MAX PLANCK COMMENTARIES ON WORLD TRADE LAW

WTO – TRADE IN SERVICES

Edited by
Rüdiger Wolfrum
Peter-Tobias Stoll
and Clemens Feinäugle

Max Planck Institute for
Comparative Public Law and International Law

MARTINUS NIJHOFF PUBLISHERS

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Editors

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VOLUME 6

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PREFACE TO THE SERIES

The idea behind the *Max Planck Commentaries on World Trade Law* is to explain the whole range of WTO law in authoritative and practical article-by-article type commentaries. The purpose is to give the reader a comprehensive and concise insight into the meaning of each rule by combining information on its legislative history, its economic and political rationale, its interpretation, existing case law and proposals for reform. Issues which are not explicitly mentioned in the rules but which are relevant for their application, like *e.g.* the question of direct applicability, are also addressed. As far as possible, reference is also made to similar rules of universal and regional economic regimes.

The format of a commentary dates back to the classical period of Roman legal science. Such commentaries were meant to collect together the relevant legal material and to provide assistance for its understanding by referring to relevant case law and by offering interpretations. Such format is well established in the German legal tradition but seems to be less so in the US legal tradition where the closest correlation may be the Restatements.

Rüdiger Wolfrum *Peter-Tobias Stoll*

PREFACE TO THIS VOLUME

While trade in goods had been regulated by the GATT 1947 since the middle of the last century, states have long hesitated to address the field of services with a comprehensive regulatory approach. The main reasons for this were the considerable diversity of services and their special characteristics such as intangibility and invisibility which rendered the regulation of trade in services difficult. In spite of these difficulties, in the 1990s the Uruguay Round not only achieved to establish the WTO as an international organization but also worked out the General Agreement on Trade in Services (GATS). This first multilateral agreement in this field sets up several general obligations and a system of so-called specific commitments. The option to schedule specific commitments (especially on market access and national treatment) which then bind the respective WTO Member enables each Member to grant the individual level of services trade liberalization it may want to choose. Although several controversial services sectors were exempted from the regular GATS rules and obligations, the existing obligations of the WTO Members can have a strong and sometimes surprising impact. In this respect, the complexity of the scheduling system can turn out to be the reverse of this tailor-made system as has been demonstrated in the recent *US—Gambling* case in which the US claimed a scheduling error to escape its obligations. This case at the same time illustrates that WTO Members do not focus on dispute settlement concerning goods only anymore, but also resort to WTO panels and the Appellate Body in order to invoke provisions of the GATS.

Given the increasing worldwide request for services—services production is the dominant economic activity in the world and services exports amounted to 2.6 trillion US $ in 2006—and the new specific commitments expected to be undertaken in the current Doha Round negotiations, the GATS rules become ever more important for economic actors, states and lawyers. In this context this volume provides a thorough analysis of each provision of the Agreement.

Starting with the negotiating history of the GATS followed by its Preamble, the present volume contains all articles of the GATS, the Annexes and Protocols to the GATS as well as the Understanding on Commitments in Financial Services and the Reference Paper on Basic Telecommunications.

Last but not least, acknowledgements are due. We would like to thank *Alina Bresler*, *David Diehl* and *Rebecca Schmidt* for formatting the manuscript and

checking the footnotes, *Andreas Michna* for accurately preparing the index and *Karen Kaiser, Michael Koebele* and *Anja Seibert-Fohr* for their valuable advice. Furthermore, thanks are due to *Kate Elliott* who scrupulously checked the linguistic correctness and style.

Clemens Feinäugle

USER'S GUIDE

Terminologies

- "GATT 1947" is used for the rules in the GATT, dated 30 October 1947 and "GATT 1994" for the rules in the GATT 1947, as amended by the Uruguay Round.
- "Reference Paper on Basic Telecommunications" refers to the document originally entitled and commented on here as "Telecommunications Services: Reference Paper".

Bibliographies

Only literature which is specifically concerned with the rule that is commented on is listed in the bibliography at the top of each commentary. Literature which is relevant to the topic of trade in services as such is listed in the "General Bibliography". This means that literature cited in the footnotes has to be looked up in the bibliography at the top of the relevant commentary read together with the "General Bibliograpy".

Lists of cases and documents

The lists under the headings "Case Law" and "Documents" contain only fundamental reports, arbitral awards and documents with regard to the rule that is commented on.

Cross references to related agreements

Where similar rules exist in related universal and regional economic regimes, cross-references to them are inserted.

Cross references to other commentaries in this volume

In the footnotes, authors frequently refer to other commentaries in this volume or other volumes of the Max Planck Commentaries on World

Trade Law by citing the author, the article of the agreement commented on and the number of the relevant paragraph (*e.g.* Wolfrum, Artricle IX WTO Agreement, para. 31).

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TABLE OF ABBREVIATIONS AND ACRONYMS

AB	Appellate Body
ACP	African, Caribbean and Pacific Group
AD	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
AER	The American Economic Review
Air & Space L.	Air and Space Law
AJIL	American Journal of International Law
Am. U. Int'l L. Rev.	American University International Law Review
Annals Air & Space L.	Annals of Air and Space Law
Annex Art. II Exemptions	Annex on Article II Exemptions
Annex ATS	Annex on Air Transport Services
Annex FS	Annex on Financial Services
Annex MNP	Annex on Movement of Natural Persons Supplying Services Under the Agreement
Annex NBTel.	Annex on Negotiations on Basic Telecommunications
Annex NMTS	Annex on Negotiations on Maritime Transport Services
Annex on Movement of Natural Persons	Annex on Movement of Natural Persons Supplying Services Under the Agreement
Annex Tel.	Annex on Telecommunications
Ann. Rev. Banking L.	Annual Review of Banking Law
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
ANZCERTA	Australia-New Zealand Closer Economic Relations Trade Agreement
ANZCERTA Protocol on Natural Persons	Protocol on Trade in Services to the ANZCERTA
APEC	Asia-Pacific Economic Cooperation
APEL	Asian-Pacific Economic Literature
Art.	Article
Arts	Articles
ASCM	Agreement on Subsidies and Countervailing Measures

ASEAN	Association of Southeast Asian Nations
Asian Y.B. Int'l L.	Asian Yearbook of International Law
ATC	Agreement on Textiles and Clothing
Austrian Rev. of Int'l and Europ. Law	Austrian Review of International and European Law
BGBl.	*Bundesgesetzblatt* (German Federal Law Gazette)
BIS	Bank for International Settlement
BISD	Basic Instruments and Selected Documents (published by GATT)
BIT	Bilateral Investment Treaty
BOP	balance-of-payments
BOP Committee	Committee on Balance-of-Payments Restrictions
BOT	Build-Operate-Transfer
Bridges/ICTSD	Bridges Monthly Review of ICTSD (International Centre for Trade and Sustainable Development)
Brook. J. Int'l L.	Brooklyn Journal of International Law
BYIL	British Yearbook of International Law
Cardozo J. Int'l Comp. L.	Cardozo Journal of International and Comparative Law
CARICOM	Caribbean Community
CEPA	Closer Economic Partnership Arrangement
CFI	Court of First Instance of the European Communities
CG-18	Consultative Group of 18
CIEL	Center for International Environmental Law
CMLRev.	Common Market Law Review
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Colum. L. Rev.	Columbia Law Review
Comp. L.I.	Competition Law Insight
Cornell Int'l L.J.	Cornell International Law Journal
CPC	United Nations Central Product Classification
CRNM	The Caribbean Regional Negotiating Machinery
CRS	Computer Reservation System
CRTA	Committee on Regional Trade Agreements
CSC	Committee on Specific Commitments
CTD	Committee on Trade and Development

CTE	Committee on Trade and Environment
CTS	Council for Trade in Services
CYIL	Canadian Yearbook of International Law
Denv. J. Int'l L. & Pol'y	Denver Journal of International Law and Policy
Doc.	Document
DÖV	*Die Öffentliche Verwaltung*
DR-CAFTA	Dominican Republic-Central America Free Trade Agreement
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding)
Duke L.J.	Duke Law Journal
EBOR	European Business Organization Law Review
EC	European Community/ies
ECJ	Court of Justice of the European Communities
Econ. J.	The Economic Journal
Econ. Rec.	The Economic Record
ECOSOC	United Nations Economic and Social Council
E.C.R.	European Court Reports
ECT	Treaty Establishing the European Community
ed.	editor
eds	editors
EEA	European Economic Area
EEC	European Economic Community
EFARev.	European Foreign Affairs Review
EFTA	European Free Trade Association
e.g.	*exempli gratia* (for example)
EIA(s)	Economic Integration Agreement(s)
e-IAPs	electronic Individual Action Plans
EJIL	European Journal of International Law
ELR	European Law Review
ENT	Economic Needs Test
EPIL	Encyclopedia of Public International Law
ERSD	Economic Research and Statistics Division
ESM	Emergency Safeguard Mechanism
Estey Centre J. Int'l L. & Trade Pol.	Estey Centre Journal of International Law and Trade Policy
et al.	*et alii* (and others)
et seq.	*et sequitur* (and the following)
EU	European Union
Eur. J. Pol. Econ.	European Journal of Political Economy
EuZW	*Europäische Zeitschrift für Wirtschaftsrecht*

FCC	Federal Communications Commission
FDI	Foreign Direct Investment
Fed. Comm. L.J.	Federal Communications Law Journal
Fed. Reserve Bank St. Louis Rev.	Federal Reserve Bank of St. Louis Review
Fordham L. Rev.	Fordham Law Review
FS	Financial Services
FSF	Financial Stability Forum
FTA	Free Trade Agreement
FTAA	Free Trade Area of the Americas
Ga. J. Int'l & Comp. L.	Georgia Journal of International and Comparative Law
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
Geo L. J.	Georgetown Law Journal
Geo. Wash. J. Int'l L. & Econ.	George Washington Journal of International Law and Economics
GNS	Group of Negotiations on Services
GPA	Agreement on Government Procurement
GRULAC	Group of Latin American and Caribbean Countries
GYIL	German Yearbook of International Law
Havana Charter	Havana Charter for an International Trade Organization
Harv. Int'l. L.J.	Harvard International Law Journal
IAIS	International Association of Insurance Supervisors
IASC	International Accounting Standards Committee
ibid.	*ibidem* (in the same place)
ICAO	International Civil Aviation Organization
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICQL	International and Comparative Law Quaterly
ICSID	International Centre for Settlement of Investment Disputes
ICSID Rev.	ICSID Review
ICTSD	The International Centre for Trade and Sustainable Development
IDB	Inter-American Development Bank
i.e.	*id est* (it or that is)
IIA	International Investment Agreement
ILC	International Law Commission

ILD Rules	International Long Distance Rules
ILM	International Legal Materials
ILR	International Law Reports
IMF	International Monetary Fund
IMF Agreement	Agreement of the International Monetary Fund
IMF Articles of Agreement	Articles of Agreement of the International Monetary Fund
Import Licensing Agreement	Agreement on Import Licensing Procedures
Int'l Affairs	International Affairs
Int'l Law.	International Lawyer
IOM	International Organization for Migration
IOSCO	International Organization of Securities Commissions
ISIC	International Standard Industry Classification
ITC	International Trade Centre
ITO	International Trade Organization
ITU	International Telecommunication Union
J.Air L. & Com.	Journal of Air Law and Commerce
JIEL	Journal of International Economic Law
J. Int'l Dev.	Journal of International Development
J.L. & Econ.	Journal of Law & Economics
J. Netw. Ind.	Journal of Network Industries
J. of World Invest. & Tr.	Journal of World Investment & Trade
JWT	Journal of World Trade
Law & Pol'y Int'l Bus.	Law and Policy in International Business
LDC(s)	least-developed country/ies
Licensing Agreement	Agreement on Import Licensing Procedures
LIEI	Legal Issues of Economic Integration
lit.	*littera(e)* (letter(s))
LJZ	*Liechtensteinische Juristenzeitung*
LMIA	Labour Markets Integration Agreement
LNTS	League of Nations Treaty Series
Max Planck CWTL	Max Planck Commentaries on World Trade Law
Max Planck UNYB	Max Planck Yearbook of United Nations Law
MERCOSUR	*Mercado Común del Sur* (Southern Common Market)
MERCOSUR Colonia Protocol	Protocol of Colonia for the Promotion and Reciprocal Protection of Investments Within MERCOSUR

MERCOSUR Defense of Competition Protocol	MERCOSUR Protocol for the Defense of Competition
MERCOSUR Montevideo Protocol	Protocol of Montevideo on Trade in Services in the Southern Common Market
MFN	Most-Favoured-Nation
Mich. J. Int'l L.	Michigan Journal of International Law
Minn. J. Global Trade	Minnesota Journal of Global Trade
MRA(s)	Mutual Recognition Agreement(s)
MTS	Maritime Transport Services
NAFTA	North American Free Trade Agreement
NAICS	North American Industry Classification System
NAPCS	North American Product Classification System
NCCR	Swiss National Center of Competence in Research
N.C. J. Int'l L. & Com. Reg.	North Carolina Journal of International Law and Commercial Regulation
NGMTS	Negotiating Group on Maritime Transport Services
NGBT	Negotiating Group on Basic Telecommunications
NGO	Non-Governmental Organization
Nw. J. Int'l L. & Bus.	Northwestern Journal of International Law and Business
N.Y.U. J. Int'l L. & Pol.	New York University Journal of International Law and Policy
N.Y.U. L. Rev.	New York University Law Review
ODI	Overseas Development Institute
OECD	Organization for Economic Co-operation and Development
para.	paragraph
paras	paragraphs
Penn St. Int'l L. Rev.	Penn State International Law Review
PPMs	Process and Production Methods
Prof. Law.	The Professional Lawyer
PTAs	Preferential Trade Agreement(s)
R&D	Research and Development
RdC	*Recueil des cours / Académie de Droit International de La Haye*
RDILC	*Revue de Droit International et de Législation Comparée*
Rec.	Recital
Recs	Recitals

Reference Paper	Reference Paper on Basic Telecommunications (official title: Telecommunications Services: Reference Paper)
RGDIP	*Revue Générale de Droit International Public*
RIA(s)	Regional Integration Agreement(s)
RIW	*Recht der Internationalen Wirtschaft*
RP	Reference Paper on Basic Telecommunications
Safeguards Agreement	Agreement on Safeguards
SBO	Substantive Business Operations
SCM (Agreement)	Agreement on Subsidies and Countervailing Measures
SEC	U.S. Securities and Exchange Commission
Second Annex FS	Second Annex on Financial Services
SIC	Standard Industrial Classification
Sing. J. Int'l & Comp. L	Singapore Journal of International & Comparative Law
South Afr. Y.B. Int'l L.	South African Yearbook of International Law
SPS (Agreement)	Agreement on the Application of Sanitary and Phytosanitary Measures
Stan. L. Rev.	Stanford Law Review
STE	State trading enterprises
subpara.	subparagraph
subparas	subparagraphs
Sw. J. L. & Trade Am.	Southwestern Journal of Law and Trade in the Americas
TBT (Agreement)	Agreement on Technical Barriers to Trade
TCBDB	Doha Development Agenda Trade Capacity Building Database
Texas Int'l L.J.	Texas International Law Journal
TNC	Trade Negotiations Committee
TPRB	Trade Policy Review Body
TPRM	Trade Policy Review Mechanism
Trans-Pacific CEPA	Trans-Pacific Closer Economic Partnership Agreement
Trans-Pacific SEP Agreement	Trans-Pacific Strategic Economic Partnership Agreement
TRIMS	Agreement on Trade-Related Investment Measures
TRIPS (Agreement)	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTTA	Trans-Tasman Travel Arrangement
Tul. Mar. L.J.	Tulane Maritime Law Journal
UBOP	Understanding on the Balance-of-Payments Provisions

U. Chi. L. Rev.	University of Chicago Law Review
UCLA	University of California, Los Angeles
UCLA Ent. L. Rev	UCLA Entertainment Law Review
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UN CPC	United Nations Central Product Classification
UNCTAD	United Nations Conference on Trade and Development
Understanding	Understanding on Commitments in Financial Services
UNDP	United Nations Development Programme
UNTS	United Nations Treaty Series
U. Pa. J. Int'l Econ. L.	University of Pennsylvania Journal of International Economic Law
UPU	Universal Postal Union
UR	Uruguay Round
US	United States of America
USTR	United States Trade Representative
Va. J. Int'l L.	Virginia Journal of International Law
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
Vand. L. Rev.	Vanderbilt Law Review
VCLT	Vienna Convention on the Law of the Treaties
Vol.	Volume
W. Comp.	World Competition
W120 List	Services Sectoral Classification List
WGDR	Working Group on Domestic Regulation
WGTCP	Working Group on the Interaction between Trade and Competition Policy
Wis. Int'l L.J.	Wisconsin International Law Journal
WissR	*Wissenschaftsrecht*
World Bank	International Bank for Reconstruction and Development
World Compet.	World Competition
World Econ.	The World Economy
World Trade Rev.	World Trade Review
WPDR	Working Party on Domestic Regulation
WPGR	Working Party on GATS Rules
WPPS	Working Party on Professional Services
WTO	World Trade Organization
WTO Agreement	Agreement Establishing the World Trade Organization
Yale J. Int'l L.	Yale Journal of International Law
Yale L.J.	Yale Law Journal

ZaöRV	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*
ZEuS	*Zeitschrift für Europarechtliche Studien*
ZLW	*Zeitschrift für Luft- und Weltraumrecht*

GENERAL BIBLIOGRAPHY

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GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

GATS Negotiating History

Documents

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A. Initiation of Negotiations on Trade in Services

I. First Efforts to Start Negotiations on Trade in Services

Historically, multilateral trade negotiations concentrated primarily on trade *1*
in goods and reducing tariffs. Until the 1970s, trade in services was assumed to be subject only to domestic regulations.[1] The only exception and first tentative step towards the international regulation of trade in a selected area

[1] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2342.

of services dates back to 1959 when the GATT Contracting Parties issued a recommendation on "Freedom of Contract in Transport Insurance".[2]

2 The **growing importance of services to world trade** raised international awareness of the sector. International trade in services grew at an annual rate of nineteen per cent between 1970 and 1980, while access to service markets was largely restricted or even denied.[3]

3 In the **GATT Tokyo Round** of Multilateral Trade Negotiations (1973–1979) the issue of trade in services was for the first time placed on the trade agenda, as a consequence of a US initiative.[4] Several US service sectors had previously pressed their government to begin negotiations to lead to a liberalization of trade in services.[5] The US continued to play a leading role throughout the negotiations.

4 **At first** the **negotiations** on trade in services **progressed slowly** and the activities were limited to studying the hitherto scarcely documented field of trade in services.[6] The Organization for Economic Cooperation and Development (OECD) Trade Committee undertook **research**, concluding that trade in services was impeded by trade barriers.[7] Also the GATT Consultative Group of Eighteen (CG-18) discussed trade in services among other emerging trade policy issues. In 1980, the CG-18 finally recommended that trade in services might be a "proper concern of the GATT" in spite of differing views among its Members relating to the feasibility of extending GATT to trade in services.[8] **Studies** undertaken by UNCTAD and the International Chamber of Commerce (ICC) also promoted an international consensus to begin multilateral trade negotiations aimed at achieving the liberalization of trade in services.[9]

II. Debate Over Inclusion of Trade in Services in the GATT Negotiations

5 In **1982** at its 38th session the GATT Contracting Parties recommended in a Ministerial Declaration that parties with interests in services trade examine their national services sectors and exchange data.[10] The subsequently

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[2] GATT Secretariat, Freedom of Contract in Transport Insurance, Recommendation, BISD 8S/26, 27 May 1959.

[3] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2342.

[4] *Footer & George*, in: *Macrory et al.* (eds), 799, 803.

[5] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2343.

[6] *Footer & George*, in: *Macrory et al.* (eds), 799, 803.

[7] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2343.

[8] GATT Secretariat, Report of Consultative Group of Eighteen to the Council of Representatives, BISD 28S/71, 23 October 1981, para. 14; see also below, paras 14–15.

[9] *Footer & George*, in: *Macrory et al.* (eds), 799, 806.

[10] GATT Secretariat, Ministerial Declaration, BISD 29S/9, 29 November 1982.

drafted comprehensive US report included figures on 107 countries which all experienced significant growth in services trade. Consequently, it was argued that a multilateral mechanism for trade in services was needed to prevent a system of discriminatory bilateral and regional agreements.[11]

At the **1984** Session of the GATT Ministerial Council the US, with support from Canada, Israel, and the Nordic countries, suggested the establishment of a working party on services trade.[12] Developing states successfully opposed this proposal, arguing that the informal consultations and the exchange of information called for in 1982 had not yet been accomplished.[13] *6*

During their 40th Session in **1983 and 1984** the Contracting Parties agreed to review national reports informally and to consider the desirability of multilateral action at the next regular session.[14] *7*

In April **1985** twenty-five OECD members declared their willingness to launch negotiations for an agreement on services.[15] On 6 June 1985, however, at the GATT Council meeting, twenty-three **developing states** under the leadership of India and Brazil agreed to begin a new round of GATT negotiations only provided that **services were not included on the agenda**.[16] This led to the suggestion by a group of 21 countries, which included industrialized countries as well as developing countries, to commence **negotiations on trade in services outside the GATT**. *8*

Finally, a Preparatory Committee was created by 90 GATT Members and given the task of preparing the groundwork for new multilateral negotiations in trade in goods. The negotiators failed to agree on a list of topics to be discussed by the Committee, since they did **not** reach any **consensus on whether or not to include services** on this list. Their compromise was to assign the Committee the task of identifying "the subject matter, modalities for, and participation in trade negotiations".[17] When the Committee concluded its work on 31 July **1986**, it had not resolved the question of the inclusion of services.[18] *9*

Subsequently, the US proposal to discuss services at the next round of GATT talks was approved by the EC, Japan, and Canada at the meeting of the *10*

[11] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2348.
[12] Council, Minutes of the Meeting Held in the Centre William Rappard on 6–8 and 20 November, 1984, C/M/183, 10 December 1984, 804.
[13] *Footer & George*, in: *Macrory et al.* (eds), 799, 805; *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2352.
[14] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2353.
[15] *Footer & George*, in: *Macrory et al.* (eds), 799, 805; *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2354.
[16] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2355.
[17] *Ibid.*; *Footer & George*, in: *Macrory et al.* (eds), 799, 805.
[18] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2358.

Quadrilateral Trade Ministers' conference held in Sintra, Portugal, on 5 and 6 September 1986. The GATT Contracting Parties agreed to **include services in** the negotiations with adoption of a *Ministerial Declaration* at Punta del Este which launched the **Uruguay Round**.[19]

III. Objectives of Negotiations and the Group on Negotiating Services

11 The **objective of** such **negotiations** was stated to be as follows: "Negotiations in this area shall aim to establish a multilateral framework of principles and rules for trade in services, including an elaboration of possible disciplines for individual sectors, with a view to expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners and the development of developing countries. Such framework shall respect the policy objectives of national laws and regulations applying to services and shall take into account the work of relevant international organizations".[20]

12 The Ministerial Declaration also set up a **Group on Negotiating Services** (**GNS**) that was entrusted with the following **five tasks** during its initial phase: to **define services and gather statistical data** on services; to **establish the broad concepts** on which the principles and rules for trade in services, including possible disciplines for individual sectors, might be based; to **discuss the coverage** of a multilateral framework for trade in services; to **determine the relationship** of existing regulations and arrangements with trade in services; and to **create a framework** dealing with measures and practices to which conditions of transparency and progressive liberalization might be applied.[21]

B. The Uruguay Round

I. Initial Challenges for Negotiators

13 There were **four central issues** which divided the negotiators. First, it had to be resolved whether the agreement was to cover all service sectors or only a limited number of them. Secondly, the structure was questionable. Agreement was needed on whether it would be appropriate to include the same obligations and principles as contained in the GATT. These debated

[19] Statement by the Chairman and Adoption of the Ministerial Declaration on the Uruguay Round, MIN.DEC, 20 September 1986.

[20] *Ibid.*, Part II.

[21] *Footer & George*, in: *Macrory et al.* (eds), 799, 805; *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2359, 2360.

principles included the MFN principle, the national treatment principle, and concepts of market access such as "scheduled concessions" which were negotiated reciprocally.[22] Third, institutional issues had to be resolved. These included decisions on a definition of services, on how to treat prior agreements in the area, and on whether or not to permit exceptions. Finally, a way had to be found to address the needs of developing countries.[23]

14 In the early phase of negotiations on services it was not yet settled whether there should be a separate agreement dealing with services or whether this issue should instead be included in the GATT or any other organization.[24] **Developing states** initially resisted the launching of negotiations on services. They were prepared to take up only **negotiations that kept trade in services separate from the GATT framework**, thus **preventing cross-linkages** between negotiations on GATT issues and services issues.

15 Argentina, Brazil, India and some other developing states objected generally to negotiations. They considered market-sharing agreements that would improve the developing countries' position within the world services trade to be best suited to facilitating their economic development.[25] **Liberalization of the domestic services** sector was perceived to cause a **loss of autonomy and flexibility** in macro-economic and development policies.[26]

16 During the negotiations on 18–22 September 1989, parties agreed to **establish a separate agreement on services** which would be negotiated without any cross-linkages or repercussions on the negotiations on goods.[27]

II. Objectives of the Negotiators

17 The initial phase of negotiations on trade in services reflected the **largely differing objectives** the negotiating parties pursued. The **EC** objective was to achieve an **agreement** with a **wide scope** which would cover a **broad range of sectors** and **ensure effective market access**. The EC suggested the creation of a permanent "Regulations Committee", which would be mandated to define the "appropriateness" of domestic rules and to

[22] *Jackson*, World Trading System, 307.
[23] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2360.
[24] *Ibid.*, 2361.
[25] *Footer & George*, in: *Macrory et al.* (eds), 799, 817.
[26] *Footer & George*, in: *Macrory et al.* (eds), 799, 818; *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2363.
[27] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2362.

prevent discrimination.[28] The EC saw the multilateral services negotiations as one aspect of its efforts to complete the internal market by 1992.

18 By the mid-1980's the EC dominated exports in services. It saw its services sector as "investment-led", which meant that the inclusion in the agreement of the right of establishment was of particular interest to the EC.[29]

19 The **US**, as well as Canada to a lesser extent, **initially** favoured a **general liberalization** of trade in services, but **later** on attempted to **exclude several specific sectors**, such as maritime and air transportation, as a result of pressure on the US government by these sectors to relinquish the universal approach.[30]

20 The civil aviation and maritime transport sectors were argued to contain elements that were irreconcilable with the basic principle of MFN. Both sectors recognize the concept of cabotage, *i.e.* the reservation to a state of air traffic rights and navigation transit rights within its own territory. Furthermore, they both contain an extended system of bilateral agreements.[31] The US feared negative impacts on its maritime interests and therefore insisted on its unilateral action against the practices of other countries. The maritime sector is only one example of the ambiguous US position. On the one hand she demanded liberalization of trade in services but at the same time she proved unwilling to give up any unilateral measures against her trading partners.[32] Canada, Japan, the EC, New Zealand, Switzerland, Hong Kong and Australia opposed the US position and advocated the liberalization of maritime services.[33]

21 In 1982 the **US** stated her most important aims to be trade expansion and the reduction of protectionist barriers to trade in services. For this purpose she intended to develop a sound institutional framework for services in the form of a framework agreement that would contain obligations to ensure non-discrimination, most-favoured-nation (MFN) treatment, national treatment, provisions on market access, as well as disciplines to control monopolies of services providers and rules on transparency and dispute settlement. The US envisaged a broad definition of the term of trade in services, to encompass the services trade that involved a commercial presence or a right of establishment. National monopolies in services were acceptable to the US as long as their services were to be sold to consumers abroad without discrimination. By December 1988, the US had limited its **envisaged**

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[28] *Footer & George*, in: *Macrory et al.* (eds), 799, 814.
[29] *Ibid.*, 816.
[30] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2364; *Footer & George*, in: *Macrory et al.* (eds), 799, 812.
[31] *Footer & George*, in: *Macrory et al.* (eds), 799, 813.
[32] *Ibid.*, 814.
[33] *Ibid.*, 816.

principles to the four issues of **national treatment, establishment, non-discrimination and transparency**.[34]

Japan's goals focused mainly on particular sectors such as **transport, tourism and financial services**.[35] Japan supported the US demand for liberalization during the Uruguay Round because it hoped to benefit from it commercially but also to distract from its trade surplus and closed markets.[36] *22*

Developing countries usually favoured universal coverage,[37] while Latin American and Caribbean states preferred a sectoral approach.[38] Several developing countries insisted on the inclusion of export promotion schemes and infant industry protection clauses in the agreement. They stressed the importance of control of inward foreign direct investment and restrictive business practices, since they were concerned about the dominance of transnational corporations in their services sectors. This attitude made them **oppose a general national treatment obligation**, with support from the EC.[39] Developing countries also argued for the **adoption of economic development and growth** as one of the objectives of any agreement. *23*

III. Negotiations up to the July 1990 Meeting of the Trade Negotiations Committee

During the first two years negotiators dealt primarily with procedural aspects. They agreed to discuss specific sectors in order to decide whether GATT principles and rules would be appropriate for trade in services.[40] On 21 November **1988**, the parties adopted a report listing the fundamental characteristics of an agreement which was, however, criticized for being too vague. The **report** was incorporated in the **mid-term review report** in which the Trade Negotiations Committee (TNC) evaluated the progress of negotiations and established the basis for further negotiations.[41] It showed that negotiations had to date achieved few tangible results. *24*

In **1989** the parties finally began to discuss **specific sectors** and to submit various proposals which helped to redirect negotiations towards substantive issues.[42] *25*

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[34] *Ibid.*, 813.
[35] *Ibid.*, 811.
[36] *Ibid.*, 816.
[37] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2363.
[38] *Ibid.*, 2364.
[39] *Footer & George*, in: *Macrory et al.* (eds), 799, 818; *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2363.
[40] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2366.
[41] *Ibid.*, 2368, 2369.
[42] *Ibid.*, 2370.

26 In October 1989, the US and the EC proposed to establish a **"negative list"** (also called the "top down" and "opt-out" approaches). They envisaged the agreement to cover all services except those included on the "negative list".

27 Most of the developing countries instead favoured a **"positive list"** ("bottom up" and "opt-in" approach) comprising all sectors that would be covered. The positive list approach was **opposed by the US and the EC**, because of the "veto power" it would grant to parties over the application of the GATS.[43]

28 At the meeting of the GNS on 26–30 March 1990, the US and EC presented a "compromise" which provided that parties should make concessions at the time of entry into force, with the exception of the sectors listed on the "negative list". They did not obtain general support for this compromise, and Canada and New Zealand were among the opponents; both supported a "positive list" approach.

29 Canada and the Nordic parties argued that developing countries should be authorized to liberalize only a restricted number of sectors or types of transactions, and to extend market access in proportion to progress in their development.[44]

30 **Disagreement** persisted also on the issue of **cross-border movement of labour** which was favoured by developing countries, while many developed countries opposed it.[45] Developing countries argued that restrictions were discriminatory.[46]

31 The EC suggested implementing some principles, such as transparency, immediately, whilst postponing the implementation of others, such as national treatment.[47] The parties **agreed** that the GATS should include an **MFN provision** but failed to establish its particular details. They also agreed that parties should continue to have the right to enter into regional free trade areas and customs unions.

32 Most countries were in favour of limitations to market access for national security reasons. **Limitations for "national policy objectives"** were discussed.[48]

33 Several proposals on **special treatment for developing countries** were submitted. They included *e.g.* linking market access with technical

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[43] *Ibid.*, 2371.
[44] *Footer & George*, in: *Macrory et al.* (eds), 799, 816.
[45] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2373.
[46] *Ibid.*, 2374.
[47] *Ibid.*, 2375, 2376.
[48] *Ibid.*, 2378.

and other assistance. In March **1990** the parties reached a **"compromise agreement"** in which developed countries revised their positions, which was however rejected by the US as well as by a number of developing countries.[49]

IV. The "July Text"

On 23 July **1990**, the Chairman of the GNS launched the "Draft Multilateral Framework For Trade In Services" (July Text).[50] The July Text **resembled the GATT**. It was composed of 35 articles, grouped into six parts, and an annex dealing with initial commitments. The text noted that most central questions, namely definition, coverage, labour mobility, MFN treatment, progressive liberalization, and the negotiation and application of commitments and special treatment for developing countries remained unsolved, while further sectoral discussions were warranted to assess the need for sectoral annexes before the scheduled end of the Uruguay Round in December 1990.[51] Provisions on dispute settlement and enforcement, relationships with other international arrangements and agreements, consultations and non-application were still altogether absent.[52] *34*

The July Text stated that further work was warranted to **assess the need for sectoral annexes**. In various sectoral working groups parties disagreed. Canada and the Nordic countries advocated an exception for the conservation of exhaustible natural resources and the protection of human, animal or plant life, or health. The July 1990 text of the GATS included an exception for the protection of "cultural values". Additionally, Canada and the EC supported an exception for "cultural goods". Together with India and Egypt, they advocated a general exception for audio-visual services which would leave room for the promotion of indigenous languages, national history and cultural heritage. The US rejected these exemptions.[53] Views of the negotiators continued also to differ in the telecommunications and financial services sectors as well as with respect to transportation.[54] The application of national treatment to financial services was viewed as problematic since imports pose particular risks in this area. Banking, insurance and brokerage were argued to require prudential governmental regulations to protect *35*

[49] *Ibid.*, 2379–2381.

[50] Group of Negotiations on Services, Uruguay Round, Draft, Multilateral Framework for Trade in Services, Introductory Note by the Chairman on the GNS Negotiations on a Framework Agreement, MTN.GNS/35, 23 July 1990.

[51] *Ibid.*, Introductory Note 6, 7.

[52] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2388.

[53] *Footer & George*, in: *Macrory et al.* (eds), 799, 816; *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2385, 2390.

[54] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2391.

consumers, and these needed to be balanced with trade liberalization.[55] The sectoral working groups did not resolve the question of the application of MFN to the various sectors to be contained in annexes.[56]

V. Course of Negotiations up to the "Dunkel Draft"

36 **Disagreement** on the application of the **MFN** provision threatened the negotiations in November 1990. The **US** argued that **MFN should not automatically apply to all service sectors** since this would oblige countries with comparatively open markets to keep their markets open, while countries with more closed markets would not be moved to open their markets.[57] Other countries criticized the US position for obstructing the conclusion of the agreement as a whole. At the ministerial meeting in Brussels on 19 December the US agreed to apply MFN to all sectors provided that parties negotiated sufficient market access and national treatment commitments.

37 The GNS drafted a GATS text for the Brussels meeting of the TNC (December Text).[58] Apart from the **unresolved issue of MFN** further problems included the **scope of exceptions** (**Art. XIV**), **balance of payment provisions** (**Art. XII**), and several technical aspects. The negotiations came to a halt due to EC agricultural policy on 7 December 1990.[59]

38 In March 1991 the parties took up consultations and decided to resume the Uruguay Round negotiations including negotiations on services. At the beginning of April they started work on the framework, initial commitments and sectoral annexes.[60]

39 The meetings were mostly informal consultations on technical issues. Due to the disagreement on MFN treatment the negotiations on the GATS remained stalled throughout the spring of 1991.[61] **Progress** was made on the **manner in which commitments** were to be **scheduled.** The newly adopted **guidelines** required states to **submit conditional offers and** to **specify their commitments** in the fields of "specific commitments" and "progressive liberalization". Finally, they also achieved an **agreement on the application of the MFN principle**.[62] Most parties were prepared to apply the MFN provision to nearly all service sectors that were included

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[55] *Jackson*, World Trading System, 307.
[56] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2392.
[57] *Ibid.*, 2393.
[58] *Ibid.*, 2394.
[59] *Ibid.*, 2395.
[60] *Ibid.*, 2396.
[61] *Ibid.*, 2401.
[62] *Ibid.*, 2403.

in other agreements after an initial phase-out period.[63] Parties also increasingly submitted offers to liberalize commitments in services.[64]

In the **autumn** of **1991** the negotiations focused on the **MFN** article, in particular the extent to which parties could exempt MFN application to specific sectors.[65] *40*

The deadline for the submission of conditional initial offers had been set at 31 July. Negotiations on initial offers did not advance as planned, given that 50 mostly developing states had not yet submitted any offers by 30 November 1991. *41*

Furthermore negotiations focused on annexes for the maritime sector, telecommunications and financial services.[66] *42*

On 7 November **1991**, the Director-General of the GATT, **Arthur Dunkel, reported** on unresolved areas. The GATS article on **MFN** was **still unclear**, while progress had been made in the Annexes for telecommunications, financial services and labour mobility.[67] More than forty initial commitments had been tabled. Disputes over the application of MFN and exemptions from it led to a stalemate, *e.g.* in the financial services sector. The EC insisted on an exemption for telecommunications and broadcast quotas, while the developing countries refused to open their markets in the maritime industries. Both positions were opposed by the US. *43*

VI. The "Dunkel Draft"

On 20 December **1991**, **Arthur Dunkel** launched the **draft** text of an agreement **for all the negotiating areas** which was entitled "Draft Final Act Embodying The Results Of The Uruguay Round Of Multilateral Trade Negotiations" (Dunkel Draft).[68] It represented the **results of five years of negotiations**. The parties were requested to notify the Secretariat by 13 January 1992 whether they accepted the draft as a final agreement or as a basis for further negotiations. *44*

The **Dunkel Draft encompassed** thirty-four articles and Annexes on MFN exemptions, movement of labour, financial services, telecommunications, and air transport services. It provided for the establishment of institutional bodies such as a Council of Representatives, and an authority to *45*

[63] *Ibid.*, 2404.
[64] *Ibid.*, 2406.
[65] *Ibid.*, 2407.
[66] *Ibid.*, 2408.
[67] *Ibid.*, 2410.
[68] General Agreement on Trade in Services, in Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/FA, 20 December 1991, Annex I.

carry out joint action. Each party would have one vote and the opportunity to waive obligations.[69]

46 The draft did **not** contain **Schedules of commitments**, which rendered its potential implications hard to assess.

47 **Art. II** on **MFN treatment** permitted derogations from MFN treatment provided that a state had negotiated specific commitments and met the conditions provided for in the Annex on Article II Exemptions.[70] The US had therefore succeeded in the establishment of a conditional MFN, *i.e.* a binding general obligation for MFN, with MFN exemptions.[71]

48 Pursuant to **Art. V** Members could **adhere to an agreement to liberalize** trade in services, provided that it had substantial coverage and did not provide for the exclusion of a mode of supply. Furthermore, it had to provide for the absence or elimination of discriminations, and prohibit the adoption of discriminatory measures.

49 The purpose of **Art. VI** was to ensure that **domestic regulations** were applied in a fair and **non-discriminatory** way.

50 **Art. VIII** requested parties to ensure that **monopolists** acted in accordance with the parties' obligations.[72]

51 **Art. XX** obligated parties to set out in a **Schedule specific commitments** for each service sector and sub-sector. These Schedules were to indicate: commitments on market access, national treatment and additional commitments, as well as a time-frame for the implementation of commitments where appropriate, and the date of entry into force of commitments. The commitments were to be progressively extended at negotiations following the Uruguay Round.

52 The draft text contained an **Annex on Movement of Labour** pursuant to which service providers and employees of service providers of a party were granted the right to temporary cross-border movement. The Schedules were to identify in which service sectors a party would undertake specific commitments.[73]

53 The **Annex on Financial Services** was not applicable to activities undertaken in the exercise of governmental functions. It permitted derogations to protect investors, depositors, policy holders or to ensure the integrity and stability of the finance sector.[74]

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[69] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2411, 2412.
[70] *Ibid.*, 2413.
[71] *Footer & George*, in: *Macrory et al.* (eds), 799, 818.
[72] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2414.
[73] *Ibid.*, 2415.
[74] *Ibid.*, 2415, 2416.

The **Annex on Telecommunications** covered access to and use of public telecommunications transport networks and transport services. It excluded radio or television programming.[75] *54*

The **Annex on Air Transport Services** applied to all air transport services, whether or not scheduled, and ancillary services. It excluded air traffic rights provided for under the Chicago Convention and under bilateral agreements.[76] *55*

VII. Conclusion of Negotiations

In January **1992** the TNC adopted a **four-track approach** to bring negotiations to an expeditious conclusion. These four tracks encompassed: **intensive negotiations on market access** and on **initial commitments** in services, the work to ensure **conformity** of the agreements, and the **adjustment** in certain stages.[77] *56*

In spite of the momentum created by this meeting, the **GATS negotiations** came to a virtual **standstill in 1992–93**. The US and EC failed to agree on the US proposal to exclude maritime services and to provide MFN exemptions in certain areas. At the same time the EC's agricultural subsidies were not acceptable to the US.[78] Both topics were linked by the negotiators, who expected concessions from the other party.[79] Additional problems were the developing countries' offers on financial services, MFN exemptions[80] and initial commitments. *57*

In summer **1993 negotiations** on services were finally **resumed** at a mini-summit in Tokyo. States were asked to make horizontal commitments that were applicable to all service sectors or to a number of them, and sector-specific commitments, that were applicable to a particular service sector, independently of different modes of supply. In late 1993 issues such as the scheduling of commitments and the submission of lists of MFN exemptions were finally resolved. *58*

In September 1993 **various textual issues** still remained **unresolved**, most significantly the **applicability of the GATS to taxation which Members intended to maintain**.[81] In October a consensus was reached *59*

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[75] *Ibid.*, 2416, 2417.
[76] *Ibid.*, 2417.
[77] Trade Negotiations Committee, Uruguay Round, Meeting on 13 January 1992, Opening Statement and Concluding Remarks by the Chairman, MTN.TNC/W/99, 15 January 1992.
[78] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2419.
[79] *Ibid.*, 2420, 2421.
[80] *Ibid.*, 2422.
[81] *Reyna*, in: *Stewart* (ed.), Vol. IV, 775, 797.

to add a footnote to Art. XIV lit. d to clarify the phrase "equitable or effective imposition or collection of direct taxes".[82] This consensus failed, however, finally to settle the taxation issue, due to a US announcement that it would enter a horizontal limitation on national treatment on all direct taxes. Eventually, the parties adopted a common ground approach which stated that tax measures which affected service providers did not need to be justified under Art. XIV provided that they did not violate an obligation or a commitment under the GATS.[83]

60 Moreover, it still needed to be determined whether certain categories of measures fell within the **scope of the GATS**.[84] The Secretariat prepared a discussion paper which clarified issues such as the permissibility of different treatment when establishing whether any person qualified to receive **social security benefits**.[85] Similarly, it was discussed whether or not **judicial and administrative assistance** provided by states to other parties was covered by the GATS. Negotiations focused also on the coverage of more favourable **procedures** (*e.g.* arbitration) accorded by states to citizens of other parties in the context of dispute settlement under bilateral investment protection agreements.[86] Finally, questions arose with respect to the entry and stay of **natural persons**, particularly pursuant to bilateral agreements.[87] The Secretariat expressed its view that measures under bilateral agreements which affected trade in services and were discriminatory fell within the scope of the GATS. Parties agreed that they should each be free to decide which measures fell within the scope of the GATS and that they were better able to limit the number of all MFN exemptions if all parties agreed to restrain themselves in challenging this classification of measures.[88]

61 During the November TNC meeting several states, such as the GRULAC (Group of Latin American and Caribbean Countries) and Japan, expressed satisfaction with the progress of the negotiations. The GRULAC criticized only the US position on financial services and Canada the quality of the initial commitments. Also Egypt, Australia, Korea, Pakistan, the Nordic countries, India and the EU opposed the US position on national treatment with respect to taxes and MFN with respect to financial services.[89]

62 The discussions following the November 10 TNC meeting concentrated mainly on **initial commitments** and the **lists of MFN exemptions**. On 26 November 1993, when the deadline for the submissions of draft final

[82] *Ibid.*, 798.
[83] *Ibid.*, 799.
[84] *Ibid.*, 801.
[85] *Ibid.*, 802.
[86] *Ibid.*, 803.
[87] *Ibid.*, 804.
[88] *Ibid.*, 805.
[89] *Ibid.*, 806.

Schedules and final lists of MFN exemptions expired, both Schedules and lists were still in the process of being drafted and circulated.[90]

63 At the end of November the Secretariat reported on the **outcomes of the Uruguay Round negotiations**. It found that commercial services, particularly in the travel sector, were of great importance to developing economies.[91] The offers of initial commitments were also evaluated, a task that proved to be difficult to carry out, since statistic data on trade in services is incomplete and hard to compare across countries, barriers to trade in services are not quantifiable and it is hard to attribute increases in business opportunities to an elimination of trade barriers.[92]

64 The parties eventually determined that the **GATS MFN provisions did not apply to judicial and administrative assistance**. They had not achieved consensus on other issues concerning the scope of the GATS as of 10 December 1993.[93]

65 In December 1993 the TNC adopted the Final Act of the Uruguay Round Multilateral Trade Negotiations. It encompassed the outcomes of the negotiations and Ministerial Decisions and Declarations. The GATT Contracting Parties' commitments however were not included in the Schedules of WTO Members until April 1994 (done in Marrakesh).

66 The final Schedules were examined to see whether they contained the negotiation results and corrected between mid-January and the end of March. Areas such as basic telecommunications and maritime transport still remained unsettled, or disappointing in the case of financial services.[94] In its December 1993 meeting the TNC determined to prepare several Ministerial Decisions and Declarations which would enable the Members of the future WTO to carry on negotiations in these unsatisfactory service sectors after the Round's conclusion.[95]

67 The result of the Uruguay Round GATS negotiations is a framework agreement, which is annexed to the WTO's founding instrument. Some 97 Schedules of services commitments and 350 MFN exemptions were submitted by 106 Members. There were initial commitments in virtually all sectors and sub-sectors. In many cases these did not, however, extend the already existing market access arrangements.

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[90] *Ibid.*, 807.
[91] *Ibid.*, 808–810.
[92] *Ibid.*, 810.
[93] *Ibid.*, 811.
[94] *Footer & George*, in: *Macrory et al.* (eds), 799, 819.
[95] Negotiating Group on Maritime Transport Services, Decision on Negotiations on Maritime Transport Services, LT/UR/D-5/5, 15 April 1994.

C. Conclusion

68 The final text did not reflect all the negotiators' aspirations; nevertheless it is a positive achievement for them. Drawing from the experiences with goods, it can be expected that there will be at least fifty years of ongoing negotiations about service concessions, and some of these negotiations will presumably continue indefinitely.[96]

[96] *Jackson*, World Trading System, 306, 307.

Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO—Trade in Services.*
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Preamble General Agreement on Trade in Services

Members,
Recognizing the growing importance of trade in services for the growth and development of the world economy;
Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries;
Desiring the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives;
Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right;
Desiring to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports including, *inter alia*, through the strengthening of their domestic services capacity and its efficiency and competitiveness;
Taking particular account of the serious difficulty of the least-developed countries in view of their special economic situation and their development, trade and financial needs;
Hereby ***agree*** as follows:

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Cross References

Art. 31 VCLT.

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A. General

I. Role of the Preamble

Even though the paragraphs preceding Art. I do not have a heading designating them as the Preamble both their location and their wording indicate that they constitute the **Preamble** to the Agreement.[1] *1*

As is customary for treaties, the **preamble names** the contracting parties (here the Members), the motives for concluding the treaty, the object and purpose pursued by the treaty and shared principles.[2] *2*

The **legal significance** of preambles under public international law is limited. They **do not create any legal obligations** that go beyond the operative part of the agreement.[3] Only where the operative part incorporates parts of the preamble by reference do those parts become enforceable obligations.[4] Some authors contest the limited legal significance of preambles, arguing that even vague commitments nevertheless remain commitments.[5] However, international courts and tribunals adhere to the majority view and refer to preambles merely when interpreting the legal obligations imposed by the operative parts of treaties.[6] As the Court of Arbitration stated in the Beagle Channel Arbitration: "Although Preambles to treaties do not usually—nor are they intended to—contain provisions or dispositions of substance—(in short they are not operative clauses)—it is nevertheless generally accepted that they may be relevant and important as guides to the manner in which the Treaty should be interpreted, and in order, as it were, to 'situate' it in respect of its object and purpose".[7] *3*

This does not imply that preambles have no legal value whatsoever. According to Art. 31.2 VCLT[8] they **serve as context for the purposes of treaty interpretation,** and thus have a significant impact on determining the meaning of the obligations states have subscribed to in the operative part of the agreement.[9] In particular, they commonly state *4*

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[1] See *von Bogandy*, Max Planck CWTL, Vol. 2, Preamble WTO Agreement, para. 1.

[2] *Treviranus*, in: *Bernhardt* (ed.), EPIL III, 1097.

[3] *Wolfrum*, in: *Simma* (ed.), para. 13; *Treviranus*, in: *Bernhardt* (ed.), EPIL III, 1097, 1098; *Seidl-Hohenveldern & Loibl*, 247; *Aust*, 336 *et seq.*; *Hestermeyer*, 113–114.

[4] *Von Bogandy*, Max Planck CWTL, Vol. 2, Preamble WTO Agreement, para. 1.

[5] *You*, 140; *Meyn*, in: *Hobe* (ed.), 25, 28 *et seq.*

[6] *E.g.* ICJ, *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, [1952] ICJ Reports 176, 179; ICJ, *South West Africa Cases (Ethiopia v. South Africa, Liberia v. South Africa)*, [1966] ICJ Reports, 6, 34; ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)*, [1996] ICJ Reports, 66, 76.

[7] *Beagle Channel Arbitration (Argentina v. Chile)*, ILR 52 (1979), 93, 132.

[8] Vienna Convention on the Law of Treaties, 23 May 1969, ILM 8 (1969), 679.

[9] *Corriente Cordoba*, 21; *Maresca*, 355.

the **object and purpose** of the treaty, which are indispensable for the purposes of interpreting the treaty obligations.[10]

5 Accordingly the **Appellate Body** has used the preambles to the WTO agreements in interpreting obligations contained in the agreements. In the words of the Appellate Body the preamble adds "colour, texture and shading" to the interpretation of the WTO agreements.[11] While the case in which the Appellate Body made that statement concerned the WTO agreement the Appellate Body has made similar use of the Preambles to the GATT 1947,[12] the TRIPS Agreement[13] and the GATS.[14]

II. Drafting History

6 Of the three major drafts of the GATS,[15] only the latter two contain preambles. The **Chairman's December 1990 Draft** shows that the wording of the Preamble was to a large extent not contested. Recitals 1–3 and 5–6 were already contained in the draft in unbracketed format and in almost exactly their present wording. The only debate remained about domestic regulations and sovereignty: the draft contained a (bracketed) recognition of the sovereignty of national economic policies that was deleted in the **Dunkel Draft**. With respect to recital 4 there was debate whether the provision should be included as Art. VI:1—giving it stronger legal force—or whether it should be located in the Preamble. The Dunkel Draft decided in favour of locating the provision in the Preamble, using the language of both the previous draft Art. VI:1 and the draft recital.

7 Some elements of the Preamble go back to the **Ministerial Declaration launching the Uruguay Round**,[16] which set out the goal of the negotiations on trade in services. Recital 2 takes up the language of the Declaration. The Declaration also stated that the framework for trade in services "shall

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[10] ICJ, *Asylum Case (Colombia/Peru)*, [1950] ICJ Reports, 266, 282; ICJ, *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, [1952] ICJ Reports, 176, 196.

[11] Appellate Body Report, *US—Shrimp*, WT/DS58/AB/R, para. 153.

[12] Appellate Body Report, *EC—Tariff Preferences*, WT/DS246/AB/R, para. 107.

[13] Appellate Body Report, *US—Section 211 Appropriations Act*, WT/DS176/AB/R, para. 216.

[14] Appellate Body Report, *US—Gambling*, WT/DS285/AB/R, paras 188–189.

[15] The Chairman's July 1990 Draft: Group of Negotiations on Services, Uruguay Round, Draft, Multilateral Framework for Trade in Services, Introductory Note by the Chairman on the GNS Negotiations on a Framework Agreement, MTN.GNS/35, 23 July 1990; the Chairman's December 1990 Draft: Trade Negotiations Committee, Uruguay Round, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Part 3, Revision, MTN.TNC/W/35–1/Rev.1, 3 December 1990, Annex II; *Multilateral Trade Negotiations*, *The Uruguay Round*, *Trade Negotiations Committee* (ed.), "The Dunkel Draft" from the GATT Secreteriat, 1992, Annex II.

[16] Ministerial Declaration on the Uruguay Round, BISD 33S/19, 20 September 1986, Preamble to Part II.

respect the policy objectives of national laws and regulations applying to services"—a concern that is now reflected in the second part of recital 3.

B. Detailed Analysis

I. Structure

8 The Preamble contains 6 recitals. The first of them gives the background to why Members considered the GATS necessary. The second recital names the general objectives and purpose of the GATS, with recital 3 giving more details on the objective of progressive liberalization. Recital 4 sets out a limit of the GATS. Recitals 5 and 6 pay respect to the special needs of developing and least-developed countries and elaborate on the development objectives of the GATS.

II. Background (Rec. 1)

9 The first recital gives the **background to the conclusion of the GATS**—it provides justification for why the WTO also covers trade in services. In the first recital Members recognize the growing importance of trade in services for the growth and development of the world economy.

10 The GATT regime originally covered only trade in goods. Before the Uruguay Round trade in services was largely viewed as a matter of domestic commerce.[17] Technological advances, particularly in the computer industry, and falling transportation costs increased the potential for international trade in services. Several studies illustrated the **growing importance of trade in services** at the time of the conclusion of the GATS. Around 1980, at the behest of the U.S. Trade Representative, the OECD undertook a study finding that participant countries had a significant stake in the trade in services and that this trade was impeded by trade barriers.[18] A U.S. study presented in December 1983 showed that world-wide service exports had reached a value of $ 350 billion, roughly one fifth the value of merchandise exports, and that trade in services had grown at an annual rate of 18.7% between 1970 and 1980 despite significant barriers to that trade.[19] Several other national studies confirmed the importance of the services sector, showing that in 1980 48% of all workers in the reporting countries were employed in the service industries.[20]

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[17] *Kakabadse*, Ga. J. Int'l & Comp. L. 19 (1989), 384.
[18] *Ascher*, Ga. J. Int'l & Comp. L. 19 (1989), 392, 395.
[19] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2342, 2349.
[20] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2347.

11 However, it has to be noted that the studies also showed that there was no clear definition of **trade in services**.[21] Such a definition is now contained in Art. I:2. The Panel in *Mexico—Telecoms* considered the broad language concerning the importance of trade in services to confirm the comprehensive coverage of the GATS.[22]

12 The importance of trade in services for the growth and development of the world economy has grown further **since the conclusion of the GATS**. The WTO statistics put the total value of world exports of commercial services in 2005 at $ 2,415 billion, roughly one quarter of the total world merchandise exports.[23]

III. General Objective (Rec. 2)

13 Recital 2 sets out the general objectives of the GATS. In doing so, it establishes a hierarchy of goals of the Agreement. The ultimate objectives are the **promotion of economic growth of all trading partners and the development of developing countries**.[24] The fact that economic growth is one of the two core objectives of the GATS proves the GATS to be an instrumental order,[25] one that does not directly protect human rights, but is aimed at fostering human prosperity by way of increasing economic growth. Unlike the WTO Agreement and GATT 1947 the GATS does not even mention the objectives of "raising standards of living" and "ensuring full employment".[26]

14 **The development of developing countries** is put on equal footing with economic growth. The WTO agreements do not define the term **developing countries**. Art. XVIII:1 GATT 1994 merely mentions some indicators, namely countries the economies of which in their normal position[27] can support only low standards of living and are in the early stages of development. "In the early stages of development" is intended to include Members the economies of which are undergoing a process of industrialization to correct an excessive dependence on primary production.[28] Original Members of the WTO decided themselves about their status, subject to possible challenges by other Members. The status of acceding Members is determined during the accession negotiations.[29] The prominence granted

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[21] *Ibid.*
[22] Panel Report, *Mexico—Telecoms*, WT/DS204/R, para 7.41.
[23] *WTO*, International Trade Statistics, 15, 16; *Mattoo*, Economics, 3.
[24] Contra *Krajewski*, National Regulation, 56, naming trade liberalization and expansion of trade in services as the main goals of GATS.
[25] See *Hestermeyer*, 197.
[26] *Krajewski*, National Regulation, 57.
[27] Ad Art. XVIII Paragraphs 1 and 4, para. 1 GATT 1994.
[28] Ad Art. XVIII Paragraphs 1 and 4, para. 2 GATT 1994.
[29] *Stoll & Schorkopf*, Max Planck CWTL, Vol. 1, para. 37.

to development goals is a concession to developing countries which were originally of the view that services should be excluded from the Uruguay Round negotiations.[30] Developing countries are also treated in recitals 4, 5 and 6 and will be discussed in greater depth below.[31]

15 The means chosen to achieve these objectives is the **establishment of a multilateral framework of principles and rules for trade in services**, a secondary objective of the GATS. This secondary objective reflects Members' fears that without a multilateral agreement on trade in services the issue would inevitably be governed by bilateral and regional agreements only, threatening the world trade system.[32] The recent proliferation of bilateral and regional agreements has prompted these concerns to resurface.[33] The fact that the framework consists of principles and rules reflects the legalization of the world trade order, an order initially perceived to be more of an economic than a legal nature,[34] and Members' believe that a rule-based multilateral framework ultimately fosters economic growth and development.

16 The framework is established **with a view to the expansion of trade in services under conditions of transparency and progressive liberalization**. It is the expansion of trade in services that leads to stronger economic growth. Two principles guide the process. First, the GATS does not lead to immediate, full liberalization, but is aimed at the **progressive liberalization** of trade in services. Such liberalization is expected to lead to an expansion of trade and hence to further growth.[35] The concept of progressive liberalization, one of the secondary objectives of the GATS, harks back to the GATT: the GATT process entailed the negotiation of further liberalization (with respect to tariff bindings) among other methods in successive rounds.[36] However, the GATS process differs significantly from the GATT process in that Members undertake market access and national treatment obligations only with respect to service sectors listed in their Schedules (the 'positive list' approach).[37] Therefore there is much greater room for further liberalization[38]—and not surprisingly the GATS contains specific provisions on how progressive liberalization is supposed to be achieved both in recital 3 of the Preamble and in Part IV of GATS

[30] *Footer & George*, in: *Macrory et al.* (eds), 799, 817.
[31] See paras 23–26.
[32] *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2348.
[33] *Sutherland et al.*, 19; in-depth: *Krajewski*, Services Liberalization, in: *Bartels & Ortino* (eds), 175 *et seq*.
[34] *Hudec*, in: *Hudec* (ed.), 17 *et seq*.
[35] *WTO*, Guide to the GATS, 2.
[36] For details see *Jackson*, Law of GATT, 217–223.
[37] See *Molinuevo*, Article XX GATS, para. 14, 26; *WTO*, Handbook, 16; *Footer & George*, in: *Macrory et al.* (eds), 799, 821.
[38] See the surveys published in *WTO*, Guide to the GATS, *e.g.* 13–20; 120–125.

(Arts XIX–XXI ("built-in agenda")), namely by Members entering into successive rounds of negotiation.[39] The Panel in *US—Gambling* pointed to the principle of progressive liberalization and argued that the principle confirms that the purpose of Art. XVI is not to abolish all measures liable to restrict freedom to provide services but rather that Members, if they have made market access commitments, have the freedom to maintain limitations, terms, conditions and qualifications to the commitments made. The Panel took this to confirm that Art. XVI covers only those restrictions on market access listed in Art. XVI:2.[40] The second principle mentioned is **transparency**. The principle is explained in detail in Art. III requiring Members to publish certain measures and to notify certain measures to the Council for Trade in Services.[41] Furthermore, Members have to establish an enquiry point to respond to requests by other Members and developed countries additionally have to establish contact points that supply information to developing country Members' service suppliers.[42] The Appellate Body has held the principle to support the need for precision and clarity in scheduling—to make the Schedule readily understandable by all other WTO Members—and stated that it is an objective of the GATS.[43]

IV. Progressive Liberalization (Rec. 3)

17 The third recital gives more details on the objective of **progressive liberalization** already mentioned in recital 2. First of all it emphasizes that the **early achievement of progressively higher levels of liberalization of trade in services** is desired. Even though no concrete timetables are set and the language is merely hortatory, the addition of the words "early" achievement, meaning "prompt"[44] achievement of higher levels of liberalization adds urgency to the desire for further liberalization. Art. XIX accordingly set a deadline for beginning the first round of negotiations no later than five years from the date of entry into force of the WTO Agreement. Services negotiations began in 2000 and have not yet been concluded. With respect to developing country Members and LDCs, recital 3 has to be read together with recitals 5 and 6, requiring fewer efforts at progressive liberalization by those Members.[45] It should also be noted

[39] See paras 17–20.

[40] Panel Report, *US—Gambling*, WT/DS285/R, paras 6.314–6.318. The issue was not addressed by the Appellate Body: *US—Gambling*, WT/DS285/AB/R, paras 218–220.

[41] For details see *Delimatsis*, Article III GATS.

[42] Arts III:4, IV:2.

[43] *US—Gambling*, WT/DS285/AB/R, paras 188–189; *US—Gambling*, WT/DS285/R, para. 6.107.

[44] *D. Thompson* (ed.), The Concise Oxford Dictionary of Current English, 9th ed. 1995.

[45] See Art. XIX:2; Ministerial Conference, Sixth Session, Hong Kong, 13–18 December 2005, Doha Work Programme, Ministerial Declaration, WT/MIN(05)/DEC, 22 December 2005; See paras 23–26.

that the objective is modified by the last part of the recital.[46] Finally, the objective seems to clash with the fourth recital—the right of Members to regulate, and introduce new regulations, on the supply of services within their territories.[47]

18 The recital goes on to set out the means of progressive liberalization, namely **through successive rounds of multilateral negotiations**. The GATS contains detailed provisions on this process in its Art. XIX. Under the GATT tariff concessions are, amongst others, also negotiated in tariff rounds.[48] The negotiations are not just multilateral but often conducted in bilateral meetings, and Members are free to negotiate tariffs outside GATT.[49] The wording of the Preamble seems to indicate that GATS procedures differ from this approach. However, according to the explicit wording of Art. XIX:4 the negotiations in a round are conducted bilaterally, plurilaterally or multilaterally.[50] The limitation to 'multilateral' negotiations in the Preamble is thus a drafting error.

19 According to recital 3, the rounds have two aims: first, **promoting the interest of all participants on a mutually advantageous basis.** This aim recalls the language of recital 3 of the WTO Agreement in which Members express their desire to contribute to the WTO's objectives by entering into reciprocal and mutually advantageous arrangements. The use of the term "mutually advantageous" without the addition of the term "reciprocal" does not imply that GATS obligations are *erga omnes*. The structure of trade in services and of the enforcement of the relevant obligations clearly show that GATS remains within the bilateral paradigm.[51] The second aim is **securing an overall balance of rights and obligations**, which, much like the first one, emphasizes the desire to achieve a balance in the Agreement.

20 Finally, the recital is modified by the phrase, "**while giving due respect to national policy objectives**". At first sight it is not entirely clear whether the modification refers to the part of the third recital starting with "aimed at", *i.e.* the goals of the trade rounds, or the whole recital. Neither the Spanish version which states, "respetando debidamente al mismo tiempo los objetivos de las políticas nacionales", nor the French version, "compte

[46] See para. 20.
[47] See paras 21–22.
[48] *Jackson*, Law of GATT, 218; *Matsushita et al.*, 261.
[49] *Jackson*, Law of GATT, 218–221; *Matsushita et al.*, 262.
[50] On the procedures used see Council for Trade in Services, Special Session, Guidelines and Procedures for the Negotiations on Trade in Services, Adopted by the Special Session of the Council for Trade in Services on 28 March 2001, S/L/93, 29 March 2001, prescribing bilateral, plurilateral or multilateral negotiations mainly using the request-offer approach. For details see *Delimatsis*, Article XIX GATS, para. 26.
[51] See *von Bogandy*, Max Planck CWTL, Vol. 2, Preamble WTO Agreement, para. 21.

dûment tenu des objectives de politique nationale" is entirely clear in that respect, either. However, a closer analysis shows that the phrase modifies the whole recital because it is introduced by a comma. The modification clarifies that the principle of progressive liberalization is not to prevent Members from pursuing their national policy objectives. Rather, it allows them fully to pursue such objectives by not undertaking commitments in certain sectors. The due respect to national policy objectives, also an issue in other provisions of the WTO agreements,[52] is a recognition of Members' sovereignty.[53] As regulation of trade in services usually takes place within a Member rather than at the border (as is at least partly the case with goods), the GATS influences internal domestic laws and regulations to a much greater extent than the GATT.[54] Hence it is no surprise that the GATS Preamble, unlike the Preambles to the WTO Agreement and the GATT 1947, contains both this caveat and a further expression of national sovereignty in recital 4.[55]

V. Limits of the GATS—Domestic Regulation (Rec. 4)

21 Recital 4 contains an important concession to national sovereignty: the **right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives**. The recital thereby adds to the expression of national sovereignty contained in recital 3.[56] It introduces one of the major challenges of the GATS: the apparent conflict between progressive liberalization[57] and the right of Members to regulate the supply of services within their territories. Members agreed that some degree of regulation of trade in services was entirely indispensable, *e.g.* to ensure the competence of service providers.[58] The precise relationship between regulation and liberalization, however, is contested. While some authors regard the GATS as favouring liberalization over permitting domestic regulation,[59] others—at least politically—favour the right of Members to regulate over liberalization. Finally a third approach seeks a balance between the two diverging poles.[60] The fact that recital 4 was initially intended to be part of Art. VI, giving it greater force, and now merely constitutes part of the Preamble seems to

[52] See *e.g. Hestermeyer*, Max Planck CWTL,Vol. 3, Art. III GATT 1994, para. 41.
[53] *Steinberger*, in: *Bernhardt* (ed.), EPIL IV.1, 500–521; *Jackson*, New Approach, 782–802.
[54] *Footer & George*, in: *Macrory et al.* (eds), 799, 802.
[55] See paras 21–22.
[56] See para. 20.
[57] See paras 17–19.
[58] See Art. VI; *Young*, Denv. J. Int'l L. & Pol'y 32 (2003), 55, 61.
[59] *Park*, Sw. J. L. & Trade Am. 12 (2006), 459, 509.
[60] See in-depth *Krajewski*, National Regulation, 58; in favour of a balance: *Ortino*, JIEL 9 (2006), 117, 142.

favour the first position.[61] However, the clear wording of the provision shows no such hierarchy and favours a balance between the two poles, and the Vienna Convention on the Law of Treaties allows recourse to the drafting history only as a supplementary means of interpretation.[62] Also, the context of the recital, namely the aim of securing an overall balance of rights and obligations mentioned in recital 3,[63] favours a balance between liberalization and the right to regulate.[64] Hence, the recital favours an interpretation of GATS with deference to national regulatory autonomy,[65] *e.g.* of Art. VI explicitly tackling the subject of domestic regulation.[66] Such an interpretative approach also takes account of the often criticized democratic legitimacy deficit of the WTO.[67]

22 Recital 4 recognizes the **particular need of developing countries to exercise this right** and justifies this particular need with **asymmetries existing with respect to the degree of development of services regulations in different countries**. The particular need of developing countries to exercise the right to regulate is an expression of development of developing countries as one of the main goals of GATS. The language takes account of the fact that the service sectors of developing countries and their service sector regulations are not competitive internationally.[68] However, the reference to the "particular need" of developing countries to exercise the right to regulate is of little legal value. Recital 4 gives the right to all Members. The interests of developing countries are taken up again in recitals 5 and 6 and will be covered in greater depth below.

