

Chapter 2

NATIONAL TREATMENT PRINCIPLE

1. OVERVIEW OF RULES

National treatment (GATT Article III) stands alongside MFN treatment as one of the central principles of the WTO Agreement. Under the national treatment rule, Members must not accord discriminatory treatment between imports and “like” domestic products (with the exception of the imposition of tariffs, which is a border measure). The GATS and the TRIPS Agreement have similar provisions. This rule prevents countries from taking discriminatory measures on imports and from offsetting the effects of tariffs through non-tariff measures. An example of the latter could be a case in which Member A reduces the import tariff on product X from ten percent to five percent, only to impose a five percent domestic consumption tax only on imported product X, effectively offsetting the five percentage point tariff cut. The purpose of the national treatment rule is to eliminate “hidden” domestic barriers to trade by WTO Members by according imported products treatment no less favourable than that accorded to products of national origin. Adherence to this principle is important in order to maintain a balance of rights and obligations, and is essential for the maintenance of the multilateral trading system.

2. LEGAL FRAMEWORK

GATT ARTICLE III

GATT Article III requires that WTO Members provide national treatment to all other Members. Article III:1 stipulates the general principle that Members must not apply internal taxes or other internal charges, laws, regulations, and requirements affecting imported or domestic products so as to afford protection to domestic production.

In relation to internal taxes or other internal charges, Article III:2 stipulates that WTO Members shall not apply standards higher than those imposed on domestic products between imported goods and “like” domestic goods, or between imported goods and “a directly competitive or substitutable product.” With regard to internal regulations and laws, Article III:4 provides that Members shall accord imported products treatment no less favourable than that accorded to “like products” of national origin.

In determining the similarity of “like products,” GATT panel reports have relied on a number of criteria including tariff classifications, the product’s end uses in a given market, consumer tastes and habits, and the product’s properties, nature, and quality. WTO panels and the Appellate Body reports utilize the same criteria.

EXCEPTIONS TO GATT ARTICLE III (NATIONAL TREATMENT RULE)

Although national treatment is a basic principle under the GATT, the GATT provides for certain exceptions, outlined below.

Government Procurement

GATT Article III:8(a) permits governments to purchase domestic products preferentially, making government procurement one exception to the national treatment rule. This exception is permitted because WTO Members recognize the role of government procurement in national policy. For example, there may be a security need to develop and purchase products domestically, or government procurement may, as is often the case, be used as a policy tool to promote smaller business, local industry, or advanced technologies.

While the GATT made government procurement an exception to the national treatment rule, the Agreement on Government Procurement resulting from the Uruguay Round mandates signatories offer national treatment in their government procurement. However, WTO Members are under no obligation to join the Agreement on Government Procurement. In fact,

it has mostly been developed countries that have joined the Agreement. Therefore, in the context of government procurement, the national treatment rule applies only between those who have acceded to the Agreement on Government Procurement. For others, the traditional exception is still in force.¹

Domestic Subsidies

GATT Article III:8(b) allows for the payment of subsidies exclusively to domestic producers as an exception to the national treatment rule, under the condition that it is not in violation of other provisions in Article III and the Agreement on Subsidies and Countervailing Measures. The reason for this exception is that subsidies are recognized to be an effective policy tool, and are recognized to be basically within the latitude of domestic policy authorities. However, because subsidies may have a negative effect on trade, the Agreement on Subsidies and Countervailing Measures imposes strict disciplines on their use.²

GATT Article XVIII:C

Members in the early stages of development can raise their standard of living by promoting the establishment of infant industries, but this may require government support, and the goal may not be realistically attainable with measures that conform to the GATT. In such cases, countries can use the provisions of GATT Article XVIII:C to notify WTO Members and to initiate consultations. After consultations are completed and under certain restrictions, these countries are then allowed to take measures that are inconsistent with GATT provisions, excluding Articles I, II and XIII. Unlike the trade restrictions for balance of payment reasons in GATT Article XVIII:B, the Article XVIII:C procedure allows both broader measures and violations of the national treatment obligations in order to promote domestic infant industries. In the case concerning Malaysia's import permit system of petrochemical products, Malaysia resorted to GATT Article XVIII:C as a reason to enforce import restrictions on polyethylene. Although Singapore filed a WTO case against this Malaysian practice, Singapore later withdrew its complaint. Thus, neither a panel nor the Appellant Body had an opportunity to rule on the case.³

Other Exceptions to National Treatment

Exceptions peculiar to national treatment include the exception on screen quotas of cinematographic films under Article III:10 and Article IV. The provisions of GATT Article XX on general exceptions, Article XXI on security exceptions, and WTO Article IX on waivers also apply to the national treatment rule. For further details, see the relevant sections

¹ See Chapter 8 on government procurement.

