usually subject to "internal regulation" and as such are covered by Art. III:4 GATT and respective provisions of NT clauses in RTAs.

The differences in wording are not significant, with one exception. Art. 18.6 of the EPA concluded with Eastern and Southern Africa stipulates that African states, especially those which are least developed countries, can depart from the NT obligation "to promote the establishment of domestic production and protect infant industry." The decision is taken by an EPA Committee, but some exceptions have been listed directly in the Annex III to the Interim EPA. This is probably the most significant modification of GATT obligations and value added to pre-RTA obligations and rights of partners.

Beside the ACP countries being signatories of EPA, only in two other agreements can one find similar clauses. Art. 13 of the decision establishing a free trade area with Mexico and Art. 77 of the EU–Chile Association Agreement also contain wording exactly mirroring Art. III GATT. The difference between the NT clauses with Chile and Mexico and with the ACP States is that the NT clauses in the Chile and Mexico agreements expressly encompass measures covered by Art. III:5 GATT.

The actual meaning of these clauses, both in the EPAs and in the Chile and Mexico agreements, is debatable, with an unclear added value. On one hand this may be seen as a step forward in regional trade agreements and proof of the growing significance of non-tariff measures in international trade. As all agreements that comprise NT clauses are inspired by the GATT, it might be a sign of a new trend in the EU strategy with respect to future RTAs. On the other hand, almost all of the EU's partners in these agreements are WTO Members, which are obliged to grant NT for exactly the same measures on the basis of the GATT. But there may be some differences arising from the fact that GATT's Art. III was not directly invoked. A question can be raised of interpretation of this exact same wording. There is not yet any existing case law. Even though all RTAs include dispute resolution mechanisms, they have never been used.[53] Therefore it is difficult to predict whether adjudicators will follow the WTO panels' and AB's reasoning. The slightly different scope of covered measures, as well as the lack of invocation of the explanatory notes of Article III, might possibly lead to a different interpretation.

It is worth underlining that no NT clause with respect to trade in goods was included into the agreement with the only non-WTO Member or observer – Lebanon. The same objective seems to be attained in the agreement with Lebanon through different clauses that prohibit quantitative restrictions and discrimination, but nonetheless full NT is still absent.

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[52] *See e.g.* 11(2) European Journal of International Law (2000), where the entire volume was dedicated to that problem. *Cf. also* M. Joshi, *Are Eco-labels Consistent with World Trade Organization Agreement?*, 38(1) Journal of World Trade 69 (2004), p. 74; D. Vogel, *The WTO, International Trade and Environmental Protection: European and American Perspectives*, EUI Working Papers 2002/34.

[53] There also have been no disputes between the EU and its partners within the framework of the WTO after conclusion of an RTA.

There are two other agreements already in force, and two negotiated, which include clauses granting NT in relation to trade in goods, albeit with different wordings. The core element of these clauses is the direct invocation of Art. III GATT. First, in the EU-Peru and Colombia Agreement not only was Art. III directly invoked, but also its interpretative notes, which should be *mutatis mutandis* applied to the EU-Peru and Colombia Agreement. Also some additional clarification was included, that NT should be granted by any level of government or authority to "like, directly competitive or substitutable domestic goods". The last statement might be difficult to interpret because, on one hand, according to the same article it should be read exactly the same way as Art. III GATT, while on the other hand in GATT we can find only a "like" product, which however is explained in numerous judgments as the same as "directly competitive or substitutable". The notion of goods that are competitive and directly substitutable can also be found in the explanatory note added to Art. III:2 (only to taxation). The clarification added in above-mentioned agreements covers all measures from Art. III GATT. The same wording was used in the newly negotiated agreements with Singapore and Canada. Therefore we can assume that the direct invocation of the GATT, together with some added clarifications, constitutes the "model NT clause" currently in use with respect to goods in the EU RTAs. Compared to those agreements that fully or partly repeat Art. III's wording instead of directly invoking it, the RTAs with Peru and Colombia, Singapore and Canada leave much less space for interpretation. It should be assumed that the NT, even if interpreted by a body other than a WTO panel or AB, should be construed in line with the WTO rulings.

