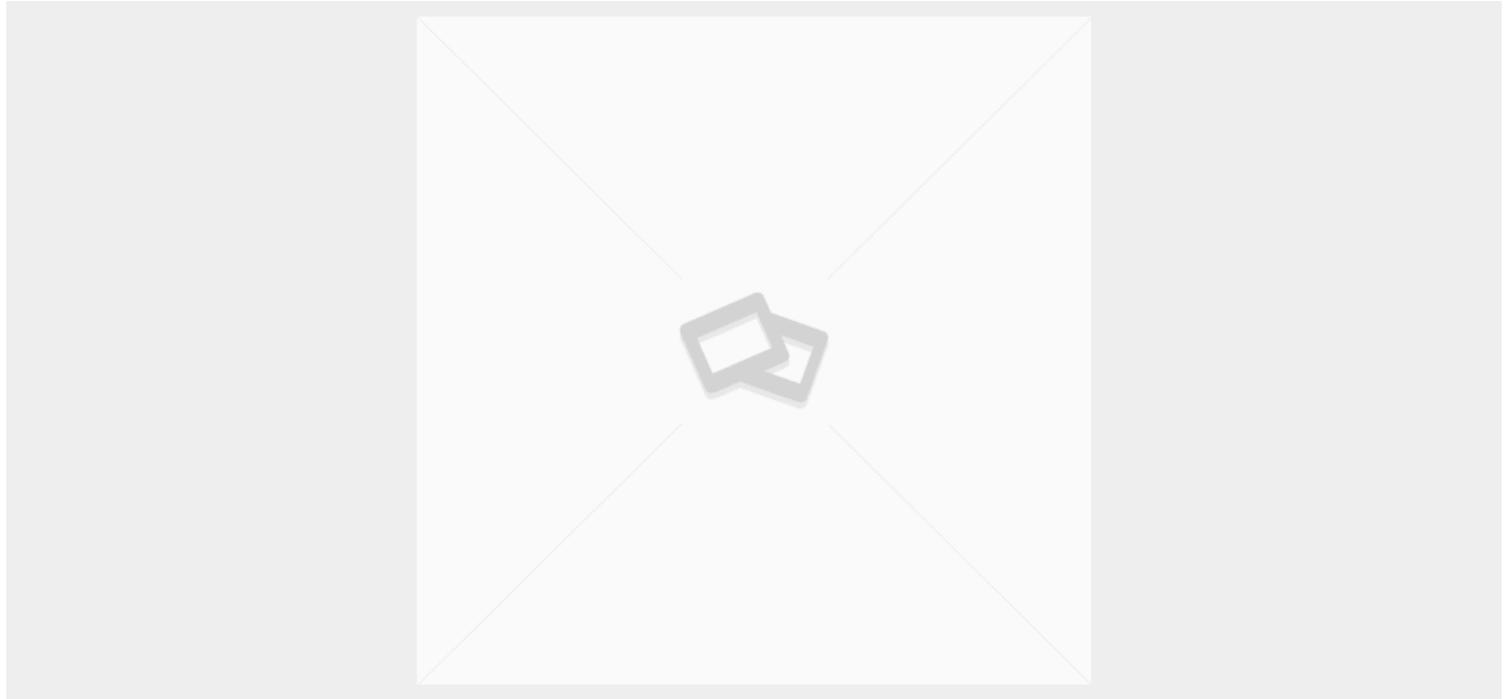


DISCRIMINATION

Posted on April 7, 2017 by Suzanne Zhou



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On this page:

Jump to: 2 20 default wide Key points:

- To avoid possible conflict with WTO agreements, parties should ensure that their WHO FCTC implementing measures are non-discriminatory, or that discrimination can be justified on public health grounds
- The two key types of non-discrimination obligations are the obligation to provide national treatment (i.e. not to discriminate between domestic and imported goods) and the obligation to provide most-favoured nation treatment (i.e. not to discriminate between the products of different WTO members)
- Discrimination covers both 'de jure' (i.e. explicit) and 'de facto' discrimination (i.e. the measure

appears origin-neutral on its face but has a discriminatory effect). De facto discrimination may be relevant if a law regulates or taxes different tobacco products differently.

