



# International Economic Law

Sessions 7-9

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# Non-Discrimination Standards

Introduction: non-discrimination as a key concept in WTO law and policy

- ▶ Why non-discrimination needed?
- ▶ Two main means to achieve the objectives of the WTO
  - (a) Tariff reduction
  - (b) elimination of discriminatory treatment

## Preamble to the Marrakesh Agreement

**Being desirous** of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations,

# Non-Discrimination Standards

## Most-Favoured-Nation (MFN) Treatment under the GATT

### I. MFN under the GATT 1994

- ▶ GATT 1994 contains a number of provisions requiring MFN treatment, at the centre of which there is Article I:1

#### GATT Article I:1

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,\* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

- ▶ The essence of Article I:1 GATT is ‘that like products should be treated equally, irrespective of their origin.’ (EC-Bananas III (1997) Appellate Body)

# Non-Discrimination Standards

## Most-Favoured-Nation (MFN) Treatment under the GATT

### I. MFN under the GATT 1994

- ▶ 'FTA exception': countries can set up a free trade agreement that applies only to goods traded within the group — discriminating against goods from outside (Article XXIV of GATT)
- ▶ De jure and de facto discrimination
- ▶ De facto discrimination – measures that are 'origin-neutral' but are in fact discriminatory e.g. Canada-Autos (2000)

# Non-Discrimination Standards

## Most-Favoured-Nation (MFN) Treatment under the GATT

### I. MFN under the GATT 1994

#### ► Four-tier test under Art I:1 GATT:

- (i) Whether the measure at issue is a measure covered by Article I:1
- (ii) Whether that measure grants an 'advantage'
- (iii) Whether the products concerned are 'like products'
- (iv) Whether the advantage at issue is accorded 'immediately and unconditionally' to all like products concerned, irrespective of their origin or destination.

# Non-Discrimination Standards

## Most-Favoured-Nation (MFN) Treatment under the GATT

### I. MFN under the GATT 1994

- (i) Whether the measure at issue is a measure covered by Article I:1
- (ii) Whether that measure grants an 'advantage'
- ▶ EC-Bananas III (1997): a measure granting an 'advantage' within the meaning of Art I:1 is a measure that creates 'more favourable competitive opportunities' or affects the commercial relationship between products of different origins.

# Non-Discrimination Standards

## Most-Favoured-Nation (MFN) Treatment

### I. MFN under the GATT 1994

#### (iii) 'Like products'

- ▶ Products that are not 'like' may be treated differently (no violation of the MFN obligation)
- ▶ No definition of the term 'like products' in the GATT 1994: 'many interpretative questions open' (Canada-Aircraft (1999) Appellate Body)
- ▶ Factors to be considered include:
  - (1) 'Likeness' for who?

# Non-Discrimination Standards

## Most-Favoured-Nation (MFN) Treatment under the GATT

### I. MFN under the GATT 1994

#### (iii) 'Like products'


- ▶ Relevance of the analysis of Art III of the GATT 1994
- ▶ Factors to be considered:
  - (i) The products' physical characteristics
  - (ii) The products' end-uses
  - (iii) Consumers' tastes and habits in respect of the products
  - (iv) The products' tariff classification
- ▶ Japan-Alcoholic Beverages II (1996): the scope of the concept of 'like products' may differ in the context and the circumstances that prevail in any given case.



# Non-Discrimination Standards

## Most-Favoured-Nation (MFN) Treatment under the GATT

### I. MFN under the GATT 1994

- (iv) Advantage accorded 'immediately and unconditionally'
- ▶ 'immediately'
  - ▶ 'unconditionally': Indonesia – Autos (1998): this requirement means that such advantage: 'cannot be made conditional on any criteria that [are] not related to the imported product itself.'
- 
- ▶ No need to demonstrate: (a) any actual trade effects, (b) the discriminatory intent of the measure at issue

# Non-Discrimination Standards

## Most-Favoured-Nation (MFN) Treatment under the GATT

### I. MFN under the GATT 1994

#### The 'Enabling Clause' Exception

- ▶ 1979 GATT Decision on Differential and MFN, Reciprocity and Fuller Participation of Developing Countries, commonly referred to as the 'Enabling Clause' (GATT Document L/4903):
  1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.
- ▶ Enabling clause as an exception to Art I:1 of the GATT 1994



# Non-Discrimination Standards

## Most-Favoured-Nation (MFN) Treatment under the GATT

### I. MFN under the GATT 1994

#### The 'Enabling Clause' Exception

##### ► Conditions to be fulfilled to invoke the Enabling clause

3. Any differential and more favourable treatment provided under this clause:

a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;

b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;

c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.