The EU-South Korea agreement also directly recalls GATT and the fact that national treatment should be granted in accordance with the GATT. Although it is similar to the one with Peru and Colombia, in this agreement "non-tariff measures" are especially emphasized and it is confirmed that they should be a subject of national treatment. This agreement also contains another specific provision that might be classified as an NT clause. It requires that both partners grant NT with respect to access to public participation in decision-making processes for issuing technical standards. Such treatment should be granted to "economic operators and other interested persons". This proves how important technical measures have become to international trade in goods. The provision does not refer to the TBT though. In this context, it might be interesting to note that although the majority of the EU RTAs do have some provisions on technical barriers to trade, there are no NT clauses in any of them. There are only general references to the TBT Agreement, which should be applied in all aspects except those which are explicitly modified. This means that the NT from the Article 2.1. of TBT is applicable here too.

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

5. NATIONAL TREATMENT IN THE EU RTAS IN RELATION TO OTHER AREAS

A greater variety in the NT clauses can be found in relation to trade in services. First it must be observed that the majority of the EU RTAs do not follow the GATS model of liberalization of trade in services and do not belong to any of the agreement "families".[54] They are in fact not similar either to GATS or to other RTAs such as NAFTA. As a consequence, in the majority of the EU RTAs the liberalization of trade in services is not described by modes.

Usually the EU RTAs contain separate provisions concerning services and service suppliers (mode 1 and partly also mode 2 of services' supply) and establishment, which is close to the GATS mode 3 (commercial presence). This is clearly inspired by the logic of the TFUE and four freedoms of the EU. As with the EU internal legislation, the division between supply of services (which covers cross border supply both within and without a physical presence in a partner territory) and the right to establish a company differs with the level of liberalization. Establishing a company (a branch, subsidiary etc.) is always related to fulfilment of all the requirements which nationals need to comply with. The scope of such a liberalization, thanks to the high level of control exercised by domestic authorities over a company, may be quite vast. Because of its temporary nature, cross border supply of services need to be more limited in scope. On the other hand, it is impossible to require from suppliers abroad that they meet and fulfil all requirements of a foreign country's domestic legal system.

Only two EU RTAs have been classified as GATS-like – the agreements with Mexico and with Chile, which refer to such typology of liberalization of trade in services. The GATS-like construction of these agreements also influences the wording of their NT clauses. The EU-Chile Agreement and the Decision 2/2001 of the EU-Mexico Joint Council both contain an NT clause which exactly mirrors Art. XVII GATS. It must be noted though that the EU–Chile Agreement is comprised of two NT clauses in relation to trade in services. There is a separate clause, with exactly the same wording, granting national treatment to establishment. Almost identical clauses (to both services and establishment) were used in the EU–Singapore agreement. The same separate clauses have been used in the EU-CARIFORUM Agreement and the recently concluded agreement with Central America. The agreement with South Korea is also based on the same model, although besides granting NT for establishment, it also covers investors. The not-yet signed agreement with Canada replicates a similar model, but the term "establishment" was not used, probably because it was considered too characteristic of EU law. There are two clauses – one in relation to services and service suppliers and the other to investment and investors – instead of establishment.

[54] For the typology and notion of "families" of regional agreements in relation to services, *see* P. Latrille, J. Lee, *Services Rules in Regional Trade Agreements: How Diverse and How Creative as Compared to the GATS Multilateral Rules?*, WTO Staff Working Paper, 2012.