- Generally, products must be 'like' for non-discrimination obligations to apply between them. Some obligations regarding tax measures also apply between 'directly competitive or substitutable' products.
- Distinctions on legitimate public health grounds are permitted under both GATT and TBT

40 default wide line Introduction and key concepts

Non-discrimination obligations run throughout the WTO agreements. They generally permit distinctions between products if they are drawn on the basis of legitimate public health grounds.

Non-discrimination obligations in the WTO agreements take two forms: national treatment obligations, which prevent 'like' imported products from being treated less favourably than domestic products, and most-favoured-nation obligations, which prevent WTO member states from favouring imports from one country over those of another WTO member state.

Discrimination in the WTO agreements generally covers both 'de jure' discrimination (measures that explicitly draw distinctions between imported and domestic products, or between products in different countries) and 'de facto' discrimination (measures that do not explicitly draw distinctions between imported and domestic products, or between the products of different trade partners, but that discriminate in effect). De facto discrimination may be relevant where, for example, certain tobacco products that are domestically produced are regulated or taxed differently to those that are predominantly imported.

Generally, WTO agreements permit differentiation on public health grounds, either by defining 'discrimination' so as not to include legitimate regulatory distinctions, or through explicit public health exceptions.

To avoid discrimination, Parties should ensure that tobacco control measures are as comprehensive as possible, or that any differentiation can be justified on public health grounds.

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20 default 2. Non-discrimination obligations across the WTO agreements line Item 1

The [General Agreement on Tariffs and Trade \(GATT\)](#) and [Agreement on Technical Barriers to Trade \(TBT\)](#) both contain national treatment and most-favoured-nation obligations. Each of these covers both de jure and de facto discrimination. However, there are slight differences in the nature of the obligations in both of the agreements, and in the measures that they apply to. National treatment and most-favoured nation obligations are also found in many other agreements, such as the [TRIPS Agreement](#) and the [General Agreement on Trade in Services](#). The remainder of this page will focus on the TBT and GATT discrimination provisions, which have been the subject of tobacco-related

case law.

General Agreement on Tariffs and Trade (GATT)

Under the GATT, WTO Members agree (subject to exceptions) to grant national treatment in relation to internal taxes and charges, and 'laws, regulations and requirements affecting [the] internal sale, offering for sale, purchase, transportation, distribution or use of products'.

In relation to internal tax measures, they commit not to impose taxation on imported products 'in excess of' that imposed on 'like' domestic products. They also commit not to impose taxation on 'directly competitive or substitutable' imported products in ways that afford protection to domestic production (GATT art III:2).

In relation to regulatory measures, members commit not to apply regulatory measures in ways that discriminate against imported products as compared to 'like' domestic products (GATT art III:4).

WTO members also agree to grant most-favoured-nation treatment in respect of tariffs and regulatory measures relating to importing and exporting, i.e. to extend 'any advantage, favour, privilege or immunity' with respect to such measures to all WTO members (GATT art I:1).

Under GATT, a breach of any of these obligations may be justified if found by the panel and/or Appellate Body to fall within the [GATT human health exception](#) (GATT art XX(b)).

Agreement on Technical Barriers to Trade (TBT)

Tobacco control measures may also constitute technical regulations, in which case they will be covered under the TBT's non-discrimination obligations. Under the TBT, WTO members agree that in respect of technical regulations, imported products will be provided treatment 'no less favourable than that accorded to like products of national origin and to like products originating in any other country' (TBT art 2.1). For more on whether a measure is a technical regulation, see the [Technical regulations and trade-restrictiveness page](#).

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20 default 3. Non-discrimination by type of measure – overview line Item 2

From these provisions we can draw out a number of tests by type of measure:

- For tax measures (which may include measures adopted to implement article 6 of the WHO FCTC), national treatment obligations require states to avoid applying internal taxes on imported products 'in excess of' that applied to 'like' domestic products, or which 'afford protection' to 'directly competitive or substitutable' domestic products
- For regulatory measures (which may include measures adopted to implement articles 7-13 of

the WHO FCTC), a measure must not provide 'less favourable treatment' to imported products as compared to 'like' domestic products, under both the GATT and the TBT.

