

# PACER Plus: Advanced Trade in Goods Workshop

Honiara, Solomon Islands

Day 1 Session 4: Key WTO Rules on Trade in Goods



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# Overview

- I. Introduction to the GATT
- II. Core GATT obligations
- III. Exceptions

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# I. Introduction to the GATT



# I. Introduction to the GATT & r'ship to WTO

- Various terms: WTO Agreement, GATT, GATT 1994, GATT 1947??
- GATT = *General Agreement on Tariffs & Trade* – almost 50 years pre WTO
- WTO Agreement includes: *Multilateral Agreements on Trade in Goods*
- WTO Agreement Annex 1A includes GATT 1994
  - Short framework agreement (2 pages) – incorporates GATT 1947
- Includes GATT 1947 text with updates (decisions and understandings) + Tariffs & accession protocols
- All WTO Members are parties to GATT:
  - Australia, New Zealand, Samoa, Solomon Islands, Tonga, Vanuatu

# I. Introduction to the GATT & r'ship to WTO

## WTO Agreement

### ANNEX 1A: Multilateral Agreements on Trade in Goods

- General Agreement on Tariffs and Trade 1994
- Agreement on Agriculture
- Agreement on the Application of Sanitary and Phytosanitary Measures
- Agreement on Technical Barriers to Trade
- Agreement on Rules of Origin
- Agreement on Subsidies and Countervailing Measures
- Agreement on Safeguards



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## **II. Core GATT obligations**

## Article I

### General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation ..., 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.

## II.1 Most-Favoured-Nation Treatment

- MFN = fundamental non-discrimination obligation under GATT
- Described as “cornerstone of GATT” and “one of the pillars of the WTO trading system” (WTO Appellate Body)
  - Amplifies effects of liberalisation
- MFN prohibits discrimination between *like products* originating in, or destined for, different countries
- Essence of MFN: *like* products must be treated equally, regardless of origin
  - Maximises impact of liberalisation
- So if A-land allows bananas from B-land to enter tariff-free it must also allow bananas from C-land to enter tariff free



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## II.1 Most-Favoured-Nation Treatment

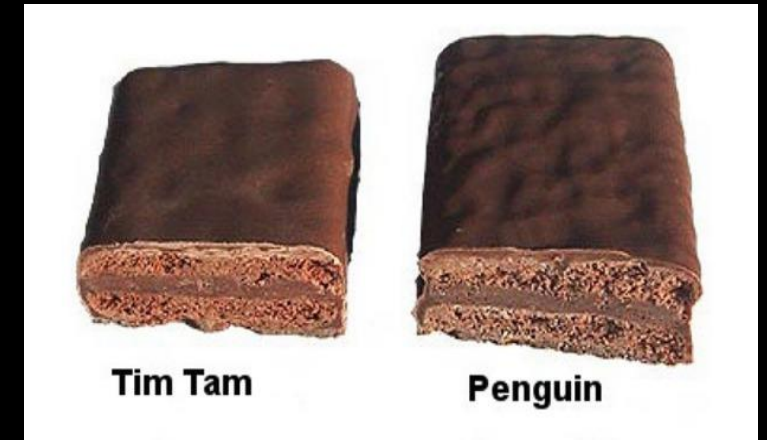
### Scope of MFN: measures covered

- MFN doesn't only apply to tariffs
  - covers a broad range of measures that affect trade in goods
  - includes both measures at the border and internal measures
- MFN applies to:
  - Customs duties & other charges on imports and exports
  - All rules connected with import and export (prohibitions and quotas, import licences)
  - Internal taxes & regulations affecting sale, distribution or use of products
    - Interpreted broadly

# II.1 Most-Favoured-Nation Treatment

## Scope of MFN: what is discrimination?

- MFN applies to both *explicit* discrimination and discrimination in *effect / practice*
- *De jure* (in law): measures discriminate **explicitly** / on their face
  - E.g. US charges 5% tariff on AUS Tim Tams but 10% on UK Penguin biscuits
- *De facto* (in fact): measures appear ‘origin-neutral’, but are **in practice / effect** discriminatory
  - E.g. A-land only allows sale of goat meat if goats graze at altitude above 1000m



## II.2 Elements of MFN

### What are “Like Products”?

- WTO disputes panels and Appellate Body have set out approach to determine whether one product is “like” another:
- ‘like product’ examination always case-by-case basis
- Four criteria:
  - (i) the properties, nature and quality of products;
  - (ii) the end-uses of products;
  - (iii) consumers' tastes and habits (perceptions & behaviour) in respect of products; and
  - (iv) tariff classification of products
- Determining whether products “like” focused on whether there is a competitive relationship between products and degree of competition

## II.2 Elements of MFN

### What is an 'advantage' or 'privilege'

- MFN prohibits preference / advantage with detrimental impact on competitive opportunities for like products from other Members
  - Competitive advantage
- Kind of treatment that can be an 'advantage' interpreted broadly – e.g.
  - Includes differences in tariffs, taxes, charges
  - Requiring importers of goods from one country to submit import declarations in advance – but not other imports from other countries
  - Ability for tuna producers from *some* countries to use dolphin-safe label = "advantage" in US market for tuna
- Preferential treatment granted to good of one Member must be granted to all other Members "immediately and unconditionally"

## II.3 Exceptions to MFN: FTAs

- In FTAs – including PACER Plus – Parties agree to preferential treatment for goods – including elimination or reduction of tariffs
  - If MFN is cornerstone of GATT – how do FTAs exist?
- GATT Art XXIV includes an exception for FTAs & customs unions

### Article XXIV: Customs Unions and Free-trade Areas

5. ... the provisions of this Agreement shall not prevent, ... the formation of a customs union or of a free-trade area ...

