

Working Paper No 2011/16 | April 2011

---

# Direct and Indirect Discrimination in WTO Law and EU Law

---

Thomas Cottier<sup>1</sup> and Matthias Oesch<sup>2</sup>

## Abstract

Non-discrimination is at the heart of WTO law and EU law. Both layers of governance share commonalities in addressing the operation of the principle, essentially banning distinctions based upon the origin of products and the nationality of persons. Both share the basic functions of preventing and correcting state failures in granting privileges and undue protection to domestic products and nationals. A closer analysis, however, shows important differences which we assign to different constitutional functions of the WTO and to a much wider and more ambitious scope of EU law, including the explicit pursuit of other policy goals and the protection of human rights. Functional differences will remain. They need recognition. Yet, global regulatory needs show that the WTO will need to expand to recognise a wider range of legitimate policy goals. In so doing, it will move closer to the matrix defining non-discrimination at the regional level of the EU. Stronger emphasis on compelling interests and proportionality offers a bridge to overcome some of the divergence, contributing to the overall coherence of multilayered governance.

<sup>1</sup> Managing Director World Trade Institute, Director NCCR Trade Regulation, University of Bern

<sup>2</sup> Assistant Professor of European and International Economic Law at the University of Bern, Senior Research Fellow at the World Trade Institute

NCCR TRADE WORKING PAPERS are preliminary documents posted on the NCCR Trade Regulation website (<[www.nccr-trade.org](http://www.nccr-trade.org)>) and widely circulated to stimulate discussion and critical comment. These papers have not been formally edited. Citations should refer to a “NCCR Trade Working Paper”, with appropriate reference made to the author(s).

# Direct and Indirect Discrimination in WTO Law and EU Law

Thomas Cottier and Matthias Oesch

Non-discrimination is at the heart of WTO law and EU law. Both layers of governance share commonalities in addressing the operation of the principle, essentially banning distinctions based upon the origin of products and the nationality of persons. Both share the basic functions of preventing and correcting state failures in granting privileges and undue protection to domestic products and nationals. A closer analysis, however, shows important differences which we assign to different constitutional functions of the WTO and to a much wider and more ambitious scope of EU law, including the explicit pursuit of other policy goals and the protection of human rights. Functional differences will remain. They need recognition. Yet, global regulatory needs show that the WTO will need to expand to recognise a wider range of legitimate policy goals. In so doing, it will move closer to the matrix defining non-discrimination at the regional level of the EU. Stronger emphasis on compelling interests and proportionality offers a bridge to overcome some of the divergence, contributing to the overall coherence of multilayered governance.

<b>I. Introduction .....</b>	<b>2</b>
<b>II. The Essence of Non-Discrimination .....</b>	<b>5</b>
A. Equality.....	5
B. Equal Conditions of Competition .....	5
C. Multilayered Governance.....	6
D. Main Challenges and Issues.....	7
<b>III. The Legal Framework of Non-Discrimination.....</b>	<b>8</b>
A. Scope of Protection.....	8
B. Regulatory Approaches to Non-Discrimination.....	9
C. Excluded Motives for Discrimination.....	11
D. Included Motives for Discrimination.....	13
<b>IV. The Operation of Non-Discrimination.....</b>	<b>15</b>
A. Tariffs and Taxes .....	15
B. Non-Tariff Measures and Regulations.....	17
1. Product-Related Discrimination.....	17
2. Process and Production Related Discrimination .....	19
C. Monopolies and State Trading.....	21
<b>V. Conclusions .....</b>	<b>23</b>

## I. Introduction

International law has been based on the principle of sovereign equality of states.<sup>1</sup> All states shall be equal Members of the international community, notwithstanding differences of economic, social or political characteristics, or of any other kind.<sup>2</sup> Sovereign equality of states in customary international law and in the law of the United Nations entitles states to be treated equally before the law in terms of procedures and formalities of international relations. Thus, equality means equality in legal status.<sup>3</sup> Yet, it does not entail equal treatment in terms of treaty relations and policies. Indeed, sovereignty entitles states to discriminate among their peers and to prefer some over others in unilateral policies and bilateral relations.<sup>4</sup> Equally, it has been the *raison d'être* of nation states to protect and thus to privilege their own citizens and domestic products within their jurisdiction. In international trade relations, the mercantilist tradition is closely tied to this rationale. Discrimination has inherently been part of the Westphalian state system, consisting of varying coalitions and balances of power. The advent of the League of Nations and the United Nations did not fundamentally alter the equation. Principles of non-discrimination among states have not emerged to form part of the general body of contemporary customary international law or general principles of law.<sup>5</sup> Moreover, non-discrimination is not a self-standing human right and may be invoked only in the context of more specific violations.<sup>6</sup>

Non-discrimination, instead, emerged as a specific trait of treaty-based international economic law, in particular in international trade regulation and the protection of foreign direct investment.<sup>7</sup> Today, it is the leading principle of the WTO and was essentially developed under the General Agreement on Tariffs and Trade (GATT).<sup>8</sup> It essentially consists of the principle of

---

<sup>1</sup> I. Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 6th ed. 2003), at 289-292; A. Peters, 'Die Strukturähnlichkeit der Diskriminierungsverbote im Menschenrechtsbereich und im Welthandelsrecht', in S. Breitenmoser *et al.* (eds.), *Human Rights, Democracy and the Rule of Law, Liber amicorum Luzius Wildhaber* (Zurich: Dike Verlag, 2007), 551, at 578; C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', *Recueil des Cours* 281 (1999), 161.

<sup>2</sup> See, e.g., Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United States, G.A. Resolution 2625 (XXV), 24 United Nations Year Book (1970), 788.

<sup>3</sup> Tomuschat, above n. 1, at 189.

<sup>4</sup> G. Schwarzenberger, 'Equality and Discrimination in International Economic Law', *The Yearbook of World Affairs* (London: Stevens & Sons, 1971), 163; W. F. Schwartz/A. O. Sykes, 'The Economics of the Most-Favored-Nation Clause', in J. S. Bhandari/A. O. Sykes (eds.), *Economic Dimensions in International Law: Comparative and Empirical Perspectives* (Cambridge: Cambridge University Press, 1997), 62.

<sup>5</sup> M. Oesch, 'Commercial Treaties', in *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2009), para. 4.

<sup>6</sup> Peters, above n. 1, at 554-562.

<sup>7</sup> See, e.g., T. Cottier/M. Oesch, *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland. Cases, Materials and Comments* (Berne/London: Stämpfli Publishers Ltd/Cameron May), at 346-381; W. J. Davey/J. Pauwelyn, 'MFN-Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of Like Product', in T. Cottier/P. C. Mavroidis (eds.), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (Michigan: The University of Michigan Press, 2000), 13.

<sup>8</sup> WTO law is reprinted in: *The Results of the Uruguay Round of the Multilateral Trade Negotiations: the Legal Texts* (Geneva, 1995); Cottier/Oesch, above n. 7, at 346; V. Heiskanen, 'The Regulatory Philoso-

most-favoured-nation (MFN) treatment and the principle of national treatment (NT). On the basis of reciprocal advantages, governments agreed to contractually limit their sovereign rights to discriminate and to meet the obligations of equal treatment, thus implementing the principles of substantive equality in international relations. The process is linked to the emergence of the doctrine of free trade and policies of progressive liberalisation. Early bilateral treaties, mainly relating to navigation and trade, developed the concept of MFN treatment, either conditional or unconditional.<sup>9</sup> The principle of non-discrimination was designed specifically to prohibit protectionism and to ensure equal treatment of foreign and domestic products.<sup>10</sup> It was thus agreed that treatment and conditions more favourable than those granted, under the MFN agreement at issue, to any third party would be equally extended to any other party to the agreement. The clause, often applied in bilateral treaties of friendship, commerce and navigation in the 19<sup>th</sup> century, thus contributed to a network of interlinked agreements, preceding the formation of a proper multilateral system after World War II. Likewise, NT emerged in the liberal period of the 19<sup>th</sup> century and found its way into bilateral agreements and, later on, into investment protection agreements. The principle protects foreign products or even persons from suffering treatment less favourable than that accorded to domestic products or nationals.

Non-discrimination enshrined in the GATT, and in the tradition of treaties of friendship, commerce and navigation, greatly inspired the model of peace through economic integration within the European Economic Community founded in 1957. Non-discrimination became the cornerstone in building the common and, later, the internal market. Today, within the European Union, it provides the foundation of European citizenship and equal treatment of individuals, supported by corresponding human rights within and outside the European Charter on Fundamental Rights.<sup>11</sup> Both the WTO and the European Union are founded upon the principle of non-discrimination, taming the sovereign rights of states to select and choose their preferences within the international community with respect to the importation of products, both of goods and of services. While these two layers thus share common philosophies, strongly diverging levels of economic integration result in partly diverging modes of implementing these principles in WTO law and EU law.

Non-discrimination in WTO law is an important ingredient of trade liberalisation, but it does not entail free trade on the level of global law. In goods, trade restrictions remain lawful despite non-discrimination. Tariffs protect domestic industries and provide fiscal income. They are increasingly being reduced and bound in WTO law, but are far from being generally eliminated. Today, non-tariff barriers, such as technical barriers to trade and food standards, as well as subsidisation are imposed to pursue mercantilist goals despite commitments to non-discrimination. While trade in industrial goods today is relatively open, strong barriers have

---

phy of International Trade Law', 38 *Journal of World Trade* (2004), 1, at 2; M. Cremona, 'Neutrality or Discrimination? The WTO, the EU and External Trade', in G. de Burca/J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart Publishing, 2001), 151, at 153-158.

<sup>9</sup> Oesch, above n. 5, paras. 11-14; Peters, above n. 1, at 558; see, for conditional and unconditional MFN, Davey/Pauwelyn, above n. 7, at 13-50.

<sup>10</sup> Heiskanen, above n. 8, at 13; G. De Búrca, 'Unpacking the Concept of Discrimination in EC and International Trade Law', in C. Barnard/J. Scott (eds.), *The Law of the Single European Market, Unpacking the Premises* (Oxford: Hart Publishing, 2002), 181.

<sup>11</sup> See for the consolidated versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) OJ 2010/C 83/1, and for the Charter of Fundamental Rights of the European Union OJ 2010/C 83/2.

persisted in the field of agriculture, despite the process of tariffication in the Uruguay Round.<sup>12</sup> Non-discrimination applies to all these hurdles, but it does not remove them. In services, progressive liberalisation is brought about by the gradual introduction of NT in schedules of commitments. This is a long-term process. Today, services are far from liberalised, and full non-discrimination of foreign services – amounting to full competition and open markets – will stay on the agenda for decades to come.