It is not easy to track the reasons why the reference to investors was added. The clause itself resembles relevant clauses from RTAs concluded by the US, but the philosophy there is slightly different. The US has often combined trade and investment agreements. In the EU RTAs, granting NT also to investors may be a sign of change in the EU's previous philosophy, strengthened by the fact that investment protection was included into the EU trade policy in the Lisbon Treaty in 2009.[55] Investors are defined very broadly, hence by means of an NT clause they gain the same level of non-discriminatory treatment that is usually obtained through investment agreements. On the other hand, any form of financial compensation was explicitly excluded in the same article.[56]

Unlike a NT clause replicated from the GATT, here – in relation to services – repeating clauses from the GATS has its legal significance. In all of these above-mentioned agreements, the key element of liberalization of services is a list of commitments, broadened in comparison to GATS commitments. In such a situation the scope of the NT has also been broadened – it might be applied to a much larger variety of services and situations. As a result, even the exact same wording and interpretation of the clause adds something to the level of liberalization, because it can be applied to other types of services. Moreover, the scope of services covered by the NT may vary not only among RTAs, but also within a given RTA by an EU Member State, which may grant some additional commitments within the framework of an EU RTA.

A slightly different clause has been used in the EU-Colombia and Peru Agreement. Here we also have two separate articles – one related to a right of establishment and investors, and the other to services and service suppliers. Both articles contain three analogical provisions – each for a different party of the agreement. The wording is precise in defining the scope of application, but it does not contain any additional explanations. As a result it mirrors only Art.XVII:1 GATS, concentrating mainly on the scope of concessions made by parties listed in annexes to the agreement.

The lack of information on its negotiating history makes it difficult to identify the reasons behind such a wording. Here a question may arise whether such a change, together with the lack of an interpretative paragraph in the EU-Colombia and Peru agreements, really influences its actual legal meaning. In my opinion it does not. If we use GATT's Art. III as a comparison, it is obvious that "treatment less favourable" refers to both factual and legal treatments. Also, the answer to the question whether formally different treatment is in conformity with that provision is in my view affirmative. There are situations when formally identical treatment of domestic and foreign services and suppliers may not be possible. The decisive factor should, however, be the actual market access for foreigners and lack of modification of conditions and competition. The lack of an explanation, although it makes the provision less clear and more susceptible to interpretation, should not in fact influence the regime of NT.

[55] *See* new Art. 207 TFUE.

[56] Art. 7.12 of the EU–South Korea Free Trade Agreement, OJ L. 127, 14 May 2011, p. 27.

Another group of the EU agreements that comprise an NT clause are SAAs. All of them, except the interim SAA with Bosnia and Herzegovina, have been notified not only as FTAs but also as EIAs to the WTO, and all contain chapters related to the cross border supply of services and establishment, but none of them contain a pure NT clause in these areas. All SAAs, as well as all DCFTAs with the Eastern Partnership states, contain a clause related exclusively to the establishment and operation of subsidiaries and branches of companies. The clause stipulates that parties grant each other treatment no less favourable than that accorded to a partner in their own companies (branches or subsidiaries) or to any company of any third country, whichever is better. This makes for a combination of MFN treatment and NT in one clause. Such a combination of non-discriminatory clauses are apparently similar to those used traditionally in investment protection agreements. It may be much stronger than a regular NT clause, as it may give better treatment than NT if based on some privileges given to other states. It is interesting that such treatment was granted only to the closest partners of the EU, with whom the agreements' ultimate aim is future EU membership.

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

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

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

Contrary to establishment, the right to provide services has not been granted either in the Europe Agreements in the past nor in the present SAAs. They all contain chapters related to supply of services, but without granting NT treatment. NT treatment was granted only in explicitly designated sectors – in maritime transport (operating of ships) in the EU-Albania, EU-Serbia and EU-Montenegro agreements. The three partners should grant NT also to the EU Members' nationals in relation to real estate acquisition, but Albania should do so in accordance with its GATS's list of concessions. Such a difference is a result of the fact that only Albania has WTO membership. The aforementioned concessions related to the supply of services have not been included in

the EU-FYROM agreement, perhaps because the SAA was signed with the FYROM a few years earlier.

On the other hand, the recent DCFTAs with the Eastern Partnership states contain an NT clause related to market access for service suppliers. Its wording, as in many other EU agreements, mirrors the GATS clause. The reason for such a deep commitment is the fact that it has a limited scope. National treatment is granted only to these sectors and suppliers who have explicitly granted market access in the annexes. This can be a signal of a new tendency in the EU agreements, but also proof of a deepened relationships with these partners.