# Non-Discrimination Standards

## Most-Favoured-Nation (MFN) Treatment under the GATT

### I. MFN under the GATT 1994

#### The 'Enabling Clause' Exception

##### ▶ Case study: EC-Tariff Preferences (2004)

- (1) Council Regulation (EC) No. 2501/2001 of 10 December 2001: concerning preferential tariff 'arrangements' applicable to 11 countries from Latin America and Pakistan. India challenged the WTO-consistency of these arrangements.
- (2) The issue: whether the EC could grant additional preferential tariff treatment to certain developing countries to the exclusion of others.
- (3) Finding of the Appellate Body:
  - (a) A developed country member may grant additional preferential tariff treatment to some, and not to other, developing country members, as long as additional preferential tariff treatment is available to all similarly situated developing country members.
  - (b) However, the EC regulation did not contain an criteria or standards to provide a basis for distinguishing developing country members which are beneficiaries under the arrangements from other developing country members. So EC cannot invoke the enabling clause.

# Non-Discrimination Standards

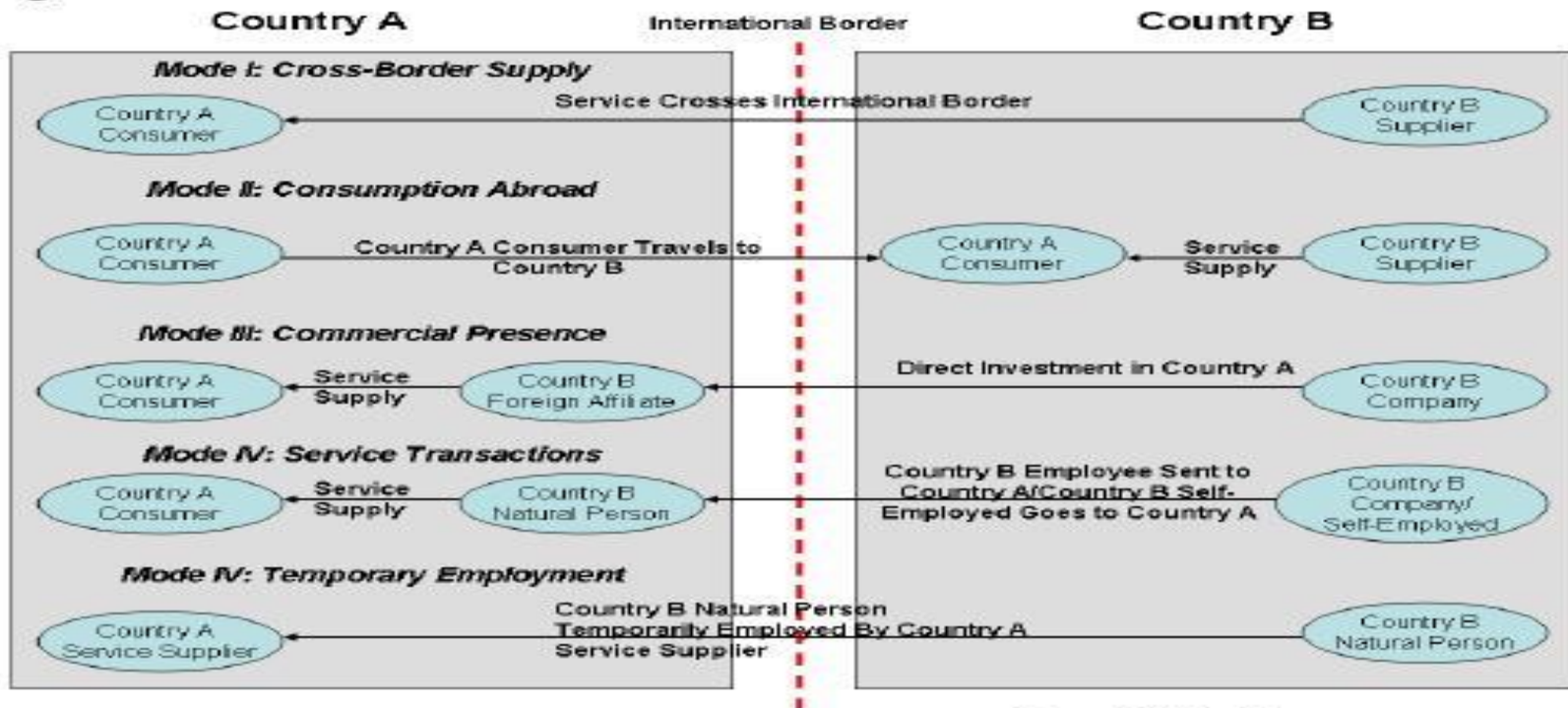
Most-Favoured-Nation (MFN) Treatment under the GATS