On the level of EU law, the impact of non-discrimination is more advanced. Equal treatment of all Member States is a matter of course, except for areas open to variable geometry. Non-discrimination in terms of NT finds its explicit and implicit expression in many provisions, ranging from non-discrimination based upon nationality, European citizenship, to the four (in fact six) freedoms of free movement of goods, services, persons, establishment, investment and transfers of funds. It is at the heart of provisions on taxation. It essentially coins competition law, restricting conduct and freedom of contract of private companies operating within the European Union. Beyond its influence on commerce and trade, ever since the inception of the process of integration, non-discrimination has equally been at the heart of gender equality and more recent emanations banning differential treatment based upon race, religion, sex and other preferences of human beings.

This paper discusses commonalities and differences among the two layers of governance, both global and regional. It will be interesting to compare the operation of non-discrimination in their respective jurisdictions, and to assess, in particular, the remaining scope of discrimination which may be induced by policy goals other than trade regulation. It is important to add that non-discrimination does not stop here. It is equally, and perhaps foremost, a principle of constitutional law in a domestic context, and thus formally outside the realm of international law. Non-discrimination is inherent to the principle of equality and other guarantees of human rights, including economic liberties. It informs the life and operation of the law under the constitution. Non-discrimination therefore amounts to an important structural linkage of different layers of governance. It operates not only as a fundamental principle of WTO law and EU law, but of multilayered governance in general terms.

We briefly describe the essence and functions of non-discrimination, the regulatory approaches on the different layers of governance and the main challenges which the concept faces today (II.). We then turn to a comparative discussion of WTO law and EU law, looking at the scope of protection and the different regulatory approaches as well as at the motives excluding, and those allowing for, discrimination in the treatment of fiscal measures and non-tariff barriers in trade in goods and services (III.). We address the operation of non-discrimination in levying tariffs and taxes and the pressing problem of product differentiation based upon process and production methods (PPMs) (IV.). Overall, we seek to compare levels and modes of protection and emphasise commonalities and differences. It will be seen that EU law is partly more stringent, and partly offers more flexibility to Member States than WTO law does. In concluding, we address this paradox and draw appropriate conclusions from these findings (V.).

---

<sup>12</sup> J. E. Stiglitz, *Globalization and Its Discontents* (London/New York: W. W. Norton & Company, 2003), at 6.

## II. The Essence of Non-Discrimination

### A. Equality

Non-discrimination, limiting sovereign powers to engage in policies privileging one state over another, emanates from the principle of equality. Equality, at the heart of the 18<sup>th</sup> century enlightenment movement and of human rights, embarked on a long journey in legal orders, moving from a purely formal concept to a principle of substantive equality. While it was a matter of treating equals in equal terms, and non-equals in unequal terms, legitimate bases for making distinctions had largely been left, ever since the times of Plato and Aristotle, to philosophy, religion and morality. Equality in law was a purely formal concept, until specific criteria, based upon which differentiation is excluded, were established in law.<sup>13</sup>

In domestic law, and after revolutions abolished the rule of aristocracy in the 19<sup>th</sup> century, this process started with political rights, banning census and introducing a general vote, irrespective of class, provenance and property. Subsequent developments abolished the option to legitimately distinguish on the basis of sex, race and age. The prohibition against distinguishing on the basis of nationality or the origin of a product amounts to the prime foundation of non-discrimination in international trade law, both in the WTO and in the EU. While it was further expanded to include human rights-based non-discrimination in the EU, it remains the cornerstone of both these layers of governance. It is characterised by the exclusion of specific motives of differentiation which otherwise, under the general principle of equality, may be lawfully used. In WTO law, no general principle of equality exists, whereas in EU law, equality is assessed in terms of a fundamental right, subject to restrictions based upon the principle of proportionality.<sup>14</sup> The relationship to specific forms of non-discrimination remains to be addressed.

### B. Equal Conditions of Competition

The essence of non-discrimination in international economic law and European law amounts to the creation of equal conditions of competition among domestic and foreign products and competitors, with respect to trade in goods and services, investment and labour. Equality of opportunity is at the heart of the concept.<sup>15</sup> Non-discrimination does not guarantee results and outcomes, but rather the potential to operate successfully on markets on equal terms and unimpaired by unfair restrictions imposed either by governments or private actors. Equality of opportunity looks at real conditions of competition and does not stop at legal discrimination. It entails direct/legal as well as indirect/*de facto* discrimination.<sup>16</sup> This holds true for the WTO

---

<sup>13</sup> See, for concepts of equality (and their evolution over time), e.g., Aristotle, *Nicomachean Ethics*, translation by Christopher Rowe (Oxford: Oxford University Press, 2002); J. Rawls, *A Theory of Justice* (Cambridge MA: Harvard University Press, 1971); A. Sen, *The Idea of Justice* (London: Allen Lane, 2009); M. Oesch, *Differenzierung und Typisierung: Zur Dogmatik der Rechtsgleichheit in der Rechtsetzung* (Bern: Stämpfli Verlag AG, 2008).

<sup>14</sup> ECJ C-292/97, *Karlsson*, ECR 2000 I-2737, para. 45.

<sup>15</sup> See T. Cottier/P. Mavroidis (eds.), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law: Past, Present, and Future* (Ann Arbor, The University of Michigan Press, 2000).

<sup>16</sup> Cf. De Búrca, above n. 10, at 188-191; L. Ehring, 'De Facto Discrimination in WTO Law: National and Most-Favored-Nation Treatment – or Equal Treatment?', 36 *Journal of World Trade* (2002), 921; F. Ortino, 'WTO Jurisprudence on *De Jure* and *De Facto* Discrimination', in F. Ortino/E.-U. Petersmann (eds.), *The WTO Dispute Settlement System 1995-2003* (The Hague: Kluwer Law International, 2003),

and for the EU alike. In the real world, constellations of *de facto* discrimination are much more frequent than legal discrimination. First, with the decrease of protective measures at the borders and the increase of non-tariff barriers to trade, general regulations are much more frequent than measures limited to imports or exports. Second, it is more convenient to hide protectionist intent with neutral clothing and the need to challenge a measure in court. Much of the interesting case law in WTO and EU jurisprudence deals with constellations of *de facto* discrimination. The WTO panels, the Appellate Body and the Court of Justice look at the real effects of the measures at stake.<sup>17</sup>

The main structural difference between WTO law and EU law does not relate to non-discrimination, but to the effects of the four freedoms establishing the cornerstones of the internal market. The Court of Justice has developed, through case law, the notion that the fundamental freedoms transcend inherent non-discrimination and entail disciplines on excessively restrictive regulations. Thus, even non-discriminatory measures may not stand the test of non-discrimination *per se* if they entail unnecessary restrictions, commensurate with the goal of a policy measure at stake. The freedoms therefore incorporate an inherent principle of proportionality by which restrictions are assessed.<sup>18</sup> It will be shown below to what extent necessity in WTO law may assume comparable functions.

### C. Multilayered Governance

From a systemic and constitutional perspective, it is important to stress that non-discrimination operates as an antidote to state failure. The international system, on the level of both the WTO and the EU, is called upon to intervene in constellations in which domestic processes fail to avoid *de jure* or *de facto* discrimination due to domestic specificities in the pursuit of vested interests. Comparable to constitutional review of state legislation in a federal system by its Supreme Court, the WTO panels, the Appellate Body and the Court of Justice assume constitutional functions, broadly speaking. From this angle, non-discrimination is an important principle of multilayered governance.<sup>19</sup> While it differs, across the various layers of governance, in form and scope, the core function of securing equal opportunity is paramount and can be found on each of the layers alike. The relationship of WTO law to EU law and a comparison of the operation of non-discrimination on these two layers is of particular interest in this context. WTO law operates as a check on EU law, just as EU law operates as a check

---

217; with respect to EU law C. Barnard, *The Substantive Law of the EU* (Oxford: Oxford University Press, 3<sup>rd</sup> ed. 2010), at 239-242.

<sup>17</sup> See, for a typical WTO case on *de facto* discrimination, *EC – Regime for the Importation, Sale and Distribution of Bananas*, Appellate Body Report, adopted on 25 September 1997, WT/DS27/AB/R: see, for typical EU cases, ECJ 152/73, *Sotgiu*, ECR 1974 153; ECJ C-237/94, *O’Flynn*, ECR 1996 I-2617.

<sup>18</sup> ECJ C-55/94, *Gebhard*, ECR 1995 I-4165.

<sup>19</sup> See, for the concept of multilayered governance, Cottier/Oesch, above n. 7, at 532-542; T. Cottier, ‘Towards a Five Storey House’, in Ch. Joerges/E.-U. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Oxford: Hart Publishing, 2<sup>nd</sup> ed. forthcoming 2010), both with references to the growing body of literature; for the relationship between WTO law and EU law in particular N. Walker, ‘The EU and the WTO: Constitutionalism in a New Key’, in G. de Burca/J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart Publishing, 2001), 31; P. Holmes, ‘The WTO and the EU: Some Constitutional Comparisons’, in G. de Burca/J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart Publishing, 2001), 59; A. von Bogdandy/T. Makatsch, ‘Collision, Co-existence or Co-operation? Prospects for the Relationship between WTO Law and European Union Law’, in G. de Burca/J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart Publishing, 2001), 131; Cremona, above n. 8, at 178-184.

on domestic law of Member States. Non-discrimination is a core element of what we have termed a five storey house, entailing local, provincial (cantonal), federal, regional and global levels of governance.<sup>20</sup> It amounts to a common element of all layers alike. We seek to explore to what extent the regional and global level share commonalities, and to what extent functions are differentiated.