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

Separate clauses granting NT in relation to maritime transport services are quite common in the EU agreements. Also a few other agreements contained such clauses – the EU-Colombia and Peru, the EU-Central America, decision 2/2002 of EC-Mexico Joint Council and the EU-South Korea agreement. The future AA with Ukraine also contains such a clause, supplemented by the exception of a special right arising from bilateral agreements concluded with the EU Member States. Moreover, in the agreements with Central America and South Korea there are NT clauses in relation to some aspects of telecommunication services. In the agreements with South Korea and Mexico NT is granted for financial services.

As was mentioned above, the EU RTAs very often cover a broader scope of issues than trade in goods and services. The geographical scope of the GPA is significantly widened by the EU RTAs. The majority of agreements which cover trade in services also contain a chapter related to public procurement. As there are only two GPA members among the EU partners, they often contain a provision that grants national treatment to public procurement. The clauses themselves exactly mirror Art. III of the GPA. Such a clause can be found in the EU agreements with Albania, the FYROM, Serbia and Montenegro (in all SAAs), with Peru and Colombia, and with Chile and Central America. Also the agreement with Ukraine contains such a provision. NT is not granted in agreements with parties which are also GPA parties. Therefore we can assume, that the purpose of the clauses is not the modification of GPA and its regime, but simply widening the geographical scope of it.

Only two agreements contain national treatment clauses in relation to intellectual property rights – the one with Colombia and Peru as well as the one with Central America. In both cases though the clauses recall TRIPS, and include both NT and MFN. The clauses provide for treatment "not less favourable" than accorded to a party's own nationals. But instead of listing exceptions they only invoke exceptions from Arts. 3 and 5 TRIPS. As a result, the scope and discipline of the clauses seems to be exactly the same as the TRIPS NT clause.

CONCLUSIONS

The NT clause is often used in the EU RTAs, although not every agreement includes that standard. A benchmark is always WTO law and its NT obligations as provided by Art. III GATT and Art. XVII GATS (and other relevant agreements such as GPA or TRIPS). In principle, the clauses used in the EU RTAs mirror the WTO language. This may be a sign that the well-developed WTO NT clauses, with its settled case law (compared to the nonexistent case law under RTAs), is really difficult to develop through regional integration. NT, as it is interpreted by the WTO adjudicating bodies, has a very vast scope. It is thus almost impossible to add any value to liberalization by granting additional NT in an RTA. Therefore we can assume that these clauses are intended more to remind the parties that any form of discrimination is prohibited. They are probably more important when it comes to trade in services, but not so much because of their specific formulation but due to extent of commitments made by the parties.

At the same time, it should be noted that the GATT/WTO NT is binding only on WTO Members and is not yet universal. This means that for a non-EU party from outside the WTO, the NT granted within the framework of an RTA with the EU is the only way to enjoy this type of preference (which, by the way, can be easier to obtain than through membership in the WTO). Having said that one also needs to admit that there are only a few partners of the EU RTAs which are not WTO Member at the same time.

We can clearly observe an evolution in the EU's way of formulating NT. First, the number of clauses is increasing. In older EU RTAs the NT clause was rarely used. There are probably two reasons for this. The first was a stronger former belief that the GATT NT clause was sufficient. NT clauses are almost always present in the newest RTAs concluded by the EU. This might be a sign of the growing importance of non-discrimination, but primarily it is a sign of the growing importance of non-tariffs measures, which have become a shaping factor of international trade. On the other hand, the NT clauses in relation to goods, although present, do not seem to add much to the WTO NT obligation. Such clauses do not change the way foreign goods and foreign producers are treated, but may have consequences with respect to the choice of judicial body for dispute settlement should a dispute arise. The second reason for the growing need of NT clauses is deeper integration in the form of EIAs. When an agreement covers services, the scope of commitments and coverage of sectors is usually wider than the

GATS commitments. Therefore a separate NT clause is needed. In such a case, its resemblance to the GATS' NT clause is natural. Despite that, the possibility of a change of the forum for potential dispute settlement is also possible here.

