A quick review…

• What is the difference between the GATT and the WTO?
• How would you describe the accession process to WTO?
• What is perhaps most striking about the WTO’s governance structure?
• Why do countries impose trade restrictions?
II. Disciplines of the WTO – GATT and GATS

1. GATT – Fundamental GATT Obligations

- Most-Favored-Nation (MFN) treatment (Art. I:1 GATT)
- National treatment (Art. III:1, 2 and 4 GATT)
- Tariff bindings (Art. II GATT)
- General elimination of quantitative restrictions (Art. XI GATT)
1. **GATT – Most-Favored-Nation Treatment**

   - Art. I:1 GATT, Art. II GATS, Art. 4 TRIPS
   - Equality of opportunity for all members…
     - *De jure* "origin-based" measures
     - Measures that are *de facto* discriminatory (EEC – Imports of Beef)
   - … and no discrimination of members compared with third countries
   - “one of the pillars of the WTO trading system” (EC – Tariff Preferences)

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"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, favor, 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."

Art. I:1 GATT 1994
1. **GATT – Most-Favored-Nation Treatment**  

MFN Treatment Test (Four-tier Test of Consistency)

- Measure covered by Art. I:1 GATT
- Granting an “advantage”
- “like product”
- “immediately and unconditionally”

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1. **GATT – Most-Favored-Nation Treatment**  

Measure Covered by Art. I:1 GATT

- Border measures
  - Customs duties and other charges on imports/exports
  - Quantitative restrictions (bans, quotas, import licenses) (to the extent allowed)
  - Administrative formalities
- Internal measures
  - Internal taxes
  - Internal regulations on the sale, distribution and use of goods
1. GATT – Most-Favored-Nation Treatment

Granting an Advantage

- “any advantage” → broad meaning in case law
  - More favorable competitive opportunities
  - Impact on the commercial relationship between products of different origins
- Filing of import declaration in advance only for Panama (Colombia – Ports of Entry)

1. GATT – Most-Favored-Nation Treatment

“like product”

- Meaning of “likeness” differs according to the context (Japan – Alcoholic Beverages II: “accordion”)
- Possible criteria (Spain – Unroasted Coffee)
  - Physical characteristics
  - End-use
  - Tariff classification (Japan – SPF Dimension Lumber)
- Analogous application of case law on Art. III:2 or III:4 GATT?
- Hypothetical like products analysis for origin-based distinctions (Colombia – Ports of Entry)
1. GATT – Most-Favored-Nation Treatment

Immediately and Unconditionally

• “immediately” → no time should lapse
• “unconditionally”
  – No conditions that are not related to the imported product itself (Indonesia – Auto)
  – No conditions that discriminate with respect to the origin of the product (Canada – Autos)

Exceptions

• Customs unions and free-trade areas (Art. XXIV:5 and 8 GATT)
• Generalized System of Preferences (GSP)
  – Waiver Decision on Generalized System of Preferences (1971)
  – “Enabling Clause”: Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries (1979) → now part of GATT 1994
  – Operates as exception to Art. I:1 GATT (EC – Tariff Preferences)
• General exceptions (Art. XX GATT)
• Security exceptions (Art. XXI GATT)
1. **GATT – Most-Favored-Nation Treatment**

   Exceptions – Regional Trade Exceptions

   "[T]he provisions of this Agreement shall not prevent (...) the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area (...)."

   Art. XXIV:5 GATT

   ⇒ GATT does not make impossible the formation of a customs union or free-trade area

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<td>1. <strong>GATT – Most-Favored-Nation Treatment</strong></td>
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<td>• Two-tier test of consistency (Turkey – Textiles)</td>
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<td>– Customs union or free-trade area that meets the definition of Art. XXIV:8(a) or (b) GATT</td>
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<td>• Trade restrictions must not exceed those applied prior to formation of customs union or free-trade area (Art. XXIV:5(a) and (b) GATT) ⇒ economic test</td>
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1. GATT – Most-Favored-Nation Treatment

Exceptions – Enabling Clause

“Notwithstanding the provisions of Article 1 of the General Agreement, [members] may accord differential and more favorable treatment to developing countries, without according such treatment to other [members].”

Para. 1 Enabling Clause

Applies to… (Para. 2 Enabling Clause)
- …preferential tariff treatment
- …preferential application of non-tariff measures
- …preferential arrangements among developing countries
- …preferential treatment of least-developed countries

• Does not merely allow, but encourage differential and more favorable treatment

• Conditions (Para. 3 and 4 Enabling Clause)
  - Designed to facilitate and promote the trade of developing countries
  - No impediment to trade on MFN basis
  - Positive response to development, financial and trade needs
  - Notification and consultation requirements
1. GATT – National Treatment

- Art. III:1, 2 and 4 GATT, Art. XVII:1 GATS, Art. 3 TRIPS
  - Art. III:2, sentence 1, GATT: internal taxation ("like products")
  - Art. III:2, sentence 2, GATT: internal taxation ("directly competitive and substitutable products")
  - Art. III:4 GATT: internal regulation

- No discrimination against foreign products…
  - *De jure* "origin-based" measures
  - Measures that are *de facto* discriminatory (Japan – Alcoholic Beverages II)

- …once they have entered the domestic market (no border measures)
1. **GATT – National Treatment**
   
   Internal Taxation – Three-tier Test of Consistency

   - Internal tax or other charge
   - “like product”
   - “in excess of”

2. **GATT – National Treatment**
   
   Internal Taxation – Internal Tax or Other Charge

   - Applied on or in connection with products
   - “Indirect taxation”, e.g. on raw materials (Mexico – Taxes on Soft Drinks)
   - Fiscal measures, not financial penalties for enforcement purposes (EEC – Animal Feed Proteins)
1. GATT – National Treatment
   Internal Taxation – “Like Products”

   • “the accordion of ‘likeness’ is meant to be narrowly squeezed” (Japan – Alcoholic Beverages)

   • Possible criteria (Philippines – Distilled Spirits)
     – Physical characteristics: properties, nature and quality
     – End-uses
     – Consumers’ tastes and habits
     – Tariff classification

   • Relative importance of individual criteria?

1. GATT – National Treatment
   Internal Taxation – “Like Products”

   • Coverage of measures on process and production methods (PPM)? (US – Malt Beverages)

   • “Aim and effect” test (US – Malt Beverages) \(\rightarrow\) relevance of regulatory intent?

   • Relevance of degree of competition among products (“close to being perfectly substitutable”) (Philippines – Distilled Spirits)
1. GATT – National Treatment
Internal Taxation – “in excess of”

- “even the smallest amount of ‘excess’ is too much” (Japan – Alcoholic Beverages II) → no de minimis standard
- Even if concerning administrative requirements related to taxation (Thailand – Cigarettes)
1. GATT – National Treatment

Internal Taxation

- Difference between sentence 1 and 2 of Art. III:2 GATT?

“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.”

Add Art. III:2 (Annex I GATT)

1. GATT – National Treatment

Internal Taxation – Four-tier Test of Consistency

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