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Rechtswissenschaftliches Institut

# Trade – WTO Law International Economic Law

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## II. Disciplines of the WTO – GATT and GATS



### A quick review...

- Most-Favored-Nation treatment (Art. I:1 GATT)
  
- National treatment
  - Internal taxation (Art. III:2 GATT)
    - “like products” (sentence 1)
    - “directly competitive or substitutable products” (sentence 2)
  - Internal regulation (Art. III:4 GATT)



### 1. GATT – National Treatment

#### Internal Taxation – Four-tier Test of Consistency

→ See Japan – Alcoholic Beverages (Text No. 22)

- Internal tax or other charge
- “directly competitive or substitutable products”
- Dissimilar taxation
- “to afford protection to domestic production” (reference to Art. III:1 GATT)



### 1. GATT – National Treatment

Internal Taxation – “directly competitive or substitutable products”

- “Like products” as a subset of “directly competitive or substitutable products” → contemplates a broader category of products
- common end-uses (Japan – Alcoholic Beverages) → cross-price elasticity of demand
- “substitutable” → Not only current, but also potential competition (Korea – Alcoholic Beverages)
- “directly” → High, but imperfect degree of substitutability (Philippines – Distilled Spirits)

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### 1. GATT – National Treatment

Internal Taxation – “directly competitive or substitutable products”

- Possible criteria (Philippines – Distilled Spirits)
  - Competitive relationship within relevant market → relevance of price differentials
  - Channels of distribution
  - Physical characteristics
  - End-uses and marketing
  - Tariff classification
  - Internal regulations regarding the products

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## 1. GATT – National Treatment

Internal Taxation – Dissimilar Taxation

- “in excess of” vs. “not similarly taxed” (Japan – Alcoholic Beverages)
  - Different standards of tax burden for imported “like” and “directly competitive or substitutable products”
  - Differential taxation must be more than *de minimis* in the latter case
- To be determined on a case-by-case basis

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## 1. GATT – National Treatment

Internal Taxation – “to afford protection to domestic production”

- Not a matter of legislative intent → protective *application* (Japan – Alcoholic Beverages)
- Comprehensive and objective analysis based on... (Japan – Alcoholic Beverages)
  - ...design
  - ...architecture
  - ...structure of the measure
- Magnitude of dissimilar taxation as a crucial indicator (Chile – Alcoholic Beverages)

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## 1. GATT – National Treatment

### Internal Regulation

*“The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable 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. (...).”*

Art. III:4 GATT



## 1. GATT – National Treatment

### Internal Regulation – Three-tier Test of Consistency

- Law, regulation or requirement covered by Art. III:4 GATT
- “like product”
- “less favorable treatment”



### 1. GATT – National Treatment

Internal Regulation – Law, Regulation or Requirement...

- Domestic regulation *affecting* the sale and use of products → wide interpretation
- No *actual* adverse trade effects required
- “requirements” → includes case-by-case action
- Private action can be a “requirement” if attributable to the government (Canada – Autos)

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### 1. GATT – National Treatment

Internal Regulation – “like product”

*“(...) the ‘general principle’ articulated in Art. III:1 is expressed in Article III:4, not through two distinct obligations, as in the two sentences in Article III:2, but instead through a single obligation that applies solely to ‘like products’. Therefore, the harmony that we have attributed to the two sentences of Article III:2 need not and, indeed, cannot be replicated in interpreting Article III:4. Thus, we conclude that, given the textual difference between Articles III:2 and III:4, the ‘accordion’ of ‘likeness’ stretches in a different way in Article III:4.”*

EC – Asbestos, para. 96

**BUT:** No significant difference between the scope of Art. III:4 and Art. III:2, first **and** second sentence!

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## 1. GATT – National Treatment

### Internal Regulation – “like product”

- Relevant criteria (EC – Asbestos)
  - Properties, nature and quality
  - End-uses
  - Consumers’ tastes and habits
  - Tariff classification
- Not a closed list, *all* relevant evidence to be considered
- Confirmed market-based, economic interpretation of “likeness”
  - Abandoning of “aim and effect” test (US – Malt Beverages)
  - But consideration of non-economic interest of health

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## 1. GATT – National Treatment

### Internal Regulation – “less favorable treatment”

- Requires effective equality of competitive opportunities for imported products
- Different treatment does not necessarily constitute less favorable treatment (Korea – Various Measures on Beef)
- No *de minimis* impact required (Canada – Wheat Exports and Grain Imports)
- Potential adverse impact on competitive conditions may be enough

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## 1. GATT – National Treatment

### Exceptions

- Government procurement (Art. III:8(a) GATT)
- Payment of domestic subsidies (Art. III:8(b) GATT)
- General exceptions (Art. XX GATT)
- Security exceptions (Art. XXI GATT)

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## 1. GATT – “Like Product” under Art. I and III GATT

- Meaning may vary depending on...
  - ...provision that applies
  - ...specific case (market) in question
- Hudec
  - Finer distinction for tariffs... → any distinction based on objective characteristics of products
  - ...than for internal taxes and regulations → focus on competitive relationship
- Case law does not follow the distinction based on policy context → overall rather narrow interpretation of “like product”

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### 1. GATT – Tariff Bindings

- “Tariff”: financial charge or tax on imported goods, due because of their importation
- Tariff negotiations (Art. XXVIIIbis GATT)
  - “on a reciprocal and mutually advantageous basis”
  - MFN treatment (“free-riding”)
- Binding commitments in the Schedules (Art. II:1(a) and (b) GATT)
  - provide an upper limit
- Schedules integral part of the GATT (Art. II:7 GATT)

