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UNIVERSITÄT
DUISBURG
ESSEN

nccr trade regulation
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international law of contemporary media

session 7: the law of the world trade organization (part two)

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the goals of the day

- **WTO law: basic non-discrimination principles**
- **most-favoured-nation treatment (MFN) under GATT and GATS**
- **national treatment (NT) under GATT and GATS**
- **special rules for media (incl. audiovisual and telecommunication services)**
- **flexibilities of the WTO law for reconciling economic and non-economic objectives.**

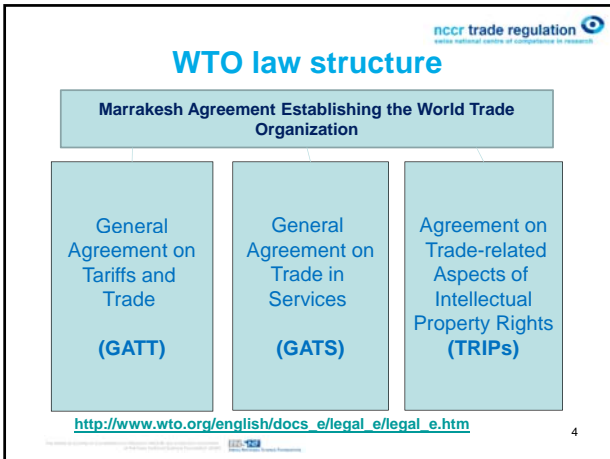
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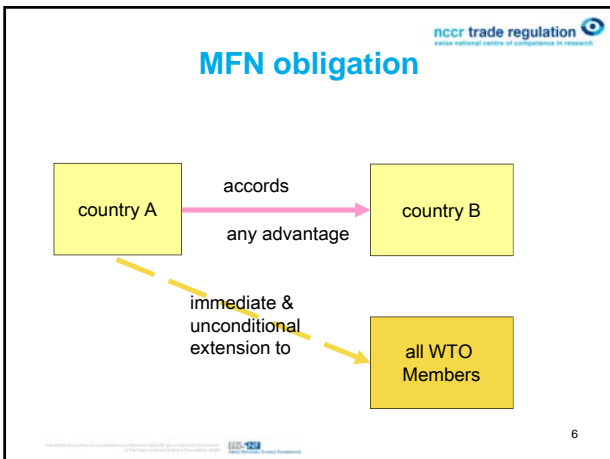
basic principles of WTO law

- **principles of non-discrimination (MFN and NT)**
- **rules on market access**
- **rules on unfair trade**
- **rules on conflicts between trade liberalisation and other societal interests**
- **rules on special and differential treatment for developing countries.**

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- ## non-discrimination obligations
- **most-favoured-nation (MFN) treatment obligation:**
 - prohibits a country from discriminating **between** other countries
 - **national treatment (NT) obligation**
 - prohibits a country from discriminating **against** other countries
 - **applicable to both trade in goods and trade in services, albeit not in the same manner.**
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MFN under GATT

- **art. I:1 GATT**
- **principal purpose: to ensure equality of opportunity to import from or to export to all WTO members**
- **de jure and de facto discrimination covered**
- **test of consistency:**
 - the measure at issue confers a trade ‘advantage’
 - the products are ‘like’
 - the advantage is granted ‘immediately and unconditionally’ to all like products.

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the concept of ‘likeness’

- **3 questions of interpretation need to be resolved:**
 - (i) which characteristics or qualities are important in assessing the ‘likeness’
 - (ii) to what degree must products share these in order to be ‘like products’
 - (iii) from whose perspective should ‘likeness’ be judged
- **different meanings in different contexts (AB, Japan-Alcoholic Beverages II: the image of accordion)**
- **criteria to be considered:**
 - the characteristics of the products
 - their end-use
 - tariff regimes of other Members
 - consumers’ tastes and habits.

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MFN under GATS (i)

- **art. II:1 GATS**
- **equality of opportunity for services and service suppliers; de jure and de facto discrimination**
- **test of consistency**
 - a measure covered by GATS:
 - (i) a measure by a Member;
 - (ii) affecting trade in services, art. I:1 GATS)
 - ‘like’ services and service suppliers
 - no less favourable treatment accorded.