- For both tax and regulatory measures, the relevant test for most-favoured-nation obligations under GATT is whether 'advantages' granted to one country have been granted to 'like' products of other WTO members.
- Regulatory measures may also be covered by most-favoured-nation obligation under TBT, which, like the TBT national treatment obligation, requires 'like products' to be treated no less favourably.

The remainder of this page will go through these concepts in more detail, looking first at what products to compare, and second at what kinds of differentiation constitute discrimination for each of these categories.

The box summarises the relevant tests to apply in determining whether a measure is discriminatory:

Box
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Summary - discrimination obligations under the WTO

National treatment: tax measures

GATT:

Are the products like? + Is the tax on imports in excess of tax on domestic products?

and/or

Are the products directly competitive or substitutable + Is the tax applied so as to afford protection to domestic production?

National treatment: regulatory measures

GATT:

Are the products like? + Is there less favourable treatment of the imported product?

TBT:

Is it a technical regulation? + Are the products like? + Is there less favourable treatment of the imported product that does not stem from a legitimate regulatory distinction (such as public health)?

MFN: both tax and regulatory measures

GATT:

Are the products like? + Has an advantage been granted to any other country which has not been granted to all other WTO members?

TBT:

[Is it a technical regulation?](#) + Are the products like? + Is there less favourable treatment of the product of a WTO member as compared to any other country?

Additional steps

For GATT obligations, consider whether measure justified under the [health exception](#)

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20 default 4. What is the appropriate comparison? line Item 1

The first step in assessing whether a measure discriminates is to determine whether any distinctions it makes are between products that are 'like'. For tax measures, it will also be relevant whether the products are 'directly competitive or substitutable'

Like products

For most of the obligations on this page, a panel will compare the treatment of 'like' domestic and imported products, or the treatment of 'like' products from different countries. The test for a like product is similar in the GATT and TBT, across national treatment and most-favoured nation obligations, and across different measures, although it is stricter for tax measures than for regulatory measures.[tooltip hint="Japan — Alcoholic Beverages II, Appellate Body, p 114, compare EC — Asbestos, Appellate Body, para 96.][*][/tooltip]

The analysis of whether products are 'like' aims to determine the nature and extent of a competitive relationship between products.[tooltip hint="EC — Asbestos, Appellate Body, para 117"][*][/tooltip] This analysis has generally focused on four criteria:[tooltip hint="EC — Asbestos, Appellate Body, para 101. Japan — Alcoholic Beverages II, Appellate Body, pp.113-14"][*][/tooltip]

1. the properties, nature and quality of the products;
2. the end-uses of the product in the market;
3. the tastes and habits of consumers; and
4. the tariff classification of the products.

In *US — Clove Cigarettes*, a case concerning whether a ban that covered clove cigarettes but not menthol cigarettes constituted discrimination under article 2.1 of the TBT, the Appellate Body held

that clove and menthol cigarettes were like because:

1. Properties, nature and quality: both products contained flavours designed to reduce the harshness of tobacco and were attractive to youth and competed in the youth market.[tooltip hint="US — Clove Cigarettes, panel, para 7.187"][*][*/tooltip]
2. End-uses: both types of cigarettes were capable of performing similar functions (i.e. satisfying the addiction to nicotine and having a social or experimental function).[tooltip hint="US — Clove Cigarettes, Appellate Body, para 132"][*][*/tooltip]
3. Consumer tastes and habits: it was sufficient that the products were substitutable for some consumers (youth smokers and potential smokers) and it need not be established that the products also competed for market share among adult smokers. The Appellate Body relied on the panel's finding that menthol cigarettes had the same characteristics as clove cigarettes in terms of their effect on rates of smoking among young people.[tooltip hint="US — Clove Cigarettes, Appellate Body, para 142"][*][*/tooltip]
4. The products had the same 6-digit tariff classification [tooltip hint="US — Clove Cigarettes, panel, para 7.239"][*][*/tooltip]