1. What is 'services'?

Article I:3(b) GATS: '(b) "services" includes any service in any sector except services supplied in the exercise of governmental authority'

Four modes of services

Figure 1:



# Non-Discrimination Standards

## Most-Favoured-Nation (MFN) Treatment under the GATS

### II. MFN under the GATS

#### 2. Art II:1 of the GATS

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

- ▶ Art II:1 prohibits discrimination between like services and service suppliers from different countries.
- ▶ De jure and to de facto discrimination (EC-Bananas III (1997))
- ▶ Measure: 'Any measure by a member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form.' (Article XXVIII(a) GATS)
- ▶ Measures taken by central, regional or local governments and authorities are included.
- ▶ Measures taken by non-governmental bodies included, when they are taken in the exercise of powers delegated by central, regional or local governments or authorities.

# Non-Discrimination Standards

## Most-Favoured-Nation (MFN) Treatment under the GATS

### II. MFN under the GATS

### 3. Exemptions

#### Art II:2 GATS

2. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.

- ▶ Members could list measures in the Annex on Article II Exemptions – the exempted measures often concern maritime transport, audiovisual, financial and business services, bilateral investment treaties and measures regarding the presence of natural persons.
- ▶ All exemptions granted for a period of more than five years are reviewed by the Council for Trade in Services.

# Non-Discrimination Standards

## Most-Favoured-Nation (MFN) Treatment

### II. MFN under the GATS

#### 4. 'like services' and 'like service suppliers'

- ▶ No definition in the GATS
- ▶ Relevance of the case law on the meaning of the terms in Article XVII:1 of the GATS

#### 5. Treatment no less favourable

- ▶ Guidance sought from Article XVII of the GATS on the National Treatment

NB: It should not be assumed that this equally applied to Art II, but it informs the concept.



# Non-Discrimination Standards

## National Treatment

### I. National Treatment under the GATT

#### 1. Article III GATT

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

NB: A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

# Non-Discrimination Standards

## National Treatment

### I. National Treatment under the GATT

#### 1. Article III GATT (cont.)

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

- ▶ Article III prohibits members from treating imported products less favourably than like domestic products once the imported product has entered the domestic market, i.e. once it has been cleared through customs.

# Non-Discrimination Standards

## National Treatment

### I. National Treatment under the GATT

### 2. The object and purpose of Article III (as recognized by panels and the Appellate Body)

- ▶ Japan-Alcoholic Beverages II (1996): ‘to avoid protectionism in the application of internal tax and regulatory measures. Toward this end, Art III obliges members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products.’
- ▶ Korea-Alcoholic Beverages (1999): ‘avoiding protectionism, requiring equality of competitive relationships’.
- ▶ EC-Asbestos (2001): the purpose of Art III is ‘to prevent members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the marketplace, between the domestic and imported products involved, “so as to afford protection to domestic production”’
- ▶ The actual trade effects of the measure are not crucial

# Non-Discrimination Standards

## National Treatment

1. National Treatment under the GATT

3. De jure and de facto discrimination

4. Internal measures versus border measures

- ▶ Article III applies only to internal measures (as opposed to border measures)
- ▶ Determination of internal measures/border measures is crucial for the application of Article III
- ▶ Distinction is not always easy – especially when the measure is applied to imported products at the time of importation.