VI. Developing Countries (Rec. 5)

23 The last two recitals of the Preamble are dedicated to the interests of developing countries[69] and LDCs. Recital 5 sets out the objective of **facilitating the increasing participation of developing countries in trade in services and the expansion of their service exports**. The recital—in hortatory words—appeals to Members to liberalize to enable developing countries to participate increasingly in service trade and expand

[61] See para. 6.
[62] Art. 32 VCLT.
[63] See para. 19.
[64] *Voon*, UCLA Ent. L. Rev. 14 (2007), 1, 14.
[65] *Krajewski*, National Regulation, 62 (also mentioning the need to take guidance from universal and inalienable human rights); *Lang*, JIEL 7 (2004), 801, 835; see also *von Bogdandy*, in: *Frowein & Wolfrum* (eds), 609, 658.
[66] See *Krajewski*, Article VI GATS, para. 74.
[67] *Howse & Nicolaïdis*, in: *Porter et al.* (eds), 227, 244.
[68] *Michaelis & Jessen*, in: *Hilf & Oeter* (eds), 601, 615, para. 40.
[69] For the term see above, para. 14.

their service exports. It cannot help in the interpretation of commitments already made by developing country Members.[70]

24 Unlike GATT, GATS does not contain provisions on special and differential **treatment of developing countries**. It does not aim to achieve the developmental goal via preferential arrangements or excluding certain sectors from liberalization, but rather via liberalization itself, *i.e.* through commitments pursuant to parts III and IV of GATS, as is provided for in Art. IV.[71] Given the importance of the development objective in the Preamble the GATS at first glance contains surprisingly few provisions favouring developing countries, *e.g.* wider access to information via contact points,[72] more flexibility with respect to integration agreements,[73] technical cooperation,[74] more flexibility with respect to conditions on access to and use of public telecommunications transport networks.[75] The absence of special rules can be explained by the positive list approach of GATS, leaving developing country Members the right to liberalize only the sectors they intent to liberalize. Developing country Members have made ample use of this possibility and have generally committed on far fewer sectors than developed country Members.[76] Their right to continue committing fewer sectors in the process of progressive liberalization is explicitly preserved by Art. XIX:2, providing that "[t]here shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV". Developing country Members are hence not bound by the principle of reciprocity.[77]

25 One of the means, but explicitly not the only one ("***inter alia***"), of reaching the objective of recital 5 is "**through the strengthening of their domestic services capacity and its efficiency and competitive-**

[70] *Mexico—Telecoms*, WT/DS204/R, para. 7.214.

[71] *Michaelis & Jessen*, in: *Hilf & Oeter* (eds), 601, 615, para. 40; *Footer & George*, in: *Macrory et al.* (eds), 799, 832.

[72] Art. IV:2, see also Art. III:4.

[73] Art. V:3.

[74] Art. XXV:2.

[75] Para. 5 lit. g of the Annex on Telecommunications. See in-depth: *Koehler*, 140–141; *Michaelis & Jessen*, in: *Hilf & Oeter* (eds), 601, 615 *et seq.*, paras 40–46. See also Arts III:4, XII:1, XV:1 and para. 6 of the Annex on Telecommunications for further provisions recognizing the needs of developing countries.

[76] See Council for Trade in Services, Recent Developments in Services Trade, Overview and Assessment, Background Note by the Secretariat, S/C/W/94, 9 February 1999, para. 24.

[77] *Koehler*, 141; *Michaelis & Jessen*, in: *Hilf & Oeter* (eds), 601, 616, para. 45. For the concept see Arts XXVIIIbis:1 GATT 1994, XXXVI:8 GATT 1994, *Jackson*, Law of GATT, 241–245.

ness". Whereas "their" evidently refers to "developing countries" in the first part of the recital, the term "its" is clearly a drafting error, as it seems to refer to "domestic services capacity". In the Spanish version the reference is also wrong as the word "su" in "mediante, en particular, el fortalecimiento de su capacidad nacional en material de servicios y de su eficacia y competividad" refers to the words "los países en desarrollo" (the developing countries) in the first part of the recital. The French version "grâce, entre autres, au renforcement de leur capacité nationale de fournir des services ainsi que de l'efficience et de la compétivité de ce secteur" helps to solve this issue, as efficiency and competitiveness clearly refer to the service sector of the developing countries.

VII. Least-Developed Countries (Rec. 6)

26 In recital 6 Members **take particular account of the serious difficulty of LDCs in view of their special economic situation and their development, trade and financial needs**. According to Art. XI:2 WTO Agreement **LDCs** are those recognized as such by the United Nations. The criteria the United Nations uses are per capita income, human assets and economic vulnerability.[78] The GATS takes account of the special situation of LDCs in Arts IV:3, XIX:3 and para. 6 lit. d of the Annex on Telecommunications. There are numerous ways in which Members can take the difficult situations of LDCs into account. In the Doha Work Programme they have, *e.g.*, done so by acknowledging that LDCs are not expected to undertake new commitments.[79]

[78] United Nations Committee for Development Policy, Report on the Sixth Session (20 March—2 April 2004), Economic and Social Council Official Records 2004, Supplement No. 13, E/2004/33; A current list by the UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States can be found at <http://www.un.org/special-rep/ohrlls/ldc/list.htm> (last visited 1 October 2007).

[79] Ministerial Conference, Sixth Session, Hong Kong, 13–18 December 2005, Doha Work Programme, Ministerial Declaration, Adopted on 18 December 2005, WT/MIN(05)/DEC, 22 December 2005, para. 26.

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PART I SCOPE AND DEFINITION

Article I GATS
Scope and Definition

1. This Agreement applies to measures by Members affecting trade in services.
2. For the purposes of this Agreement, trade in services is defined as the supply of a service:
   a) from the territory of one Member into the territory of any other Member;
   b) in the territory of one Member to the service consumer of any other Member;
   c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
   d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.
3. For the purposes of this Agreement:
   a) "measures by Members" means measures taken by:
      (i) central, regional or local governments and authorities; and
      (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

   In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;
   b) "services" includes any service in any sector except services supplied in the exercise of governmental authority;
   c) "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

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A. General

I. Status of the Norm in the Context and Structure

1 Art. I forms Part I of the Agreement, which, like the Article itself, is entitled "Scope and Definition". It preceeds Part II on "General Obligations and Disciples" since it contains **elementary provisions** which are relevant for and underlie the application of any other provision of the Agreement, not least the central obligations of the Members which have the function to promote the liberalization of trade.

2 Art. I:1 determines the **scope of the Agreement**. It regulates the conditions under which the Agreement both finds application and, consequently, distinguishes itself from other agreements. Art. I:2 and 3 provide for **definitions** which refer to individual elements of the determination in Art. I:1 and, thus, help to elaborate on the regulatory, institutional and sectoral aspects[1] of the scope of the Agreement. Moreover, they explain the use of certain basic notions of the whole Agreement. They are expanded by the more specific definitions that can be found in the glossary in Art. XXVIII. It would have been possible to list all definitions exclusively in the latter

[1] See *Krajewski*, JIEL 6 (2003), 341, 347.

Article which belongs to the final provisions, but the drafters eventually preferred a solution where the question whether the Agreement is applicable can be answered, in principle, on the basis of just Art. I, without referring to further provisions of the Agreement. Thus, Art. I functions as a complex and concentrated **entrance norm**. The definitions in Art. XXVIII give some additional information or clarification with regard to certain aspects of the definitions in Art. I, in particular by way of example.

II. Historical Background

3 In the first major draft of the GATS, the **July 1990 Draft of the Chairman of the Group of Negotiations on Services**,[2] Art. I consisted of only one paragraph reading that for the purposes of this framework trade in services should include transactions involving cross-border supply of the services; cross-border movement of consumers; cross-border movement of factors of production (under conditions of specificity of purpose, discreteness of transactions and limited duration). This was a non-conclusive enumeration of examples of trade in services.

4 Conversely, the **Chairman's December 1990 Draft**[3] in principle already exhibited the structure of the today provision. The previous draft of the norm, with a revised text, became Art. I:2. Art. I:2 lit. c of the new draft said that one mode of supply was supply "by natural persons of one Party in the territory of any other Party". Art. I:2 lit. d of the draft mentioned as a further mode supply "through the (commercial) presence (of service providing entities/juridical persons) of one Party in the territory of any other Party"; thereby, it offered as an additional textual element the formulation that the provision of service should be "for a limited duration and a specific purpose". Art. I:3 lit. a (ii) of the draft mentioned as measures by parties measures taken by non-governmental bodies in the exercise "of governmental powers (or in the grant of governmental benefits)". Finally, Art. I:3 lit. a (iii) of the draft, the inclusion of which was proposed by several participants with its precise location to be determined later, stated that "[e]ach Party is fully responsible under the Agreement for the observance of all provisions of the Agreement and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory".

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[2] Group of Negotiations on Services, Uruguay Round, Draft, Multilateral Framework for Trade in Services, Introductory Note by the Chairman on the GNS Negotiations on a Framework Agreement, MTN.GNS/35, 23 July 1990.

[3] Trade Negotiations Committee, Uruguay Round, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Part 3, Revision, MTN. TNC/W/35–3/Rev.1, 3 December 1990, Annex II.

5 The **Dunkel Draft** of December 1991[4] revised the previous draft only in a very few points. Art. I:2 lit. c and lit. d were changed over. The new Art. I:2 lit. c used the term "service providing entities" instead of "juridical persons" and no longer contained the proposed restrictions concerning duration and purpose. In Art. I:3 lit. a (ii) of the draft the former "governmental powers" was replaced by "powers delegated by central, regional or local governments or authorities", which clarified that the circle of relevant delegates is not limited to those at the level of the state's government but includes authorities below that level which, according to a non-etatistic understanding not least of municipality in many countries, may not be regarded as parts of the state. The previous Art. I:3 lit. a (iii) lost its number, but its content remained in the same place. Furthermore, the new version no longer stipulated separately that each party was fully responsible for the observance of all provisions of the Agreement. Rather, it assumed that the Members had this responsibility and deduced from it the obligation to take measures to ensure that regional and local governments and authorities and non-governmental bodies within their territory observed the GATS provisions.

III. Relationship Between GATS and GATT 1994

6 Although the GATS covers trade in services and the GATT 1994 trade in goods, which seems to indicate a clear division between the scopes of the two agreements, there is the **possibility of overlap**. As the Panel in *Canada—Periodicals* held, overlaps between GATS and GATT 1994 cannot always be avoided. Rather, overlaps between the subjects of disciplines in GATT 1994 and in GATS were inevitable, and they were going to increase further with the progress of technology and the globalization of economic activities. The Panel considered that such overlaps would not undermine the coherence of the WTO system. It mentioned that in fact certain types of services which fell into the scope of the GATS, such as transport and distribution, were also recognized as a subject of disciplines under Art. III:4 GATT 1994. Moreover, advertising services had long been associated with the disciplines under Art. III GATT 1994 as a whole.[5]

7 While in *Canada—Periodicals* the Appellate Body did not find it necessary to rule on the question whether there could be overlaps between the scope of application of GATT 1994 and GATS,[6] in *EC—Bananas III* it confirmed the approach of the Panel in *Canada—Periodicals*. The Appellate Body rejected the notion that the GATT 1994 and the GATS were "mutually exclusive

[4] Trade Negotiations Committee, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA, 20 December 1991.

[5] Panel Report, *Canada—Periodicals*, WT/DS31/R, para. 5.18.

[6] See Appellate Body Report, *Canada—Periodicals*, WT/DS31/AB/R, 21–22.

agreements" and held that there was a **"category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS"**.[7]

B. Scope of the GATS (Art. I:1)

I. Overview

8 In accordance with Art. I:1, the Agreement applies to measures by Members affecting trade in services. That provision makes it clear that the GATS, like other WTO agreements, is not an agreement regulating trade, but an agreement regulating government measures affecting trade.[8] However, Art. I:1 is not a non-binding prescription of objectives.[9] Rather, it **determines normative prerequisites** that must be fulfilled before a measure can be judged by the standards of the relevant special provisions in the GATS.

9 That was clearly pointed out by the Appellate Body in *Canada—Autos*. In that case, the Panel had argued that the determination of whether a measure affected trade in services could not be done in isolation from examining whether the effect of such a measure was consistent with the Member's obligations and commitments under the GATS.[10] The Appellate Body strongly criticized this approach because it neglected the **fundamental structure and logic** of Art. I:1. It argued that the structure and logic of Art. I:1, in relation to the rest of the GATS, required that determination of whether a measure is covered by the GATS must be made before the consistency of that measure with any substantive obligation of the GATS could be assessed. Therefore, the Panel should have inquired, as a threshold question, whether the measure was within the scope of the GATS by examining whether the measure affected trade in services within the meaning of Art. I. In failing to do so, the Panel had erred in its interpretive approach.[11]

10 Thus, Art. I:1 contains the initial points of examination that must be complied with before other GATS provisions can be applied. This programme has **four elements**: There must, firstly, be services which must, secondly,

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[7] Appellate Body Reports, *EC—Bananas III*, WT/DS27/AB/R, para. 221. See also below, paras 20, 23 and 30.

[8] *Krajewski*, National Regulation, 62.

[9] *Michaelis*, in: *Hilf & Oeter* (eds), 375, 384, para. 23.

[10] Panel Report, *Canada—Autos*, WT/DS139/R, WT/DS142/R, para. 10.234.

[11] Appellate Body Report, *Canada—Autos*, WT/DS139/AB/R, WT/DS142/AB/R, paras 150–152.

be objects of transboundary trade and, thirdly, a measure by a Member which, fourthly, affects this trade in services.[12]

II. "Services" (Art. I:1 and Art. I:3 lit. b)

1. Notion of Services

11 The GATS does not define the notion "services" as such, since the contracting parties could not agree a definition.[13] Art. I:3 lit. b states only that "services" include any service in any sector, which clarifies that the scope of the Agreement is not limited to certain types of services or to services in certain sectors. Also the Appellate Body had not hitherto found it necessary to define "services" in abstract terms; rather, it took a **programmatic approach** indicating which sector was affected in the cases that had so far been decided under GATS.[14]

12 A selective terminological limitation of what is a service in fact cannot easily be found.[15] As early as in the 1930s, economists developed analyses based on the assumption that economic activities should be subdivided into three major sectors.[16] Accordingly, the exploitation of natural resources forms the so-called primary sector, whereas the enrichment of the natural resources and their transformation into tradable goods fall into the so-called secondary sector. All other economic activities which are covered neither by the primary nor by the secondary sector fall into the so-called **tertiary sector**.[17] To the extent that the branches envisaged as belonging to the tertiary sector are specified in more detail, all those economic sectors which are today considered to be services are included.[18] Thus, the concept of the tertiary sector can contribute to the containment of the material relative to the field of services.[19]

13 However, some uncertainties remain. On the one hand, the content of the tertiary sector can only be determined by **negative assignment**, which means by incorporating all those economic activities that do not belong to one of the first two sectors. Consequently, the tertiary sector is likely

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[12] *Zacharias*, WissR 38 (2005), 290, 292; see *Canada—Autos*, WT/DS139/AB/R, WT/DS142/AB/R, para. 155; *Pitschas*, RIW 49 (2003), 676, 677.

[13] See *Barth*, EuZW 5 (1994), 455; *Krajewski*, Wirtschaftsvölkerrecht, 136–137, para. 432.

[14] See *Canada—Autos*, WT/DS139/AB/R, WT/DS142/AB/R, para. 157; *EC—Bananas III*, WT/DS27/AB/R, paras 323–228.

[15] See for the following, *e.g.*, *Koehler*, 28–30.

[16] See *Fisher*, Econ. J. 43 (1933), 379–389; *Fisher*, Econ. Rec. 15 (1939), 24–38; *Clark*; *Fourastié*; *Delaunay & Gadrey*, 75–84.

[17] See *Krommenacker*, 4.

[18] See *Clark*, 6, 375; *Carreau et al.*, 292, para. 448.

[19] *Blankart*, Aussenwirtschaft 44 (1989), 5, 7; see also *H. B. Malmgren*, World Econ. 8 (1985), 11, 12–18.

to become a kind of collecting tank for all those activities that are barely classifiable,[20] since the approach lacks a definition containing substantive criteria for services.[21] On the other hand, the concept of the three sectors does not recognize, for instance, that within the processes of the production of goods, which are generally attributed to the secondary sector, there may take place activities that are to be qualified as services,[22] in particular if outside companies are involved in maintaining or repairing machines that are used for production.[23]

14 A first positive attempt to determine the notion of services referred to the **International Standard Industry Classification** (ISIC)[24] in its 2nd revision 1968.[25] According to that classification, the products of certain sectors, professions and enterprises are generally regarded as services. The classification lists the major divisions of infrastructure (electricity, gas and water; construction; transport, storage and communication), trade (wholesale and retail trade, restaurants and hotels), business services (financing; insurance; real estate), and public services (community, social and personal services), each of them with a series of subdivisions.

15 The United States used a similar Standard Industrial Classification (SIC),[26] which was replaced in 1997 by the **North American Industry Classification System** (NAICS).[27] NAICS was developed jointly by the US, Canada and Mexico to provide new comparability in statistics about business activity across North America. In its 2002 version it lists 17 major service divisions, among them beside divisions already mentioned in the ISIC, *e.g.* the following: information; professional, scientific and technical services; management of companies and enterprises; educational services; health care and social assistance; art, entertainment and recreation; accommodation and food services. All divisions are further defined by dozens or rather hundreds of subdivisions. NAICS, which is currently under revision and will be replaced in the future by the North American Product Classification System (NAPCS),[28] is very complex and seems to mention any item that is currently regarded as forming part of the services sector,

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[20] *Eiteljörge*, in: *Klein et al.* (eds), 137, 138.
[21] See *Delaunay & Gadrey*, 83–84.
[22] *Krommenacker*, 4.
[23] See *Cass & Noam*, in: *Friedmann & Mestmäcker* (eds), 43, 46–48.
[24] Available at <http://laborsta.ilo.org/applv8/data/isic2e.html> (last visited 1 October 2007).
[25] See *Eiteljörge*, in: *Klein et al.* (eds), 138–139.
[26] Available at <http://www.osha.gov/pls/imis/sic_manual.html> (last visited 1 October 2007).
[27] Available at <http://www.census.gov/epcd/naics02/naicod02.htm> (last visited 1 October 2007).
[28] See <http://www.census.gov/eos/www/napcs/napcstable_unfinalized.html> (last visited 1 October 2007).

not just in North America. However, the list, being similar to the ISIC, has the disadvantage that it is at best stocktaking for the moment and cannot by itself handle future developments; any change of production methods, technologies or economic assessment that is relevant for the stock of services requires a revision of the list.

16 Consequently, it seems to be appropriate to find some **abstract characteristics** by which to determine the notion of services. On the basis of an analysis of the existing classification lists, the services sector is defined in literature as industries that provide time and place and form utility, while bringing about a change in or for the recipient of the service.[29] Furthermore, services are described as "immaterial goods" with a series of qualities like **intangibility**,[30] **invisibility**,[31] **lack of suitability for storage**,[32] **lack of transportability**,[33] and **coincidence of production and consumption**.[34]

17 One must admit that these criteria are useful only to a certain extent.[35] Services are in fact in the main not embodied in concrete objects and, thus, **intangible** as such. For instance, conveyance of news by the various forms of telecommunications is not substantive. Also the service delivered to a passenger is not laid down in a corporeal object but manifests itself in a translocation. But services often involve materially tangible objects, such as in particular when faulty machines are repaired.[36] Moreover, there are some services that are embodied in objects which can be traded,[37] a phenomenon which had been called in literature a "disembodiment of services".[38] An example of this is the making of computer programs the result of which is software inscribed on a data carrier or memory medium.

18 Services that are not embodied in corporeal objects are **invisible** in the sense that they cannot be caught by the typical border controls.[39] But there often exist visible manifestations of the trade in such services, for instance the entry of the client or of the attorney into the country in which the

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[29] *Riddle*, in: *Giarini* (ed.), 83, 86.
[30] *Engel*, in: *Oppermann & Molsberger* (eds), 213, 214.
[31] *Carreau et al.*, 291 (para. 446); *Engel*, in: *Oppermann & Molsberger* (eds), 213, 214.
[32] *Ipsen & Haltern*, 85.
[33] *Sindelar*, 9.
[34] See *Eiteljörge*, in: *Klein et al.* (eds), 137, 139; *Wegmann & Müller*, 11.
[35] See *Koehler*, 31–33 with references.
[36] See *Cass & Noam*, in: *Friedmann & Mestmäcker* (eds), 43, 46; *Grubel*, in: *Vosgerau* (ed.), 257, 259.
[37] See *Krommenacker*, 5.
[38] *Bhagwati*, World Econ. 7 (1984), 133, 137–138.
[39] *Koehler*, 32.

service of legal advice is going to be delivered, or the opening of a branch by an insurance company.[40]

19 A number of services are characterized by the service supplier and the consumer staying at the same place when the service is delivered. Thus, physical closeness is often a prerequisite for trade in services. In international trade, this closeness can be reached by the entry either of the service supplier or of the consumer into the other's country or by a permanent branch of the service supplier being established in the country of the consumer.[41] While material goods can normally be stored and transported, a service is "consumed" at the moment in which it is supplied. But **lack of suitability for storage** and **lack of transportability** are also not criteria that can be used in every case to describe services in a clear-cut manner. Since there are services sectors in which the services are embodied in corporeal goods, suitability for storage and transportability may exist (*e.g.* with a written expert opinion or a computer program stored on a disk). Moreover, for other kinds of services these two characteristics appear to be irrelevant, for example when legal advice is given not by means of a conversation face to face but *via* a telephone call, fax or email.[42]

20 Against the background of the abovementioned difficulties in defining services positively on the basis of the criterion of immateriality and some related aspects, it is argued that it was practical to abstain from any definition of the term "services".[43] This view is, to a certain extent, plausible since in economic reality one and the same event can often be understood both as the production of goods and as the supply of services.[44] According to that approach, the commercial activities which are caught by the notion of services can only be determined by enumeration.[45] Hence, in 1991, in the course of the negotiations on the GATS, the GATT Secretariat presented a **"Services Sectoral Classification List"**[46] which followed the "Provisional Central Product Classification" of the UN (UN CPC).[47]

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[40] See *Grubel*, in: *Vosgerau* (ed.), 257, 258; *Breuss*, Aussenwirtschaft 45 (1990), 105, 108–109.

[41] *Sampson & Snape*, World Econ. 8 (1985), 171, 172; *Stern & Hoekman*, Issues, World Econ. 10 (1987), 39, 40–42; *Bhagwati*, in: *Giarini* (ed.), 3, 7.

[42] *Koehler*, 33.

[43] *Gershuny & Miles*, 250; *Krommenacker*, 8.

[44] See *Bhagwati*, in: *Giarini* (ed.), 3, 7.

[45] See *Krommenacker*, 8; *Carreau et al.*, 292 (para. 447).

[46] Group of Negotiations on Services, Uruguay Round, Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120, 10 July 1991.

[47] Provisional Central Product Classification, Statistical Papers, Series M No. 77, United Nations, 1991. The UN CPC which was the basis for the GATT secretariat's classification has been replaced by the 2002 version, which contains different subcategories and classification numbers from the Provisional CPC. The current version is Central Product Classification

21 That List is used as a guide for the **classification** of services by most of the WTO Members; in particular, the Members formulate their lists of specific commitments along the sectoral divisions made by that List. Unlike the ISIC or the NAICS, the Services Sectoral Classification List is restricted to services; it does not mention any product even from the first or second sector or rather the extractive and manufacturing sectors. It enumerates 155 kinds of services which are grouped into twelve sectors. These sectors are: business services; communication services; construction and related engineering services; distribution services; educational services; environmental services; financial services; health related and social services; tourism and travel related services; recreational, cultural and sporting services; transport services; and other services not included elsewhere. The Services Sectoral Classification List thus names all commercial activities which were regarded as services in economic reality at a certain point in time; to that extent, there is no difference from the ISIC or the NAICS, although the List may be useful for the purposes of the GATS. It can function as a **positive indicator** of whether an activity belongs to the services sector. However, the Services Sectoral Classification List has the same weaknesses as the abovementioned enumerative lists: On the one hand, it is not clear why one or another activity has or has not been included in the catalogue.[48] On the other hand, and this is connected with the first aspect, it does not provide for an internal standard for the **qualification** of "new" commercial activities brought about by technological and economic progress.[49] It merely reveals decisions about the qualification of certain activities as services which were found outside the legal system of WTO/GATT in the past. Although the Services Sectoral Classification List is itself flexible as a result of the twelfth sector ("other services not included elsewhere"), which makes it possible to **classify** new activities under the condition that they are to be regarded as services, this open disposition does not help with regard to the preceding decision about the qualification of the activities. Hence, new developments must sooner or later lead to an explicit updating of the Services Sectoral Classification List if the List is to give contemporary information about the activities that are qualified as services.

22 After all, it seems to be appropriate to use, merely as a **working formula**, a definition which, on the one hand, stresses the immateriality of the services but, on the other hand, also makes it clear that this criterion must be handled with care. Thus, one could say, as proposed in literature,

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Version 1.1, ST/ESA/STAT/SER.M/77/Ver.1.1, E.03.XVII.3, see also <unstats.un.org/unsd/cr/family2.asp?Cl=16> (last visited 1 October 2007).

[48] *Cass & Noam*, in: *Friedmann & Mestmäcker* (eds), 43, 48–49.

[49] See *Ehlermann & Campogrande*, in: *Petersmann & Hilf* (eds), 481, 485.

that services are **commercial activities which are not embodied directly in tradeable, tangible products**.[50]

2. Distinguishing Services From Goods

23 Whereas most services can, without any doubt, be qualified as such, it is disputed whether **digital products** are goods or services. These are products which can be stored as data, *e.g.* texts, computer programs, music or films. The end-user can buy these data in an embodied form (*e.g.* print-outs, disks, CDs, DVDs). In that case, the product is one to which the GATT 1994 applies. However, the record can also be downloaded, stored or used directly from networks like the internet or radio broadcasting. According to the Services Sectoral Classification List,[51] they, then, must be regarded as **communications services** for which the GATS is exclusively applicable. In contrast to this formally unambiguous classification, some WTO Members seek to put electronically communicable products such as so-called virtual goods under the regime of the GATT 1994 that, at least with regard to the audiovisual sector, shows a higher level of liberalization. The reason for this proposal is the controversy about a cultural sectoral exemption for international trade.[52]

3. Comprehensive Approach

24 As laid down in Art. I:3 lit. b, the Agreement is moulded by a comprehensive approach:[53] It should be applicable in principle to any service in any sector. Thus, it should cover **any service which can be traded commercially**[54] or in competition with other service suppliers; no service sector should be excluded *a priori* from the process of liberalization.[55] Thereby, an **economic view** is decisive; in principle any service which is either demanded or consumed is capable of being an object of trade.[56]

4. Special Exceptions

25 The wide scope of the GATS provides for two exceptions:[57] The GATS, firstly, does not apply to **services supplied in the exercise of governmental authority** in accordance with Art. I:3 lit. b.[58] Irrespective of

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[50] *Cass & Noam*, in: *Friedmann & Mestmäcker* (eds), 43, 39; *Mestmäcker*, in: *Friedmann & Mestmäcker* (eds), 9, 13; *Koehler*, 35.

[51] MTN.GNS/W/120.

[52] See *Michaelis*, in: *Hilf & Oeter* (eds), WTO-Recht, 375, 387, para. 27 with references.

[53] See *Koehler*, 90–91; *Messerlin*, 228.

[54] *Öhlinger*, 71.

[55] *EC—Bananas III*, WT/DS27/AB/R, para. 220; see also *Barth*, EuZW 5 (1994), 455; *Sinclair*, 16.

[56] *Zacharias*, WissR 38 (2005), 290, 293; critical in this regard *Sturn*, in: *Prisching et al.* (eds), 117, 121–126.

[57] See *Messerlin*, 229; *Michaelis*, in: *Hilf & Oeter* (eds), 375, 387, para. 28.

[58] See below, paras 57–68.

the sector to which they may belong, these services are, contrary to the general rule, *a priori* excluded from the scope of the GATS and, thus, from the liberalization negotiations under the GATS. The second exception is laid down in para. 2 of the Annex on Air Transport Services. This provision says that the Agreement shall not apply to measures affecting **traffic rights** and services directly related to the exercise of traffic rights.[59]

III. Transboundary Trade

26 The trade in services must be transboundary in nature and thus have an **international dimension**. The question when this prerequisite is satisfied is answered by Art. I:2. This provision, which defines "trade in services" in the sense of the GATS, explains in which way a service must be delivered to be regarded as a transaction between economic subjects of different Members[60] by listing four **modes of suppl**y.[61] Thereby, the four modes of supply refer to the service supplier and the user or consumer of the service. They differentiate by means of the origin of both (nationality) and the kind and length of the stay of the service supplier or consumer.[62] This differentiation must be understood against the background that the immaterial service itself, unlike the product, cannot be attributed to an origin,[63] so that there must be an alternative starting-point.

IV. "Measures by Members"

27 In accordance with Art. I:1, there must be a **measure** by a Member. The term "measures by Members" is defined in Art. I:3 lit. a insofar as it names the levels and authorities which may take such measures. "Measure" must be understood broadly; it includes **any barrier to trade in services**.[64] Art. XXVIII lit. c contains typical examples of measures by Members affecting trade, but it does not limit the broad understanding of the notion of measures to them.[65]

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[59] See also *WTO*, Handbook, 6–7.
[60] *Koehler*, 92.
[61] See below, paras 37–47.
[62] See *Chang et al.*, JWT 33 (1999) 3, 93, 94–95.
[63] See *Michaelis*, in: *Hilf & Oeter* (eds), 375, 389, para. 36. In general about the principle of the land of origin under the GATS *Abu-Akeel*, Geo. Wash. J. Int'l L. & Econ. 32 (1999), 189, 203–206.
[64] See *Koehler*, 99; *Michaelis*, in: *Hilf & Oeter* (eds), 375, 390, para. 38; *Zdouc*, Legal Problems, 110–111. See in detail below, paras 48–55.
[65] *Michaelis*, in: *Hilf & Oeter* (eds), 375, 391–392, para. 44.

V. "Affecting Trade"

The GATS applies only to such measures by Members which affect trade in services. This can be understood in two ways: on the one hand, it is not necessary for a measure to regulate or directly aim at influencing trade in services; rather, even **non-final**, **indirect** and ***de facto* restrictions** are sufficient to broaden the scope of the GATS.[66] On the other hand, the measure must have at least **some effect** on trade in services.[67] As indicated by Art. XXVIII lit. c, this can in particular be the case when there are measures relating to, firstly, the purchase, payment or use of a service, secondly, access to and use of a service, in connection with supply, where such service is required by the Member to be offered to the public generally, or, thirdly, the presence, including commercial presence, of persons of one Member for the supply of a service in the territory of another Member.[68] *28*

Based on the ordinary meaning of the word **"affecting"**, the Appellate Body held in *EC—Bananas III*, which dealt with the question whether the GATS is applicable in cases where measures regulating trade in goods (*e.g.* import licensing procedures) have indirect negative effects on trade in services (*e.g.* **trade in wholesale services** or distribution services concerning those goods), that the **term should be interpreted broadly**. It argued that the use of the term "affecting" reflected the intent of the drafters to give a broad scope to the GATS. The ordinary meaning of the word "affecting" implied a measure that has "an effect on", which indicated a broad scope of application.[69] This interpretation was further reinforced by the conclusions of previous panels that the term "affecting" in the context of Art. III GATT 1994 was wider in scope than such terms as "regulating" or "governing".[70] This interpretation was held to be fostered by the systematic order of the GATS. The Appellate Body in that context pointed both to the broad notion of "services" in Art. I:3 lit. b and to the definition of the term "supply" in Art. XXVIII lit. b.[71] *29*

Regarding the **applicability of GATS and/or GATT 1994**, the Appellate Body identified three categories of measures: first, measures could fall exclusively within the scope of the GATT 1994, when they affect trade in *30*

[66] *Zacharias*, WissR 38 (2005), 290, 302; *Michaelis*, in: *Hilf & Oeter* (eds), 375, 391, para. 43; *Zdouc*, Legal Problems, 111.

[67] See *Krajewski*, National Regulation, 67.

[68] See *EC—Bananas III*, WT/DS27/AB/R, para. 220 clarifying that Art. XXVIII lit. c GATS does not determine the meaning of "affecting trade in services".

[69] *Ibid.*, para. 220.

[70] See, *e.g.*, the Panel Reports in the Bananas dispute: *EC—Bananas III (Ecuador)*, WT/DS27/R/ECU, *EC—Bananas III (Mexico)*, WT/DS27/R/MEX, *EC—Bananas III (US)*, WT/DS27/R/USA, para. 7.281; furthermore already the GATT Panel Report, *Italy—Agricultural Machinery*, BISD 7S/60, para. 12.

[71] *EC—Bananas III*, WT/DS27/AB/R, para. 220.

goods as goods. Secondly, measures affecting the supply of services as services would fall exclusively within the scope of the GATS. A third category of measures could be found to fall within the scope of both agreements. It was formed by measures having effects on either a **service relating to a particular article** (*e.g.* tuning or painting of a car, modernization or renovation of a ship) or a **service supplied in conjunction with a particular article** (*e.g.* installation of computer hardware). In these cases, the measures could be scrutinized under the GATT 1994 as well as under the GATS,[72] although the specific aspects of the measure examined under each agreement could be different. The Appellate Body stressed that under the GATT 1994 the focus was on how the measure affects the goods involved, whereas under the GATS the focus was on how the measure affects the supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular product fell within the scope of application of the GATT 1994 or the GATS, or both, was a matter that could be determined only on a **case-by-case basis**.[73]

31 Furthermore, the Appellate Body in *EC—Bananas III* made some statements concerning the question whether the distributors in the case fulfilled the qualification for being injured by measures affecting the supply of a service relating to bananas. The question had to be answered in the affirmative if they could be regarded as "wholesale services suppliers". The Appellate Body conceded that the operators were engaged in some activities that were not strictly covered by the definition of **"distributive trade services"** in the headnote to section 6 of the UN CPC. However, there was no question that they were also engaged in other activities involving the wholesale distribution of bananas that fell within the definition. While the principal service rendered by wholesalers and retailers was considered to be reselling merchandise, the UN CPC definition also referred to a variety of related, subordinate services that may accompany the principal service of reselling. The Appellate Body noted that these related services would include buying and importing, as it would be difficult for a wholesaler or retailer to engage in reselling without obtaining the goods by some means. Further, the Appellate Body took the view that even if a **vertically integrated company** performs other functions related to the production, importation, distribution and processing of a product, to the extent that it is also engaged in providing "wholesale trade services" and is affected by a measure of a

[72] See above, paras 6–7.

[73] *EC—Bananas III*, WT/DS27/AB/R, paras 220–221, referring to *Canada—Periodicals*, WT/DS31/AB/R, 19.

Member in its supply of those services, it is a "service supplier" for the purposes of the application of the GATS.[74]

32 In *Canada—Autos*, the Appellate Body applied the understanding of "affecting" found in *EC—Bananas III*. It affirmed that the use of the term "affecting" in Art. I:1 reflects the intention of the drafters to give broad scope to the Agreement and that particular measures could fall within the scope of both the GATT 1994 and the GATS, which can only be determined on a case-by-case basis.[75] However, the Appellate Body concluded that in cases where the same measure could be scrutinized under both the GATT 1994 and the GATS the focus of the inquiry, and the specific aspects of the measures to be scrutinized, under each agreement will be different because the subjects of the two agreements are different. Under the GATS "the focus is on **how the measure affects the supply of the service or the service suppliers involved**".[76]

33 The Appellate Body noted Canada's argument that the import duty exemption in question was not a measure "affecting trade in services" within the meaning of Art. I:1, because it was a tariff measure that affected the **goods** themselves and not the supply or distribution of services. Canada maintained that the measure did not "affect" a service supplier in its capacity as a service supplier and in its supply of a service; it fell squarely within GATT 1994 and did not involve a service relating to a particular product or a service supplied in conjunction with a particular product.[77] Nevertheless, the Panel had previously determined that the import duty exemption, granted only to manufacturer beneficiaries, bore upon conditions of competition in the supply of distribution services. It had therefore held that the import duty exemption fell into the category of measures identified by the Appellate Body in *EC—Bananas III* as involving "a service relating to a particular good or a service supplied in conjunction with a particular good" which "could be scrutinized under both the GATT 1994 and the GATS".[78]

34 Referring to its analysis in *EC—Bananas III*, the Appellate Body confirmed that a company which is **vertically integrated** with producers, ripeners and retailers and perhaps even performs other functions related to the production, importation, distribution and processing of a product to the extent that it is also engaged in providing **"wholesale trade services"** and is therefore affected in that capacity by a particular measure of a Member

[74] *EC—Bananas III*, WT/DS27/AB/R, paras 225–227.
[75] *Canada—Autos*, WT/DS139/AB/R, WT/DS142/AB/R, para. 159.
[76] *Ibid.*, para. 160; see for the last statement *EC—Bananas III*, WT/DS27/AB/R, para. 221.
[77] *Canada—Autos*, WT/DS139/AB/R, WT/DS142/AB/R, para. 161
[78] *Canada—Autos*, WT/DS139/R, WT/DS142/R, para. 10.239.

in its supply of these "wholesale trade services" is a service supplier within the scope of the GATS.[79]

35 On the basis of this argument, the Appellate Body criticized the Panel for failing to examine any evidence relating to the provision of wholesale trade services in motor vehicles within the Canadian market, and, as a result, for not having made any factual findings on the structure of the market for motor vehicles in Canada, or the companies that actually provide wholesale trade services in motor vehicles. Thus, the Appellate Body criticized the Panel for its consequent failure to examine **whether or how the import duty exemption affected wholesale trade service suppliers in their capacity as service suppliers**.[80]

36 The Appellate Body found that the Panel's statement saying that the import duty exemption bore upon conditions of competition in the supply of distribution services, regardless of whether it directly governed or indirectly affected the supply of such services, was an insufficient basis for a legal finding. A proper analysis of whether the measure is one "affecting trade in services" under Art. I:1 would have required the Panel to show that the import duty exemption "affects" wholesale trade services in motor vehicles **as services**, or wholesale trade service suppliers of motor vehicles **in their capacity as service suppliers**. The Appellate Body argued that the Panel ought to have **examined all the relevant facts**, including **who supplies wholesale trade services** of motor vehicles through a commercial presence in Canada, and **how such services are supplied**.[81] Thus, determining whether a measure "affects" trade in services requires a **careful analysis** of the provision of services within a particular market.

C. Trade in Services: Modes of Supply (Art. I:2)

I. Overview

37 In Art. I:2, "trade in services" is defined as the "supply of a service", which includes the production, distribution, marketing, sale and delivery of a service (Art. XXVIII lit. b) and, thus, all steps of the added value that the service goes through on its way from the producer to the consumer,[82] by four means or "modes". An understanding of the distinct modes is crucial because the Members of the WTO in the process of negotiation determine

[79] *Canada—Autos*, WT/DS139/AB/R, WT/DS142/AB/R, para. 163.
[80] *Ibid.*, para. 164.
[81] *Ibid.*, para. 165.
[82] See *Michaelis*, in: *Hilf & Oeter* (eds), 375, 388, para. 32.

the conditions of trade in services to which they want to bind themselves within the specific commitments in regard to market access and national treatment, not only on a sector-by-sector but also on a mode-by-mode basis.[83] The **four modes** which cover all possible ways to supply a service[84] are: cross-border supply, consumption abroad, commercial presence, and presence of natural persons.

II. Cross-Border Supply (Art. I:2 lit. a)

38 The first mode of supply (**mode 1**), commonly referred to as "cross-border supply", comprises "the supply of a service from the territory of one Member into the territory of any other Member" (Art. I:2 lit. a). In this mode, both the consumer (see Art. XXVIII lit. i) and the service supplier (see Art. XXVIII lit. g) remain in their respective territories, whereas the delivered **service as such crosses the border**. For a service product, this situation arises when the service can be **embodied in a transportable medium**, such as written documentation or a computer disk,[85] or when it can be sent across borders through **telecommunications channels**, in particular by telephone and the internet.[86] The consumer's and supplier's personal contact face to face is, thus, replaced by a mediating data store, institution or person. That is also the case with **international transport**.[87] As regards its structure, cross-border supply is similar to trade in goods.[88]

III. Consumption Abroad (Art. I:2 lit. b)

39 The second mode of supply (**mode 2**), referred to as "consumption abroad" or "movement of consumers", becomes relevant if there is a supply "in the territory of one Member to the service consumer of any other Member" (Art. I:2 lit. b). This mode concerns services which have a connection to the **international migration of consumers**.[89] Hence, it is not the service which crosses the border, but the consumer who moves to the territory of the supplier to receive services, for example tourism services, medical treatment in a foreign hospital, or educational services when studying abroad.[90]

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[83] *Footer & George*, in: *Macrory et al.* (eds), 799, 823; *Koehler*, 94.

[84] *Barth*, EuZW 5 (1994), 455, 456; *Koehler*, 92; *Öhlinger*, 74; see also *UNCTAD*, 154.

[85] See *Chang et al.*, JWT 33 (1999) 3, 93, 95.

[86] *Footer & George*, in: *Macrory et al.* (eds), 799, 823; *Raworth*, 4; see also *Wunsch-Vincent*, World Trade Rev. 5 (2006), 319, 324–327 concerning gambling services supplied *via* a foreign web page.

[87] *Michaelis*, in: *Hilf & Oeter* (eds), 375, 388, para. 33; *Öhlinger*, 74.

[88] ECJ, Opinion 1/94, [1994] E.C.R. I-5267.

[89] See *Koehler*, 42.

[90] See *Senti*, LJZ 16 (1995), 77, 79; *Michaelis*, in: *Hilf & Oeter* (eds), 375, 388, para. 33; *Sampson & Snape*, World Econ. 8 (1985), 171, 173; *Shackleton*, World Econ. 4 (2003), 55, 59–64; *Zacharias*, WissR 38 (2005), 290, 296–297.

40 According to the concept of the GATS and not least for balance-of-payments purposes, in all these cases there is an "export" of services from the territory of the supplier and an "import" of them into the home territory of the consumer.[91] Thus, the GATS is based on a broad notion of trade,[92] which includes not only the direct cross-border transfer of the "service" which is the object of trade but also the **crossing of the border by the service supplier and the consumer as partners of the transaction**.[93] Furthermore, the second mode covers on the one hand cases in which the consumer's property, on which the service that is going to be delivered is to have effect, crosses the border or is situated abroad, *e.g.* activities such as the repair of a ship in a foreign shipyard.[94] On the other hand, the Understanding on Commitments in Financial Services extends mode 2 to the receipt of certain financial services; thus, it is not necessary for the services to be already consumed or used abroad.[95]

41 There are some **constellations**, though, where a **precise attribution** either to the mode of **cross-border supply or** to that of **consumption abroad** is **problematic**. This is, for example, the case when a consumer, *e.g.* a policy holder, of one Member concludes a contract with a service supplier, *e.g.* an insurance company, in the territory of another Member and pays the price or the premium to activate the insurance cover from his or her bank account in the home country.[96] If the place where the contract was concluded is decisive, one must qualify the mode of supply as consumption abroad. Conversely, if the place where the payment is made is decisive, one must assume a cross-border supply.[97] Against this background, the Members in their lists of specific commitments made some **clarifications regarding modes of supply**.[98] If clarifications were lacking, it could be a possible solution in such ambivalent constellations to ignore for the determination of the prevailing mode of supply the manner of payment for the delivered service, and to focus solely on the service as such.

42 However, even this solution does not fit all cases. An extinct field where problems concerning the determination of the prevailing mode of supply arise is **cross-border financial services**. If the financial transaction is deemed to have originated with a supplier in one jurisdiction selling a service

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[91] *Footer & George*, in: *Macrory et al.* (eds), 799, 824; see also S/C/W/49, para. 23.
[92] *Barth*, EuZW 5 (1994), 455, 456.
[93] *Zacharias*, WissR 38 (2005), 290, 297.
[94] Council for Trade in Services, Trade in Services, Guidelines for the Scheduling of Specific Commitments under the GATS, Adopted by the Council for Trade in Services on 23 March 2001, S/L/92, 28 March 2001, para. 29; *Chang et al.*, JWT 33 (1999) 3, 93, 95; *Weiss*, CMLRev. 32 (1995), 1177, 1192.
[95] See *European Commission*, 26.
[96] See *Chang et al.*, JWT 33 (1999) 3, 93, 96, footnote 5.
[97] *Michaelis*, in: *Hilf & Oeter* (eds), 375, 389, para. 35.
[98] *Chang et al.*, JWT 33 (1999) 3, 93, 96, footnote 5.

to a consumer in another without leaving his or her home territory, from the point of view of the jurisdiction in which the consumer is located this would be classified as cross-border supply. But if, on the other hand, the consumer initiates the transaction or solicits the service, it could be classified as consumption abroad. This **potential confusion** between the first two modes becomes important if the commitments scheduled by a Member are not identical in both modes. Therefore, the suggestion in academic literature is either to amalgamate the two modes and to read them as one, or to redefine the second mode in the sense that it always requires a **physical movement** by the consumer;[99] thus, an initiative by a letter, telephone call, or sending a signed contract form downloaded from the internet would not be sufficient to assume the mode of consumption abroad.

IV. Commercial Presence (Art. I:2 lit. c)

43 The third and the fourth modes concern transactions in services which take place in the consequence of the **international migration of the service suppliers**.[100] The differences between the two modes relate to the kind and length of the supplier's stay in the territory of the other Member. In accordance with Art. I:2 lit. c, it is a characteristic of trade in services that the service is supplied "by a service supplier of one Member, through commercial presence in the territory of any other Member" (**mode 3**). Thus, "commercial presence" means any type of business or professional establishment within the territory of a Member for the purpose of supplying a service. The notion includes the constitution, acquisition or maintenance of a **juridical person** (see Art. XXVIII lit. l, m and n), or the creation or maintenance of a **branch** or a representative office (see Art. XXVIII lit. d). Since these concrete forms of commercial presence are mentioned as non-exclusive, as indicated by "including", one must assume that the GATS finds application to **any kind of permanent presence** of a service supplier of one Member in the territory of another Member.[101] Remarkably, the reference to commercial presence as a means of delivering international services is an innovation of the GATS.[102] Since the supply of services by commercial presence is connected with direct investments

[99] See *Hoekman & Mattoo*, in: *Guzmán & Sykes* (eds), 113, 135.
[100] *Koehler*, 93.
[101] *Koehler*, 94; *Messerlin*, 229; see also *Öhlinger*, 76–77.
[102] *Footer & George*, in: *Macrory et al.* (eds), 799, 825; *Öhlinger*, 77.

abroad,[103] the GATS is even called a **"multilateral investment treaty for services"**.[104]

V. Presence of Natural Persons (Art. I:2 lit. d)

44 As Art. I:2 lit. d reveals, a minimum of organizational establishment is, though, not compelling for cases of international trade in services in which the service supplier or a natural person working for him is present abroad. Rather, it is sufficient that there is a "supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member" (**mode 4**). This means the **crossing of the border by a natural person** of one Member (see Art. XXVIII lit. k) for the purpose of delivering a service in the territory of another Member; thereby, the stay of the natural person is **limited to the duration of the supply**.[105]

45 The fourth mode of supply is the subject of a separate Annex to the GATS that applies to "measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service" (para. 1 of the Annex on Movement of Natural Persons). The **Annex on Movement of Natural Persons Supplying Services Under the Agreement**, which was negotiated on an initiative of the industrial states which did not want to open their labour markets by means of the GATS,[106] makes clear that the Agreement does not apply to measures affecting individuals seeking access to the employment market of a Member, or to measures regarding citizenship, residence, or employment on a permanent basis (para. 2).[107] Thus, the Members can still restrict access to the employment market and permanent entry, just as they like.[108] Furthermore, the Members are free not to guarantee market access and national treatment regarding the presence of natural persons, or to limit them to certain groups of persons, by regulations within their Schedules of specific commitments.[109]

46 Anyway, the GATS and its relevant Annex provide for **two distinct categories of natural persons** located in the territory of the consumer:

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[103] See *Barth*, EuZW 5 (1994), 455, 456; *Chang et al.*, JWT 33 (1999) 3, 93, 99; *Hoekman*, in: *Martin & Winters* (eds), 327, 329; *Wegmann & Müller*, 34; *Weiss*, CMLRev. 32 (1995), 1177, 1192; *Krajewski*, Wirtschaftsvölkerrecht, 137, para. 435.

[104] *Barth*, EuZW 5 (1994), 455, 456; *Öhlinger*, 77–78; see also *Pitschas*, RIW 49 (2003), 676, 678, footnote 22.

[105] *Koehler*, 94.

[106] See *Young*, in: *Sauvé & Stern* (eds), 184–210.

[107] See also *Senti*, LJZ 16 (1995), 77, 79.

[108] See *Ipsen & Haltern*, 96.

[109] *Michaelis*, in: *Hilf & Oeter* (eds), 375, 390, para. 37; see in this context also *Guild & Barth*, EFARev. 4 (1999), 395–415; but see, on the other hand, Art. V^{bis}.

self-employed service providers and natural persons employed by service providers. A foreign self-employed service provider will simply move to the territory of the consumer to supply his or her service. Employees will be foreign natural persons who need not have the same nationality as the service provider and who are employed with regard to the supply of the service. The employer or service provider in that case may be located abroad or have a commercial presence in the territory of the consumer.[110]

Since the presence of natural persons is a prerequisite for a commercial *47*
presence, there may be **difficulties of differentiation** between modes 3 and 4. For instance, opening a branch needs a lot of preparation. When, for that purpose, a representative of the mother enterprise enters the territory of the other Member, the question arises whether this is covered by mode 3 (commercial presence) or by mode 4 (presence of natural persons).[111] According to the concept of the GATS, both modes which concern the international migration of service suppliers must be differentiated from each other as distinct forms of supply:[112] Aspects of the organizational establishment must be scrutinized under Art. I:2 lit. c, aspects of the movement of natural persons under Art. I:2 lit. d. Thus, one could assume that, if a transaction combines both modes within it, as is the case with the foundation of a branch, Art. I:2 lit. d is relevant to the entry and the actions of the representative, whereas Art. I:2 lit. c covers any aspect relating to the establishment.[113] However, there may be cases where such a strict differentiation appears to be inadequate. For example, the establishment of a commercial presence, which is allowed under the specific commitments in the Schedules for mode 3, could be made permanently impossible by a lack of specific commitments or even explicit restrictions with regard to mode 4. This in particular goes for companies which, for whatever reason, need their foreign branch personnel to come from the country in which they have their headquarters. As a consequence mode 3 could in fact be the crucial angle for such a barrier to free trade. A possible mediating solution is that an exemption to the principle of strict differentiation must be made when the measure of the Member prevents or at least to a considerable extent hinders the establishment of branches of foreign companies by restrictions on trade in services by mode 4; in such cases **both modes could apply simultaneously**.

[110] *Footer & George*, in: *Macrory et al.* (eds), 799, 826.
[111] See *Martini*, 88.
[112] *Hoekman & Sauvé*, 30; see *Messerlin*, 229.
[113] *Koehler*, 95.

D. Measures by Members (Art. I:3 lit. a)

I. Notion of "Measure"

48 As one can deduce from Arts I:3 and XXVIII lit. a, a "measure by a Member" is an action in any form that can be attributed to a Member. Art. XXVIII lit. a reads that "measure" means "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action or any other form". Thus, the GATS, unlike the GATT 1994, provides for a **general notion of trade barriers** which are intended to be lowered. That the GATT 1994 lacks such a definition is due to the fact that at the time of its foundation it was primarily regarded as an instrument for lowering customs barriers, whereas the non-tariff trade barriers came into the field of view only in the 1960s and 1970s.[114] The advantage of the general notion in the GATS is that even such trade barriers which occur in future developments of the trade policy of the Members are covered by the Agreement and can, thus, be made an object of multilateral negotiations on trade liberalization.[115]

49 The open list in Art. XXVIII lit. a reveals that none of the various regulatory instruments is *a priori* excluded from the scope of the GATS. Any state action can be a "measure" according to the GATS, because the list extends to "any other form". There is no indication that only legislative or administrative actions should qualify as measures in the GATS context.[116] Furthermore, the inclusion of administrative activities indicates that the measure need not have legal quality; it can also be a mere factual activity.[117] Hence, **fiscal activities** can be considered as measures, which can be already taken as an *argumentum e contrario* from Art. XIII:1. This provision reads that government procurement is exempt from the application of Arts II, XVI and XVII; conversely, government procurement in general and in particular in cases not mentioned in Art. XIII:1 falls within the scope of the Agreement. Even promotional or information activities of the government can be considered measures. Besides, it should be noted that the **implementation of international agreements**, standards or decisions of international organizations or related administrative bodies through national measures can also fall within the scope of the GATS. While the GATS does not directly apply to international law-making, any national implementation measure can be subject to the Agreement.[118]

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[114] See *Senti*, GATT—WTO, 45–55.

[115] *Koehler*, 99–100.

[116] For a similar interpretation of the term "measures" in Art. XI GATT 1994, see GATT Panel Report, *Japan—Semi-Conductors*, BISD 35S/116, para. 106.

[117] *Michaelis*, in: *Hilf & Oeter* (eds), 375, 391, para. 40.

[118] *Krajewski*, National Regulation, 64.

It is doubtful whether an **omission or inactivity** of the state authority can also be qualified as a "measure" in accordance with the GATS, since it can definitely have an effect on trade in services. An example is the omission to proceed and decide an application of a foreign service supplier for a licence. One can argue that an omission can only be considered a government measure if the failure to process the application is based on a positive decision by a governmental authority. Conversely, if it depends solely on a slowly working administration it will be difficult to detect a measure in the sense of Art. XXVIII lit. a.[119] *50*

II. Attribution of the Measure to a Member

The GATS has wide institutional scope. According to **Art. I:3 lit. a (i)**, the Agreement applies to measures not only of the central government, but also of regional and local governments and authorities. Thus, it covers **measures from any authority on any level within the state organization** and even such territorial authorities which, according to a non-etatistic view, do not belong to the state although they are provided with original competencies to exercise jurisdiction, which means to pass unilaterally binding rules or state actions restricting the rights of subjects. This is important, because many regulations exist at the regional and local level, such as regulations based on district or municipal planning. Moreover, the local level is often involved in the provision of basic services, not least sewerage services, refuse disposal services, transportation services (*e.g.* underground and tram), educational services (*e.g.* primary schools), and cultural services (*e.g.* public libraries and theatres). *51*

Regarding the central level, the GATS is not restricted to measures taken by government departments. Rather, it also applies to measures of "authorities" which are not directly part of the government, such as **independent regulatory commissions** or other public entities vested with regulatory competence.[120] *52*

Art. I:3 lit. a (ii) extends the scope of the GATS beyond the sphere of the territorial governments and authorities to **non-governmental bodies**. Such a body could be any association, institution or other entity regardless of its legal constitution and its status under public or private law if governmental powers were **delegated** to it. This includes for example private associations licensing doctors or lawyers. The GATS can in that *53*

[119] *Ibid.*, 65; see Art. VI:3 which requires only prompt information about the status of an obligation but not a prompt decision.

[120] *Krajewski*, National Regulation, 63.

regard penetrate into the **area of self-regulation**,[121] not least professional self-regulation.[122]

54 It is discussed in literature whether measures of self-regulating bodies would be affected by GATS if those bodies did not exercise formally delegated powers, but would be **functionally equivalent** to bodies with delegated powers; functional equivalence means in this context that the self-regulating bodies perform a function and maybe even behave externally or towards their members in a way and with instruments compatible with those of authorities which are provided with public powers by an act of the government (*e.g.* compulsory membership, pressure to pay contributions, binding administrative actions). According to one view, the perspective which refers to the formal act of delegation could result in an arbitrary asymmetry of obligations, because WTO Members preferring self-regulation could be subject to fewer disciplines than those adopting more direct regulation.[123] However, the wording of Art. I:3 lit. a (ii) suggests a narrow perspective since it speaks of "delegated powers" and names the bodies to which powers may be delegated. "Delegated powers" imply a formal act of delegation and not just mere reliance on self-regulation. Therefore, measures of **self-regulatory bodies without explicitly delegated regulatory powers** should **not** be considered to fall within the scope of the GATS. Conversely, if the non-governmental body is merely formally non-governmental, but in fact closely controlled and supervised by the government, it could be argued that the activities of such an organization are to be qualified as measures taken by the government in the sense of Art. I:3 lit. a (i).[124]

55 **Measures by private actors** affecting trade in services are normally outside the scope of the GATS; private trade barriers are considered in only the provisions on monopolies (Art. VIII) and business practices (Art. IX).[125] However, GATT and WTO case law suggests that a private action encouraged or supported by a government and not merely tolerated by it could be regarded as a government measure which is within the scope of the GATS.[126] This interpretation of the term "measure" coincides with the standards of international law on state responsibility, which provide that a "conduct acknowledged and adopted by a state as its own" can be seen as an act of that state.[127]

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[121] See *ibid*.
[122] See *Krajewski*, Wirtschaftsvölkerrecht, 138, para. 436.
[123] *Trebilcock & Howse*, 360.
[124] *Krajewski*, National Regulation, 63; *Zdouc*, in: *Ortino & Petersmann* (eds), 381, 387–389.
[125] *Öhlinger*, 79.
[126] *Zdouc*, in: *Ortino & Petersmann* (eds), 381, 387–389; *Zdouc*, Legal Problems, 111–114.
[127] See *Krajewski*, National Regulation, 65; *Zdouc*, Legal Problems, 111–112.

III. Obligations of the Members Towards Domestic Entities

Art. I:3 lit. a, sentence 2 prescribes that each Member shall take **"reasonable measures"** to ensure that regional, local and non-governmental entities within its territory observe the obligations and commitments of the GATS. This stipulation partly parallels Art. XXIV:12 GATT 1994 which requires WTO Members to ensure that regional and local governments and authorities observe the GATT obligations.[128] The GATS diverges from the GATT insofar as it extends that obligation to non-governmental entities. This is not uncommon, however, since the obligation of the central government to ensure the **compliance of sub-central and non-governmental entities with international law** is based on general international practice. Under the customary international law on state responsibility the conduct of such entities is usually regarded as conduct of the relevant state.[129] Art. I:3 lit. a, sentence 2 reflects this rule and makes it clear that the GATS applies to all regulatory measures taken by any entity of a WTO Member.[130] *56*

E. Service Supplied in the Exercise of Governmental Authority (Art. I:3 lit. c)

I. General Considerations

In accordance with Art. I:3 lit. b, the sectoral scope of the GATS covers any service in any sector except those services supplied in the exercise of governmental authority. Services supplied in the **exercise of governmental authority** are defined in Art. I:3 lit. c as services which are supplied "neither on a commercial basis, nor in competition with one or more service suppliers". *57*

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[128] See also the Understanding on the Interpretation of Art. XXIV of the General Agreement on Tariffs and Trade 1994, which is part of the Final Act of the Uruguay Round.

[129] See, *e.g.*, Art. 4 of the 2001 ILC Draft Articles on State Responsibility reading: "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State." Furthermore, Art. 5 of the 2001 ILC Draft Articles states: "The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance." The Draft Articles are published under *General Assembly of the United Nations*, International Law Commission, State Responsibility, Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading, A/CN.4/L.602/Rev.1.

[130] *Krajewski*, National Regulation, 64.

58 The exact meaning of Art. I:3 lit. b and c played an important role in the political debates about the impact of GATS on public services. Since the GATS does not use the term "public services" (see only Art. XXVIII lit. c (ii) speaking about "services which are required [...] to be offered to the public generally"), the central question was whether **public services** would qualify as "services supplied in the exercise of governmental authority".[131] This question concerns, in particular, services which are traditionally scrutinized under the heading of "services delivered in the public interest" or rather "services for the public", such as in the central European context the provisions concerning energy and water, the disposal of waste, the health system, or general basic education.[132] While some WTO and government officials initially argued that Art. I:3 lit. c exempted most public services from the scope of the GATS,[133] critics insisted that this was not the case;[134] they feared that the GATS would undermine the field of public services.[135]

59 The initial situation has not changed much: hitherto there has been **no coherent WTO practice** relating to Art. I:3 lit. b and c, as publications of the WTO Secretariat[136] or statements of individual WTO Members in different bodies show.[137] For example, in an informal discussion in the Council for Trade in Services (CTS) about future negotiations in the health, medical and social services sector, members expressed their view that basic welfare and equity considerations "had led to a very substantial degree of government involvement, both as a direct provider of such services and as a regulator" in the health and social services sector, and they seemed to agree that "this did not mean that the whole sector was outside the remit of GATS; the exceptions provided in Art. I:3 of the Agreement needed to be interpreted narrowly".[138] Moreover, in a discussion concerning negotiations on government procurement in the Working Party on GATS Rules (WPGR), the Chairman wondered whether it was necessary further to specify the

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[131] See *ibid.*, 68.

[132] *Michaelis*, in: *Hilf & Oeter* (eds), 375, 387, para. 28.

[133] *Hartridge*, <http://www.wto.org/english/news_e/news00_e/gats2000neg_hartridge_e.htm> (last visited 1 October 2007).; WTO Director General *M. Moore*, as quoted in *Sinclair & Grieshaber-Otto*, 19; UK Trade Minister *R. Caborn*, as quoted in *World Development Movement*, 34–35.

[134] *World Development Movement*, 35; *Sinclair & Grieshaber-Otto*, 24–25.

[135] See *Fritz & Scherrer; Michaelis*, in: *Hilf & Oeter* (eds), 375, 387, para. 28.

[136] Just compare the use of the term in the background note on health and social services in Council for Trade in Services, Health and Social Services, Background Note by the Secretariat, S/C/W/50, 18 September 1998, paras 37–39; further the background note on environmental services in Council for Trade in Services, Environmental Services, Background Note by the Secretariat, S/C/W/46, 6 July 1998, paras 52–53; and in *WTO*, Market Access, 124.

[137] See *Krajewski*, National Regulation, 68–69; *Krajewski*, Public Services and the Scope, 6–9; *Van Duzer*, in: *Curtis & Ciuriak* (eds), 287–518.

[138] Council for Trade in Services, Report of the Meeting Held on 14 October 1998, Note by the Secretariat, S/C/M/30, 12 November 1998, para. 22 (b).

services supplied in the exercise of governmental authority which did not fall within the GATS, but the Members did not express any specific views on that question;[139] they appeared to be at a loss with regard to tackling Art. I:3 lit. b and c.

60 The difficulties in determining whether, or rather how far, public services are to be scrutinized under Art. I:3 lit. b and c have, not least, to do with the broad factual range of activities which are attributed to the public sector in the individual WTO Members[140] as well as with the **variety of legal concepts** of the public sector as such in the WTO Members. The same services are provided in different jurisdictions in completely different economic and institutional settings, from **government monopolies** to open markets.[141] On the other hand, the provisions are, at first glance, not easy to understand.

61 Against this background, it is not surprising that the European Parliament in the Resolution on the WTO services negotiations adopted on 12 March 2003 stated that "the GATS Agreement has given rise to widespread concern regarding lack of transparency in [...] relation to its possible impact on public services and the regulation of services in general".[142] However, there were also voices that spoke in favour of an **interpretation of the GATS norms following the interpretation of Art. 45 ECT** which applies to the freedom to provide services by reference from Art. 55 ECT. Art. 45, sentence 1 ECT reads that the provisions of Chapter 2 of Title III of the Treaty shall not apply, so far as any given Member state is concerned, to activities which in that state are connected, even occasionally, with the exercise of official authority. It was stated by EC diplomats during the negotiations in the Uruguay Round[143] and later, for example, by a Joint Communication from the EC, Hungary, Poland and the Slovak Republic that the provisions of the EC Treaty "are similar to those of Art. I:3 (b) of GATS".[144]

62 In its **case law** to Art. 45 EC, the ECJ did not define the term "official authority" in an abstract manner but decided the cases before it on a **case-**

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[139] Working Party on GATS Rules, Report of the Meeting of 19 February 1999, Note by the Secretariat, S/WPGR/M/20, 17 March 1999, para. 33.

[140] *Marchetti & Mavroidis*, EBOR 5 (2004), 511, 527.

[141] *Adlung*, JIEL 9 (2006), 455, 456.

[142] *European Parliament*, GATS within the WTO, including cultural diversity, 2003, Doc. P5_TA(2003)0087. See *Chanda*, World Development 31 (2003), 1997, 2009 for further references of criticism raised against the GATS in this area.

[143] *Hartridge; Krajewski*, JIEL 6 (2003), 341, 363.

