

**UNDERSTANDING NON-DISCRIMINATORY PRINCIPLE IN WTO TRADE LAW:
A COMPARATIVE ANALYSIS OF MOST FAVOURED NATION AND NATIONAL
TREATMENT CRITERIA**

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INTRODUCTION

In general, the concept of “likeness” in International Economic Law, particularly in the context of trade, refers to “like product,” which means a product in the form of goods or services with similar characteristics.¹ To constitute a product as a ‘like product’, there has to be a consideration or criterion that can be seen through case laws. The criterion might differ between Most Favoured Nation (MFN) and National Treatment (NT). These are the two principles of Non-discriminatory embedded within the WTO policy, which serve as the principle to promote equality in trade.² Both principles will be explained further below:

Table 1. Comparison of MFN and NT Principles in International Trade

Non-Discriminatory Principle		
Principle	Most Favoured Nation (MFN)	National Treatment (NT)
Area/ Scope	International market	Domestic market
Subject	Among WTO members	Among like imported products and local-produced products
Object	Like Products	

¹ von Moltke, Konrad. "Reassessing 'like products'." In *Trade Investment and the Environment*, pp. 176-182. Routledge, 2017.

² Van den Bossche, Peter. *The law and policy of the World Trade Organization: text, cases and materials*. Cambridge University Press, 2008.

<p>Purpose</p>	<p>Prevent discrimination based on state favourability.</p> <p>(e.g., the US set higher import customs for imported oil to Muslim countries than to European)</p>	<p>Prevent discrimination against imported goods and domestic or local products.</p> <p>(e.g. higher VAT on imported headphones than local headphones)</p>
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Note: The MFN principle prevents discrimination between WTO members, while the NT principle ensures equal treatment for imported and domestic products.

DISCUSSION

GATT 1994 Article I paragraph (1) serves as the pillar of **Most Favoured Nation (MFN)**, whose concept revolves around equal treatment to “like products” trade for any country, not limited to GATT or WTO members. This applies to export and import activities. It prohibits a country from providing “advantages” or “special treatment” for like product to a specific country. For instance, when country A provides a lower customs duty rate for one of its products to country B, this would contradict the MFN principle if the same preferential treatment is not extended to all other countries or WTO members.³ The concept of MFN ensures equal opportunity for states in trade by eliminating preferential treatment and fostering a level playing field. Therefore, the definition of “like product” as applied under the MFN principle can be understood through case law. Like in the Spain – Unroasted Coffee (1981) case, there are three characteristics of like products that were identified: (1) physical characteristics, (2) end-use, and (3) tariff regime. This approach primarily focuses on the products themselves and the customs tariff regime applied to them. By focusing on these criteria, the MFN principle aims to create a fair trading environment where similar products are treated equally, irrespective of origin.

³ WTO, *WORLD TRADE ORGANIZATION*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

On the other hand, **National Treatment (NT)** is the concept of treating foreign and domestic products equally in the state's domestic market. This principle aims to prevent protectionism by ensuring that internal tax and regulatory measures do not favor domestic products over imported ones. The issue of NT revolves around internal regulation relating to discriminatory internal policy and practices (tax, intellectual property rights, etc.) over imported and locally produced goods, such as higher taxes or stricter regulations on imported goods compared to locally produced goods. A real example can be seen in the case of Japan – Alcoholic Beverages II (1996) where imported goods are taxed higher (internal tax like VAT) than domestic goods. In another instance, the price of imported goods being significantly lower than domestic goods was addressed in the Canada – Provincial Liquor Boards (1992) case. These examples highlight how NT seeks to eliminate discriminatory practices that could harm fair competition in the domestic market.

The definition of “like product” in NT, similar to that in MFN, can be seen through both laws and case laws. However, each tribunal has discretion in determining which products are considered “like,” and the criteria can vary on a case-by-case basis.⁴ According to GATT Article III para. 2, it highlights criteria such as (1) consumer taste and habits, (2) process and production method (PPM), and (3) directly competitive or substitutable products (DCS) when the product can be used interchangeably. Additionally, the criteria established in the Philippines - Distilled Spirits (2013) case, emphasize the assessment of a product’s “likeness” which must consider (1) the product’s end uses in the market, (2) consumers’ tastes and habits, which change from country to country, (3) the product’s properties, nature, and quality, and (4) tariff classification. However, in the holding of Japan—Alcoholic Beverages II (1995) case, none of the criteria determining “likeness” is individually determinative. This indicates that a holistic approach is necessary when assessing "likeness," taking into account multiple factors to ensure a comprehensive evaluation.⁵

⁴ Mireille Cossy, “Determining Likeness under the GATS: Squaring the Circle?”, *SSRN Electronic Journal*, 2006.

⁵ *Ibid.*

Furthermore, the “like products” criteria in NT slightly differ from those in MFN. While MFN focuses on international trade policies and customs tariffs, NT emphasizes internal market regulations and policies. This difference in focus reflects the broader scope of MFN, which aims to ensure non-discrimination across borders, and the more localized scope of NT, which seeks to maintain fair competition within domestic markets.

CONCLUSION

In conclusion, the concept of “likeness” in MFN and NT differs due to the scope of their principles and objectives. MFN applies to transborder products, affecting how exported or imported products are treated between states, and focuses on the global marketplace by influencing a country's trade policies, such as customs tariffs. Meanwhile, NT only encompasses “like products” that have already entered the domestic market, addressing the treatment of imported goods compared to local products. The criteria for “like products” differ between MFN and NT due to their respective focuses: MFN on international trade and customs tariffs, and NT on internal policies related to goods, such as value-added tax, price subsidies, and market access. By understanding these distinctions, policymakers and trade officials can better navigate the complexities of international trade law and promote a fairer and more equitable trading system.

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