#### **D. Main Challenges and Issues**

Non-discrimination, in jurisprudence and doctrine, faces a number of challenges. Partly, they are shared on different layers of governance. Partly, they concern a certain layer only. WTO law operates based on a fundamental difference between trade in goods and trade in services. The GATT and the General Agreement on Trade in Services (GATS) operate with different functions of non-discrimination. While the principle of national treatment applies horizontally and across the board for goods under Article III GATT, it only applies to scheduled services of Members under Articles XVII and XVIII GATS. Such a difference is a reflection of the fact that market access in goods is essentially defined by tariffs – a concept for regulating the amount of imports which is not available for services. Market access in services is defined in terms of granting non-discriminatory treatment. Both agreements operate under a philosophy of progressive regulation, yet use different and diverging tools. They also protect different subjects. While non-discrimination relates to goods only under the GATT, thus not including economic operators producing or trading goods, it covers both services and service providers under the GATS. Article 3 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) formally addresses non-discrimination of right holders and thus of persons only. These functional differences tend to result in diverging interpretative outcomes of key concepts, such as the notion of like products, which determine the scope of the obligation to grant equal treatment.<sup>21</sup> The prohibition of *de facto* discrimination has reduced, at least to some extent, conceptual differences in practical terms.<sup>22</sup> Yet, basic distinctions between goods and services raise long-term problems as goods and services are increasingly intertwined in a modern economy. A chain of production and marketing is increasingly difficult to split into two separate categories responding to different regimes. Both regimes, however, share the problem of appropriately defining policy space in the pursuit of policy goals other than trade liberalisation which may require the operation of unequal treatment and discrimination. The scope is largely defined by the analysis of like products and the operation of exceptions to the rule.

Both WTO law and EU law face these challenges, and answers cannot be found in a uniform manner. Moreover, recourse to exemptions varies. It will be seen that, on the one hand, WTO law applies general exceptions to NT, including taxation. EU law applies strict rules to tariffs and tax discrimination and does not allow for exemptions other than for non-tariff barriers and regulation. On the other hand, EU law allows for implied restrictions – a concept which is alien to WTO law. Finally, non-discrimination entails the question whether product differentiation and discrimination needs to be based upon particular qualities of a product, or whether

---

<sup>20</sup> Cottier, above n. 19.

<sup>21</sup> See, for the concept of likeness in WTO law, below n. 35.

<sup>22</sup> Cf. *EC – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, Panel Report, adopted on 20 April 2005 (WT/DS174/R and WT/DS290/R); see W. Zdouc/M. Oesch, ‘The Jurisprudence of WTO Dispute Resolution (2004/2005)’, 15 *SZIER* (2005), 641, at 649-652.



it may also be based on criteria as to how a particular product is produced in terms of process and production methods (PPMs). This issue is pivotal for elements of the ‘trade and’-debate, such as trade and human rights or trade and the protection of the environment. It will play a key role in addressing climate change. It will be interesting to examine to what extent discrimination based upon PPMs is admissible in the pursuit of policy goals both at the global level of the WTO and at the regional level of EU law. The proper scope of policy space entails fundamental questions as to the role of judicial review of legislative action. It is at the heart of checks and balances, albeit hardly ever discussed in such terms. Judicial review of the key issues of likeness, exceptions, necessity and proportionality and product standards as well as PPMs equally entails the problem of allocating powers among different bodies of government not only horizontally, but also vertically among different layers of governance. These are not technical issues, but problems lying at the heart of the international and regional trading system.

### III. The Legal Framework of Non-Discrimination

#### A. *Scope of Protection*

Non-discrimination in international economic law and European law aims at protecting foreign products and persons from suffering disadvantages in foreign markets. Commensurate with the compensatory functions of international law, protection is not extended *per se* to all goods and persons alike in a manner otherwise inherent to constitutional law. The subject-matter of non-discrimination is therefore limited, and states essentially have a sovereign right to treat their own products and nationals in a less favourable manner than that with which they treat imported products and aliens (reverse discrimination, *discrimination à rebours*).<sup>23</sup> Such constellations are rare for obvious reasons of political economy. Domestic constituencies will see to it that they do not suffer disadvantages passively tolerated or even actively imposed by domestic law. But such constellations exist. They fall outside the scope of non-discrimination as guaranteed by WTO law and EU law and may be challenged on the basis of domestic constitutional law. However, it is important to note that boundaries are increasingly blurred in European law. First, domestic measures applicable to own nationals may impair the exercise of market access rights abroad and therefore, because they affect rights abroad, are protected by EU law.<sup>24</sup> Comparable constellations may occur in WTO law. Second, the principle of equality in European law fully applies to the domestic operation of EU law irrespective of nationality of those affected by governmental measures.<sup>25</sup> Originally recognised by the Court of Justice as a general principle of law, equality before the law is now enshrined in Article 20 of the Charter on Fundamental Rights. Third, the prohibition against gender-based discrimination has ever since applied, irrespective of a transnational context, pursuant to Article 157(1) TFEU.<sup>26</sup> Today, human rights based upon non-discrimination equally apply irrespective of

---

<sup>23</sup> See, for *discrimination à rebours* in EU law, Barnard, above n. 16, at 88-89; A. Epiney, *Umgekehrte Diskriminierungen: Zulässigkeit und Grenzen der discrimination à rebours nach europäischem Gemeinschaftsrecht und nationalem Verfassungsrecht* (Köln: Carl Heymanns Verlag KG, 1995); for *discrimination à rebours* in domestic law M. Oesch, ‘Inländerdiskriminierung’, 145 ZBJV (2009), 787.

<sup>24</sup> ECJ C-321/94 to C-324/91, *Pistre*, ECR 1997 I-2343.

<sup>25</sup> ECJ C-292/97, *Karlsson*, ECR 2000 I-2737.

<sup>26</sup> ECJ 43/75, *Defrenne*, ECR 1976 455.

origin and nationality.<sup>27</sup> Overall, non-discrimination in European Law has increasingly moved to constitutional modes of operation, expanding its scope in comparison to WTO law. The latter, so far, remains limited to the protection of foreign products and persons. It does not *per se* protect domestic products and producers in a domestic context, unless market access rights are affected. For example, tax privileges accorded to domestic companies, which affect equal opportunities on third markets, are subject to disciplines of non-discrimination.<sup>28</sup>

As a corollary to the scope of protection, many jurisdictions exclude the invocation of treaties in defence of domestic right holders.<sup>29</sup> To the extent, however, that WTO law engages in harmonisation of rules, for example in the field of intellectual property rights, it is difficult to see why standards in international law should not also benefit nationals in a domestic context.<sup>30</sup> To the extent that the WTO increasingly assumes constitutional functions, standing in court should be extended and shaped accordingly.

### **B. Regulatory Approaches to Non-Discrimination**

The creation of level playing fields for foreign and domestic products is open to a number of different regulatory approaches squaring sovereign regulatory powers with goals of non-discrimination. Discrimination is essentially addressed and removed mainly by employing positive integration. It would seem useful to recall these approaches at the outset. They can be characterised as follows, ranging from centralisation to co-operation.

(i) Non-discrimination, of course, would best be secured by transferring regulatory powers to the international law-maker, resulting in common and uniform rules administered by the same authority for stakeholders and members alike. In the WTO, this is partly the case for the application of rules by its adjudicatory body, *i.e.*, by panels and the Appellate Body. Other than that, the WTO, not being supranational in nature, does not have inherent rule-making powers in implementing the law. In the EU, transfer of powers is inherent to the adjudication of primary law by the Court of Justice, and the power to enact legislation (regulations pursuant to Article 288(2) TFEU) in areas of exclusive competence, including the common commercial policy (Articles 206 and 207 TFEU) and competition policy (Articles 101 and 102 TFEU).

(ii) Non-discrimination is secured by means of harmonisation of law. Common rules are established, but implemented by members, subject to dispute settlement. In the WTO, this is reflected in the autonomous application and interpretation of WTO law by the Members. In the EU, harmonisation creates common rules mainly by means of directives (Article 288(3) TFEU), defining goals but leaving implementation to Member States. Most secondary law seeks to prevent and remedy non-discrimination on that basis. Directives are mainly enacted

---

<sup>27</sup> ECJ C-450/93, *Kalanke*, ECR 1995 I-3051; ECJ C-409/95, *Marschall*, ECR 1997 I-6363.

<sup>28</sup> *US – Tax Treatment for ‘Foreign Sales Corporations’*, Appellate Body Report, adopted on 20 March 2000 (WT/DS108/AB/R).

<sup>29</sup> See, for the issue of direct effect of WTO law, *e.g.*, J. H. Jackson, ‘Status of Treaties in Domestic Legal Systems: A Policy Analysis’, in J. H. Jackson, *The Jurisprudence of GATT & the WTO* (Cambridge: Cambridge University Press, 2000), 328; M. Bronckers, ‘The Relationship of the EC Courts with other International Tribunals: Non-Committal, Respectful or Submissive?’, 44 CMLR (2007), 601; Cottier/Oesch, above n. 7, at 197-232.

<sup>30</sup> Cottier/Oesch, above n. 7, at 218.

in order to overcome discrimination otherwise well-rooted in domestic law and protected under exceptions. Such restrictions are the main driver of harmonisation as equal conditions of competition and the pursuit of policy goals other than trade liberalisation presuppose common and shared rules.

(iii) Non-discrimination is secured by operating the principle of equivalence of domestic law. Members recognise that products lawfully placed on the market in accordance with regulations of the exporting country can be lawfully marketed even though the rules of the importing country may differ. The principle of equivalence was established in EU law by the Court of Justice in its ruling on *Cassis-de-Dijon*.<sup>31</sup> Equivalence does not apply in WTO law except where specifically provided for on a non-mandatory basis in Article 2.7 Agreement on Technical Barriers to Trade (TBT Agreement) and – in more compelling, but not automatic terms – in Article 4 Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). Equivalence entails a high level of mutual trust among different legal orders and constituencies. It is thus an approach essentially limited to regional integration or domestic law securing interstate commerce.<sup>32</sup>

(iv) Non-discrimination may be secured by the principle of reciprocity. According to this principle, equal treatment is granted, provided that the same level of market access is specifically conceded *vice versa*. Reciprocity is inherently a matter of bilateral or plurilateral relations.<sup>33</sup> The policy, often applied in former times, is inconsistent with the principle of unconditional MFN treatment as it excludes equal treatment of third parties. While inconsistent with WTO law, it has occasionally been used in EU law, *e.g.*, in the process of liberalising electricity markets.

(v) Non-discrimination finally may be curbed by policies of co-operation and concertation on a voluntary basis. This approach reflects the least intrusive, but equally the least effective, means to avoid direct or indirect discrimination. In the EU, it applies in areas of co-operation not subject to integration, properly speaking. It has little importance within the bounds of the internal market. Co-operation to this effect does not exist in the WTO except for technical co-operation which may induce unilateral dismantlement of discriminatory trade barriers.

