Non-discrimination: Two rules

- Most favoured nation treatment (MFN)
  - GATT art. I and GATS art. II
  - Significance in international law: International Law Commission Part I (draft articles) and Part II (trade and investment)
  - The principle of sovereign equality between states

- National treatment (NT)
  - GATT art. III, GATS art. XVII
  - Historical background
  - Link to general principles on non-discrimination

- Are there reasons for different interpretation of MFN and NT?
General issues

The distinction between de jure and de facto

1. Who or what shall be compared?
   - General or case-by-case? Average or best treated?
     - The issue of “balancing out”
   - Characteristics? (physical, functional, input, …)
   - Potential competitive relationship?
   - Systems of classification?
   - Opinions in the market?

2. The obligation of “equal treatment”
   - Absolute or relative?
   - De minimis?
   - Purpose?
   - Effects?
MFN

- **Scope of application**
  - Border measures and internal measures
  - Safeguards, anti-dumping duties, countervailing duties, subsidies, public procurement, free trade agreements?

- **Who or what shall be compared? “like products”**
  - The “accordion” image
  - Average or best treated?

- **Obligation of equal treatment**
  - Any advantage accorded “immediately and unconditionally”
    - Degree of flexibility?

- **Importance during negotiations**

- **Exceptions**
  - Regionalism and bilateralism – compensation?
  - Developing countries, “GSP trap” (treaty collection p. 1262)
National treatment I

- Scope of application
  - Public authority – public as an economic actor – private parties
  - Internal measures
  - Local authorities

- Taxes: direct vs. indirect taxes, payment for services, border tax adjustment
  - Footnote 58 to the SCM Agreement

- "laws, regulations and requirements"

- Government procurement and subsidies
  - Article III:8
  - The GPA (see art. III) and SCM Agreement
National treatment II

- Specific issues
  - The two tests related to taxes
  - The problem of manipulation of internal markets
  - Processes and production methods (PPMs)
  - Burden of proof
  - Hypothetical discrimination
Relationship to "non-tariff barriers"

- Non-tariff barriers as a main trade concern
- The TBT and SPS Agreements
  - Specifications of the national treatment clauses?
  - A broader range of domestic measures?
  - Applicable in addition to the NT and MFN clauses
- Non-discrimination and harmonization
  - Harmonization: one step further!
  - Shift of burden of proof
- Bilateral agreements
  - Mutual recognition agreements
- Negotiations in the Doha Round
Japan– Alcoholic beverages II

- The role of art. III:1: purpose. Ruled out as independent obligation? Possibly secondary
- Rejection of "aim-and-effect" test
- Likeness of alcoholic beverages
  - Distinction between first and second sentence of art. III:2
  - Like products: differing meanings in different provisions - contextual
- Equality of treatment – two stages?
  - Tax regimes
  - Sales regulation
    - Drinking tradition
    - Labels
- Burden of proof
EC – Asbestos

■ The issue of asbestos finally resolved?
■ Two stages
■ The meaning of "like products"
  ➔ Three questions:
  1. Which characteristics are relevant?
  2. What degree of likeness?
  3. From whose perspective?
■ PPMs?
EC – Bananas III: MFN

- Policies towards former colonies
  - From Lomé to Cotonou – preferential agreements

- ACP bananas favoured over Latin American bananas
  - Statement that all bananas are like products regardless of origin! Para. 190

- Emphasis on the broad applicability of GATT Art. I – wording!
  - “activity function rules”

- GATS art. II covers implicit discrimination