The way of wording NT clauses shows as well that the EU is a strong negotiator, which often concludes agreements with weaker partners (it makes its RTAs hub-and-spokes-like). There are sorts of "families" of treaties with almost identical clauses (not only those related to NT). There is an EPA family and SAA family, although the SAA family has evolved over time. The first SAA agreement (with the FYROM) was clearly influenced by the earlier Europe Agreements with the states from Central and Eastern Europe. It also became an inspiration for the newly signed agreements with the Eastern Partnership states. There is a bigger variety in the Euro-Mediterranean Agreements, which can be explained by the fact, they were concluded in two waves, and the time factor is very important in the EU RTAs.

What's also interesting in the NT clauses in relation to services is that apparently there is no "model clause" used by the EU, even in its most recent agreements. Different approaches were used in the purely economic agreements with developed partners (South Korea, Canada, Singapore) and in the association agreements with the Eastern Partnership states. And the most important differences are difficult to discover, as they are stipulated in annexes and can vary by scope, by the EU Member State, and the sector of services.

APPENDIX no. 1

Table 1

Signatory	Association Agreement	Type of agreement	Year	EIA Y/N	MFN – goods	MFN – services	NT – goods	NT – services
Albania	Y	SAA	2006	Y	N	Y	N	Y
Algeria	Y	Euro-Mediterranean	2002	N*	N	Y = GATS	N	Y
Bosnia & Hercegovina	Y/N	Interim SAA	2008	N	N	N	N	N
Cameron	Y/N	Interim EPA	2009	N	Y asymmetric	N	Y	N
Canada	N	CETA	-	Y	N	Y	Y	Y
CARIFORUM	Y/N	EPA	2008	Y	Y asymmetric	Y	Y	Y
Central America	Y	FTA/Association Agreement	2012	Y	N	Y	N	Y
Chile	Y	FTA/association	2002	Y	N	N	Y	Y
Columbia & Peru	N	FTA	2012	Y	N	N	Y	Y
Eastern African Community	Y/N	Interim EPA	-	N	Y asymmetric	N	Y	N

Table 1 cont.

Signatory	Association Agreement	Type of agreement	Year	EIA Y/N	MFN – goods	MFN – services	NT – goods	NT – services
Eastern & Southern Africa	Y/N	Interim EPA	2009	N	Y asym-metric	N	Y	N
Egypt	Y	Euro-Mediterranean	2001	N*	N	Y= GATS	N	N
Georgia	Y	Association/ DCFTA	2014	Y	N	Y	N	Y
Israel	Y	Euro-Mediterranean	1995	N*	N	Y= GATS	N	N
Ivory Coast	Y/N	Interim EPA	2009	N	Y asym-metric	N	Y	N
Jordan	Y	Euro-Mediterranean	1997	N*	N	Y	N	Y
Korea	N	FTA	2010	Y	N	Y	Y	Y
Lebanon	Y	Euro-Mediterranean	2002	N*	N	Y= GATS	N	N
FYROM	Y	SAA	2000	Y	N	Y	N	Y
Mexico	N	FTA	2000	Y	Y	Y	Y	Y
Moldova	Y	Association/ DCFTA	2014	Y	N	Y	N	Y
Montenegro	Y	SAA	2010	Y	N	Y	N	Y
Morocco	Y	Euro-Mediterranean	1996	N*	N	Y= GATS	N	N
Pacific countries	Y/N	Interim EPA	2009	N	Y asym-metric	N	Y	N
Palestinian Authority	Y	Euro-Mediterranean	1997	N	N	N	N	N
Serbia	Y	SAA	2008	Y	N	Y	N	Y
Singapore	N	FTA	-	Y	N	N	Y	Y
South Africa	N	Trade Development and Cooperation	1999	N	N	Y= GATS	N	N
Tunisia	Y	Euro-Mediterranean	1995	N*	N	Y= GATS	N	N
Turkey	Y	Custom Union	1996	N	N	N	N	N
Ukraine	Y	Association/ DCFTA	2014	Y	N	Y	Y	Y

* Agreements cover services but are not notified as EIA.