# Non-Discrimination Standards

## National Treatment

### I. National Treatment under the GATT

#### 5. National Treatment test for internal taxation on like products (Art III:2, first sentence)

- ▶ The three-tier test of consistency of internal taxation with Article III:2, first sentence:
  - (i) Whether the measure at issue is an internal tax or other internal charge on products;
  - (ii) Whether the imported and domestic products are like products; and
  - (iii) Whether the imported products are taxed in excess of the domestic products

# Non-Discrimination Standards

## National Treatment

### I. National Treatment under the GATT

#### 5. National Treatment test for internal taxation on like products

- (i) Whether the measure at issue is an internal tax or other internal charge on products
  - ▶ When imported products from one member are subject to taxes in excess of those applied to like domestic products in another member, this is deemed to 'afford protection to domestic production' within the meaning of Art III.1.
  - ▶ Examples of 'internal taxes': VAT, sales taxes and excise duties.
  - ▶ Income taxes are not covered by Art III:2
  - ▶ The criterion to distinguish internal taxes and customs duty - China-Auto Parts (2009): 'the obligation to pay a charge must accrue due to an internal event, such as the distribution, sale, use or transportation of the imported product'.

# Non-Discrimination Standards

## National Treatment

### I. National Treatment under the GATT

#### 5. National Treatment test for internal taxation on like products

(ii) Whether the imported and domestic products are like products

▶ No definition of 'like products' in the GATT

▶ Japan-Alcoholic Beverages II (1996):

(a) facts: the higher tax imposed on imported vodka than the internal tax imposed on domestic shochu

(b) issue: whether shochu and vodka should be considered to be 'like products'.

# Non-Discrimination Standards

## National Treatment

(ii) Whether the imported and domestic products are like products

▶ Japan-Alcoholic Beverages II (1996):

(c) Findings of the Appellate Body:

- 'No one approach to exercising judgment will be appropriate for all cases. The criteria in *Border Tax Adjustments* should be examined, but there can be no one precise and absolute definition of what is "like". The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.'



# Non-Discrimination Standards

## National Treatment

(ii) Whether the imported and domestic products are like products

▶ Relevant criteria for determining 'likeness':

(i) The products' properties, nature and quality, i.e. their physical characteristics

(ii) The products' end-uses

(iii) Consumers' tastes and habits in respect of the products

(iv) The products' tariff classification

▶ Note that in Korea-Alcoholic Beverages (1999), soju and vodka were not found to be 'like products' – case-by-case nature of the analysis

# Non-Discrimination Standards

## National Treatment

6. National Treatment test for internal taxation on directly competitive or substitutable products (Art III:2, second sentence)

- ▶ The relationship between (a) Article III:2, first sentence and (b) Article III:2, second sentence

Canada – Periodicals (1997) Appellate Body: if an internal tax on products is found to be consistent with Article III:2, first sentence, there is no need to examine further whether the measure is consistent with Article III:2, second sentence.

- ▶ The four-tier test of consistency of internal taxation with Article III:2, second sentence:
  - (1) Whether the measure at issue is an internal tax or other internal charge on products;
  - (2) Whether the imported and domestic products are directly competitive or substitutable;
  - (3) Whether the imported and domestic products are dissimilarly taxed;
  - (4) Whether the dissimilar taxation is applied so as to afford protection to domestic production.

# Non-Discrimination Standards



## National Treatment

- (2) Whether the imported and domestic products are directly competitive or substitutable
- ▶ No definition of 'directly competitive or substitutable products' in the GATT 1994
  - ▶ Japan-Alcoholic Beverages II (1996) and Korea-Alcoholic Beverages (1999): the traditional local alcoholic beverages, shochu and soju respectively, were found to be 'directly competitive or substitutable' with imported 'Western-style' liquors, such as whisky, vodka, brandy, cognac, rum, gin and liqueurs.
  - ▶ Chile-Alcoholic Beverages (2000): the domestically produced pisco was considered 'directly competitive or substitutable products' were the domestic cane sugar and imported high fructose corn syrup.
  - ▶ Korea-Alcoholic Beverages (1999): 'competition in the market place is a dynamic, evolving process. Accordingly, the wording of the term 'directly competitive or substitutable' implies that the competitive relationship between products is not to be analysed exclusively by reference to current consumer preferences.... The requisite relationship may exist between products that are not, at a given moment, considered by consumers to be substitutes but which are, nonetheless, capable of being substituted for one another'.



Latent demand should also be considered

# Non-Discrimination Standards



## National Treatment

- ▶ 'quality' or 'nature' of competition
- ▶ Factors to be considered:
  - (a) competitive relationship between the products in the market;
  - (b) the products' channels of distribution;
  - (c) their physical characteristics;
  - (d) their end-uses and marketing;
  - (e) their tariff classification;
  - (f) internal regulations regarding these products.