While the goals of guaranteeing non-discrimination and level playing fields are pursued across and through all these models, the core issues are with the primary rules on non-discrimination in international law. They mainly apply in the absence of one of the regulatory approaches or in constellations of equivalence when affected countries insist on the application of their domestic law. In such constellations, domestic law is measured against treaty law, be it WTO law or EU law. This paper thus focuses on Articles III and XX GATT, on Articles XVII and XIV GATS and on related provisions in EU law, in particular Articles 18, 30, 34, 36, 56, 62/52 and 110 TFEU. As a starting point, we analyse the motives for excluding, and

---

<sup>31</sup> EJC C-120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, ECR 1979 649.

<sup>32</sup> See, *e.g.*, Article 2(1) of the Swiss Internal Market Act of 1995 (SR 943.02), codifying the *Cassis-de-Dijon* principle for goods and services for intercantonal market access purposes. Moreover, Switzerland, a non-Member of the EU, unilaterally adopted the principle of equivalence of technical standards vis-à-vis the EU and its Member States, cf. Article 16a of the Technical Barriers to Trade Act (SR 946.51); T. Cottier/M. Oesch, 'Switzerland', in G. Anderson (ed.), *Internal Markets and Multilevel Governance: The Experience of the European Union, Australia, Canada, Switzerland and the United States* (Oxford: Oxford University Press, forthcoming 2011).

<sup>33</sup> See, for the principle of reciprocity in negotiating commercial treaties, Oesch, above n. 5, para. 8.

those allowing for, regulatory differentiation between domestic and foreign products and competitors. In Section IV, we specifically look at the operation of non-discrimination in tariffs and taxes, before turning to non-tariff barriers, both in goods and services. We particularly focus on the problem of PPMs. It will be seen that the constitutional framework of the EU, including human rights-based provisions on non-discrimination in the Treaty and in the Charter of Fundamental Rights, has considerable influence in addressing non-discrimination, offering an interesting comparison to the globally applicable WTO rules.

### C. *Excluded Motives for Discrimination*

Beyond the principle of equality, international and European trade regulation exclude a number of motives upon which differential treatment must not be based in law. The comparison of like and unlike is no longer left to philosophy, religion and morals, but strongly guided by law. Both WTO law and EU law specifically exclude discrimination based upon the origin or nationality of a product or person. The principle of MFN treatment pursuant to Article I(1) GATT requires treatment no less favourable to products ‘originating in or destined for any other country’. Article III(4) GATT requires treatment no less favourable for ‘the products of the territory of any contracting party imported into the territory of any other contracting party’. GATS is based upon the same principles (albeit NT is subject to scheduling) and extends, as much as the TRIPS Agreement does, protection to natural and juridical persons and right holders domiciled in other Members. Non-discrimination in WTO law is thus essentially based upon the origin of a product or competitor, and discrimination on the basis of origin, subject to exceptions, is unlawful. The same holds true in the field of government procurement. While Article III GATT allows for the exclusion of procurement, the plurilateral Agreement on Government Procurement (GPA) essentially requires procurement of goods and services irrespective of the origin and nationality of the bidders and suppliers. Strong resistance of developing countries to joining the agreement indicates the extent to which discriminatory procurement and ‘buy local’ practices still prevail. In this field, non-discrimination and market access are far from being realised due to corruption, strongly diverging competitiveness and the desire to build infant industries in these countries.<sup>34</sup>

Equality before the law and non-discrimination inherently entail comparable products, both goods and services. Non-discrimination, linked to the idea of level playing fields and competition, applies to like or competing products. While like products are inherently competing, non-like products do so only to the extent that they are mutually substitutable. Discrimination among products belonging to these two groups is thus ruled out, albeit based on different concepts. The specific analysis of likeness and competition of products is at the heart of non-discrimination in WTO law.<sup>35</sup> It essentially defines the scope of non-discrimination. It also indicates key motives disallowing differentiation and unequal treatment.

---

<sup>34</sup> S. Brown-Shafii, *Promoting Good Governance, Development and Accountability: Implementation and the WTO* (Basingstoke: Palgrave Macmillan, 2011).

<sup>35</sup> See, for the concept of likeness in WTO law, W.-M. Choi, *Like Products in International Trade Law: Towards a Consistent GATT/WTO Jurisprudence* (Oxford: Oxford University Press, 2003); T. Cottier/P. Mavroidis (eds.), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law: Past, Present, and Future* (Ann Arbor, The University of Michigan Press, 2000); Cottier/Oesch, above n. 7, at 389-411; N. Diebold, *Non-Discrimination in International Trade in Services: ‘Likeness’ in WTO/GATS* (Cambridge: Cambridge University Press, 2010).

EU law operates on the same foundations, but significantly expands upon the excluded motives of discrimination. The fundamental provision of Article 18 TFEU excludes all distinctions on the basis of nationality of persons. Moreover, discrimination on the basis of origin and nationality is inherently excluded by the four freedoms. Products from, and destined for, other Member States of the EU are entitled to treatment no less favourable. The principle applies to goods, services and persons alike. EU law, however, evolved beyond the classical motives of non-discrimination in international economic relations. Equality of men and women has been a long-standing requirement of EU law, first limited to equal pay and then expanded to cover equality of opportunity in the domestic workplace, irrespective of any transnational business. Articles 8, 10 and 19 TFEU today provide the basis for combating discrimination based upon gender, sexual preference, race, ethnic origin, religion and political beliefs. The Charter of Fundamental Rights goes beyond equality before the law in Article 20, to embody a prohibition against discriminating on these grounds in terms of individual rights in Article 21. These provisions are likely to inform the interpretation of traditional motives of non-discrimination. The introduction of European citizenship in 1992 exerted considerable influence on the interpretation of free movement of persons and rights attached, in particular on non-discrimination in the field of social policy<sup>36</sup> and immigration.<sup>37</sup> The impending adherence to the European Convention on Human Rights (ECHR) will further strengthen the impact of fundamental rights on the interpretation and application of non-discrimination provisions in EU law. It should be recalled, however, that the Charter of Human Rights only applies to acts of the Union. It does not extend to domestic law of Member States. Moreover, the EU Treaty is not formally a constitution. It is a treaty with limited and selected tasks, broad as they may be. Human rights guaranteed by EU law only apply to the extent that the treaty applies to a particular set of facts.

The incorporation of human rights into EU law sharpens the canon of motives based upon which discrimination cannot take place. Human rights define, or offer guidance, on defining like and non-like constellations by law. They no longer leave this issue, as under a general principle of equality, to the eye of the beholder and to philosophy. In WTO law, these linkages have not yet been established. The relationship between trade and human rights has been extensively dealt with in academic circles, while no formal linkages so far exist in the agreements and in dispute settlement reports.<sup>38</sup> In 2008, the International Law Association (ILA) called for a principle of interpretation of WTO law in accordance with human rights standards.<sup>39</sup> It is a matter of time until human rights will inform, as in EU law, the basis, upon which like and non-like products are to be defined, and thus will relevantly and explicitly shape the operation of non-discriminatory treatment.

---

<sup>36</sup> ECJ C-184/99, *Grelczyk*, ECR 2001 I-6193.

<sup>37</sup> ECJ C-127/08, *Metock*, ECR 2008 I-6241.

<sup>38</sup> Cf. T. Cottier/J. Pauwelyn/E. Bürgi Bonanomi (eds.), *Human Rights and International Trade* (Oxford: Oxford University Press, 2005); A. Lang, 'Re-Thinking Trade and Human Rights', 15 *Tulane Journal of International and Comparative Law* (2007), 335; G. Marceau, 'WTO Dispute Settlement and Human Rights', 13 *European Journal of International Law* (2002), 753; E.-U. Petersmann, 'Human Rights and International Economic Law in the 21<sup>st</sup> Century: The Need to Clarify Their Interrelationships', 4 *Journal of International Economic Law* (2001), 3; E.-U. Petersmann, 'Trade and Human Rights I', in P. F. J. Macrory/A. E. Appleton/M. G. Plummer (eds.), *The World Trade Organization: Legal, Economic and Political Analysis*, Vol. II (New York: Springer, 2005), 623; T. Cottier, 'Handel und Menschenrechte: Humanisierung des WTO-Rechts?', in T. Giegerich/A. Proelss (eds.), *Internationales Wirtschafts- und Finanzrecht in der Krise* (Berlin: Duncker & Humblot, forthcoming 2011), with further references.

<sup>39</sup> ILA Resolution 5/2008 on Human Rights and International Trade Law.

#### D. *Included Motives for Discrimination*

Trade liberalisation and economic integration may compete with other equally legitimate policy goals. WTO law and EU law therefore offer a number of exceptions based upon which discrimination may be lawful.<sup>40</sup> Article XXIV GATT offers exemptions to MFN treatment of like products (free trade areas and customs unions), complemented by the enabling clause permitting specific exemptions to the benefit of developing countries, and by individual waiver decisions. Comparable to Article XXIV GATT, Article V GATS permits Members to join, under certain requirements, regional agreements liberalising trade in services, thus justifying deviations from MFN treatment. Article XX GATT amounts to the main catalogue of exemptions primarily applicable, but not restricted to discriminatory treatment. Under the GATS, Members basically remain free to discriminate against foreign services and service providers, subject to scheduling. Even within scheduled sectors, Members may employ differential treatment and discriminatory restrictions for different modes of supply. For services that are not scheduled, a general exemption results under Article XIV GATS which is comparable to XX GATT. Articles 3 and 4 TRIPS Agreement only allow for a limited range of exemptions to MFN treatment and NT, mainly induced by policies of reciprocity contained in other international agreements, in particular the Paris Convention, the Berne Convention and the Rome Convention. The TRIPS Agreement does not contain a provision on general exceptions.