[144] Committee on Regional Trade Agreements, The European Communities, Hungary Europe Agreement, Services; the European Communities, Poland Europe Agreement, Services; and the European Communities, Slovak Europe Agreement, Services, Joint Communication from the Parties, Addendum, WT/REG50/2/Add.3, WT/REG51/2/Add.3, WT/REG52/2/Add.3, 19 May 1999, para. 3.

by-case basis using different lines of argument.[145] One line refers to the **closeness of the disputed activities** (*e.g.* those of an advocate, insurance commissioner, traffic expert, or private security service) **to activities indisputably considered as "exercise of official authority"**,[146] such as activities of the judicial authority or of the armed forces. The Court seemed to be willing to assume that an activity was connected with the exercise of official authority only in cases where the latter depended on the former. Another line of argument takes a closer look at the **circumstances of the activity**. The Court considered employment and remuneration by private companies as an indicator against the assumption that "official authority" was given.[147] It should, though, be noted that the ECJ interprets the exemption clause **very narrowly**; in any of the decided cases the Court refused to accept a particular activity as being connected with the exercise of official authority. Because of the similar functions of Art. 45 EC and Art. I:3 lit. b the decisions of the ECJ are regarded, by some voices in literature,[148] as *de facto* precedents for future WTO jurisprudence, and it is expected that WTO panels or the Appellate Body will also interpret the exemption provision of Art. I:3 lit. b GATS narrowly.[149]

63 However, one must not ignore the **textual differences between the EC and the GATS** law which may become crucial in future disputes.[150] Unlike the GATS, EC law does not attempt further to define the term "official authority". The ECJ, in not defining the term, has left the door open for future changes and adaptations of its jurispridence. It is not debarred from interpreting "official authority" based on broader considerations such as public, namely social, interests. Conversely, WTO panels and the Appellate Body have to interpret the notion of "governmental authority" in **economic terms** since they are not allowed to make an interpretation independently of the notions "commercial basis" and "competition" which are laid down as limitations of the definition in Art. I:3 lit. c. Thus, the **jurisdiction of the ECJ is not suitable as a precedent** for the interpretation of GATS law. Rather, the meaning of Art. I:3 lit. b and c must be found without referring to EC law.

64 **Art. I:3 lit. b and c** have to be **read together** in such a way that such services are excluded from the sectoral scope of the GATS which are supplied in governmental authority and neither on a commercial basis nor in competition with one or more service suppliers. Although the definition in

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[145] See *Krajewski*, JIEL 6 (2003), 341, 363–365.

[146] See, *e.g*, ECJ, 2/74, *Reyners*, [1974] E.C.R. 631, paras 51–54; ECJ, C-114/97, *Commission v. Spain*, [1998] E.C.R. I-6717, paras 36–38.

[147] See, *e.g.*, ECJ, C-42/92, *Thijssen*, [1993] E.C.R. I-4047, paras 19–22.

[148] See *Sinclair & Grieshaber-Otto*, 20.

[149] See *Krajewski*, JIEL 6 (2003), 341, 365–366.

[150] See *Ibid.*, 366.

Art. I:3 lit. c seems to point into a different direction, the term "governmental authority" is not interchangeable with the composed term "neither on a commercial basis nor in competition with other service suppliers". The two terms are far from being congruent. Rather, the notion "governmental authority" has residual importance.[151] It ensures that services which are provided by **private companies** on a non-commercial basis and in a non-competitive environment without any government involvement are not excluded from the scope of the GATS. Thus, not only the character of the service but also the nature of the service supplier or rather the **type of his or her legal competences when providing the service** is relevant.[152] Companies enjoying a private market monopoly and providing a particular service on a non-profit-making basis, for example by reasons of public relations, do not provide a "service in the exercise of governmental authority" in the sense of Art. I:3 lit. b.[153]

II. Governmental Authority

65 The notion "authority" implies the aspect of command and control as well as the power to make decisions binding on others.[154] Government activities exercising authority can usually be distinguished from activities of the government as an economic actor. Whereas the former are characterized by an **element of subordination** in the relationship between government and citizen and are, at least in the continental European tradition, usually associated with the application of public law, the latter suggest equal standing and an element of coordination between citizen and government and usually employ private law.[155] Consequently, it would depend on the national legal order whether or not services were supplied in the exercise of governmental authority. This would mean that the WTO Member could deliberately exclude activities from the scope of the GATS by putting them under a public law regime, which would question the reach of the GATS' target of liberalization.[156]

66 An alternative interpretation of the term "governmental authority" could rely on the actor's competencies. Such a perspective is already indicated by the wording "in the exercise of", which signals that the actor is provided with specific powers which are characteristic of the government. Thus, Art. I:3 lit. c could be understood in the sense that the services "supplied in the exercise of governmental authority" must have a **governmental**

[151] See *Krajewski*, National Regulation, 71–72; *Adlung*, JIEL 9 (2006), 455, 465–466.
[152] See *Adlung*, JIEL 9 (2006), 455, 466; *Van Duzer*, in: *Curtis & Ciuriak* (eds), 287, 393.
[153] See *Krajewski*, National Regulation, 72.
[154] See *Krajewski*, JIEL 6 (2003), 341, 350.
[155] See *Picard*, in: *Freedland & Sciarra* (eds), 83, 88.
[156] See *Messerlin*, 229.

connection.[157] This does not necessarily mean that only services directly supplied by central, regional or local governmental entities in the sense of Art. I:3 lit. a (i) qualify for the exception of Art. I:3 lit. b,[158] since this provision does not prescribe that the service supplier must be a government. Thus, it is sufficient that the services are supplied by entities outside the government structure which are vested with **delegated governmental powers** and just make use of these powers when supplying the services.[159] Moreover, the governmental connection can be made if a private company is merely formally privatized and still ruled or at least effectively controlled by the government, since Art. I:3 lit. b does not make any stipulations with regard to the organizational form of the service supplier.[160] After all, the provision seems to include any entity that could be scrutinized under Art. I:3 lit. a (i) and (ii). An additional argument for this conclusion is that services supplied in the exercise of governmental authority can qualify as measures of a Member affecting trade in services in the sense of Art. I:1; it would cause confusion if the same activity were, on the one hand, a service involved in the process of liberalization and, on the other hand, a (counter) measure of a Member.

67 A third way to interpret Art. I:3 lit. b focuses on a **public function** of the services supplied in the exercise of governmental authority.[161] It is argued that the services must serve an important public interest.[162] However, the term "public function" is by no means clearer than "public services". Furthermore, it seems to be integral to the requirement of Art. I:3 lit. c that services supplied in the exercise of governmental authority must not be delivered on a commercial basis. Hence, emphasis on the public interest should not play an independent role for the interpretation of Art. I:3 lit. b.

68 Notably, para. 1 lit. b of the **Annex on Financial Services** contains a definition of governmental authority which differs from that in Art. I:3 lit. c. The provision states that financial services supplied in the exercise of governmental authority are activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies; activities forming part of a statutory system of social security or public retirement plans; and other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government. This definition emphasizes the supplier (central bank, monetary or other public authority) and the nature of the service itself (social security). Whereas the activities of the central bank

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[157] *Krajewski*, JIEL 6 (2003), 341, 353; *Krajewski*, National Regulation, 72.
[158] *Zdouc*, Legal Problems, 109.
[159] See *Zdouc*, Legal Problems, 109.
[160] *Michaelis*, in: *Hilf & Oeter* (eds), 375, 387, para. 29.
[161] See *Krajewski*, JIEL 6 (2003), 341, 353; *Krajewski*, National Regulation, 72.
[162] *Michaelis*, in: *Hilf & Oeter* (eds), 375, 387, para. 29.

are *per se* non-competitive,[163] some of the other activities mentioned could be supplied in a competitive environment. Therefore, para. 1 lit. c of the Annex on Financial Services says that if a Member allows such activities to be conducted in competition with a public entity or a financial services supplier, they are nevertheless understood as services falling within the scope of the GATS. This underlines the importance of competition as a condition for the application of the GATS.[164]

III. Services not Supplied on a Commercial Basis

69 To be excluded from the scope of the GATS the service supplied in the exercise of governmental authority must not be supplied on a **commercial basis**. On the basis of a **textual analysis**, the term "commercial" can be understood, on the one hand, as referring to an **"act of buying and selling"** or "exchange of goods" without the expectation or necessity of making a profit.[165] If this understanding were decisive, only services provided for free would not be supplied on a commercial basis in the sense of Art. I:3 lit. c, since the supply of a service for a low, subsidized price would still be an act of selling the service. Moreover, the provision of a service in exchange for an administrative fee could also be regarded in this way. Consequently, in the territory of many Members only core police services and national defence would be outside the substantive scope of the GATS because even judicial services given by a court are often offered only in return for certain fees. On the other hand, "commercial" can be understood in a broader way relating to **profit-seeking activities**.[166] If such an understanding were used to interpret Art. I:3 lit. c, a service supplier providing a service for a certain price but prohibited from making a profit could be considered as supplying a service on a non-commercial basis.[167] Thus, it could be sufficient simply to formulate in the statutes which are relevant for the service supplier's activities that the yields may not exceed the costs, or rather that a possible revenue surplus must be reinvested within an appropriate time.

70 However, in determining which meaning of "commercial" should be applied to Art. I:3 lit. c, the **context** of the provision has also to be considered. Thus, the definition of "commercial presence" in Art. XXVIII lit. d must be taken into account. It captures "any type of business or professional establishment". This passage suggests that "commercial" in the context of the GATS implies a **notion of profitability** because businesses or

[163] See *Footer & George*, in: *Macrory et al.* (eds), 799, 823.
[164] *Krajewski*, National Regulation, 72–73.
[165] See *Krajewski*, JIEL 6 (2003), 341, 351 with reference.
[166] *Krajewski*, National Regulation, 69.
[167] *Krajewski*, JIEL 6 (2003), 341, 351; *Cossy*, in: *Brown Weiss et al.* (eds), 117, 126.

professional establishments are usually set up to make a profit. Hence, it is argued that services supplied on a commercial basis are services supplied on a profit-seeking basis.[168]

71 But this interpretation is too narrow, since Art. XXVIII lit. d does not restrict itself to the abovementioned passage. Rather, it makes it clear that commercial presence means any type of business or professional establishment, "including through the constitution, acquisition or maintenance of a juridical person". Thus, a juridical person is defined in Art. XXVIII lit. l as any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise. This clearly **extends the scope of "commercial" beyond profit-seeking activities**.[169]

72 Against this background, one must find an adequate determination of the term "on a commercial basis" by a **combination** of the two possible textual meanings. Since Art. I:3 lit. c formulates a negative definition of "exercise of governmental authority", at least activities which are profit-seeking do not fall under Art. I:3 lit. b and are, thus, not excluded from the scope of the GATS. But the meaning of "commercial basis" is not restricted to profit-seeking activities. Rather, there can be services which do not aim at making a profit but which are, nevertheless, supplied on a commercial basis. Here, the first alternative of the textual meaning of "commercial" comes into play: services supplied on a commercial basis are **services which, if not already supplied for reasons of profit-making, are at least delivered to the consumer only for payment**.

73 This raises the question whether in fact all supplies for which a price is charged should be considered to be "commercial" or whether this understanding is too broad. One can ask whether a distinction must be made between the use of rather **symbolic dues** that may be aimed at preventing excessive demand, waiting queues or cost explosion, and deliberate pricing strategies with a view to maximizing revenue in the pursuit of a public policy objective (*e.g.* peak load pricing in the energy or transport sectors).[170] It would, however, be problematic to differentiate between various categories of targets of pricing other than profit-making, and to state that some aims still can be regarded as "commercial" and others cannot. Such an assessment appeared to be arbitrary. Consequently, it is preferable to require for an activity to be considered as commercial an element of **strategic economic behaviour**[171] which is more objective and, thus, comprehensible than a subjectively set target. For example, in setting prices

[168] See *Krajewski*, National Regulation, 70.
[169] See *Adlung*, JIEL 9 (2006), 455, 462.
[170] See *ibid.*, 463.
[171] *Ibid.*, 463.

the operator concerned, when acting economically, would take into account the preferences of potential users or the availability of alternative sources of supply. In contrast to many universities and museums, monopoly rail or postal operators in particular might contemplate such parameters and act in a "commercial" manner accordingly, since potential clients could otherwise travel by plane or use their cars, or rely on the internet or send a fax.[172]

74 However, **two further clarifications** must be made: First, the term "commercial basis" refers to the supply modalities and not to the operational basis of the service supplier, which is covered by the notion "governmental authority" in Art. I:3 lit. b. This means that a service supplier may in general operate on a commercial basis but may choose to supply one particular service on a non-commercial basis. Or vice versa: a service supplier that generally operates on a non-commercial basis may supply a particular service on a commercial basis.[173] This is noteworthy not least because governments increasingly "commercialize" public services which were traditionally supplied on a non-profit-making basis. As a consequence of this development, sometimes the **same institution or agency provides services on both a commercial and a non-commercial basis**. For instance, educational institutions charging foreign students higher fees than domestic students often attempt to make a "profit" by educating foreign students and "cross-subsidize" the education of domestic students. It could be argued that the education provided to foreign students is supplied "on a commercial basis," while the education to domestic students is not.[174] Moreover, many public services are provided through **public-private partnerships** in private finance initiatives. These new forms of financing public services often involve profit-seeking on the part of the private partner or financier of the public service.[175] Since Art. I:3 lit. b focuses on the services, in such a case the profit-seeking intentions of the private partners are decisive: the service is delivered on a commercial basis and, thus, not excluded from the scope of the GATS.

75 Secondly, public entities, including universities, have increasingly sought to develop new sources of revenue in recent years. They have provided a wide range of **additional, often complementary services** with the potential to attract even more clients for the original services because they find a broad variety of offers "under the same roof". Hence, it has been argued that such activities could affect the applicability of the exclusion to other services provided by the same supplier.[176] However, this cannot be a

[172] See *ibid.*, 463.
[173] See *Krajewski*, JIEL 6 (2003), 341, 351.
[174] *Krajewski*, National Regulation, 70.
[175] *Craig*, 136–138.
[176] See *Shackleton*, World Econ. 4 (2003), 55, 72.

strong argument in the context of Art. I:3 lit. b and c. These provisions refer explicitly to the conditions governing the supply of a particular service and not to its overall role within the supplier's accounting system or to the existence of remunerative activities that may be conducted in parallel.[177]

IV. Services not Supplied in Competition with Other Service Suppliers

76 The sectoral exception of Art. I:3 lit. c requires further that the service is not supplied in competition with one or more service suppliers. The term "**competition**" is usually understood as a situation of **one producer targeting the same market as at least one other producer**.[178] This raises the question of the relevant market[179] and of when producers are targeting the same market. A situation of competition normally exists if two service suppliers are providing the same service for the same group of consumers. However, situations in which the services are not exactly the same but differ to a certain extent are problematic. If the service suppliers do not supply the same service it is doubtful whether they nevertheless compete with each other.

77 Hence, the **relationship** between **"like" service suppliers**, which are also mentioned in Arts II:1 and XVII, **and service suppliers "in competition"** needs to be determined. For the sake of argument, an analogy can be drawn between this relationship and the distinction between "like", which means having the same or at least similar characteristics or qualities,[180] and "directly competitive and substitutable products" in accordance with Art. III:2 GATT 1994.[181] Concerning the latter notion, the Panel, confirmed by the Appellate Body, in *Japan—Alcoholic Beverages II* held that "the decisive criterion in order to determine whether two products are directly competitive or substitutable is whether they have common end-uses, inter alia, as shown by elasticity of substitution. [...] In this context, factors like marketing strategies could also prove to be relevant criteria, since what is at issue is the responsiveness of consumers to the various products offered on the market".[182] If a similar understanding were applied to the notion of competition in the context of Art. I:3 lit. c, a service could be supplied in a competitive environment even if it were not like the other service, because the notion of competitiveness, which is not limited to the characteristics of

[177] *Adlung*, JIEL 9 (2006), 455, 463.
[178] See *Krajewski*, JIEL 6 (2003), 341, 352 with reference.
[179] See in this regard the definitions of *Marchetti & Mavroidis*, EBOR 5 (2004), 511, 532.
[180] *EC—Asbestos*, WT/DS135/AB/R, para. 90.
[181] See *Michaelis*, in: *Hilf & Oeter* (eds), 375, 387, para. 30.
[182] Panel Report, *Japan—Alcoholic Beverages II*, WT/DS8/R, paras 6.22 and 6.28.

the product itself, would be wider than that of likeness. Consequently, a service supplied "in competition" could be assumed when there was a **certain degree of elasticity of substitution**.[183] Whether such elasticity exists and how large it has to be must be determined, according to the view of the Panel, on a case-by-case basis and varies from country to country.[184]

78 However, this approach leaves open a series of questions. At first, it is not clear how an elasticity of substitution could be established for services, such as public education or basic medical care, that are supplied for free. Moreover, the concept provides no guidance for governments which, prior to admitting private suppliers in sectors hitherto dominated by **public monopolies**, would like to explore whether a competitive relationship in the sense of Art. I:3 lit. c would ensue. Finally, one may wonder to what extent considerations inspired by the GATT and related jurisprudence are relevant for an agreement that covers not only cross-border trade but also the possibility for consumers and producers to move between, and consume or supply services in, some 150 geographically distinct markets.[185]

79 In fact, even in a country where, for example, education and health services are normally provided for free by the government without parallel private supplies, competition in the usual sense may exist insofar as commercial supplies are readily available across the national border. Hence, if coexistence and substitutability were equated with the existence of competition, the governmental service exclusion of Art. I:3 lit. b would largely be devoid of substance; provision through a domestic monopoly would not be a sufficient criterion in the context of the GATS, given the existence of alternative supplies that are accessible *via* **consumer movements** (consumption abroad)[186] or telecommunication channels (cross-border supply).[187, 188]

80 This implies, of course, that a **competitive relationship** can be deemed to exist **across different modes of supply**. Some authors object to such a view. They argue that, since the end-users might be different, there was "usually no full competitive relationship" between services that were supplied through different modes. Moreover, if like services could be supplied through different modes, the scheduling of commitments by mode of supply would not have been necessary.[189] However, this is not convincing. On the one hand, the users can, definitely, be the same. Regarding the consumer's

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[183] See *Krajewski*, National Regulation, 71; *Krajewski*, JIEL 6 (2003), 341, 353.

[184] *Japan—Alcoholic Beverages II*, WT/DS8/R, para 6.28; see also *Marchetti & Mavroidis*, EBOR 5 (2004), 511, 533; *Fidler*, 36.

[185] *Adlung*, JIEL 9 (2006), 455, 464.

[186] See above, para. 39.

[187] See above, para. 38.

[188] See *Adlung*, JIEL 9 (2006), 455, 464–465; dissenting, *e.g.*, *Michaelis*, in: *Hilf & Oeter* (eds), 375, 387 (para. 30).

[189] See *Krajewski*, National Regulation, 102 with references.

alternative between, for instance, using a domestic service supplied by a governmental monopolist and consumption abroad, one can point to the population living next to the national border. Furthermore, the circle of potential users is very often determined more by the price of the service than by the mode of its supply; the higher the difference is between the price of one product on the domestic market and on a foreign market in favour of the latter, the higher is the willingness of the consumers to switch to a different mode. Finally, one should remember the difficulties in certain constellations of attributing the services to a particular mode of supply; in such cases it might be extremely easy to turn from one mode to the other. On the other hand, if the **possibility of cross-modal likeness** is precluded *per se*, it is not clear how the national treatment obligation for modes 1 and 2 could be substantiated. Furthermore, it is doubtful which benchmark could be used to monitor compliance other than treatment of like services that are supplied within a Member's domestic market.[190] After all, better reasons seem to speak for a competitive relationship being possible across different modes of supply. This view is supported by the Panel in *Canada—Autos*, which, in its application of the national treatment principle (Art. XVII), accepted the possibility that like services may be supplied through various modes.[191]

81 After all, it seems to be necessary to find a notion of "competition" which does not solely hinge on the availability of alternative supplies. Such a notion is already laid down in the Panel Report in *Mexico—Telecoms* concerning the meaning of "anti-competitive practices" in section 1 of Mexico's Reference Paper. There, the Panel identifies as a core notion the **"rivalry in the market, striving for custom between those who have the same commodities to dispose of"**.[192] Thus, interferences in the existence of competition would depend on the behaviour of the service supplier in question, rivalling other service suppliers or not, regardless of whether the actions of others are within or beyond a country's jurisdiction.[193] This approach has, therefore, been called a "one-way conception of competition".[194] Its application leads to the consequence that, for example, public universities or hospitals cannot be deemed to be in competition as long as they do not seek to poach students or patients. But if they do so, they

[190] *Adlung*, JIEL 9 (2006), 455, 465, footnote 25.

[191] *Canada—Autos*, WT/DS139/R, WT/DS142/R, para. 10.307. The Appellate Body did not address the issue. See also the early discussion in *Mattoo*, JWT 31 (1997) 1, 107, 119–121.

[192] *Mexico—Telecoms*, WT/DS204/R, para. 7.230. See also *Van Duzer*, in: *Curtis & Ciuriak* (eds), 287, 388; *Cossy*, in: *Brown Weiss et al.* (eds), 117, 126–127; *Fidler*, 35.

[193] *Adlung*, JIEL 9 (2006), 455, 465.

[194] *Van Duzer*, in: *Curtis & Ciuriak* (eds), 287, 388.

behave like commercial market participants in a competitive environment, and should be treated accordingly.[195]

82 The requirements of Art. I:3 lit. c, which are non-commercial character and non-competitiveness, must be fulfilled **cumulatively**. Therefore, commercial supply in the absence of competitors or non-commercial supply along with other competing suppliers alone would not qualify for the exception.[196]

F. Conclusion

83 When taking the various elements laid down in Art. I together, one must conclude that the **scope of the GATS is very broad**. The Agreement applies to measures taken by entities with governmental authority including non-governmental bodies at all levels. The concept of services in the GATS context is far reaching, since only air traffic rights and a small number of governmental services are excluded.[197] Moreover, the definition of trade in services through the supply of services in the four different modes and the broad understanding of the term "affecting" reveal that there are hardly any government measures which could generally be excluded from the coverage of the Agreement. This view coincides with the approach taken by the Appellate Body in *EC—Bananas III*. After having analysed Arts I and XXVIII, the Appellate Body observed that there was "nothing at all in these provisions to suggest a limited scope of application of the GATS".[198]

[195] See *Adlung*, JIEL 9 (2006), 455, 465.
[196] *Zdouc*, Legal Problems, 108.
[197] See *Krajewski*, JIEL 6 (2003), 341, 358–359.
[198] *EC—Bananas III*, WT/DS27/AB/R, para. 200. See also *Krajewski*, National Regulation, 74.

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PART II GENERAL OBLIGATIONS AND DISCIPLINES

Article II GATS
Most-Favoured-Nation Treatment

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.
2. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.
3. The provisions of this Agreement shall not be so constructed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.

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A. Introductory Remarks

I. General

1 The most-favoured-nation (MFN) clause of Art. II is the first provision of Part II of the GATS entitled "General Obligations and Disciplines". This has two implications: on the one hand, MFN treatment under the GATS applies generally to all measures covered by the GATS irrespective of the question whether an MFN obligation has been inscribed in a Member's Schedule, as is necessary under Part III of the GATS ("Specific Commitments"), with regard to market access, national treatment and additional commitments. On the other hand, its prominent position at the beginning of this part shows the significance the MFN treatment clause had for the whole Agreement in the eyes of the GATS' drafters. Other prominent general obligations include, amongst others, transparency (Art. III), domestic regulation (Art. VI) and recognition (Art. VII).

II. Notion

2 The MFN treatment clause of Art. II is to be interpreted in the context of **similar clauses** widely used **in international treaties** and against the background of the International Law Commission's (**ILC**) **attempt to draft rules** on the MFN clause in general. Although its wording in the various international instruments may differ it means, as most succinctly defined by the ILC:

"[…]treatment accorded by the granting State to the beneficiary State or to persons or things in a determined relationship with that State, no less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State".[1] *3*

The MFN treatment clause technically constitutes a **mechanism through which advantages** granted by a state to a third state **are incorporated into the relations with another state**. The meaning of this clause has been qualified appropriately as **"drafting by reference"**.[2] *4*

The MFN treatment clause has **two consequences**; existing **bilateral relations** are being **multilateralized** and the **fragmentation** of relations into bilateral ones, at least in principle, is becoming **less likely**.[3] In the context of GATS the MFN treatment clause has two facets. It requires Members of the WTO to treat services and service providers from one Member no less favourably than like services and service suppliers from any other country, whether or not it is a Member of the WTO. The clause also means implicitly that any disadvantages imposed upon one Member must be imposed upon the others; otherwise the disadvantaged Member may invoke the MFN clause against the disadvantage imposed upon it. Art. II does not contain an obligation, though, to multilaterize disadvantages. It is neutral in this respect as its object and purpose are to abolish differences. Differences may be equalized by the adoption of the lower or the higher level for all. Art. II does not provide a guarantee that the higher level is being preserved. *5*

Art. II contains a **general MFN clause**. **Apart from Art. II** a modified MFN clause applies to the mutual recognition of qualifications, work experience, licences and certifications: **Art. VII:3**.[4] References to the MFN clause are contained in **Art VIII** (monopolies and exclusive service suppliers), **Art. XIV lit. e** and **Art. XXI** (modification of Schedules). Equally the Annexes to GATS are relevant for the MFN clause. In a footnote to the *6*

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[1] Report of the International Law Comission on the Work of its Thirtiest Session, Draft Articles on most-favoured-nation clauses, Article 5, ILC Yearbook 1978 Vol. II, Part Two, 16, 21; the ILC also drafted a provision on the MFN clause (Article 4, ILC Yearbook 1978 Vol. II, Part Two, 16, 18). It reads: "A most-favoured-nation clause is a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured-nation treatment in an agreed sphere of relations." During the deliberations it was emphasized that the word "obligation" was added so as to stress the legal nature of the undertaking of one state to another. It should be noted that the deliberations of the ILC have not resulted in a codification.

[2] *Schwarzenberger*, 243.

[3] On Art. I GATT 1994 the Appellate Body in *Canada—Autos* case stated: "The prohibition of discrimination in Art. I:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis." (Appellate Body Report, *Canada—Autos*, WT/DS139/AB/R, WT/DS142/AB/R, para. 84).

[4] See *Krajewski*, Article VII GATS, para. 11.

Annex on Movement of Natural Persons Supplying Services under the Agreement it is stated that requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment.[5] The **Second Annex on Financial Services** provides for a possibility, additional to Art. II:2, to list measures relating to financial services which are inconsistent with Art. II:1.[6] The **Annex on Negotiations on Maritime Transport Services** and the **Annex on Negotiations on Basic Telecommunications** spell out when the requirement to list measures concerning the relevant measures inconsistent with the MFN clause enters into force.[7]

7 The MFN treatment clause enshrined in Art. II is **modelled on Art. I:1 GATT 1994**; the structure of the former is similar to that of the latter. Art. II contains a **legal commitment** of all Members ("[...] each Member shall accord immediately and unconditionally [...]"); it defines the **scope** of this legal commitment ("[...] any measure covered by this Agreement [...]"); and its paras 2 and 3 set out **possibilities** for Members **to restrict** such legal commitment. A comparison between Art. II:1 GATS and Art. I:1 GATT 1994 illustrates the differences as well as the similarities between the two provisions as far as the legal commitment and scope are concerned. The legal commitment is identical in both provisions; Art. I:1 GATT 1994 is also couched in mandatory terms ("[...] shall be accorded immediately and unconditionally [...]").[8] Compared to Art. I:1 GATT 1994 which is applicable to customs duties, methods of levying such duties, rules and formalities in connection with importation and exportation, and matters referred to in Art. III:2 and III:4 GATT 1994, Art. II has a wider scope. It refers to "any measure covered by this Agreement".[9]

8 The clause has been adopted **in numerous bilateral agreements**, mostly concerning economic and commercial inter-state relations, and in particular in investment agreements. **From there** it has found its way **into multilateral and universal or regional treaties** on economic and commercial relations. The prime example to this extent is **Art. I:1 GATT 1947**. Although it has its roots in the tradition of bilateral trade agreements[10] this provision significantly modifies the MFN clause by detaching it from its bilateral context while multilaterizing it. The MFN clause was

[5] Footnote 13 to the Annex on Movement of Natural Persons Supplying Services Under the Agreement.

[6] Para. 1 of the Second Annex on Financial Services.

[7] Para. 1 of the Annex on Negotiations on Maritime Transport Services and para. 1 of the Annex on Negotiations on Basic Telecommunications, see also the Second Protocol (Financial Services) and the Fourth Protocol (Basic Telecommunications) to the GATS.

[8] On the interpretation of these words see below, paras 45–48.

[9] On the interpretation of these words see below, paras 22–30.

[10] See *Cottier & Oesch*, 346.

also used in connection with other issues such as administration of justice, access to courts or dispute settlement mechanisms as well as diplomatic and consular privileges.[11] In spite of its prolific use no uniform MFN clause exists and, given the differing contexts, it is not necessarily possible to use the jurisdiction of one such clause to interpret another.

The **economic rationale** for the MFN commitment is that **discrimination may lead to wasteful trade diversion**: without the benefit of the MFN principle, the most efficient service provider or the best service may not have access to a foreign market because of discriminatory trade preferences in that market in favour of less efficient service providers from other countries.[12] The idea of granting MFN treatment is in the first place to guarantee the most efficient service providers market access to foreign markets (if scheduled), thus supporting the **best allocation of resources**. This in turn lowers the costs of services, increases consumer choices, and promotes world economic growth.[13] Unconditional MFN treatment also facilitates trade negotiations by giving a country that has negotiated a trade concession the peace of mind of knowing that whatever trade deal it has struck with another country, it will not be denied the benefit of its bargain if the latter country later strikes a more favourable deal with a third country concerning the same services.[14] This approach was confirmed—in respect of the MFN clause under Art. I GATT 1994—by the Appellate Body Report in *Canada—Autos*. It stated: *9*

"Th[e] object and purpose [of Art. I] is to prohibit discrimination among like products originating in or destined for different countries. The prohibition of discrimination in Article I:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis".[15] *10*

III. The Most-Favoured-Nation Treatment Clause in the Context of the WTO

As already indicated, the MFN treatment clause which is at the **roots** of such or similar clauses in the WTO agreements is **Art. I:1 GATT 1947**. More specific clauses concerning MFN treatment are enshrined in Art. V:5 GATT 1994 with regard to transit regulations and Art. IX:1 GATT 1994 for marking requirements. Also Art. 4 TRIPS sets out the principle *11*

[11] On the application of the MFN clause see among others *Schwarzenberger*, BYIL 22 (1945), 96–121.
[12] *Kennedy*, in: *Macrory et al.* (eds), 89, 100.
[13] *Ibid.*
[14] *Ibid.*
[15] *Canada—Autos*, WT/DS139/AB/R, para. 84.

of unconditional MFN treatment for intellectual property rights. The last is subject to a number of exceptions which are listed in Art. 4 TRIPS.

12 The MFN treatment clauses are considered to be of overwhelming **importance for the implementation of the WTO agreements** since Art. X:2 WTO Agreement provides that amendments to those provisions containing this clause shall take effect only upon acceptance by all Members. That means that unanimity is required for the amendment of these clauses.

13 Although the MFN treatment clause is most important as a **legal principle** and is thus protected by Art. X:2 WTO Agreement its relevance in practice may be quite limited. Under the MFN clause the beneficiary Member acquires the right to MFN treatment only if the granting Member extends to a third state treatment within the limits of the subject-matter of the clause. All that the clause promises is that the Member concerned will treat any other Member no less favourably than it treats any third party. In the absence of any undertaking *vis-à-vis* third states, the clause remains but an empty shell.[16] This should not detract from its legal relevance. The existence of that clause **effectively discourages Members from granting third states particular treatment**.

14 To date the WTO dispute resolution process has addressed the interpretation of Art. II in only a few cases.[17] Hence there is a temptation to have recourse to the jurisprudence of WTO panels and the Appellate Body on Art. I GATT 1994 (MFN treatment) or on Art. III GATT 1994 (national treatment) in spite of the difference in wording.[18] The latter is particularly problematic.[19]

IV. The Most-Favoured-Nation Treatment Clause in Other International Agreements

15 The **NAFTA** Agreement also contains a MFN treatment clause.[20] Further, such a clause is contained in Art. 10.7 **Energy Charter Treaty**.[21] Such

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[16] *Wang*, JWT 30 (1996) 1, 91, 106.

[17] See *e.g.* Appellate Body Report, *EC—Bananas III*, WT/DS27/AB/R.

[18] *Ku*, 136.

[19] See below, para. 53.

[20] Art. 1103.1 NAFTA (ILM 32 (1993), 612, 639) reads: "[…] Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments".

[21] Art. 10.7 Energy Charter Treaty (ILM 34 (1995), 381, 390) provides: "Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related

clauses are also contained in the Framework Agreement on the **ASEAN Investment** Area,[22] the **Colonia Protocol** for the Promotion and Reciprocal Protection of Investment Within **Mercosur**[23] and the **Draft Multinational Agreement on Investment**.[24] As already indicated, most bilateral investment agreements, including recent ones, contain a MFN treatment clause.

16 The MFN treatment clause as formulated in the international agreements referred to is rooted in the **general principle of non-discrimination**[25] and reflects the growing liberalization of international trade. Before that, namely in the period before the Second World War, MFN treatment clauses were often made subject to conditions[26] and thus based upon the principle of reciprocity rather than on non-discrimination.

B. Legislative History of Art. II

17 GATT 1947 did not include trade in services; at the time of the conclusion of this agreement services were mostly considered non-tradable.[27] Therefore it is quite understandable that the negotiations on GATS were influenced by GATT 1947, in particular, its leading principles, such as the MFN clause.

18 In the GATS draft of December 1990 there were **different approaches** to the MFN clause. The first alternative provided for a **general commitment**, under which any favourable treatment accorded by one GATS Member to another would be accorded to every GATS Member automatically with the entry into force of GATS.[28] A second alternative covered **only new measures,** namely those negotiated after the entry into force of GATS. As a matter of principle the parties came to an understanding as early as in 1991 that at the time of entry into force of the GATS not all measures in all service sectors would conform to a general MFN treatment clause, and that after a **phasing-out period** the clause should address

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activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable." Art. 12.1 and Art. 14.5 of that Agreement also contain a MFN clause concerning other, more specific, issues.

[22] Art. 8 Framework Agreement on the ASEAN Investment Area, 7 October 1998, <http://www.aseansec.org/6466.htm> (last visited 1 October 2007).

[23] Art. 3.2 MERCOSUR Colonia Protocol, 17 January 1994, <http://www.sice.oas.org/Mercosur/instmt_e.asp> (last visited 1 October 2007).

[24] Art. 3.1.2 Multilateral Agreement on Investment Draft, OECD, Negotiating Group on the Multilateral Agreement on Investment (MAI), The Mulitlateral Agreement on Investment Draft, Consolidated Text, DAFFE/MAI(98)7/REV1, 22 April 1998, <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf> (last visited 1 October 2007).

[25] *Kennedy*, in: *Macrory et al.* (eds), 89, 100.

[26] See on conditional and unconditional MFN treatment *ibid.*, 101.

[27] *Kraus*, 39.

[28] See *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2393.

almost all services. However it was also pointed out that **certain sectors of services should be exempted** from the application of the clause. This understanding is at the root of the structure of Art. II.[29] A third approach favoured the **complete abolition of a MFN treatment clause**.[30] After the breakdown of the negotiations in 1990 due to controversies over agricultural issues a different approach was pursued which resulted in a **more limited scope of GATS** which benefited the negotiations on the MFN clause.[31]

19 One of the **issues discussed** during the negotiations was whether distinct treatment for **taxation** would constitute a violation of the MFN clause.[32] Another issue was the **lists of exemptions** to the MFN treatment clause.[33] In that context it was agreed that the clause did not apply to measures relating to judicial and administrative assistance and, as a result, a footnote explicitly exempting such assistance in draft Art. II was removed.[34] A further issue with implication for the MFN clause was the disagreement about **financial services** since the US envisaged to make a general MFN exemption in this respect.[35]

20 The GATT Secretariat noted during GATS negotiations that in cases where a **MFN exemption** is granted: "[A] Member may accord treatment in that sector more favourable than the minimum standard to some Members, as long as all other Members receive at least that minimum standard of market access and national treatment appearing in its schedule".[36]

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[29] A major step forward was achieved with the so-called Dunkel Draft (Trade Negotiations Committee, Uruguay Round, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/35, 26 November 1990). Statement by *A. Dunkel*: Trade Negotiations Committee, Uruguay Round, Assessment of the Situation in the Market Access Negotiations and Modalities for Their Completion, Statement by the Chairman of the Negotiating Group on Market Access, MTN.TNC/W/93, 20 December 1991.

[30] Detailed see *Reyna* in *Stewart* (ed.), Vol. II, 2335, 2393 *et seq*.

[31] See, *Koehler*, 78 *et seq.; Reyna* in *Stewart* (ed.), Vol. II, 2335, 2403 *et seq*.

[32] See *Reyna*, in: *Stewart* (ed.), Vol. IV, 775, 800.

[33] *Ibid*., 807 *et seq*.

[34] Group of Negotiations on Services, Uruguay Round, Issues Relating to the Scope of the General Agreement on Trade in Services, Note by the Secretariat, Addendum. MTN. GNS/W/177/Rev.1/Add.1, 6 December, 1993. The footnote had been intended explicitly to exempt international agreements on juridical and/or administrative assistance from MFN treatment (see Dunkel Draft, MTN.TNC/W/35) but was later deemed unnecessary since, due to other assistance obligations in the GATS (*e.g.* Art. III:4 and Art. VIII:3), its scope would have been very limited. See *Reyna*, in: *Stewart* (ed.), Vol. IV, 775, 803.

[35] *Reyna*, in: *Stewart* (ed.), Vol. IV, 775, 815.

[36] Group of Negotiations on Services, Uruguay Round, Scheduling of Initial Commitments in Trade in Services, Explanatory Note, MTN.GNS/W/164, 3 September 1993, para. 14.

C. Scope of Art. II

I. General

Art. II encompasses several elements. **Art. II:1** describes the **scope** of the MFN clause, whereas **Art. II:2 and 3** provide for **exemptions** from this clause. *21*

II. "Any Measure Covered by this Agreement"

Art. II:1 applies to "any measure covered by this Agreement". This wording refers to **Art. I:1** regulating the scope of the GATS, which states that this Agreement applies to **"measures by Members affecting trade in services"**.[37] *22*

The reference to **"measures affecting trade in services"** is to be seen as a **limitation** on the scope of the MFN treatment clause, since only those measures which may affect trade in services come within the ambit of this clause. Turning to the question of how to establish whether and to what extent a measure[38] is **"affecting trade in services"**,[39] some indication may be drawn from the WTO case law. In *EC—Bananas III* the Appellate Body upheld the Panel's position that the ordinary meaning of the term **"affecting"** suggests a **broad scope** of the GATS.[40] It argued that no measures were excluded *a priori* from that scope; rather it encompassed any measure affecting the supply of services **regardless of whether** such measure **directly governed** the supply of a service or whether it regulated other matters but nevertheless affected trade in services.[41] This approach *de facto* significantly reduced the restrictive meaning of the words "any measure covered by this Agreement". The Appellate Body further distinguished between three categories of trade measures, namely those on goods and on services only and those affecting trade in goods as well as trade in services.[42] Measures exclusively affecting goods or not affecting trade at all would be excluded. Measures affecting both services and goods would fall under the scope of the GATT and of Art. II.[43] *23*

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[37] Panel Report, *EC—Bananas III*, WT/DS27/R/USA, para. 7.298.

[38] The definition of the term "measure" is to be found in Art. XXVIII lit. a.

[39] The term "measures by Members affecting trade in services" is defined in Art. XXVIII lit. c.

[40] *EC—Bananas III*, WT/DS27/R/USA, para. 7.285; *EC—Bananas III*, WT/DS27/AB/R, para. 220.

[41] *Ibid.*

[42] *EC—Bananas III*, WT/DS27/AB/R, para. 221.

[43] *Ibid.*, para. 222.

24 The Appellate Body in *Canada—Autos* introduced a clear-cut test for Art. II.[44] In its view the wording of the provision suggested that the **analysis of Art. II** should proceed in **several steps**: there must **first** be a **threshold determination under Art. I** that the measure was covered by the GATS.[45] This required the existence of "trade in services" in one of the four modes of supply and a measure which would "affect" this trade.[46] **After that** the **requirements of Art. II:1** had to be examined, *i.e.* the treatment by one Member of "services and service suppliers" of any other Member had to be compared to the treatment of "like"[47] services and service suppliers of "any other country".[48] To complete the test suggested by the Appellate Body it must be added that this comparison is undertaken to find out whether there was treatment less favourable[49] of the first group which would trigger the obligation "immediately"[50] and "unconditionally"[51] to treat this group "no less favourably" than the other group.

25 The term **"trade in services"** is defined in Art. I:2 by identifying four modes of supply: (a) from the territory of one Member into the territory of any other Member (cross-border supply not necessarily involving the presence of the supplier in the country where the supply is to take place); (b) in the territory of one Member to the service consumer of any other Member (consumption abroad, for example in the case of tourism); (c) by a service supplier of one Member, through commercial presence in the territory of any other Member (commercial presence abroad, for example a branch of an insurance company); (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member (for example the supplier sends its personnel into the territory of another Member where its services are offered).[52] This differentiation may be of relevance for the establishment whether the services are "like" and thus benefit from treatment accorded to one of them.[53]

26 The term **"measures"** means measures taken by central, regional or local governments and authorities and by non-governmental bodies in the exercise of powers delegated by central, regional or local governments or

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[44] *Canada—Autos*, WT/DS139/AB/R, WT/DS142/AB/R, para. 170; the Appellate Body critisized the Panel here for not having separated the examination of the measure as "affecting trade in services" under Art. I from the further examination of the measure's consistency with Art. II (para. 152).

[45] *Ibid.*, paras 152, 170.

[46] *Ibid.*

[47] See for further details on "likeness" below, para. 32 *et seq.*

[48] *Canada—Autos*, WT/DS139/AB/R, WT/DS142/AB/R, para. 171.

[49] See for details on "no less favourable" below, paras 49 *et seq.*

[50] See for details on "immediately" below, para. 45.

[51] See for details on "unconditionally" below, paras 46 *et seq.*

[52] See *Wang*, JWT 30 (1996) 1, 91, 94.

[53] See below, paras 32 *et seq.*

authorities.[54] The term applies, in principle, to measures taken by Members in the form of laws, regulations, rules, procedures, judicial decisions, administrative actions, or in any other form.[55]

27 It is noteworthy that **Art. I:1 refers to trade in services,** whereas **Art. II:1** when dealing with the beneficiaries of the clause **speaks of services and service suppliers**. The **question** may be raised—based purely on the wording of Art. I:1—**whether Art. II:1 only prohibits discriminatory treatment *vis-à-vis* services,** but not, however, against service suppliers. Such limiting interpretation of the MFN treatment clause **would run counter to Art. I:2**. This provision describes "trade in services" as "supply of a service" which explicitly refers to the service supplier in modes 3 and 4. Further, any attempt to limit the applicability of the MFN treatment clause to services and to exclude the service supplier **would render ineffective the implementation of the objective of Art. II:1**—namely to provide for a comprehensive ban on discriminatory measures against services.

28 It may be noted in this context, though, that the MFN treatment clause of **NAFTA** (Art. 1203 NAFTA) **provides** that **MFN treatment** shall apply only **to "service providers"** of another party. This considerably limits the scope of the MFN treatment clause compared to that of Art. II since a service may be supplied under different circumstances, for example, in the case of cross-border supply or in the case of consumption abroad, to a consumer without the presence or residence of a foreign service supplier in the territory of that country. In these cases discriminatory treatment of the services supplied which cannot be considered as discriminatory on the supplier would not come under the ambit of the MFN treatment clause of NAFTA.

29 Thus, the examination of the term "measure covered" by reference to the scope of the GATS laid down in Art. I:1 shows that it comprises not only measures concerning services but also measures relating to service suppliers.

30 The **broad wording** of Art. II:1 results in **broad** coverage of national laws and regulations, wider than that covered by Art. I:1 GATT 1994. This broad coverage is somewhat balanced by the possibility of exemptions under Art. II:2. Nevertheless, these selective exemptions leave the scope of Art. II:1 intact, at least in principle. Therefore, the MFN clause of GATS has significant potential to eliminate existing barriers in trade thus contributing to its further harmonization. Some insight may be gained in that respect

[54] Art. I:3.
[55] Art. XXVIII lit. a.

from the impact the principle of non-discrimination has had in the EU legal system.

D. MFN Obligations and Rights Under Art. II:1

I. Structure of the Clause

31 Once the threshold analysis concludes that there is a "measure covered by this Agreement", the next step is to establish **whether a Member accords** to like services and suppliers of any other country **treatment** which is **more favourable** than that accorded to any other Member. **If** that question is to be **answered affirmatively** then the Member is under the obligation to **accord immediately and unconditionally** to services and service suppliers of any other Member **treatment no less favourable**. The reference to like services and services suppliers as contained in Art. II:1 has a limiting effect. The prohibition of discrimination is not a general one, but is related only to particular services or services suppliers which are "like". This limitation is a common one; it is to be found similarly in the US Model Bilateral Investment Treaty[56] ("in like circumstances") or in Art. 1103 NAFTA ("in like circumstances").

II. Like Services and Like Service Suppliers

32 Like other non-discrimination provisions Art. II identifies a comparator and establishes that there shall be no negative discrimination[57] against services and service suppliers of any Member compared to like services and services suppliers of any other country. Thus the **basis of comparison** in Art. II:1 is the **likeness** of services and service suppliers.[58]

33 The starting point on interpreting the notion of likeness is the **literal meaning** of the term. Quoting the New Shorter Oxford English Dictionary, the Appellate Body stated in *EC—Asbestos* with respect to Art. III:4 GATT 1994 that "like" means having the same characteristics or qualities as some other thing of approximately identical shape, size etc. with something else, similar.[59] This definition does not improve understanding since it substitutes for the word "like" words such as "approximately identical shape" or "similar", equally open for interpretation.

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[56] Art. 4 of the 2004 Model BIT Draft, 2004, <http://www.bilaterals.org/IMG/doc/2004_update_US_model_BIT.doc> (last visited 1 October 2007).

[57] Art. II:1 speaks of "no less favorable"; see on that below paras 49 *et seq.*

[58] See *Krajewski & Engelke*, Article XVII GATS, para. 15.

[59] See Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, para. 90.

For that reason it is necessary to have recourse to the **object and purpose** of Art. II. The general object and purpose of Art. II are to provide for "equality"[60] of conditions for competition between services and services suppliers amongst imported services including importers of services. *34*

In determining what "like services and service suppliers" are one is tempted to have recourse to the rich jurisprudence of GATT concerning like products under Art. III GATT 1994. The **criteria** that have been used in past disputes **for defining "like"** products are (i) the visibility and acceptance of a product in a given market, (ii) customer tastes and habits, and (iii) the product's properties, nature and quality. Another factor was the tariff classification of products.[61] *35*

These criteria may effectively be used in determining like services and services suppliers only with some **modification**. As services are intangible it is evident that physical properties are irrelevant, although they may play a particular role in establishing the likeness of goods. *36*

Based upon the jurisprudence of GATT/WTO panels and the Appellate Body concerning the likeness of products the **Services Sectoral Classification List**[62] may be used to identify "like" services and service suppliers. In this list services are categorized in twelve main sectors and 160 subsectors. The subsectoral descriptions of the service transaction have to be read in the light of the United Nations Central Product Classification (**CPC**) developed by the UN (Department of International Economic and Social Affairs).[63] However, this services classification system is less detailed than that on goods, which means that a broader range of services qualifies as like services. **However**, the CPC has been developed for statistical purposes and is **not based upon the competitive relationship between services or service suppliers.** *37*

Equally, **customers' tastes and habits** as well as **services end-uses** may be used to identify like services; the decisive question is whether customers consider services to be **exchangeable**. Such exchangeability could be examined by reference to cross-price elasticity in demand.[64] *38*

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[60] See above, para. 5.

[61] See Appellate Body Report, *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, para. 20; Appellate Body, *Canada—Periodicals*, WT/DS31/AB/R, para. 21; *EC—Asbestos*, WT/DS1357AB/R, para. 101.

[62] Group of Negotiations on Services, Uruguay Round, Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120, 10 July 1990.

[63] The UN CPC which was the basis for the GATT secretariat's classification has been replaced by the 2002 version, which contains different subcategories and classification numbers from the Provisional CPC. The current version is Central Product Classification Version 1.1, ST/ESA/STAT/SER.M/77/Ver.1.1, E.03.XVII.3, see also <unstats.un.org/unsd/cr/family2.asp?Cl=16> (last visited 1 October 2007).

[64] See for details on that *Krajewski & Engelke*, Article XVII GATS, para. 22.

39 In the context of GATT there is discussion whether **process and production methods** should be taken into account when determining the likeness of the product. It is the majority view that the process and product methods should not be taken into account.[65] In the context of GATS this issue may be looked upon differently. Since Art. II refers to the service supplier as well as to the service this justifies, at least in principle, taking into consideration service supplier related facts, and thus at least some process methods, when considering the likeness of services.[66]

40 A, probably evident, option for the establishment of the likeness of services is to refer to the **mode of supply** in accordance with Art. I:2. This means that it would be possible to differentiate, for example, between cross-border supply not involving the presence of the supplier in the country where the supply is to take place and supply through the presence of the supplier in the territory of another Member. Since services supplied through different modes of supply are always foreign,[67] the test using modes may be viable under Art. II, although not applicable under Art. XVII, which deals with a comparison between foreign and domestic services and service suppliers. This element of comparing modes of supply, however, does not solve the problem since this differentiation does not assist in establishing whether services supplied in the same mode are alike or not. **Considering the objective** of the MFN test, *i.e.* to avoid the deterioration of competition, the **only viable test** seems, as indicated, to be not to abandon, as a test element, the question whether customers consider services as **exchangeable**.

41 This would suggest a **two-steps-approach**: first to establish whether services are supplied in the **same mode** and secondly whether customers consider them **exchangeable**. The question is whether the WTO panels or the Appellate Body would have to establish both discrimination against a service supplier and discrimination in the services supplied. Given the fact that Art. II refers to both service supplier and services it seems to be more in line with the construction of this provision to consider both separately and to consider the discrimination against either the service supplier or the service as sufficient to invoke the consequences of Art. II.

42 That the question of likeness or unlikeness raises particular problems in respect of services is shown by the jurisprudence of the WTO. This jurisprudence equally demonstrates that the product-related criteria for determining the likeness of goods offer only limited guidance for the determination of like service suppliers via the services they offer. The WTO Panel in *EC—Bananas III* held:

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[65] See *Krajewski & Engelke*, Article XVII GATS, para. 28.
[66] *Ibid.*
[67] *Ibid.*, para. 26.

"[…] wholesale transactions as well as of each of the different subordinated services mentioned in the head note to section 6 of the CPC are 'like' when supplied in connection with wholesale services, irrespective of whether these services are supplied in respect of bananas of EC and traditional ACP origin, on the one hand, or with respect to bananas of third-country or non-traditional ACP origin, on the other and that, in our view, at least to the extent that entities provide these like services, they are like service suppliers".[68] *43*

This jurisprudence raises two problems. First, following the wording of this decision, is there actually any need to establish the likeness or the unlikeness of services suppliers or **is only the likeness of the service** supplied **relevant?** If the answer is that it is only the service offered which counts then it would be possible to distinguish between certain service suppliers in spite of the fact that they offer like services. For example, it would be possible to privilege juridical persons offering insurance from one country without according the same treatment to juridical persons from others, although they offer like services. Considering that it is the **objective and purpose** of the MFN treatment clause to avoid a deterioration of competition one may sustainably argue that the notion of **likeness extends to services and service suppliers alike** and that the obligation of MFN treatment is violated if there is discrimination against the service or the service supplier. It is reasonable for the panels and the Appellate Body to establish a link between the service supplier and the service supplied. Extending the MFN treatment clause to service suppliers is meant to ensure undistorted competition between like services and not between service suppliers in general. However, it is **questionable** whether this also calls for **equal treatment of actual service suppliers and potential ones**.[69] The MFN treatment clause applies, with its objective and purpose in mind **only if** and when **concrete steps** are taken **to enter the market**. *44*

III. "Immediately"

The term means that the beneficiary party acquires a right to MFN treatment **as soon as the granting party accords to any other country favourable treatment** within the scope of the subject matter of the clause. It may be appropriate to distinguish between **two different scenarios**. Services are already supplied from one Member to another and now the latter agrees with a third state on more favourable treatment. The moment this agreement is reached the conditions apply to the like service already being supplied. These new conditions have no retroactive effect *45*

[68] *EC—Bananas III*, WT/DS27/R/USA, para. 7.346.
[69] Critical also *Krajewski & Engelke*, Article XVII GATS, para. 31.

unless the agreement with the third state provides so. Where a Member receives services from another country under specially agreed conditions and at the same time services from a Member are about to enter the market these latter services have to be granted the same conditions the moment they enter the market.

IV. "Unconditionally"

46 The term means that MFN treatment is extended **unconditionally** or, in other words, **without equivalent compensation**. This is an essential element which was negotiated in detail.[70] In the *Canada—Autos* dispute the Panel discussed the meaning of the term "unconditionally" in the GATT context:

47 "We agree with Japan that the ordinary meaning of 'unconditionally' is 'not subject to conditions'. However, in our view Japan misinterprets the meaning of the word 'unconditionally' in [...] Art. I:1 [GATT 1994]. The word 'unconditionally' in Art. I:1 [GATT 1994] does not pertain to the granting of an advantage *per se*, but to the obligation to accord to the like products of all Members an advantage which has been granted to any product originating in any country [...]. In this respect, it appears to us that there is an important distinction to be made between, on the one hand, the issue of whether an advantage within the meaning of Art. I:1 [GATT 1994] is subject to conditions, and, on the other, whether an advantage, once it has been granted to the product of any country, is accorded 'unconditionally' to the like product of all other Members. An advantage can be granted subject to conditions without necessarily implying that it is not accorded 'unconditionally' to the like product of other Members."[71]

48 In other words if an advantage is bilaterally being granted conditionally Members may, on the basis of the MFN treatment clause, only request not to be discriminated against in this respect, which means that they can ask to benefit from the advantage **as granted bilaterally**. Members may not request better conditions than those accorded to another state. Thus, "unconditionally" relates only to the grant itself and not to the benefits and possible conditions associated with the treatment granted.

V. No Less Favourable Treatment

49 The term "no less favourable" was not borrowed from Art. I GATT 1947 but rather from the national treatment clause in Art. III GATT 1947.

[70] See *Wang*, JWT 30 (1996) 1, 91, 107.
[71] Panel Report, *Canada—Autos*, WT/DS139/R, paras 10.23–10.24.

Nevertheless, this term is used widely, for instance in Art. 10.7 Energy Charter Treaty and Art. 1103 NAFTA. There is no evidence that, by using different wording, the parties to these agreements intended to give the MFN treatment clause different scope. Whatever the terminology used may be, the objective of the clause remains the same, namely to protect against discriminatory treatment.

50 The "no less favourable clause" has a **positive implication** since it requires each Member, as a general obligation, to accord to any other Member treatment no less favourable than that which it grants to any other country. The notion "no less favourable", however, does not prevent it from granting any other Member additional favours or advantages beyond those extended to any third country. In such a case other Members are correspondingly entitled to claim the same additional advantages.

51 The **same terminology**—"no less favourable"—is used in **Art. XVII:1** (national treatment clause). Unlike Art. II:1, Art. XVII specifies the content of that obligation further, thus giving the state concerned some flexibility in accommodating the beneficiary state.[72] The limit is that the treatment which may be formally different **must not modify the conditions of competition** to the detriment of the beneficiary state. It has been **discussed whether such approach** may **also be applied to the MFN clause**. This would mean in essence that a state would not be under an obligation formally to grant to the beneficiary state the same treatment granted to the third state; equal treatment in kind would suffice.

52 In rejecting the EC's interpretation that Art. II:1 was limited to a mere prohibition of *de jure* discrimination, the Panel in *EC—Bananas III* has interpreted the notion of "no less favourable" by reference to Art. XVII:2 and 3. The Panel stated:

53 "[…] the standard of 'no less favourable treatment' in paragraph 1 of Article XVII is meant to provide for no less favourable conditions of competition regardless of whether that is achieved through the application of formally identical or formally different measures. Paragraphs 2 and 3 of Article XVII serve the purpose of codifying this interpretation, and in our view, do not impose new obligations on Members additional to those contained in paragraph 1. "In essence, the 'treatment no less favourable' standard" of Article XVII:1 is clarified and reinforced in the language of paragraph 2 and 3. The absence of similar language in Article II is not, in our view, a justification for giving a different ordinary meaning in terms of Article

[72] See *Krajewski & Engelke*, Article XVII GATS, para. 40.

31(1) of the Vienna Convention to the words 'treatment no less favourable', which are identical in both Articles II:1 and XVII:1".[73]

54 The Appellate Body argued, however, that the meaning of Art. II was distinct from that accorded to national treatment under both GATS and GATT. For that reason it disagreed with an interpretation of the MFN treatment clause by having recourse to the national treatment clause. In the Appellate Body's view, the Panel should have compared the MFN obligation in Art. II with the respective clauses in GATT 1994.[74] It stated that:

55 "Therefore, provisions elsewhere in the GATS relating to national treatment obligations, and previous GATT practice relating to the interpretation of the national treatment obligation of Article III of the GATT 1994 are not necessarily relevant to the interpretation of Article II of the GATS".[75]

56 This reasoning is endorsed by the different objectives pursued under the MFN treatment clause and the national treatment clause respectively. The purpose of the MFN treatment clause is to ensure equality of opportunity among exporters from all Members.[76] The national treatment clause strives instead to ensure that services admitted are not discriminated against on the basis of their origin.

57 Having proceeded from Art. I GATT 1994 as a means of interpretation of Art. II the Appellate Body emphasized that **Art. II** was directed against **not only *de jure* but also *de facto* discrimination**. It stated:

58 "The possibility that the two Articles [Arts II and XVII GATS] may not have exactly the same meaning does *not* imply that the intention of the drafters of the GATS was that a *de jure*, or formal, standard should apply in Article II of the GATS. If that were the intention, why does Article II not say as much? The obligation imposed by Article II is unqualified. The ordinary meaning of this provision does not exclude *de facto* discrimination. Moreover, if Article II was not applicable to *de facto* discrimination, it would not be difficult—and, indeed, it would be a good deal easier in the case of trade in services, than in the case of trade in goods—to devise discriminatory measures aimed at circumventing the basic purpose of that Article".[77]

59 This means in essence that under the MFN treatment clause it is not sufficient to accord the Member similar treatment to that accorded to a third state. By virtue of the clause the Member is rather to be given exactly the same treatment as the third state.

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[73] *EC—Bananas III*, WT/DS27/R/USA, para. 7.301.
[74] *EC—Bananas III*, WT/DS27/AB/R, para. 231.
[75] *Ibid.*
[76] See above, para. 34.
[77] *EC—Bananas III*, WT/DS27/AB/R, para. 233. Italics in the original text.

E. Exceptions and Exemptions

I. Introduction

As already indicated, GATS provides for exceptions to and exemptions from the MFN treatment clause. These exceptions and exemptions have to be seen from the point of view of the situation prevailing at the **time of the negotiations** on GATS. GATS and its MFN obligation came into effect before WTO Members were able or willing completely to eliminate discriminatory measures in trade in services. This was anticipated. Apart from that, GATS was not able to overcome national sensibilities concerning the liberalization of some sectors of services. Therefore it was agreed to provide for possibilities of different exceptions and exemptions. *60*

Concerning their format one may **distinguish** between those **exceptions which exclude certain services from the scope of GATS** which, accordingly, limits the scope of application of the MFN treatment clause. Examples of this are services supplied in the exercise of government authority[78] or measures affecting air traffic rights and directly related services.[79] An alternative is **limiting the applicability of the MFN clause** although the services concerned fall under the scope of GATS. Art. II:2 follows this approach. *61*

An alternative method of differentiation is to distinguish between **statutory exemptions** and **self-selective exemptions**.[80] *62*

The several possibilities of limiting the applicability of the MFN clause reflect the economic heterogeneity of the service sector and the different level of development in that sector. For that reason the interests and preoccupations of the Member states differed significantly. Apart from that, exceptions also try to accommodate the needs of regional economic integration. *63*

II. Self-Selective Exemptions (Art. II:2)

In accordance with Art. II:2, a Member may maintain measures inconsistent with Art. II:1, provided that such measures are listed in, and meet the conditions of, the Annex on Article II Exemptions. As the word **"maintains"** indicates, Art. II:2 **only** covers **measures in existence before the entry into force of the WTO Agreement**. Original Members had a once-and-for-all opportunity to exempt themselves from their MFN obligation *64*

[78] Art. I:3 lit. b.

[79] See Annex on Air Transport Services; it excludes the network of bilateral agreements on air traffic rights from the GATS rules. The same is true for maritime transport where the application of the MFN clause was suspended.

[80] *Wang*, JWT 30 (1996) 1, 91, 99.

with respect to specific measures prior to the entry into force of the WTO Agreement. Such a measure must be specified in a list of MFN exemptions describing the measure, its coverage and duration. After that date, namely the entry into force of the Agreement establishing the WTO, applications for new exemptions are to be dealt with under the more stringent procedure for waivers provided for in Art. IX of the WTO Agreement.[81/82]

65 The reality is somewhat different. Some of the exemptions presented under Art. II:2 are, in fact, future exemptions which were presented as existing ones.

66 The Annex on Article II Exemptions is tailored to original Members. Nevertheless, **new Members** have the same opportunity as the original ones when **acceding** to the WTO Agreement, as there is no differentiation between original and new Members. Before the entry into force of the WTO Agreement for them they may indicate which measures inconsistent with Art. II:1 they wish to maintain. The exemption lists form an integral part of GATS.[83] From the entry into force of the WTO Agreement, in principle, no further exemptions can be added to those lists. There is, however, the possibility that sectoral negotiations may open up such possibility. In the case of acceding Members the Protocol of Accession may contain lists of exemptions.[84]

67 One further possibility for a Member to exempt itself from a MFN obligation is to invoke Art. XIII WTO Agreement[85] and to declare the non-application of the GATS *vis-à-vis* a particular Member.

III. Statutory Exemptions

68 Statutory exemptions can be invoked by each Member to exempt itself from the MFN obligation under certain circumstances. Some are subject to prior approval by, or notification to, the Council for Trade in Services (CTS); others become operative directly.[86]

69 According to **Art. II:3** advantages for services trade in frontier zones are exempt from the applicability of the MFN clause if such service is locally produced and consumed. The applicability of GATS—and that includes the

[81] Para. 2 of the Annex on Article II Exemptions.
[82] For further details see *Wolfrum*, Max Planck CWTL, Vol. 2, Article IX WTO Agreement, paras 18 *et seq*.
[83] See *Wolfrum*, Annex on Article II Exemptions, para. 1.
[84] *Footer & George*, in: *Macrory et al.* (eds), 799, 830.
[85] See *von Bogdandy & Wagner*, Max Planck CWTL, Vol. 2, Article XIII WTO Agreement.
[86] *Wang*, JWT, 30 (1996) 1, 91, 99 uses somewhat different terminology.

MFN clause—is limited in respect of **economic**[87] **and labour market integration systems**.[88] In addition, more favourable treatment may be granted to least-developed countries under **Art. IV:3**[89] and to juridical persons owned or controlled by natural persons of developing country parties in the context of an economic integration agreement involving only developing countries.[90] There are further exceptions under **Art. XIV**, which give Members the possibility to take measures for the protection of public morals, public order and human, animal or plant life or health, to avoid double taxation etc. It copies Art. XX GATT 1947.[91] The measures in question shall be applied in a manner which does not discriminate between countries. Equally, the security exceptions of Art. XIVbis are modelled upon the GATT provision.[92] In accordance with **Art. XIII** government procurement is exempted from Art. II.[93] Different requirements between the various options for exemptions can exist in connection with visas.[94] Finally, the modification of Schedules may have an implication on the applicability of the MFN clause since it applies only to the commitments scheduled.

IV. Effect of MFN Exemptions

Exemptions from the MFN clause relieve a Member from its commitment *70*
under Art. II. Such exemptions, however, are irrelevant to the obligations under Art. XVI (market access) and Art. XVII (national treatment). This means in effect that a Member may accord to some Members market access and/or national treatment that is more favorable than the minimum scheduled in that specific sector without being obliged to accord the same treatment to other Members. However, it is not permitted to accord to certain Members treatment which falls below the standard specified in its Part III Schedule. In such a case only upward discrimination is permitted.[95] If no scheduled commitment exists in a sector or a mode of services, an exemption to the MFN clause opens the possibility for complete discrimination.[96]

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[87] See *Cottier & Molinuevo*, Article V GATS, para. 2.
[88] See *Bast*, Article V^{bis} GATS, para. 5.
[89] *Footer & George*, in: *Macrory et al.* (eds), 799, 833.
[90] See *Cottier & Molinuevo*, Article V GATS, paras 43 *et seq.*
[91] See *Cottier et al.*, Article XIV GATS, para. 1.
[92] See *Cottier & Delimatsis*, Article XIVbis GATS, para. 1.
[93] See *Zacharias*, Article XIII GATS, para. 12.
[94] Annex on Movement of Natural Persons Supplying Services under the Agreement, footnote to para. 4.
[95] *Footer & George*, in: *Macrory et al.* (eds), 799, 829 *et seq.*
[96] *Ibid.*, 830.

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Article III GATS
Transparency

1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.
2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.
3. Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.
4. Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the "WTO Agreement"). Appropriate flexibility with respect to the time-limit within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations.
5. Any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement.

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A. General

1 Transparency plays a pivotal role in the facilitation of trade in general. Not only does it increase predictability and legal certainty, but it also improves the accountability and legitimacy of regulatory authorities at all stages of regulatory policymaking.[1] Taking into account that regulatory intensity is an inherent characteristic of trade in services, the absence of transparency can increase the complexity and the costs of supplying services. More

[1] See ECJ, C-41/00 P, *Interporc Im- und Export GmbH v. Commission* [2003] E.C.R. I-2125, Rec. 39.

significantly, it can affect the **patterns of service supply**. For instance, due to opaque domestic regulatory and administrative practices, cross-border supply may be preferred to commercial presence. In the absence of border measures, transparency in domestic regulation is the only tool that can ascertain the **public availability** of domestic laws, regulations and practices. Of course, ensuring transparency in the case of services is a dynamic process that aims ultimately to improve the fairness and rationality of domestic policymaking and regulation.

2 Art. III sets out the main obligations that WTO Members should abide by with respect to transparency. This provision belongs to Part II of the GATS, entitled "General Obligations and Disciplines". Taking into account the current weakness of the other GATS provisions that are embodied in Part II of the Agreement, including MFN (Art. II) and Domestic Regulation (Art. VI), it can be argued that Art. III currently constitutes the most powerful general obligation that Members should abide by with respect to trade in services. Indeed, a careful look at Art. III reveals that all paras but one (Art. III:3) apply regardless of commitments made, *i.e.* unconditionally.

3 Art. III, like Art. 63 TRIPS, draws its wording from its GATT 1994 counterpart, that is, Art. X GATT 1994.[2] More generally, the **principle of transparency** in WTO law is usually divided into three main obligations: (a) the **obligation to publish**, or otherwise make publicly available, all relevant regulations and subordinate measures of **general application** that affect trade; (b) **the obligation to notify** several forms of government action and their possible changes to the WTO; and (c) **the obligation duly to administer** such regulations and measures, as well as the existence of domestic review mechanisms where legal redress can be sought. These obligations aim at promoting a rules-oriented approach to trade policy at the national level, providing information to service suppliers, assisting in the avoidance of disputes, and facilitating trade negotiations.

