

Non-discrimination: Three 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 among 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?
- Non-discrimination TBT art. 2.1 – both aspects, supplemented by minimum standard in art. 2.2

General issues

- De jure and de facto (implicit and explicit or origin based and origin neutral)
 1. 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, monopolies, 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 pp. 1418-9)
- Why is the MFN provision 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 43 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

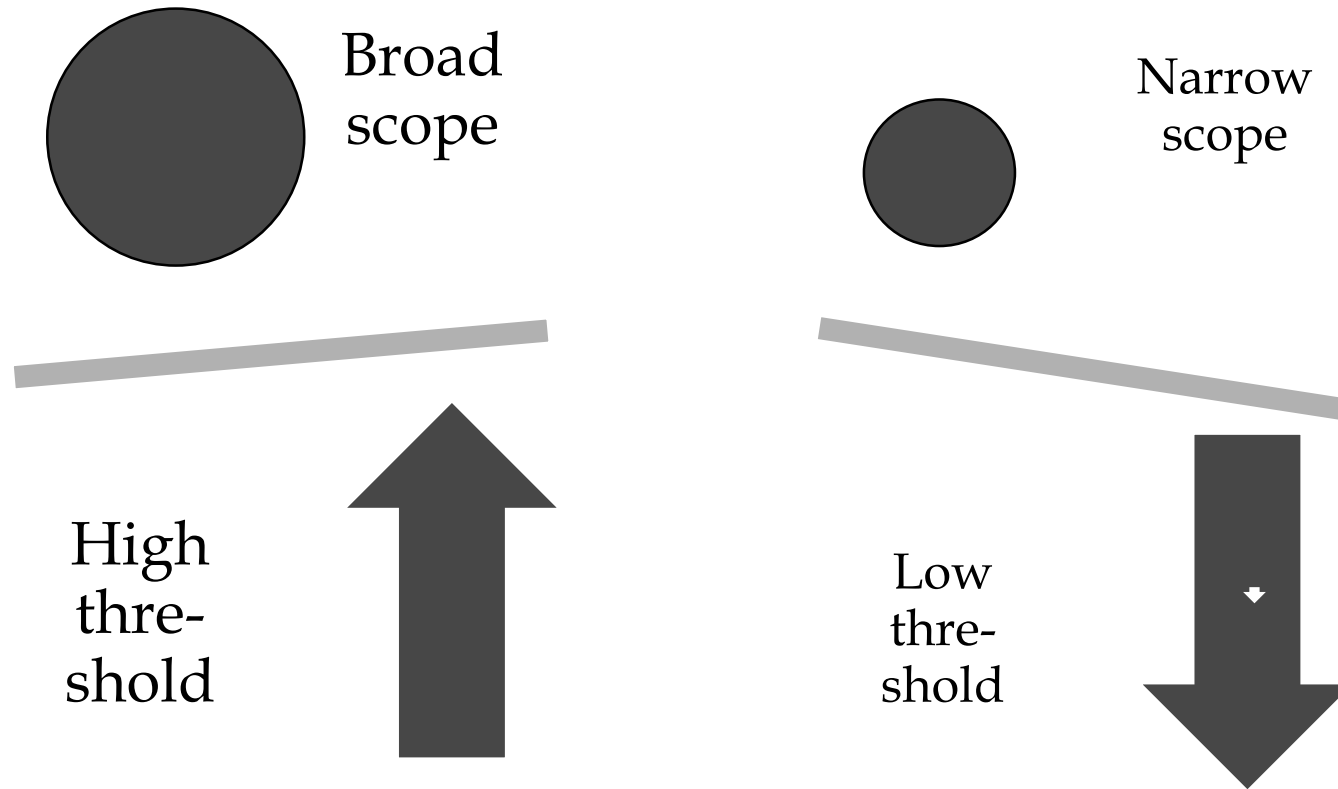
- ↗ The two tests related to taxes
- ↗ The problem of manipulation of internal markets
- ↗ Processes and production methods (PPMs)
- ↗ Hypothetical discrimination
- ↗ Burden of proof

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Scope and level of 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
 - ↗ 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?

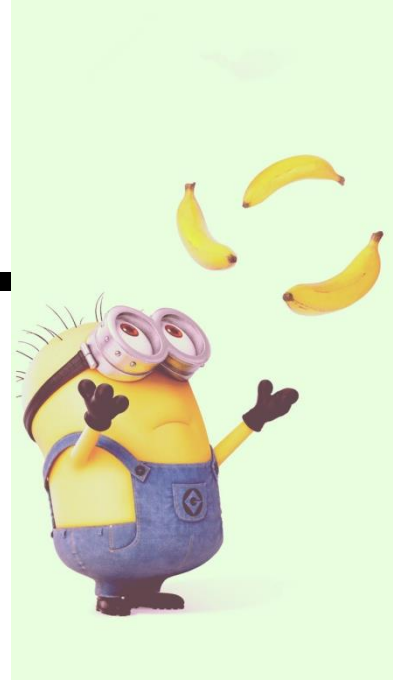
- PPMs?



- The issue of asbestos finally resolved?

EC – Bananas III: MFN

- 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



US – Tuna (2012): TBT art. 2.1

- Combination of NT and MFN, three stages:
 - "technical regulation": Annex 1.1;
 - like products
 - less favourable (appeal focused on this)
- Label reflecting fishing practices ("setting on dolphins")
 - AB: context of art. 2.2, WTO preamble, GATT III:4
 - Panel approach flawed: nationality related factors
 - Conditions of competition to the detriment of imported products (AB: yes)
 - Discrimination? (legitimate regulatory distinction / "even-handed") (AB: the US had not demonstrated that the measure fulfilled these requirements, AB reversed panel findings)