Directly competitive or substitutable products (tax measures under GATT)

For tax measures under GATT, even if products are not deemed to be 'like', there is an additional obligation applying to products that are 'directly competitive or substitutable'. Products are directly competitive or substitutable if they are 'interchangeable' or offer 'alternative ways of satisfying a particular need or taste'. [tooltip hint="Korea — Alcoholic Beverages, Appellate Body, para 115"][*][*/tooltip] To determine whether this is the case, a panel will look at the competitive conditions between the products in the relevant market, in light of the products' physical properties, common end uses, tariff classification, channels of distribution, and price relationships including cross-price elasticities. [tooltip hint="Japan — Alcoholic Beverages II, Appellate Body, pp. 114-120; Philippines — Distilled Spirits, Appellate Body, para 198-199; Korea — Alcoholic Beverages, Appellate Body, para 134"][*][*/tooltip]

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20 default 5. What kinds of differentiation constitute discrimination? line What kinds of differentiation constitute discrimination?

The second step will be to compare how the products are treated in relation to each other. Under the GATT, this simply examines the competitive relationship between the products, but any public policy considerations (including health) can be considered under the general exceptions clause. Under the TBT, public policy (including public health) considerations are built into the definition of

discrimination.

National treatment and tax measures

Tax measures must not apply tax to imports 'in excess of' that applied to 'like' domestic products. This involves a comparison of actual tax burdens, and covers any level of excess taxation on the imported product as compared to the 'like' domestic product.[tooltip hint="Argentina — Hides and Leather, Panel, para 11.182; Japan — Alcoholic Beverages, Appellate Body, p. 23"][*][/tooltip]

Tax measures must also not afford protection to 'directly competitive or substitutable' domestic products. This involves an assessment of whether the tax burden on imported products is heavier than on directly competitive or substitutable domestic products, beyond a de minimis threshold to be determined on a case-by-case basis.[tooltip hint="Japan — Alcoholic Beverages, Appellate Body, p. 118; Canada — Periodicals, Appellate Body, para 474"][*][/tooltip] If so, a panel will examine whether the dissimilar tax burden affords protection to domestic production by looking at the design, architecture and revealing structure of the measure. This may, for example, involve looking at whether imported products are more likely to fall within higher tax brackets.[tooltip hint="Japan — Alcoholic Beverages II, Appellate Body, p. 120; Chile — Alcoholic Beverages, Appellate Body, para 67."][*][/tooltip]

For either of these, WTO members can invoke GATT's general exception for health to justify measures found to discriminate against imported products. This is covered in our page on 'health exceptions'.

National treatment and regulatory measures

Under GATT

A regulatory measure will discriminate against imported products under GATT if it accords 'less favourable treatment' to the imported product than to a like domestic product. Under GATT, less favourable treatment is simply 'treatment that modifies the conditions of competition to the detriment of imported products.' [tooltip hint="EC — Asbestos, Appellate Body, paras 96, 98"][*][/tooltip]

GATT does not define discrimination by reference to the purpose of a measure. However, WTO members can invoke GATT's general exception for health to justify measures found to discriminate against imported products. This is covered in our page on [health exceptions](#).

Under TBT

A regulatory measure will discriminate against imported products under TBT if it accords 'less

favourable treatment' to the imported product than a like domestic product. Less favourable treatment is also defined as treatment that modifies the conditions of competition to the detriment of imported products. However, unlike under the GATT, differential treatment of like domestic and imported products that 'stems exclusively from a legitimate regulatory distinction' will not amount to less favourable treatment under the TBT Agreement.[tooltip hint="US — Clove Cigarettes, Appellate Body, paras 169, 173, 174"][*][/tooltip] A WTO Member may therefore advance a public policy justification — such as the protection of public health — as a reason for differential treatment of like domestic and imported products in its technical regulations. This means that unlike GATT, public health considerations under the TBT are not contained in a separate exception, but integrated into the definition of 'discrimination'.