Lawful motives for discrimination are listed in Article XX GATT and XIV GATS. They mainly involve the public goods of public morals, human, animal and plant health and life, natural resources, prison labour and compliance with domestic law not inconsistent with GATT rules. In services, exemptions were extended to include consumer protection, privacy and taxation. These motives are generally subject to a necessity test, while less stringent requirements apply in other fields, in particular environmental protection under Article XX(g) GATT. The necessity test implies a demonstration that the measure is suitable and feasible, and that less intrusive alternatives are not reasonably available. WTO case law does not employ the term proportionality principle or test. Panels and the Appellate Body instead embark on a process of balancing and weighing interests at stake.<sup>41</sup> In practical terms, however, the analysis is close to the test under the heading of proportionality employed by the Court of Justice in assessing exceptions under Article 36 TFEU. Restrictions imposed to justify discriminatory treatment largely correspond to WTO law and practice. This is equally true for the second requirement, as provided for by the *chapeau* of Article XX GATT, banning arbitrary discrimination and disguised restrictions of trade. In both jurisdictions, this provision was construed to entail the prohibition of abuse of right (*abus de droit*) and the exclusion of

---

<sup>40</sup> See, for commentaries on the relevant provisions, *e.g.*, R. Wolfrum, N. Wenzel, P.-T. Stoll/L. Strack, N. Matz-Lück, S. Reyes-Knoche/K. Arend (commenting on the various lit. of Article XX), 'Article XX GATT', in R. Wolfrum/P.-T. Stoll/H. P. Hestermeyer (eds.), *WTO – Trade in Goods* (Leiden: Martinus Nijhoff Publishers, 2011); A. Tevini, 'Article XXIV GATT', in R. Wolfrum/P.-T. Stoll/H. P. Hestermeyer (eds.), *WTO – Trade in Goods* (Leiden: Martinus Nijhoff Publishers, 2011); T. Cottier/M. Molinuevo, 'Article V GATS', in R. Wolfrum/P.-T. Stoll/C. Feinäugle (eds.), *WTO – Trade in Services* (Leiden: Martinus Nijhoff Publishers, 2008); T. Cottier/P. Delimatsis/N. Diebold, 'Article XIV GATS', in R. Wolfrum/P.-T. Stoll/C. Feinäugle (eds.), *WTO – Trade in Services* (Leiden: Martinus Nijhoff Publishers, 2008); T. Cottier, 'The Agreement on Trade-Related Aspects of Intellectual Property Rights', in P. F. J. Macrory/A. E. Appleton/M. G. Plummer (eds.), *The World Trade Organization: Legal, Economic and Political Analysis*, Vol. I (New York: Springer, 2005), 1041, at 1067-1069.

<sup>41</sup> See *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Appellate Body Report, adopted 20 April 2005 (WT/DS285/AB/R); *Brazil – Measures Affecting Imports of Retreaded Tyres*, Appellate Body Report, adopted on 17 December 2007 (WT/DS332/AB/R).

rent-seeking protectionism to the benefit of the domestic industry.<sup>42</sup> In addition, GATT law requires equal treatment of Members in terms of international consultations and negotiations prior to the imposition of a restrictive measure.<sup>43</sup>

In addition to explicit restrictions, EU law developed implied restrictions in the field of goods. In its judgment on *Cassis-de-Dijon*, the Court of Justice recognised the motive of compelling public interests other than those listed in Article 36 TFEU, in particular consumer protection (wording).<sup>44</sup> Unless such a compelling interest exists, a Member is bound to accept goods lawfully placed on the market in another Member State in accordance with the (different) regulations of that Member State. Implied restrictions, however, can only be invoked as general measures equally applicable *de jure* to domestic and imported products. They are not available to justify import restrictions which do not apply to domestic products. Indirect, or *de facto*, discrimination therefore may be justified to defend such compelling interests of Member States.

WTO law does not recognise implied restrictions in the same way. The parallel debate is located in defining like products.<sup>45</sup> It is interesting to ask whether WTO law will one day be equally dependent upon implied restrictions. The problem surfaced in the *China – Trading Rights* case concerning the issue of whether the general exemptions of Article XX GATT also apply to the Chinese Protocol of Accession and the concept of trading rights.<sup>46</sup> The Appellate Body affirmed this. However, it remains to be seen whether, with this finding, the Appellate Body has opened the door for general applicability of Article XX GATT to a violation of non-GATT obligations (related to goods).<sup>47</sup> Another approach would consist in exploring implied restrictions which eventually could also apply to other agreements devoid of an explicit catalogue of exceptions applicable in the pursuit of legitimate policy goals, such as the Agreement on Implementation of Article VI of the GATT (Anti-Dumping Agreement), the Agreement on Safeguards and TBT Agreement. The same issue arises in the context of investment protection agreements. Most of them operate under strict rules of NT, but do not provide for appropriate exceptions which may be required to protect legitimate domestic policy goals.<sup>48</sup>

---

<sup>42</sup> ECJ 34/79, *Henn & Darby*, ECR 1979 3795; *United States – Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, adopted on 20 May 1996 (WT/DS2/AB/R).

<sup>43</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, adopted on 6 November 1998 (WT/DS58/AB/R); see M. Oesch, ‘US – Shrimp Case’, in *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2009), para. 9.

<sup>44</sup> EJC C-120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, ECR 1979 649; see, for a list of such compelling public interests, Barnard, above n. 16, at 166-171.

<sup>45</sup> See, for the concept of likeness in WTO law, the references cited above n. 35.

<sup>46</sup> *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Appellate Body Report, adopted on 19 January 2010 (WT/DS363/AB/R).

<sup>47</sup> Cf. M. Oesch, ‘The Jurisprudence of WTO Dispute Resolution (2010)’, 21 *SZIER* (forthcoming 2010).

<sup>48</sup> See J. Kurtz, ‘The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO’, in S. W. Schill (ed.), *International Investment Law and Comparative Law* (Oxford: Oxford University Press, 2010), 243.

## IV. The Operation of Non-Discrimination

### A. Tariffs and Taxes

Tariffs and taxes are the classical field addressing non-discrimination in international economic law. Import and export tariffs are inherently discriminatory as they privilege domestically produced and sold goods. The reduction of industrial tariffs among developed countries from an average of 40%, in 1947, to 4% after the Uruguay Round in 1995 has been a major achievement in non-discrimination.<sup>49</sup> Reduction of tariffs on the basis of MFN treatment has offered level playing fields, albeit distorted by an increasing number of preferential agreements of which the EU, of course, remains the prime and most important one, followed by the North American Free Trade Agreement (NAFTA). In the WTO, tariffs still remain relatively high in agriculture, thus expressing relatively high levels of discrimination and domestic protection.<sup>50</sup> These levels of protection, combined with extensive and *per se* discriminatory subsidisation of domestic farmers in the United States, Europe and Japan, reflect a strong tradition of nationalist policies which runs counter to cosmopolitan goals of enhancing market access for developing countries strongly dependent upon the export of commodities.<sup>51</sup>

Tariffs have not existed in the EU since 1966 when the programme of abolishing them was completed by the Member States. However, measures having equivalent effect may continue to operate in tax law and fee structures. Whether or not this is the case essentially depends upon whether or not the tax is discriminatory, and whether the fee exceeds the equivalent of the service rendered to importers or exporters. The problem of implied tariffs essentially arises in fiscal taxation of products for which no domestic production exists.<sup>52</sup> Such taxes carry the risk of turning into measures having the equivalent effect to tariffs. These risks are avoided if such taxation forms part of a large and general scheme of taxation, which is not limited to targeting specific imported products.<sup>53</sup> Measures having equivalent effect also exist if revenues of taxes indiscriminately imposed on imports and domestic products are eventually used to support domestic production.<sup>54</sup>

Article III(2) GATT – the *locus classicus* of non-discrimination – addresses two constellations. The first applies to like products.<sup>55</sup> National treatment in such constellations has consistently been given a strict interpretation. Members are not allowed to apply to imported products internal taxes or charges in excess of those applied, directly or indirectly, to like domestic products. The second constellation relates to substitutable, but unlike, products. Contrary to the first sentence of Article III(2), the second sentence explicitly refers to Paragraph 1 and

---

<sup>49</sup> Cottier/Oesch, above n. 7, at 74.

<sup>50</sup> M. G. Desta, *The Law of International Trade in Agricultural Products* (The Hague: Kluwer Law International, 2002); Cottier/Oesch, above n. 7, at 712-731.

<sup>51</sup> T. Cottier, 'Cosmopolitan Values in International Economic Law: Myths and Realities', in B. Sitter-Liver (ed.), *Universality: From Theory to Practice* (Fribourg: Academic Press Fribourg, 2009), 33, at 42-44.

<sup>52</sup> Cf. ECJ C-383/01, *De Danske Bilimportører*, ECR 2003 I-6065.

<sup>53</sup> ECJ 193/85, *Cooperativa Co-Frutta*, ECR 1987 2085.

<sup>54</sup> ECJ C-78/90 to C-83/90, *Compagnie Commerciale de l'Ouest*, ECR 1992 I-1847; ECJ C-17/91, *Lor-noy*, ECR 1992 I-6523; ECJ C-375/95, *Commission v. Hellenic Republic*, ECR 1997 I-5981.

<sup>55</sup> See, for the concept of likeness in WTO law, the references cited above n. 35.



thus to the obligation not to apply internal taxes and other charges to imported or domestic products so as to afford protection to domestic production. Such reference relates to the overall objective of the provision and allows for greater flexibility in assessing the discriminatory effects of tax regimes. To the extent that differential taxation does not amount to protection of domestic industries, it thus allows for diverging tax regimes for domestic and imported products. In essence, the regime is subject to the so-called ‘aims and effect’ test, otherwise formally refuted by the WTO Appellate Body with respect to like products and non-tariff measures.<sup>56</sup> Special rules exist for border tax adjustment and fees.<sup>57</sup> They are not subject to tariff bindings, along with duties offsetting dumping and unlawful subsidies (Art. II(2) GATT).<sup>58</sup> Article VIII GATT addresses fees. These need to be equivalent to the service provided in return and shall not represent indirect protection for domestic products or a taxation of imports or exports for fiscal purposes: put differently, inherent discrimination due to importation and exportation is subject to objective criteria and containment.

Article 110 TFEU on non-discriminatory taxation of products is structured similarly to Article III(2) GATT. Paragraph 1 relates to like products and prohibits the imposition, directly or indirectly, of taxes higher than those levied upon like domestic products. Paragraph 2 addresses taxation of substitutable and thus competing products.<sup>59</sup> It does not allow for taxation which is suitable to protect domestic production. Yet, relying upon the aim and effect of taxation implies the possibility to adopt a different tax system for imports as long the system adopted does not amount to protecting domestic products.