4 The transparency obligations may capture discriminatory measures, but origin-neutral measures may also be covered. As will be demonstrated,[3] it is possible for different categories of domestic measures to be subject to different obligations. As to the scope of this analysis **top-down transparency** (Trade Policy Review Mechanism (TPRM)) is not at issue here. Rather, the various features of **bottom-up transparency** are analysed here. Furthermore, the analysis will be limited to **procedural transparency**. **Regulatory transparency** in the GATS is addressed mainly in Art. VI:4. The current negotiations within the Working Party on Domestic Regulation (WPDR) are expected to generate specific transparency disciplines that would

[2] See generally, *Mavroidis*, 270 *et seq*.
[3] See below, para. 14.

apply across services sectors.[4] Regarding the evolution of the WTO case law on transparency, a meticulous look at the WTO rulings demonstrates that transparency obligations are usually the "victims of judicial economy" exercised by the WTO judiciary. Although allegations of violations of transparency obligations can stand alone, in practice Members use them as **subsidiary allegations**, and therefore the adjudicating bodies refrain from addressing them after they have found a violation of another provision.[5] This is one of the reasons that interpretations of provisions containing transparency obligations are fewer than for other WTO provisions.

As pointed out earlier, the principle of transparency in the GATS replicates Art. X GATT 1994.[6] Nevertheless, there are significant differences between the two agreements as regards the function of transparency. First and foremost, Art. III, contrary to Art. X GATT 1994, uses the term "transparency".[7] In fact, transparency forms an important part of the object and purpose of the GATS.[8] Rec. 2 of the Preamble to the GATS explicitly acknowledges Members' willingness "to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization [...]".[9] Second, transparency and its promotion in the GATS stands, according to the Preamble, on an equal footing with other objectives, such as: the overall balance of rights and obligations, while paying due respect to national policy objectives; the irrefutable right of Members to regulate; and the leeway of the developing country Members and LDCs to implement at a slower pace those transparency obligations that may impose an intolerable administrative burden. Third, transparency obligations in the GATS are split into two provisions: Art. III, which contains the publication and notification requirements, and Art. VI:1–3, which disciplines the administration of domestic regulation, calls for the establishment of review mechanisms, and provides for specific **due process** obligations where an authorization is sought. This contradicts the GATT approach where the obligations of **publication**, **notification**, and **due administration** are all incorporated in Art. X. Again, Arts III and VI, like Art. X GATT 1994, are not concerned with the **substantive content** of a particular

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[4] *Krajewski*, Article VI GATS, paras 60 *et seq*.

[5] See, for instance, Panel Report, *Indonesia—Autos*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, para. 14.152; Panel Report, *US—DRAMS*, WT/DS99/R, para. 6.92; Panel Report, *US—Stainless Steel*, WT/DS179/R, para. 6.55.

[6] See also *Croome*, 210.

[7] The first GATT document that used the term "transparency" was the Decision on Notification Procedures, LT/UR/D-1/5, 15 April 1994, which aimed to "contribute to the transparency of Members' trade policies[...]". See *WTO*, The Legal Texts, 388.

[8] See also Panel Report, *US—Gambling* WT/DS285/R, para. 6.107; Appellate Body Report, *US—Gambling*, WT/DS285/AB/R, para. 235 and footnote 271.

[9] This recital replicates the Ministerial Declaration on the Uruguay Round, Statement by the Chairman, MIN.DEC, 20 September 1986, 10.

domestic measure.[10] These provisions refer only to the **publication** and **administration** of laws.

B. Publication Requirements (Art. III:1–2)

6 The **obligation to publish promptly** all relevant rules, regulations, judicial decisions, and administrative actions of general application affecting the GATS is the most central WTO transparency requirement, and GATS could not be an exception to this. The publication of international agreements also comes within the scope of this obligation.[11] Art. III:2 acknowledges that publication requirements may **not** be **practicable** because of the administrative burden, the lack of human resources, and the costs involved. Publication requirements can also be burdensome in decentralized economies. In such cases, the obligation to publish can **otherwise** be satisfied if Members ensure the public availability of their domestic measures that relate to or affect the operation of the GATS by other means, for instance, by creating a website.

7 It is incumbent on each Member to decide which domestic measures or international agreements it will publish to conform to Art. III:1. The WTO consistency of those decisions will be subject to review by the WTO judiciary in case of disagreement between WTO Members. The **wording** that **Art. III:1** advances ("measures [...] which pertain to or affect the operation of this Agreement") implies a **broad coverage**. The definition of "measures affecting trade in services" laid down in Art. XXVIII lit. c is equally broad. That the term "affect" implies a wide reach was confirmed by the Appellate Body in *EC—Bananas III*.[12] In addition, the meaning in Art. III:1 of the terms **"affecting the operation of this Agreement"** (*i.e.* the GATS) and **"affecting trade in services"** should be regarded, for all practical purposes, as being the same.

I. "Measures of General Application"

8 Any **measure of general application** and any international agreement which pertains to or affects the operation of the GATS fall within the scope of application of Art. III:1. Just as in every WTO agreement where

[10] See *US—Gambling* WT/DS285/R, para. 6.432; Appellate Body Report, *EC—Bananas III*, WT/DS27/AB/R, para. 200; Appellate Body Report, *EC—Poultry*, WT/DS69/AB/R, para. 115; but Panel Report, *Argentina—Hides and Leather*, WT/DS155/R, paras 11.70–11.71; Appellate Body Report, *EC—Selected Customs Matters*, WT/DS315/AB/R, para. 200. For a thorough analysis, see *Delimatsis*, JIEL 10 (2007), 13.

[11] In addition, in accordance with Art. V:7, Members are required to notify promptly to the CTS any economic integration agreements in which they participate. See also Art. VII:4.

[12] *EC—Bananas III*, WT/DS27/AB/R, para. 220.

a transparency obligation is identified, Art. III extends its coverage to the full range of possible measures that come under the purview of the GATS, in accordance with Art. XXVIII. In other words, although many of the measures of general application are likely to take the form of laws, regulations, or administrative guidelines, such measures need not directly govern a particular service. The fact that they affect or pertain to the operation of the GATS would suffice to bring them within the scope of Art. III. Under this category of measures would arguably also come measures in other sectors, *e.g.* in goods, which can affect the operation of the GATS. Such measures, however, need only be published, not notified to the WTO.

Rationae materiae, whereas the WTO judiciary did not clarify the exact scope of the term **"of general application"** in Art. III:1, this term has been interpreted in the GATT 1994, under its Art. X:3 lit. a, to cover measures that affect "an unidentified number of economic operators"[13] and apply to **a range of situations or cases**.[14] Thus, measures that address **specific** situations would not fall within the ambit of Art. III:1. Furthermore, the *Japan—Film* Panel ruled that administrative rulings in **individual** cases should also be deemed measures of general application whenever such rulings establish or revise principles or criteria applicable in future cases. Nevertheless, the complainant bears the burden of demonstrating that such rulings have not been published.[15] *9*

II. "Prompt" Publication

Rationae personae, the obligation of prompt publication will usually be the task of a government authority or a non-governmental one with delegated power.[16] *Rationae temporis*, Members are required to publish **promptly** all measures of general application. As a general rule, the publication of a domestic measure is deemed prompt provided that it occurs **prior** to the application or enforcement of that measure. However, Art. III:1 allows Members to publish the measures falling within Art. III:1 at the time that they enter into force. While the provision suggests, through the use of the word "and", that simultaneous publication and entry into force of the measures cannot be deemed "prompt", this approach is in line with the *10*

[13] See Panel Report, *US—Underwear*, WT/DS24/R, para. 7.65; and Appellate Body Report, *US—Underwear*, WT/DS24/AB/R, p. 21.

[14] See Panel Report, *EC—Selected Customs Matters*, WT/DS315/R, para. 7.116.

[15] See Panel Report, *Japan—Film*, WT/DS44/R, para. 10.388.

[16] See also Council for Trade in Services, Disciplines on Domestic Regulation in the Accountancy Sector, Adopted by the Council for Trade in Services on 14 December 1998, S/L/64, 17 December 1998, para. 4. A non-governmental body may also be obliged to publish information. See, for instance, para. 2.3 of the Reference Paper on Basic Telecommunications which requires that the major supplier "make publicly available either its interconnection agreements or a reference interconnection offer".

GATT legacy where the requirement for "prompt" publication under Art. X GATT 1947 was interpreted very narrowly to allow the **simultaneous** publication and entry into force of a domestic measure.[17] This approach appears to render futile the requirement under Art. X:1 GATT 1994 that the covered measures be published promptly in a manner that "enable[s] governments and traders to become acquainted with them".[18] Furthermore, the *Provincial Liquor* Panel from the GATT era ruled that Art. X:1 GATT 1947 does not entail a requirement that domestic and foreign traders acquire access to the information at stake **at the same time**.[19] In other words, then, the publication requirement is not put in place to ensure equality between domestic and foreign traders.

11 Arguably, the abovementioned findings also apply to Art. III:1. In fact, this provision, contrary to Art. X:1 GATT 1994, does not explicitly require that service suppliers become acquainted with measures of general application affecting trade in services before their publication. Therefore, Art. III:1 can be regarded as **weaker** than its counterpart in the GATT. This omission, however, should not be deemed deliberate, since the GATS effectively recognizes that individual service suppliers are the first to suffer from the opacity of domestic regulations when doing business. Art. VI:2 and 3, which establish **minimum due process rights** for service suppliers,[20] also corroborates this view. Therefore, like Art. X:1 GATT 1994, Art. III:1 aims to provide specific information to individual economic actors. Hence, not only does this provision refer to the **horizontal** relationship, that is, that among Members, but also, or more significantly, it informs the **vertical** relationship between a given Member and the service suppliers affected.[21]

12 The Appellate Body, when interpreting Art. X:2 GATT 1994, emphasized the importance of transparency for the world trading system.[22] Indeed, the WTO judiciary acknowledges the growing importance of, and the rising demand for, transparency in the new WTO legal order. Thus, it can be reasonably expected that the WTO judiciary, when requested, will give full effect to the phrase **"as to enable governments and traders to become acquainted with them"**[23] by ruling that prompt publication cannot equate with coincident publication **and** entry into force of a given domestic regulation. Even so, such a shift in the area of goods should not

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[17] See GATT Panel Report, *EEC—Dessert Apples*, BISD/36S/93, paras 12.1, 12.29; GATT Panel Report, *EEC—Apples (US)*, BISD/36S/135, paras 5.20–5.23 (regarding the prohibition of the use of back-dated quotas).

[18] See *Delimatsis*, 260, 263.

[19] See GATT Panel Report, *Canada—Provincial Liquor Boards (US)*, BISD 39S/27, para. 5.34.

[20] See *Argentina—Hides and Leather*, WT/DS155/R, para. 11.68.

[21] *Ibid.*, para. 11.76.

[22] See *US—Underwear*, WT/DS24/AB/R, para. VI.

[23] Art. X:1, sentence 1 GATT 1994.

be expected to affect the interpretation of Art. III:1. This is so because the latter permits the **simultaneous** publication and entry into force of a measure affecting trade in services. Exceptionally, the GATS tolerates the publication of a measure even **after** its entry into force, but only in case of emergency. This option is not available in the GATT. Of course, whether a specific measure is allowed to be published *ex post* is to be assessed on a case-by-case basis, depending on the record that the WTO judiciary has before it. An **emergency situation** that justifies an *ex post* publication would be an unexpected and unforeseeable event that occurs and which does not allow a Member to publish the measure that this Member adopts to confront the imminent danger. For instance, measures that aim to cope immediately with a sudden financial crisis and its domino effects can fit well into this category.

13 However, transparency and basic **due process** require that domestic measures generate only **prospective effect**, *i.e.* they produce their results only after they have been published.[24] As the GATS currently stands, service suppliers will continue to suffer from the unpredictability of unpublished domestic regulations which contradicts any contemporary notion of transparency when regulating at the domestic level.

C. Notification Requirements (Art. III:3)

14 While Art. III:1 embodies the transparency obligation that Members should adhere to at the domestic level, Art. III:3 concerns the transparency obligation that Members have *vis-à-vis* the WTO. More specifically, the Council for Trade in Services (CTS) should be informed **promptly**, and, at the latest, on an **annual** basis, of all **new**, or any **changes to existing**, laws, regulations or administrative guidelines **significantly** affecting trade in services. The notification requirement covers only the domestic measures, or changes thereto, that have a **significant impact** on services trade in those sectors where the Member in question undertook specific commitments. Various Members were of the view that extending the notification requirement of Art. III:3 to measures significantly affecting trade in services **not** covered by their specific commitments would imply an administrative burden that many Members could not live up to.

15 Nevertheless, Art. III:3 measures arguably need not fall into the committed services sectors, but can also fall into uncommitted sectors, which nevertheless have significant repercussions on trade in committed services sectors. Taking into account the important links between trade in goods and trade

[24] See *US—Underwear*, WT/DS24/AB/R, para. VI.

in services, one could even argue that measures from the goods sector can significantly hamper trade in services in committed sectors. Theoretically, then, such measures would also have to be notified to the CTS.

16 Thus, only a specific category of domestic measures comes within the scope of Art. III:3, that is, **laws, regulations** or **administrative guidelines** significantly curtailing trade in services. As a result, the scope of this provision is narrower than that of Art. III:1, since the scope of the latter, by covering all measures of general application affecting the operation of the GATS, seems to be vast. The ambit of Art. III:3 is further confined by the fact that the measures subject to notification need to have a **significant effect** on trade in services in a committed services sector. In addition, whether the effect is significant or not is a matter that the Member at stake will judge.[25] Nevertheless, this exercise of discretion, just as in Art. III:1 regarding the kind of measures that should be published, is justiciable and, consequently, the WTO judiciary has to confirm the WTO conformity of a Member's stance *vis-à-vis* its obligations under Art. III. **Reverse** or **counter-notification** by other Members is theoretically possible pursuant to Art. III:5, but in practice this type of notification, while enhancing transparency at the multilateral level, would not accrue any considerable benefit to the notifying Members.

17 Furthermore, Members are not obligated to notify **existing** measures that significantly affect trade in services in committed sectors, unless they have amended them. Hence, Art. III has the effect of **grandfathering** laws, regulations or administrative guidelines that existed **prior** to the entry into force of the GATS. It goes without saying that measures that significantly **improve** existing regulations and affect market access or national treatment in a sector covered by the GATS commitments are also to be notified under Art. III:3. Conversely, changes that weaken existing measures and thus trading conditions in a sector where specific commitments were made should equally be notified in accordance with Art. III:3. If these changes also affect market access or national treatment in this committed sector, then the Member at stake should follow the procedure prescribed by Art. XXI:1 lit. b. Thus, the Member should notify the CTS of its intention to introduce a new measure that weakens its previous commitments at least three months before the intended date of implementation of that measure.

[25] In the case of the SPS, several factors such as the value of imports in respect of the importing Member concerned or the difficulty for producers in other Members to comply with a new or modified SPS measure may determine whether the trade effect of that measure is significant. See Committee on Sanitary and Phytosanitary Measures, Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7), Revision, G/SPS/7/Rev.2, 2 April 2002, paras 6–7. See also Panel Report, *Japan—Apples*, WT/DS245/R, para. 8.314.

It is this notification pursuant to Art. XXI:1 lit. b that will start the procedure for the modification of Schedules.

18 The CTS adopted specific **guidelines** regarding notifications under the GATS.[26] According to these guidelines, the notifications under Art. III should follow a **standard format** and are to be sent to the CTS. In practice, however, the Trade Policy Review Body (TPRB) is the **repository** of all notifications that countries are obliged to make under the WTO agreements. The form must be completed in one of the three official WTO languages and should specify: (a) the Member notifying (or the sub-federal government or authority or non-governmental body involved, if applicable); (b) the GATS provision under which the notification is made; (c) the date of entry into force and the duration of the measure in question; (d) the domestic agency which is responsible for the enforcement of the measure; (e) a concise description of the measure at stake indicating the modes of supply covered, the effect on trade in services and the impact of the measure on the commitments that the notifying Member undertook or on its list of MFN exemptions, if applicable. International agreements and recognition measures should also be described in an exhaustive manner; (f) the Members that may be directly affected by the measure at issue; and (g) the authority from which the full text of the measure can be obtained. This can be an enquiry point, the WTO Secretariat, or a domestic body.[27] A measure that may fall within the ambit of several GATS Articles that include an obligation to notify can be notified only once on condition that the notifying Member specifies in the form that it is including all the GATS Articles concerned.

19 The standard format created by the WTO Secretariat is also to be followed when Members are willing to comply with their notification obligations under Arts V, V^{bis}, VII, VIII, X, XII, XIVbis, XXI, as well as with para. 7 of the Annex on Art. II Exemptions.[28] It appears that the level of notifications under GATS to date has been unsatisfactory.[29] In addition, while Art. III:3 calls for prompt, or at least annual, notifications to the CTS, it appears that Members disregard this obligation. A brief overview of the notifications to date demonstrates that Members may notify measures under this provision as many as six years after the entry into force of the measure at stake.[30] However, an interpretation faithful to the letter of the

[26] Council for Trade in Services, Guidelines for Notifications under the General Agreement on Trade in Services, Adopted by the Council for Trade in Services on 1 March 1995, S/L/5, 4 April 1995.

[27] In the case of notifications under GATS Arts V:7 (economic integration agreements) or V^{bis} lit. b (labour market integration agreeements), the full text of those agreements should be notified to the CTS.

[28] *WTO*, Handbook, 33.

[29] *Iida & Nielson*, in: *Mattoo & Sauvé* (eds), 7, 21.

[30] Notifications under Art. III:3 use the WTO symbol S/C/N and can be found at the WTO website.

provision would consider as prompt a notification that occurred not later than a year after the entry into force of the domestic measure. Obviously, the term "prompt" under Art. III:3 has a different, more flexible meaning than under Art. III:1.

D. Prompt Responses and Establishment of Enquiry Points (Art. III:4)

20 Members also have transparency obligations *vis-à-vis* other WTO Members. Art. III:4 imposes an **"access-to-information" obligation,** in that each Member is required to respond promptly to any request **by another Member** which relates to measures falling within the scope of Art. III:1. To this end, Members were required to set up **enquiry points** by 1997,[31] which are also in charge of providing specific information upon request with respect to measures coming within the purview of Art. III:3. Hence, requests by other Members may relate to: (a) measures of general application affecting the operation of the GATS; (b) international agreements that a given Member participates in; or (c) measures that are subject to notification pursuant to Art. III:3. Whereas enquiry points are expected to provide information, they need not be depositories of domestic laws and regulations (Art. III:4, sentence 5). The impact of this obligation is somehow weakened because Art. III:4 allows only for **government-to-government** enquiry points. Other interested parties, such as individual service suppliers, which are most exposed to opaque domestic regulations, are not permitted to make use of this right. Civil society is equally banned from any access to information through these enquiry points. For the sake of comparison, individual traders are permitted to submit such requests under the TBT Agreement.[32]

21 Along with the establishment of enquiry points, developed countries were required, pursuant to Art. IV:2, to set up contact points by 1997 which would allow service suppliers from developing countries to request specific information regarding access to developed country markets. In other words, Art. IV:2, contrary to Art. III:4, provides for an **access-to-information right** for individual service suppliers from developing countries who are interested in obtaining access to a developed-country market.

[31] "[W]ithin two years from the date of entry into force of the Agreement Establishing the WTO" (Art. III:4, sentence 3).

[32] Art. 10 TBT.

22 In May 1996, the CTS adopted a Decision that calls for the notification of the establishment of enquiry and contact points.[33] Recall that, in accordance with Art. III:4, no such notification was required. As of December 2006, 118 notifications of enquiry and contact points to the CTS pursuant to Arts III:4 and IV:2 have been made.[34] It follows that more than ten years after the entry into force of the GATS, there are Members that have not established, or at least have not notified the establishment of, enquiry points in their respective markets. It is remarkable that, while Art. III:4, sentence 4 provides for the possibility of allowing appropriate flexibility for developing countries to establish enquiry points after 1997, several developing countries have not made use of this possibility. In any case, there was no attempt to reach an agreement allowing developing countries to set up enquiry points at a later date. This demonstrates that the interest in using these points has been minimal. Indeed, requests for information through the enquiry or contact points have been few. For instance, as of September 2004, the contact point established by the European Union appears to have received only one enquiry.[35] Notably, with respect to enquiry points, the fact that individual service suppliers are not allowed to submit requests may be to blame for the current ineffectiveness of enquiry points.[36]

E. Reverse Notifications (Art. III:5)

23 Under Art. III:5 all WTO Members are entitled to notify measures adopted by any other Member if they believe that these measures that that Member has not notified affect the operation of the GATS. This institutional recognition of the possibility for **reverse or counter notifications** can further enhance transparency as to the remaining barriers to trade in services, but only on condition that the notifying Member has in place a well-established system that would collect complaints made by negatively affected suppliers in a given foreign market.

[33] Council for Trade in Services, Decision on the Notification of the Establishment of Enquiry and Contact Points, Adopted by the Council for Trade in Services on 28 May 1996, S/L/23, 27 June 1996.

[34] Apart from the European Commission, each EC Member State has its own enquiry point. See Council for Trade in Services, Contact and Enquiry Points Notified to the Council for Trade in Services, Revision, S/ENQ/78/Rev.9, 1 December 2006.

[35] Working Party on Domestic Regulation, Report on the Meeting Held on 24 September 2004, Note by the Secretariat, S/WPDR/M/27, 15 November 2004.

[36] *Yi & Stephenson*, 17.

F. Due Administration and Prompt Review (Art. VI:1–3)

24 As noted earlier, transparency obligations in the GATS are incorporated in two separate Articles, that is, Arts III and VI. Contrary to Art. III, which entails transparency obligations at a multilateral, intergovernmental level, the obligations contained in Art. VI refer to the vertical relationship between the domestic regulatory authority and the individual service suppliers. No notification is required under Art. VI.

25 Art. VI embodies the notion of **due administration** and other elements of **procedural transparency**.[37] Such **due process requirements** are set out in Art. VI:1–3 as well as Art. VI:6.[38] These provisions establish **procedural rights** that aim to enhance the transparency and fairness of administrative processes. Having said this, with the exception of Art. VI:4 lit. a, transparency is not mentioned in Art. VI. Like several WTO agreements dealing with trade in goods, the GATS requires that Members administer measures of general application in a **reasonable**, **objective** and **impartial** manner.[39] This obligation of consistency and predictability[40] is conditional upon specific commitments. Nevertheless, Art. III:1, which also refers to measures of general application, applies regardless of specific commitments.

26 Consequently, the GATS departs from other WTO agreements in the following respect: Whereas "all relevant measures of general application which pertain to or affect the operation" of the GATS within the meaning of Art. III:1 merely have to be published promptly, the measures of general application affecting trade in services **in committed sectors** should, **in addition to their prompt publication**, be administered reasonably, objectively and impartially. *A contrario*, no Member is obliged to administer in a reasonable, objective and impartial manner those measures of general application affecting services trade which do **not** relate to committed sectors. The GATT approach, however, is different, since the obligation for reasonable, uniform and impartial administration pursuant to Art. X:3 lit. a GATT 1994 covers all measures specified in Art. X:1 GATT 1994. Clearly, the approach adopted in the GATS creates unnecessary confusion and uncertainty for individual service suppliers.

27 Thus, only suppliers of services that form part of a committed sector can benefit from the due administration requirement. By the same token, only this category of suppliers can benefit from several procedural rights where

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[37] *Delimatsis*, JIEL 10 (2007), 13, 20 *et seq.; Krajewski*, Article VI GATS, para. 25.
[38] See *US—Gambling*, WT/DS285/R, para. 6.432.
[39] Art. VI:1; also, *Delimatsis*, JIEL 10 (2007), 13, 20.
[40] See *Argentina—Hides and Leather*, WT/DS155/R, para. 11.83.

an authorization is required in order to supply a service, in accordance with Art. VI:3. In such cases, the domestic authorities are obliged to inform the applicant of their decision regarding her application within a reasonable period of time. The applicant is also allowed to seek any information regarding the status of the application. Such information, when requested, is to be provided without any undue delay. In this regard, the GATS embodies even higher standards than GATT does in its Art. X where no such provision similar to Art. VI:3 is envisaged.

28 Nevertheless, pursuant to Art. VI:2, all service suppliers, regardless of whether commitments were made in a given services sector, should have recourse to independent judicial, arbitral or administrative review mechanisms against administrative decisions that affect them negatively. In addition, appropriate remedies for any GATS-inconsistent use of domestic laws and regulations should also be put in place. It stems from the above that significant elements of **due process** and **procedural fairness** flow into the GATS through Art. VI:1–3.[41]

G. Relationship with Other Provisions

29 Art. III directly or indirectly relates to a bundle of provisions addressing transparency issues. The relationship with Art. VI has been highlighted above. In the sectoral approach that Members chose in the aftermath of the Uruguay Round, transparency was further enhanced. First, in the case of telecommunications, the **Reference Paper on Basic Telecommunications** elaborated on Arts III and VI.[42] The sector-specific disciplines that Members agreed to with regard to domestic regulation in **accountancy services** also demonstrate Members' willingness to establish stronger transparency obligations when it comes to sector-specific disciplines.[43] The most important sector-specific transparency obligations in the accountancy disciplines are to be found in Art. III:5–6. Art. III:5 provides that Members are obliged, upon request, to provide information on the rationale behind domestic regulatory measures in the accountancy sector in relation to a legitimate objective. In turn, Art. III:6 introduces a prior comment obligation, the effect of which is nevertheless weakened by the use of "best endeavours" language. In addition, this obligation covers only measures that significantly affect trade in accountancy services. As to the TBT and SPS, both (Art. 2 TBT and Annex B SPS) are more comprehensive than

[41] *Delimatsis*, JIEL 10 (2007), 13, 33.
[42] See also para. 4 of the Annex on Telecommunications.
[43] S/L/64.

the GATS obligations.[44] This is so because the TBT and SPS call for a "reasonable interval" between the publication of a measure and its entry into force, and require Members to allow reasonable time for other Members to make comments where a prospective domestic measure significantly affects trade.

30 Notwithstanding the transparency obligations laid down in the GATS, Members are still allowed to refuse to disclose confidential information within the meaning of Art. III*bis*.[45] By the same token, Members can suppress any information which, if disclosed, would harm essential security interests of a given Member.[46]

H. Outlook

31 The transparency obligations in the GATS are narrower than those in other WTO agreements in several respects. For instance, there is no provision allowing for reasonable intervals between the publication of a domestic measure and its entry into force. Consequently, service suppliers will continue to face unpredictable trading conditions. For this reason, Members should consider the introduction of a provision that would allow service suppliers to become familiar with the prospective domestic laws and regulations in advance. This is a fundamental **"good" regulation** provision that would enhance security and predictability when trading in the services realm. Such a provision could be drafted along the lines of the Arts 2.12 and 5.9 TBT and Annex B:2 SPS.

32 Whereas the WTO is a government-to-government contract, everyday traders are the constituents that are most interested in the transparency, objectivity and due administration of domestic regulatory regimes. The GATS recognizes several rights relating to transparency only for Members, but not for every interested private party. In other words, individual service suppliers are deprived of prompt access to vital information. The only way to gain such information is to go through their government, which alone may make use of the "right to information" set out in Art. III:4. It is imperative that access to enquiry points is extended also to allow individual service suppliers to refer their questions to those points. Discussions within the WPDR also pointed in this direction with respect to domestic measures relating to qualifications, licensing or technical standards.[47] Mode 4 liberalization will

[44] *Iida & Nielson*, in: *Mattoo & Sauvé* (eds), 7, 9.
[45] *Delimatsis*, Article III*bis* GATS, paras 3 *et seq*.
[46] *Cottier & Delimatsis*, Article XIV*bis* GATS, paras 17 *et seq*.
[47] Working Party on Domestic Regulation, Report of the Meeting Held on 3 July 2001, Note by the Secretariat, S/WPDR/M/12, 16 August 2001, para. 58.

benefit from such a development. Individual suppliers, who would otherwise have to convince their respective governments to question another Member's enquiry or contact point, would economize on time and effort. Additionally, Members may reflect on the possibility of establishing sectoral enquiry points so that accurate and reliable sector-specific information is provided in a timely manner.

33 With respect to notifications, the scope of Art. III:3 is rather limited and Members should reflect on the possibility of improving and extending it, bearing in mind the crucial balance between enhanced transparency and reasonable administrative burden. Furthermore, notifications under this provision will usually take place only **after** the measure at stake was adopted and enforced. There are two issues to be further considered here. First, the possibility of defining the term **"prompt notification"** under Art. III:3. For instance, Members could agree that a notification which takes place more than one year after the entry into force of the measure at stake is no longer regarded as "prompt". Such a measure would greatly enhance transparency. Second, the possibility of a **"prior notice and comment" procedure**. This would normally entail a period of consultations that would also allow interested parties, be they nationals or foreign traders, to comment on the proposed legislation and which would be followed by the adoption of the legislation at issue. Legal certainty and better information are ensured through such mechanisms. In more generalized terms, prior consultations and comment mechanisms are considered requisite parts of a transparent domestic regulatory framework and important aspects of "good" governance.[48/49]

[48] *Esty*, Yale L.J. (15) 2006, 1490, 1528.

[49] The author wishes to thank *Petros Mavroidis* for valuable comments on an earlier draft.

Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), WTO—*Trade in Services.*
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Article III*bis* GATS
Disclosure of Confidential Information

Nothing in this Agreement shall require any Member to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

Case Law

Appellate Body Report, *Canada—Aircraft*, WT/DS70/AB/R; Panel Report, *US—Wheat Gluten*, WT/DS166/R; Appellate Body Report, *US—Wheat Gluten*, WT/DS166/AB/R; Decision by the Arbitrator, *Canada—Aircraft Credits and Guarantees*, WT/DS222/ARB; Panel Report, *EC—Tube or Pipe Fittings*, WT/DS219/R; Panel Report, *Korea—Commercial Vessels*, WT/DS273/R; Panel Report, *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R.

Documents

Working Group on the Relationship Between Trade and Investment, Transparency, Note by the Secretariat WT/WGTI/W/109, 27 March 2002.

Cross References

Arts 1411.5 lit. b, 2105 NAFTA, Art. IX MERCOSUR Montevideo Protocol.

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A. Art. III*bis* in Its Context

1 Art. III*bis* belongs with Part II of the Agreement, entitled "General Obligations and Disciplines". This said, Art. III*bis* reflects a **general exception** to the GATS obligations and not just to the transparency obligations established in Art. III.[1] Therefore, the decision of the GATS drafters to insert this provision immediately after Art. III instead of incorporating it in Art. XIV which entails a list of general exceptions to the GATS substantive obligations is hard to explain. Apparently, Members anticipated that the provision to which Art. III*bis* would be more relevant would indeed be Art. III relating to the transparency obligations that WTO Members should adhere to.[2]

2 Art. III*bis* echoes Art. X:1 GATT 1994, but it is stronger than the latter, because Art. X:1 GATT 1994 forms a **specific** exception to the obligation

[1] Working Group on the Relationship between Trade and Investment, Transparency, Note by the Secretariat, WT/WGTI/W/109, 27 March 2002, para. 43. Art. XIV*bis*: 1 lit. a also exempts Members providing information that they deem to be contrary to their essential security interests. See *Cottier & Delimatsis*, Article XIV*bis* GATS, para. 22.

[2] For these obligations, see *Delimatsis*, Article III GATS.

established in Art. X:1 GATT 1994.[3] In comparison, Art. III*bis* states that the exception laid down therein should prevail not only over the transparency obligations set out in Art. III, but also over any other GATS obligation.[4] Indeed, Art. III*bis* provides that "[**n**]**othing** in this Agreement"[5] shall require the disclosure of confidential information by any WTO Member.

B. Scope of Art. III*bis*

3 Pursuant to Art. III*bis*, Members can circumvent any GATS obligation by refusing to provide **confidential information**, if its **disclosure** would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, be they public or private.[6] The provision does not specify the characteristics that render the information confidential. By way of comparison, in Arts 6.5 Anti-Dumping Agreement and 12.4 SCM, it is provided that information may be regarded as confidential if, for instance, its disclosure: (a) would be of significant competitive advantage to a competitor; or (b) would have a significantly adverse effect on a person supplying the information or on a person from whom that person acquired that information. In *US—Wheat Gluten*, the Panel, when interpreting the term "confidential" under Art. 3.2 Safeguards Agreement, submitted that the absence of any clear definition in that agreement of the type of information that can be deemed "confidential", the word should be taken to mean that the competent authorities "enjoy a certain amount of discretion in determining whether or not information is to be treated as 'confidential'".[7] This interpretation is also applicable *mutatis mutandis* to Art. III*bis*.

4 In addition, the responding Member, that is, the Member denying the disclosure of information, bears the burden of proving that such information, if revealed, would either hinder **law enforcement** or otherwise be **contrary to the public interest**. Hence, confidential information that would obstruct the process of compelling observance of, or compliance with, a law or the detection and punishment of violations of the law would come under this category. The same applies to confidential information the disclosure of which would be contrary to the public interest. **Public interest** is a very abstract concept that allows Members a margin of manoeuvre

[3] Art. X:1 GATT 1994 specifies in its last sentence that "the provisions of this paragraph [*i.e.* Art. X:1 GATT 1994] shall not require" the disclosure of confidential information by any Member. Compare also Arts XVII:4 lit. d GATT 1994 and Art. 63:4 TRIPS.

[4] Compare Annex B:11 lit. b SPS; also Art. 1.11 Import Licensing Agreement.

[5] Emphasis added.

[6] A similar exception is to be found in para. 2 lit. b of the Annex on Financial Services.

[7] See Panel Report, *US—Wheat Gluten*, WT/DS166/R, para. 8.20.

as to the need for government intervention in their respective markets to protect the general welfare of the public. The use of the word "otherwise" implies that law enforcement forms part of the broader concept of public interest protection.

5 Information can also be withheld provided that its disclosure would have adverse effects on **legitimate commercial interests** of public or private companies. Commercial interests may relate, *inter alia*, to production or sales methods or practices relating to the marketing and delivery of a given service that a given company uses. These interests should also be **legitimate**, that is, they should be lawful. Whether this is the case will be subject to review by the WTO judiciary. Art. III*bis* does not distinguish between the commercial interests of public and private companies, and consequently provides the same level of protection for confidential information that is vital for the business of these companies.

C. Confidentiality and Dispute Settlement

6 With respect to dispute settlement in the WTO a Member cannot invoke Art. III*bis* to justify its refusal to provide information of the kind described in Art. III*bis* when such information is sought by a panel pursuant to Art. 13 DSU. Seeking information under Art. 13 DSU is the only avenue that panels can use in order to obtain information that they believe is crucial for deciding a case. To this end, the Appellate Body made it clear that Members are "under a duty and an obligation to 'respond promptly and fully' to requests made by panels for information under Article 13.1 of the DSU".[8] If confidential information is provided, it should not be disclosed unless the individual, body, or authority that furnished it formally permits such disclosure.

7 Panels cannot compel parties to a dispute or private parties to disclose confidential information.[9] Nevertheless, what panels are allowed to do is to draw **negative inferences** from a party's refusal to disclose information.[10] Again, a panel does not have an obligation to draw adverse inferences; what it has is merely the **legal authority** and the **discretion** to draw such inferences.[11] In practice, due to sovereignty concerns, panels will refrain from drawing negative inferences that will affect the outcome of a case. Rather, they will attempt to base their rulings on the available facts in

[8] See Appellate Body Report, *Canada—Aircraft*, WT/DS70/AB/R, para. 187.
[9] See, for instance, Panel Report, *EC—Tube or Pipe Fittings*, WT/DS219/R, para. 7.307.
[10] See *Canada—Aircraft*, WT/DS70/AB/R, para. 203.
[11] See Appellate Body Report, *US—Wheat Gluten*, WT/DS166/AB/R, paras 172–173.

the panel record.[12] On appellate review, the Appellate Body will deal with this issue only within the context of a claim of improper exercise of the panel's discretion under Art. 11 DSU.[13] In *Canada—Aircraft*, the Appellate Body emphasized that withholding information from the Panel seriously undermines the Panel's ability to comply with its duties under Art. 11 DSU and the ability of other WTO Members to seek a prompt and satisfactory resolution of disputes.[14] Therefore, the Appellate Body suggested that panels should be ready to take all necessary steps at their disposal to provoke the disclosure of information which is essential for the resolution of the dispute in issue. To this end, panels "should be willing expressly to remind parties—during the course of dispute settlement proceedings—that a refusal to provide information requested by the panel[s] may lead to inferences being drawn about the inculpatory character of the information withheld".[15]

Finally, it bears noting that, if the party concerned decides to disclose the *8*
confidential information that the panel requested, such information, just like any other information before the WTO judiciary, is to be treated as confidential during the dispute settlement proceedings, in accordance with Art. 18.2 DSU.[16] Panels will often adopt **additional procedures** to ensure the protection of **confidential business information**.[17] While the full cooperation of WTO Members and private parties hinges on the appropriate protection of confidential information,[18] reality has shown that this **confidentiality obligation** has rarely been adhered to. More recently, the *EC—Approval and Marketing of Biotech Products* Panel highlighted the dangers for the integrity and credibility of the dispute settlement system overall that breach of the confidentiality obligation may bring about. In addition, the Panel correctly identified the risk that private parties will refuse to provide panels, complaining parties or responding parties with confidential information that only they possess if they cannot have confidence that such information will not be disclosed unless they expressly allow it.[19]

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[12] See, for instance, *US—Wheat Gluten*, WT/DS166/R, para. 8.12.
[13] See *US—Wheat Gluten*, WT/DS166/AB/R, paras 174–175.
[14] See *Canada—Aircraft*, WT/DS70/AB/R, para. 189; *US—Wheat Gluten*, WT/DS166/R, paras 8.11–8.12; *US—Wheat Gluten*, WT/DS166/AB/R, para. 171.
[15] See *Canada—Aircraft*, WT/DS70/AB/R, para. 204.
[16] *Ibid.*, paras 145–147.
[17] See, *inter alia*, Panel Report, *Korea—Commercial Vessels*, WT/DS273/R, para. 1.15.
[18] See Decision by the Arbitrator, *Canada—Aircraft Credits and Guarantees*, WT/DS222/ARB, para. 2.18.
[19] See Panel Report, *EC—Marketing and Approval of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 6.185.

D. Relationship with Other Provisions

9 Art. III*bis* constitutes a **general exception** to the GATS obligations. *A fortiori*, then, it **prevails over Arts III and VI**, which set out the transparency obligations that Members should abide by when it comes to trade in services. As the Annexes to the GATS are an integral part of the Agreement pursuant to Art. XXIX, Art. III*bis* is also applicable in telecommunications and financial services, that is, the two sectors that Members negotiated in the aftermath of the Uruguay Round and for which they ultimately agreed on additional disciplines embodying enhanced transparency obligations. If the accountancy disciplines are also annexed to the GATS at the end of the current round of negotiations, Art. III*bis* will also provide for an exception applicable to accountancy services. Thus, Members need not furnish information that may be contrary to the public interest or legitimate commercial interests of particular companies with regard to the above-mentioned sectors. **Provisions similar to Art. III*bis*** are to be found also in other WTO agreements. For instance, in Annex B:11 lit. b **SPS** or in Art. 5.2.4 **TBT**, confidential information is equally protected. Art. 6.3 **TRIMS** also echoes Art. X:1 **GATT 1994** in this regard. The **Safeguards Agreement** in its Art. 12.11 likewise allows for an exception to the notification requirement when confidential information is at stake. As regards regional agreements, **NAFTA** sets out a similar exception in its Art. 1411, but only with respect to the financial services sector.

E. Outlook

10 While publication and notification of domestic regulatory measures play a crucial role in trade in services, disclosure of confidential information is not required under the GATS unless for dispute settlement purposes. At first blush, it appears that the WTO agreements set up a sufficient "safety net" to protect sensitive information that Members and public or private companies decide to disclose to the WTO. Therefore, the interests of a Member, a public entity or a private enterprise are protected. In several cases, however, interim panel reports which included confidential information were leaked and thus put public or commercial interests in jeopardy. The *EC—Approval and Marketing of Biotech Products* Panel shrewdly identified the long-term negative effects that breach of the confidentiality requirement might bring about, notably as regards private parties' willingness to furnish information. In the highly competitive environment in which companies interact, any confidential information that is leaked without the permission of the company concerned may prejudice fair competition and legitimate commercial interests that private or public companies may have.

Therefore, there is an urgent need to ensure that the confidentiality of disclosed information will in no way be jeopardized. Members should contemplate additional measures to strengthen the current set of WTO provisions regarding the protection of confidential information. This is one of the factors that would ascertain the unhindered flow of the information that a panel considers necessary for its ruling and ensure the viability of the dispute settlement system. In other words, improving the level of protection of confidential information would assist in the attempt to address the question of the procedures that should govern the protection of information requested by a panel which is purportedly confidential. This is a "serious systemic issue"[20] that Members have to cope with sooner rather than later.[21] *11*

[20] See *US—Wheat Gluten*, WT/DS166/AB/R, para. 170; *US—Wheat Gluten*, WT/DS166/R, para. 8.11.

[21] The author wishes to thank *Petros Mavroidis* for valuable comments on an earlier draft.

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Article IV GATS
Increasing Participation of Developing Countries

1. The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members pursuant to Parts III and IV of this Agreement, relating to:
   a) the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia*, through access to technology on a commercial basis;
   b) the improvement of their access to distribution channels and information networks; and
   c) the liberalization of market access in sectors and modes of supply of export interest to them.
2. Developed country Members, and to the extent possible other Members, shall establish contact points within two years from the date of entry into force of the WTO Agreement to facilitate the access of developing country Members' service suppliers to information, related to their respective markets, concerning:
   a) commercial and technical aspects of the supply of services;
   b) registration, recognition and obtaining of professional qualifications; and
   c) the availability of services technology.
3. Special priority shall be given to the least-developed country Members in the implementation of paragraphs 1 and 2. Particular account shall be taken of the serious difficulty of the least-developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.

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A. General

Art. IV provides for a number of mechanisms designed to increase the participation of developing countries in the international trade in services. It gives practical effect to para. 5 of the Preamble which expresses the desire of the Members to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports, in particular through the strengthening of the competitiveness and efficiency of their domestic service industries. The GATS differs considerably on this point from Part IV of the **GATT 1994** which tries to facilitate the integration of developing countries by providing for their **special and differential treatment** and the granting of tariff preferences for merchandise trade, *e.g.* in the form of the Generalized System of Preferences.[1] It is also less specific than the TRIPS which, in Arts 66 and 67, commits the developed countries to close co-operation with developing countries in the implementation of the TRIPS Agreement and grants the least-developed countries generous exemptions from the bulk of treaty obligations during a transition period of ten years. By contrast, the approach taken to the position of developing countries in the context of the GATS and codified in Art. IV rests on the assumption that the flexibility generally provided to Member countries in the scheduling of their commitments concerning the liberalization of services sufficiently takes into account the particular needs of the weaker economies and renders unnecessary the adoption of rules on their special and differential treatment for development purposes.[2] The principles set out in Art. IV are taken up again in other provisions of the Agreement, most notably in Art. XIX:2 and 3 which *inter alia* recognizes the legitimacy of a cautious approach of developing countries when entering into liberalization commitments, and Art. XXV which grants the developing countries the right to technical assistance by the GATS Secretariat. In addition, Arts III:4, V:3 lit. a and b, XV of the Agreement and paras 5 and 6 of the Annex on Telecommunications specifically address the need for flexibility in the application of the rules and disciplines of the GATS in relation to developing countries. *1*

B. Drafting History

Services were put on the global trade policy agenda largely in spite of the **opposition of developing countries**. Whereas service industries have come to play a dominant role in the economies of many developed countries, *2*

[1] *Hoekman & Mattoo*, in: *Guzman & Sykes* (eds), 113, 128; *Senti*, 579.
[2] *Kulkarni*, in: *Chimni et al.*, 249, 254.

developing countries could not see what they stood to gain from multilateral negotiations on the liberalization of the services sector and viewed them as largely inimical to the development of their own fledgling service sectors. They feared that such negotiations might be used by the developed countries under the leadership of the United States to press for greater liberalization in the fields of foreign investment and free establishment of service providers, issues of particular concern in developing countries. In addition, they did not see themselves as possessing much experience in the crafting of multilateral disciplines in the services area. Led by India and Brazil, developing countries therefore argued that services were not central to the advancement of the trade policy agenda and should best be left to domestic regulatory policies. This defensive approach limited their influence on the outcome of the Uruguay Round concerning the rules governing the production and exchange of services.[3]

3 The proposals presented by the developing countries during the negotiations of the Uruguay Round pursued two principal aims: to secure the necessary "opt-outs" which would allow them to protect their fledgling service industries and to gain improved access to the service markets of the developed countries. In particular, they pressed for the recognition of the right to protect infant service industries and the flexibility to liberalize service sectors and the modes of supply in accordance with their level of development. At the same time, developing countries asked for a differential and more favourable treatment for their service exports, improved access to distribution channels and information networks, and the liberalization of service sectors of special export interest to them.[4] These proposals were only partly successful. The final version of Art. IV retains only those proposals which aim to increase the **competitiveness** of the service industries of developing countries, through improved access to distribution channels in developed economies or the promotion of technology transfer. By contrast, no provision has been made on the differential treatment of service exports from developing countries or on their right to protect particularly vulnerable service sectors through appropriate measures. Only the least-developed country Members are to benefit from some kind of preferential treatment: particular account shall be taken of their difficulties in accepting negotiated specific commitments given their particular economic needs.

[3] *Sauvé*, JWT 34 (2000) 2, 85.
[4] *Zdouc*, Legal Problems, 66.

C. Structure of Art. IV

Art. IV:1 formulates the overall **goal** towards which the individual measures described in the provision are to be directed, *i.e.* the promotion of **increased participation of developing countries** in the international trade in services, and the **instruments** by which this goal is to be implemented, *i.e.* through **negotiated specific commitments** particularly with developed countries which strengthen the domestic service capacity of developing countries and facilitate their access to the service markets of the developed countries. **Art. IV:2** provides more specifically for the setting up of so-called **contact points** in order to provide service suppliers from developing countries with the necessary information on service markets, particularly in developed countries, as a way of improving their market access. Unlike the other two paragraphs, Art. IV:2 imposes a specific and directly binding obligation upon Members, although it is very much attenuated in the case of developing county Members ("to the extent possible"). Finally, **Art. IV:3** emphasizes that special priority shall be given to the group of **least-developed country Members** in the implementation of measures under Arts IV:1–2. At the same time, it grants those countries the right to limit their commitments under GATS, or to accept no commitments at all, in view of their special economic situation and their particular needs. *4*

D. Increase of Participation Through Specific Commitments (Art. IV:1)

I. General Scope

Para. 1 defines the general aim of Art. IV and the means to be employed in reaching this goal. The goal is the increase in participation of **developing countries** in the trade in services, *i.e.* the increase of their share in international services trade. The means selected to implement this goal are **negotiated specific commitments** designed to increase the competitiveness of the domestic service industries of developing countries and to facilitate the access of their service suppliers to foreign markets, thus excluding alternative means like the granting of preferential treatment for services from developing countries. The countries which are to benefit from these measures are identified as "developing country Members". Like the other WTO agreements containing special provisions on the treatment of developing countries, the GATS itself does not define the countries which belong to this group. A possible definition could take into account the specific purposes of the Agreement and include only those countries in which the service industry occupies a relatively minor position when compared to the significance of the agricultural and industrial production for the *5*

domestic economy. However, such a definition would exclude most of the less developed economies, since the share of services in GDP and employment is nowadays quite significant even in the poorest countries.[5] It is thus the **self-definition** of a country as developing country which also serves as the **starting point** for the application of Art. IV, although other countries remain free to challenge this self-definition and to refuse to negotiate any commitments with the country concerned under Art. IV.

6 The WTO Members which are to negotiate with developing countries specific commitments under Art. IV are referred to as **"different Members"**. As a comparison with Art. IV:2 which concerns the implementation of the commitment to improve the access of developing countries to distribution channels and information networks shows, this term refers **primarily** to **developed country Members**. In many cases only they will possess the technology to which Art. IV:1 lit. a refers. The fuller participation of developing countries in the international trade in services which Art. IV aims to bring about will thus be most effectively promoted by specific commitments under para. 1 entered into by developed countries. However, although the benefits to be obtained from such commitments will often be more limited, the domestic services capacity of developing countries, particularly that of the least-developed countries, may conceivably also be strengthened by commitments made by other developing countries, given that the services industries constitute a fast expanding sector of many low and middle income economies, too. While Art. IV:1 is thus primarily designed to increase the participation of developing countries by means of specific commitments made by developed countries, it does not prevent developing countries from entering into such commitments themselves, particularly with regard to improved access to distribution channels and the liberalization of market access.

7 However, such commitments, according to Art. IV:1, have to be made **pursuant to Parts III and IV** of the GATS. In case of market access and national treatment undertakings that means that each Member shall accord services and service suppliers of *any* other Member treatment no less favourable than scheduled. This effectively reduces the scope for commitments made by developing countries under IV:1 since these countries will often want to avoid the commitments they make for the benefit of other developing economies being extended to developed countries. But the requirement that specific commitments must be made pursuant to Parts III and IV of the GATS may also act as a deterrent for developed countries from entering into commitments under IV:1 because they may

[5] According to *Marchetti*, Developing Countries, 4, service sectors already accounted for 45% of GDP in low-income economies, 57% in middle-income and more than 70% in high-income economies at the beginning of the decade.

be reluctant to extend the market access which they are willing to grant to service suppliers from developing countries in certain sectors or modes of supply to providers and competitors from strong service industries of other developed countries.

II. Types of Commitments

8 Art. IV:1 distinguishes between three different types of commitments. The first group of commitments are designed to strengthen the capacity and the **competitiveness of the domestic service industries** of the developing countries, while the commitments in the second and the third groups aim to **facilitate** the **access** of service suppliers from those countries to foreign service markets.

9 **Art. IV:1 lit. a** mentions the commitment concerning the **access** of developing countries **to technology only as an example** of commitments which aim to strengthen the competitiveness of the developing countries' service industries. Moreover, it specifically refers to technology transfers **on a commercial basis**; developing countries must thus be prepared to pay the full market price if they want to gain access to modern technology in the services industry. This should considerably limit the effectiveness of **technology transfer** commitments under Art. IV as a means to facilitate the integration of developing countries in the international services trade. On the other hand, it was not to be expected that developed countries would consent to technology transfer commitments which bind them, once they have been scheduled, vis-à-vis all Members on any other than on a purely commercial basis.

10 **Other measures** which may strengthen the capacity of the developing countries' service industries include those which provide for better **training and education** of domestic service providers and for **logistical and organizational support** in the running of their business. Another important measure which might conceivably expand the capacity and competitiveness of service industries is **foreign direct investment** in the relevant businesses. Through their stimulating effect on the growth of the domestic service industry such investment would almost certainly have the desired strengthening effect. However, the inclusion of such commitments would amount to nothing less than investment liberalization by the backdoor, which the developing countries were fighting hard to prevent during the negotiations in the Uruguay Round. Given the need for massive investment in some of the most rapidly growing services sectors—telecommunications, banking—they may nevertheless find it hard to reject such investment.

11 **Art. IV:1 lit. b** addresses the negative effects which the lack of adequate distribution channels and of information about the relevant foreign markets

have on the ability of service providers from developing countries to participate effectively in the international trade in services. The provision covers all measures designed to improve their access to **distribution channels** and **information**. The provision of adequate information for foreign service suppliers is dealt with in greater detail in Art. IV:2, which formulates the only specific obligation of developed countries with regard to improved access to their markets.

12 **Art. IV:1 lit. c** deals with the **liberalization of market access** in specific service sectors and modes of supply which are the object of the negotiations and the specific commitments that form the very core of the GATS. The provision thus does not add anything new to the general framework of the GATS. It limits itself to exhorting the developed country Members to give special attention to the service sectors and modes of supply which are of particular significance to the export interests of the developing countries in the multilateral negotiations on services trade liberalization.

III. Implementation

13 Seven years after the start of the Doha Round of negotiations on the liberalization of trade in services mandated in Art. XIX it is difficult to assess what progress, if any, is being made in the **implementation** of Art. IV:1. Since the commitments under Art. IV:1 are part of the wider commitments on trade liberalization negotiated pursuant to Parts III and IV it is not easy to determine to what extent the needs and interest of developing countries have in fact become part of the negotiating agenda. As has been pointed out in the literature, the WTO's economic analyses lack an appropriate methodology for the effective monitoring of the progress made in the implementation of those economic objectives which particularly relate to developing countries.[6] What is clear from the negotiations so far, however, is that developing countries have considerable difficulty in pushing issues of particular concern to them to the top of the trade agenda. The temporary movement of persons, for example, is a crucial area of export interest for many developing countries. Despite the importance attached to the liberalization of mode 4 of services supply over the last few years, however, no real progress has so far been made in the negotiations.[7]

[6] *Tuerk & Krajewski*, para. 13.
[7] *Marchetti*, Developing Countries, 38.

E. Contact Points (Art. IV:2)

14 Unlike Art. IV:1 which encourages developed country Members to negotiate commitments facilitating the full integration of developing countries in the international services trade but does not oblige them to reach specific results within a precisely defined timeframe, Art. IV:2 imposes a **specific obligation** on Member countries with regard to the establishment of an information network concerning the supply of services in their respective markets. Members are given two years from the date of entry into force of the WTO Agreement, *i.e.* from 1 January 1995, to establish contact points which are to make available the information specified under Art. IV:2 lit. a–c to service providers from developing countries. The provision does not prescribe any specific institutional or organizational form for the contact point. Most Members have set up a directorate or a division of their national Ministry of Commerce or Trade as their contact point, although it may occasionally also take the form of a separate agency. Whatever its organizational structure, the contact point must be readily accessible to all service suppliers seeking the relevant information. Whereas the duty to establish such **contact points** is formulated in unconditional terms for developed country Members, the other Members are required to do so only "to the extent possible". While the obligation to provide information on the conditions for the supply of services in the relevant domestic markets is instrumental in promoting the overall goal of greater participation of developing countries in world trade, it must also be seen as an extension of the **transparency** requirements laid down in Art. III:3 to other than legal aspects relating to the supply of services.[8] Art. IV:2 mirrors and is closely related to Art. III:4, which provides for the establishment of enquiry points through which Members are to provide to other Members specific information on measures of general application or international agreements pertaining to or affecting trade in services. The application of the transparency principle to the clarification of the scope of the obligation existing under Art. IV:2 implies that the information made available through contact points must conform to certain minimum standards: in particular, that information must be easily accessible, accurate, complete and up-to-date.

15 The information to be provided by the contact points is specified in Art. IV:2 lit. a–c. It includes information on the **commercial and technical aspects** of the supply of services, the registration, recognition and obtaining of **professional qualifications**[9] and the availability of **services**

[8] See Council for Trade in Services, Communication from Canada, Special Session, Transparency: Market and Regulatory Information of Interest to Service Providers, TN/S/W/41, 25 Mai 2005, paras 1–2.

[9] Member shall, for example, make publicly available through the contact points the names and addresses of competent authorities (*i.e.* governmental or non-governmental

technology. The required information has to be given for all service sectors and all modes of supply covered by the GATS, although it will be relevant mainly for supply modes 2–4. The legal rules governing the supply of services have to be published by all Members in accordance with Art. III:4. Since legal and non-legal information concerning services is of equal interest to service suppliers, the separate establishment of enquiry and contact points by those Members which are under an obligation to set up both would run counter to the purpose of Art. IV:2.

16 As of 1 December 2006, 81 Members had set up contact points under Art. IV:2. The Members must notify to the Council for Trade in Services the establishment of contact points.[10] The Council for Trade in Services publishes the enquiry and contact points set up by the Members under Arts III:4 and IV:2 in a **list** which is regularly updated.[11] While all developed countries have established a contact point as required by Art. IV:2, a significant number of developing countries have also done so, sometimes restricting the information given to specific service sectors. A general assessment of the quality of these contact points with regard to the relevance and the accuracy of the information provided has yet to be carried out.

F. Participation of Least-Developed Countries (Art. IV:3)

17 Art. IV:3 recognizes the special position of **least-developed countries** in the liberalization of the trade in services. The term refers, here as well as in other WTO agreements, to those Members of the WTO which have been designated as least-developed countries (LDCs) by the United Nations.[12] These countries have scarcely any modern service industry, and therefore have little to gain from the inclusion of services within the international trading system's purview. With regard to the few service sectors which are of relevance to their domestic economy—in particular tourism—they

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entities responsible for the licensing of professionals or firms, or accounting regulations), see Council for Trade in Services, Disciplines on Domestic Regulation in the Accountancy Sector, Adopted by the Council for Trade in Services on 14 December 1998, S/L/64, 17 December 1998, para. 3.

[10] See Council for Trade in Services, Decision on the Notification of the Establishment of Enquiry and Contact Points, Adopted by the Council for Trade in Services on 28 May 1996, S/L/23, 27 June 1996.

[11] See Council for Trade in Services, Contact and Enquiry Points Notified to the Council for Trade in Services, Note by the Secretariat, Revision, S/ENQ/78/Rev.9, 1 December 2006.

[12] These are Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, Gambia, Guinea Guinea Bissau, Haiti, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda, Zambia (as of 1 June 2006).

are often reluctant to open them to foreign competition. Special attempts have therefore to be made to facilitate the integration of the LDCs into the international services trade. However, just as with regard to developing countries in general, the GATS refuses to provide for any special and differential treatment which would make it possible to allocate quotas or to grant specific commitments only to the LDCs.[13] Instead, Art. IV:3 emphasizes the need to give **"special priority"** to LDCs in the implementation of Arts IV:1–2. In practice this means that particular attention should be given in the negotiation of specific commitments pursuant to Parts III and IV to those aspects of trade liberalization which are most relevant to the LDCs, especially to the temporary movement of natural persons (mode 4).[14]

18 Similarly, the second sentence of Art. IV:3 does not grant any additional rights under the GATS. The general rule under the GATS, that each country decides unilaterally at the end of the bi- and multilateral negotiations which commitments, if any, it wants to make, also applies to the LDCs. The second sentence of Art. IV:3 is a reminder that this discretion is of special significance to the LDCs. In particular this means that LDCs shall have full **flexibility** in opening fewer sectors and liberalizing fewer types of transactions in accordance with their specific development needs.[15] LDCs are not expected to offer full national treatment to foreign service providers or to go beyond their institutional and administrative capacities on regulatory issues. They may make their commitments compatible with their trade and financial needs, thereby limiting them in terms of sector, mode of supply and scope.[16] On the other hand, Art. IV:3 also imposes restraints on the other WTO Members when negotiating services liberalization with the LDCs. They are to exercise restraint in seeking commitments from LDCs pursuant to Parts III and IV, and they are not to seek the removal of conditions attached by LDCs in accordance with Art. IV to commitments by which they open their service markets to foreign suppliers.[17]

G. Outlook

19 At the time of writing, it is difficult to assess what **impact**, if any, Art. IV is going to have on the increased participation of developing countries in the

[13] *Marchetti*, Developing Countries, 17.

[14] The Council for Trade in Services urges Members to consider "to the extent possible" undertaking commitments to provide access in mode 4, "taking into account all categories of natural persons identified by LDCs in their requests", Council for Trade in Services—Special Session, Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services, TN/S/13, 5 September 2003, para. 9.

[15] *Ibid.*, para. 5.

[16] *Ibid.*

[17] *Ibid.*, para. 4.

international service trade. In practice this will depend on the willingness of the developed countries to take into account the particular needs and specific interests of the developing countries in the future talks on liberalization in services trade. The services negotiations in the current Doha Round have not so far yielded any concrete and positive results for developing countries. The assumption of the drafters of the GATS Agreement that the mechanism of negotiated specific commitments and the flexibility accorded to Members in the application of this mechanism would in themselves be sufficient to enable developing countries successfully to pursue a "positive" agenda of strengthening their services capacity and thus pave the way for their increased participation in international trade may yet turn out to have been unduly optimistic.

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Article V GATS
Economic Integration

1. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:
   a) has substantial sectoral coverage,[1] and
   b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph a), through:
      (i) elimination of existing discriminatory measures, and/or
      (ii) prohibition of new or more discriminatory measures,
      either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.
2. In evaluating whether the conditions under paragraph 1 b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.
3. a) Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.
   b) Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.
4. Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement.
5. If, in the conclusion, enlargement or any significant modification of any agreement under paragraph 1, a Member intends to withdraw or modify a specific commitment inconsistently with the terms and conditions set out in its Schedule, it shall provide at least 90 days advance notice of such modification or withdrawal and the procedure set forth in paragraphs 2, 3 and 4 of Article XXI shall apply.
6. A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.
7. a) Members which are parties to any agreement referred to in paragraph 1 shall promptly notify any such agreement and any enlargement or any significant modification of that agreement to the Council for Trade in Services. They shall also make available to the Council such relevant information as may be requested by it. The Council may establish a working party to examine such an agreement or enlargement or modification of that agreement and to report to the Council on its consistency with this Article.
   b) Members which are parties to any agreement referred to in paragraph 1 which is implemented on the basis of a time-frame shall report periodically to the Council for Trade in Services on its implementation. The Council may establish a working party to examine such reports if it deems such a working party necessary.
   c) Based on the reports of the working parties referred to in subparagraphs a) and b), the Council may make recommendations to the parties as it deems appropriate.
8. A Member which is a party to any agreement referred to in paragraph 1 may not seek compensation for trade benefits that may accrue to any other Member from such agreement.

Footnote 1: This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply.

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A. Introduction

1 Cargo vessels and containers are no longer the prime and sole symbols of international trade. International transactions in the 21st century increasingly concern the sale and purchase of invisible goods—services. National governments are aware of this phenomenon and have in recent years embarked on efforts to enhance market access opportunities for companies engaged in the export of services. Following the precepts of freedom of services in the EC and the North American Free Trade Agreement (NAFTA), the General Agreement on Trade in Services (GATS) was negotiated in the Uruguay Round (1986–1994). It provides the multilateral basis upon which progressive liberalization of services is sought. Given the reluctance of many countries to make substantial commitments multilaterally, a growing number of countries resort to including services in preferential agreements as a means of improving access to foreign markets as well as developing and establishing international rules on trade in services. **Economic integration agreements (EIAs) in services are starting to mushroom across the globe.**[1]

2 The proliferation of EIAs in services entails a number of challenges, not only pertaining to the interaction of different EIAs, but primarily affecting the relationship of the regional/bilateral level of services regulation to the multilateral system operating under the most-favoured-nation (MFN) principle (Art. II). With a view to protecting MFN and to reducing trade-distortive effects of preferential arrangements, it was therefore necessary to establish a number of pertinent requirements which preferential agreements on services need to meet in order to be legally compatible with the multilateral systems. Following the precepts of Art. XXIV GATT 1994, **Art. V sets out a number of substantial requirements for the conclusion of economic integration agreements in trade in services.**

[1] East Asian countries, for instance, have to date signed twenty-five EIAs in services, and over forty such negotiations are currently ongoing. On the proliferation of EIAs, see *Crawford & Fiorentino*. The term "economic integration agreements" is used in a broad sense here, so as to embrace any agreement seeking to provide for the liberalization of international trade, be it bilateral, regional or plurilateral, and regardless of the official desgination given to it by the parties (Free Trade Agreement, Economic Partnertship Agreement, Economic Cooperation Agreement, *etc.*).

3 In general public international law, the law of treaties as well as WTO law, multilateral rules and preferential rules have not yet been defined in a hierarchical relationship. All trade agreements, whether bilateral, regional or multilateral, are international treaties in nature. They stand on an equal footing in international law. Hence, **WTO agreements per se have no legal supremacy over EIAs**. Inconsistencies of preferential rules with WTO agreements and conditions set for preferential trade do not per se affect the existence and validity of an economic integration agreement. Such agreements have a life of their own. They remain valid and binding upon their parties despite their inconsistency with WTO rules.[2]

4 However, inconsistencies of preferential agreements with WTO agreements have implications within the WTO legal framework. Agreements and provisions not compatible with the requirements of Art. V fail to qualify for exemption from MFN treatment. Third parties affected are thus basically entitled to object to such agreements in the process of examination of the agreement, or to call for MFN treatment on the basis of preferences granted. They may equally challenge such rules under the Dispute Settlement Understanding. Importantly, panels and the Appellate Body exercise jurisdiction and are entitled to examine the compatibility of preferential rules with WTO obligations.[3] Where an inconsistency is found, the parties to the EIA in implementing the decision of the DSB may either extend MFN treatment or offer compensation to the Member affected. Failing the offer or acceptance of compensation, Members will be entitled to seek permission to suspend concessions and seek enforcement by means of retaliation (suspension of concessions) against the parties of the EIA in accordance with Arts 21 and 22 DSU. Until now, Members have been reluctant to challenge EIAs, and the substantial requirements discussed below have failed to have strong preventive effects in bringing about the coherence and compatibility of an increasing number of preferential agreements with the disciplines of WTO law. To this effect, it will be necessary to establish a future hierarchy of rules and to grant WTO rules a constitutional function in order to secure enhanced compatibility and to avoid distorting trade effects caused by agreements inconsistent with Art. V.

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[2] On the hierarchy of trade agreements, see *Cottier & Foltea*, in: *Bartels & Ortino* (eds), 43–76.

[3] Unlike Art. XXIV:12 GATT 1994 and the related Understanding on the Interpretation of Art. XXIV GATT 1994, paras 13 and 14, there is no provision in the current WTO legal framework which explicitly establishes the jurisdiction of panels and the Appellate Body to examine an agreement under Art. V. However, absent a provision to the contrary, jurisdiction stems from the general jurisdiction rules set out in Arts XXII and XXIII and Art. 1.2 DSU. See Panel Report, *Turkey—Textiles*, WT/DS34/R, para. 9.49–9.56. See also Appellate Body Report, *Turkey—Textiles*, WT/DS34/AB/R, para. 42 and 63; *Marceau & Reiman*, LIEI 28 (2001), 297, 299–300.