- FTA preferences not breach GATT if satisfy Art XXIV conditions:
  - Can't increase barriers to non-party trade (XXIV:5(b))
  - Tariffs and other restrictions must be eliminated on substantially all trade between the parties (XXIV:8(b))

## **GATT Article III\***

### **National Treatment on Internal Taxation and Regulation**

1. ... internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, ... distribution or use of products ... 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.\*

...

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, ... distribution or use. ...

## II.4 National Treatment

- Like MFN – NT concerned with discrimination – except comparison is between imported products and *domestic* products (vs other imports)
- NT concerned with national treatment on internal taxation and regulations / requirements – against *imported* products
- NT requires treatment of imports to be no worse than ‘like’ domestic goods
  - prevent protectionist use of tax & regs from undermining tariff bindings
- Like MFN – applies not only where measures discriminate on their face (*de jure*) but also in fact / practice (*de facto*)

## II.4 National Treatment – taxes and charges

- GATT NT obligation prevents discriminatory internal taxes and charges on imports
- Different rules depending on how similar domestic / imported goods are

### 'like' products

- If domestic goods and imports are “like” – imports cannot subject to internal taxes or charges *in excess* of like domestic products
  - *Any amount* extra tax or charge will breach obligation

### 'directly competitive or substitutable' products

- broader category than “like products”
- Products directly competitive or substitutable and in competition
- Will breach if domestic and imported products *not similarly taxed* (protects domestic production)
- Difference more than just ‘in excess’ (not as strict as ‘like products’ - not as closely competitive)



## II.4 National Treatment – taxes and charges

### 'like products' v Directly competitive and substitutable

Products	"like"	DCS
Shochu v vodka (Japan)	Yes	
Soju v vodka (Korea)	No	Yes
Drinks sweetened with HFCS v cane sugar (Mex)	Yes	
Beet sugar v cane sugar	Yes	
Cane sugar v HFCS	No	Yes



## II.4 National Treatment – internal laws & regs

- GATT NT prohibits regulatory discrimination between imported & like domestic products

### 3 elements:

1. imported & domestic products are 'like products';
2. There is a law, regulation, requirement affecting internal sale etc
3. Imports receive 'less favourable' treatment than like domestic products

- **Less favourable treatment** where the treatment 'modifies the conditions of competition' in the market to detriment of imports
  - Gives domestic goods a 'competitive advantage'

## II.4 National Treatment – internal laws & regs

### Less favourable treatment

- E.g. *Korea – Beef* concerned ‘dual-retail’ system of importing beef – required dom & imported beef sold in different stores / sections
- In effect - required small retailers to either stop selling imports or *only* sell imports – vast majority chose dom beef – result exclusion imported beef from retail channels
- Competitive disadvantage – significant reduction in opportunity to sell to consumers through traditional retail channels - breach GATT NT



## **Article XI\***

### **General Elimination of Quantitative Restrictions**

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.

...

## II.5 Elimination of Quantitative Restrictions

- Art XI regulates restrictions on *import* (and export) at the border – includes quotas & import or export licenses
  - Strict prohibition on quantitative restrictions – more problematic than tariffs
- Broad scope - not just restrictions on *quantity* (e.g. quotas) but any “other measures” restrict imports / exports
- Includes:
  - Prohibitions on import or export of goods
  - Restrictions on import or export (e.g. quotas or limits on number of importers / exporters)
  - Discretionary / non-automatic import licensing

### Examples

- *China - Raw Materials*: China's export quotas on rare earths inconsistent Art. XI
- *Colombia – Ports of Entry*: restriction to two ports of entry for Panama goods restricted competitive opportunities & limited imports – inconsistent Art XI

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## **III. Exceptions**

## Article XX: General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health; ...
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement...; ...
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; ...

## III.1 General Exceptions

- Even if government action otherwise inconsistent with GATT – not breach if justified by general exceptions
- Exceptions for measures taken for certain policy interests including:
  - Protection of (human, animal or plant) life or health;
  - Protection of public morals
  - Conservation
  - Specific circumstances of shortages of essential products





## III.1 General Exceptions

- To benefit from General Exception – must satisfy conditions
- **First** measure must fit into one of the categories / policy areas – e.g.:
  - *Necessary* to protect human health
  - *Relating to* conservation of natural resources
- Different language effects scope: harder for a measure to be “necessary” than “relating to” policy interest
- **Second** must satisfy requirements of introduction to exceptions
  - Not arbitrary or unjustifiable discrimination
  - Not disguised restriction on trade
- Protects against abuse / improper use of exceptions

## Article XXI: Security Exceptions

Nothing in this Agreement shall be construed:

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
  - (i) relating to fissionable materials or the materials from which they are derived;
  - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
  - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

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## III.2 Security Exceptions

- GATT security exception provides exception for measures necessary to protect certain essential security interests
- Broader than general exceptions
  - No disciplines around discrimination / concept disguised restriction on trade
  - Refers to measures “it [a Member] considers necessary”
  - Connectors are “relating to” or “taken in time of”
- But – specific interests limited – core security concerns
  - Broadest limb (b)(iii) “taken in time of war or ... emergency in int relations”

# Quiz

It's not important for non-WTO Members to understand GATT rules

True False

In the WTO GATT – the Most-Favoured-Nation obligation applies only to tariff rates:

True False

The National Treatment obligation prevents discrimination against foreign imports *in effect* as well as *explicit* discrimination

True False

GATT general & security exceptions provide flexibility for requirements that would otherwise breach GATT – but only if they satisfy the conditions:

True False

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Thank you