WTO law and EU law do not interfere with the scope and level of domestic taxation provided that taxes are non-discriminatory.<sup>60</sup> Levels of taxation remain a matter for Members to decide. While there is partial harmonisation in EU law (and, perhaps, increasing harmonisation will occur in the context of the Monetary Union), WTO law is completely neutral on tax levels and rates. It leaves tax competition to Members within the bounds of non-discrimination. Moreover, in WTO law, a rigid analysis of likeness under Article III(2) GATT does not exclude subsequent application of the exceptions under Article XX GATT, in particular Article XX(d) GATT, which allows for exceptions in the pursuit of goals not incompatible with the GATT. The issue of lawful discrimination therefore is simply analysed in a second step, subject to the conditions of Article XX GATT. The same arguably applies to Article II GATT with respect

---

<sup>56</sup> The ‘aims-and-effect’ test was first applied in the GATT 1947 Panel Report on *US – Measures Affecting Alcoholic and Malt Beverages*, adopted on 19 June 1992 (DS23/R) and further developed in the GATT 1947 Panel Report on *US – Taxes on Automobiles*, not adopted (DS31/R). In *Japan – Taxes on Alcoholic Beverages*, Appellate Body Report, adopted on 1 November 1996 (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R), the Appellate Body explicitly rejected the ‘aims-and-effect’ test.

<sup>57</sup> Cf. Report of the Working Party, *Border Tax Adjustments*, adopted on 2 December 1970 (BISD 18S/97, 1972), for criteria to define permissible internal tax adjustments applicable to like products crossing national borders.

<sup>58</sup> See, for the interpretation and application of the term ‘a charge equivalent to an internal tax’ pursuant to Article II(2) GATT *India – Additional and Extra-Additional Duties on Imports from the United States*, Appellate Body Report, adopted on 17 November 2008 (WT/DS360/AB/R); M. Oesch, ‘The Jurisprudence of WTO Dispute Resolution (2008)’, 18 *SZIER* (2008), 387, at 388-393.

<sup>59</sup> See, for determining whether two products are in competition pursuant to Article 110(2) TFEU, ECJ C-170/78, *Commission v. United Kingdom (British Wine and Beer)*, ECR 1980 417; ECJ C-167/05, *Commission v. Sweden (Swedish Wine and Beer)*, ECR 2008 2127.

<sup>60</sup> See, for the principle of ‘fiscal autonomy’ or ‘fiscal sovereignty’ in EU law, ECJ 243/84, *Johnnie Walker*, ECR 1986 875; Barnard, above n. 16, at 52-53.

to tariffs. At least the text of Article XX GATT does not exclude its application to Articles II and XVIII GATT on tariffs and tariff negotiations. Recourse to Article XX GATT for taxes, and possibly tariffs, starkly contrasts with EU law. The exemption of Article 36 TFEU does not apply to Article 30 TFEU or Article 110 TFEU on tariffs and taxation, respectively. Thus, the principle of non-discrimination is fully realised in fiscal matters in EU law, while allowing for more flexibility in WTO law. This is a notable difference in assessing multilayered governance.

## **B. Non-Tariff Measures and Regulations**

Non-tariff barriers include all other measures. It is a wide field, comprising technical product standards and norms, sanitary and phytosanitary regulations, as well as rules pertaining to different policy areas, such as environment, health, culture, labour and the regulation of related markets. In WTO law, these measures are partly addressed by special side-agreements, in particular the TBT Agreement and the SPS Agreement.<sup>61</sup>

### **1. PRODUCT-RELATED DISCRIMINATION**

Under WTO law, the general rule prohibiting discriminatory non-tariff barriers is Article III:4 GATT. Governmental measures must not accord to imported products treatment less favourable than they accord to like domestic products in respect of all laws, regulations and requirements affecting the marketing of these products. The like product analysis is, again, of critical importance. While WTO jurisprudence rejected reliance upon aims and effect, product differentiation in the context of health-related consumer preferences opened new margins of differentiation among competing products.<sup>62</sup> In addition, Article XX GATT can be invoked to justify unequal treatment of domestic products and competing imports to the extent that the necessity test, or the requirement of relatedness, as well as the conditions of the *chapeau* are met.<sup>63</sup> Special rules exist in regard to import licensing. The operation of tariff quotas raises the difficult question of equal treatment and non-discrimination. Article XIII GATT prescribes the application of MFN treatment in the operation of trade barriers and requires Members to allocate quotas taking into account legitimate expectations which often are based upon past performance. The Agreement on Import Licensing Procedures entails a number of non-exhaustive criteria Members need to take into account in allocating quotas. Transparent procedures and criteria are intended to secure fair and equal market access for newcomers too. While recognising unequal treatment, they seek to avoid rent-seeking discrimination.

---

<sup>61</sup> Unsurprisingly, some of the most high-profile disputes adjudicated by panels and the Appellate Body so far have arisen under these agreements, cf. *EC – Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report, adopted on 13 February 1998 (WT/26/AB/R, WT/DS48/AB/R); *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report, adopted on 5 April 2001 (WT/DS135/AB/R); *EC – Measures Affecting the Approval and Marketing of Biotech Products*, adopted on 2 November 2006 (WT/DS291/R, WT/DS292/R, WT/DS293/R).

<sup>62</sup> *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report, adopted on 5 April 2001 (WT/DS135/AB/R); *Brazil – Measures Affecting Imports of Retreaded Tyres*, Appellate Body Report, adopted on 17 December 2007, WT/DS332/AB/R; see, for the concept of likeness in WTO law, the references cited above n. 35; for the rejection of the ‘aims-and-effect’ test above n. 56.

<sup>63</sup> *United States – Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, adopted on 20 May 1996 (WT/DS2/AB/R); *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Appellate Body Report, adopted 20 April 2005 (WT/DS285/AB/R); *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, adopted on 6 November 1998 (WT/DS58/AB/R).

Overall, WTO law offers a reasonably flexible system which, in practical terms, is close to relying upon the prevention and removal of protectionist, rent-seeking effects while leaving governments ample leeway to regulate different policy areas. With respect to key public interests, in particular public morals and public health, the necessity test is of paramount importance. Panels and the Appellate Body engage in the process of weighing and balancing the pros and cons of an imposed regulation. Claimants are called upon to suggest *prima facie* less intrusive alternative solutions which defendants are required to rebut in defence of the measure challenged. The Appellate Body clearly stated, in the context of Article XIV(a) GATS (public morals), that WTO Members are not required to adopt the least trade restrictive measure in order to pursue legitimate objectives if the least restrictive measure would not sufficiently contribute to accomplishing that objective or if it is not reasonably available to the Member concerned.<sup>64</sup> At the same time, the Appellate Body stressed, in the context of Article XX(b) GATT (public health), that a trade restrictive measure's 'contribution to the achievement of the objective must be material, not merely marginal or insignificant, especially if the measure at issue is as trade restrictive as an import ban'.<sup>65</sup> In essence, the necessity test boils down to examining whether the trade restrictive measure at issue meets the proportionality test (yet without saying so), including the criteria of the aptitude of the measure to achieve the goal set, and the proper relationship of end and means which cannot be replaced in a less intrusive manner.

With respect to trade in goods, EU law basically follows the precepts expounded in Articles III and XX GATT which inspired the drafting of Articles 34 and 36 TFEU. Measures having equivalent effect are very broadly defined, encompassing all direct, indirect, actual and potential trade restrictions,<sup>66</sup> while non-discriminatory measures affecting conditions of sale as opposed to product standards are no longer considered to amount to measures falling under the ambit of Article 34 TFEU.<sup>67</sup> To the extent, however, that conditions of sale amount to *de jure* or *de facto* discrimination against foreign sales, the provision applies, and restrictions need to be justified, either under explicit restrictions pursuant to Article 36 TFEU or under implied restrictions in accordance with the 'compelling interest test'.<sup>68</sup> The categorical exclusion of conditions of sale is being reduced by a liberal reading of *de facto* discriminatory effects.<sup>69</sup> Today, it is being further reduced by the rise of Internet commerce. Local sale conditions tend to discriminate against foreign Internet companies and thus need to be justified accordingly.<sup>70</sup> Non-discrimination, again, is at the heart of defining unlawful trade barriers in EU law.

---

<sup>64</sup> *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Appellate Body Report, adopted 20 April 2005 (WT/DS285/AB/R); P. Delimatsis, 'Determining the Necessity of Domestic Regulations in Services: The Best is Yet to Come', 19 *European Journal of International Law* (2008), 365; W. Zdouc/M. Oesch, 'The Jurisprudence of WTO Dispute Resolution (2004/2005)', 15 *SZIER* (2005), 641, at 648.

<sup>65</sup> *Brazil – Measures Affecting Imports of Retreaded Tyres*, Appellate Body Report, adopted on 17 December 2007 (WT/DS332/AB/R), para. 210.

<sup>66</sup> ECJ 8/74, *Dassonville*, ECR 1974 837.

<sup>67</sup> ECJ C-267/91 and C-268/91, *Keck*, ECR 1993 I-609.

<sup>68</sup> See, for typical constellations in which selling arrangements may result in *de facto* discrimination, *Barnard*, above n. 16, at 130-144; the 'compelling interest test' was developed in EJC C-120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, ECR 1979 649 (*Cassis de Dijon*).

<sup>69</sup> ECJ C-405/98, *Gourmet*, ECR 2001 I-1795.

<sup>70</sup> ECJ C-108/09, *Ker-Optika*, judgment of 2 December 2010, not yet published.

Conceptually, free movement of goods in EU law entails not only non-discrimination but also an inherent prohibition of excessive restriction. A measure may be excessively intrusive on a non-discriminatory basis. Proportionality of the measure is then legally assessed within the framework of explicit or implicit restrictions. The ‘compelling interest test’, as first developed in *Cassis de Dijon*,<sup>71</sup> not only goes beyond non-discrimination, but also requires adopting the least restrictive measure within Article 34 TFEU. Today, this principle is a general requirement for restrictions of all freedoms alike.<sup>72</sup> Moreover, the goal of the measure may be unduly restrictive in itself and lead to the negation of free movement of goods or any other freedom.<sup>73</sup> Unlike WTO law, the four freedoms in EU law assume functions of fundamental rights (without being part of the Charter itself). Today, the methodology to assess restrictions of the four freedoms follows the logic of restricting individual rights requiring compelling interests and proportionality to impose domestic measures to this effect.

In conclusion, product standards are dealt with in comparable terms in WTO law and EU law as both legal spheres explicitly or implicitly operate for the most part under a necessity test which needs to be met in order to justify restrictions and discriminatory regulations. Still, a closer look reveals notable differences. EU law is more strongly influenced by constitutional law. Excessive product regulation is directly assessed as a violation of free movement of goods irrespective of *de jure* or *de facto* discrimination. WTO law, however, requires examining the necessity of a measure only to the extent that a violation of GATT, in particular Articles III or XI, exists.