B. Substantial Liberalization Requirements (Art. V:1)

I. *Chapeau*

5 The *chapeau* of Art. V:1 explicitly recognizes the possibility of preferential agreements in services, in line with the traditions of GATT 1947 and 1994 which stipulate the coexistence and mutual supportiveness of multilateral and regional trade liberalization in Art. XXIV. **WTO Members remain free to conclude agreements providing for the preferential liberalization of trade in services**. The agreement states that it "shall not prevent any of its Members from being a party or entering into" such an agreement. Paraphrasing the Appellate Body findings in the context of Art. XXIV GATT 1994, the *chapeau* makes clear that Art. V may, under certain conditions, justify the adoption of a measure which is inconsistent with certain provisions of GATS.[4]

6 The conclusion of an EIA under the conditions of Art. V implies an **exception to the MFN obligation** enshrined in Art. II, as it is in the very nature of EIAs to accord preferential treatment to certain partners. Whether Art. V may also justify deviations from other obligations of the GATS is controversial; some WTO Members have expressed the view that it does not.[5] It would seem at first sight that there is nothing in the nature of economic integration agreements that would require the parties to adopt measures inconsistent with other GATS general disciplines such as transparency, domestic regulation, or emergency safeguard measures. While the likelihood of such constellations is limited, the wording, context and object of the provision do not rule out the possibility of deviating from provisions other than Art. II, in particular in the context of specific commitments in Arts XVI and XVII. For example, a party joining an existing EIA may be obliged to adopt more restrictive standards than currently applied. In dispute settlement, it would be for the defending party to demonstrate that such deviations are necessary in order for the agreement to work.

7 The *chapeau* of Art. V:1 broadly refers to agreements "liberalizing trade in services". Unlike Art. XXIV GATT 1994, the provision **does not distinguish between free trade areas and customs unions**. Instead, the provision operates under a single notion of economic integration. Unlike goods, most services are not suitable to be dealt with by means of border

[4] *Turkey—Textiles*, WT/DS34/AB/R, para. 45.

[5] Namely, New Zealand and Japan. See Committee on Regional Trade Agreements, Note on the Meetings of 29–30 April and 3 May 1999, WT/REG/M/22, 4 June 1999, paras 17 and 18. Also, Committee on Regional Trade Agreements, Synopsis of "Systemic" Issues Related to Regional Trade Agreements, Note by the Secretariat, WT/REG/W/37, 2 March 2000, para. 33.

measures, in particular tariffs. The emphasis is on domestic measures which essentially define market access and conditions of competition. Such conditions operate irrespective of whether or not the parties to the agreement jointly deal with third party relations in services (such as the EC in terms of mixed agreements).

8 Agreements liberalizing trade in services are thus admitted by Art. V "provided that" the conditions set out subsequently are met. This language makes clear that **Art. V requirements are mandatory in nature**. Lack of compliance with these requirements inhibits compliance with WTO law.[6]

9 The requirements set out in Art. V apply, like any other WTO obligation, to all Members. EIAs concluded between Members hence must fully comply with Art. V. WTO agreements have no effect on EIAs concluded between non-members of the WTO. They remain free, under the principle of sovereign equality, to enter into discriminatory agreements. However, **preferential agreements concluded between a WTO Member and a non-Member are subject to the disciplines of Art. V in respect of the WTO Member.** Art. II is not limited to relations among Members of the WTO but obliges no less favourable treatment to be immediately and unconditionally extended to Members in respect of all privileges granted to like services and service suppliers "of any other country". It follows that the WTO Member must ensure that at least its own obligations stemming from the EIA meet Art. V requirements. Otherwise, the WTO Member's departure from GATS MFN obligation cannot be justified under Art. V.[7]

II. Substantial Sectoral Coverage (Art. V:1 lit. a)

10 The first condition required by Art. V:1 lit. a establishes the standard for internal trade among the parties and provides that the EIA in services needs to have **"substantial sectoral coverage"**. The footnote to the provision explains that this requirement is understood "in terms of number of sectors, volume of trade affected and modes of supply". Art. V:1 lit. a is based upon, and imports into the GATS, the key concept of **substantially all the trade** in Art. XXIV:8 GATT 1994. Unlike in GATT, the wording of the provision and of the footnote clarifies that the requirement entails both qualitative and quantitative requirements.

1. Inclusion of Substantially All Sectors

11 As under the GATT, the notion of what is "substantial" is controversial and the object of debate, albeit that the GATS clearly prescribes the adop-

[6] See above, para. 4.
[7] See *Choi*, JIEL 8 (2005), 825, 843–847.

tion of a combined, quantitative and qualitative approach and does not allow one to argue exclusively on the basis of one or the other approach as under Art. XXIV GATT 1994. Nevertheless, a number of services-specific problems arise in the context of the GATS.

12 As to qualitative requirements, a number of questions arise regarding the specific terms by which the agreement's sectoral coverage is to be measured. For instance, at what level of detail should the determination of included and excluded services be made: individual services, sub-sectors or whole sectors? Can entire sectors be excluded from the agreement? The footnote states that this requirement should be read, *inter alia*, "in terms of number of sectors". This suggests that it is primarily based upon the concept of entire sectors, and that inclusion of substantially all of these sectors is necessary in order to comply with Art. V. The Appellate Body held in *Turkey—Textiles* that substantially all the trade "is not the same as *all* the trade", and that it is "something considerably more than merely *some* of the trade".[8] The same reasoning also applies to services. Art. V does not require all sectors to be covered but that the agreement excludes no more than a very limited number of sectors. In other words, out of 11 current services sectors identified by the Services Sectoral Classification List, the exclusion of possibly more than one or two sectors most likely fails to meet the test of substantial sectoral coverage of the agreement.[9] In assessing the relevance of exclusions, it is important to take into account the economic importance of the sector in terms of international exchange. It has been suggested that the exclusion of "major sectors" would in itself prevent the EIA in services from passing the test of substantial sectoral coverage.[10]

13 Thirdly, **it remains unclear how those sectors that are only partially covered by the EIA in services should be computed**, that is, those sectors in which one or more sub-sectors have been excluded. Practice reveals that some regional and bilateral EIAs do fully exclude some service sectors from their coverage, as is the case of financial services in Korea–Chile FTA and Trans-Pacific CEPA, and that the exclusion of some subsectors is a common practice—in particular, within the transport sector for the air and maritime transport subsectors.

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[8] *Turkey—Textiles*, WT/DS34/AB/R, para. 48. Italics in the original.

[9] It is worth noting that the GATS provides no definition of what constitutes a service "sector". Art. 22.3 lit. f (ii) DSU defines "sector" as each of the eleven sectors identified in the "Services Sectoral Classification List" (Group of Negotiations on Services, Uruguay Round, Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120, 10 July 1991). While the definition of the DSU is circumscribed to the purposes of that provision, Art. 22 DSU and the Services Sectoral Classification List are relevant for the purposes of identifing a "sector" under the GATS.

[10] See WT/REG/M/22, para. 16.

14 Some WTO Members have expressed the view that excluded sectors should not be "essential" services, in the sense of those services that serve as the infrastructure for economic activity, "such as transportation".[11] While this would certainly be desirable, as it would set the scene for greater and deeper economic integration, nothing in the text of the GATS Article seems to enshrine an obligation to that effect. Subject to the concept of substantial sectoral coverage, parties to an agreement may exempt a limited number of sensitive services, including public services (*service public*) such as primary education or public health care. Furthermore—except allegedly for tourism and travel as well as recreational, cultural and sporting services, which are all services almost exclusively oriented to the end-consumer—almost every other service directly or indirectly relates to the establishment and maintenance of infrastructure for further economic activity.

15 Overall, the concept of substantial sectoral coverage responds to the need to avoid the advent of numerous sector-specific agreements which pick and choose from mutually interested areas but leave the idea of comprehensive regional and preferential trade in services behind. The requirement therefore establishes a proper balance between the goals of multilateral and preferential trade. It promotes trade creation, but seeks to contain trade diversion to which randomly concluded sectoral agreements are likely to contribute. The requirement thus also serves the purpose of limiting the number if EIAs and of rendering them substantial and comprehensive in coverage. **The requirements of substantial sectoral coverage** and the need to include all sectors irrespective of market structures and interests render the conclusion of EIAs more difficult and thus indirectly **protect the principle of MFN**.

16 As to quantitative requirements, the reference to **"volume of trade"** in the footnote to Art. V:1 lit. a entails the **obligation to liberalize those services that amount to substantial trade volumes between the parties**, in terms of both current and potential trade.[12] Allowing for the exclusion of sectors which amount to, or in the absence of limitations would amount to, substantial trade between the parties would pave the way to circumventing the obligations of substantial liberalization. In other words, the sectors, or even particular services where limitations are maintained, cannot be those where significant trade between the par-

[11] See *ibid.*, paras 18 and 20.

[12] Arguably, the concept of "volume of trade" is of limited significance in the realm of international trade in services as covered by the GATS. Indeed, the mere idea of "volume" is at odds with the intangible nature of services. Furthermore, international trade in services may occur without international transactions taking place, as is the case when services are provided through a locally established commercial presence, which also interferes with the assessment of the "volume of trade" in services between two countries in terms of international transactions.

ties occurs or would occur in the absence of restrictions. For instance, if financial services between Korea and Chile, or between the parties to the Trans-Pacific CEPA, currently amount—or would amount in the absence of restrictions—to a substantial share of their reciprocal trade in services, the exclusion of financial services from the scope of those agreements could entail a violation of Art. V:1 lit. a.[13]

17 A particular difficulty in assessing volumes of trade relates to statistical data on international trade in services. It currently falls short in amount and quality compared to data available for international trade in goods. This brings about additional **problems of quantification in assessing the "volume of trade" in services**.[14] It should be recalled in this context that WTO law essentially relates to conditions of competition and per se is less concerned with the impact on particular trade flows. In assessing WTO compatibility of an EIA, the concept of qualitative requirements as to substantial sectoral coverage is thus of paramount importance.

2. Inclusion of All Modes of Supply

18 The requirement of substantial sectoral coverage, as clarified by the footnote to Art. V:1 lit. a, also encompasses the modes of supply. The footnote explicitly states that none of the four modes of supply should be *a priori* excluded from the liberalization obligations of the agreement, *i.e.* the **EIA should provide for liberalization obligations on all modes of supply of services**, namely cross-border supply (mode 1), consumption abroad (mode 2), commercial presence (mode 3) and presence of natural persons (mode 4) as established in Art I.

a) No *a Priori* Exclusion of Any Mode of Supply

19 The qualification of *a priori* exclusion, however, implies that EIAs may provide for **differential degrees of liberalization for different modes of supply**, as long as none of them is excluded as a matter of principle. Current state practice in bilateral and regional EIAs shows that agreements tend to feature largely the same obligations for all modes of supply—including those covering obligations on mode 3 under investment disciplines. Nonetheless, liberalization commitments under the different modes show highly diverging levels of ambition. While modes 1 and 2 seem to be relatively free of regulatory barriers, and therefore substantially

[13] In practice, however, potential or future trade in services may be hard to measure. For this reason, the assessment of the substantiality of the trade affected may be done on the basis of current trade flows between the parties, while the liberalization of services sectors where future trade may occur could be assessed under the number of sectors covered by the agreement.

[14] On the problems related to the collection of precise data on international trade in services, see *Hoekman*, Tentative First Steps; *Stephenson*, in: *Sauvé & Stern* (eds), 509, 514–516. See also WT/REG/W/37, para. 75.

liberalized, mode 3 is subject to important limitations in most agreements, and commitments regarding mode 4 are often of marginal significance.[15] Other than Labour Market Integration agreements addressed by Art. V*bis*, EIAs on services have not been widely developed as an avenue to address labour mobility and migration.

20 Nothing in Art. V and the footnote suggests that the obligation to provide substantial liberalization in terms of "volume of trade" is limited to the number of sectors. The requirement also extends to the modes of supply. A comprehensive reading of the footnote to Art. V:1 lit. a reveals that while a) no mode of supply should be *a priori* excluded from the agreement, b) liberalization commitments may be undertaken with regard to some modes of supply more than others, **provided that c) the lack of commitments with regard to one or more modes of supply does not impair the liberalization of substantial volumes of trade**.

b) Coverage of Movement of Natural Persons

21 The GATS Annex on Movement of Natural Persons limits the scope of the Agreement to short-term service suppliers and intra-corporate transferees. A key question is **whether EIAs in services may limit the scope of mode 4 to the same extent as in GATS or** whether they are **required to provide greater** and more complete **coverage relating to the movement of natural persons**.[16] Some WTO Members have considered that "the movement of natural persons, which was exempted from the GATS framework, need[s] to be included in the integration process for consistency with the GATS".[17] The answer to this question depends on whether the limitation featured by the Annex on Movement of Natural Persons forms an integral part of the definition of mode 4 in the context of the GATS.[18]

22 The Annex on Movement of Natural Persons provides that the GATS does not apply to measures affecting natural persons seeking employment, residence or citizenship on a permanent basis. The exemption is not limited in time, although provisional. Future negotiations may alter that constellation. At present, GATS does not extend to labour mobility *per se*, and the exclusion of it in EIAs therefore does not amount to a violation

[15] *Fink* & *Molinuevo*, East Asian Free Trade Agreements, 61. See also, *Stephenson*, APEC's Progress; *Roy et al.*

[16] Para. 2 of the Annex on Movement of Natural Persons provides that the GATS "shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis". In practice the overwhelming majority of EIAs in services feature such a carve-out too.

[17] See WT/REG/M/22, para. 18.

[18] In this sense, Art. XXIX provides that the Annexes, including the one on the movement of natural persons, are an "integral part" of the GATS.

of Art. V. Parties to an EIA, however, are **barred from restricting the concept of mode 4 to a narrower scope than the one provided by the GATS.** This would amount to an *a priori* exclusion of the mode of supply from the disciplines of the EIA, in violation of Art. V:1 lit. a requirements.

III. Elimination of Discrimination (Art. V:1 lit. b)

1. Establishment of Level Playing Fields

23 In addition to substantial sectoral coverage, Art. V:1 lit. b requires EIAs in services to provide for "the absence or elimination of substantially all discrimination" in the sectors covered, by granting national treatment to the services suppliers of the other party. The requirement mirrors the obligation to abolish all tariffs and quantitative restrictions with respect to substantially all the trade in Art. XXIV:8 GATT 1994. In services, and in the absence of border measures, market opening is essentially brought about by granting national treatment to avoid legal or de facto discrimination against imported services in accordance with the disciplines set out in Art. XVII: 2 and 3, to which the provision explicitly refers in the text. The EIA is therefore required to **bring about level playing fields between domestic and foreign services on the markets** of the parties to the agreement in respect of sectors covered. Legal or de facto discrimination against foreign services or service suppliers *vis-à-vis* domestic service suppliers needs to be eliminated.[19]

2. Reciprocity

24 Elimination of discrimination is bound to take place **between the parties**. In the words of the Panel in the *Canada—Autos* case, the requirement imposed by Art. V:1 lit b ensures non-discrimination between all service suppliers of other parties to the economic integration agreement.[20] Art. V thus implies, as does Art. XXIV:8 GATT 1994, that level playing fields need to be established on the basis of reciprocity.[21] Both parties are obliged to bring about non-discrimination in their respective markets on an equal footing. As **sectoral coverage and removal of discriminatory measures essentially depend on the country-specific Schedules**, it may be that commitments undertaken are not balanced among the parties. In fact, some agreements feature meaningful commitments by only one party, while

[19] See below, para. IV.

[20] Panel Report, *Canada—Autos*, WT/DS139 and WT/DS142, para. 10.270.

[21] See Panel Report, *EC—Bananas III*, WT/DS27/R, para. 159: "The lack of any obligation of the sixty-nine ACP countries to dismantle their trade barriers […] made the trade arrangements set out in the Convention substantially different from those of a free trade area, as defined in the Art. XXIV:8 lit.b".

those of the other party are more limited. This is the case, for instance, of Japan–Malaysia FTA, where Japan's commitments markedly outweigh Malaysia's undertakings. Para. 3 discussed below offers some flexibility, but does impair the principle implicit in Art. V:1 lit. b.

3. Obligation to Liberalize "and/or" Stand-Still Obligation

25 EIAs in services may achieve level playing fields by means of the "(i) elimination of existing discriminatory measures, and/or (ii) [the] prohibition of new or more discriminatory measures". Art. V:1 lit. b (i) entails an **obligation to liberalize** as it requires the elimination of existent discriminatory measures. Art. V:1 lit. b (ii) prevents parties from introducing new restrictive measures. It essentially amounts to a stand-still obligation. It features only a limited liberalization, as it requires **conditions of competition** between domestic and foreign services suppliers not to be worsened. The reference to one "and/or" the other means in Art. V:1 lit. b raises the question whether or not these two channels can be considered to be two self-standing, independent ways of fulfilling the requirements of Art. V:1 lit. b. In other words, are countries entitled freely to choose between either of the two alternatives, so that the mere inclusion of a "stand-still" obligation[22] would ensure compliance with the requirements of elimination of substantially all discrimination?[23] In order to assess the issue, it is necessary to construe Art. V:1 lit. b as a whole.

26 The main obligation set out in Art. V:I lit. b relates to the absence or elimination of substantially all discrimination. It does not rest with the options of Art. V:I lit. b (i) and (ii); rather, the latter are informed by the main obligation and need to be construed accordingly. **The two channels set out in Art. V:I lit. b (i) and (ii) are not independent alternatives.** They are merely means to achieve the main obligation of the EIAs, which is to provide for the absence or elimination of substantially all discrimination. It is clear that the formulation "and/or" does not set out two alternative courses of action at the discretion of the parties, but rather means that the parties to the EIA are bound to adopt one "and/or" the other instrument in the process of bringing about non-discrimination and level playing fields, depending on the domestic regulatory situation. In sectors and modes in which discriminatory measures are in force, the EIA is to provide for their elimination. Instead, in sectors and modes that are being liberalized or have

[22] Provisions estalishing the prohibition on introducing new restrictive measures—in addition to those existent at the time of the conclusion of the agreement—are commonly called "stand-still obligations", as their purpose is to freeze the regulatory *status quo*.

[23] On the different positions of WTO Members on the "and/or" language discussion, see WT/REG/W/37, para. 82; Negotiating Group on Rules, Compendium of Issues Related to Regional Trade Agreements, Background Note by the Secretariat, Revision, TN/RL/W/8/Rev.1, 1 August 2002, para. 95.

previously been subject to unilateral liberalization, the stand-still obligation ensures that the absence of discrimination will be maintained. In brief, depending on the regulatory framework of the parties, **EIAs in services must provide** for the **elimination** of discriminatory measures **and** a **stand-still** obligation in a manner conducive to **ensuring the absence of substantially all discrimination**.

27 EIAs in services are not required to eliminate *all* preferential treatment for a Member's own services suppliers, but only a substantial part of it. **The parties to the EIA may maintain certain discriminatory measures** in specific services activities or in regard to some modes of supply, as long as substantially all discrimination is removed from the sectors covered by the agreement. Horizontal restrictions that apply to all sectors are not formally ruled out by Art. V. On the other hand, given the high level of restriction that they may entail across the board, strong horizontal restrictions are likely to compromise the elimination of substantially all discrimination, hence jeopardizing the WTO consistency of the EIA.

IV. Timeframe for Liberalization and Exceptions

1. Timeframe for Liberalization

28 The last paragraph of Art. V:1 indicates that compliance with the substantial requirements set out in Art. V:1 lit. a and b is to be achieved **either at the entry into force of the EIA in services or "on the basis of a reasonable time-frame"**.

29 In discussions on the definition of a **"reasonable time-frame"** in the context of the Committee on Regional Trade Agreements, WTO Members have suggested **periods ranging from five to ten years**.[24] Those supporting shorter timeframes have recalled that the next round of negotiations in trade in services was scheduled to start five years after the entry into force of the GATS. On the other hand, a general 10-year period would ensure a common timeframe with that provided for integration in the area of goods set out in Art. XXIV:5 lit. c GATT 1994 and para. 3 of the Understanding on the Interpretation of Art. XXIV GATT 1994. Para. 3 of this Understanding specifies that this period should exceed ten years only in exceptional cases, subject to the provision of a full explanation to the Council. Interim agreements therefore may extend beyond ten years, and in state practice include longer periods relating to sensitive sectors. Furthermore, some WTO Members have suggested that the timeframe

[24] WT/REG/W/37, para. 84.

may also depend on the final degree of liberalization to be achieved by the EIA in services.[25]

2. Measures Exempted from Liberalization Obligations

30 Finally, Art. V:1, last paragraph, provides that measures covered by Arts XI (Payments and Transfers), XII (Restrictions to Safeguard the Balance of Payments), XIV (General Exceptions), and XIV*bis* (Security Exceptions) do not fall within the requirement of substantial liberalization as laid down in Art. V:1. The provision lists the main exceptions to GATS general obligations and specific commitments, so as to ensure that possible discriminatory or trade-restrictive **measures that respond to legitimate regulatory objectives need not to be subject to the national treatment obligation of the EIA in services**.

31 Notably, Art. V does not exempt measures eventually covered by Art. X on emergency safeguard measures. This suggests that, where an EIA in services featured such a mechanism, the **adoption of safeguard measures against the EIA partner beyond the benefits granted by the EIA may be contrary to GATS disciplines**, at least until an emergency safeguard mechanism in services is established at the multilateral level. In this regard, some WTO Members have considered that the list of exceptions featured in the last paragraph of Art. V:1 is not exhaustive and that Art. X should be added to that list.[26]

32 EIAs normally prescribe principles and exemptions in their own terms. To the extent that the terms exceed those of the abovementioned provisions, restrictions may be held inconsistent with Art. V for all sectors covered by the EIA.

V. Assessment of Compliance

33 The difficulties in measuring and assessing **"substantially all discrimination"** in the abstract, in both quantitative and qualitative terms, inevitably entails that an **assessment of compliance with this requirement must be made on a case-by-case basis**. The review of agreements notified by the Committee on Regional Trade and examined under the new Transparency Mechanism for Regional Trade Agreements of 14 December 2006[27] is inherently limited to an overall assessment of the agreement as to compliance with non-discrimination and mutual rights and obligations under the EIAs. More specific examination may take place in assessing a

[25] *Ibid.*, para. 84. See also WT/REG/M/22, paras 15 and 20 respectively.
[26] TN/RL/W/8/Rev.1, paras 91–93.
[27] General Council, Transparency Mechanism for Regional Trade Agreements, Decision of 14 December 2006, WT/L/671, 18 December 2006.

particular measure in dispute settlement, as has been the case in the field of goods.[28] Given the novelty of GATS and the lack of experience in dealing with EIAs, the assessment of compliance faces unresolved issues. How should one assess an agreement which essentially lacks reciprocal commitments, and where substantial commitments are essentially taken and implemented unevenly by one of the parties only? To the extent that the agreement does not comply with the conditions set out in Art V:1 upon assessing it in general terms, Members of the WTO will fail to approve it by consensus in the Committee on Regional Trade, as has been the case for all but one of the preferential agreements examined (*i.e.* Czech-Slovak FTA). As the decision does not affect the legal validity of the agreement in international law, it may upon application be challenged under the DSU. Panels and the Appellate Body will normally be called upon to examine the compatibility of specific domestic measures, which are based upon the EIA, with WTO law. In this context, they may, as a preliminary matter, examine the compatibility of the agreement with Art. V.

C. Wider Process of Economic Integration (Art. V:2)

Art. V:2 allows one to take into account the relationship of the EIA in *34*
services with a **"wider process of economic integration"** in evaluating whether the substantial liberalization requirements of Art. V:1 lit. b are met. It is understood that a "wider process of economic integration" refers to the liberalization of trade in goods in the terms of Art. XXIV:5 GATT 1994.[29] The provision does not specify precisely how the relationship between integration in goods and services should be considered. It is submitted that the provision allows one to make an overall assessment, taking into account goods as well as services. The text, as much as the context of the provision, implies that an overall assessment may translate into the **lowering of the threshold allowing remaining discriminatory measures** among the parties to the EIA in services. On the other hand, it could also be argued that participation in a "wider process of economic integration" would require a stricter reading of the liberalization commitments of the parties. As Art. V:1 sets out conditions in a fairly rigorous manner, it is difficult to see how the latter argument is necessary further to tightening up conditions in order to meet the conditions of WTO law in a constellation of advanced economic integration. It has also been suggested that a "wider process of integration" could consist in the **harmonization**

[28] See *Turkey—Textiles*, WT/DS34/R.
[29] WT/REG/W/37, para 85. Committee on Regional Trade Agreements, Systemic Issues Arising from Article V of the GATS, Communication from Hong Kong, China, WT/REG/W/34, 19 February 1999, para. 11.

of regulatory measures affecting services by parties to the EIA.[30] It is difficult to see how such an obligation could be imposed in the absence of explicit language.

35 Participation in a wider integration process may only be considered in evaluating whether the EIA in services provides for the elimination or absence of substantially all discrimination, but not in regard to the sectoral coverage of the EIA. That means that **EIAs in services are still subject to the obligation to provide for substantial sectoral coverage**, in terms of number of sectors, volume of trade and modes of supply. Further, the provision specifically refers to the lowering of intra-trade barriers among the parties to the EIA and not to the barriers maintained in relation to third parties.

36 Art. V:2 states that consideration **"may be given"** to participation in an EIA in goods as well as services, thus making such consideration optional in nature. Therefore, the evaluating body—be it the Council for Trade in Services (CTS), the Committee on Regional Trade Agreements, or a panel or the Appellate Body in the context of a dispute—**may disregard the relationship with goods** and evaluate the EIA in services exclusively on its own merits, **or**, alternatively, **may subject the consideration** of the relationship between integration in goods and services **to other elements** (such as the depth of scope and depth of liberalization in goods, the level of development of the parties, *etc.*).

D. Special and Differential Treatment (Art. V:3)

I. Flexibility (Art. V:3 lit. a)

37 In the ambit of trade in services, developing countries do not benefit from an "enabling clause" which allows them to enter into sectoral agreements, or agreements that bring about less than substantial liberalization. Rather, developing countries are subject to the same substantive requirements set out in Art. V as are developed countries. Art. V:3 lit. a provides for **flexibility** in the application of the substantial liberalization requirements where developing countries are parties to an EIA in services. The provision refers to the level of development of the countries concerned, thus not necessarily requiring all the parties to the agreement to be involved. Unlike Art. 2 lit. c of the Enabling Clause relating to preferential treatment in goods,[31] Art.

[30] WT/REG/W/34, para. 11.

[31] Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979 (L/4903), LT/TR/D/1, 4 December 1979.

V:3 is not limited to preferential agreements among developing countries. Flexibility also applies to agreements between developed and developing countries and operates as a limitation on the principle of reciprocity required by Art. V:1 lit. b. Finally, Art. V:3 lit. b is explicitly dedicated to agreements involving developing countries only, and sets out special rules for such agreements.

38 The mandatory language featured by the provision ("flexibility shall be provided") suggests a greater **degree of deference to developing countries'** positions in EIAs than the mere "consideration" that may be given in the context of a wider process of economic integration.

39 Flexibility is to be accorded **in accordance with the level of development** of the countries concerned. The provision responds to the philosophy of progressive regulation which links levels of commitments in WTO law to levels of competitiveness of Members and specific sectors.[32] In assessing flexibility and special and differential treatment in commitments on services, consideration therefore should be paid to the **state and prospects of competitiveness of the economy and of particular service sectors**. Overall flexibility may be based upon low levels of competitiveness of the service economy as a whole. As to specific sectors, competitive sectors should be fully subject to reciprocal commitments, while uncompetitive sectors may benefit from flexibility, exemption or a lesser degree of commitment to liberalize and grant full national treatment. Flexibility could be afforded by accepting the **exclusion of more services activities** from the sectoral coverage of the agreement, or allowing for **more and more restrictive measures** to be maintained despite the obligation to eliminate substantially all discrimination.

40 One other means of providing flexibility would be to accept **longer transition periods**, so as to extend the reasonable timeframe for developing countries. In determining competitiveness, appropriate thresholds and indicators should be used. The same test may apply to sub-sectors. Parties remain free under Art. V:3 to limit flexibility in time or to render it conditional upon the economic performance of a sector and thus subject to review. Agreements therefore may **entail a dynamic approach** with evolving obligations commensurate with the level of development of the sectors concerned.

41 Some WTO Members have suggested that the language "in accordance with the level of development of the countries concerned" may extend flexibility to developed countries too when these participate in an EIA in

[32] See *Cottier*, JIEL 9 (2006), 779, 821.

services with a developing country.[33] While the wording of the provision does not rule out such a reading, this interpretation would lead to the awkward result that developed countries would be required to provide for greater liberalization in agreements among themselves, while they could maintain more restrictions when the partner was a developing country.

42 The provision faces the usual difficulties linked to **the lack of legal definition of the status of "developing country"** and of industrialized or developed country, respectively. The WTO operates on the basis of the classification of the group of least developed countries (LDCs) elaborated by the United Nations.[34] All other countries may proclaim themselves to hold "developing country status" and hence benefit from special and differential treatment provisions in the WTO agreements, including Art. V:3. It is primarily for the negotiating partners of an EIA to define the status in the process of claims and responses. Third parties, suffering from trade diversion, may however challenge an agreement both in the review of the agreement and in WTO dispute settlement. Panels and the Appellate Body may be called upon to assess whether flexibility granted is justified by current levels of development of the economy or the specific sector concerned. The doctrine of progressive regulation may assist in establishing an appropriate balance between auto-determination of status and recourse to objective criteria.

II. Preferential Rules of Origin (Art. V:3 lit. b)

43 A further flexibility is granted to EIAs in services where all the parties are developing countries. **EIAs in services concluded by developing countries may feature more restrictive rules of origin for juridical persons** than those required by Art. V:6. This privilege is limited to agreements among developing countries and does not apply in those with developed countries. Art. V:6 requires EIAs in services to extend the benefits of the agreement to juridical persons established and involved in commercial activity in the territory of the parties, but owned or controlled by persons of third countries.[35] Art. V:3 lit. b allows EIAs in services concluded among developing countries to depart from this obligation and hence **restrict preferential treatment to service suppliers owned or controlled by their own citizens**. The relevant concepts of "ownership and control" applicable in this context are to be taken from GATS definitions of Art. XXVIII lit. n (i) and (ii). The provision allows the parties to the

[33] WT/REG/W/34, para. 12.

[34] See UN List of LDCs After the 2006 Triennial Review, <http://www.unctad.org/Templates/Page.asp?intItemID=3641&lang=1> (last visited 1 October 2007).

[35] See below for a more detailed discussion on the requirements of Art. V:6.

EIA to privilege companies owned or controlled by their natural persons, as opposed to those controlled by juridical persons from other Members operating in the territory of one of the parties to the agreement. In other words, it amounts to a particular privilege of private ownership which is otherwise bound to be treated like other forms of juridical persons and of control under the definitions of Art. XXVIII. The provision should be read in essence to allow for preferential treatment for small and medium sized enterprises and as a limitation to the liberal rules of origin of Art. V:6.

44 The provision allows one to grant more favourable treatment to service suppliers of citizens of the parties; **this does not entail permission to raise the overall level of barriers** for service suppliers of non-parties, which is subject to the prohibition of Art. V:4.

45 It has been suggested in this context that the more favourable treatment of Art. V:3 lit. b should be interpreted in conjunction with "the purpose of Art. V:3 lit. a which is to consider the situation of developing countries that have a lower competitiveness in trade in services".[36] Beyond the questionable assessment that Art. V:3 lit. a entails a consideration of the degree of competitiveness in services trade of the developing country concerned, nothing in the two paragraphs of Art. V:3 seems to establish any link between them. Rather, the flexibility provided by Art. V:3 lit. a and the preferential rules of origin allowed by Art. V:3 lit. b concern **two independent and cumulative means to grant special and differential treatment** to developing countries in EIAs in services.

E. Prohibition of "Fortress" Integration (Art. V:4)

46 While the requirements set out in Art. V:1 aim at ensuring free movement of services within the parties to the EIA, Art. V:4 substantially tackles the external dimension of the agreement.[37] It provides that the EIAs in services must **not "raise the overall level of barriers" to trade in services with respect to third parties**. The assessment is to be made in comparison with the level of barriers applicable before the conclusion of the EIA and should take account of each sector and sub-sector covered by the agreement.

[36] WT/REG/W/37, para. 91.

[37] Art. V:4 also requires the EIA to "be designed to facilitate trade between the parties". This requirement—regarding the internal dimension of the agreement—does not seem however to set a new, independent obligation. Indeed, any EIA in services that fullfils the conditions of Art. V:1 would easily be considered to be designed to facilitate trade between the parties.

47 The goal of the provision is to prevent the parties from embarking on so-called "fortress" economic integration, in which the countries liberalize internal trade but do so to the detriment of products from third countries by raising compensatory protection in relation to services and service providers from third parties outside the EIA. The provision builds upon the tradition of Art. XXIV:5 lit. a and b GATT 1994 which obliges Members to a preferential agreement to abstain from raising specific trade barriers under an FTA and to avoid an overall increase of trade barriers under a customs union. Since GATS does not need the distinction of free trade areas and customs unions, a uniform approach is adopted in addressing the problem of third party relations.

48 Art. V:4 does not specify the coverage of **"barriers"** to trade in services. In particular, it is unclear whether the provision covers measures subject to the general disciplines of the GATS (such as MFN, domestic regulation, and transparency), or merely those subject to specific commitments (market access and national treatment). Subject to compensation addressed in Art. V:5, the **prohibition on raising trade barriers applies across the board** and prevents parties from adopting measures which result in increasing barriers to trade as compared to levels applicable prior to the conclusion of the agreement.

49 The provision relies upon measures **applicable**, and not those effectively applied. This suggests that the requirement refers to commitments under the GATS and not to measures effectively in force. Members are entitled to increase without compensation domestically applied barriers up to multilaterally agreed commitments as they may also do in raising applied tariff rates to the level of bound rates in the field of goods. Members remain fully bound by general provisions, such as measures affecting the fair application of domestic regulation, transparency, *etc*.[38] Legal and *de facto* barriers relating to these regimes must not be increased for third parties in the wake of bringing about preferential relations with the parties of the EIA. In essence, Art. V:4 requires Members to **maintain the overall level of commitments** with regard to third parties, including those adjustments necessary to form the EIA.

50 The evaluation is to be done within the sectors and sub-sectors covered by the agreement and compared to the level of barriers applicable prior to the agreement. The lack of precise statistical data on trade in services and the difficulties in quantifying restrictions that may be qualitative in nature

[38] It could also be argued that while Art. V:5 establishes the renegotiation process for each inidivual new restriction on market access and national treatment, Art. V:4 covers these measures and those subject to GATS general disciplines together, by setting a ceiling which does not raise the **overall** level of barriers.

poses important challenges in the practical application of this requirement. Further, the raising of the level of barriers is to be attributable to the EIA in a causal **relationship between the agreement and the new level of applicable barriers**. New restrictions introduced unilaterally by one of the parties to the EIA in services are to be evaluated on their own terms, unless they are directly or indirectly related to the change of circumstances induced by the EIA.

F. Renegotiation of Commitments (Art. V:5)

51 Where the modification of specific commitments is necessary for the conclusion of the EIA, Art. V:5 stipulates that the withdrawal or modification of specific commitments stemming from the conclusion, enlargement, or modification of an EIA in services is subject to the **regular renegotiation procedures set out in Art. XXI:2–4**.[39] The provision builds upon the tradition of Art. XXIV: 6 and Art. XXVIII GATT 1994 (modification of Schedules). To the extent that withdrawal of specific commitments is necessary in order to establish, enlarge or join an EIA, Members are entitled to do so and offer compensation to WTO Members primarily affected by such withdrawal in accordance with procedures set out in Art. XXI.

52 The provision requires **90-days' advance notice** of the modification or withdrawal of the commitment, which matches the requirement established in Art. XXI:1 lit. b. Albeit not expressly indicated in the provision, such notification should be made to the Council for Trade in Services, as indicated in Art. XXI:1 lit. b.

53 In addition to the conclusion or enlargement of an EIA in services, any withdrawal or modification of specific commitments stemming from "any significant modification" of the agreement should be followed by renegotiation procedures with a view to achieving agreement on compensatory adjustment. While the "significant modification" language remains ambiguous, it may be understood that **any modification of the EIA that requires the withdrawal or modification of specific commitments is in itself significant**, and would hence trigger the renegotiation process.

54 In brief, **participation in an EIA in services does not in substance justify the introduction of measures contrary to the specific commitments** undertaken under the GATS. Subject to the special provision of Art. V:5, the renegotiation process applies equally to those participating in an EIA in services as to those unilaterally wishing to withdraw or modify a commitment, so no particular flexibility is granted to parties to an EIA

[39] For a detailed discussion, see *Nartova*, Article XXI GATS, paras 16–32.

in services in this regard. It is worth noting, however, that the introduction of new restrictions on market access or national treatment in sectors or modes where no specific commitments were undertaken, whether or not in the context of an EIA in services, remains a possibility for any WTO Member under the GATS.

G. Rules of Origin (Art. V:6)

55 The GATS features a novel condition for EIAs in services, unparalleled in the area of goods trade. Art. V:6 introduces a requirement to establish a **liberal rule of origin** to the benefit of all WTO Members substantially operating in the territories, so as to reduce the preferences—and hence the trade-distorting effects—brought about by EIAs.

56 Art. V:6 requires the EIA in services to **extend the benefits of the agreement to any service supplier of any other WTO** Member "that is a **juridical person** constituted under the laws of a party" to the EIA, provided that the service supplier "engages in substantive business operations in the territory of the parties to such agreement". In other words, parties to an EIA in services are bound to grant market access preferences and national treatment to third party services suppliers established in their territory, without regard to whether they are owned or controlled by their own nationals or by persons of any other WTO Member.

57 The extension applies to all companies established under the laws of one of the parties to the EIA. In accordance with Art. XXVIII lit. l, a juridical person is deemed to include "any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association". GATS thus adopts a broad notion of legal personality, not limited to the standard forms of corporation and association.

I. Non-Incorporated Entities

58 The preferences are to be extended to any service supplier "that is a juridical person constituted under the laws of a party" and is involved in commercial activity in the territory of the parties. The drafting raises the question whether branches and representative offices—that is, non-incorporated legal entities—of service suppliers of third parties are also to be granted preferential treatment. Firstly, branches and representative offices of foreign companies are considered not to constitute "juridical persons" by themselves. Rather, they are extensions of a juridical person—the home enterprise—that is not constituted under the laws of a party to the EIA,

but abroad. Secondly, branches and representative offices are arguably not "constituted" under the laws of the parties *stricto sensu*, since the "constitution" of a juridical person is typically associated, for commercial enterprises, with the act of incorporation. These elements are reflected in Art. XXVIII lit. d (i) and (ii),[40] which expressly differentiate between "juridical persons" and branches and representative offices. Along these lines, the EIA would not be bound to extend its preferences to branches and representative offices from third countries.

59 Regarding the first element, the concept of "juridical persons" under the GATS is broadened by Art. XXVIII lit. l to encompass "any legal entity". To the extent that branches and representative offices are authorized by the domestic law of the host country to act legally, and as far as they are granted rights and may acquire obligations for which they are—typically, together with the home juridical person—legally accountable, they are "legal entities" deemed by the GATS to be "juridical persons".

60 Regarding the second element, it could be argued that the inclusion of just the term "constituted" is meant to limit the scope of the provision to those juridical persons that are formally "constituted" under the laws of the parties and not "otherwise organized"—so as to exclude branches and representative's offices. The term "constitution", however, is not a precise legal term such as "incorporation", but rather is the general term used to refer to the acquisition of legal personality, which applies to any legal entity—incorporated entities, associations, foundations, etc. In that sense, the procedures for recognizing a foreign branch or representative under the domestic laws entail a sort of "constitution". Furthermore, it is reasonable to consider that had the drafters of the Agreement wished to reduce the scope of the juridical person as defined by Art. XXVIII lit. l in this particular context, or simply to take branches and representative offices out of this provision, they would have said so in clear terms, rather than relying on the interpretation of a general term such as "constitution".

61 Under this reading, it is clear that **branches and representative offices from services suppliers of other WTO Members are to benefit from the preferences of the EIA** in services, just as any other service supplier established in the territory of the parties.

[40] Art. XXVIII lit. d stipulates that: "'commercial presence' means any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service".

II. Substantive Business Operations

62 The provision limits the services suppliers of other WTO Members that are to be extended the preferences of the EIA to those established ("constituted") in the territory of the parties and therein engaged in **"substantive business operations"** (SBO). This second requirement of substantial business operations implies that mere control of a company by nationals of a WTO Member or operations entailing no substantive business relationship with the domestic economy of the parties to the EIA is not sufficient to qualify for non-discriminatory treatment under this provision.

63 The SBO test aims at ensuring that the third-country service suppliers that benefit from the agreement have a real economic tie with the country concerned, so as to prevent the formation of "mail-box" companies with the sole purpose of benefiting from the preferential access. While the wording is vague, it is understood that **a service supplier engaged in regular commercial activity** would meet the SBO requirement. In this sense, the term "business operations" has been considered to cover the production, distribution, marketing, sale and delivery of a service, as provided for in Art. XXVIII lit. b.[41]

64 In accordance with Art. V:6 the substantive business operation is to take place **"in the territory of the parties"** to the EIA in services. The provision does not expressly stipulate that the business operation should be carried out in the territory of the party in which the service supplier is located, but allows to interpret that the SBO **may take place in the territory of *either* party**—capturing to some extent the notion of cumulation of rules of origin. This may be particularly relevant for EIAs in services involving more than two parties. In that case, a service supplier of a non-party established in party A that has traditionally supplied cross-border services to consumers in party B is to benefit from preferential treatment in its operations with party B. In such a case, the place of legal organization would not match the place of substantive business operations, but both would be "in the territory of the parties" to the EIA.

65 However, the provision may also be interpreted as granting the parties to the EIA the ability to restrict the rule of origin in such a manner that the substantive business operation would be in one given party, most likely, within the territory in which **the service supplier is established**. In that case, too, the SBO would take place, as required by Art. V:6, "in the territory of the parties" to the EIA in services. A number of EIAs in services currently feature a rule of origin with such characteristics.[42]

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[41] See TN/RL/W/8/Rev.1, paras 111–112.

[42] For a review of rules of origin in East Asian EIAs in services, see *Fink & Nikomborirak*, Rules of Origin. See also, *Fink & Molinuevo*, East Asian Free Trade Agreements, 36–42.

H. Notification and Examination Procedures (Art. V:7)

66 In addition to the substantive conditions introduced by the GATS with regard to substantial liberalization, the prohibition on raising the level of barriers to third parties, and the establishment of a liberal rule of origin, Art. V sets out notification requirements for EIAs. Art. V:7 lit. a establishes that the parties to an EIA in services "shall **promptly notify** any such agreement"[43] as well as its enlargement or any significant modification.

67 The provision does not specify what is to be considered **"prompt notification"**, nor whether it should be triggered by the signature or the entry into force of the agreement. A period of at least 90 days before the entry into force of the agreement has been suggested, as is required by Art. V:5 for the notification of the modification or withdrawal of specific commitments. However, some WTO Members have pointed out that Arts V:5 and V:7 govern different situations, which does not give rise to a need to apply the same timeframes.[44] In the light of increasing numbers of EIAs, the matter was addressed by the Negotiating Group on Rules during the Doha Agenda negotiations and settled on a provisional basis before the conclusion of the round. Para. 3 of the 2006 **Decision on a Transparency Mechanism for Regional Trade Agreements** clarifies that "as a rule, [notification] will occur no later than directly following the parties' ratification of the" EIA, "and before the application of preferential treatment between the parties",[45] which suggests that **notification is to take place before the implementation of the EIA's obligations and commitments**.[46] State practice shows that WTO Members commonly notify EIAs in services within a few weeks or months after their entry into force, albeit that a number of agreements have to date not been notified despite their long existence.[47]

68 Art. V:7 lit. a specifies that the **notification is to be made to the CTS**. It should include general background information on the agreement, a description of the agreement's provisions affecting trade in services (including, *inter alia*, on treatment of services and service suppliers, the rules of origin, safeguards, subsidies, and government procurement), and of the

[43] Emphasis added.
[44] See WT/REG/M/22, paras 16 and 17, respectively.
[45] WT/L/671, para. 3.
[46] The "Transparency Mechanism for Regional Trade Agreements" was established on a provisional basis by the General Council on 14 December 2006. See Negotiating Group on Rules, Negotiation Group on Rules, Report by the Chairman to the Trade Negotiations Committee, TN/RL/18, 13 July 2006.
[47] See <http://www.wto.org/english/tratop_e/region_e/summary_e.xls> (last visited 1 October 2007) for a list of EIAs notified to the WTO, with their dates of signature, entry into force and notification.

structural provisions of the agreement, including exceptions and reservations, dispute settlement procedures and the institutional framework.[48]

69 The **CTS may set up a working party to examine the EIA in services**. Unlike in the area of goods, the Council is allowed, but not obliged, to require the examination under this provision. The CTS, however, routinely requires the examination of every EIA in services that is notified. The working party examining the EIA in services—commonly, the Committee on Regional Trade Agreements—is to report on the consistency of the agreement with Art. V. To date, however, no such report has been adopted.[49]

70 The right of the Council to make appropriate recommendations to the parties based upon the working party report (Art. V:7 lit. c) has so far not been used due to requirement of decision-making by consensus. Issues relating to the interpretation and application of Art. V are more likely to be raised subsequently in dispute settlement under the DSU. It should be noted in this context that Art. V does not include a provision comparable to Art. XXIV:12 GATT 1994 and its Understanding, requiring Members to take all measures constitutionally available to them to secure compliance by regional and local governments. Obligations of sub-federal levels to comply with GATS remain without such restrictions and are subject to the principles of international law, *i.e.* that responsibility in international law is incurred irrespective of the allocation of powers and the domestic level of governance.

71 Pursuant to Art. V:7 lit. b, the same procedures and remedies apply for interim agreements—EIAs to be implemented on the basis of a time-frame, with the additional requirement that parties are periodically to report to the CTS regarding the implementation of the agreement.

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[48] Committee on Regional Trade Agreements, Standard Format for Information on Economic Integration Agreements on Services, Note by the Chairman, WT/REG/W/14, 6 May 1997. See also, Council for Trade in Services, Guidelines for Notifications under the General Agreement on Trade in Services, Adopted on 1 March 1995, S/L/5, 4 April 1995.

[49] It is unclear whether some of these procedures may be altered by the implementation of the Transparency Mechanism for Regional Trade Agreements. Although the Transparency Mechanism is meant to supplement GATT and GATS provision on EIA, the new procedures seem to limit the ability of the CTS to require the examination of an agreement, as para. 5 of the Transparency Mechanism provides that each EIA "*shall* be considered by Members" (WT/L/671, para. 5; italics added) according to the procedures set out therein. On the examination process, see Committee on Regional Trade Agreements, Note on Procedures to Facilitate and Improve the Examination Process, Note by the Secretariat, WT/REG/W/9, 9 October 1996; Committee on Regional Trade Agreements, Guidelines on Procedures to Facilitate and Improve the Examination Process, Note by the Chairman, WT/REG/W/15, 6 May1997; Committee on Regional Trade Agreements, Checklist of Points on Reporting on the Operation of Regional Agreements, Note by the Secretariat, WT/REG/W/3, 20 June 1996.

Further, following the 2006 Transparency Mechanism for Regional Trade Agreements, the WTO Secretariat, "on its own responsibility and in full consultation with the parties", is required to prepare a "factual presentation" of the agreement,[50] which will then be circulated to WTO Members and submitted for their "consideration".[51] The factual presentation will typically consist of a report on the EIA's disciplines and commitments relevant to GATS rules, particularly Art. V. While the report "shall not be used as a basis for dispute settlement procedures",[52] it offers an important basis for the overall assessment of compatibility of the EIA with the disciplines of Art. V. *72*

I. Lack of Compensation by Non-Parties (Art. V:8)

Art. V:8 clarifies that parties to an EIA in services are not entitled to demand compensation from non-parties for any trade benefit that may accrue to the non-parties from the conclusion of the EIA in services. The provision does not find an equivalent in Art. XXIV GATT 1994 and its implication remains a matter of speculation. In particular, it is conceivable that the conclusion of an EIA benefits service providers of third parties under Art. V:6. No compensation for such and other benefits may be requested from third parties under this provision.[53] *73*

[50] WT/L/671, para. 7 lit. b.
[51] *Ibid.*, para. 12.
[52] *Ibid.*, para. 10.
[53] The authors wish to thank *Carsten Fink* and *Luis Verdeja* for valuable comments and discussions on this study. Any inaccuracy remaining is the authors' own.

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Article V^bis GATS
Labour Markets Integration Agreements

This Agreement shall not prevent any of its Members from being a party to an agreement establishing full integration[2] of the labour markets between or among the parties to such an agreement, provided that such an agreement:

a) exempts citizens of parties to the agreement from requirements concerning residency and work permits;
b) is notified to the Council for Trade in Services.

Footnote 2: Typically, such integration provides citizens of the parties concerned with a right of free entry to the employment markets of the parties and includes measures concerning conditions of pay, other conditions of employment and social benefits.

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Cross References

Arts 39, 40 and 42 ECT.

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A. Introduction: Significance of the Article

Art. V^bis **privileges** a particular type of bilateral or multilateral treaty to which at least one WTO Member is a party: so-called **Labour Markets Integration Agreements** (LMIAs). This type of agreement is characterized by promoting among its parties a high degree of transnational integration of their respective labour markets, including free market access for citizens of the parties. *1*

In the realities of international law such agreements are a rare species. Even states which pursue decidedly liberal trade policies hesitate to open their employment markets to foreigners on a non-selective basis. Labour migration is usually considered too sensitive an issue, both in socioeconomic and political terms, to be included in bilateral or regional agreements facilitating economic integration. Of the different production factors, the factor labour is least likely to be subject to an agreement liberalising cross-border transactions. *2*

Exceptions to the rule exist where states have a similar level of economic development, enjoy geographical proximity and wish to maintain, or establish, extraordinarily close political and socioeconomic links among themselves. In these instances, however, economic integration usually extends also to other production factors. The main examples are the Agreement on the European Economic Area (EEA) and the single market established between the EU Member States. As an example of a 'stand-alone' LMIA one can cite the **Nordic Labour Market Agreement** concluded between Denmark, Finland, Iceland, Norway and Sweden.[1] In substantive terms, the Trans-Tasman Travel Arrangement (TTTA) between Australia and New Zealand would also qualify.[2] This arrangement does not, however, take the form of a binding international treaty.[3] *3*

Art. V^bis should be seen in connection with the **Annex on Movement of Natural Persons Supplying Services Under the Agreement** (hereinafter: Annex MNP). These provisions share a common negotiating history within the Working Group on Labour Mobility set up in 1989.[4] During the Brussels Ministerial Meeting in December 1990, the treatment to be accorded to integrated labour markets still appeared among the issues to be addressed in a possible annex on labour mobility. Special treatment *4*

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[1] Agreement Concerning a Common Labour Market, 6 March 1982, UNTS 36 (1984), 1347, entered into force 1 August 1983.

[2] For a summary of the informally agreed immigration procedures which form the TTTA see http://www.mfat.govt.nz/Foreign-Relations/Australia/0-trans-tasman-travel.php (last visited 1 October 2007).

[3] *Nielson*, in: *Mattoo & Carzaniga* (eds), 93, 100.

[4] On the drafting history of Art. V^bis see *Self & Zutshi*, in: *Mattoo & Carzaniga* (eds), 27, 30 *et seq*.

of LMIAs was a particular concern of the Nordic countries (of which at that time only Denmark was an EC Member State) and of India because of its integrated labour market with Nepal (the latter became a WTO Member only in 2004).[5] The matter was not resolved until the very end of the Uruguay Round. Eventually an explicit provision was incorporated into the main body of GATS Articles, hence its unorthodox position between Arts V and VI.[6]

5 Both Art. V*bis* and the Annex MNP demonstrate the contracting parties' willingness to **limit** the possible **impact on** domestic **immigration regimes** resulting from the wide definition, in Art. I:2, of the modes of service supply, in particular mode 4. This approach led to the formulation of several provisions designed to **preserve** the **Members' discretion to regulate** their respective **labour markets** and the access of foreigners thereto.[7] With Art. V*bis* the contracting parties recognized that the establishment of integrated labour markets should not be frustrated by the application of a most-favoured-nation (MFN) rule, potentially demanding free market access for natural persons of all other Members. Art. V*bis* confirms that **no listing of MFN exemptions** in accordance with Art. II:2 is needed in order to maintain the exclusivity of the agreement, and that the conditions for justifying MFN exemptions do not apply.[8]

6 It is not entirely clear whether an explicit provision was necessary for preserving the Members' right to open their labour markets selectively, taking into account that, according to para. 2 of the Annex MNP, measures affecting natural persons seeking access to the employment market of a Member are entirely removed from the scope of GATS. Certain aspects of the movement of employees do, however, fall under GATS.[9] Art. I:2 lit. d and para. 2 of the Annex MNP read together imply that these aspects concern the supply of services through the presence of natural persons in the territory of another Member, provided that these persons are not considered to be seeking access to, or permanent presence in, the employment market of that Member. It is not per se impossible that an LMIA, if broadly framed, also addresses such forms of mode 4 supply. A possible cause for conflict is the temporary posting of workers by a service supplier into the territory of another Member. Their presence may in fact be subject to an existing LMIA, *e.g.*, in waiving residency and work permit requirements for the posted workers.

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[5] *Self & Zutshi*, in: *Mattoo & Carzaniga* (eds), 27, 35.
[6] See below, paras 8 *et seq.*
[7] See *Bast*, Annex on Movement of Natural Persons, paras 36 *et seq.*
[8] On the potential impact of the MFN rule on national immigration regimes see *Worster*, Tex. Int'l L. J. 42 (2006), 55–117.
[9] See *Bast*, Annex on Movement of Natural Persons, paras 20 *et seq.*

The broad leeway for a Member who wishes to be a party to an LMIA is counterbalanced by **ambitious standards** regarding the content of an agreement as a precondition for an Art. V^{bis} privilege. A level of labour markets integration has to be achieved which closely resembles the legal characteristics of a single market, usually found within the boundaries of a state.[10] In addition, a notification requirement applies in order to safeguard other Members' interests.[11] *7*

B. Systematic Position in GATS

Art. V^{bis} is placed in Part II of GATS containing "General Obligations and Disciplines". It thus **modifies** the **general obligations** under GATS of the relevant Members. Provided that an international agreement meets the conditions set out in Art. V^{bis} it shall not be considered incompatible with GATS in general. Art. V^{bis} can justify the adoption of a measure which is inconsistent with other GATS provisions if, and to the extent that, prohibition of the measure would make being a party to the relevant LMIA impossible.[12] *8*

In its **legal effects** Art. V^{bis} is very **similar to Art. V**, hence the proximity of the Articles. Both give Members unlimited permission to be a party to bilateral or regional integration agreements if and when the relevant conditions are met. Moreover, a **certain overlap** of their respective scopes of application is **inevitable**. Since labour market integration does not in its entirety fall outside the scope of GATS, the type of agreement circumscribed in Art. V^{bis} simultaneously constitutes "an agreement liberalizing trade in services" as set out in Art. V, namely, in liberalising certain aspects of trade in services in mode 4 of supply. Taking into account that the particular **requirements differ** significantly, there is a need to clarify the legal relationship between the two Articles. *9*

Generally speaking, Art. V^{bis} requires a certain depth of economic integration affecting mode 4 of services supply, whereas Art. V basically requires a certain breadth of economic integration by demanding "substantial sectoral coverage". According to the footnote to Art. V:1 lit. a, an Economic Integration Agreement (EIA) should not *a priori* exclude any mode of supply. Hence, an agreement which solely addresses mode 4 can enjoy privileged status if, and only if, it meets the more rigorous conditions of Art. V^{bis}. A trade agreement that addresses the movement of natural persons supplying *10*

[10] See below, paras 13 *et seq*.
[11] See below, paras 33 *et seq*.
[12] See concerning Art. XXIV GATT 1994, Appellate Body Report, *Turkey—Textiles*, WT/DS34/AB/R, paras 45 and 46; for details see below, paras 38 *et seq*.

services in mode 4, but does not meet the standard of "full integration of the labour markets", may still be privileged under Art. V. In this case, however, all other modes of supply should be included in the agreement. In sum, Art. V*bis* is a ***lex specialis* to Art. V**, but the existence of the former does not pre-empt a Member from taking advantage of the latter.[13]

C. Requirements Regarding Form and Content of the Agreement

11 Art. V*bis* stipulates **three conditions** as to form and content of the LMIA: (I.) it has to be an international agreement which (II.) establishes full labour market integration and (III.) exempts citizens of parties from residency and work permit requirements.

I. International Agreement

12 In formal terms, there has to be a **binding international treaty** to which the Member is a party. It is not necessary for the other parties to be WTO Members. Less formal means of international cooperation, such as codes of practice consented to among governments or letters of understanding exchanged between the responsible administrations, are not enough. This follows from the clear wording of the provision which refers to the traditional source of international law ("agreement", "parties") and is in line with the interest of the WTO Members which are not party to such an agreement to restrict the conceded leeway to foreseeable and legally stabilized situations.

II. Establishing Full Integration of the Labour Markets

13 The crucial substantive requirement concerns the result to be achieved through the relevant agreement; "full integration of the labour markets" must be established between or among the parties.

14 The term **"labour markets"** (in French "*marchés du travail*", in Spanish "*mercados de empleo*") lacks a precise definition. The term does not appear in any other provision of GATS, but the concept is present in para. 2 of the Annex MNP. There, the English version of GATS utilizes the term "employment market", whereas the French and Spanish versions avail themselves of the same language as in the *chapeau* of Art. V*bis*. This comparison demonstrates that the two terms do not have a legal distinction. Hence,

[13] By implication also *Cottier & Molinuevo*, Article V GATS, paras 21 *et seq.*; for a different view see *Worster*, Tex. Int'l L. J. 42 (2006) 55, 71: "mutually exclusive".

the concept of "labour markets" in Art. V^{bis} has the same meaning as the term "employment markets" in the Annex MNP.

15 This concept of "labour markets" denotes the set of norms and practices according to which natural persons, on a contractual basis, offer their labour against payment to a legal or natural person under whose instructions the work is to be performed. The decisive element for distinguishing an employment relationship from other contracts of personal service is the degree of freedom from the instructions of a superior.[14]

16 For the construction of the term **"full integration"** (in French "*une intégration totale*", in Spanish "*la plena integración*"), guidance is given by the **footnote** to Art. V^{bis}, which forms part of the legal body of GATS. The footnote does not provide a complete definition of what amounts to full integration. It rather confines itself to providing a **characterization** of the necessary content of an agreement that typically establishes such a degree of integration (see the French and Spanish wordings "*se caratérise*" and "*se carateriza*").

17 The **two criteria** mentioned in the footnote are "a right of free entry to the employment markets" for citizens of the parties and the inclusion of "measures concerning conditions of pay, other conditions of employment, and social benefits".

18 The **free entry criterion** deals with **access to** the **employment markets** by natural persons who are citizens of other parties to the agreement.

19 Translated into the familiar terminology of GATS, **unlimited market access** has to be granted to the citizens of the other party or parties. The types of measures which may not be maintained or adopted can be drawn from the list provided in Art. XVI:2, as applicable *mutatis mutandis* in the context of employment. This rules out any limitations on the total number of natural persons that may be employed in a particular sector or that a particular employer may hire, in the form either of numerical quotas or of the requirement of an economic needs test (see Art. XVI:2 lit. d).

20 Notably, the term **"citizens"** is used instead of "nationals". The broad definition of Art. XXVIII lit. k is not applicable. Hence, the treatment of permanent residents who are nationals of non-party states is not decisive for measuring the state of labour market integration brought about by an agreement.

21 The terms **"employment markets"** in the footnote and "labour markets" in the *chapeau* of Art. V^{bis} have the same legal content, despite the

[14] See *Bast*, Annex on Movement of Natural Persons, para. 21.

varying language in all three authentic texts of GATS (in French "*marchés de l'emploi*", in Spanish "*mercados de empleo*").[15]

22 The **second criterion** deals with the treatment of other parties' citizens while employed, or having been employed, in the territory of another party. Interestingly, full national treatment is not required. The footnote only presupposes that **conditions of employment**, including **pay**, and **social benefits** for the foreign workers are addressed at all by the inclusion of **"measures"** dealing with theses issues. This may take the form either of substantive regulations in the agreement itself, or of the obligation of bodies set up by the agreement to adopt the relevant implementing measures.[16]

23 In this respect, the footnote demands that the agreement have a certain scope rather than a particular content. It does not explicitly call for the absence or elimination of substantially all discrimination, in the sense of Art. XVII, in all sectors of the employment market. However, a **certain degree** of realization of the principle of **national treatment** must be present; otherwise citizens' access to the employment markets could not be called "free" as required by the first criterion. This view is confirmed by a systematic interpretation of Art. V*bis* in light of Art. V:1 lit. b. As regards national treatment, full integration cannot mean anything less than the standard set out in the latter provision. It follows that the conditions of employment of foreigners, and the social benefits they are entitled to, must be governed by the principle of non-discrimination, at least in a substantial number of sectors. Guidance for the application of this principle can be found in Art. V:1 lit. b. In failing to provide for the absence or elimination of substantially all discrimination in the fields indicated in the footnote, the agreement does not fully integrate the labour markets of the parties concerned.

24 According to the language of the *chapeau*, an agreement qualifies for an Art. V*bis* privilege only through in fact **"establishing"** full integration of the labour markets. An agreement providing for full labour markets integration merely as a future objective yet to be implemented, or as a simple declaration of the parties' intent, does not suffice.

25 Finally, labour markets integration must have been established **"between or among the parties"** to the agreement. The same formula can be found in the *chapeau* of Art. V:1. The French version of GATS is particularly clear as regards its meaning ("*entre deux parties* [...] *ou plus*"). In the case of a multilateral agreement the state of full integration of labour markets may concern only some of the parties, or merely two of them in an extreme

[15] See above, para. 14.
[16] See, by way of comparison, Arts 39, 40 and 42 ECT.

case. Other parties may lag behind or may not be committed to reaching this advanced goal at all. In this event, the criteria for evaluating full integration as stated in the footnote apply only to the parties concerned, hence the wording "citizens of the parties concerned" instead of "the citizens of the parties".

III. Exempting Citizens from Residency and Work Permit Requirements (Lit. a)

26 In addition, Art. V^{bis} lit. a requires that the agreement "exempts citizens of parties to the agreement from requirements concerning residency and work permits".

27 One wonders how an agreement maintaining requirements concerning residency and work permits could actually satisfy the "full integration" test of the *chapeau* together with the footnote, in particular regarding the first criterion of free entry to the employment markets. Hypothetically, however, ensuring a right of free entry to the employment markets could also take the form of individual administrative decisions, in giving the person concerned a right to obtain such permits once his or her eligibility has been checked by the competent authorities. Yet, maintaining such requirements would run the **risk of distorting** the right of **free market access** in making it dependent on burdensome administrative procedures which do not apply to nationals of the host state. Thus, only when an agreement meets the additional condition of abolishing all **formalities exclusively relevant to foreign employees** can it be called an LMIA in the sense of Art. V^{bis}.[17]

28 The term **"work permits"** has to be construed in light of the purpose of ensuring market access on equal terms with citizens of the host state. It includes all administrative permissions or authorizations that foreign nationals, according to the domestic law of the party concerned, would usually have to obtain before being **entitled to take up employment**. It does, however, not include permissions or authorizations which a national of the host state, being in the same position, would also have to apply for.

29 Accordingly, the term **"residency permit"** includes all administrative permissions or authorizations which are usually granted to foreign nationals in order to **legalize** their **presence in the territory** of the party concerned. It does not comprise registration requirements under domestic law that also apply to nationals. This is in line with the ordinary meaning of the term, as confirmed by a glossary compiled by the International Organization for Migration (IOM) which defines a residence permit as "a

[17] See *WTO*, Handbook, 16: "[t]he main condition".

document issued by a state to an alien, confirming that the alien has the right to live in that country".[18]

30 There appears to be room for interpretation of whether the concept of "residency permit" also embraces **visas**.[19] Most legal systems carefully distinguish between visas and residence permits. In this case a visa only certifies the eligibility of the holder, at the time of issuance, to move across the state border, but does not imply the right to stay in that country.[20] According to other traditions, however, a visa is a particular type of residence permit issued by a consular officer abroad. Following the first terminological approach, maintaining a visa requirement for citizens of other parties would not be inconsistent with Art. V*bis* lit. a, if only residence permits in the narrow sense were abolished properly. Following the second approach, citizens of parties must be exempt from any residence permit requirements, including permits issued in the form of a visa.

31 Hence, the term "residency permit" pursuant to Art. V*bis* lit. a includes visas if and insofar as they serve the function of **confirming the right to stay** in the territory of that party. If, however, a visa regime regulates only the crossing of the border by natural persons and is in effect neutral as to the right to stay, it may be maintained even among parties to an LMIA. This conclusion is in consonance with the overall purpose of Art. V*bis* of privileging agreements establishing an advanced state of *economic* integration. Art. V*bis* does not require that the parties concerned have abolished among themselves measures relating to public order which they perceive as necessary to ensure the orderly movement of natural persons across their borders.[21]

32 The term "citizens of parties" has the same meaning as in the footnote.[22]

D. Notification Requirement (Lit. b)

33 Even an agreement which satisfies the test as to form and content discussed above enjoys privileged status under Art. V*bis* only after it is **notified** to the Council for Trade in Services (CTS). This procedural requirement is laid down in Art. V*bis* lit. b.

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[18] See *IOM*, Glossary on Migration, 2004, 56, entry "residence permit".

[19] On the construction of the term "visa" in the footnote to para. 4 of the Annex MNP see *Worster*, Tex. Int'l L. J. 42 (2006), 55, 76 *et seq*.

[20] See *IOM*, Glossary on Migration, 2004, 69, entry "visa".

[21] See para. 4 of the Annex MNP.

[22] See above, para. 20.

