

# Non-discrimination: Two rules

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- 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

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- De jure and de facto / implicit and explicit / origin based and origin neutral
- 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?
  - ↗ Effects? Purpose?

# MFN



- Importance during negotiations
- 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?
- Exceptions
  - Regionalism and bilateralism – compensation?
  - Developing countries, "GSP trap" (treaty collection p. \*)
- Why rarely invoked?

# NT I

- Scope of application
  - Internal measures
  - Public authority
    - Public as an economic actor / private parties
  - 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)
- ↗ Hypothetical discrimination
- ↗ Burden of proof

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# Relationship to "non-tariff barriers"

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- 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

- Two stages
- The meaning of "like products"
  - Three questions:
    1. Which characteristics are relevant?
    2. What degree of likeness?
    3. From whose perspective?

- PPMs?



- The issue of asbestos finally resolved?



# EC – Bananas III: MFN

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- Policies towards former colonies
  - From Lomé to Cotonou
- ACP vs. 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