## 2. DISCRIMINATION BASED ON PROCESS AND PRODUCTION METHODS

Regulation affecting products not only defines product standards. It may equally address ways and means of production. Process and production methods (PPMs) may affect the quality of a product, but may also be of a completely independent nature, *e.g.*, in terms of defining energy or labour sources to be used in the process of production. PPMs are of increasing importance in linking trade and other policy areas, in particular human rights and the environment. Effective policies require these factors to be taken into account. At the same time, PPMs in effect result in the extraterritorial reach of domestic production standards, as foreign producers are required to comply in order to obtain import clearances for their products. To the extent that PPMs affect the quality of the product, they essentially amount to a product standard and can be dealt with in accordance with the principles set out *supra*. Where no such material linkage exists, *e.g.*, in the case that specific energy inputs are required, the matter is highly controversial.<sup>74</sup> On the one hand, it is argued that PPMs do not affect the likeness of products, and the products therefore need to be treated similarly, in accordance with the principle of non-

---

<sup>71</sup> EJC C-120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, ECR 1979 649.

<sup>72</sup> Cf. ECJ C-55/94, *Gebhard*, ECR 1995 I-4165.

<sup>73</sup> Cf. ECJ 205/84, *Versicherungen*, ECR 1986 3755; ECJ 107/63, *Klopp*, ECR 1984 2971; ECJ C-212/97, *Centros*, ECR 1999 I-1459; ECJ C-208/00, *Überseering*, ECR 2002 I-9919.

<sup>74</sup> See, *e.g.*, on the legality of PPMs under WTO/GATT law, S. Charnovitz, ‘The law of environmental “ppms” in the WTO: Debunking the myth of illegality’, 27 *Yale Law Journal* (2002), 59; R. Howse/D. Regan, ‘The Product/Process Distinction – An Illusory Basis for Disciplining “Unilateralism” in Trade Policy’, 11 *Journal of International Economic Law* (2000), 249; R. E. Hudec, ‘The Product-Process Doctrine in GATT/WTO Jurisprudence’, in M. Bronckers/R. Quick (eds.), *New Directions in International Economic Law, Essays in Honor of J.H. Jackson* (The Hague: Kluwer Law International, 2000), 187; L. Bartels, ‘Article XX of GATT and the problem of extraterritorial jurisdiction. The case of trade measures for the protection of human rights’, 36 *Journal of World Trade* (2002), 353.

discrimination. Early GATT panels ruled to this effect.<sup>75</sup> Indeed, PPMs tend to increase market access barriers and will often be detrimental to developing countries which do not have state-of-the-art production methods at their disposal. On the other hand, it is argued that Article III GATT does not offer a textual basis upon which to exclude PPM-based distinctions. Ways and means of making a product, and the circumstances surrounding it, are as important in defining the quality and nature of the product as its physical properties. Consumer tastes and habits – the most important factor in defining likeness after physical properties – and perhaps most importantly, depend upon the context of production.

While the issue is pending (with respect to likeness), PPMs can be justified in terms of exceptions. Thus, specific fishing methods supporting conservation may be imposed on the basis of Article XX(g) GATT as a condition of importation of the product itself.<sup>76</sup> PPMs adopted in the context of climate change mitigation, *e.g.*, feed-in tariffs, are therefore not excluded under GATT even though PPMs cannot serve as a foundation for discriminatory treatment under Article III of the GATT. The problem remains unresolved for restrictions imposed with respect to labour standards and human rights. Article XX GATT does not offer (with the exception of prison labour) an appropriate motive for lawful discrimination.

The problem of PPMs is equally present in EU law. It is interesting to observe that the Court of Justice adopted a liberal view and allowed Member States to differentiate treatment of goods on the basis of PPMs to a larger extent than is the case under WTO law. The Court of Justice recognised the legitimacy of PPM-based restrictions in a series of cases, with respect to both restrictions on the free movement of goods and discriminatory taxation. In 1981, it acknowledged the consistency of a PPM-based tax differentiation with Article 101 TFEU in a case concerning industrial alcohol, which could be produced naturally or synthetically (the former being environmentally preferable), as follows:

‘Community law does not restrict the freedom of each member state to lay down tax arrangements which differentiate between certain products on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed. Such differentiation is compatible with community law if it pursues economic policy objectives which are themselves compatible with the requirements of the treaty and its secondary law and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, in regard to imports from other member states or any form of protection of competing domestic products.’<sup>77</sup>

Subsequently, the Court of Justice consistently confirmed the legality of PPMs, if the differentiation pursues a legitimate policy objective and does not result, directly or indirectly, in discriminatory effects to the detriment of foreign competitors.<sup>78</sup> Most cases dealt with measures aimed at the protection of the environment. A prominent example is provided by the

---

<sup>75</sup> *US – Restrictions on Imports of Tuna (Tuna I)*, Panel Report, not adopted (DS21/R, BISD 39S/27 1993).

<sup>76</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, adopted on 6 November 1998 (WT/DS58/AB/R).

<sup>77</sup> ECJ 140/79, *Chemical Farmaceutici SpA v DAF SpA*, ECR 1981 1, para. 14; the Court made reference to a series of earlier cases: ECJ 127/75, *Bobie*, ECR 1976, 1079; ECJ 148/77, *Hansen*, ECR 1978 1787; ECJ 21/79, *Commission v. Italy*, ECR 1980 1.

<sup>78</sup> Cf. ECJ 6/81, *Beele*, ECR 1982 707; ECJ C-213/96, *Outokumpu Oy*, ECR 1998 I-1777; ECJ C-221/06, *Stadtgemeinde Frohnleiten*, ECR 2007 I-9643; see, for an overview on the pertinent case law, G. Davies, ‘Process and Production Method-Based Trade Restrictions in the EU’, in C. Barnard (ed.), *Cambridge Yearbook of European Legal Studies 2007-2008* (Oxford: Hart Publishing, 2008), 69.

Court in *PreussenElektra*, concerning a national law requiring electricity supply undertakings to purchase all of the renewable electricity produced within their area of supply at minimum prices higher than the real economic value of that type of electricity.<sup>79</sup> The Court emphasised the importance and weight of the public interest involved, *i.e.*, protecting the environment, and noted that the use of renewable energy sources ‘contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat.’<sup>80</sup> Moreover, the Court of Justice hinted, in a case concerning mandatory labelling of genetically modified organisms, that the goal of informing consumers about the means of production – or, put differently, public morals – can provide a legitimate reason for distinguishing between products which are physically alike.<sup>81</sup> Lastly, PPMs may play a prominent role in public procurement. The relevant Directive 2004/18/EC is silent on the matter. Although it mentions that environmental considerations may be taken into account, it is not clear whether they may include considerations relating to the manufacturing process.<sup>82</sup> According to Article 53(1)(a) of the Directive, the award criteria must be ‘linked to the subject-matter of the contract’, including, *e.g.*, ‘environmental characteristics’. The Court’s case law seems to indicate that PPMs can indeed be relevant in public procurement.<sup>83</sup>

Such findings may seem paradoxical. It would seem that the internal market should adopt a more stringent attitude to PPMs in order to avoid trade restrictions and market segregation. Instead, more stringent rules apply in WTO law where PPMs are controversial and admitted under exceptional circumstances only, in particular for environmental purposes. We return to discuss this paradox in the conclusions.

### C. Monopolies and State Trading

WTO law and GATT in particular are often conceived as prime tools for promoting privatisation and trade liberalisation. While the characterisation of progressive liberalisation is appropriate (but does not include an inappropriate characterisation of privatisation and free trade), WTO law is more than that. Essentially, it is about international trade regulation, seeking a proper balance between diverging policy goals and interests. This is particularly true for those agreements which address trade remedies, technical barriers to trade, sanitary and phytosanitary measures, agricultural subsidies and intellectual property rights. These agreements essentially offer a framework within which national rules in these different areas are obliged to operate under international law in a transparent manner. The regulatory nature of GATT is particularly evident in framing rights and obligations on a non-discriminatory basis, seeking to limit discriminatory effects on foreign products and economic operators. Yet, it is equally

---

<sup>79</sup> ECJ C-379/98, *PreussenElektra*, ECR 2001 I-2099; see, for a critical account of this judgment, G. V. Calster, ‘Procurement and the World Trade Organization: purchase power or pester power’?, in T. Cottier/O. Nartova/S. Z. Bigdeli (eds.), *International Trade Regulation and the Mitigation of Climate Change* (Cambridge: Cambridge University Press, 2009), 351, at 362-364, arguing that the Court did not apply an appropriate proportionality test.

<sup>80</sup> *Id.*, para. 73.

<sup>81</sup> EJC C-132/03, *Federconsumatori*, ECR 2005 I-4167; this case, however, concerned an EU regulation. It did not turn on a trade restrictive measure imposed by a Member State; see Davies, above n. 78.

<sup>82</sup> Directive 2004/18/EC on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts; Davies, above n. 78.

<sup>83</sup> Davies, above n. 78.

true for monopolies and state trading. Article XVII GATT recognises the possible existence of state trading enterprises which operate under monopoly rights. Legal and *de facto* monopolies by definition entail discrimination and the exclusion of competitors. At the same time, the provision requires these companies to operate in a manner consistent with the principles of non-discrimination as prescribed by GATT.<sup>84</sup> Companies are required to purchase and sell on commercial terms. Yet, state trading, monopolies and non-discrimination inherently are mutually exclusive. The law has remained unclear, and no pertinent case law has yet emerged in the field.<sup>85</sup> Comparable requirements limiting discriminatory effects of monopolies equally exist in Article VIII GATS. Companies are required to operate within the bounds of commitments made for the sector. Discriminatory practices, however, are inherent, and obligations to avoid abuse of a monopolist position are limited to areas outside the scope of the monopoly rights. This provision, compared to Article XVII GATT, seems to support such a reading and thus implicitly recognises the inherent limitations to competition. The GATS side-agreement on telecommunication, requiring Members to leave legal monopolies of operators behind, establishes first and foremost obligations on competition law in the reference paper.<sup>86</sup> Members are under an obligation to secure market access by competitors and to curb *de facto* monopolies and discriminatory practices of established and often state-owned telecommunication companies. Experience showed that the implementation of these provisions was met with considerable resistance by operators controlling physical networks.