The provision corresponds to the notification requirements in Art. V:7 and several other provisions of GATS. With few exceptions, these notifications have to be made to the **CTS** established under Art. XXIV. On 1 March 1995, the CTS proposed a common format to be used by Members in making notifications and adopted for that purpose some broad Guidelines for Notifications.[23] *34*

In principle, Art. V^{bis} lit. b requires the **full text** of the LMIA to be notified to the CTS. According to No. 3 of the Guidelines, a full text of the agreement should be provided for retention by the Secretariat and consultation by interested Members; only a synthesis of the main elements of the agreement should be included in the standard format for notification purposes. *35*

In contrast to Art. V:7, the notification requirement of Art. V^{bis} is not formulated in the language of an obligation (Art. V:7 lit. a reads: "Members [...] shall promptly notify any such agreement"). Instead, the notification requirement concerning LMIAs takes the form of a precondition for enjoying privileged status under Art. V^{bis} ("provided that"). Members are therefore under **no duty to notify** such an agreement. Unless it has been notified, however, they cannot invoke Art. V^{bis} in order to justify non-compliance with any of their obligations under GATS. *36*

E. Legal Consequences of Fulfilling the Requirements

Provided that all the requirements of Art. V^{bis} are fulfilled, GATS **"shall not prevent"** a Member **"from being a party to"** an LMIA. *37*

I. Substantive Scope of LMIA Privilege

The formulation "shall not prevent" can be found in several other provisions of GATS or GATT, notably Art. V:1 GATS and Art. XXIV:5 GATT 1994. With respect to the latter, the Appellate Body has defined its ordinary meaning as being equivalent to **"shall not make impossible"**.[24] Art. V^{bis} may justify the adoption of a measure which is inconsistent with certain other GATS provisions and may be invoked as a **"defence" to a finding of inconsistency**.[25] *38*

In the given context of potentially conflicting treaty regimes, use of the phrase "prevent [...] from being a party" is somewhat misleading if taken *39*

[23] Council for Trade in Services, Guidelines for Notifications under the General Agreement on Trade in Services, Adopted by the Council for Trade in Services on 1 March 1995, S/L/5, 4 April 1995.

[24] *Turkey—Textiles*, WT/DS34/AB/R, para. 45.

[25] See, *mutatis mutandis, ibid.*

literally. In hardly any circumstances are parties to an international treaty strictly prevented from entering into new contractual relationships. The Vienna Convention on the Law of Treaties (VCLT),[26] which expresses the relevant customary international law, addresses the issue of successive treaties relating to the same subject-matter in terms of "application" of the respective treaties (see Art. 30 VCLT). What is in fact intended by Art. V*bis* is the non-application of certain GATS provisions where they conflict with obligations of a Member assumed under an LMIA. Art. V*bis* provides an **express rule of conflict** pursuant to Art. 30.2 VCLT, according to which the provisions of a treaty prevail if another treaty specifies that the latter is subject to, or that it is not to be considered incompatible with, the former.

40 This rule of conflict at any rate applies where there is a **direct conflict of obligations**, *i.e.*, when a provision of GATS obliges a Member to undertake certain actions or omissions that would be in breach of an obligation assumed under a notified LMIA. However, a more likely type of conflict is an **indirect** one, where GATS obliges a Member to commit actions or omissions which are not prohibited under an LMIA but would nevertheless make being a party to it practically impossible. This is particularly relevant with respect to MFN treatment of WTO Members which are not party to the LMIA. Even if the terms of an LMIA may not legally rule out the possibility of granting free labour market access to non-party citizens alike, compliance with Art. II:1 *vis-à-vis* all Members would make being a party to the LMIA practically "impossible". Hence, the rule of conflict in favour of the LMIA **also** applies to such **indirect conflicts** which relate to the exclusive nature of an LMIA.

41 In the case of indirect conflicts, however, it must be carefully examined whether the contested measure is needed to enable the Member concerned to be a party to the LMIA. Art. V*bis* can justify the adoption of a measure which is inconsistent with other provisions of GATS only if the measure is **introduced upon being a party** to an LMIA, and **only to the extent** that being a party to an LMIA would be prevented, *i.e.* **made** either **legally or practically impossible**, if the introduction of the measure were not allowed.[27]

II. Temporal Scope of LMIA Privilege

42 As regards the temporal scope of the privilege granted to LMIAs, a particular difference between the wordings of Arts V and V*bis* is noteworthy.

[26] Vienna Convention on the Law of Treaties, 23 May 1969, ILM 8 (1969), 679, entered into force 27 January 1980.

[27] See, *mutatis mutandis, Turkey—Textiles*, WT/DS34/AB/R, para. 46.

Whereas the first explicitly states that GATS shall not prevent Members "from being a party to or entering into" an economic integration agreement, the second confines itself to not to prevent Members "from being a party to" an LMIA. This *prima facie* makes a case for limiting the scope of Art. V^{bis} to **earlier treaties**, *i.e.*, to LMIAs which already existed at the date of the entry into force of GATS or the date of accession of the particular Member.

43 Before giving too much weight to this argument of systematic interpretation, however, one has to take into account the drafting history of Art. V^{bis}, which found its way into the text of GATS only as a result of a last-minute concession[28]. This may explain a certain degree of disparity with the language of other provisions. Revealingly, the wording "being a party to" does not actually refer to a particular point in time at which the Member acquires the legal status of being a party. Had the contracting parties intended to limit the scope of Art. V^{bis} to already existing LMIAs, there would have been various ways to state this intention clearly.

44 To interpret the provision in the light of its object and purpose, one can start from the premise that confining Art. V^{bis} to earlier treaties is a reasonable construction only if the contracting parties regarded LMIAs as a phenomenon which is, as a matter of principle, incompatible with the idea of a **multilateral system for the trade in services**. Such an evaluation in fact underlies the permission to "maintain" (*sic!*) MFN exemptions according to Art. II:2. If the same rationale applied to Art. V^{bis}, its temporal scope would have to be construed narrowly in order to prevent this deviation from GATS principles from expanding in the future. The very existence of Art. V^{bis} suggests a different reading. The contracting parties have accepted that labour market integration is a phenomenon to be distinguished from "ordinary" trade liberalization. Members who wish to establish fully integrated labour markets pursue an independent policy with which the contracting parties of GATS did not want to interfere (see, in that respect, Rec. 3 of the Preamble). As long as this policy commitment is credible, which is tested by the ambitious standards regarding the content of the agreement, current and **future LMIAs** are **not incompatible** with the objectives of GATS.

45 In conclusion, the formulation "being a party to" **also** relates to LMIAs concluded **after the entry into force** of the WTO agreements.

[28] See above, para. 4.

F. Members' Practice

46 Judging from publicly available sources, including the WTO website, there is only a very limited number of notifications pursuant to Art. V*bis*.[29] They record **five** individual and almost identical **notifications** by Denmark, Iceland, Norway, Sweden and Finland.[30] The Members notified the CTS that they were parties to the agreement concerning a **Common Nordic Labour Market** and the protocol annexed to it, which entered into force on 1 August 1983 and replaced a previous Nordic agreement of 22 May 1954.[31] In their description the five Nordic countries summarized that the agreement fulfils the requirements of Art. V*bis* and that it is applied in a fashion which is compatible with the EEA Agreement and the ECT, as applicable. The CTS took note of these notifications at its meeting of 5 March 1997.[32]

G. Outlook

47 There is no indication that Art. V*bis* in its present form is going to be challenged in the course of the Doha Round.

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[29] For a comprehensive overview as of 10 July 1997, see Council for Trade in Services, Notifications under the General Agreement on Trade in Services, Note by the Secretariat, S/C/4, 14 July 1997.

[30] Council for Trade in Services, Notification pursuant to Article V*bis* of the General Agreement on Trade in Services, Denmark, S/C/N/34, 2 December 1996; Council for Trade in Services, Notification pursuant to Article V*bis* of the General Agreement on Trade in Services, Iceland, S/C/N/35, 2 December 1996; Council for Trade in Services, Notification pursuant to Article V*bis* of the General Agreement on Trade in Services, Norway, S/C/N/36, 2 December 1996; Council for Trade in Services, Notification pursuant to Article V*bis* of the General Agreement on Trade in Services, Sweden, S/C/N/37, 2 December 1996; Council for Trade in Services, Notification pursuant to Article V*bis* of the General Agreement on Trade in Services, Finland, S/C/N/38, 2 December 1996.

[31] See above, footnote 1.

[32] Council for Trade in Services, Report to the General Council on Activities during 1997, S/C/5, 28 November 1997.

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Article VI GATS
Domestic Regulation

1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.
2. a) Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.
   b) The provisions of subparagraph a) shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.
3. Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application.
4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:
   a) based on objective and transparent criteria, such as competence and the ability to supply the service;
   b) not more burdensome than necessary to ensure the quality of the service;
   c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.
5. a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:
      (i) does not comply with the criteria outlined in subparagraphs 4 a), b) or c); and
      (ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.
   b) In determining whether a Member is in conformity with the obligation under paragraph 5 a), account shall be taken of international standards of relevant international organizations[3] applied by that Member.
6. In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.

Footnote 3: The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.

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Cross References

Arts 904.4, 1210.1 NAFTA; Art. X MERCOSUR Montevideo Protocol; Art. 11.8 CAFTA-DR; Art. 12.10 Trans-Pacific SEP Agreement.

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A. General Remarks

1 Art. VI contains obligations concerning measures of domestic regulation. Four of the six paragraphs of this Article (Art. VI:1–3 and 6) relate to the application, administration and review of measures and therefore provide **procedural standards** for regulatory measures.[1] Two paragraphs (Art. VI:4 and 5) relate to the content of measures and are hence of a **substantive nature**.

2 The obligations of Art. VI **supplement** the GATS provisions concerning **non-discrimination** (Arts II and XVII) and **market access** (Art. XVI) by addressing regulatory measures which are neither discriminatory nor

[1] Panel Report, *US—Gambling*, WT/DS285/R, para. 6.432: "Articles VI:1 and VI:3 contain disciplines of a procedural nature". This view is generally shared in the literature, see *e.g. Wouters & Coppens*, 14; *Delimatsis*, JIEL 10 (2007), 13, 18.

market-restrictive, but may nevertheless impede trade in services. This is the case in particular for regulations which are considered "overly burdensome". If domestic regulations make it too costly for foreign suppliers to enter a market and offer their services, these regulations have a negative effect on real market access. In the words of two leading commentators, "[c]oupled with Article XVI on market access and Article XVII on national treatment, Article VI can indeed be seen as the third complementary dimension of a three-pronged approach to effective access to services markets".[2]

B. Procedural Obligations

3 The procedural obligations of Art. VI:1–3 and 6 do not address the content of a particular domestic measure. They are also neutral with regard to the instruments used and the goals pursued by domestic regulation. The procedural obligations of Art. VI contain standards which must be followed with regard to the **administration and review of a measure**. Though the immediate context of these paragraphs is the substantive provisions of Art. VI:4 and 5, the procedural obligations of Art. VI must also be seen in the wider context of the transparency obligations of Art. III.[3]

I. Reasonable, Impartial and Objective Application of Measures (Art. VI:1)

4 Art. VI:1 embodies the general rule that all measures of general application affecting trade in services are to be administered in a reasonable, objective and impartial manner. This obligation embodies a fundamental standard of the **rule of law** and of **good governance**. The main function of Art. VI:1 is to ensure that trade in services is not impeded by the arbitrary and biased application and administration of domestic regulations. This also contributes to the consistency and predictability of administrative decisions, which is important for foreign service suppliers.[4]

5 Art. VI:1 is **modelled on Art. X:3 lit. a GATT 1994**. In *EC—Bananas III*, the Appellate Body used the established interpretation of a GATT 1994 provision (Art. I GATT 1994) to determine the scope of the corresponding GATS provision (Art. II).[5] Hence, the case law relating to Art. X:3 lit. a GATT 1994 can be used in interpreting Art. VI:1.[6]

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[2] *Mattoo & Sauvé*, Key Issues, in: *Mattoo & Sauvé* (eds), 1, 3.
[3] See *Delimatsis*, Article III GATS, para. 3.
[4] *Delimatsis*, JIEL 10 (2007), 13, 28.
[5] Appellate Body Report, *EC—Bananas III*, WT/DS27/AB/R, para. 231.
[6] For a similar view see *Sunde*, in: *Tietje et al.* (eds), 12 *et seq.; Delimatsis*, JIEL 10 (2007), 13, 21 *et seq.*

1. Scope

Art. VI:1 applies to all **measures affecting trade in services.** Regarding the term "measures" in this provision, the definition of "measures" in Art. XXVIII lit. a applies. Accordingly, Art. VI:1 covers any measure "whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form". Like the general scope of GATS as defined in Art. I:1,[7] Art. VI:1 covers all measures "affecting" trade in services. According to the Appellate Body in *EC—Bananas III*, "[t]he ordinary meaning of the word 'affecting' implies a measure that has 'an effect on', which indicates a broad scope of application. [...] '[A]ffecting' [...] is wider in scope than such terms as 'regulating' or 'governing'".[8] The scope of Art. VI:1 is therefore determined by the effect of a measure on trade in services and not by the intention of the regulators. Therefore, even measures which have been put in place to regulate only the domestic supply of a service or which regulate goods can become subject to Art.VI:1 if they also affect trade in services. *6*

Art. VI:1 applies only in **sectors with specific commitments**. The restriction to sectors with commitments shows the supplementary character of Art.VI:1 *vis-à-vis* commitments to market access and national treatment. The applicability of Art. VI:1 therefore varies from Member to Member.[9] This distinguishes Art. VI:1 from Art. X:3 lit. a GATT 1994. The wording of Art. VI:1 suggests that the provision will apply to an entire sector regardless of the breadth and depth of the commitments made in that sector. As a consequence, even if a Member made only a minor commitment in one subsector or a commitment limited to one mode of supply, the obligation of Art. VI:1 would apply to the whole sector and to all modes of supply. However, this reading does not accommodate the objective of the provision in sectors with a large number of diverse subsectors. In particular, if the regulatory environments and regimes of different subsectors vary greatly it is more appropriate to limit the application of Art. VI:1 to the respective subsector. *7*

Art. VI:1 is restricted to **measures of general application** and does not cover measures addressing specific situations. Measures of general application are measures which apply to an unidentified number of cases.[10] They are typically of an abstract nature. In most legal systems, general laws and regulations fall within this definition. Administrative decisions and decisions of courts or tribunals are therefore generally not covered by Art. VI:1. It *8*

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[7] On this see *Zacharias*, Article I GATS, paras 8 *et seq*.
[8] *EC—Bananas III*, WT/DS27/AB/R, para. 220.
[9] *Delimatsis*, JIEL 10 (2007), 13, 19.
[10] *Delimatsis*, JIEL 10 (2007), 13, 20 with references to the case law on Art. X:3 GATT 1994.

has been argued in the literature that Art. VI:1 also covers individual measures because they are typically the result of the application of a general measure.[11] This view ignores the difference between the scope of application of an obligation and its effects. While the obligation of Art. VI:1 affects the outcome of individual decisions, it nevertheless does not apply to individual decisions. Only the administration of measures of general application can be tested under Art. VI:1. However, if a measure which directly applies only to a specific and individual case establishes (or abandons) a principle of general application that measure can be considered a measure of general application. This could be the case in legal systems where courts or the administration have the competence to establish a general principle by deciding an individual case.[12]

2. Content

a) Administration of Measures

9 Art. VI:1 requires that measures be administered in a reasonable, objective and impartial manner. Art. VI:1 therefore applies to the administration of a measure, **not to its substantive content**.[13] Whether or not the content of the measure is reasonable must be examined under other provisions.[14] With regard to Art. X:3 lit. a GATT 1994, the Appellate Body confirmed in *EC—Selected Customs Matters* that the substantive content of the legal instrument being administered is not challengeable. However, the Appellate Body also pointed out that this does not rule out the possibility of challenging the content of an (administrative) legal instrument which regulates the application or implementation of another (substantive) legal instrument, if the administrative instrument leads to a lack of impartial and reasonable administration of the substantive legal instrument.[15] The same line of argument applies to Art. VI:1. For example, if a general administrative regulation requires the regulatory authorities to process applications for licences from established service suppliers in 15 days and applications from newcomers in 30 days, the content of this general measure could be challenged on the basis that it leads to a partial administration of the licensing requirement.

10 One commentator has argued that **individual measures** falling within Art. VI:1 must fulfil the requirements of reasonableness, objectiveness and

[11] *Sunde*, in: *Tietje et al.* (eds), 13–14.

[12] Panel Report, *Japan—Film*, WT/DS44/R, para. 10.388 regarding Art. X:1 GATT 1994.

[13] *Delimatsis*, JIEL 10 (2007), 13, 19; *Sunde*, in: *Tietje et al.* (eds), 14; see *EC—Bananas III*, WT/DS27/AB/R, para. 200 regarding Art. X:3 lit. a GATT 1994.

[14] Appellate Body Report, *EC—Poultry*, WT/DS69/AB/R, para. 115 with regard to Art. X:3 lit. a GATT 1994.

[15] Appellate Body Report, *EC—Selected Customs Matters*, WT/DS315/AB/R, para. 200.

impartiality in substance.[16] Like the view criticized above,[17] this argument confuses the actual application of a GATS provision with its result: if a measure of general application is not administered in a reasonable, objective and impartial manner, the substance of the resulting individual decision will most likely also not be reasonable, objective and impartial. Yet, challenging the substance of an individual decision on the basis of Art. VI:1 is incompatible with the wording of this provision. This does not mean that a WTO Member could not use individual decisions as evidence of the unreasonable, subjective or biased administration of a measure of general application in dispute settlement proceedings.[18] The Member would, however, have to identify the measure of general application and challenge its administration.

b) "Reasonable, Objective and Impartial"

11 The administration of a measure is **"reasonable"**, if it is in accordance with generally accepted standards of rationality and of sound judgement.[19] This is not the case if the administration of the measure deviates from existing rules and legislation or ignores obvious facts and standard practice.[20] Reasonableness is therefore a basic requirement, which **differs from** the more advanced standards of **necessary or proportionate.** Necessity and proportionality require a balance between the aims and means of a measure. Reasonable and objective administration, however, requires only that there is a rational reason for the conduct in question. Commentators who argue that reasonableness, necessity and proportionality are similar or even the same[21] disregard the different uses of these terms in the WTO legal order. If the drafters of the GATS had been of the opinion that the administration of a measure should be tested for its necessity, Art. VI:1 would have used the term "necessary" instead of "reasonable".

12 Based on the ordinary wording of the term, **"objective"** can be understood as requiring a process which disregards irrational, emotional or personal intentions.[22] The application of a measure should not be arbitrary. It should be noted that, unlike Art. X:3 lit. a GATT 1994, Art. VI:1 **does not refer to the uniformity** of the application of a measure. It is doubtful whether "uniform" and "objective" have identical meanings and

[16] *Sunde*, in: *Tietje et al.* (eds), 16.
[17] See para. 8.
[18] *Japan—Film*, WT/DS44/R, para. 10.388 regarding Art. X:1 GATT 1994.
[19] Panel Report, *Dominican Republic—Import and Sale of Cigarettes*, WT/DS302/R, para. 7.385 regarding Art. X:1 GATT 1994.
[20] See *Dominican Republic—Import and Sale of Cigarettes*, WT/DS302/R, paras 7.378–7.388; Panel Report, *Argentina—Hides and Leather*, WT/DS155/R, paras 11.67–11.68 for examples which would also apply in the context of Art. VI:1.
[21] *Sunde*, in: *Tietje et al.* (eds), 23 *et seq.*; *Trachtman*, in: *Petersmann* (ed.), 211.
[22] *Sunde*, in: *Tietje et al.* (eds), 19.

are interchangeable.[23] The ordinary meanings of the terms seem too different. Uniformity refers to the consistent and predictable application of a measure.[24] It is therefore usually necessary to take more than one decision into account in determining uniformity. Objectivity on the other hand refers to the circumstances of an individual decision. The first application of a general measure can therefore already violate the requirement of objectivity, but it would be difficult to argue that it could also violate the requirement of uniformity.

13 **"Impartial"** means that a decision is taken without giving special consideration or privileges to one party or commercial interest concerned while not giving the same amount of consideration or privileges to other parties or interests which are equally affected by the decision.[25] While the requirement of impartiality contains elements of the fundamental principle of **non-discrimination,** it differs from the requirements of Art. II (most-favoured-nation treatment) and Art. XVII (national treatment).[26] Arts II and XVII prohibit less favourable treatment of one service or service supplier compared to a "like" service or service supplier irrespective of the goals and objectives pursued by the administration, which may possibly justify the different treatment. A justification can only be considered under Art. XIV. However, the application of a measure which treats two comparable ("like") situations differently with good reason does not necessarily violate the standards of Art. VI:1.

14 Even though the three requirements of Art. VI:1 are closely linked and serve similar functions, they are three **separate legal obligations.** All three requirements must be satisfied if Art. VI:1 is not to be violated.[27] A WTO Member can challenge the application of a general measure on the basis of one, two or all three requirements of Art. VI:1.

II. Review of Administrative Decisions (Art. VI:2)

15 Art. VI:2 requires the maintenance or establishment of judicial, arbitral or administrative tribunals or procedures which have the competence to review administrative decisions and to provide appropriate remedies if justified. Unlike Art. VI:1, Art. VI:2 is **not limited to** measures in sectors with **specific commitments**. Instead it applies to all measures within

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[23] This is argued by *Delimatsis*, JIEL 10 (2007), 13, 20, footnote 25.

[24] *Argentina—Hides and Leather*, WT/DS155/R, para. 11.83; Panel Report, *EC—Selected Customs Matters*, WT/DS315/R, paras 7.123–7.135.

[25] *Argentina—Hides and Leather*, WT/DS155/R, para. 11.100. For a similar approach *Sunde*, in: *Tietje et al.* (eds), 19.

[26] *Sunde*, in: *Tietje et al.* (eds), 19, seems to consider Art. VI:1 as *lex generalis vis-à-vis* Art. II and XVII.

[27] *Delimatsis*, JIEL 10 (2007), 13, 26 *et seq.* with references to the case law.

the scope of GATS. WTO Members must therefore establish or maintain review procedures for administrative decisions across **all sectors**.[28]

16 The obligation to provide for a review of an administration decision and appropriate remedies is based on a **due process objective**.[29] With the exception of the constitutional safeguard clause of Art. VI:2 lit. b,[30] the obligation under Art. VI:2 resembles the corresponding provision of **Art. X:3 lit. b and lit. c GATT 1994**.[31] Case law developed under Art. X:3 lit. a GATT 1994 which addresses issues which also come up in the GATS context can therefore be useful. The Panel—upheld by the Appellate Body—in *EC—Selected Customs Matters* stated with regard to Art. X:3 lit. b GATT 1994 that the underlying objective of the provision is that "a trader who has been adversely affected by a decision of an administrative agency has the ability to have that adverse decision reviewed".[32] This perspective also applies to Art. VI:2. The impartial and objective review of administrative decisions is a fundamental element of the rule of law and of transparent and accountable government.[33] It helps to prevent arbitrary decision-making in all services sectors.[34]

1. Reviewing Administrative Decisions and Granting Remedies

17 Art. VI:2 requires institutions or procedures which review administrative decisions affecting trade in services. The term "administrative decision" is not defined in the GATS. Based on the ordinary meaning of the term, an **administrative decision** can be understood as a legally binding act by an authority, agency or other unit which is part of the administrative branch of government and which regulates a particular, individual situation. Typically, an administrative decision is the application of a general measure to a specific case with binding effect. An administrative decision can therefore be distinguished from acts of general application which apply to a large number of cases such as laws or regulations and from administrative activities which do not have binding and regulating effect. The term **"affecting trade in services"** has the same meaning as in Arts I:1 and VI:1 and indicates a broad scope.[35]

18 **Review** of an administrative decision requires that both the facts as established by the deciding authority and the interpretation and application of

[28] *Delimatsis*, JIEL 10 (2007), 13, 29.
[29] *EC—Selected Customs Matters*, WT/DS315/AB/R, para. 302.
[30] See below, paras 22–23.
[31] *Delimatsis*, JIEL 10 (2007), 13, 30; *Wouters & Coppens*, 15.
[32] *EC—Selected Customs Matters*, WT/DS315/R, para. 7.538.
[33] *Delimatsis*, JIEL 10 (2007), 13, 29.
[34] *Footer & George*, in: *Macrory et al.* (eds), 799, 837.
[35] See above, para. 6.

the law are examined. According to Art. VI:2, administrative decisions must be reviewed at the **request of an affected service supplier**. This implies that institutions or procedures with the power to review administrative decisions *ex officio* are neither necessary nor sufficient. Instead, Art. VI:2 requires a WTO Member to provide ways and means for individual service suppliers to request a review of an administrative decision. Art. VI:2 therefore contains an individual right to demand a review of an administrative decision. However, Art. VI:2 leaves considerable **discretion** to WTO Members **regarding the procedural specifications of the review**. A WTO Member may limit the right to demand a review to those affected by a decision and to requests which meet certain requirements. For example, a Member may require that a request be submitted in written form, within a certain time and that it identifies the administrative decision challenged and the basic grounds for the challenge. A Member may also require evidence of how the service supplier is affected by the decision. Art. VI:2 does not imply the possibility of an *actio popularis* against administrative decisions.

19 In addition to the review of an administrative decision, Art. VI:2 also requires institutions or procedures which have the power to grant **remedies** to the affected service supplier. A remedy must be granted **if justified**. This means that a review of an administrative decision which concludes that the decision was based on legal and/or factual mistake may not remain without consequences. Art. VI:2 does not specify the type of remedy; it provides only that the remedy must be **appropriate**. Such appropriateness should be determined on the basis of the effect on trade in services of the administrative decision under review. WTO Members again therefore have a degree of discretion. In general, two types of remedies are available in administrative review proceedings: the first type of remedy aims at restitution and involves the replacement of the incorrect administrative decision with a correct one. This includes the ability to quash the administrative decision and to replace it by another or to refer the matter back to the administrative unit which made it in the first place. The second type of remedy is aimed at the awarding of damages and involves the award of compensation if the service supplier suffered economic loss. WTO Members are free under Art. VI:2 to choose either of the two types of remedies or to combine them.

2. Institutional Obligations

20 Art. VI:2 contains **no specific requirements regarding the institutional structure** of the review mechanism.[36] The provision allows WTO Members to use whichever system of review best suits their administrative or

[36] *EC—Selected Customs Matters*, WT/DS315/R, paras 7.491–7.556 with regard to Art. X:3 GATT 1994.

constitutional framework as long as it provides for an effective and impartial review and allows for the granting of remedies. Art. VI:2 also contains no obligation with regard to an appeals system, *i.e.* a review system on more than one level. A WTO Member is required to establish only institutions or proceedings which allow for **first instance review**.[37]

21 WTO Members may discharge their obligations under Art. VI:2 by "judicial, arbitral or administrative tribunals or procedures". **Judicial** tribunals or procedures mean that the administrative review is in the hands of independent courts which decide on the basis of the law. Their decisions are legally binding and can be enforced by coercive measures. Review by **arbitration** involves a third party (the arbitrator) chosen by the parties to the dispute. Arbitral proceedings are typically less formalized than judicial proceedings and are not necessarily directly enforceable. **Administrative** tribunals and proceedings place the review of an administrative decision in the hands of an administrative entity. This entity can be different from that which took the decision under review. As stipulated by the second sentence of Art. VI:2 lit. a, it is also possible for the review to be carried out by the decision-making unit itself. As this type of review does not provide for independent review, the second sentence of Art. VI:2 lit. a requires that the relevant procedures must ensure an objective and impartial review.

3. Constitutional Safeguard Clause (Art. VI:2 lit. b)

22 Art. VI:2 lit. b contains an important safeguard clause which **allows Members to depart from the standards** of Art. VI:2 for constitutional reasons. In accordance with Art. VI:2 lit. b, Art. VI:2 lit. a is not to be construed as requiring the institution of tribunals or procedures, where this would be "inconsistent with its constitutional structure or the nature of its legal system". This constitutional safeguard clause is a departure from Art. 27 VCLT,[38] which holds that domestic law cannot be used as an excuse for the non-fulfilment of an international legal obligation. The safeguard clause is based on the assumption that guaranteeing independent review of administrative decisions may be unconstitutional in some WTO Members. This would be the case in particular in countries which adhere to a strict principle of separation of powers or where the parliamentary and political control of administrative decisions is superior to judicial and quasi-judicial review.

23 The **potential for conflict** between the obligations of Art. VI:2 lit. a and the constitutional structure of a national legal system, however, **seems limited**. Considering the broad range of institutional possibilities under

[37] *EC—Selected Customs Matters*, WT/DS315/AB/R, para. 294 with regard to Art. X:3 GATT 1994.

[38] Vienna Convention on the Law of Treaties, 23 May 1969, ILM 8 (1969), 679.

Art. VI:2 lit. a as described above, it is difficult to imagine a constitutional order which could not embrace at least one instance of review of administrative decisions.

III. Informing the Applicant (Art. VI:3)

24 Art. VI:3 obliges administrative authorities to **inform service suppliers** who require authorization for the supply of a service without undue delay about the status of the application and within a reasonable time about the decision concerning the application. Like Art. VI:1 this obligation is limited to the supply of services in sectors with **specific commitments**. There is no parallel provision to Art. VI:3 in GATT law, but Art. 5.2.2 TBT, Annex C:1 lit. a SPS and Art. 3.5 lit. e and f Licensing Agreement contain requirements which have similar functions to Art. VI:3.

25 Art. VI:3 recognizes that application procedures can create impediments to the provision of services, in particular if they take a long time to be completed.[39] As pointed out by the Panel in *US—Gambling*, Art. VI:3 "imposes **transparency and due process** obligations".[40] The provision is therefore a concretization of the general rule of Art. VI:1 with regard to the processing of authorization applications. However, Art. VI:3 also takes into account the legitimate interest of the administration in processing an application thoroughly and completely within the necessary period of time. The provision aims to balance the interests of service suppliers and the administration.

26 Art. VI:3 presupposes a **system of granting authorization**. In the absence of authorization procedures, a Member cannot violate the obligations of Art. VI:3.[41] Art. VI:3 contains **three obligations**: first, the administration must inform the applicant without undue delay of the application's status. Second, the administration must inform the service supplier about the decision on the application within a reasonable time. This implies, third, that the administration is also required to take that decision within a reasonable time. Based on the function of Art. VI:3, the terms "reasonable period of time" and "undue delay" must be interpreted by taking into account the interests of the service supplier and of the administration. The exact meaning of the terms, however, can only be determined on the basis of the facts of each individual situation.[42]

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[39] *Footer & George*, in: *Macrory et al.* (eds), 799, 837.
[40] *US—Gambling*, WT/DS285/R, para. 6.432.
[41] *Delimatsis*, JIEL 10 (2007), 13, 32.
[42] Similar *Wouter & Coppens*, 16.

IV. Procedures to Verify Professional Competence (Art. VI:6)

27 In accordance with Art. VI:6, WTO Members shall provide for adequate procedures to **verify the competence of professionals** of other Members (professional competence verification procedures). Like the other procedural obligations with the exception of Art. VI:2, the obligation of Art. VI:6 is limited to sectors with specific commitments. In particular, as the obligation refers to the competence of professionals, it only applies to Members with **specific commitments in professional services**. Professional services are those services classified in Subsector A of Sector 1 (Business Services) of the Services Sectoral Classification List.[43]

28 Art. VI:6 reacts to the high level of regulation in professional services. Its purpose is to **guarantee** that the economic **value of market access commitments** in professional services is not undermined by the lack of relevant verification procedures.[44] It should be noted that Art. VI:6 also makes it clear that WTO Members have the right to verify the competence of professional service suppliers, because market access is only granted to service suppliers which are sufficiently qualified.[45]

29 Professional competence verification procedures usually involve the review of licensing requirements of the home country of a professional service supplier, including qualifications and professional experience gained in the home country, and the determination whether these licensing requirements are sufficient to supply the service in the host country. Such procedures include **the determination of equivalence** of professional qualifications. The obligation of Art. VI:6 can therefore be placed in the context of Art. VII.[46]

30 The term **"adequate procedures"** is not further specified in the GATS and therefore open to interpretation.[47] Like the terms "undue delay" and "reasonable period of time" in Art. VI:3, the term "adequate procedures" needs to be interpreted in the light of the function of Art. VI:6 and on a case-by-case basis. Attempts further to define the term have been made in the context of the negotiations on domestic regulation disciplines in accordance with Art. VI:4,[48] but no agreement has yet been reached.

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[43] Group of Negotiations on Services, Uruguay Round, Group of Negotiations on Services, Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120, 10 July 1991, reproduced as Annex 8 to the Scheduling Guidelines; see Council for Trade in Services, Trade in Services, Guidelines for the Scheduling of Specific Commitments under the GATS, Adopted by the Council for Trade in Services on 23 March 2001, S/L/92, 28 March 2001.

[44] *Delimatsis*, JIEL 10 (2007), 13, 47.

[45] *Footer & George*, in: *Macrory et al.* (eds), 799, 837.

[46] *Delimatsis*, JIEL 10 (2007), 13, 48.

[47] *Wouters & Coppens*, 16.

[48] See below, paras 35–38.

C. Substantive Obligations

31 Art. VI:4 and 5 refers to substantive obligations for domestic regulation. Art. VI:4 contains a **negotiating mandate** for the Council for Trade in Services to establish disciplines on domestic regulation to ensure that regulations do not constitute unnecessary barriers to trade in services. Pending the entry into force of such disciplines, Art. VI:5 provides for the **provisional application of the criteria of Art. VI:4** under certain conditions.

I. Disciplines on Domestic Regulation (Art. VI:4)

32 In accordance with Art. VI:4, the Council for Trade in Services shall, through appropriate bodies it may establish, develop **necessary disciplines on domestic regulations** with a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services. This mandate is further specified in the second sentence of Art. VI:4, which holds that the disciplines shall aim to ensure that domestic regulations are, "*inter alia* (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service". The term **disciplines** refers to norms which restrict (*i.e.* discipline) governmental and administrative discretion. By choosing this term the GATS drafters indicated that the norms to be developed under Art. VI:4 aim at the limitation of domestic regulatory autonomy.

33 Standards and disciplines for domestic regulation can also be found in **regional integration** and **free trade agreements**.[49] WTO Members have studied provisions relating to domestic regulation in regional trade agreements in the course of the negotiations on domestic regulation.[50] However, regional trade agreements **do not follow a uniform approach** with regard to domestic regulation. Some do not address the issue at all; others follow the approach taken by Art. VI:4 or contain a requirement to revisit the issue after the conclusion of the negotiations on domestic regulation in the WTO. Yet other agreements contain the same standards as Art. VI:4, but make them directly applicable and binding. This indicates the complexity of disciplining domestic regulation and also reflects different legal and regional approaches to this concept.[51]

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[49] *Krajewski*, in: *Bartels & Ortino* (eds), 175, 186–191.

[50] Working Party on Domestic Regulation, Overview of Regulatory Provisions in Services Economic Integration Agreements, Informal Note by the Secretariat, JOB(05)175, 14 September 2005.

[51] *Krajewski*, in: *Bartels & Ortino* (eds), 175, 191.

1. Background

Art. VI:4 is based on the perception that domestic regulations can impede trade even if they do not discriminate between foreign and domestic suppliers or expressly restrict access to markets. This perception has long been accepted concerning **trade in goods**, which is why the rules on trade in goods contain specific disciplines for certain regulatory measures. The most prominent examples are the TBT and SPS agreements, which are often used as examples or templates in the context of Art. VI:4.[52] The GATS negotiators during the Uruguay Round apparently saw a similar case for disciplines on services regulations, because the **first draft of the GATS** contained a provision requiring WTO Members to base their regulations on objective criteria and to make them "not more burdensome than necessary to achieve the national policy objective".[53] The final version of the Article on domestic regulation, however, contained only a mandate to develop disciplines. *34*

2. Negotiations on Disciplines on Domestic Regulation Between 1995 and 2006

As instructed by the Marrakech Ministerial Decision on Professional Services, the Council for Trade in Services established the **Working Party on Professional Services** (**WPPS**) on 1 March 1995 and entrusted it with the mandate of Art. VI:4 in the field of professional services.[54] As a matter of priority, the Council requested the WPPS to develop multilateral disciplines in the accountancy sector to give effect to specific commitments in that sector. The WPPS produced two documents in fulfilling its mandate: In May 1997, WTO Members adopted Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector.[55] The aim of these non-binding guidelines is to provide practical guidance for the negotiation of mutual recognition agreements on accountancy services. In December 1998, WTO Members adopted Disciplines on Domestic Regulation in the Accountancy Sector (**Accountancy Disciplines**).[56] The Accountancy Disciplines contain principles and obligations for the regulation of accountancy services.[57] Even though the Accountancy Disciplines *35*

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[52] *Djordjevic*, LIEI 29 (2002), 305, 310 *et seq.; Trachtman*, Lessons, in: *Mattoo & Sauvé* (eds), 57.

[53] Article VII:2 of the Uruguay Round, Group of Negotiations on Services, Draft, Multilateral Framework for Trade in Services, Introductory Note by the Chairman on the GNS Negotiations on a Framework Agreement, MTN.GNS/35, 23 July 1990.

[54] Council for Trade in Services, Decision on Professional Services, Adopted by the Council for Trade in Services on 1 March 1995, S/L/3, 4 April 1995, para. 1.

[55] Council for Trade in Services, Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector, S/L/38, 28 May 1997.

[56] Council for Trade in Services, Decision on Disciplines Relating to the Accountancy Sector, Adopted by the Council for Trade in Services on 14 December 1998, S/L/64, 17 December 1998.

[57] See below, paras 39–41.

do not establish a formal precedent, they can be seen as a **raw-model for future general disciplines** or specific disciplines in other professional sectors, because they are frequently used as a template in the negotiating context and in the literature.[58]

36 In April 1999, the Council for Trade in Services abolished the WPPS because it had fulfilled its mandate, and replaced it with the **Working Party on Domestic Regulation** (**WPDR**). The Council asked the WPDR to "develop any necessary disciplines to ensure that measures relating to licensing requirements and procedures, technical standards and qualification requirements and procedures do not constitute unnecessary barriers to trade in services".[59] The Council for Trade in Services added that "[i]n fulfilling its tasks the Working Party shall develop generally applicable disciplines and may develop disciplines as appropriate for individual sectors or groups thereof". Since its constitution the WPDR has met in countless formal and informal meetings, but had not produced any proposals for general or sectoral disciplines up to the end of 2006.[60]

37 The negotiations on domestic regulation have to be seen in the **context** of the GATS **negotiations on specific commitments** mandated by Art. XIX:2 even though they are formally separate and take place in different WTO bodies.[61] The connection between the different negotiating streams was emphasized in the 2001 Guidelines and Procedures for the Negotiations on Trade in Services, which stipulated that Members shall aim to complete negotiations under Art. VI:4 prior to the conclusion of negotiations on specific commitments.[62] The Doha Ministerial Declaration of November 2001 specifically confirmed those Negotiating Guidelines.[63] These documents show that the negotiations on domestic regulation have been incorporated into the overall negotiations of the **Doha Development Agenda**.

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[58] See Council for Trade in Services, Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Sectors, Note by the Secretariat, S/C/W/96, 1 March 1999, para. 6.

[59] Council for Trade in Services, Decision on Domestic Regulation, Adopted by the Council for Trade in Services on 26 April 1999, S/L/70, 28 April 1999, para. 2.

[60] For the latest summary of the work of the WPDR see, Working Party on Domestic Regulation, Annual Report of the Working Party on Domestic Regulation to the Council for Trade in Services (2006), S/WPDR/9, 20 November 2006.

[61] The negotiations on specific commitments are conducted in the Council for Trade in Services in Special Session. On these negotiations, see *Deltmatsis*, Article XIX GATS, paras 11 *et seq*.

[62] Council for Trade in Services, Guidelines and Procedures for the Negotiations on Trade in Services, Adopted by the Special Session of the Council for Trade in Services on 28 March 2001, S/L/93, 29 March 2001, para 7.

[63] Ministerial Conference, Fourth Session, Doha, 9–14 November 2001, Ministerial Declaration, Adopted on 14 November 2001, WT/MIN(01)/DEC/1, 20 November 2001, para. 15.

In the first years of the existence of the WPDR, the negotiations remained relatively general and broad.[64] Since 2004 there has been considerable **momentum in the negotiations** which is owed to an increased number of concrete proposals and a more text-focused approach to the negotiations. The Doha Work Programme of August 2004 reminded WTO Members of the importance of negotiations on domestic regulation and called for an intensified effort to conclude them.[65] The Hong Kong Ministerial Declaration of December 2005 confirmed this and recalled the goal to conclude the negotiations before the end of the current round of negotiations.[66] Despite the **suspension of the Doha negotiations** in July 2006, negotiations in the WPDR have continued and increased their pace once again in early 2007. In April 2007, the Chairman of the WPDR produced a third draft for disciplines on domestic regulation which was aimed to draw the different proposals together and to provide a basis for compromises in areas of disagreement.[67] Though the contents of this draft do not (yet) represent a consensus of the WPDR, it is likely that the final version will not deviate from this draft substantially. *38*

3. Disciplines in the Accountancy Sector

As mentioned above, the first disciplines on domestic regulation to be concluded under Art. VI:4 concerned the accountancy sector. The Accountancy Disciplines are **not yet binding**. The Council for Trade in Services indicated its intention of formally integrating them into the GATS no later than the conclusion of the current GATS negotiations, but has yet to decide on how to implement them.[68] The Council also decided that the disciplines should apply only to Members with **specific commitments in the accountancy sector**.[69] *39*

The Accountancy Disciplines contain a **general necessity test**, which provides that WTO Members shall ensure that licensing requirements and procedures, technical standards and qualification requirements and procedures in the accountancy sector "are not more trade-restrictive than *40*

[64] *Footer*, LIEI 29 (2002), 7, 20 *et seq*.

[65] General Council, Doha Work Programme, Decision of 1 August 2004, WT/L/579, Annex C lit. e.

[66] Ministerial Conference, Sixth Session, Hong Kong, 13–18 December 2005, Doha Work Programme, Ministerial Declaration, Adopted on 18 December 2005, WT/MIN(05)/DEC, 22 December 2005, para. 25.

[67] Working Party on Domestic Regulation, Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Informal Note by the Chairman, Room Document of 18 April 2007, <http://www.tradeobservatory.org/library.cfm?refID=98264>.

[68] See below, para. 64 for a discussion of the possibilities to implement disciplines negotiated on the basis of Art. VI:4.

[69] Council for Trade in Services, Decision on Disciplines Relating to the Accountancy Sector, Adopted by the Council for Trade in Services on 14 December 1998, S/L/63, 15 December 1998, No 1.

necessary to fulfil a legitimate objective". Legitimate objectives are "*inter alia*, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession".[70] The necessity test is considered the most significant provision of the Accountancy Disciplines, because it submits every regulatory measure in the accountancy sector to scrutiny for necessity.[71] It is noteworthy that the Accountancy Disciplines link necessity to a legitimate objective and include a non-exhaustive, **illustrative list of legitimate objectives**, which refers to the objective referred to in Art. VI:4 lit. b, *i.e.* quality of the service, but also to additional objectives not referred to in Art. VI:4 lit. b, *i.e.* consumer protection, professional competence and integrity of the profession.[72]

41 Apart from the general necessity test, the Accountancy Disciplines also include provisions concerning **transparency** and specific requirements for licensing requirements and procedures, qualification requirements and procedures and technical standards. Some of these provisions reiterate or rephrase existing GATS obligations, especially those concerning transparency (Art. III). Other parts of the Accountancy Disciplines specify the requirements of a necessity test.[73] The Accountancy Disciplines also make frequent reference to the use of **international standards** and **recognition** of home country legislation.

4. Possible Scope and Contents of Future Disciplines

42 Based on the negotiations in the WPDR and the proposals submitted by various Members to the WPDR it is possible to identify **key aspects** of the scope and contents of potential future disciplines.[74] There is also considerable debate on some of these aspects in academic literature.[75]

a) Applicability

43 An important aspect of the applicability of future disciplines concerns the question whether disciplines should apply **horizontally** or on a **sectoral basis**. Horizontal (or general) disciplines would apply to all services sectors, whereas sectoral disciplines such as the Accountancy Disciplines would apply

[70] S/L/63, para 2.

[71] *Mattoo & Sauvé*, Key Issues, in: *A. Mattoo & P. Sauvé* (eds), 1, 3; *Trolliet & Hegarty*, in: *Mattoo & Sauvé* (eds), 147, 152; *Footer & George*, in: *Macrory et al.* (eds), 799, 943; *Wouters & Coppens*, 20.

[72] *Delimatsis*, in: *Sauvé et al.* (eds), *forthcoming*.

[73] *Trolliet & Hegarty*, in: *Mattoo & Sauvé* (eds), 147, 152.

[74] See Working Party on Domestic Regulation, Matrix of Current WPDR Proposals for Regulatory Disciplines, Informal Note by the Secretariat, Room Document, 16 June 2005.

[75] *Djordjevic*, LIEI 29 (2002), 305, 316–320; *Krajewski*, National Regulation, 134–151; *Wouters & Coppens*, 21–50; *Sunde*, in: *Tietje et al.* (eds), 51–59; *Krajewski*, in: *Ehlers et al.* (eds), 185, 200–220.

to only one specific sector. The debates in the WPDR have so far focussed on horizontal disciplines. Many developing countries prefer horizontal disciplines because they presumably restrict domestic regulatory autonomy to a lesser degree. However, some proposals for sectoral disciplines have also been submitted[76] and it is possible that the WPDR will develop specific sectoral disciplines at a later stage.[77] Sectoral disciplines can address the specific regulatory needs and circumstances in a particular sector. For example, membership of professional organizations may be of greater importance in some sectors than in others. Sectoral disciplines could specify the necessity and condition of such membership in more detail than horizontal disciplines. However, some economic and policy rationales for regulation (*i.e.* monopolies, asymmetric information, externalities) can be found in all sectors, and this supports the case for horizontal disciplines.[78]

It is also debated in the WPDR and in the literature whether future disciplines should apply to **all sectors** or only to **sectors with specific commitments**. Members of the WPDR are still divided on this issue, but the emerging consensus seems to be that future disciplines should apply only to sectors with specific commitments.[79] This is also the approach of the Accountancy Disciplines. The limitation of future disciplines to sectors with specific commitments has been criticized in the literature as contrary to the text of Art. VI:4.[80] However, it should be noted that **Art. VI:4 does not explicitly address this question**, because it makes no reference to specific commitments. It can be argued that the wider context of Art. VI:4 suggests the horizontal applicability of future disciplines, because Art. VI is one of the general obligations of GATS, which apply to all measures and services sectors. Furthermore, Art. VI:1, 3, 5 and 6 is specifically restricted to sectors with specific commitments, while Art. VI:4 does not contain a similar qualification.[81] In contrast, it has been argued that the structure of GATS implies that Members are bound by only those liberalization requirements which they explicitly agreed to. This would suggest that future disciplines under Art. VI:4 should apply only to sectors with specific commitments.[82] It *44*

[76] See *e.g.* Working Party on Domestic Regulation, Communication from Australia, Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors, S/WPDR/W/34, 6 September 2005; Working Party on Domestic Regulation, Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Transparency Disciplines on Domestic Regulation in the Telecommunications Sector, S/WPDR/W/36, 14 September 2005.

[77] *Delimatsis*, in: *Sauvé et al.* (eds), *forthcoming*.

[78] *Mattoo & Sauvé*, Looking Ahead, in: *Mattoo & Sauvé* (eds), 221, 223; on the rationales of regulation see also *Krajewski*, National Regulation, 11–21.

[79] Room Document, 18 April 2007, para 10.

[80] *Delimatsis*, in: *Sauvé et al.* (eds), *forthcoming*.

[81] *Delimatsis*, in: *Sauvé et al.* (eds), *forthcoming*. This perspective seems to be shared by *Trachtman*, Regulatory Divergence, in: *Mattoo & Sauvé* (eds), 27, 31.

[82] *Djordjevic*, LIEI 29 (2002), 305, 309; *Sunde*, in: *Tietje et al.* (eds), 53.

should also be recalled that the *raison d'être* of future disciplines on domestic regulation is to secure market access and national treatment commitments and to ensure that domestic regulations do not render commitments effectively meaningless.[83] This objective requires only that the disciplines apply to sectors with specific commitments.

45 In any case, the absence of an explicit limitation of the scope of disciplines to sectors with specific commitments does not prevent the WPDR from negotiating disciplines only for sectors with specific commitments. Art. VI:4 contains a negotiating mandate which **does not prohibit disciplines which apply only to specific commitments**. The WPDR seems to have taken the contentiousness of disciplines on domestic regulation and their complexity into account in opting for a limited approach to future disciplines.

b) Measures Covered

46 Even though Art. VI:4 refers to domestic regulation in general, it is not applicable to all domestic measures which could be considered "regulation".[84] Instead, the provision only refers to **qualification requirements and procedures, technical standards and licensing requirements** in its first sentence. In addition, Art. VI:4 lit. c mentions **licensing procedures**. These five types of measures, three substantial (qualification requirements, licensing requirements, technical standards) and two procedural (qualification procedures and licensing procedures), have been at the centre of the negotiations in the WPPS and the WPDR. The Accountancy Disciplines also apply to these measures.[85] In 2003, Japan proposed an Annex on Domestic Regulation, which would apply to "measures affecting trade in services *including* those relating to licensing requirements and procedures, qualification requirements and procedures and technical standards".[86] This suggested that future disciplines could also apply to regulatory instruments other than those referred to in Art. VI:4. Yet, the emerging consensus in the WPDR seems to limit the application of future disciplines to the five types of measures mentioned in Art. VI:4.[87]

47 There is also a growing consensus in the WPDR regarding the **definition** of the types of measures. The April 2007 draft of the WPDR Chairman uses the following definitions, which are very similar to the ones

[83] *Mattoo & Sauvé*, Key Issues, in: *Mattoo & Sauvé* (eds), 1, 3.
[84] For a typology of regulatory measures see *Krajewski*, National Regulation, 21–36.
[85] S/L/63, para. 2.
[86] Working Party on Domestic Regulation, Communication from Japan, Draft Annex on Domestic Regulation, JOB(03)/45/Rev.1, 2 May 2003, para. 3.
[87] Room Document, 18 April 2007, para. 10.

used in the Accountancy Disciplines and various negotiating documents:[88] **"Qualification requirements"** are substantive requirements relating to the competence of a natural person to supply a service, and which are required to be demonstrated for the purpose of obtaining authorization to supply a service. **"Qualification procedures"** are administrative or procedural rules that a natural person must adhere to in order to demonstrate compliance with qualification requirements, for the purpose of obtaining authorization to supply a service. **"Technical standards"** are measures that lay down the characteristics of a service or the manner in which it is supplied. Technical standards also include the procedures relating to the enforcement of such standards. **"Licensing requirements"** are substantive requirements, other than qualification requirements, with which a natural or a juridical person is required to comply in order to obtain, amend or renew authorization to supply a service. **"Licensing procedures"** are administrative or procedural rules that a natural or a juridical person, seeking authorization to supply a service, including the amendment or renewal of a licence, must adhere to in order to demonstrate compliance with licensing requirements.

48 Members of the WPDR have discussed whether **voluntary standards** or **standards of non-governmental** bodies without delegated regulatory authority should be included in future disciplines.[89] It should be recalled that standards set by non-governmental bodies with delegated regulatory power are specifically included in the scope of GATS (Art. I:3 lit. a (ii)).[90] Voluntary standards of non-governmental organizations play an important role in regulating a service industry and can therefore become barriers to trade.[91] However, GATS applies to "measures by Members" (Art. I:1) only.[92] A genuine link between the WTO Member and measures of non-governmental bodies is therefore necessary. As suggested by one commentator, the attribution of non-governmental conduct to governments in accordance with the Draft ILC Articles on the Responsibility of States could be used

[88] Room Document, 18 April 2007, paras 5–9; see also S/C/W/96, para. 4. Slightly different definitions are suggested in Working Party on Domestic Regulation, Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Definitions of Qualification Requirements, Qualification Procedures, Licensing Requirements, Licensing Procedures and Technical Standards, S/WPDR/W/37, 6 October 2005.

[89] Working Party on Domestic Regulation, Communication from Switzerland, Proposal for Disciplines on Technical Standards in Services, S/WPDR/W/32, 1 February 2005, paras 7 and 15; Working Party on Domestic Regulation, Communication from Chile; Hong Kong, China; Korea, Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand, Application of Regulatory Disciplines to Different Levels of Government and Non-Governmental Bodies, Room Document, 27 April 2005, paras 7 and 8.

[90] See *Zacharias*, Article I GATS, para. 53.

[91] *Trebilcock & Howse*, 360.

[92] See *Zacharias*, Article I GATS, para. 27.

as a reference.[93] Non-governmental activities should therefore be attributed to the state only if there was a certain degree of control or guidance by the state. However, there is no consensus on this question in the WPDR (yet). The April 2007 draft of the WPDR Chairman does not mention non-governmental or voluntary standards and only refers to "measures by Members".[94]

49 There is also some debate in the WPDR about the application of future disciplines to measures of **regional and local governments**, because it may be overly onerous for local or regional authorities to comply with future disciplines, in particular in developing countries.[95] Even though GATS applies to measures of central, regional and local government and authorities (Art. I:3 lit. a),[96] future disciplines could be limited to measures of the central government. However, the emerging consensus in the WPDR seems to be that regional or local measures should not be excluded from the scope of future disciplines.[97]

c) Extent of a Necessity Test

50 Among the **most contentious** and **practically most important** aspects of future disciplines ranks the necessity test mentioned in Art. VI:4 lit. b: Regulatory measures should not be "more burdensome than necessary to ensure the quality of the service". Many WTO Members have expressed doubts and concerns regarding the usefulness and desirability of the inclusion of a necessity test in future disciplines.[98] This view has been supported by critical civil society groups.[99] Other WTO Members strongly support such a test and regard disciplines without a necessity test as worthless. This view is shared by representatives of the service industries. Academic views are divided: Some writers are in favour of the inclusion of a necessity test,[100] while others question the capability of the WTO dispute settlement organs adequately to apply a necessity test with regard to domestic regulatory interests.[101] According to yet another view, a necessity test should not be included in future disciplines, because of the contentiousness of the issue.[102]

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[93] *Zdouc*, in: *Ortino & Petersmann* (eds), 381, 387 *et seq*.
[94] Room Document, 18 April 2007, para. 10.
[95] S/WPDR/W/32, para. 14.
[96] See *Zacharias*, Article I GATS, para. 51.
[97] Room Document, 18 April 2007, para. 10.
[98] WPDR, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4—Consolidated Working Paper—Note by the Chairman, JOB(06)/225, 18 July 2006, footnote 1.
[99] *Institute for Agriculture and Trade Policy & Polaris Institute*, 3.
[100] *Djordevic*, LIEI 29 (2002), 305, 321; *Delimatsis*, in: *Sauvé et al.* (eds), *forthcoming*.
[101] *Howse & Türk*, Canada Watch 2002, 3, 4–5; *Krajewski*, National Regulation, 154–157.
[102] *Mattoo*, JWT 39 (2005), 1223, 1232.

Necessity tests exist in various WTO agreements.[103] In general, those which are part of **exception clauses** such as Art. XX GATT 1994 and Art. XIV[104] can be distinguished from those which form **positive obligations** such as Art 2.2 TBT or Arts 2.2 and 5.6 SPS. A necessity test in future disciplines would be a positive obligation, which is why commentators have compared it with the necessity tests of the TBT and SPS agreements.[105] Three aspects of the necessity test have been debated in the WPDR and in the literature:[106] legitimate policy goals, criteria of necessity and reasonably available alternative means. *51*

As mentioned above, the necessity test of the Accountancy Disciplines is based on an **indicative open-ended list of legitimate objectives** which broadens the scope of the necessity test compared to the wording of Art. VI:4 lit. b and gives national regulatory measures greater leeway. Members of the WPDR have discussed whether future disciplines should follow this approach. Many Members favour a similar open-ended list, which would give examples of legitimate objectives.[107] Some Members even proposed that the determination of legitimate objectives should not be predetermined by WTO law, and that domestic regulations should not be more trade restrictive than necessary to fulfil **national policy objectives**. This approach was also used in a consolidated working paper of the WPDR Chairman of July 2006.[108] The Chairman's draft of April 2007 does not contain a necessity test any longer. It is hence possible that the WPDR will not include a necessity test in future disciplines. However, if WPDR Members agree on a necessity test at all, it is not unlikely that such a test will refer to national policy objectives in a broader sense. *52*

Unlike most necessity tests in WTO law, the one referred to in Art. VI:4 lit. b refers not to the degree of **trade restriction** ("not more trade restrictive than necessary"), but to the degree of **"burdensomeness"** ("not more burdensome than necessary"). It has been pointed out that the two notions have been used interchangeably in WPDR discussions.[109] However, this use is not compatible with the ordinary meaning of the two terms. For example, *53*

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[103] For a discussion of the relevant case law see *Neumann & Türk*, JWT 37 (2003), 199, 199–233.

[104] See *Cottier et al.*, Article XIV GATS, paras 55 *et seq*.

[105] *Djordjevic*, LIEI 29 (2002), 305, 311–316; *Trachtman*, Lessons, in: *Mattoo & Sauvé* (eds), 57, 64–69.

[106] For a summary of the different proposals see *Delimatsis*, in: *Sauvé et al.* (eds), *forthcoming*.

[107] For an example, see S/WPDR/W/32, para. 15, which includes protection of human health or safety, animal or plant life or health, protection of public morals and the maintenance of public order, national security requirements, access to essential services, prevention of deceptive and fraudulent practices.

[108] JOB(06)/225, para. F.2.

[109] *Delimatsis*, in: *Sauvé et al.* (eds), *forthcoming*.

a lengthy and complicated licensing process could be considered more burdensome than necessary, but if this process is identical in two countries, it does not restrict trade in services between those two countries. It could be argued that since the overall purpose of GATS is aimed at the liberalization of trade in services and not at the reduction of burdensome regulation, future disciplines should be based on the notion of trade restriction. The Accountancy Disciplines follow this approach.[110] The consolidated working paper of the WPDR Chairman of July 2006 referred to "not more burdensome" with regard to licensing and qualification procedures, while it uses the concept of trade restriction with regard to licensing requirements and technical standards.[111] "Not more trade restrictive" is therefore the term used for **substantive obligations**, while "not more burdensome" refers to **procedural obligations**. This usage of the terms is supported by the only other reference to burdensomeness in another WTO agreement: Art. 3.2 Licensing Agreement, which also refers to procedures and not to substantive obligations, holds that "Non-automatic licensing procedures [...] shall be no more administratively burdensome than absolutely necessary to administer the measure". It is likely that future disciplines will follow this distinction if they contain a necessity test at all.

54 A last element of the debates on the necessity test concerns the idea that a measure restricting trade may be considered necessary only if there is no alternative less trade-restrictive measure which may be **reasonably available** to the Member in question to achieve its same policy goals. GATT and WTO dispute settlement practice indicates that **higher enforcement costs** of the alternative measure or an increased administrative burden are not necessarily taken into consideration in that context.[112] However, the GATS Preamble explicitly recognizes asymmetries between the degrees of services regulations in different countries and the particular need of developing countries to exercise the right to regulate.[113] A necessity test which does not take regulatory capacities and levels of development into account may not serve this objective. Future disciplines could therefore state, for example, that costs and local conditions should be considered in the context of necessity. Such a specification can be found in the Accountancy Disciplines and in the working paper of the WPDR Chairman of July 2006 concerning residency requirements.[114]

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[110] S/L/63, para. 2.

[111] JOB(06)/225, paras F.2, G.3, I.2 and J.4.

[112] Appellate Body Report, *Korea—Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, para. 181; see *Krajewski*, LIEI 32 (2005), 417, 442–443 for further references.

[113] See *Hestermeyer*, Preamble GATS, para 8. On the specific importance of the right to regulate from a developing country perspective see *Türk*, in: *Andenas & Alexander* (eds), *forthcoming*.

[114] S/L/63, para 9; JOB(06)/225, para. F.3.

d) International Standards and Recognition

International standards can facilitate trade, because they lead to similar, if not uniform, domestic regulatory regimes and therefore reduce the trade-distorting effect of regulatory difference. The role and use of international standards in future disciplines were therefore also subject to debate and negotiation in the WPDR. The international **standardization of services** seems generally **less advanced than the standardization of goods**. Furthermore, there is a high degree of variation between sectors: In some sectors, such as financial services, there are a number of standard-setting bodies and institutions which play an important practical role.[115] Other sectors, such as education and social services, are to a lesser degree subject to international standardization efforts. *55*

Generally, WTO law employs **different approaches** to international standards. A first group of WTO provisions establishes a presumption in favour of international standards. For example, in accordance with Art. 2.5 TBT, a technical regulation which is in accordance with a relevant standard shall be presumed not to create an unnecessary obstacle to trade. Other WTO law provisions do not establish a presumption, but require Members to "use" international standards for national regulations or to "base" these regulations on international standards (*e.g.* Art. 3.1 SPS and 2.4 TBT). A last group of WTO provisions merely requires that international standards are taken into account. The Accountancy Disciplines follow this approach.[116] Art. VI:5 lit. b contains a similar provision, but uses slightly more ambiguous language.[117] It is likely that future disciplines will also favour such a soft approach.[118] *56*

Two aspects of international standards and their incorporation into WTO law raise **legitimacy problems**: First, the **membership** of an international standard-setting organization and of the WTO may not be identical. In fact, membership of some standardization organizations, such as the Basle Committee on Banking Supervision, is limited to very few countries.[119] References to international standards in future disciplines will therefore probably require the international standardization organization which produced the relevant international standard to be **open to at least all WTO Members** or their relevant bodies. This requirement can also be found in Art. VI:5 lit. b and in the Accountancy Disciplines.[120] However, even if the standardization organization is formally open to all WTO Members, *57*

[115] *Trachtman*, Regulatory Divergence, in: *Mattoo & Sauvé* (eds), 27, 32 *et seq*.
[116] S/L/63, para. 26.
[117] See below, para. 66.
[118] Room Document, 18 April 2007, para. 41.
[119] *Trachtman*, Regulatory Divergence, in: *Mattoo & Sauvé* (eds), 27, 32.
[120] S/L/63, para. 26.

developing countries often find it difficult to participate actively in a standard setting organization due to their **lack of capacity**.

58 The second problem concerns the **decision-making process** within an international standardization organization. International standards are often drafted by the relevant international organization as non-binding voluntary standards.[121] Because of their voluntary nature, it is not necessary for the standards to be adopted unanimously or by consensus. However, if they are translated into WTO law, they may become binding even on those WTO Members which voted against the standard in the relevant standardization organization. This is why it was suggested in the negotiations on domestic regulation disciplines to limit the reference to international standards to those standards that were approved by consensus and on a "one country-one vote" basis.[122]

59 Another element of future disciplines concerns the **recognition of equivalence**.[123] This is based on the idea that a service supplier who has already met certain conditions in his or her home country should not be asked to meet the same conditions again. Recognition (of equivalence) can play an important role in facilitating trade in services.[124] The Accountancy Disciplines apply a "soft" equivalence requirement similar to Art. 2.7 TBT, which merely requires Members to give positive consideration to equivalent qualifications acquired in another country or to take those qualifications into account. A stronger requirement would be the obligation to accept equivalent qualifications and licences even if they differed from host country regulations (see *e.g.* Art. 4.1 SPS). However, the emerging consensus in the WPDR seems to be that future disciplines should not contain such a strong requirement if they refer to equivalence at all. Rather, the use of recognition may be encouraged, but left to the discretion of the Members.[125] However, it should be noted that the April 2007 draft of the WPDR chairman omitted any reference to equivalence.[126]

e) Transparency

60 Even though GATS contains specific provisions on transparency in Art. III and further obligations which provide for transparent decision-making in Art. VI:1–3 and 6, Members of the WPDR have intensively discussed the inclusion of further transparency obligations in future disciplines.[127] Many

[121] *Krajewski*, National Regulation, 147; *Wouters & Coppens*, 51.
[122] JOB(06)/225, para. C.2.
[123] On the concept of recognition see also *Krajewski*, Article VII GATS, paras 1–4.
[124] *Nicolaïdis & Trachtman*, in: *Sauvé & Stern* (eds), 241, 263 *et seq.*
[125] JOB(06)/225, para. H.3.
[126] Room Document, 18 April 2007, paras 27–29.
[127] See *e.g.* Working Party on Domestic Regulation, Communication from the European Communities and Their Member States, Domestic Regulation: Necessity and Transparency,

proposals on transparency in the WPDR reiterate or specify the circumstances of **existing GATS obligations on transparency**, but do not seem substantially to increase the scope of these obligations.

61 Some Members of the WPDR suggested increasing existing transparency obligations with so-called **"prior consultation"** and/or **"prior comment"** requirements.[128] Such obligations include the requirement of WTO Members to explain the justification of a regulation upon request by other Members, to notify other Members of the scope, objective and rationale of a proposed regulation, to provide other Members with particulars or copies of the proposed regulation and to allow other Members (and their services industries) to make comments on proposed regulations, which should be taken into account. Comparable obligations already exist in the TBT and SPS agreements and can also be found in the Accountancy Disciplines.[129]

62 Prior consultation or prior comment requirements **"internationalize" domestic decision-making processes**, because it is no longer sufficient for a WTO Member's parliament or administration to take only the interests of domestic stakeholders into account. Rather, the views of other WTO Members and their service industries can become an important factor in the national regulation-making process. Furthermore, these requirements place a heavy **administrative burden** on countries with limited administrative resources and capacity, in particular developing countries.[130] It has therefore been suggested that enhanced transparency obligations should not be fully imposed on developing countries.[131]

f) Provisions for Developing Countries

63 A last element of future disciplines on domestic regulation concerns aspects of **technical assistance** and **special and differential treatment** for developing countries.[132] In this context, it is worth recalling that the Preamble to GATS and Art. IV call for the recognition of the special situation of developing countries.[133] Proposals in the WPDR seem to be based on the provisions on special and differential treatment and technical assistance in

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S/WPDR/W/14, 1 May 2001; for an overview of the issues see *Iida & Nielson*, in: *Mattoo & Sauvé* (eds), 13–23; *Wouters & Coppens*, 39–41.

[128] Working Party on Domestic Regulation, Horizontal Transparency Disciplines in Domestic Regulation: Proposal by the United States, Revision, Room Document, 2 May 2005, para. B. 2; JOB(03)/45/Rev.1; S/WPDR/W/37.

[129] *E.g.* Arts 2.5 and 2.9 TBT; Annex B:5 SPS; S/L/63, paras 5 and 6.

[130] *Karmakar*, JWT 41 (2007), 127, 136.

[131] *Iida & Nielson*, in: *Mattoo & Sauvé* (eds), 7, 17–18.

[132] See Working Party on Domestic Regulations, Communication from Brazil, Colombia, Dominican Republic, Peru and the Philippines, Elements for Draft Disciplines on Domestic Regulation, Room Document, 26 April 2005, paras 11–18; S/WPDR/W/32.