In order to determine whether differential treatment 'stems exclusively from a legitimate regulatory distinction', the Appellate Body has held that a panel must scrutinize 'the design, architecture, revealing structure, operation and application of the technical regulation', in particular whether the regulation is even-handed [tooltip hint="US — Clove Cigarettes para 215"][*][/tooltip]. A distinction would not be legitimate if it was 'designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination.[tooltip hint="US — COOL, Appellate Body, para 270"][*][/tooltip] The reference to 'exclusively' in the case law suggests that future WTO panels will closely scrutinize the reason or reasons for the differential treatment.

In *US — Clove Cigarettes*, Indonesia challenged a US regulation that banned clove cigarettes, but not menthol cigarettes. The Appellate Body did not accept that the reasons for a distinction between clove-flavoured cigarettes and menthol-flavoured cigarettes were legitimate. The US had argued that banning menthol cigarettes would impose too great a burden on its healthcare system and would risk the development of a black market in menthol cigarettes. However, the Appellate Body was not persuaded that these consequences would occur, stating that the addictive element in menthol cigarettes was nicotine (also found in other cigarettes), not menthol.[tooltip hint="US — Clove Cigarettes, Appellate Body, para 225"][*][/tooltip]

Most favoured nation obligations

GATT and TBT also contain most-favoured nation obligations applying between imports from different countries. Under GATT, the relevant test of discrimination is whether one country has an 'advantage' over another, i.e. whether it has been granted a 'more favourable competitive opportunity'. This obligation covers all measures, including tax and regulatory measures, and applies to like products.[tooltip hint="EC — Bananas III, panel, para 7.239; Canada — Autos, Appellate Body, para 79"][*][/tooltip]

The TBT most-favoured nation is contained in the same provision as its national treatment obligation, and likewise applies the TBT 'less favourable treatment' standard. The TBT most-favoured nation obligation has not been the subject of a relevant dispute, but it is highly likely that

legitimate regulatory distinctions will not breach this obligation, as the TBT most-favoured nation and national treatment obligations stem from the same provision (article 2.1).

Additional steps for all GATT provisions

For all GATT provisions, whether they relate to most-favoured nation, national treatment, tax, or regulatory measures, even if a measure is discriminatory, it may be justified under GATT's general health exception. See more on our [health exceptions and recognition for public health page](#).

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20 default 4. Relevant case law line References

- [United States – Measures Affecting the Production and Sale of Clove Cigarettes](#), Appellate Body Report, WT/DS406/AB/R, 12 June 2007
- [United States – Measures Affecting the Production and Sale of Clove Cigarettes](#), Panel Report, WT/DS406/R, 12 June 2007
- [European Communities – Measures Affecting Asbestos and Products Containing Asbestos](#), Appellate Body Report, WT/DS135/AB/R, 12 March 2001
- [Japan – Taxes on Alcoholic Beverages \(Japan – Alcoholic Beverages II\)](#), Appellate Body Report, WT/DS8/AB/R, 4 October 1996
- [Korea – Taxes on Alcoholic Beverages](#), Appellate Body Report, WT/DS75/AB/R, 18 January 1999
- [Chile – Taxes on Alcoholic Beverages](#), Appellate Body Report, DS87/AB/R, 13 December 1999
- [Philippines – Taxes on Distilled Spirits](#), Appellate Body Report, 21 December 2011, WT/DS403/AB/R
- [Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather](#), Panel Report, WT/DS155/R, 19 December 2000
- [Canada – Certain Measures Concerning Periodicals](#), Appellate Body Report, WT/DS31/AB/R, 30 June 1997
- [United States – Certain Country of Origin Labelling \(COOL\) Requirements](#), Appellate Body Report, WT/DS384/AB/R, 29 June 2012
- [European Communities – Regime for the Importation, Sale and Distribution of Bananas](#), Panel Report, WT/DS27/AB/R, 22 May 1997
- [Canada – Certain Measures Affecting the Automotive Industry](#), Appellate Body WT/DS139/AB/R, 31 May 2000

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