MFN under GATS (ii)

- art. I:3(b): 'services' include 'any service in any sector except services supplied in the exercise of governmental authority' (art. I.3(a): 'supplied neither on a commercial basis nor in competition with one or more service suppliers')
- art. I:2 defines 'trade in services' as 'the supply of a service' within one of four 'modes of supply':
 1. 'cross border'
 2. 'consumption abroad'
 3. 'commercial presence'
 4. 'presence of natural persons'
- a measure affects trade in services when it bears 'upon the conditions of competition in supply of a service'.

MFN under GATS (iii): likeness

- art. XXVIII(g) provides that a 'service supplier' is 'any person who supplies a service', incl. natural and legal persons as well as service suppliers providing their services through forms of commercial presence, such as a branch or a representative office
- 'like services and service suppliers' criteria:
 - the characteristics of the service or service supplier
 - the classification and description of the service in the UN Central Product Classification (CPC): <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&Lq=1>
 - consumer habits and preferences
- two service suppliers that supply a like service are not necessarily 'like service suppliers'.

MFN under GATS (iv)

- treatment no less favourable accorded to like services and service providers
- immediately and unconditionally
- art. XVII GATS (on NT) provides guidance: '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 the like services or service suppliers of any other Member' (art. XVII:3 GATS).

MFN exemptions: art. II:1 GATS

- exemptions listed in the *Annex on Article II Exemptions*; possible only until 1 January 1995 (i.e. WTO Agreements' entry into force)
- all such exemptions should in principle not exceed a period of 10 years
- around two-thirds of all WTO members have listed MFN exemptions, mainly for transport (maritime), communications (especially audiovisual media), financial and business services.

Switzerland: art. II MFN exemptions

Sector or Sub-Sector	Description of measure indicating its inconsistency with Article II	Countries to which the measure applies	Intended duration	Conditions creating the need for the exemption
Audiovisual services	To confer national treatment to audiovisual works covered by bilateral or plurilateral agreements on coproduction in the field of audiovisual works, in particular in relation to access to funding and to distribution	All countries with whom cultural cooperation may be desirable (at present agreements exist with member countries of the Council of Europe and with Canada)	Indefinite	Promotion of common cultural objectives
	Measures granting the benefit of support programmes, such as MEDIA and EURIMAGES, and measures relating to the allocation of screen-time which implement arrangements such as the Council of Europe Convention on Transfrontier Television and confer national treatment, to audiovisual works and/or to suppliers of audiovisual services meeting specific European origin criteria	European countries	Indefinite	Promotion of cultural objectives based on long-standing cultural links
	Concessions for the operation of radio or television broadcast stations may be granted, normally on the basis of bilateral agreements, to persons of countries other than Switzerland	All countries with whom cultural cooperation may be desirable	Indefinite	Promotion of common cultural objectives, and to regulate access to a market limited in scale (given the size of Switzerland) in order to preserve diversity of supply

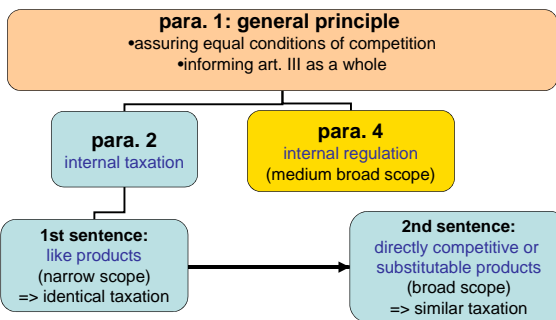
services sectoral classification list (W/120, 1991)

2. **Communication services**
 - A. Postal services
 - B. Courier services
 - C. Telecommunication services (a to o)
 - D. **Audiovisual services**
 - a. Motion picture and video tape production and distribution services
 - b. Motion picture projection services
 - c. Radio and television services
 - d. Radio and television transmission services
 - e. Sound recordings
 - f. Other

national treatment under GATT

- **art. III GATT**
- **principal purpose: to avoid protectionism in the application of internal tax and regulation**
- **internal measures *versus* border measures**
- **complex structure of the NT obligations:**
- **art. III:2 with regard to internal taxation: 2 different tests:**
 (i) with regard to **like products**; (ii) with regard to **directly competitive or substitutable products**
- **art. III:4 with regard to internal regulation.**

NT under GATT: structure art. III



NT under GATT: tests

- **art. III:2, 1st sentence:**
- **the measure at issue is an 'internal tax'**
- **the imported and domestic products are 'like products':** narrow scope
- **the imported products are not taxed in excess of the domestic products:** even the smallest amount of 'excess' is too much
- **art. III:2, 2nd sentence: also internal tax but for 'directly competitive or substitutable products'; not similarly taxed:** more than *de minimis*; **so as to afford protection.**