² See Chapter 6 on subsidies and countervailing measures.

³ Malaysia – Prohibition of Imports of Polyethylene and Polypropylene (WT/DS1). This complaint had the distinction of being the first dispute under the new WTO dispute settlement system.

of Chapter 1 (MFN Principle).

NATIONAL TREATMENT RULES OUTSIDE OF GATT ARTICLE III

With the entry into force of the WTO Agreement, the principle of national treatment has been extended, although in a limited fashion, to agreements on goods, services, and intellectual property. For instance, among the agreements on goods, Article 5.1.1 of the TBT Agreement also addresses national treatment. GATS Article XVII provides national treatment for services and service providers and Article 3 of the TRIPS Agreement provides national treatment for the protection of intellectual property rights. The plurilateral Agreement on Government Procurement also contains a national treatment clause. (See the relevant chapters for more information on Trade in Services, Intellectual Property Rights, and Government Procurement.)

3. ECONOMIC IMPLICATIONS

There is a tendency for importing countries to try to use discriminatory application of domestic taxes and regulations to protect national production, often as the result of protectionist pressures from domestic producers. This distorts the conditions of competition between domestic and imported goods and leads to a reduction in economic welfare.

The national treatment rule does not in principle permit these sorts of policies designed to protect domestic products. GATT Article II does permit the use of tariffs as a means of protecting domestic industry, but this is because tariffs have high degrees of transparency and predictability since they are published and committed to in tariff schedules. On the other hand, domestic taxes and regulations are “hidden barriers to trade” that lack both transparency and predictability. Thus, they can have a large trade-distortive impact. The existence of GATT Article III generally impedes the adoption of policies and measures aimed at domestic protection, and thus promotes trade liberalization.

In addition, regarding tariff concessions, GATT Article II recognizes tariffs have been used as tools for domestic industrial protection. Consequently, it sets a course for the achievement of liberalization through gradual reductions. Even if tariff reductions were made as a result of trade negotiations, if domestic taxes and regulations were to be applied in a discriminatory fashion to protect domestic industry simultaneously, then effective internal trade barriers would remain. The national treatment rule prohibits countries from using domestic taxes and regulations to offset the value of tariff concessions and is, therefore, a significant tool in promoting trade liberalization.

4. MAJOR CASES

National treatment provisions, as well as the MFN clause, are often invoked in WTO disputes. However, an argument on national treatment is rarely made on its own; instead, the national treatment principle is usually invoked in conjunction with other provisions regarding MFN, quantitative restrictions, TRIMs, and technical barriers to trade. In this section we discuss France's (EU) ban on the import and distribution of asbestos and products containing asbestos, in which national treatment was a major issue. In principle we have left detailed descriptions of other cases to other chapters (e.g., in Chapter 1 we take up the U.S. Harbour Maintenance Tax (Harbour Services Fee) and Merchant Shipping Act of 1920 (Jones Act), in which national treatment was one of the major issues in that case).

EU – Measures Affecting Asbestos and Products Containing Asbestos

France issued a ban on the import and distribution of asbestos and products containing asbestos in order to protect its consumers and workers. Canada requested a panel regarding this measure in October 1998. In September 2000, although the WTO panel found France (EU) in violation of GATT Article III:4 because of discriminatory treatment of like domestic and foreign products, it ultimately concluded that the discriminatory treatment was justified under GATT Article XX:(b) (general exceptions for the purpose of protecting the life and health of people, animals, etc.). In March 2001 the Appellate Body found that asbestos and building materials containing asbestos were not like products and thus, reversed the panel's decision on this issue. The Appellate Body, however, upheld the panel's decision concerning GATT Article XX:(b). (See Chapter 10, "Standards and Conformity Assessment Systems".)