[133] *Hestermeyer*, Preamble GATS, paras 23–25 and *Grote*, Article IV GATS, paras 1 *et seq.*

the TBT and SPS agreements.[134] They include general recognition of the special developmental, financial and trade needs of developing countries; special and differential treatment concerning the implementation of international standards, in particular a possible derogation from those standards; the phased introduction and application of new national regulations, in particular to exports from developing countries; time-limited exceptions in whole or in part from future disciplines granted upon request by the Council for Trade in Services, and technical assistance for the development and implementation of national regulation and the increased participation of developing countries in international standardizing bodies.[135]

5. Implementing Future Disciplines

64 It is generally agreed that a simple **decision of the Council for Trade in Services would not be sufficient** to make future disciplines on domestic regulation binding on all WTO Members.[136] Art. VI:4 is not a basis for the adoption of binding secondary WTO law. Art. VI:5 refers to the "entry into force" of future disciplines, which implies that they have to be implemented as a source of public international law. Two options for such implementation are discussed: First, future disciplines could become an **Annex to the GATS**.[137] According to Art. XXIX, the disciplines—like the other Annexes—would then become an integral part of the Agreement. However, achieving consensus both internationally and domestically for the necessary changes to the GATS framework could be difficult. A second option is thus more likely: future disciplines could become **additional commitments** of Members under Art. XVIII either in the form of a reference paper like the Reference Paper on Basic Telecommunicatons[138] or in some other form. This would allow WTO Members a degree of flexibility which might be crucial for the successful conclusion and implementation of future disciplines.

II. Provisional Application of the Criteria of Art. VI:4 (Art. VI:5)

65 Due to the complicated wording and structure of Art. VI:5, its content and function are not imminently apparent. At the core of the provision is the requirement that Members not apply licensing and qualification requirements and technical standards in a manner which does not comply with

[134] For a comprehensive discussion of these proposals see *Türk*, in: *Andenas & Alexander* (eds), *forthcoming*.
[135] Room Document, 18 April 2007, paras 42–46.
[136] *Pitschas*, in: *Prieß & Berrisch* (eds), 495, 544, para. 140.
[137] See JOB(03)/45/Rev.1.
[138] *Adlung*, JIEL 9 (2006), 865, 889–890.

the **criteria outlined in Art. VI:4 lit. a, lit. b, and lit. c.** The most important of these criteria is the necessity test of Art. VI:4 lit. b.

66 In determining whether a Member is in conformity with the criteria of Art. VI:4 account shall be taken of **international standards** of relevant international organizations. This "soft" requirement of considering international standards only covers standards **actually applied by the Member** in question.[139] Furthermore, according to the interpretative footnote 3 to Art. VI:5 only standards of those international bodies the membership of which is open to the relevant bodies of at least all Members of the WTO shall be considered. These limitations address some of the legitimacy concerns mentioned above.[140]

67 There are a number of important **limitations** on the requirement of Art. VI:5. First and foremost, the obligation ceases once disciplines on domestic regulation have been agreed upon ("pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4"). Art. VI:5 therefore aims at the **provisional application** of the standards laid down in Art. VI:4.[141] Second, Art. VI:5 applies only in **sectors with specific commitments**. Third, Members are only required to adhere to the standards of Art. VI:4 if they would otherwise **"nullify or impair"** specific commitments. A Member challenging a domestic regulation of another Member on the basis of Art. VI:5 must claim and prove that the application of that measure amounts to the nullification or impairment of a specific commitment. This requires the identification of the specific commitment and the establishment of a connection between the challenged domestic regulation and the value of the commitment.

68 Because of the last limitation Art. VI:5 can be seen as the **codification of a "non-violation nullification and impairment"**, *i.e.* a nullification or impairment of a benefit which is not based on a violation of WTO law.[142] As such, Art. VI:5 provides for the mixture ("mingling") of concepts of non-violation and violation.[143] One commentator, however, argues that Art. VI:5 only requires a violation of the standards of Art. VI:4 and therefore benefits from the *prima facie* presumption of Art. 3.8 DSU.[144] This view cannot be sustained: it runs counter to the clear wording of Art. VI:4 and the intention of the drafters that the standards of Art. VI:4 should not be binding. Furthermore, this view cannot explain why the drafters of GATS

[139] *Krajewski*, National Regulation, 152; *Sunde*, in: *Tietje et al.* (eds), 66–67.
[140] See above, paras 57 and 58.
[141] *Footer & George*, in: *Macrory et al.* (eds), 799, 838; *Wouters & Coppens*, 51.
[142] *Trachtman*, Lessons, in: *Matto & Sauvé* (eds), 67.
[143] *Verhoosel*, 95; *Wouters & Coppens*, 52.
[144] *Sunde*, in: *Tietje et al.* (eds), 63.

explicitly included the notion of "nullification and impairment" if they simply intended to make the standards of Art. VI:4 binding.

69 Lastly, the obligation of Art. VI:5 is limited to measures that **could not have been reasonably expected** at the time the specific commitments were made. The standard of "reasonable expectation" is determined by the scope and the level of specific commitments. Measures which are scheduled as limitations to specific commitments can be reasonably expected. Measures which are not covered by specific commitments because of horizontal or other limitations can also be reasonably expected. In other words, all measures which were in place at the time of scheduling can be reasonably expected. Only new measures are captured by Art. VI:5.[145] This makes Art. VI:5 in essence a **"standstill-clause"**.[146] Art. VI:5 is limited to measures which were adopted after the adoption of the relevant list of specific commitments. Art. VI:5 is therefore generally considered to be a provision of limited practical relevance.[147] However, the provision may have a greater impact on developing countries, which did not have a comprehensive regulatory regime in place when they made their specific commitments. The standstill-clause of Art. VI:5 may therefore limit the choices of countries which are still in the process of developing their own domestic regulation.

D. Relationship with Other GATS Provisions

70 The relationship between Art. VI and other provisions of the GATS is **not specified in the Agreement** itself. It has been subject to intense debate in the WTO and in academic literature. The focus of this debate is the relationship between Art. VI:4/VI:5 on the one hand and the specific commitments, in particular Art. XVI (market access), on the other hand. This relationship also played a role in *US—Gambling*.

71 The relationship between the **procedural obligations** of Art. VI and other GATS provisions seems relatively straightforward: Art. VI:1 applies to all measures affecting trade in services and can therefore apply simultaneously with all other GATS provisions.[148] There is neither a textual basis nor a policy reason for excluding the simultaneous application of Art. VI:1 and other GATS provisions. The same is true for Art. VI:2: An administrative decision which must be subject to review under this provision can also fall within the scope of other GATS obligations. Since Art. VI:1, VI:3

[145] *Sunde*, in: *Tietje et al.* (eds), 68.
[146] *Trachtman*, Lessons, in: *Mattoo & Sauvé* (eds), 57, 67; *Wouters & Coppens*, 52.
[147] *Trachtman*, Lessons, in: *Mattoo & Sauvé* (eds), 57, 77.
[148] *Pauwelyn*, World Trade Rev. 4 (2005), 131, 152.

and VI:6 applies to the administration of measures in sectors with specific commitments, there can be an overlap with the disciplines of Arts XVI and XVII GATS.[149]

72 The relationship between the **substantial provisions** of Art. VI and other GATS obligations is more complex ("the thorniest systemic issue in the GATS today")[150] and practically of greater importance. In *US—Gambling*, the Panel stated: "Under Article VI and Article XVI, measures are either of the type covered by the disciplines of Article XVI or are domestic regulations relating to qualification requirements and procedures, technical standards and licensing requirements subject to the specific provisions of Article VI. Articles VI:4 and VI:5 on the one hand and XVI on the other hand are mutually exclusive".[151] The Panel gave no further reasons for this view. As this finding was not appealed, the Appellate Body did not rule on it. The assumption of **mutual exclusiveness** is shared by some Members of the WPDR and some academic commentators.[152] Others have criticized this view, arguing that it had no textual basis and disregarded the fundamentally different rationales of Arts VI and XVI GATS.[153]

73 The starting point for an analysis of the relationship between Art. VI:4/VI:5 and other GATS provisions should be an **exact determination of the scope of each provision based on its wording**. General assumptions about the rationale of a provision should only be used as an additional argument. For example, Art. VI:4 covers qualification requirements and procedures, technical standards and licensing requirements and procedures, while Art. XVI covers the measures referred to in Art. XVI:2 GATS.[154] The Panel in *US—Gambling* apparently assumed that it is not possible for the same measure to be covered by both provisions. However, a measure covered by Art. VI:4, *e.g.* a licensing requirement, could also incorporate a measure covered by Art. XVI, *e.g.* an economic needs test.[155] In such a case, Arts VI:4/VI:5 and XVI could apply simultaneously. Similarly, a technical standard (covered by Art. VI:4) could amount to *de facto* discrimination and therefore also be covered by Art. XVII, which applies to "all measures affecting the supply of services".[156] It is therefore possible for the **substantive provisions of Art. VI and specific commitments to overlap** to

[149] *Ibid*.
[150] *Delimatsis*, JWT 40 (2006), 1059, 1061.
[151] *US—Gambling*, WT/DS285/R, para. 6.305.
[152] *Terry*, The Prof. Law. 83 (2004), 83, 95–98.
[153] *Pauwelyn*, World Trade Rev. 4 (2005), 131, 152–158.
[154] *Krajewski*, National Regulation, 82–85; *Delimatsis & Molinuevo*, Article XVI GATS, paras 14–66.
[155] *Krajewski*, National Regulation, 139.
[156] See *Krajewski & Engelke*, Article XVII GATS, paras 6–8.

a certain extent.[157] In such a case disciplines on domestic regulation based on Art. VI:4 and the market access and/or national treatment obligations would apply cumulatively.

74 In the WPDR negotiations on domestic regulation disciplines many Members voiced concern about the potential overlap between Art. VI:4 disciplines and specific commitments.[158] It has been argued that such an **overlap is undesirable and creates legal insecurity**. This is why the Accountancy Disciplines explicitly exclude measures subject to specific commitments ("The disciplines therefore do not address measures subject to scheduling under Art. XVI and XVII of the GATS, which restrict access to the domestic market or limit the application of national treatment to foreign suppliers").[159] A similar perspective can be found in the Scheduling Guidelines.[160] The emerging consensus in the WPDR on general disciplines also seems to be that **disciplines on domestic regulation should not apply to measures covered by Arts XVI and XVII**.[161] Excluding measures subject to scheduling from the scope of domestic regulation disciplines would provide legal clarity and may enhance the acceptability of future disciplines. It would also respect the sovereign right of WTO Members to regulate services as recognized in the GATS Preamble.[162, 163]

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[157] For further examples see also S/L/92, Attachment 4, Working Party on Professional Services, Discussion of Matters Relating to Articles XVI and XVII of the GATS in Connection with the Disciplines on Domestic Regulation in the Accountancy Sector, Informal Note by the Chairman, Job No. 6496, 25 November 1998.

[158] *Footer & George*, in: *Macrory et al.* (eds), 799, 838.

[159] S/L/63, para 1.

[160] S/L/92, Attachment 1, para. 2.

[161] Room Document, 18 April 2007, para. 10: "They *(i.e. these disciplines)* do not apply to measures, which constitute limitations subject to scheduling under Article XVI and XVII", explanation added.

[162] *Footer & George*, in: *Macrory et al.* (eds), 799, 838; for a more detailed development of this argument see *Krajewski*, National Regulation, 139–140.

[163] The author would like to thank *Elisabeth Türk* and *Panos Delimatsis* for useful comments on an earlier draft.

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Article VII GATS
Recognition

1. For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.
2. A Member that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Member's territory should be recognized.
3. A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.
4. Each Member shall:
   a) within 12 months from the date on which the WTO Agreement takes effect for it, inform the Council for Trade in Services of its existing recognition measures and state whether such measures are based on agreements or arrangements of the type referred to in paragraph 1;
   b) promptly inform the Council for Trade in Services as far in advance as possible of the opening of negotiations on an agreement or arrangement of the type referred to in paragraph 1 in order to provide adequate opportunity to any other Member to indicate their interest in participating in the negotiations before they enter a substantive phase;
   c) promptly inform the Council for Trade in Services when it adopts new recognition measures or significantly modifies existing ones and state whether the measures are based on an agreement or arrangement of the type referred to in paragraph 1.
5. Wherever appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases, Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.

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Cross References

Art. 906.4, Art. 1210.2 NAFTA; Art. 11.9 DR-CAFTA; Art. XI MERCOSUR Montevideo Protocol; Art. 12.11 Trans-Pacific SEP Agreement; Art. 13 General Framework of Principles and Rules and for Liberalizing the Trade in Services in the Andean Community.

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A. General Remarks

1 Art. VII contains basic provisions on the **function and application of recognition** in the GATS. References to recognition can also be found in para. 3 of the Annex on Financial Services[1] and in the negotiations on domestic regulation disciplines in accordance with Art. VI:4.[2] Despite these references, the term **"recognition" is not defined** in Art. VII or anywhere else in the GATS.[3] This reflects the fact that no common definition of "recognition" has been established in trade practice or academic writing. In broad terms, recognition can be defined as the acceptance of regulatory conditions for goods and services required in one country (exporting origin/home country) as equivalent to the conditions necessary in another country (importing country/host country).[4] However, the scope and content of recognition are determined by the legal and political framework in which it is used. Not surprisingly, there is a high degree of variation and diversification in the international practice of recognition.[5]

2 Recognition can be understood as an **advanced instrument of trade liberalization**.[6] It typically requires a greater degree of economic and political integration than traditional instruments of liberalization such as non-discrimination, market access or the requirements of a necessity

[1] *von Bogdandy & Windsor*, Annex on Financial Services, paras 26 *et seq*.
[2] *Krajewski*, Article VI GATS, para. 59.
[3] *Beviglia Zampetti*, in: *Sauvé & Stern* (eds), 283, 294; *Footer & George*, in: *Macrory et al.* (eds), 799, 839.
[4] *Nicolaïdis*, Jean Monnet Working Paper 7/1997, para. 3.
[5] *Beviglia Zampetti*, in: *Sauvé & Stern* (eds), 283, 284; *Nicolaïdis*, in: *Cottier & Mavroidis* (eds), 267, 277–281.
[6] *Krajewski*, in: *Sauvé et al.* (eds), *forthcoming*.

test. Recognition necessitates a minimum standard of regulatory cohesion between different systems, which exists more frequently at a regional than at the global level. Nevertheless, examples of recognition obligations can be found **in other WTO agreements**, in particular in the SPS and TBT agreements. However, unlike Art. VII, these provisions contain binding obligations to accept standards and regulations of other Members as equivalent (Art. 4.1 SPS), or at least to give positive consideration to accepting as equivalent regulations of other Members (Art. 2.7 TBT).

3 Art. VII:1 refers to **two methods of recognition**: autonomous recognition and (mutual) recognition on the basis of a bilateral or regional agreement.[7] **Autonomous recognition** is the autonomous decision of a regulatory authority of the importing (or host) country to accept as equivalent qualifications, licences and standards of the exporting (or home) country. Typically, such a decision is based on administrative discretion. In a system of **mutual recognition** two or more countries accept each other's qualifications, licences and standards as equivalent on a reciprocal basis. Typically, this process is based on an international agreement between two or more countries (Mutual Recognition Agreement, MRA).[8] Both forms of recognition can be achieved through **harmonization** or other means. Harmonization refers to the development of common international standards, which are subsequently accepted by all Members and which serve as a basis of recognition. By considering harmonization as a method of recognition, GATS terminology is different from terminology in other contexts, in particular the EC legal order, and from the use of the terms in some parts of the literature.[9]

4 While recognition practice contributes to the liberalization of trade between the countries involved in recognition, it can also **divert or even restrict trade** with regard to those countries which do not benefit from recognition. This tension between the liberalizing and the trade distorting effects of recognition is acknowledged in Art. VII. While recognition is generally encouraged and justified in paragraph 1 of Art. VII, the other paragraphs contain substantial and procedural requirements that must be met when according recognition. These obligations seek to reduce potential trade distorting and restricting effects of recognition. Art. VII therefore aims to **balance the trade liberalizing and trade distorting effects of recognition** and serves a similar purpose as Art. V, which seeks to reconcile the trade liberalizing and trade distorting effects of economic integration agreements.[10]

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[7] *Pitschas*, in: *Prieß & Berrisch* (eds), 495, 526, para. 92.
[8] For a typology of MRAs see *Nicolaïdis*, in: *Cottier & Mavroidis* (eds), 267, 270–272.
[9] See *e.g. Trachtman*, in: *Mattoo & Sauvé* (eds), 57, 77.
[10] See *Cottier & Molinuevo*, Article V GATS, paras 2 and 15.

B. Encouragement and Authorization of Recognition (Art. VII:1)

5 Art. VII:1 states that a Member may recognize the education or experience obtained, requirements met, or licences or certifications granted in another Member for the purposes of the fulfilment of the standards or criteria for the authorization, licensing or certification of services suppliers. Art. VII **does not require recognition** in any form.[11] This distinguishes it from provisions on recognition in other WTO agreements such as Art. 2.7 TBT and Art. 4.1 SPS. Art. VII:1 serves as an **encouragement** to WTO Members **to use recognition** as a means of liberalization of trade in services.[12]

6 In addition to the encouragement to use recognition, Art. VII:1 also indicates that recognition as such is **not considered a violation of the principle of most-favoured-nation treatment** (MFN) as set out in Art. II.[13] MFN could be seen as a prohibition of recognition, because a WTO Member which recognizes as equivalent the qualifications of country A, but not those of country B, would seem to afford less favourable treatment to country B compared to country A. The tension between MFN and recognition is especially vivid with regard to mutual recognition agreements, because the parties to such an agreement grant each other more favourable treatment than the treatment they afford to non-members of the agreement.[14] By stating that a WTO Member "may" use recognition, Art. VII:1 thus serves as an **authorization of recognition** *vis-à-vis* MFN treatment and is seen as an exception to Art. II.[15] However, it should be noted that Art. VII also maintains basic non-discrimination standards in paragraphs 2 and 3 regarding the application of recognition measures.

C. Substantive Obligations

7 Art. VII contains three substantive obligations: Arts VII:2 and 3 contain standards for **the application of autonomous or mutual recognition**. Both provisions aim to prevent recognition practices from being used to "dilute entirely the MFN obligation".[16] Art. VII:5 requires WTO Mem-

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[11] *Pitschas*, in: *Prieß & Berrisch* (eds), 495, 526, para. 91; *Nicolaïdis & Trachtman*: in: *Sauvé & Stern* (eds), 241, 261, 264; *Krajewski*, National Regulation, 43; *Footer & George*, in: *Macrory et al.* (eds), 799, 839.

[12] *Nicolaïdis*, in: *Cottier & Mavroidis* (eds), 267, 274.

[13] *Nicolaïdis & Trachtman*, in: *Sauvé & Stern* (eds), 241, 265; *Adlung*, JIEL 9 (2006), 865, 869–870.

[14] *Nicolaïdis*, in: *Cottier & Mavroidis* (eds), 267, 288.

[15] *Beviglia Zampetti*, in: *Sauvé & Stern* (eds), 283, 298; *Footer & George*, in: *Macrory et al.* (eds), 799, 839.

[16] *Nicolaïdis & Trachtman*, in: *Sauvé & Stern* (eds), 241, 265.

bers **to cooperate** on a multilateral and international level to facilitate recognition. All three obligations are relatively weak and have not played an important role in WTO practice hitherto.[17]

I. Affording Adequate Opportunity to Other Members (Art. VII:2)

8 According to the first sentence of Art. VII:2, a WTO Member which is party to an existing or future **recognition agreement or arrangement** shall afford adequate opportunity for other interested WTO Members to negotiate their accession to such an agreement or to negotiate comparable agreements with the Member concerned. This shows a preference for multi- and plurilateral approaches over bilateral agreements.[18] As *Trebilcock* and *Howse* point out, this obligation aims at the "multilateralization of existing recognition agreements".[19] The second sentence of Art. VII:2 obliges a WTO Member which grants **autonomous recognition** to afford adequate opportunity for any other Member to demonstrate that requirements for service suppliers met in that other Member's territory should (also) be recognized.

9 Art. VII:2 does not define **"adequate opportunity"**.[20] Based on the ordinary wording and the object and purpose of the GATS, it can be argued that affording adequate opportunity requires at least a general willingness to include other WTO Members in the recognition processes.[21] An accession clause in a recognition agreement would certainly fulfil this requirement.[22] However, Members may also simply offer another Member the opportunity to negotiate similar agreements. This possibility must be offered to other Members on a non-discriminatory basis and the negotiations must be conducted on a *bona fide* basis. The notification requirement of Art. VII:4 lit. b facilitates the opportunity of other Members to enter into negotiations with the Member in question.

10 Art. VII:2 does not cover activities of private bodies even though professional associations play an important role in the field of recognition, because they often determine in effect whether requirements obtained abroad are equivalent. There is, however, uncertainty as to whether **agreements between non-governmental bodies with delegated authority** are covered by the term 'recognition agreement'.[23] While GATS in general applies to

[17] *Adlung*, JIEL 9 (2006), 865, 871.
[18] *Beviglia Zampetti*, in: *Sauvé & Stern* (eds), 283, 299.
[19] *Trebilcock & Howse*, 361.
[20] *Beviglia Zampetti*, in: *Sauvé & Stern* (eds), 283, 299.
[21] *Pitschas*, in: *Prieß & Berrisch* (eds), 495, 527, para. 93.
[22] *Beviglia Zampetti*, in: *Sauvé & Stern* (eds), 283, 299.
[23] *Adlung*, JIEL 9 (2006), 865, 872; see also Council for Trade in Services, Report of the Meeting Held on 24 June 2004, Note by the Secretariat, S/C/M/73, 4 August 2004, paras

measures by non-governmental bodies with delegated powers (Art. I:3 lit. a (ii)),[24] the scope of the term 'recognition agreement' in Art. VII:2 seems more limited. Art. VII:2 refers to Art. VII:1, which uses the term "agreement or arrangement with the *country* concerned".[25] The ordinary wording indicates that only agreements between states (*i.e.* agreements among WTO Members or agreements between WTO Members and non-members) fall into this category. Unless the activities of non-governmental bodies can be attributed to a state, agreements between such bodies are not covered by Art. VII. Contrary to this, the Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector seem to include agreements between non-governmental entities.[26] However, these guidelines have been negotiated under the mandate of Art. VI.[27] They are not part of the immediate context of Art. VII and cannot justify a deviation from the wording of Art. VII. Art. VII therefore does not contain disciplines for agreements of non-governmental bodies.[28] This exclusion is regrettable in light of the importance of agreements of non-governmental bodies. WTO Members can, however, address such agreements through the negotiation of guidelines for mutual recognition agreements on the basis of Art. VI.

II. Non-Discriminatory Application (Art. VII:3)

11 Art. VII:3 requires that recognition is not used as a means of **discrimination between different countries** and not as a **disguised restriction on trade**. A WTO Member must ensure that its recognition practices do not restrict international trade in a manner contrary to the most fundamental standards of world trade law. Art. VII:3 does not further specify the conditions of non-discriminatory treatment. The terms "discrimination between countries" and "disguised restriction to trade" mirror the **language of the *chapeau* of Art. XIV**.[29] However, Art. XIV is an exemption and Art. VII:3 is a positive obligation. The provisions therefore serve different purposes. It hence seems more appropriate to consider the non-discrimination standards of Art. II and Art. XVII as a context of Art. VII. Both standards emphasize the need for comparable situations and employ the notion of "**likeness**".[30] This approach also seems useful in the context of

25–30 and Council for Trade in Services, Report of the Meeting Held on 23 September 2004, Note by the Secretariat, S/C/M/74, 10 November 2004, paras 6–36.

[24] See *Zacharias*, Article I GATS, paras 53 *et seq*.

[25] Emphasis added.

[26] Council for Trade in Services, Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector, S/L/38, 28 May 1997, para. B.1.

[27] *Krajewski*, Article VI GATS, para. 35.

[28] *Beviglia Zampetti*, in: *Sauvé & Stern* (eds), 283, 299.

[29] See *Cottier et al.*, Article XIV GATS, paras 70 *et seq*.

[30] See *Wolfrum*, Article II GATS, paras 32 *et seq.* on likeness in Art. II and *Krajewski & Engelke*, Article XVII GATS, paras 15 *et seq.* on likeness in Art. XVII.

Art. VII:3. A WTO Member therefore violates Art. VII:3 if it recognizes as equivalent the education or experience obtained, requirements met, or licences or certifications granted in one country without recognizing "like" requirements in another country. For example, a violation of Art. VII:3 could occur if a Member of the WTO recognizes an academic qualification obtained in Country A as equivalent to its own requirement, but not a qualification obtained in Country B, even though the length of the academic programme, contents of the curriculum, methods and quality of teaching in Countries A and B are identical.

III. Multilateral and International Cooperation (Art. VII:5)

12 Art. VII:5 emphasizes the **preference for recognition based on multilaterally agreed criteria**, because multilateral recognition achieves a maximum of liberalization effects while minimizing the trade distorting effects of recognition. In line with Art. VII:1, which considers harmonization of standards as one form of recognition, Art. VII:5 strongly encourages the development and use of international standards. In particular, Art. VII:5 obliges WTO Members "in appropriate cases" to work towards **common international standards** for recognition and for the practice of services trades and professions. Common standards for recognition aim at the multilateral harmonization of recognition, while common standards for services trades and profession aim at the harmonization of regulations, which can then be applied in recognition processes. Art. VII:5 compels WTO Members to **cooperate in the relevant international bodies** in order to develop these standards. Similar obligations can be found in Art. 3.4 SPS and Art. 2.6 TBT.

D. Notification Requirements (Art. VII:4)

13 Art. VII:4 contains three notification requirements: According to Art. VII:4 lit. a, Members have to notify the Council for Trade in Services of all **existing recognition measures**, and state whether they are based on recognition agreements. WTO Members have to fulfil this requirement within a period of twelve months after the entry into force of the WTO agreements for the relevant country, *i.e.* until 31 December 1995 for the founding Members and twelve months after the accession date for all acceding Members. Art. VII:4 lit. c contains a similar notification requirement with regard to **new measures** or significant changes in existing measures. Such measures have to be notified promptly. Art. VII:4 lit. b requires Members to inform the Council for Trade in Services as far in advance as possible of the **opening of negotiations on a recognition agreement** in order to provide adequate opportunity to other Members to

express their interest in participating in these negotiations before they enter a substantive phase. This notification is of special importance in allowing WTO Members to benefit from the right contained in Art. VII:2. WTO Members have agreed on the form and content of the notification requirements in accordance with Art. VII:4 in the Guidelines for the Notifications under the GATS.[31]

14 Despite the clear language of Art. VII:4, the **notification record** of recognition agreements and other measures **is poor**.[32] Between 1995 and 2006 sixteen WTO Members submitted a total of 52 notifications. Most submissions came from Switzerland, the United States and the Latin American countries. The poor record of notifications has been discussed in the Council for Trade in Services, but Members have not agreed on concrete steps to improve the situation.[33] There could be **various reasons** for the poor notification record: The competent authorities and bodies may be unaware of the obligation of Art. VII:4, in particular if there is no effective coordination between the trade ministries and the entities responsible for (mutual) recognition. It is also possible that the high level of recognition activities by private bodies including mutual recognition contributed to the low level of notifications, because agreements of these bodies are not covered by Art. VII:4.[34]

15 Another reason for the low level of notifications could be that some Members are of the opinion that **economic integration agreements** (EIAs) which contain recognition provisions need only to be notified under Art. V:7 lit. a[35] and not also under Art. VII:4 lit. b.[36] There is, however, no basis in the texts of Art. V or Art. VII to support such a view. Art. V does not exempt EIAs from all obligations of the GATS. It provides only for an exemption from those GATS obligations which would otherwise prevent Members from entering into such an agreement. The notification of an agreement does not prevent its conclusion. EIAs which provide for mutual recognition in the meaning of Art. VII:1 are therefore recognition agreements in the meaning of Art. VII:4 lit. b and need to be notified. The notification can be submitted to the Council for Trade in Services together with the notification in accordance with Art. V:7 lit. a. Such double notification would not be redundant since it would inform other WTO Members that the EIA in question contains recognition provisions.

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[31] Council for Trade in Services, Guidelines for Notifications under the General Agreement on Trade in Services, Adopted by the Council for Trade in Services on 1 March 1995, S/L/5, 4 March 1995, paras 4, 7.

[32] *Adlung*, JIEL 9 (2006), 865, 871.

[33] Council for Trade in Services, Annual Report of the Council for Trade in Services to the General Council (2004), S/C/22, 2 December 2004, para. 6.

[34] See above, para. 10.

[35] See *Cottier & Molinuevo*, Article V GATS, paras 66–68 for this requirement.

[36] *Adlung*, JIEL 9 (2006), 865, 872.

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Article VIII GATS
Monopolies and Exclusive Service Suppliers

1. Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments.
2. Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.
3. The Council for Trade in Services may, at the request of a Member which has a reason to believe that a monopoly supplier of a service of any other Member is acting in a manner inconsistent with paragraph 1 or 2, request the Member establishing, maintaining or authorizing such supplier to provide specific information concerning the relevant operations.
4. If, after the date of entry into force of the WTO Agreement, a Member grants monopoly rights regarding the supply of a service covered by its specific commitments, that Member shall notify the Council for Trade in Services no later than three months before the intended implementation of the grant of monopoly rights and the provisions of paragraphs 2, 3 and 4 of Article XXI shall apply.
5. The provisions of this Article shall also apply to cases of exclusive service suppliers, where a Member, formally or in effect, a) authorizes or establishes a small number of service suppliers and b) substantially prevents competition among those suppliers in its territory.

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Cross References

Art. 82 ECT.

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A. Introduction

1 Whenever monopoly suppliers of a service or exclusive services suppliers abuse their dominant position in their relevant market this poses a considerable threat to market access opportunities and non-discriminatory treatment of their competitors. Therefore, while Art. VIII does not prohibit monopolies and exclusive service suppliers *per se* it tries to control such privileged suppliers in the interest of trade liberalization.

B. Definitions, Scope and Disciplines of Art. VIII:1

I. Definition of "Monopoly Supplier of a Service" and Scope of Art. VIII:1

1. "Monopoly Supplier of a Service"

2 Art. XXVIII lit. h **defines** "monopoly supplier of a service" as "any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service".

Art. XXVIII lit. g defines "service supplier" as "any person that supplies a service" and in Art. XXVIII lit. j, a person is defined as "either a natural person or a juridical person".[1] In situations where an entity carries out a range of **different activities** involving trade in **goods and services, determining whether** a person is a **service supplier may not be straightforward**.[2] Art. XXVIII lit. b states that "supply of a service" includes the production, distribution, marketing, sale and delivery of a service. In *EC—Bananas III*,[3] the Appellate Body stated in its report that "[E]ven if a company is vertically-integrated, and even if it performs other functions related to the production, importation, distribution and processing of a product, to the extent it is also engaged in providing 'wholesale trade services' [...] that company is a service supplier within the scope of the GATS".[4] *3*

It should be noted that the scope of the **definition** of the **"monopoly service supplier"** is primarily **determined by** the **structure of the market** and **not** by the **ownership** pattern of the undertakings.[5] Whether an entity is publicly or privately owned is not relevant to its qualification as a monopoly service supplier under the above definition. What is required is that the supplier is the sole supplier in a relevant market. However, not every monopoly or sole supplier falls within the ambit of Art. VIII:1. Only so-called **legal monopolies** that are "authorized or established formally or in effect" (see Art. XXVIII lit. h) by a Member are covered by Art. VIII:1. Monopolies which exist for economic or technological reasons (such as **natural monopolies**),[6] but without any government facilitation, fall outside the scope of the "monopoly supplier of a service" for the purpose of the provisions of Art. VIII.[7] *4*

2. "Authorized or Established"

In order to define the notion of "authorized or established" (Art. XXVIII lit. h), Art. VIII:1 should be interpreted in line with other paras of Art. VIII: Art. VIII:2 mentions "monopoly rights", Art. VIII:3 refers to a "Member establishing, maintaining or authorizing" a monopoly supplier and Art. VIII:4 refers to a Member granting monopoly rights. In the light of this wording, *5*

[1] Art. XXVIII lit. m defines "juridical person" as "any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or government-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association".

[2] *Zdouc*, JIEL 2 (1999), 295, 327.

[3] Appellate Body Report, *EC—Bananas III*, WT/DS27/AB/R.

[4] *Ibid.*, para. 227.

[5] See *Mattoo*, in: *Cottier & Mavroidis* (eds), 37, 38.

[6] Natural monopolies can be found in sectors where considerable infrastructure is needed, auch as the telecommunication sector or railways.

[7] See *Adlung*, JIEL 9 (2006), 455, 473; *Mattoo*, in: *Cottier & Mavroidis* (eds), 37, 39.

it could be argued that mere "tolerance" of a monopoly by a government (inaction), in the absence of any government facilitation (action), does not necessarily make such a monopoly a "monopoly services supplier" for the purpose of Art. VIII. Therefore, a **governmental "action"** somehow is **needed** for a monopoly service supplier to be "authorized or established" and thus fall within the scope of Art. VIII:1.

6 The **question** arises **whether any governmental action suffices**. For instance the **creation of a disincentive** for potential competitors **to enter a market** in which a monopoly service supplier is operating **could amount to** an act of **authorization or establishment**. In addressing this question it may be helpful to draw analogies from the GATT case law on the attributability of actions to the government: when does a governmental action such as guidance or a non-mandatory request amount to a governmental measure? The Panel in *Japan—Semi-Conductors* stated that for non-mandatory requests to be regarded as measures within the meaning of Art. XI:1 GATT 1947, it has to be demonstrated first that "there were reasonable grounds to believe that sufficient incentives or disincentives existed for non-mandatory measures to take effect. Second, the operation of the measures to restrict export of semi-conductors at prices below company-specific costs was essentially dependent on Government action or intervention".[8] Furthermore, the Panel in *Japan—Agricultural Products I*, noted that "the practice of 'administrative guidance' played an important role. Considering that this practice is a traditional tool of Japanese Government policy based on consensus and peer pressure, the Panel decided to base its judgments on the effectiveness of the measures in spite of the initial lack of transparency".[9] Finally, the Panel in *Japan—Film* considered that the ordinary meaning of measure is broader than laws and regulations and includes government actions short of legally enforceable enactments.[10] At the same time the Panel stated that "not every utterance by a government official or study prepared by a non-governmental body at the request of the government or with some degree of government support can be viewed as a measure of a Member government".[11]

7 In the context of GATS, *Zdouc* opines that **"the scope of measures attributable to a government could be broader under the GATS than under the GATT"**.[12] It is also worth noting that Art. XXVIII lit. a defines "measure" in a broad sense.[13] However, there is as yet no specific

[8] GATT Panel Report, *Japan—Semi-Conductors*, BISD 35S/116, para. 109.
[9] GATT Panel Report, *Japan—Agricultural Products I*, BISD 35S/163, para. 5.4.1.4.
[10] Panel Report, *Japan—Film*, WT/DS44/R, para. 10.43.
[11] *Ibid.*
[12] *Zdouc*, JIEL 2 (1999), 295, 305.
[13] Art. XXVIII lit. a defines a measure as "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form".

case law on this issue in the GATS context. Overall, the GATT case law can be seen as indicating for the GATS context that whether a concrete governmental action "authorizes or establishes" a person as the sole supplier of a services in the sense of Art. XXVIII lit. h has to be decided on a **case-by-case basis**.

3. "Monopoly Supplier of a Service" *Versus* "Governmental Service Suppliers"

It is important to note that "services supplied in the exercise of governmental *8*
authority" are excluded from the scope of GATS in general by virtue of Art. I:3 lit. b. Art. I:3 lit. c says that "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers. Thus, so-called **public monopolies** that provide education, health, and similar services to the public and do not function on a commercial basis **are outside the scope of GATS** in general and Art. VIII in particular. It is generally believed that the scope of governmental services is narrower than that of public services.[14] That means that a provider of a public service such as transportation services may operate on a commercial basis or be in competition with other service suppliers. In this case, such public service would be covered by GATS. In this line of argument, it could be concluded that activities of public monopolies which basically operate on a commercial basis[15] should fall within the scope of GATS in general and (under conditions explained above) its Art. VIII in particular.[16]

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[14] For more see *Adlung*, JIEL 9 (2006), 455 *et seq.; Krajewski*, JIEL 6 (2003), 341, 350.

[15] *Marchetti* and *Mavroidis* opine that to determine whether an entity operates on a commercial basis for the purpose of Art. I:3 "one has to assess the profit seeking nature of the activity itself regardless of the suppliers' own nature". (*Marchetti & Mavroidis*, EBOR 5 (2004), 511, 530). However, *Van Duzer*, 71 considers that reference to the exercise of governmental authority in Art. I:3 implies that direct participation of a governmental agency might be necessary as a hidden criterion for governmental services. Therefore, in their opinion, a link should be established between the government's role and the commercial nature of a service. *Krajewski*, JIEL 6 (2003), 341, 353 opines that although the wording of the provision lacks any reference to government, an interpretation in light of the context, object and purpose of the provision implies that services without any governmental connection or public function would be excluded from the notion of governmental authority.

[16] However, there is one exception to this rule. In the view of *Marchetti* and *Mavroidis*, by virtue of para. 1 lit. b and c of the Annex on Financial Services "activities forming part of a statutory system of social security or public retirement plans" are considered services supplied under the governmental authority and, therefore fall outside the scope of GATS, if they are not conducted "in competition of a public entity or a financial service supplier" regardless of whether or not they are operated on a commercial basis. See *Marchetti & Mavroidis* EBOR 5 (2004), 511, 534. Also see *Adlung*, JIEL 9 (2006), 455, 467; *Van Duzer*, 83 *et seq*.

4. "In the Supply of the Monopoly Service"[17]

9 In accordance with the wording of Art. VIII:1, **the scope of the provision is limited** to the behaviour of legal monopolies **"in the supply of the monopoly service"**. **"Supply of a service"** includes "the production, distribution, marketing, sale and delivery of a service" according to the definition in Art. XXVIII lit. b. In order to qualify as a **"monopoly service"** such service must fall into the field of services in which the supplier has a monopoly. However, the purchase or sale activities of such monopolies (either of goods or services) in their input market or for their own consumption remain undisciplined under Art. VIII.[18]

10 Art. VIII **differs in scope from its equivalent in Art. XVII GATT 1994** which includes purchases or sales involving either imports or exports by the so-called state trading enterprises.[19] Also in the context of GATT, *Mattoo* opines that purchases by state trading enterprises of services to produce goods are not covered.[20]

11 The fact that the respective purchase or sales behaviour of "monopoly services suppliers" in their input market or for their own consumption is beyond the ambit of Art. VIII:1 may imply that **such entities are legally free to discriminate in their procurement activities** in favour of, for example, domestic producers or service suppliers even in sectors subject to specific commitments,[21] unless prohibited under other provisions of GATS such as Art. XIII on government procurement. It should be noted, however, that the scope of Art. XIII is limited to "procurement by governmental agencies of services purchased for governmental purposes".[22] As stressed above, a "monopoly service supplier" under Art. VIII:1 could be a fully private entity established or authorized by a Member. In that case, the procurement activities of such private monopolies fall outside the scope of Art. XIII.

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[17] The definition of the relevant market is also decisive in setting the scope of Art. VIII:1. For more on this see commentaries on Art. VIII:2, paras 23 *et seq*.

[18] *Mattoo* in: *Cottier & Mavroidis* (eds), 37, 39; *Adlung*, JIEL 9 (2006), 455, 474.

[19] Art. XVII:1 lit. a GATT 1994 states: "Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports and exports by private traders".

[20] *Mattoo* in: *Cottier & Mavroidis* (eds), 37, 39.

[21] This point is confirmed by *Adlung*, JIEL 9 (2006), 455, 474.

[22] Art. XIII:1.

5. "In its Territory"

12 Art. VIII:1 regulates the behaviour of "monopoly service suppliers" within the territory of the Member establishing or authorizing such monopolies.[23] Therefore, **Art. VIII does not cover extraterritorial anti-competitive behaviour** of "monopoly services suppliers" in export markets.[24]

II. Disciplines of Art. VIII:1

13 According to Art. VIII:1 Members shall **ensure** that monopoly service suppliers, as defined above, do not act in a manner inconsistent with that Member's obligations under Art. II and specific commitments. This language implies that the government is responsible for actions of monopoly service suppliers because, as defined earlier, they are authorized or established by the government. The provision addresses the Members and not the monopoly service suppliers *per se*.

1. Compliance with the Most-Favoured-Nation Obligation

14 The Appellate Body in *EC—Bananas III* decided that "treatment no less favourable" in Art. II includes *de facto* as well as *de jure* discrimination.[25] Therefore, in accordance with Art. VIII:1 as a general obligation within Part II of the GATS, monopoly suppliers are banned from discriminating, *de jure* or *de facto*, among service suppliers of other Members (in the supply of the monopoly service in the relevant market) **regardless of whether the sector in question is scheduled or not**. That is, of course, without prejudice to the sectors which Members have listed in their MFN exemption lists.[26] The following behaviour would constitute a violation of Art. VIII:1: a monopoly postal service provider gives priority to the delivery of the letters of a particular foreign company over those of other foreign companies doing business in its country.[27]

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[23] This is also the case with Art. VIII:2.

[24] The case is different for Art. XVII:1 GATT 1994 which includes both imports and exports in its scope. Particularly Ad Art. XVII:1 GATT 1994 states that "The charging by a state enterprise of different prices for its sales of a product in different markets is not precluded by the provisions of this Article provided that such different prices are charged for commercial reasons to meet conditions of supply and demand in export markets".

[25] *EC—Bananas III*, WT/DS27/AB/R, paras 233–234.

[26] Except for the sectors listed on the MFN exemption lists, Art. II on MFN treatment is generally applicable to all service sectors whether or not Members have listed them in their Schedules of specific commitments (see *Zdouc*, JIEL 2 (1999), 295, 342). For more on MFN and related exemptions see *Wolfrum*, Article II GATS.

[27] *Michaelis*, in: *Hilf & Oeter* (eds), 375, 403.

2. Compliance with Specific Commitments[28]

15 "The scope of Art. VIII disciplines, [...], crucially depends on the extent to which members have made liberalizing specific commitments"[29] including market access commitments subject to Art. XVI and national treatment commitments subject to Art. XVII.[30] Members are committed to providing market access and national treatment to all Members **to the extent that they have made specific commitments** in that respect. In the context of the GATT, however, some scholars consider that the non-discrimination obligations of state trading enterprises do not include national treatment.[31]

C. Definitions, Scope and Disciplines of Art. VIII:2

16 Art. VIII:2 differs in scope from Art. VIII:1 in the sense that the first addresses the behaviour of monopoly service suppliers "in the supply of the monopoly service **in** the relevant market" and the second addresses the behaviour of the monopoly service supplier **"outside the scope of its monopoly rights"**. The aim of Art. VIII:2 is to avoid that the monopoly position the supplier has in one field of services is abused for the services trade in another. Art. VIII:2 concerns the situation that a Member's monopoly supplier competes, directly or through an affiliated company, in the service supply outside the scope of its monopoly rights and in a field where specific commitments are undertaken by the Member.

I. Definitions and Scope of Art. VIII:2

1. "Affiliated Company"

17 Art. XXVIII lit. n helps with the definition of the notion **"affiliated company"** and reads: "a juridical person is: [...] 'affiliated' with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person". This sets out the general criterion of **"control"** (*e.g.* holding a certain percentage

[28] The way the language of the treaty text is drafted seems to imply that its discipline applies to the behaviour of "monopoly service suppliers" *per se* and not to government rules of general application. But the discipline addresses the Members, see above, para. 13. A similar situation exists in Art. XVII GATT 1994. For more see *Mattoo* in: *Cottier & Mavroidis* (eds), 37, 39.

[29] *Mattoo* in: *Cottier & Mavroidis* (eds), 37, 40.

[30] Unlike Art. III GATT 1994 on national treatment, which is a generally applicable rule, national treatment provided in Art. XVII GATS is subject to scheduling in each Member's Schedule. For more see *Krajewski & Engelke*, Article XVII GATS, para. 1.

[31] See *Jackson*, World Trading System, 326 for state trading enterprises and *Mattoo* in: *Cottier & Mavroidis* (eds), 37, 40 for comparison.

of shares to maintain voting power) for a juridical person to be "affiliated" with another without setting any numerical benchmark.

2. "Scope of Monopoly Rights" and Market Definition

a) "Scope of Monopoly Rights"

18 Art. XXVIII lit. h implies that **monopoly rights** consist of a government's authorization or establishment to be the sole supplier in a relevant market. Therefore the question of the scope of monopoly rights is **linked with the definition of a "relevant market"**. In other words, it is crucial to know how a relevant market is to be defined in order to assess the existence of monopoly rights. For example, if the transmission and distribution of electricity is defined as the relevant market, a Member establishing a single company to operate the grid would constitute a monopoly service supplier. In this case, the grid operator's behaviour outside the monopoly rights, *e.g.* in the production and supply markets, would be subject to the disciplines of Art. VIII:2.

b) The Relevant Product Market

19 The definition of a relevant market varies in different national competition laws. In WTO law, however, the question of relevant market is traceable in the GATT non-discrimination disputes concerning the definition of "like product" and "directly competitive or substitutable", in the Agreement of Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement), in the Agreement on Safeguards and in the Agreement on Subsidies and Countervailing Measures. For instance, the Appellate Body in *Japan—Alcoholic Beverages II* stated that "it does not seem inappropriate to look at **competition in the relevant markets** as one among a number of means of identifying the broader category of products that might be described as 'directly competitive or substitutable.'"[32]

20 The WTO Appellate Body has not yet directly applied the relevant market definition in GATT national treatment (like-product) cases.[33] However, the Panel in *Mexico—Telecoms* addressing the issue of relevant market in the context of the Reference Paper on Basic Telecommunications confirmed that "the notion of demand substitution—simply put, **whether a consumer would consider two products as 'substitutable'**—is central to the process of market definition as it is used by competition authorities".[34]

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[32] Appellate Body Report, *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, para. 25. Emphasis added.

[33] Whereas the ECJ has stated that "similar products" belong to the same market. See ECJ, Case 168/78, *Commission v. France*, [1980] E.C.R. 347.

[34] Panel Report, *Mexico—Telecoms*, WT/DS204/R, para. 7.152. Emphasis added.

21 WTO adjudicating bodies may apply their own view on the interpretation of Art. VIII and to the definition of the relevant market based on **the existing WTO case law which may not necessarily be consistent with the view of national competition authorities**. In this regard, the findings of the Panel in *EC—Bananas III*[35] in referring to the United Nations Central Product Classification (UN CPC)[36] as a benchmark for defining like services may eventually find relevance in defining a relevant services market in a future case.

c) The Relevant Geographical Market

22 **In order for a market to qualify as monopolistic, the relevant geographical market needs to be defined.** For example, consider that a government grants exclusive rights to a company to operate a certain port or a highway in a particular region. If the market is defined narrowly in geographical terms by national competition authorities, such a company may be considered to have a monopoly in that region. The situation may change however, if competition authorities perceive a certain level of competition from alternative ports or highways and therefore define the market as including these competitors due to substitutability of their services.[37] These questions, if raised in the WTO, can only be addressed on a case-by-case basis.

II. Abuse of a Monopoly Position (Disciplines of Art. VIII:2)

1. Introduction

23 Art. VIII:2 refers to **"abuse" of** a legal **"monopoly position"**, a term which is **narrower** in scope **than the term "dominant position", as used in competition law. Abuse of a dominant position in**

[35] Panel Report, *EC-Bananas III*, WT/DS27/R/USA, para. 7.322: "the nature and the characteristics of wholesale transactions as such, as well as of each of the different subordinated services mentioned in the headnote to section 6 of the CPC, are 'like' when supplied in connection with wholesale services, irrespective of whether these services are supplied with respect to bananas of EC and traditional ACP origin, on the one hand, or with respect to bananas of third-country or non-traditional ACP origin, on the other. Indeed, it seems that each of the different service activities taken individually is virtually the same and can only be distinguished by referring to the origin of the bananas in respect of which the service activity is being performed. Similarly, in our view, to the extent that entities provide these like services, they are like service suppliers".

[36] The UN CPC which was the basis for the GATT secretariat's classification has been replaced by the 2002 version, which contains different subcategories and classification numbers from the Provisional CPC. The current version is Central Product Classification Version 1.1, ST/ESA/STAT/SER.M/77/Ver.1.1, E.03.XVII.3, see also <unstats.un.org/unsd/cr/family2.asp?Cl=16> (last visited 1 October 2007).

[37] See *Mattoo*, in: *Cottier & Mavroidis* (eds), 37, 39.

competition law[38] means the practice of an undertaking to maintain, enhance or exploit its monopoly power. Abuse of a dominant position includes "exclusive dealing, market foreclosure through vertical integration, tied selling, the control of scarce facilities and vital inputs or distribution channels, price and non-price predation, price discrimination, exclusionary contractual arrangements and, in some jurisdictions, even the simple charging of higher than competitive prices, or the imposition of other 'exploitative' forms of abuse".[39] In the context of international trade there is particular concern over those forms of abuse which have an "exclusionary effect or otherwise limit effective competition from foreign firms".[40]

24 Para. 1.2 of the Reference Paper on Basic Telecommunications provides a non-exhaustive list of **types of abuse of a dominant position**, which could be of relevance to all "network" industries such as gas, electricity, water and railways: anti-competitive cross-subsidization, use of competitors' information with anti-competitive results and not making available information about essential facilities necessary to provide services.

25 Recognizing that the scope of this Reference Paper is limited to the basic telecommunication services, it is briefly examined here **to what extent**, if any, the general language of **Art. VIII:2 could be interpreted to prohibit abuse of a monopoly position** through the refusal of non-discriminatory access **to essential facilities, anti-competitive cross-subsidization** and **prohibition of misuse of information**.

2. The Essential Facilities Doctrine and Art. VIII:2

26 One of the critical issues regarding the abuse of a monopoly position by a monopoly service provider relates to the doctrine of "essential facilities". This legal principle which originates in US Antitrust law[41] basically states that a monopolist in control of a facility essential to other competitors must provide non-discriminatory access to that facility if it is feasible to do so.[42] The **essential facility** must be essential to enter an adjacent market and it must not be feasible for a competitor to duplicate the facility. In such cases non-discriminatory access to the essential facility is necessary to enable competition in adjacent markets.

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[38] In European competition law, for example, Art. 82 ECT speaks of the prohibition of such an abuse.

[39] *WTO*, Competition Policy, 30, 42.

[40] Working Group on the Interaction Between Trade and Competition Policy, Submission by the European Community and its Member States, WT/WGTCP/W/45, 24 November 1997, 7.

[41] See US Supreme Court, *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912). For more on on this case, see *Reiffen & Kleit*, J.L. & Econ. 33 (1990), 419–438.

[42] See *Lipsky & Sidak*, Stan. L. Rev. 51 (1999), 1187, 1190–1191.

27 It should be noted that the issue here is not obtaining access to the monopoly market *per se*, since foreign producers may not seek to provide services which are subject to a monopoly. The scope of Art. VIII:2 is clearly limited to **adjacent markets in which the monopoly service supplier competes with competitors**. This is also because there is no obligation in the GATS for Members to dismantle their monopolies: the determination of their market structure is up to the individual Members and is reflected in their Schedules of commitments.

28 However, what is at stake here is **access to essential facilities, controlled by a monopolist**, which are **necessary to provide services in adjacent markets which are liberalized** and indicated in the Members' Schedules. Without access to the essential facilities, such as roads, ports, pipelines, *etc.*, the concessions on market access could not be realized particularly in services markets adjacent to monopolized markets.

29 It is crucial to note that even if the concept of third-party access to essential facilities received impetus in the WTO judiciary, its scope would not go beyond the legal monopolies as defined above. That means that **a natural monopoly** that is not backed by legal monopoly rights **does not fall within the scope of this Article**.

30 The question whether the language of Art. VIII:2 provides for mandatory access to essential facilities under certain circumstances may be controversial and the conventional path of nullification or impairment claims may be deemed more appropriate.[43] However, the uncertainty as to the applicability of the essential facilities doctrine to Art. VIII:2 is not to be extended to MFN (Art. II). That means that according to Art. II:1, the Member shall ensure that the **monopoly service supplier provides MFN treatment to the service suppliers of other Members if access to its essential facilities is granted**.

31 Finally, some may argue that the fact that Art. VIII:2 "could" amount to a mandatory provision of access to essential facilities is of no practical significance due to **lack of detailed disciplines such as those incorporated in the Reference Paper on Basic Telecommunications**, *e.g.* rules regarding transparency such as providing terms of access, establishment of an independent domestic body for dispute settlement, *etc.* However, this view should not be seen as undermining the potential of Art. VIII and its second paragraph, should Members make further liberalizing commitments in pertinent service sectors in the future.

[43] See Art. XXIII:3 and Grote, Article XXIII GATS, paras 16 *et seq.*

3. "Anti-Competitive Cross-Subsidization" and "Misuse of Information" in the Light of Art. VIII:2

32 A service supplier which has been granted monopoly rights in the sense of Art. VIII, may use its monopoly rent to cross-subsidize its activities in the downstream market in which it competes with foreign service suppliers.[44] It may also misuse information it obtains from competitors as a result of its control over essential facilities to the detriment of such competitors.[45] **All such anti-competitive activities** of a monopoly service supplier **can be seen as** included in the meaning of **abuse of a monopoly position** and therefore banned by Art. VIII:2.

D. Provision of Relevant Information (Art. VIII:3)

33 Art. VIII:3 contains provisions regarding information-sharing with respect to Art. VIII: the Member which believes that a monopoly service supplier of any other Member is acting in a manner inconsistent with Art. VIII:1 or 2 provides its reasons to the Council for Trade in Services (CTS).[46] The CTS, which acts at the request of that Member, "may" request the Member establishing, maintaining or authorizing the supplier to provide specific information concerning the relevant operations of the monopoly service supplier. Taking into account the soft language of Art. VIII:3, it **offers scarcely any "hard law" provision**[47] which could be subject to dispute settlement.

E. Notification Requirements (Art. VIII:4)

34 Art. VIII:4 contains a notification requirement if a Member grants monopoly rights regarding the supply of a service covered by its specific commitments. The notification should be made to the CTS no later than three months before the intended implementation of the grant of monopoly rights. This provision only applies to the granting of the monopoly rights that takes place after the entry into force of the WTO Agreement.

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[44] For an example of a violation of Art. VIII:2 see *Michaelis*, in: *Hilf & Oeter* (eds), 375, 403.

[45] See *WTO*, Competition Policy, 30, 61.

[46] On the Council for Trade in Services see *Röben* Article XXIV GATS.

[47] For the distinction between hard law and soft law provisions and the role of the principle of good faith see *Bigdeli & Nenova*, Article IX GATS, paras 27, 32 *et seq*.

I. Notification Formats

35 The Guidelines for Notifications under the General Agreement on Trade in Services adopted by the Council for Trade in Services on 1 March 1995[48] first identify the provisions of the GATS that contain notification requirements and the elements to be included in such notifications, and then propose **a common format to be used by Members for such notifications**. The elements to be included in such notifications are, *inter alia*, the name of the notifying Member,[49] the Article under which the notification is being made, the date of entry into force and the duration of the measure, the agency responsible for enforcement of the measure, the complete description of the measure, Members specifically affected, if any, and other points aiming at making relevant information available to interested Members.

II. Conditions for Creating New Monopoly Rights

36 Under Art. XX:3, Schedules of specific commitments are annexed to the GATS and shall form "an integral part thereof". Also according to Arts XVI:1 and XVII:1 all WTO Members are bound by the conditions, qualifications and limitations provided in their Schedules. Therefore **any derogation from the commitments thereof must be channelled through Art. XXI**, which basically allows a Member to modify or withdraw any commitments in its Schedules as long as the Members acts in accordance with the preconditions in Art XXI.[50]

37 Art. VIII:4 is simply an affirmation of the above general provisions: since the introduction of new monopolies would bring about restrictions that violated existing commitments, any Member who wishes to do so is required to follow the procedures and comply with the provisions of Art. XXI:2–4. The **core obligation** of such a Member would be to **negotiate compensatory adjustments** on an MFN basis, with "affected Members".

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[48] Council for Trade in Services, Guidelines for Notifications under the General Agreement on Trade in Services, Adopted by the Council for Trade in Services on 1 March 1995, S/L/5, 4 April 1995.

[49] If the subcentral government or authority or non-governmental bodies are involved they should be specified.

[50] See on Art. XXI, *Nartova*, Article XXI GATS.

F. Exclusive Service Suppliers (Art. VIII:5)

38 In accordance with Art VIII:5, all the provisions of Art. VIII that apply to monopoly service suppliers are **equally applicable** to the so-called "exclusive service suppliers".

39 **The first condition** for a service supplier to qualify as an "exclusive service supplier" is that such a service supplier must be **authorized or established, formally or in effect**, by a Member as one of the "few" suppliers in that Member's territory. It is not obvious, however, what exactly constitutes, in terms of quantity, a **"small number of service suppliers"** for the provisions of Art. VIII to apply. But it can be presumed that to meet the object and purpose of Art. VIII, *i.e.* to prevent the abuse of market power in the interest of trade in services, the number of suppliers must be so small that each of them has a dominant position that could be abused.

40 **The second condition** for service suppliers to qualify as "exclusive service suppliers" is that the Member establishing or authorizing such suppliers **substantially prevents competition among those suppliers in its territory**. Art. VIII:5 does not provide any details of what constitutes a suitable measure for these terms. The conventional interpretation would lead to the meaning of regional monopolies, *i.e.* suppliers who have been granted exclusive rights to supply a specific region. Another way of examining the issue could be to look at the extent to which the price of a service is driven by market forces. In this line of argument, not every action taken by governments to set down conditions for service suppliers, *e.g.* public service obligations, would amount to "substantially" preventing competition. However, if a Member directly sets prices in a certain market and removes other incentives for competition among exclusive service suppliers, such action may qualify as meeting the second condition stipulated in Art. VIII:5.

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Article IX GATS
Business Practices

1. Members recognize that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services.
2. Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating practices referred to in paragraph 1. The Member addressed shall accord full and sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question. The Member addressed shall also provide other information available to the requesting Member, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Member.

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Cross References

Art. 46 Havana Charter; Art. XII MERCOSUR Montevideo Protocol; Art. 81 ECT; Art. 27 VCLT.

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D. Evaluation and Outlook **37**

A. General

1 The **connection between trade and competition** has been acknowledged from the very start of international trade relations and this acknowledgement is discernible in essentially all multilateral attempts to tackle trade issues. Restrictive business practices were a central element of the negotiations of the Havana Charter for an International Trade Organization (ITO) in 1947–1948, where an entire chapter (Chapter V) was devoted to "business practices affecting international trade which restrain competition, limit access to markets or foster monopolistic control".[1]

2 The Havana Charter did not however come into force and the precious survivor of the aborted ITO project, the **GATT 1947**, did **not** include **any binding rules on restrictive business practices**. The subsequent 1960 Decision on restrictive business practices,[2] while recognizing that such

[1] Art. 46.1 of the Havana Charter for an International Trade Organization, 24 March 1948, Canadian Treaty Series, No. 32, 3; UN Doc. E/CONF. 2/78 (1948). See also Art. 46.3 Havana Charter for a non-exhaustive list of practices deemed to be restrictive.

[2] Restrictive Business Practices: Arrangements for Consultations, Decision of 18 November 1960, BISD 9S/28. See also, Report of Experts, Restrictive Business Practices: Arrangements for Consultations, Adopted 2 June 1960, L/1015, BISD 9S/170.

activities "may hamper the expansion of world trade and the economic development in individual countries and thereby frustrate the benefits of tariff reduction and removal of quantitative restrictions",[3] provided only for *ad hoc* notifications and consultation mechanisms.

3 With the creation of the World Trade Organization (WTO),[4] while no comprehensive framework addressing restrictive business practices was adopted, there are pertinent rules scattered within the entire body of the WTO law.[5] The focus here is on **Art. IX**, which is a **companion to Art. VIII**. Considering the lack of legal practice on this provision, the **guidelines elaborated in related disciplines are applied *mutatis mutandis*** to the interpretation on **Art. IX**. In the realm of the WTO, one can in particular benefit from the efforts of the Working Group on the Interaction between Trade and Competition Policy (WGTCP),[6] which had as its task to "study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework".[7] Also, the experience gathered from further-reaching and more fine-grained commitments under GATS, such as found most notably in the Reference Paper on Basic Telecommunications, can be applied.

4 **Outside the realm of the WTO**, restrictive business practices have continuously received attention in the inter-governmental frameworks of the United Nations Conference on Trade and Development (**UNCTAD**) and the Organisation for Economic Co-operation and Development (**OECD**), which have adopted a variety of non-binding legal instruments.[8] These instruments, as well as the law and practice of the European Community (**EC**) in the field of competition, may also be employed for clarifying Art. IX, however under a *mutatis mutandis* condition due to the essentially non-binding nature of UNCTAD and OECD rules, and the regionally-bound character of EC law.

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[3] BISD 9S/28, Rec. 2.

[4] WTO Agreement with DSU and TPRM.

[5] See, *e.g.*, Arts 8, 31 lit. c and lit. k, 40 TRIPS and Art. 9 TRIMS. See also *Weinrauch*, 131–150; Working Group on the Interaction Between Trade and Competition Policy, The Fundamental WTO Principles of National Treatment, Most-Favoured-Nation Treatment and Transparency, Background Note by the Secretariat, WT/WGTCP/W/114, 14 April 1999.

[6] See WT/WGTCP/W/114. On the development since Singapore see, *Marsden*, Competition Policy, 59 *et seq*.

[7] Ministerial Conference, Singapore, Draft Singapore Ministerial Declaration, WT/MIN(96)/DEC/W, 13 December 1996, para. 20.

[8] For an overview see, Group of Negotiations on Services, Uruguay Round, Restrictive Business Practices and Trade in Services, Note by the Secretariat, MTN.GNS/W/99, 25 April 1990, paras 1–4, 7.

B. The Scope of the Art. IX (Art. IX:1)

I. Relationship to Art. VIII: Delineating the Scopes of Application

5 In order properly to define the scope of application of Art. IX, it may briefly be reiterated where the lines of Art. VIII lie, since **Art. IX's ambit is negatively specified to apply to business practices "other than those falling under Art. VIII"**. The latter provision specifically covers activities of monopoly and exclusive service suppliers, who owe their position in the market to some sort of government facilitation in the form of establishment, authorization or maintenance, either formally or in effect.[9] With the increasing endeavours of diverse service sectors to liberalize, however, government-mandated monopolies or exclusive service suppliers in the sense of Art. VIII:5 are gradually disappearing and are widely being replaced by suppliers holding dominant positions in the world markets.[10] The scope of Art. IX is wider than that of Art. VIII[11] and able to catch precisely such activities of service suppliers, who maintain a dominant position or collude in services markets but do not have a special status granted by the state. While the **scope of Art. IX** is much **broader**,[12] its **disciplines** are **significantly weaker than those of Art. VIII** and encompass only consultation and information-sharing obligations.

II. "Certain Business Practices" That "May Restrain Competition"

1. Introduction

6 The general language of Art. IX:1 regarding "certain business practices of service suppliers" allows for an inclusive interpretation that could expand to literally any such practices of service suppliers[13] that may somehow "restrain competition". In that sense, the scope of Art. IX does not correspond precisely to any competition law framework existing under Members' national regimes.[14] Indeed, **Art. IX does not impose any obligation upon**

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[9] Art. XXVIII lit. h defines "monopoly supplier of a service" as "any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service". For an extensive analysis, see *Bigdeli & Rechsteiner*, Article VIII GATS, paras 2 *et seq*.

[10] See, *Mattoo*, in: *Cottier & Mavroidis* (eds), 37–70.

[11] *Ibid.*, 37, 59.

[12] See below, para. 6 *et seq*.

[13] For a definition of "service supplier", see *Feinäugle*, Article XXVIII GATS, paras 26 *et seq*.

[14] See, Working Group on the Interaction Between Trade and Competition Policy, Overview of Members' National Competition Legislation, Note by the Secretariat, Revision, WT/WGTCP/W/128/Rev.2, 4 July 2001.

Members actually to have a domestic competition regulation.[15] Regardless of the latter condition, Art. IX continues to apply to practices of Members' service suppliers as long as these have the effect of restraining competition and restricting trade in services.

7 Practices restraining competition are normally referred to as "restrictive business practices",[16] although this notion largely coincides with the standard concept of "anti-competitive practices", which are found to be against the existing national competition law rules. The UN Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices[17] defines **"restrictive business practices"** as "acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries and on the economic development of these countries, or which through formal, informal, written or unwritten agreements or arrangements among enterprises have the same effect".[18]

8 While the stress on developing countries is missing in Art. IX, the concept of "certain business practices" that "may restrain competition", "thereby restrict[ing] trade in services" is identical to that of the UN Principles and Rules. It should however be borne in mind that the latter apply to both goods and services, while Art. IX is explicitly directed at services only.

2. Typology of Restrictive Business Practices

9 This section contains a brief overview of the categories of business acts and/or behaviour that may be deemed anti-competitive under national competition law regimes[19] and may equally be considered "restrictive business practices", and are thus likely to fall within the ambit of Art. IX.

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[15] Art. IX is in this context similar to Art. XII MERCOSUR Montevideo Protocol, 15 December 1997, available in English at <http://www.cvm.gov.br/ingl/inter/mercosul/montv-e.asp> (last visited 1 October 2007). In the framework of MERCOSUR, however, the MERCOSUR Defense of Competition Protocol, 17 December 1996, mandates all members to maintain autonomous national competition agencies and establishes a formal mechanism for cooperation among these. See, *Lee & Morand*, 20–21.

[16] See, *e.g.*, MTN.GNS/W/99.

[17] *UNCTAD*, The United Nations Set of Principles and Rules on Competition, TD/RBP/CONF/10/Rev.2, 2000, <http://www.unctad.org/en/docs/tdrbpconf10r2.en.pdf> (last visited 1 October 2007), first version adopted by the United Nations General Assembly as resolution on 5 December 1980, UN General Assembly, Restrictive Business Practices, A/RES/35/63.

[18] *UNCTAD*, above note 17, Section B, para. 1.