Moreover, exclusive rights are paramount in the TRIPS Agreement, establishing minimal standards of intellectual property rights in all relevant forms of protection. Exclusive rights are important to distinguish products on the market and to secure return on investment. They are, however, inherently discriminatory and often allow the operation of trade barriers. The TRIPS Agreement seeks to balance these effects by allowing fair use exemptions and compulsory licensing.<sup>87</sup> It also reserves the right to exclude abuses of rights by means of anti-trust rules.

State trading and monopolies are equally recognised in EU law. Article 106 TFEU is modelled upon GATT rules. It subjects monopolies on goods and services to the disciplines of non-discrimination and competition law, including disciplines on subsidies (Articles 101 to 109 TFEU). These rules apply to the extent that the objectives and tasks of the monopoly allow for, and require, the grant of exclusive rights. The Court of Justice essentially squares legitimate objectives of monopolies and examines to what extent exclusive rights and their

---

<sup>84</sup> Cf. T. Cottier/P. C. Mavroidis (eds.), *State Trading in the Twenty-First Century* (Ann Arbor: The University of Michigan Press, 1998).

<sup>85</sup> See, for a rare dispute under Article XVII GATT, *Canada – Measures Relating to Exports of Wheat and Treatment of Import Grain*, Appellate Body Report, adopted on 27 September 2004 (WT/DS276/AB/R); W. Zdouc/M. Oesch, ‘The Jurisprudence of WTO Dispute Resolution (2004/2005)’, 15 SZIER (2005), 641, at 644-646.

<sup>86</sup> B. Mathew, *The WTO Agreements on Telecommunications* (Bern: Peter Lang, 2003); T. F. Fischer, *Die Entbündelung der letzten Meile in der Schweiz im Lichte des GATS* (Bern: Peter Lang, 2004).

<sup>87</sup> Cf. *Canada – Patent Protection of Pharmaceutical Products*, Appellate Body Report, adopted 7 April 2000 (WT/DS114/AB/R), concerning Article 30 TRIPS Agreement; Ministerial Conference, *Doha Declaration on the TRIPS Agreement and Public Health*, adopted on 14 November 2001 (WT/MIN(01)/DEC/2); General Council, *Amendment of the TRIPS Agreement. Decision of the General Council of 6 December 2005* (WT/L/641); F. Abbott/T. Cottier/F. Gurry, *International Intellectual Property in an Integrated World Economy* (Austin: Wolters Kluwer, 2007); P. van den Bossche, *The Law and Policy of the World Trade Organization. Text, Cases and Materials* (Cambridge: Cambridge University Press, 2<sup>nd</sup> ed. 2008), at 786-792.

operation are necessary to achieve them. In effect, non-discrimination is reduced by applying a proportionality test.<sup>88</sup> The jurisprudence of the Court of Justice may well inform future litigation within the WTO.

EU law equally protects exclusive rights in the field of intellectual property. While recognising such rights since the outset, rules on free movement of goods and services reduced the scope of domestic rights, in particular in terms of exhaustion. The doctrine of regional exhaustion, introduced by the Court of Justice and codified in harmonisation, reduces discrimination and opens markets for parallel trade, subject to special conditions in strongly regulated markets.<sup>89</sup> The abuse of dominant positions may induce the granting of compulsory licensing.<sup>90</sup> More recent developments show the advent of EU-wide systems of protection in trademarks, designs and geographical indications, while an EU-wide patent is still pending due to language problems. These systems eliminate discrimination within the Union, but have partly established new barriers and discrimination in relation to third countries. A regulation submitting the protection of geographical indications within the EU to reciprocal protection abroad was held inconsistent with the prohibition of *de facto* discrimination under Article 3 TRIPS Agreement.<sup>91</sup>

## V. Conclusions

The principle of non-discrimination provides the backbone of both WTO law and EU law. Both layers of government establish strict checks on discriminatory practices which the political economy and political system of subsequent layers of governance may produce. Both recognise the equivalence of *de jure* and *de facto* discrimination, of indirect and direct restrictions. Both agree to look at the practical impact of regulations, and ignore considerations limited to formal aspects. In so doing, they strongly share a common philosophy. Non-discrimination thus offers a common core and secures overall coherence among systems both dedicated to open markets and competition. It is a mainstay of multilayered governance and vertical checks and balances. Equal conditions of competition and opportunity inform specific rules in the WTO and the EU. Partly, these rules share commonalities. Partly, they show important differences in their terms of operation and scope.

Largely parallel functions of non-discrimination are assumed in rendering the principle of equality operational by defining in law exclusions and inclusions of legitimate motives of discrimination. The exclusion of origin or nationality of products and persons, respectively, is a cornerstone, offsetting nationalist policies and rent-seeking protectionism. Either implicitly or explicitly, motives allowing for discrimination largely overlap, with key public interests and policies at their heart. EU law, however, goes beyond non-discrimination in goods and services. Non-discrimination based upon gender, beliefs or religion import a principle of non-discrimination founded in constitutional law and human rights. The Charter on Fundamental

---

<sup>88</sup> ECJ C-320/91, *Corbeau*, ECR 1993 I-2533; ECJ C-475/99, *Ambulanz Glöckner*, ECR 2001 I-8089; see also ECJ C-179/90, *Porto di Genova*, ECR 1991 I-5889.

<sup>89</sup> ECJ 56/64 and 58/64, *Grundig v. Consten*, ECR 1966 322; ECJ C-468/06 to C-478/06, *GlaxoSmith-Kline*, ECR 2008 I-7139.

<sup>90</sup> ECJ C-241/91 and C-242/91, *Magill*, ECR 1995 I-743.

<sup>91</sup> *EC – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, Panel Report, adopted on 20 April 2005 (WT/DS290/R).



Rights gives them a proper standing on their own. The same is true for the European Citizenship. It is at this point that the Treaty, in substance, turns to a constitutional mode, leaving treaty relations aimed at creating a single market behind. While the WTO so far has remained a functional organisation with specific and trade related tasks, the EU in terms of regional governance adopts a much wider range of tasks and objectives, which, in turn, also influence the operation and interpretation of trade-related provisions of the TFEU. These two different modes may also explain differences between WTO law and EU law regarding non-discrimination.

In many ways, different levels of integration translate into a different operation of non-discrimination. While WTO law allows for discrimination based upon tariffs, EU law excludes such discrimination without allowing for exemptions. Non-discrimination is equally rigid in terms of taxation and fees, excluding the operation of exceptions otherwise available in WTO law. The analysis of likeness of products and of competing products is comparable, but discrimination may be justified in WTO law. This is not the case under EU law.

The treatment of non-tariff barriers shows important conceptual differences because in EU law, they are governed by free movement of goods and services and thus are not limited to non-discrimination. The four freedoms entail an inherent prohibition of excessive measures which does not exist in WTO law. The concept of trading rights is so far alien to WTO law, with the exception of such rights being explicitly inscribed in Protocols of Accession.<sup>92</sup> Even though *de facto* non-discrimination is uniformly applied to domestic and foreign products alike, restrictive measures are subject to the requirements of proportionality in EU law. The European doctrine, strongly influenced by traditions of German administrative law, requires both aptitude and a proper relationship of end and means. These requirements are mainly applied within the analysis of the freedom itself. They may be assessed in terms of explicit exceptions, but the requirements of compelling reasons and proportionality have become inherent to the freedoms themselves. In WTO law, on the other hand, elements of proportionality can be found in assessing the necessity requirement in applying exceptions to the principle of non-discrimination or other restrictions to trade. The proportionality test has essentially found its way into Article XXIV GATT, yet without explicitly being mentioned by panels and the Appellate Body. It is unclear to what extent non-discrimination amounts, in practical terms, to the granting of *de facto* trading rights comparable to free movement of goods and services in EU law. Comparative structures exist in terms of monopoly rights and the inherent discrimination which accompanies them. The case law of the Court of Justice will assist in assessing monopoly rights in WTO law. Again, proportionality will be key in finding an appropriate balance of competing policy goals.

Interestingly, WTO law and EU law produce divergent results mainly in the field of PPMs. While WTO law remains restrictive and seems to depend upon the justification by exceptions, PPMs have traditionally been recognised within the fundamental freedoms. EU Member States therefore enjoy greater leeway in product differentiation based upon external factors than WTO Members do. These findings are counterintuitive. It would seem that greater leeway is available on the global level than in regional (or domestic) law. A possible explanation is that the EU today is functionally less limited to trade regulation than the WTO. It recog-

---

<sup>92</sup> See, e.g., China's Protocol of Accession, Decision of the Ministerial Conference of 10 November 2001 (WT/L/432); *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Appellate Body Report, adopted on 19 January 2010 (WT/DS363/AB/R).

nises a far greater number of policy goals, including human rights. This in return requires that goals of trade liberalisation, market access and equal opportunities are shared with partially competing interests which adjudication needs to take into account. In the end, it would seem that the recognition of PPMs reflects the constitutional structure of the EU Treaties. Also, the EU offers broad support to its Members in terms of social and economic development, including transfer of technology and know-how, which allows them to adapt more readily than appears to be possible for countries within the WTO with its rudimentary structures and support for trade promotion and transfer of technology. Moreover, PPMs may be harmonised within the EU to the extent that trade barriers cannot be removed by equivalence or mutual recognition. Given the increasing importance of PPMs, appropriate lessons may be drawn for the WTO. Recognition of PPMs will depend upon appropriate levels of support for those affected by the imposition of PPM-based measures. Transfer of technology will be of paramount importance in securing recognition of PPM-based measures in, *e.g.*, the pursuit of human rights or environmental policies in the context of climate change. The WTO, in other words, will need to develop its policies on non-discrimination in line with the recognition of broader policy goals in the context of the ongoing 'trade and'-debates.

In conclusion, inherent functional differences will remain between the WTO and the European Union in implementing the shared philosophy of non-discrimination. They are based upon the broader scope and constitutional framework of the EU which does not exist in the WTO despite efforts at constitutionalisation. These differences need recognition and partly explain divergent policies and rules on non-discrimination. Yet, global regulatory needs show that the WTO will need to expand to recognise a wider range of legitimate policy goals. In so doing, it will move closer to the matrix defining non-discrimination at the regional level of the EU. Stronger emphasis on compelling interests and proportionality offers a bridge to overcome some of the divergence, contributing to the overall coherence of multilayered governance.

\*\*\*