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NT under GATT: tests

- **art. III:4 GATT**
- the measure at issue is a law, regulation or requirement covered by art. III:4
- the imported and domestic products are 'like' products: **scope broader than art. III:2, 1st sentence but not broader than the combined scope of sentence 1+3 art. III:2**
- the imported products are accorded less favourable treatment
- **example: *Canada-Periodicals*, WT/DS31/AB/R, 1997.**

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NT under GATS

- **art. XVII GATS**
- no general application; applies only to the extent members have explicitly committed themselves to grant 'national treatment' in respect of specific service sectors
- commitments inscribed in the schedules of specific commitments (integral part of GATS); often subject to conditions and qualifications
- **negative scheduling-opting out (for MFN) vs. positive scheduling-opting in (for NT).**

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Switzerland, List of specific commitments GATS/SC/83 nccr trade regulation
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Sector or Sub-sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
5. Educational Services			
Private Educational Services:			
Compulsory education services (primary and secondary I)	1) Unbound 2) Unbound 3) None 4) Unbound	1) Unbound 2) Unbound 3) None 4) Unbound	
Non-compulsory secondary education services (secondary II)	1) None 2) None 3) None 4) Unbound except as indicated in Part I	1) None 2) None 3) None 4) Unbound except as indicated in Part I	
Higher Education Services (CPC 923)	1) None 2) None 3) None 4) Unbound except as indicated in Part I	1) None 2) None 3) None 4) Unbound except as indicated in Part I	
Adult Education Services (CPC 924)	1) None 2) None 3) None 4) Unbound except as indicated in Part I	1) None 2) None 3) None 4) Unbound except as indicated in Part I	Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

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exceptions under GATT and GATS

- flexibilities meant to provide possibilities for reconciling trade liberalisation with other interests
- art. XX GATT and art. XIV GATS (to be looked at during the next session)
- otherwise inconsistent with GATT or GATS measures justified because they are necessary to serve certain public interests (e.g. public morals, public order); **the chapeau test:** the application of the trade restrictive measure **may not constitute an arbitrary or unjustifiable discrimination between countries, or a disguised restriction on int'l trade.**

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WTO rules of specific relevance to media

- critical difference between **telecommunication services, audiovisual services, 'new' media services**
- historically justified path dependencies (privatisation, liberalisation, national interests)
- advanced regulatory framework for telecommunication services; virtually non-existent rules (and commitments) for audiovisual services.

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telecommunication services

- **Annex on Telecommunications (AT)**, attached to GATS, ensures 'access to and use of public telecommunications transport networks and services'
- continued negotiations after the end of the Uruguay Round; results attached through the **Fourth Protocol to GATS** (69 Members made specific commitments; in force since 1998)
- **the Reference Paper (RP): a mixture of sector-specific and competition rules**; elaborates what rules are appropriate for telecommunications at the global level prescribing ends rather than means; radically different from the ITU sovereignty-centered approach
- telecommunications – one of the best covered sectors.

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telecommunication services classification

Basic

- a. Voice telephone services
- b. Packet-switched data transmission services
- c. Circuit-switched data transmission services
- d. Telex services
- e. Telegraph services
- f. Facsimile services
- g. Private leased circuit services
- *Value-Added*
- h. Electronic mail
- i. Voice mail
- j. On-line information and data base retrieval
- k. Electronic data interchange (EDI)
- l. Enhanced/value-added facsimile services
- m. Code and protocol conversion
- n. On-line information and/or data processing (incl. transaction processing)
- o. Other

(WTO, Services Sectoral Classification List, MTN.GNS/W/120, 1991)

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audiovisual services

- **cultural exception discussions during the Uruguay Round**
- **the least covered services sector (only 26 members made specific commitments; 35 listed MFN exemptions)**
- **all-or-nothing approach**
- **no real breakthrough expected in the Doha Round**
- **the absence of any guarantee of openness stands in stark contrast to the economic and trade importance of the sector**
- **political (EC vs. US) path dependencies.**

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digital media

- **spillovers of the political discussion** (trade vs. culture)
- **classification issues: value-added vs. basic telecom vs. audiovisual vs. computer-related services**
- **goods or services** (GATT vs. GATS / US vs. EC)
- **no legal certainty; potential negative effects – forum-shopping**
- **US preferential trade agreements (negative scheduling, ‘freezing’ of exemptions)**
- **UNESCO.**