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### 1. GATT – Tariff Bindings

*“Tariffs are legitimate instruments to accomplish certain trade policy or other objectives such as to generate fiscal revenue. Indeed, under the GATT 1994, they are the preferred trade policy instrument, whereas quantitative restrictions are in principle prohibited. Irrespective of the underlying objective, tariffs are permissible.”*

India – Additional Import Duties, para. 159

- More predictability regarding price increase
- Revenue for the government (not importers)
- Less prone to corruption
- Potentially surmountable trade restriction

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## 1. GATT – Tariff Bindings

### Exceptions

- Internal tax (Art. II:2(a) GATT)
- Anti-dumping and countervailing duties (Art. II:2(b) GATT)
- Services fees (Art. II:2(c) GATT)
- “Escape Clause” (Art. XXXVI:8 GATT) → principle of relative reciprocity

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## 1. GATT – General Elimination of Quantitative Restrictions

*“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 [member] on the importation of any product of the territory of any other [member] or on the exportation or sale for export of any product destined for the territory of any other [member].”*

Art. XI:1 GATT

→ “tariffication process”

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## 1. GATT – General Elimination of Quantitative Restrictions

### Exceptions

- Temporary prevention or relief of critical shortages of products essential to exporting member (Art. XI:2(a) GATT)
- Restrictions to safeguard the balance of payments (Art. XII GATT)
- Special and differential treatment of developing countries
- General exceptions (Art. XX GATT)
- Security exceptions (Art. XXI GATT)

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## 2. GATS – Fundamental GATS Principles

- Most-Favored-Nation (MFN) treatment (Art. II GATS)
- National treatment (Art. XVII GATS)
- Market access (Art. XVI GATS)
- Transparency (Art. III GATS)

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### 2. GATS – Fundamental GATS Principles

Liberalization Approach

“top-down” approach  
MFN



“bottom-up” approach  
• National treatment  
• Market access

Coverage of all areas, with the exception of those listed

→ Art. II:2 GATS, Art. IX:3 WTO Agreement (“negative list”)

Coverage of only those areas listed in Schedules of Specific Commitments, with all others considered excluded

→ Art. XX GATS (“positive list”)

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### 2. GATS – MFN and Negative List

*“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 GATS

*“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.”*

Art. II:2 GATS

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## 2. GATS – Most-Favorite-Nation Treatment

Three-tier Test of Consistency

- Measure covered by Art. II:1 GATS
- “like services” or “like service suppliers”
- “less favorable treatment”

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## 2. GATS – Most-Favorite-Nation Treatment

Measure Covered by Art. II:1 GATS

- “measures by Members...” (Art. I:3 GATS) → broad concept
  - “...affecting trade in services” → modes of supply (Art. I:2 GATS)
    - Cross-border supply
    - Consumption abroad
    - Commercial presence
    - Presence of a natural person
  - Exempted measure (Art. II:2 GATS)?
- See definitions in Art. XXVIII GATS

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## 2. GATS – Most-Favorite-Nation Treatment

“like service” or “like service supplier”

- Suppliers of “like services” are “like service suppliers” (Canada – Autos)
- Size, assets, nature and extent of expertise of service suppliers do not matter?
- Very little case law

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## 2. GATS – Most-Favorite-Nation Treatment

“less favorable treatment”

- Guidance by Art. XVII:2 and 3 GATS (national treatment)

*“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.”*

*“Formally identical or formally different treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to the like service or service suppliers of any other Member.”*

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## 2. GATS – National Treatment and Positive List

*“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.”*

Art. XVII:1 GATS

→ Commitments in Schedules determine the extent to which national treatment obligation applies

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## 2. GATS – National Treatment

Four-tier Test of Consistency

- National treatment commitment regarding the relevant services sector
- “measures by Members affecting trade in services” → measure to which the GATS applies
- “like service” or “like service supplier”
- “less favorable treatment”

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## 2. GATS – National Treatment

“like service” or “like service supplier”

- Transposition of case law on Art. III GATT? (Cossy)
  - Less detailed classification system for services
  - “Intrinsic characteristics” of intangible, often customized services
  - Consumers’ tastes/habits and end-uses as the most useful criteria → indicators of competitive relationship
  - Regulatory distinctions?
- Case law rejects “aims and effects” test under GATS
- Relevant is the (potential) competitive relationship of the services compared (China – Electronic Payment Services)

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## 2. GATS – National Treatment

“less favorable treatment”

- Does the measure provide for different/identical treatment of domestic and like foreign services (suppliers) (Art. XVII:2 GATS)?
- Does the different/identical treatment amount to a modification of competitive conditions (Art. XVII:3 GATS)?

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## 2. GATS – Market Access and Positive List

- Members bind themselves through commitments in Schedule (Art. XVI:1 GATS)
- Prohibition of certain market access barriers (unless otherwise specified in the Schedule) (Art. XVI:2 GATS)
  - Number of service suppliers
  - Value of the service transactions
  - Number of service operations
  - Number of persons employed by a service supplier
  - Amount of foreign capital invested in service suppliers
  - Limitations on the kind of legal entity through which services may be supplied

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## 2. GATS – Market Access and Positive List

### Progressive Liberalization

*“In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations (...) 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 (...).”*

Art. XIX:1 GATS

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## 2. GATS – Exceptions

- Economic integration (Art. V GATS)
- Economic emergencies (Art. X, XII GATS)
- Government procurement (Art. XIII GATS)
- General exceptions (Art. XIV GATS)
- Security exceptions (Art. XIV *bis* GATS)