# Non-Discrimination Standards



## National Treatment

(4) Whether the dissimilar taxation is applied so as to afford protection to domestic production

- ▶ The design, the architecture, the structure and the overall application of the measure
- ▶ The magnitude of the tax differential.
- ▶ The intent of the legislator or regulator is irrelevant

# Non-Discrimination Standards



## National Treatment

### 7. National Treatment test for internal regulation (Art III.4)

- ▶ The three-tier test of consistency of internal regulation with Art III:4
  - (i) Whether the measure at issue is a law, regulation or requirement covered by Article III:4;
  - (ii) Whether the imported and domestic products are like products; and
  - (iii) Whether the imported products are accorded less favourable treatment.

# Non-Discrimination Standards



## National Treatment

### 7. National Treatment test for internal regulation (Art III.4)

(i) Whether the measure at issue is a law, regulation or requirement covered by Article III:4

- ▶ Whether only substantive laws, regulations and requirements or also procedural laws, regulations and requirements can be regarded as 'affecting' the internal sale of imported goods? - US-Section 337 Tariff Act (1989)
- ▶ Whether/not taxes can also be measures subject to Article III:4? - China-Auto parts (2009)
- ▶ The Agreement on Trade-Related Investment Measures (TRIMS Agreement) provides an illustrative list of trade-related investment measures that are inconsistent with Article III:4
- ▶ Exemption of measures governing government procurement and subsidies: Article III:8 excludes these kinds of measure from the scope of application of Article III:4.

# Non-Discrimination Standards



## National Treatment

### 7. National Treatment test for internal regulation (Art III.4)

(ii) Whether the imported and domestic products are like products

- ▶ EC-Asbestos (2001): 'like product' in Article III:4 must be interpreted to give proper scope and meaning to the anti-protectionism principle of Article III:1. It is clear that an internal regulation can only afford protection to domestic production if the internal regulation addresses domestic and imported products that are in a **competitive relationship**.
- ▶ 'Likeness' is a matter of judgment – qualitatively as well as quantitatively
- ▶ Comparison with Article III:2, first and second sentences: EC-Asbestos (2001) AB: 'the product scope of Article III:4, although broader than the first sentence of Article III:2, is certainly not broader than the combined product scope of the two sentences of Article III:2'.



Art III:2, first sentence

Art III:4

Art III:2, second sentence



narrower

broader



# Non-Discrimination Standards



## National Treatment

### 7. National Treatment test for internal regulation (Art III.4)

- (ii) Whether the imported and domestic products are like products
  - ▶ Relevance of non-economic interests and values in the determination of 'likeness'

### EC-Asbestos (2001) Appellate Body:

- (a) Issue: whether chrysotile asbestos fibres and cement-based products containing chrysotile asbestos fibres are 'like' PCG fibres and cement-based products containing PCG fibres on the other hand
- (b) The health risks posed by asbestos in the determination of 'likeness'
- (c) The carcinogenic or toxic nature of chrysotile asbestos fibres constitutes a defining aspect of the physical properties of those fibres and must therefore be considered when determining 'likeness' under Article III:4.
- (d) Consumers' tastes and habits regarding asbestos fibres or PCG fibres are very likely to be shaped by the health risks



They were **not** 'like produces' within the meaning of Art III:4 GATT.

# Non-Discrimination Standards



## National Treatment

### 7. National Treatment test for internal regulation (Art III.4)

(ii) Whether the imported and domestic products are like products

- ▶ Irrelevance of regulatory intent: Japan-Alcoholic Beverages II (1996)
- ▶ Relevance of non-product-related processes and production methods (NPR-PPMs): impact on consumers' perceptions and behavior

# Non-Discrimination Standards



## National Treatment

### 7. National Treatment test for internal regulation (Art III.4)

(iii) Whether the imported products are accorded less favourable treatment

- ▶ Irrelevance of regulatory intent: Japan-Alcoholic Beverages II (1996)
- ▶ Comparison between the treatment given to the group of imported products as a whole and the treatment given to the group of like domestic products as a whole.
- ▶ 'Overall equality' does not justify (US-Gasoline (1996))
- ▶ A genuine relationship between the measure at issue and its adverse impact on competitive opportunities for imported versus like domestic products required

# Non-Discrimination Standards



## National Treatment

### II. National Treatment under the GATS

#### 1. Article XVII GATS

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

- ▶ No general application (only to the extent of commitments by member states)
- ▶ Schedule of Specific Commitments
- ▶ Typical limitations to National Treatment relate to:
  - (1) nationality or residence requirements for service suppliers;
  - (2) requirements to invest a certain amount of assets in local currency;
  - (3) restrictions on the purchase of land by foreign service suppliers;
  - (4) special subsidy or tax privileges granted only to domestic service suppliers;
  - (5) differential capital requirements and special operational limits applying only to operations of foreign service suppliers.

# Non-Discrimination Standards



## National Treatment

### II. National Treatment under the GATS

#### 2. Applicability to both de jure and de facto discrimination

▶ Unlike GATT, this is explicitly indicated in Art XVII:3

3. Formally identical or formally different treatment shall be considered to be less favourable if it 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 2001 Scheduling Guidelines

# Non-Discrimination Standards



## National Treatment

### II. National Treatment under the GATS

#### 3. National Treatment test of Article XVII:1

- ▶ A four-tier test of consistency with the NT obligation (EC-Bananas III (1997) and China-Publications and Audiovisual Products (2010) and China-Electronic Payment Services (2012)
  - (i) Whether, and to what extent, a national treatment commitment was made in respect of the relevant services sector;
  - (ii) Whether the measure at issue is a measure by a Member affecting trade in services, i.e. a measure to which the GATS applies;
  - (iii) Whether the foreign and domestic services or service suppliers are 'like services' or 'like service suppliers';
  - (iv) Whether the foreign services or service suppliers are accorded 'treatment no less favourable'.

# Non-Discrimination Standards



## National Treatment

### II. National Treatment under the GATS

#### 3. National Treatment test of Article XVII:1

(ii) Whether the measure at issue is a measure by a Member affecting trade in services, i.e. a measure to which the GATS applies;

- ▶ Canada-Autos (2000): a measure affects trade in services when the measure bears 'upon the conditions of competition in supply of a service'
- ▶ China-Publications and Audiovisual Products (2010) panel: 'the term affecting is wider in scope than regulating or governing'

(iii) Whether the foreign and domestic services or service suppliers are 'like services' or 'like service suppliers';

- ▶ No definition in the GATS
- ▶ Case-by-case determination is needed: market competitiveness

# Non-Discrimination Standards



## National Treatment

### II. National Treatment under the GATS

#### 3. National Treatment test of Article XVII:1

(iv) Whether the foreign services or service suppliers are accorded 'treatment no less favourable'

▶ Article XVII:2 and 3 clarify this term

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it 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



# Market Access

## Introduction

- ▶ Two main categories of barriers to market access: (1) tariff barriers; and (2) non-tariff barriers
- ▶ Tariff barriers include: customs duties (trade in goods)
- ▶ Non-tariff barriers include: quantitative restrictions, 'other non-tariff barriers' (e.g. technical barriers to trade, sanitary and phytosanitary measures, lack of transparency) (trade in goods and services)

# Market Access

## Tariff Barriers

### 1. Definition and types

- ▶ A customs duty or tariff on imports
- ▶ Distinction between ‘internal charges’ and ‘customs duties’

China-Auto Parts (2009) Appellate Body: ‘the time at which a charge is collected or paid is not decisive’ in determining whether a charge is a customs duty or an internal charge. What is important is whether the obligation to pay that charge accrues due to the importation or to an internal event (such as the distribution, sale, use or transportation of the imported product).

- ▶ Two types of customs duty: ad valorem (an amount based on the value of that good – more commonly used) or non-ad valorem (e.g. an amount based on a unit of quantity such as weight, length or volume).

# Market Access

## Tariff Barriers

### 2. Purpose of Customs Duties on imports

#### ▶ Customs Duties are:

- a source of revenue for governments
- a means to protect and/or promote domestic industries why?

### 3. Customs Duties as a lawful instrument of protection

- ▶ In principle, WTO members have the right impose customs duties on imported products.

India – Additional Import Duties (2008): ‘Tariffs are legitimate instruments to accomplish certain trade policy or other objectives such as to generate fiscal revenue.’

However,



# Market Access

## Tariff Barriers

- ▶ Customs Duties do constitute an obstacle to trade

Therefore,



- ▶ Article XXVIIIbis of the GATT 1994 calls upon WTO members to negotiate the reduction of customs duties.

1. The contracting parties recognize that customs duties often constitute serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports and in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities, and conducted with due regard to the objectives of this Agreement and the varying needs of individual contracting parties, are of great importance to the expansion of international trade. The CONTRACTING PARTIES may therefore sponsor such negotiations from time to time.

# Market Access

## Tariff Barriers

- ▶ The negotiation on the reduction of tariffs has been the sole (Geneva, Annecy, Torquay, Geneva and Dillon) and main (Kennedy, Tokyo and Uruguay) agenda of the rounds of trade negotiations.
- ▶ The success of trade negotiations in reducing Customs Duties

Late 1940s

Now



Around 40%

below 3.8%

# Market Access

## Tariff Barriers

- ▶ Differences between developed and developing countries

Argentina	13.6	Japan	5.3
Bangladesh	14.4	EU	5.3
Brazil	13.7	Canada	4.5
China	9.6	US	3.5
India	12.6	Hong Kong	0
Mexico	8.3		
Nigeria	11.7		

# Market Access

## Tariff Barriers

- ▶ Differences according to products
  - Agricultural products and sensitive industrial products – high tariffs tend to exist
- ▶ Basic principles and rules governing tariff negotiations:
  - (1) the principle of reciprocity and mutual advantage;
  - (2) the MFN treatment obligation (Art I:1 GATT).
- ▶ Reciprocity principle not applied to tariff negotiations between developed- and developing-country members

Article XXXVI:8 of Part VI ('Trade and Development') of the GATT 1994

8. The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.\*

# Market Access

## Tariff Barriers

### 4. Tariff Concessions and Schedules of Concessions

- ▶ Schedule of Concessions Exception: EU Member States
- ▶ Each schedule of concessions contains four parts.
  - (i) Part I : the MFN concessions with agricultural and non-agricultural products.
  - (ii) Part II : preferential concessions
  - (iii) Part III: concessions on non-tariff measures
  - (iv) Part IV: specific commitments on domestic support and export subsidies on agricultural products.



# Market Access

## Tariff Barriers

### 4. Tariff Concessions and Schedules of Concessions

- ▶ Most schedules follow the Harmonized Commodity Description and Coding System ('Harmonized System' or 'HS').

### 5. Protection of tariff concessions agreed to in the context of tariff negotiations

#### Art II:1

1. (a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein.



Products may not be subjected to Customs Duties above the tariff concessions or bindings.

# Market Access

## Non Tariff Barriers

### I. Non Tariff Barriers to trade in goods

#### 1. Introduction

- ▶ No definition
- ▶ All governmental and sponsored actions or omissions resulting in prohibitions or restrictions on trade, other than tariff barriers

#### 2. Quantitative restrictions on trade in goods

- ▶ Generally prohibited – Article XI:1

- Article XI:1

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

- ▶ Cases: India – Autos (2002); Brazil – Retreaded Tyres (2007); China-Raw Materials (2012)

# Market Access

## Market Access Barriers to Trade in Services

### 1. Introduction

- ▶ Trade in services represent 71 % of world GDP.
- ▶ Trade in services represent only 18.6 % of world trade in 2011 – impact of non-tariff-barriers

### 2. Definition and Types of market access barriers to trade in services

- ▶ Article XVI:2(a) to (f) of the GATS provide an exhaustive list of MA barriers
  - (a) limitations on the number of service suppliers
  - (b) limitations on the total value of service transactions
  - (c) limitations on the total number of service operations
  - (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier
  - (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service
  - (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

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## Market Access Barriers to Trade in Services

### 3. Rules on Market Access Barriers

- ▶ The 'positive list' or 'bottom-up' approach to the liberalization of trade in services
- ➔ The GATS do not provide for a general prohibition on the Market Access barriers. Obligation undertaken only to the extent of commitments under **Services Schedule**

### Art XVI

1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.

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## Market Access Barriers to Trade in Services

### 4. Negotiations on Market Access for services

#### Article XIX

1. In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.

- ▶ Progressive achievement of higher levels of liberalization of trade in services through successive rounds of negotiations.

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## Market Access Barriers to Trade in Services

### 5. Schedules of Specific Commitments

- ▶ No minimum requirement as to the scope or depth of the commitments
- ▶ 15% of the total subsectors are liberalized on average
- ▶ Market Access commitments have been advanced in tourism, financial and business services
- ▶ Fewest market access commitments have been made in the health and education sectors, as well distribution services.