[19] See, *e.g.*, *WTO*, Competition Policy, 30, 40–42. For an account of different national competition law regimes see, *Whish*, 57 *et seq.*

It is important to bear in mind that some anti-competitive practices discussed below, such as cartels, are mainly subject to *ex post* review, while others, such as, above all, mergers and acquisitions, are subject to *ex ante* review. The language of Art. IX, *i.e.* "business practices" that "**may** restrain competition",[20] **implies that both types of anti-competitive practices subject to *ex ante* and *ex post* control will be covered by it**, although in the former case the anti-competitive effects may materialize only in the future. *10*

a) Horizontal Agreements

"Horizontal agreements" are referred to as "implicit or explicit arrangements between firms competing with identical or similar products in the same market".[21] They consist of two broad categories. The first encompasses the so-called **"hard core" cartels**, which are considered a grave violation of all competition law regimes and include anti-competitive practices, such as price-fixing, limiting output or dividing markets. Such agreements are normally prohibited *per se* under domestic competition law regimes.[22] Hard core cartels, in particular "export cartels",[23] have been continuously identified as causing significant adverse effects on international trade.[24] *11*

The second class of horizontal agreements are those that, besides their anti-competitive effects, may also incur some **efficiency gains** in the form of improved production or distribution, or the promotion of technical or economic progress. Such agreements may be "exempted" from the *per se* prohibition either on an individual basis, when the positive gains outweigh the negative ones, or through the so-called "block exemptions" contained in some competition law regimes, which provide limited exceptions for certain types of agreements.[25] *12*

Such agreements may include R&D joint ventures and consortia, and co-operative arrangements for product standard setting procedures. With regard to the latter, concern has been raised that certain standard setting *13*

[20] Emphasis added.

[21] *WTO*, Competition Policy, 30, 40.

[22] See, *e.g.*, Art. 81.1 ECT. Under EC law, the provisions of such agreements contrary to Art. 81.1 are considered void. See, Art. 81.2 ECT; ECJ, Case 56/65, *Société Technique Minière v Maschinenbau Ulm*, [1966] E.C.R. 235; ECJ, Case 319/82, *Soc. De Vente de Ciments v. Kerpen & Kerpen*, [1983] E.C.R. 4173.

[23] See, *WTO*, Competition Policy, 30, 63–65.

[24] See, Working Group on the Interaction Between Trade and Competition Policy, Report [2002], WT/WGTCP/6, 9 December 2002, paras 17–22. See also, OECD, Council, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, adopted at its 921st Session on 25 March 1998, C(98)35/FINAL, 13 May 1998, <http://www.oecd.org/dataoecd/39/4/2350130.pdf> (last visited 1 October 2007).

[25] See, *e.g.*, in the EC context, Council Regulation (EC) No 772/2004 of 27 April 2004 on the Application of Art. 81.3 of the Treaty to Categories of Technology Transfer Agreements, OJ 2004 L 123/11.

procedures in the context of tourism services may be competition restraining and trade restrictive under Art. IX.[26]

b) Vertical Agreements

14 Vertical agreements are struck **between undertakings involved in different successive stages of the production, distribution and marketing chain**. They include practices such as exclusive dealing, allocating exclusive territories, making tying arrangements and imposing resale price maintenance. For most vertical restraints, competition concerns can arise if "there is insufficient inter-brand competition, *i.e.* if there is some degree of market power at the level of the supplier or the buyer or at both levels".[27]

15 Since vertical agreements often generate **efficiency gains**, they are not *per se* prohibited and are considered by competition authorities on a case-by-case basis by applying a rule of reason.[28] Vertical agreements, especially exclusive distribution and supply arrangements, are deemed to be one of the barriers for foreign products in obtaining market access. The request for consultations in *Japan—Distribution Services*[29] concerned such restraints, in particular the **vertically integrated distribution** through the operation of the Japanese large-scale retail store laws, which placed various restrictions upon supermarkets and department stores (*e.g.* regarding floor space and business hours). The US claimed that by means of these laws, the Japanese government was attempting to control large stores in the pursuit of the protection of smaller Japanese businesses. Pursuant to the US claims, Japan divested the large stores of their power to deal directly with foreign manufacturers[30] and allowed local authorities to determine whether a new large-scale business would pose a risk to small local businesses and to act accordingly (*e.g.* by recommending that the stores reduce their floor space).[31] The US claimed that this legislation on the whole had an exclusionary effect on foreign distribution services suppliers. The US did not, however, pursue the case against Japan under GATS, but instead followed a GATT non-violation case with particular regard to photographic film and paper,[32]

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[26] See *Font & Bendell*, 19–20.

[27] European Commission, Guidelines on Vertical Restraints, OJ 2000 C 291/1, para. 6.

[28] See, *WTO*, Competition Policy, 30, 41.

[29] Request for Consultations by the United States, *Japan—Distribution Services*, WT/DS45/1; See also, Request for Further Consultations by the United States, *Japan—Distribution Services*, WT/DS45/1/Add.1.

[30] See Panel Report, *Japan—Film*, WT/DS44/R, para. 5.263.

[31] *Ibid.*, para. 5.286.

[32] Panel Report, *Japan—Film*, WT/DS44/R. The Panel found that the US had not demonstrated that the Japanese measures nullified or impaired, either individually or collectively, benefits accruing to the US within the meaning of Art. XXIII:1 lit. b GATT 1994. Neither were the Japanese distribution measures found to accord less favourable treatment to imported photographic film and paper within the meaning of Art. III:4, nor

"even though it would arguably have been easier for it to establish a GATS violation case".[33]

c) Abuse of a Dominant Position

16 Dominant positions[34] are not banned *per se* under most national competition law regimes. However, the **practices of a dominant firm in abusing its position in the relevant market** are held to be against national competition rules. Such practices may include exclusive dealing, tying, refusal to supply (including control over essential facilities), price and non-price predation, price discrimination or excessive pricing.[35] Of particular concern in the WTO context are those abuses which have an **"exclusionary effect or otherwise limit effective competition from foreign firms"**.[36]

17 The finding of an abuse of a dominant position is a complex exercise that normally involves thorough economic analyses to define the relevant product/service market, the geographic market and the competitive constraints upon the undertaking (or undertakings) under scrutiny. The assessment of dominance does not simply follow from the firm's market share or the industry's concentration, but also involves a consideration of barriers to entry, innovation and the emergence of new markets, and demands an examination on a case-by-case basis.

d) Mergers

18 Mergers may be categorized into horizontal,[37] vertical[38] and conglomerate.[39] From the national perspective, competition authorities review merger transactions *ex ante* to examine whether the ability of the new entity to exercise market power would substantially increase and thereby would significantly impede effective competition.[40]

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had Japan failed to publish administrative rulings of general application in violation of Art. X:1 GATT 1994.

[33] *Zdouc*, JIEL 2 (1999), 295, 301.

[34] For the European context, see Art. 82 ECT.

[35] See *WTO*, Competition Policy, 30, 42.

[36] Working Group on the Interaction between Trade and Competition Policy, Submission by the European Community and its Member States, WT/WGTCP/W/45, 24 November 1997, 6.

[37] Horizontal mergers are those between two or more underatkings in the same line of business.

[38] Vertical mergers bring together underatkings that are involved in different stages of production and marketing within an industry.

[39] Conglomerate mergers intergrate undertakings in unrelated lines of business.

[40] See *e.g.*, in the EC context, Council Regulation No 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings, (The EC Merger Regulation), OJ 2004 L 24/1, Art. 2.

3. Some Insights from the Panel Report in *Mexico—Telecoms*

a) *Mexico—Telecoms* on the Meaning of "Anti-Competitive Practices"

19 While the above typology reflects above all the concept of anti-competitiveness in national legal regimes, the Panel Report in *Mexico—Telecoms*,[41] which was the first panel decision regarding GATS issues only, interpreted the meaning of "anti-competitive practices" in the context of the Reference Paper on Basic Telecommunications, which forms part of the commitments made by multiple WTO Members in the realm of basic telecommunications services.[42] Some of the conclusions of this Panel may be of interest in the context of Art. IX, insofar as they reveal the approach of the Panel towards practices that may restrain competition.

20 The Reference Paper aims in particular at preventing anti-competitive practices of major suppliers[43] in basic telecommunications markets. As such anti-competitive practices, it lists (i) cross-subsidization; (ii) the use of information obtained from competitors with anti-competitive results and (iii) not making available to other service suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.[44] It is notable in the context of Art. IX that **the Panel interpreted the concept of "anti-competitive practices" broadly** and considered the above list **not** to be exhaustive.[45]

21 The Panel concluded that, "the term 'anti-competitive practices' is broad in scope, suggesting actions that lessen rivalry or competition in the market".[46] The Panel went on to state that the "first example—on cross-subsidization—indicates that 'anti-competitive practices' may also include **pricing actions** by a major supplier. All three examples show that 'anti-competitive practices' may also include action by a major supplier **without collusion or agreement** with other suppliers. Cross-subsidization, misuse of competitor information, and withholding of relevant technical and commercial information are all practices which a major supplier can, and might nor-

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[41] Panel Report, *Mexico—Telecoms*, WT/DS204/R.

[42] These commitments have been attached to the Fourth Protocol, which forms an integral part of GATS. See, Fourth Protocol to the General Agreement on Trade in Services, S/L/20, 30 April 1996.

[43] For a definition of "major supplier" see *Gao*, Telecommunications Services: Reference Paper, paras 16 *et seq*. For interesting details of the negotiating history of the "major supplier" definition, see *Marsden*, Competition Policy, 229, 230.

[44] Para. 1.2 of the Reference Paper on Basic Telecommunications. On the interpretation of the concept of "anti-competitive practices", see *Mexico—Telecoms*, WT/DS204/R, paras 7.229–7.245.

[45] *Mexico—Telecoms*, WT/DS204/R, para. 7.232.

[46] *Ibid*., para. 7.230.

mally, undertake on its own".[47] It was further established that the concept of "anti-competitive practices" encompasses **horizontal coordination**, *i.e.* between undertakings operating at the same level of production, distribution or sale,[48] as examined in the light of the definition of "major supplier" and para 1.1 of the Reference Paper.[49]

22 It is noteworthy that the *Mexico—Telecoms* Panel based its analysis upon the Members' own competition legislation but **recognized further that, "the meaning of 'anti-competitive practices' is informed by related provisions of some international instruments that address competition policy"**.[50] It referred in particular to the already mentioned international instruments embodied in the Havana Charter, the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices,[51] as well as the OECD Council Recommendation Concerning Effective Action against Hardcore Cartels.[52] The Panel also referred to the work of the WTO Working Group on the Interaction between Trade and Competition Policy. By analogy, one could deem all of these documents in addition to other similar international instruments (especially when both parties to the dispute are members) to be of relevance to Art. IX when interpreting restrictive business practices.[53]

b) *Mexico—Telecoms* on Whether Practices Required Under a Member's Law Can Be Anti-Competitive

23 A final helpful insight from the Panel decision in *Mexico-Telecoms* comes from its finding that **practices required under a Member's law can also be anti-competitive**.[54] Referring to Art. 27 VCLT,[55] the Panel concluded in this regard that, "a requirement imposed by a Member under its internal law on a major supplier cannot unilaterally erode its international commitments made in its schedule to other WTO Members to prevent major suppliers from 'continuing anti-competitive practices'".[56] In light of the above and with respect to Art. IX, it is apparent that **Members cannot justify restrictive business practices of their service suppliers by simply invoking their national laws and regulations**.

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[47] *Ibid.*, para. 7.232 (emphasis in the original).
[48] See above, para. 12.
[49] *Mexico—Telecoms*, WT/DS204/R, paras 7.234–7.238.
[50] *Ibid.*, para. 7.236.
[51] TD/RBP/CONF/10/Rev.2, above, note 17.
[52] See, *WTO*, Competition Policy, 30, 63–65.
[53] It must be noted, however, that the methodology of the Panel has been subject to cricism. See *e.g*, *Marsden*, Competition Law Insight, 3–9.
[54] *Mexico—Telecoms*, WT/DS204/R, paras 7.239–7.245.
[55] Vienna Convention on the Law of Treaties, 23 May 1969, ILM 8 (1969), 679.
[56] *Mexico—Telecoms*, WT/DS204/R, para. 7.244.

24 Finally, while the above typology of restrictive business practices provides a useful overview of the various activities likely to fall within the ambit of Art. IX, it should be borne in mind that **whether** an alleged practice is **restrictive or not is not** in itself **a precondition for** triggering the **consultation** procedures as contained in Art. IX:2. **The request of a Member** to that effect **will suffice.** The **restrictiveness** of the alleged practices will then be **part of the consultation** and information-sharing process**.**

III. Trade Restrictiveness of Business Practices Restraining Competition

25 The restraining of competition and the trade restrictiveness of certain business practices are formulated in Art. IX as **cumulative conditions**. The element of **trade restrictiveness** is likely however to be **interpreted broadly**. The UN Principles and Rules, for instance, speak widely of practices "having or being likely to have adverse effects on international trade".[57] The EC has also applied a broad concept in the context of effect on inter-state trade and defined it as "actual, potential, direct or indirect effect on the pattern of trade between Member States".[58]

26 Domestic competition law regimes normally contain the so-called ***de minimis* rules**,[59] whereby anti-competitive activities of minor importance (due to the small market share of the undertakings involved[60] or the minimal aggregate turnover of the merging undertakings)[61] are not taken into consideration. The trade restrictiveness of such practices may equally be deemed negligible within the context of Art. IX.

C. Disciplines (Art. IX:2)

I. Introduction: Soft Law *Versus* Hard Law Approach

27 Art. IX:2 contains weak disciplines with a mixture of soft law and hard law language. Soft law in this context means disciplines the enforcement

[57] TD/RBP/CONF/10/Rev.2, see above, note 17, Section D, para. 3.

[58] The test was first stated in ECJ, Case 56/65, *Société Technique Minière v. Maschinenbau Ulm*, [1966] E.C.R. 235. See also, European Commission, Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty, OJ 2004 C 101/81.

[59] The *de minimis* doctrine was established by the European Court of Justice in Case 5/69, *Völk v. Vervaecke* [1969] E.C.R. 295. See also, Commission Notice on Agreements of Minor Importance Which Do Not Appreciably Restrict Competition Under Art. 81.1 of the Treaty Establishing the European Community *(de minimis)*, OJ 2001 C 368/13.

[60] See, Commission Notice, above, note 59, paras 7–9.

[61] See, in the EC context, Council Regulation No 139/2004, OJ 2004 L 24/1, Art. 1.

of which cannot be subject to the dispute settlement mechanism.[62] As will be seen below, however, the significance of such a differentiation for Art. IX:2 is minimal, since its hard law provisions do not extend beyond a duty to consult and share information.

II. A Duty to Consult (Art. IX:2, Sentence 1)

28 Pursuant to Art. IX:2, the Member whose service suppliers act in a manner that restricts competition **has the duty to enter into consultations** upon request with a view to eliminating practices referred to in Art. IX:1. This however involves **no duty of the Member to eliminate the restrictive business practices** subject to consultation. The legal obligation is limited to entering into consultations at the request of the other party.

29 Consultation is also the first stage in the WTO dispute settlement procedure, which aims at resolving disputes cooperatively. There are generally two types of provisions regarding consultation in WTO law: (i) those provided in Art. 4 DSU, which, *inter alia*, sets consultation as a prerequisite for the right of Members to request the establishment of a panel; and (ii) consultation provisions in the covered agreements, as defined by note 4 of Art. 4.11 DSU.

30 Art. XXII:I explicitly obliges Members to accord sympathetic consideration to, and adequate opportunity for, consultation regarding such representations as may be made by any other Member with respect to any matter affecting the operation of the GATS Agreement. It adds that the DSU is to apply to such consultations.

31 In this line of reasoning, the **DSU provisions on consultation, particularly the procedural rules stipulated in Art. 4 DSU**, insofar as they are of relevance, would also **apply to Art. IX:2**.

III. Good Faith in Consultations (Art. IX:2, Sentence 2)

32 Art. IX:2 provides further for according **"full and sympathetic consideration to such a request"**. This provision is an expression of the "good faith" principle of public international law,[63] which is key to its proper functioning.[64]

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[62] For instance, most of the WTO provisions on Special and Differential Treatment are soft law provisions. See, *e.g.*, Art. 10.1 SPS.

[63] See, *e.g., Panizzon*.

[64] See, *e.g.*, ICJ, *Nuclear Tests (Australia v. France)*, [1974] ICJ Reports, 253; ICJ, *Nuclear Tests (New Zealand v. France)*, [1974] ICJ Reports, 457.

33 The DSU contains language similar to that of Art. IX: Art. 4.3. DSU provides that, "the Member to which the request is made, [...] shall enter into consultations in good faith [...] with a view to reaching a mutually satisfactory solution". Art. 3.10 DSU provides further that, "if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute".

34 Breaching good faith obligations in the DSU context may have the effect of limiting the Member's right to establish a panel in accordance with Art. 4.3. DSU[65] **With regard to Art. IX**, however, **a breach of a good faith obligation would not have a significant practical effect**, since there are no concrete rights or obligations of Members. One can construe some residual effect of an action contrary to the good faith principle with regard to a Member's obligation to provide information.

IV. Information Provision and Safeguarding Confidentiality (Art. IX:2, Sentences 2–3)

35 In the consultation process, the Member addressed is obliged to co-operate through the supply of information. The obligation to share information can be divided into two categories. The first is the obligation to **provide publicly available non-confidential information of relevance to the matter in question**. Since the provision does not address the issue of who determines which information is relevant to the matter, it would be for the providing Member to decide upon such relevance, doing so in the spirit of cooperation in good faith. The requesting Member may ask for additional documentation, which is to its knowledge in existence, non-confidential and relevant.

36 The second obligation is to **provide confidential information**. The latter is limited however by the relevant domestic rules of the providing Member, as well as conditional upon the conclusion of a satisfactory agreement concerning the safeguarding of confidentiality by the requesting Member. This leaves substantial leeway for the providing Member, which, not being bound by specific procedural rules,[66] may deny or delay indefinitely the flow of information by claiming that there is insufficient safeguard of confidentiality or by requesting specific and/or elaborate preconditions in its domestic regulation.

[65] See Appellate Body Report, *Mexico—Corn Syrup*, WT/DS132/AB/RW, para. 47.
[66] See, Art. 18.2 DSU. See also, Panel Report, *Canada—Aircraft*, WT/DS70/R, Annex 1.

D. Evaluation and Outlook

37 Art. IX is a soft consultation norm, which translates into GATS and thus makes applicable to services, the 1960 GATT Contracting Parties Decision on Restrictive Business Practices. Despite its minimal obligations, it still provides a valuable forum for addressing contentious issues with regard to restrictive business practices and enhances co-operation.

38 It does not, however, provide a satisfactory solution to the various problems relating to restrictive business practices in services markets and Members are likely to search for other more effective possibilities going beyond Art. IX and to develop alternative disciplines similar to the Annex on Telecommunications or the Reference Paper on Basic Telecommunications[67] (in particular, considering the aborted WTO efforts in the field of competition policy).[68]

39 Further clarification on restrictive business practices, and specifically on Art. IX, may stem from efforts in the framework of the **Work Programme on Electronic Commerce**,[69] which aims to examine "all trade-related issues relating to global electronic commerce"[70] and has defined a related mandate for the Council for Trade in Services.[71]

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[67] An approach suggested by *Mattoo* with regard to Art. VIII. See, *Mattoo*, in: *Cottier & Mavroidis* (eds), 37, 55–58.

[68] General Council, Doha Work Programme, Decision Adopted by the General Council on 1 August 2004, WT/L/579, 2 August 2004, para. g.

[69] General Council, Work Programme on Electronic Commerce, Adopted by the General Council on 25 September 1998, WT/L/274, 30 September 1998.

[70] *Ibid.*, para. 1.1.

[71] *Ibid.*, para. 2.1. See more generally, Council for Trade in Services, Work Programme on Electronic Commerce, Interim Report to the General Council, S/C/8, 31 March 1999, 9.

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Article X GATS
Emergency Safeguard Measures

1. There shall be multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination. The results of such negotiations shall enter into effect on a date not later than three years from the date of entry into force of the WTO Agreement.
2. In the period before the entry into effect of the results of the negotiations referred to in paragraph 1, any Member may, notwithstanding the provisions of paragraph 1 of Article XXI, notify the Council on Trade in Services of its intention to modify or withdraw a specific commitment after a period of one year from the date on which the commitment enters into force; provided that the Member shows cause to the Council that the modification or withdrawal cannot await the lapse of the three-year period provided for in paragraph 1 of Article XXI.
3. The provisions of paragraph 2 shall cease to apply three years after the date of entry into force of the WTO Agreement.

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Art. 801 to 805 NAFTA.

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A. General

The reference to emergency safeguard measures was included in the GATS as part of the overall compromise designed to allow the developing countries to overcome their initial hostility to the inclusion of services in the agenda of the multilateral trade negotiations.[1] **"Emergency safeguard measure"** can be defined as covering "actions taken by a Member on the supply or consumption of a service of another Member with a view to temporarily withdrawing or modifying its GATS specific commitments in order to temporarily safeguard its domestic industry against serious injury or threat thereof".[2] The idea of an **emergency safeguard mechanism (ESM) for services** is taken from the existing Agreement on Safeguards in the General Agreement on Tariffs and Trade which sets out the rules for the application of safeguard measures pursuant to Art. XIX GATT 1994. As in the GATT, the principal function of an emergency safeguard mechanism in GATS would be that of "safety valve" which allows governments temporarily to protect their domestic service industry if they are unable to cope with intensified international competition resulting from trade liberalization measures. The extraordinary complexity and diversity of services trade have raised the question, however, whether the crafting of uniform rules on emergency safeguards applicable to all service sectors and to all modes of supply is feasible and desirable.[3] Notwithstanding the existence of a precedent in the goods area, the question of feasibility and desirability of an ESM remained unresolved at the time of the conclusion of the GATS negotiations and was left for future negotiations. The mandate for these negotiations has been included in Art. X, together with provisions on the entry into force of the result of such negotiations and the safeguard measures that shall be available to Members during the interim period. *1*

B. Structure

Art. X:1 stipulates that **negotiations** on the question of emergency safeguard measures shall be held and that they are to be conducted on the basis of the principle of non-discrimination. This wording makes clear that only safeguard mechanisms of general application may be considered and excludes mechanisms which would allow for the selective restriction of service *2*

[1] *Kulkarni*, in: *Chimni et al.*, 249.

[2] See Working Party on GATS Rules, Communication from ASEAN, Concept Paper: Elements of a Possible Agreed Draft of Rules on Emergency Safeguard Measures for Trade in Services (GATS Article X), S/WPGR/W/30, 14 March 2000, para. 3.

[3] See on the difficulties in creating a uniform set of rules applicable to all modes of supply: Working Party on GATS Rules, Communication from the European Communities and Their Member States, S/WPGR/W/38, 21 January 2002.

imports only from particular Members, like the provisional safeguard measures provided for by Art. 6 of the Agreement on Textiles and Clothing (ATC).[4] The negotiations shall be concluded and the result of the negotiations enter into effect not later than three years from the date of entry into force of the WTO Agreement, *i.e.* on 1 January 1998. Since no conclusion has been reached, the deadline has been repeatedly extended. ESM negotiations are part of the negotiations on rules under the GATS, together with the rules on Domestic Regulation (Art. VI), Government Procurement (Art. XIII) and Subsidies (Art. XV). Unlike the negotiations on market access in services, which, following the Hong Kong Ministerial Declaration, are conducted in the plurilateral 'request-offer' mode, the negotiations on the ESM rules are undertaken multilaterally. Their final outcome will take the form of a text for adoption and become part of the GATS Agreement.[5]

3 **Art. X:2** grants the Members permission to modify or withdraw specific scheduled commitments without having to wait for the end of the three-year period fixed in Art. XXI:1, as a form of **substitute safeguard measure** while the ESM is still being negotiated. According to **Art. X:3**, this instrument shall become unavailable three years after the entry into force of the WTO Agreement, *i.e.* with the entry into force of the results of the negotiations undertaken under Art. X:1. Since these negotiations have not yet yielded any results, the deadline fixed by Art. X:3 also had to be repeatedly extended.[6]

C. Scope of the Negotiating Mandate (Art. X:1)

4 The scope of the mandate defined in Art. X:1 has been controversial right from the start. Some Members have pointed to the negotiating history of Art. X[7] and the fact that its wording refers not just to negotiations on emergency safeguard measures but to negotiations "on the question of emergency safeguard measures", indicating that in the minds of the provision's drafters the outcome of those negotiations was not a foregone conclusion and that the Members are under **no obligation to reach consensus** on the introduction of an ESM for GATS.[8] By contrast, others have focused on Art. X:1, sentence 2 which refers to the entry into effect of the results of

[4] *Lee*, 63.
[5] *Kulkarni*, in: *Chimni et al.*, 249, 250.
[6] See below, para. 20.
[7] See Working Party on GATS, Emergency Safeguard Measures under Article X of GATS, Note by the Secretariat, S/WPGR/W/1, 6 July 1995, para.1 ("the negotiating history [...] implies that prior to elaborating specific provisions, Members may wish to consider the broader question whether or not it would be desirable to develop an emergency safeguard instrument in the field of trade in services").
[8] *Lee*, 135.

such negotiations, arguing that the only negotiating results that can enter into force are precisely those which relate to introduction of an ESM.[9] A negative decision on the adoption of an ESM for GATS could not "enter into effect" since it did not modify the existing legal situation. Nor was a positive decision needed in order to terminate the interim faculties of Members with regard to the withdrawal of specific commitments under Art. X:2 since they would automatically lapse if the deadlines in Arts X:1 and X:3 were no longer extended. While this argument is not without merits it overlooks the fact that Art. X:1, sentence 2 does **not** say that such results will indeed be reached or should be reached at the end of the negotiating process. Instead it limits itself to establishing a timetable for the entry into force of such results **if** an agreement on the introduction of a safeguard mechanism should indeed emerge from the negotiations. The negotiations mandated by Art. X:1 are therefore not restricted to the definition of the modalities of a future ESM but may also address the preliminary issue whether such a mechanism is really necessary and feasible in a GATS context.

5 The initial date for the conclusion of the ESM negotiations was 1 January 1998.[10] However, since no progress has been made in the negotiations, the **deadline** has been extended on several occasions. The Fifth Decision on Negotiations on Emergency Safeguard Measures adopted by the Council for Trade in Services on 15 March 2004 states that the results of the ESM negotiations are to enter into effect not later than the results of the current round of services negotiations become effective.[11]

D. Unresolved Issues

6 Despite many years of negotiations on an ESM for services, no consensus between Members on the **desirability** and **feasibility** of such a mechanism has yet emerged. Developing countries in particular argue that ESM is a necessary mechanism which enables them to deal effectively with unforeseen economic and social consequences of services liberalization. Since developing countries often lack adequate regulatory capacities it is particularly difficult for them to predict the impact specific liberalization measures are going to have on their nascent service industries. The existence of a safeguard mechanism which offers temporary protection to a domestic

[9] *Marconini*, Emergency Safeguard Measures in the GATS: Beyond Feasible and Desirable, UNCTAD/DITC/TNCD/2005/4, 9 March 2005, http://www.uneca.org/ATPC/documents/June/GATS%201.pdf (last visited 1 October 2007), 4.

[10] See above, para. 2.

[11] Council for Trade in Services, Fourth Decision on Negotiations on Emergency Safeguard Measures, Adopted by the Council for Trade in Services on 15 March 2002, S/L/102, 27 March 2002, para. 2.

industry seriously injured by liberalization measures would help to reduce the risks of market liberalization for developing countries, and thus in effect strengthen their commitment to further open their markets.[12]

7 The opponents of a safeguard mechanism for services object to these arguments that the existing structure of the GATS already provides for the necessary flexibility. Members are obliged to permit market access only to the extent of their specific commitments in their Schedules, and may exclude certain sectors and modes of supply from their commitments. The GATS framework thus provides the regulatory space for Members to study the regulatory structure needed for each sector in detail and to determine the limitations on the liberalization measures they intend to undertake prior to any scheduling of commitments. In this situation, the existence of an ESM may undercut the willingness of Members to conduct serious sectoral assessments before they commit themselves to specific liberalization measures and to make full use of the **flexibility available under the existing multilateral framework**.[13] In addition, Art. XXI allows Members to re-negotiate scheduled commitments and to go back on commitments which have proved detrimental to the development of their service industries. Thus the built-in flexibility of the GATS provides the Members with sufficient discretion to define their commitments *ex ante* with regard to their specific needs and enables them to modify commitments which have produced unforeseen negative consequences *ex post*. The need for the introduction of an emergency safeguard instrument in the trade of services is therefore less than evident.[14]

8 However, it is doubtful whether these arguments fully take into account the special difficulties developing countries may face in the context of a multilateral framework on trading in services. Unlike developed countries, they often do not have the necessary capacity to gauge the impact of their scheduling commitments correctly. For structural reasons they are less well placed to make full use of the flexibilities provided by GATS than most industrialized countries. They are therefore likely to be conservative when scheduling specific commitments in order to preserve their ability to respond to emergencies, thus making progress in the liberalization of trade in services more difficult to achieve. The mechanism provided for in Art. XXI does not allow for a **timely response** to market disruptions. Three years must pass before a scheduled commitment may be modified or withdrawn.

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[12] See S/WPGR/W/1, para. 8, which argues precisely that "the security of knowing that appropriate safeguards were available against unforeseen developments might induce higher levels of commitment than Members would otherwise be willing to assume".

[13] *Kulkarni*, in: *Chimni et al.*, 249, 257.

[14] See Working Party on GATS Rules, Communication from the European Communities and Their Member States, Scope for Emergency Safeguard Measures (ESM) in the GATS, S/WPGR/W/41, 3 March 2003, para. 4.

In addition, Art. XXI requires Members who wish to modify or withdraw commitments to hold consultations with Members potentially affected by those measures in order to reach agreement on the compensation which the latter may obtain for the cancellation of their benefits. The modification of commitments under Art. XXI thus does not allow for a timely response in emergency situations. Besides, the use of modifications for the purpose of dealing with emergencies which are often of a temporary nature would introduce an element of instability in the level of commitments which runs contrary to the whole gist of the multilateral trade framework.[15]

9 While the question of desirability of an ESM for services remains as yet unsettled, serious difficulties also continue to exist with regard to the definition of the situations in which the application of such measures may be justified and the form any remedial action may take. While most proponents of an ESM argue that the concept and the general conditions for the application of a safeguard measure should be modelled on the **safeguard mechanism for goods** as defined in the Safeguards Agreement, there is also widespread consensus that its main elements have to be adapted to the particularities of trade in services. The main **conditions** for the application of a safeguard measure in the area of goods are an increase in imports, the occurrence or the threat of serious injury to the domestic industry that produces like or directly competitive products, and a causal link between the increase in imports and the injury.[16] While the concept of import is clearly defined in trade in goods where the importation necessarily involves the crossing of borders by physical objects, the intangible nature of services makes its application more difficult.[17] The concept would thus have to be redefined for the purpose of the ESM, in particular with regard to the four different modes of service supply recognized by GATS. It is especially difficult to apply this GATT concept in the context of mode 3, *i.e.* in the case of service supply through commercial presence in the territory of another Member, since here the protection of acquired rights of locally established foreign providers would also have to be addressed.[18] It would seem unfair to subject service suppliers that have taken the risk of establishing their commercial presence in a foreign market to the contingencies of a safeguard mechanism the application of which will most likely reduce their expected returns of investments or even force them out of the market, all the more since in the goods area safeguards are not applied to products of locally established foreign firms.[19]

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[15] *Lee*, 136.
[16] See Art. II:1 Safeguards Agreement.
[17] *Lee*, 140.
[18] *Marconini*, above note 9, 12.
[19] *Lee*, 140.

10 The concept of "increase" in imports would also have to be redefined since no agreed standards exist for measuring the quantity of services rendered.[20] Similar considerations apply to the **concept of "like services"** since no universally accepted categorization of services exists. The intangible nature of services makes the physical variables used to identify like products in the trade of goods inapplicable. They would have to be replaced by criteria like modes of supply, end use by consumers and the substitutability between imported and domestic services in order to retain the essence of the concept of like services for defining the scope of application of the ESM.[21]

11 Even less than in the goods area is the issue of a **causal link** between the increase in imports and the injury to the domestic industry in the area of services a straightforward one. Since the decline of the competitive position of specific domestic industries in practice can rarely be attributed to the increase in imports alone, an ESM in services must require a Member willing to apply the ESM to conduct a comprehensive investigation into the possible causes of the injury and to present convincing evidence why, if other factors do indeed contribute to the deteriorating competitiveness of the domestic service providers, the increase in imports has to be considered as a major cause of the injury.[22]

12 With regard to the **measures** which may become **applicable** if the conditions for an emergency described above are met, there seems to be considerable agreement that they should not go beyond what is **strictly necessary** to remedy the injury. Among several measures which constitute an equally effective remedy for the elimination of the injury, the least-trade-restrictive measure would have to be chosen.[23] This includes measures which fall well short of the suspension or withdrawal of a commitment.[24] There is strong support, too, for the adoption of the **proportionality** test as applied by the Appellate Body in the goods area, according to which the extent of remedial action should not exceed the amount of injury caused by increased imports.[25] Since the ESM is designed to deal with emergencies, *i.e.* with situations that are **temporary** in nature, there should also be strict limitations on the duration of safeguard measures and the possibilities of renewal.[26]

13 By contrast, the question whether the application of a safeguard measure should entail **compensation** by the Member applying the measure to

[20] *Lee*, 141.
[21] *Marconini*, above note 9, 12.
[22] *Lee*, 143; *Marconini*, above note 9, 16.
[23] *Lee*, 143; *Marconini*, above note 9, 1, 17.
[24] See *Lee*, 143–144.
[25] See Appellate Body Report, *US—Line Pipe*, WT/202/AB/R, paras 241 *et seq*.
[26] *Marconini*, above note 9, 17.

those Members negatively affected by it is much more controversial. Its proponents point out that the inclusion of an obligation to compensate would make sure that the application of the ESM is restricted to really unavoidable cases and one of the main principles of the multilateral trading system, *i.e.* the maintenance of a substantially equivalent level of concessions and other obligations of its Members, is preserved.[27] Others object, however, that the practical difficulties in implementing the compensation principle in the field of services would be enormous. The data basis in the field of services is notoriously incomplete and unreliable, and the barriers for import of services are extremely hard to quantify. The determination of substantially equivalent levels of concession could thus give rise to interminable negotiation, making the application of the safeguard mechanism in practice exceedingly difficult.[28]

14 Finally, the need for **special and differential treatment of developing country Members** with regard to the application of the ESM is widely recognized. This treatment could take the form of the adoption of the de minimis provisions in the Safeguards Agreement, *i.e.* the non-application of emergency safeguard measures against imports originating in developing countries whose total exports do not exceed a certain minimum level.[29] There is also widespread agreement that developing countries should have longer periods for the application of their own safeguard measures and extended possibilities for renewal.[30]

E. Current Status of Negotiations

15 Since the start of the negotiations on ESM in 1994, several proposals have been tabled by the WTO Member countries. The developed countries, namely the European Communities and the US, have suggested abandoning altogether the concept of ESM in services. They have argued, among other things, that concrete examples of potential circumstances in which an ESM may be required have yet to be provided,[31] that the existing structure of the GATS allowed for the inclusion of safeguard-type provisions for specific sectors in a Member's Schedule of specific commitments and thus provided the Members with the necessary flexibility to deal effectively with

[27] *Lee*, 145; *Marconini*, above note 9, 18.
[28] *Marconini*, above note 9, 1, 19.
[29] *Lee*, 1, 146; Art. IX:1 Safeguards Agreement restricts the application of safeguard measures to those developing countries whose exports to the Member country applying the measure account for more than 3 % of the total imports of the good concerned.
[30] *Marconini*, above note 9, 17.
[31] S/WPGR/W/41, para. 4.

emergencies,[32] that Arts XII, XIV and XIV*bis* adequately covered emergency situations and provided for a procedure to modify and to withdraw commitments in Art. XXI,[33] and that there was no conceptual clarity on how the ESMs could be designed and made to work, especially with regard to their modal application.[34]

16 Developing countries, on the other hand, have generally (but not uniformly)[35] taken a more favourable view of ESM. The ASEAN countries in particular have tabled a number of proposals which outline the scope of application of a future ESM in services.[36] In March 2007, the **ASEAN** group (without Singapore) presented, in a so-called room document, a complete draft for the formulation of an **Annex on Art. X**. The draft provides that a member may apply emergency safeguard measures in a service or sub-service sector where commitments have been made if that Member determines that domestic service suppliers experience market conditions that result or are likely to result in serious injury to these suppliers or seriously threaten the viability of a domestic industry.[37] The draft then lists a number of factors the investigating authority of the Member wishing to apply a safeguard measure may use in order to establish evidence of injury or likely injury. These include substantial increase in imports, decreasing employment, sharp reduction in the number of domestic suppliers, abrupt or persistent loss of market share, price suppression associated with market saturation, consistent negative net income of domestic industry, serious decline in profits, return on investments or cash flow, reduced sales, reduced ability to raise capital or investment and reduced level of capital and capacity utilization. No single or several of these factors combined are to be considered as providing decisive guidance on the issue of injury.[38] The Member applying for the ESM is thus left with considerable latitude in the interpretation and application of these factors. Before a safeguard measure may be imposed, the Member is obliged to conduct an investigation which gives all interested parties the opportunity to present their views in public hearings or any other adequate manner and also allows for consultations with Members affected by the envisaged measures.[39] If at the end of the investigation the existence

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[32] Working Party on GATS Rules, Communication from the United States, Emergency Safeguards, S/WPGR/W/17, 13 March 1997, paras 4–5.

[33] S/WPGR/W/41, paras 2–3.

[34] *Ibid.*, paras 6, 7.

[35] India seems in the meantime to have dropped its earlier support for an ESM in services, see, *Kulkarni*, in: *Chimni et al.*, 249, 259.

[36] S/WPGR/W/30, para. 30.

[37] Communication from Brunei Darussalam, Cambodia, Indonesia, Malaysia, Myanmar, the Philippines, Thailand, Annex on Article X Emergency Safeguard Measures, Room Document, 6 March 2007, <http://www.tradeobservatory.org/library.cfm?refID=97723>, para. 2.

[38] *Ibid.*, para. 3.

[39] *Ibid.*, paras 5 and 10.

of an injury or threat of injury resulting from liberalizing commitments is established, the measure taken by the invoking Member to remedy the situation is to be non-discriminatory, reasonable and necessary and shall take into account the public interest. It is to give support to domestic suppliers through differential positive measures and only "as a last resort" to include the suspension of commitments. Acquired economic rights which have been exercised have to be observed, while rights which have already been granted but not yet exercised may be deferred until the termination of the safeguard.[40] The time limit for the safeguard is three years; a safeguard shall not be applied in the same sector or sub-sector for two years following the termination of a previous safeguard.[41] The draft does not provide for the granting of compensation to Members negatively affected by the measure; these Members are instead given the right to suspend substantially equivalent levels of specific commitments in response to the safeguard measure.[42] Safeguard measures against developing countries whose service exports to the Member do not exceed a certain minimum percentage of total supply of services in the relevant sector or sub-sector invoking the ESM are to be prohibited. On the other hand the time limit for the application of safeguard measures is extended to a maximum of five years for developing countries and to six years in the case of least developed countries.[43]

17 Whether the ASEAN proposal constitutes substantial progress in the search of consensus on ESM in services remains to be seen. The definition of the situations in which safeguard measures may be applied is rather broad and thus lends itself to abuse. The draft allows the Member applying for a safeguard measure considerable leeway in the selection of factors which it wants to take into account in the interpretation of the available statistical material. Nor does the draft attempt to clarify the complex concepts of "imported services" and "like services". With regard to the first issue, an understanding attached to the draft explicitly states that **domestic industry** is not a fixed concept and may include national suppliers and/or foreign established suppliers. Particularly with regard to mode 3 supply, Members are free to define the concept of domestic industry through reference to a specific level of foreign interest in the service supplier, to its physical presence or domicile in their territory or to its registration under its national laws. Equally restrictive is the approach to the protection of acquired rights which is limited to those rights which are already effectively being exercised. By contrast, the provisions on the investigation which has to be carried out before any safeguard measure may be imposed, the proportionality of the

[40] *Ibid.*, para. 4 lit. (i) to (iv).
[41] *Ibid.*, para. 4 lit. (v) to (viii).
[42] *Ibid.*, para. 11.
[43] *Ibid.*, paras 12–14.

measure to the injury it intends to remedy and the strict temporal limits for the application constitute a valuable basis for further negotiations; the same is true for the sensible proposals granting the developing and least-developed countries special and differential treatment in the application of ESM.

F. Safeguard Action During the Interim Period (Art. X:2 and 3)

18 In the interim period, *i.e.* until the results of the negotiations on ESM mandated by Art. X:1 enter into force, Members may modify or withdraw a specific commitment after a period of one year from the date of entry into force of the commitments (Art. X:2). The provision thus reduces the period which would normally be applicable to the modification or withdrawal of commitments under Art. XXI:1 from three years to one, in order to allow for a **timely response** to emergency situations. The Member applying for the application of this provision has to demonstrate ("show cause") the particular urgency of the withdrawal or modification by providing evidence that it cannot await the lapse of the normal three-year period without serious harm being done to its domestic service industry. By contrast, the Member is not required to show that the measure meets the proportionality requirements applied to safeguard measures in the area of goods.

19 The Member must **notify** the decision to initiate a modification or withdrawal procedure under Art. X:2 to the Council for Trade in Services. The notification must specify the decision to modify or to withdraw, indicate the specific commitment(s) affected and induce evidence for the particular urgency of the situation. It must take place sufficiently in advance in order to give the Council the opportunity to check whether the Member has shown sufficient cause for an early withdrawal or modification.

20 Art. X:3 limits the use of the extended faculties to modify or withdraw commitments to the interim period until the entry into force of the results of the negotiations on ESM for GATS. Since the deadline for the entry into force of those results was repeatedly extended,[44] the **expiry of the interim provisions of Art. X:2** also had to be postponed. According to the Fifth Decision of the Council on Negotiations on ESMs, they will now cease to apply on the entry into force of the results of the current round of service negotiations.[45] As of today (June 2007), the interim provisions have never been applied.

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[44] See above, para. 5.

[45] Council for Trade in Services, Fifth Decision on Negotiations on Emergency Safeguard Measures, Adopted by the Council for Trade in Services on 15 March 2004, S/L/159, 17 March 2004, para 3.

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Article XI GATS
Payments and Transfers

1. Except under the circumstances envisaged in Article XII, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.
2. Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article XII or at the request of the Fund.

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Cross References

Art. 56 ECT; Art. 2104 NAFTA.

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A. General

I. Overview

1 Art. XI (in conjunction with Art. XII) **liberalizes international transfers and payments** in connection with services that are provided pursuant to a specific commitment made under the GATS. Art. XI, as a general rule, prohibits any restrictions on international transfers and payments,[1] but permits exceptions in five sets of circumstances.[2]

2 The goal of the GATS, multilateral liberalization of trade in services, can only be achieved if the corresponding international transfers and payments are permitted.[3] Yet, international transfers and payments are also governed by the **Articles of Agreement of the International Monetary Fund** (the "IMF Agreement" and the International Monetary Fund, the "IMF").[4] Art. XI attempts to (1.) liberalize international transfers and payments while at the same time (2.) recognizing the IMF's role in creating a stable international financial system by providing for a conflict of laws rule between the GATS and the IMF Agreement.[5]

3 Since the wording of Art. XI is rather complex, trying to accommodate several interests that may, at least partially, diverge,[6] **the following reading is recommended** for the discussion below: "A Member shall not apply restrictions on international transfers and payments for (current as well as capital) transactions relating to its specific commitments unless (i) restrictions are applied to safeguard the balance of payments in accordance with Art. XII GATS, (ii) in case a general exception applies in accordance with Art. XIV and XIV*bis* GATS, (iii) in case an exception applies in accordance with para. 2 lit. a of the Annex on Financial Services, (iv) in the case of current transactions, if consistent with the rights and obligations of the members of the IMF under the IMF Agreement, or (v), in the case of capital transactions, at the request of the IMF".

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[1] See below, paras 11 *et seq*.
[2] See below, paras 23 *et seq*.
[3] See *Lehmann et al*., 3.
[4] Articles of Agreement of the International Monetary Fund, adopted at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, 22 July 1944, UNTS 2 (1945), 39, as amended through June 28, 1990, <http://www.imf.org/external/pubs/ft/aa/index.htm> (last visited 1 October 2007).
[5] See *Zapatero*, Penn St. Int'l L. Rev. 24 (2006), 595, 600; see *Footer*, Int'l Law. 27 (1993), 343, 356; see *Siegel*, AJIL 96 (2002), 561, 561 *et seq*.; see also *Williams*, Fordham L. Rev. 70 (2001), 561–621 for a critical view on the benefits of liberalizing international payments and transfers.
[6] *Footer & George* in: *Macrory et al*. (eds.), 799, 842.

II. Historical Development

From the outset of the Uruguay Round negotiations on trade in services, it was widely accepted that the GATS should contain a provision liberalizing international transfers and payments while reserving certain measures to safeguard the balance of payments.[7] During the Uruguay Round negotiations, the **IMF** issued a **communication** highlighting the overlap of jurisdiction between GATS and the IMF Agreement to explain the IMF's role to the negotiators and proposing to include in the GATS a conflict of laws rule preserving the IMF's jurisdiction over questions relating to the international monetary system.[8] *4*

The **Chairman's July 1990 Draft** contained a clause regarding international transfers and payments, however, not until the **Chairman's December 1990 Draft** the IMF Agreement expressly did take precedence. The draft was a compromise (notably the OECD countries had proposed including in the GATS liberalization obligations beyond those of the IMF Agreement) that furthered international economic coherence by on the one hand respecting the responsibility of the IMF for achieving global financial stability and on the other hand realizing multilateral services trade liberalization under the GATS.[9] The **December 1991 Dunkel Draft** represented the final form of the Article, adding the proviso regarding capital transactions and Art. XVI, footnote 8.[10] *5*

During the negotiations, there was only informal contact and little interaction with the IMF. Only at the very end of the negotiations did the Ministers issue the **Declaration on the Relationship of the WTO with the IMF**[11] and the **Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policymaking**,[12] which promote a policy of "consistent and mutually supportive interlinkages" between the two organizations.[13] *6*

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[7] See *Reyna*, in: *Stewart* (ed.), Vol. II, 2335, 2381, 2384.

[8] See Group of Negotiations on Services, Uruguay Round, Communication from the International Monetary Fund, The Role of the Fund in the Area of Services Under its Articles of Agreement, MTN.GNS/W/91, 10 January 1990.

[9] See *Footer*, Int'l Law. 27 (1993), 343, 356; see *Zapatero*, Penn St. Int'l L. Rev. 24 (2006), 595, 600.

[10] See below, para. 18.

[11] Declaration on the Relationship of the World Trade Organization with the International Monetary Fund, 15 April 1994, ILM 33 (1994), 1252.

[12] Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking Adopted by the Trade Negotiations Committee on 15 December 1993, ILM 33 (1994), 1249.

[13] *Ibid.*, para. 5; see *Siegel*, AJIL 96 (2002), 561, 565, 567 *et seq.* and 584 *et seq.*

III. Related Provisions

7 Art. XI is closely related to a number of other provisions in the WTO agreements:

8 The **Marrakesh Agreement Establishing the WTO** provides in its **Art. III:5** for the cooperation of the WTO with the IMF to achieve greater global economic coherence.[14] This basic principle is the basis for the rule in Art. XI and its interpretation. Also, on 9 December 1996 both organizations entered into the **Agreement between the IMF and the WTO** regarding cooperation governing, for instance, the exchange of documents and the attendance at meetings.[15]

9 The **GATT** embodies in its **Arts. XII, XV and XVIII**, the **Understanding on the Balance-of-Payments Provisions of the GATT 1994**[16] and the **Declaration on the Relationship of the WTO with the IMF** a set of rules comparable to Arts XI and XII governing international transfers and payments in connection with trade in goods.[17] Accordingly, the jurisprudence and doctrine developed under Arts XII, XV and XVIII GATT 1994 apply *mutatis mutandis* to Arts XI and XII.

10 The **GATS** itself contains a number of other provisions relating to international transfers and payments. **Art. XII** (allowing certain restrictions to safeguard the balance of payments) is directly related to Art. XI specifying one set of exceptions to the general liberalization rule of Art. XI. **Art. XVI:1, footnote 8** (dealing with the general principles of market access) reiterates for capital transfers the general principle of Art. XI and provides an additional interpretative guideline as discussed below.[18] The **Annex on Financial Services**, finally, includes in its **para. 2 lit. a** a clause permitting measures for prudential reasons, thereby providing for an example of an exception to Art. XI.

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[14] See *Zapatero*, Penn St. Int'l L. Rev. 24 (2006), 595 *et seq*.

[15] See Agreements Between the WTO and the IMF and the World Bank, Decision Adopted by the General Council at its Meeting on 7, 8 and 13 November 1996, WT/L/194, 18 November 1996; see also *Siegel*, AJIL 96 (2002), 561, 568.

[16] Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994, ILM 33 (1994), 1158.

[17] See Working Group on the Relationship Between Trade and Investment, Exceptions and Balance-of-Payments Safeguards, Note by the Secretariat, WT/WGTI/W/137, 26 August, para. 35; *Siegel*, AJIL 96 (2002), 561, 568 *et seq*.

[18] Para. 18; see *Footer*, Int'l Law. 27 (1993), 343, 356.

B. No Restrictions on International Transfers and Payments

11 As a basic rule, Art. XI prohibits any restrictions on international transfers and payments for transactions relating to specific commitments. It covers current transactions[19] as well as capital transactions.[20]

12 In what follows, (1.) the definition of and the distinction between current and capital transactions (see I.), (2.) international transfers and payments (see II.), (3.) their relation to a specific commitment (see III.) and (4.) possible restrictions (see IV.) will be discussed in detail.

I. Current and Capital Transactions

13 The GATS as well as the IMF Agreement distinguish between current and capital transactions. The **IMF Agreement** defines current transactions in its Art. XXX lit. d as any payments that are not for the purpose of transferring capital.[21] This negative definition is followed by a non-exhaustive list of transactions to be considered current, including payments made in connection with the supply of a service. The IMF Agreement acknowledges that the distinction may not always be clear and, therefore, provides for the IMF to determine the nature of a specific transaction in case of doubt. Capital transactions are not further defined in the IMF Agreement.

14 The **GATS**, in contrast, while using both terms does not contain a definition. Yet, as construed here,[22] for the purposes of Art. XI no definition other than that in the IMF Agreement will be required since, as a general rule under the GATS, neither kind of transactions may be restricted under the GATS. Only if applying the clause regarding the precedence of the IMF Agreement does the distinction become relevant. In this case, however, the IMF Agreement's definition must apply to actually be able to take precedence.[23] Other than under the GATS, for IMF purposes[24] a distinction is required, since restrictions on capital transactions, as a general rule, are permitted by the IMF Agreement while restrictions on current transactions are not.

II. International Transfers and Payments

15 International transfers and payments comprise all kinds of transactions for currency. Art. XI deals only with international transfers and payments;

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[19] See Art. XI:1.
[20] See the proviso Art. XI:2.
[21] See MTN.GNS/W/91, para. 8 *et seq*.
[22] See above, para 3.
[23] See MTN.GNS/W/91, para. 21; see *Siegel*, AJIL 96 (2002), 561, 598–599; see also *UNCTAD*, 12.
[24] As discussed below, paras 29 *et seq*. and 33 *et seq*.

accordingly only cross-border transactions between residents and non-residents will benefit from the liberalization.[25] Unlike Art. VIII of the IMF Agreement, which addresses outward transfers and payments only, Art. XI does not distinguish between outward and inward transfers and payments and, consequently, applies to both as long as they relate to a specific commitment.[26]

III. Relation to a Specific Commitment

16 The provision of Art. XI exclusively applies to international transfers and payments that are related to a service provided pursuant to a specific commitment of a Member and, thus, Members' obligations under Art. XI are conditional obligations. Liberalization of international transfers and payments is not an independent goal of the GATS, but only an ancillary means to liberalize trade in those services for which specific commitments have been made.[27] There must be a direct relationship between the service and the international transfer and payment in question.

17 Regarding **current transactions**, the GATS fails to provide for any guidelines on how close the relationship between the transfer and the service must be. Based on the wording of Art. XI:1, the nature of Art. XI as a general obligation and the GATS' object and purpose of achieving progressively higher levels of liberalization of trade in services,[28] one can conclude that the GATS intends to liberalize any and all international transfers and payments that are directly related to a service covered by a specific commitment.[29]

18 Regarding **capital transactions**, Art. XVI:1, footnote 8 contains an interpretation of how close the relationship between international transfers and payments and a service that is provided pursuant to a specific commitment must be. For services in **mode 1** (cross-border supply, Art. I:2 lit. a) the capital transaction must be an essential part of the service. For instance, for a cross-border bank loan it is essential that the lender may transfer the loan amount (that is the capital) to the borrower. In contrast, for services in **mode 3** (commercial presence, Art. I:2 lit. c), it suffices for the capital transfer to be related to the service. This distinction is consistent with the purpose of the GATS: a commercial presence will often entail incidental capital transfers (for instance, for the establishment of the presence or the repatriation of gains) even if the service to be provided does not itself

[25] See *UNCTAD*, 12 *et seq.*; see *Siegel*, AJIL 96 (2002), 561, 586.
[26] See *UNCTAD*, 25; see *Siegel*, AJIL 96 (2002), 561, 590.
[27] See *Williams*, Fordham L. Rev. 70 (2001), 561, 613.
[28] Rec. 3 of the Preamble to the GATS.
[29] See *Footer & George*, in: *Macrory et al.* (eds), 799, 842.

involve a capital transfer. For a cross-border supply, on the other hand, no such incidental transfers are necessary, which justifies limiting the permitted capital transfers in mode 1 to those essential to the service. It seems that **mode 2** (consumption abroad) and **mode 4** (presence of natural persons) have not been addressed in footnote 8 because, typically, neither the services in mode 2 nor those in mode 4 involve a cross-border capital transaction (of course, remittances of mode 4 persons are permitted since they qualify as current transactions).[30] To the extent that mode 2 or mode 4 services nevertheless would involve capital transactions, any restrictions on capital transfers that are necessary for such service would be prohibited applying the rules of footnote 8 by analogy (since, otherwise, the commitment in question would be without value).

IV. Restrictions

19 Art. XI, in principle, prohibits any restriction that could impede international transfers and payments in connection with a specific commitment.[31] Considering the general purpose of the GATS (that is the liberalization of trade in services), the term "restriction" should be **construed broadly**. The panels and the Appellate Body have repeatedly confirmed this interpretation in a number of cases dealing with the interpretation of the terms "restrictions" and "measures" in other provisions of the GATS and the GATT.[32] Consequently, for the purposes of Art. XI, the term "restriction" includes any measure that could negatively affect international transfers and payments.[33]

20 Typical **examples** of restrictions are, of course, the practices described in Art. VII of the IMF Agreement (such as exchange restrictions, discriminatory currency arrangements and multiple currency practices), which are prohibited in general, but permitted under certain circumstances as discussed below.[34] However, the scope of possible restrictions is much broader than that and, as a basic rule, any measure that could impede international transfers and payments in connection with GATS services is prohibited. Restrictions can be direct or indirect. Direct restrictions affect the transactions themselves, for instance by prohibiting certain transactions, setting quotas, providing for approval procedures, etc. Indirect restrictions, conversely, do not restrict international transfers and payments as such, but discourage them without

[30] See *Lehmann et al.*, 19.
[31] *Siegel*, AJIL 96 (2002), 561, 596.
[32] See Appellate Body Report, *US—Corrosion-Resistant Steel Sunset Review*, WT/DS244/AB/R, paras 81–82, 88; Panel Report, *US—Gambling*, WT/DS285/R, para. 6.174; Appellate Body Report, *EC—Bananas III*, WT/DS27/AB/R, para. 194.
[33] See *UNCTAD*, 13 *et seq.*; see *Siegel*, AJIL 96 (2002), 561, 585 *et seq.*
[34] See below, paras 23 *et seq.*

directly limiting them by means of restrictive regulation, such as excessive taxation, measures requiring undue paperwork or those creating extensive delays, *etc*.[35]

21 In the *US—Gambling* case, the complainant, Antigua, argued that the various US restrictions on payments for gambling services (such as a New York state law declaring void claims in connection with wagers or bets) were in violation of Art. XI.[36] The Panel for reasons of judicial economy did not rule on this claim. Yet, it confirmed in an obiter dictum "that Article XI plays a crucial role in securing"[37] the purpose of the GATS. Any restriction on international transfers and payments would seriously impair the value of Members' commitments.[38]

22 Art. XI belongs to the **general obligations** of Part II of the GATS that apply across the board to all services in trade. For current transactions the way Art. XI:1 is worded and for capital transactions Art. XVI, footnote 8,[39] confirm that the GATS does not permit a member to derogate from its general obligation to refrain from imposing restrictions on international payments and transfers relating to its specific commitments. The ruling of the GATT 1947 Panel Report, *US—Restrictions on Imports of Sugar* (applied in analogy to GATS) confirms that general obligations take precedence over the Members' Schedules of commitments.[40] In *Mexico—Telecoms*, the Panel underlined that Members, in their specific commitments, are to specify limitations on the substance of their liberalization entries pursuant to the closed list of any of the three categories: market access, national treatment and additional commitments (Arts. XVI, XVII and XVIII). Thus, Members may not add limitations or restrictions that do not fall under any of the three categories, for instance by providing for restrictions on international transfers and payments relating to their specific commitments.[41] Consequently, any such restrictions contained in a Schedule would have no legal effect. Also,

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[35] See *Williams*, Fordham L. Rev. 70 (2001), 561, 571 *et seq*.

[36] See *US—Gambling*, WT/DS285/R para. 6.438.

[37] *Ibid*., para. 6.442.

[38] *Ibid*.

[39] In relation to capital transactions one might argue that this applies to mode 1 and mode 3 commitments only based on Art. XVI, footnote 8, while, regarding mode 2 and mode 4 commitments (which are not mentioned in footnote 8), a Member may provide in its Schedule for restrictions. This argument is also based on the wording in the proviso of Art. XI:2 referring to "restrictions [...] inconsistently with its [...] commitments" (which can be construed to allow for specifications in the Schedule) rather than to restrictions "relating to its [...] commitments" (which does not permit any specifications in the Schedule). Apart from being of rather limited relevance, this argument is inconsistent with the view expressed in para. 18 above that footnote 8 applies by analogy to mode 2 or 4 services that necessarily entail international transfers and payments.

[40] See GATT Panel Report, *US—Restrictions on Imports of Sugar*, BISD 36S/331, paras 5.3, 5.8–6.2.

[41] See Panel Report, *Mexico—Telecoms*, WT/DS204/R; paras 7.359–7.362.

the fact that a specific restriction contained in a specific commitment may be consistent with other provisions of the GATS, such as for instance the national treatment principle embodied in Art. XVII, will not limit Art. XI's general application.[42]

C. Exceptions

There are five alternative exceptions to the general rule of Art. XI that a Member may not impose restrictions on international transfers and payments (for current or capital transactions) relating to a specific commitment of such Member. The five exceptions are (1.) any restriction to safeguard the balance of payment in accordance with Art. XII (see I.), (2.) any restriction covered by the general exceptions of Arts XIV and XIV*bis* (see II.), (3.) any restriction covered by the exception of para. 2 lit. a of the Annex on Financial Services (see III.), (4.) with respect to current transactions only, any restriction that is consistent with the rights and obligations of such Member under the IMF Agreement (see IV.), and (5.), with respect to capital transactions only, any restriction requested by the IMF (see V.). *23*

I. Art. XII—Restrictions to Safeguard the Balance of Payments

The first exception, set out in Art. XII, permits restrictions to safeguard the balance of payments.[43] *24*

II. Arts XIV and XIV*bis*—General Exceptions

As a second exception to Art. XI, Arts XIV and XIV*bis* provide for exceptions to a Member's obligations under the GATS in a number of circumstances listed in these Articles.[44] *25*

Examples of domestic law restricting international transfers and payments, but permitted by virtue of the general exceptions, are, for instance, rules on the seizure or blocking of assets in connection with bankruptcies (dealing with the effects of a default on services contracts) or criminal procedures (public order). Even though such measures can, strictly speaking, amount to restrictions of international transfers and payments, they prevail for public policy reasons by operation of Arts XIV and XIV*bis* over the rules of Art. XI. *26*

[42] See *Lehmann et al.*, 19.
[43] See *Grote*, Article XII GATS, paras 5 *et seq.*
[44] See *Cottier et al.*, Article XIV GATS, paras 16 *et seq.*, *Cottier & Delimatsis*, Article XIV*bis* GATS, paras 13 *et seq.*; WT/WGTI/W/137, paras 15 *et seq.*

Accordingly, in its obiter dictum to Art. XI, the Panel in the *US—Gambling* case confirmed "that Article XI does not deprive Members from regulating the use of financial instruments, such as credit cards, provided that these regulations are consistent with other relevant GATS provisions, [...]".[45]

III. Para. 2 lit. a of the Annex on Financial Services

27 Of particular importance in connection with Art. XI are, as a third exception, the exceptions known as measures for prudential reasons in the financial sector. As defined in para. 2 lit. a of the Annex on Financial Services, measures for prudential reasons include any regulations (1.) to protect any person to whom the financial service provider owes a fiduciary duty or (2.) to ensure the integrity or stability of the financial system. Examples of prudential measures are rules against money laundering.

28 While the broad language of the Annex permits a wide range of prudential measures, such measures may never be used as a pretext for actually avoiding any obligations under the GATS (including the obligation to liberalize international transfers and payments relating to services for which specific commitments have been made).[46]

IV. Rights and Obligations of a Member Under the IMF Agreement

29 As a fourth exception, relating to current transactions only, Art. XI reserves the rights and obligations of a Member under the IMF Agreement. The major purpose of the IMF is to promote international trade and prosperity by creating an international monetary system (Art. I IMF Agreement).[47] To achieve this purpose, among others, the IMF Agreement provides (1.) in its Art. IV[48] for obligations regarding exchange arrangements, the IMF's surveillance jurisdiction over the international monetary system and the members' obligation to collaborate and (2.) in its Art. VIII[49] for obligations regarding current transactions.

30 In general, the IMF Agreement liberalizes current transactions between its members by prohibiting certain practices (including exchange restrictions, discriminatory currency arrangements and multiple currency practices), but permitting certain **transitional** (Art. XIV IMF Agreement)[50] or, with the IMF's prior approval, **temporary restrictions** (Art. VIII IMF Agreement)

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[45] See *US—Gambling*, WT/DS285/R, para. 6.442.
[46] See *Lehmann et al.*, 9, 19, 21; see *Siegel*, AJIL 96 (2002), 561, 589–590.
[47] See *Qureshi*, 107, 173.
[48] See MTN.GNS/W/91, paras 11 *et seq.*; *Lowenfeld*, 507.
[49] See MTN.GNS/W/91, paras 6 *et seq.*; *Lowenfeld*, 508 *et seq.*
[50] See *Lowenfeld*, 508; *Siegel*, AJIL 96 (2002), 561, 565.

to counter balance-of-payment difficulties.[51] If the IMF Agreement permits any of these practices and, to the extent that they relate to current transactions, the IMF Agreement will take precedence over the GATS to avoid any inconsistencies between IMF and GATS rights and obligations.[52]

31 Regarding current transactions, Art. XI exempts all rights and obligations under the IMF Agreement, not just those under Art. VIII of the IMF Agreement explicitly dealing with current transactions. This is confirmed by the clause in Art. XI:2 regarding **exchange actions**[53] (see Art. IV IMF Agreement) which are explicitly included in the term "rights and obligations" (to the extent applied in conformity with the IMF Agreement).[54] Strictly speaking, the clause would not be necessary, since, in any event, all rights and obligations under the IMF Agreement dealing with current transactions take precedence over Art. XI.

32 Since the 1980s the IMF's adjustment programmes typically include various conditions that a member receiving IMF financing has to meet (**conditionality**). These conditions have become far more important than classical balance-of-payment measures. However, such conditions are not considered to be obligations of an IMF member and, therefore, cannot be invoked to justify a restriction on international transfers and payments.[55]

V. Request of the IMF

33 The fifth exception relates to capital transactions only and permits restrictions on capital transfers at the request of the IMF. As a general rule, the IMF Agreement predominantly deals with limitations on restrictions on current transactions, but does not address capital transactions.[56] Accordingly, Art. VI:3 of the IMF Agreement permits its members to exercise controls over capital transactions.[57] Therefore, to achieve its goal of avoiding restrictions on services-related international transfers and payments, regarding capital transactions, Art XI must provide for a general ban that can only be lifted in exceptional circumstances in which the IMF has an explicit overriding interest.

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[51] See *UNCTAD*, 16 *et seq.*; see *Qureshi*, 176–177; see *Lowenfeld*, 9 *et seq.*, 15 *et seq.*; see *Siegel*, AJIL 96 (2002), 561, 585 *et seq*.

[52] See *Footer*, Int'l Law. 27 (1993), 343, 356; see *Siegel*, AJIL 96 (2002), 561, 584 *et seq.*, 597; see also *UNCTAD*, 26.

[53] See Art. IV IMF Agreement, above, note 4.

[54] See *Siegel*, AJIL 96 (2002), 561, 588 *et seq*.

[55] See Panel Report, *Argentina—Textiles and Apparel (EC)*, WT/DS56/R, as modified by Appellate Body Report, *Argentina—Footwear (EC)*, WT/DS121/AB/R; *Siegel*, AJIL 96 (2002), 561, 566, 572 *et seq.*; see *Thomas*, Am. U. Int'l L. Rev. 15 (2000), 1248, 1261–1262.

[56] See MTN.GNS/W/91, para. 21.

[57] See *Lehmann*, 19; see *Lowenfeld*, 509 *et seq*.

34 The reference to "at the request of the Fund" relates to Art. VI Section 1 IMF Agreement under which the IMF may request a Member to impose capital controls to prevent the use of the IMF's resources to meet a large or sustained outflow of capital. Therefore, as with current transactions, the IMF Agreement takes precedence regarding capital transactions, but only if (direct or indirect) capital controls actually have been requested by the IMF. There has never been such request.[58]

D. Evaluation and Outlook

35 Even though the liberalization of international transfers and payments is an "indispensable complement to the GATS",[59] so far there has been hardly any jurisprudence and doctrine dealing with Art. XI. This may be for a number of reasons:

36 Art. XI addresses restrictions on international transfers and payments incidentally, in order to ensure that the services can actually be provided. In contrast, a number of other international organizations including the IMF or the Organisation for Economic Co-operation and Development (OECD) were expressly regulating such restrictions long before the GATS. In particular, the OECD Codes of Liberalisation of Capital Movements and of Liberalisation of Current Invisible Operations of December 12, 1961,[60] as amended, liberalize a broad range of transfers relating to investment and, in general, prohibit any controls on international transfers and payments.[61] Therefore, many restrictions addressed by Art. XI have long been abolished among OECD members and reduced the potential for issues to arise under the GATS. Similarly, Arts. 56 *et seq*. ECT liberalize international transfers and payments between Member States of the European Union.

37 The IMF, today, typically favours conditionality over balance-of-payment safeguards, thus, aligning its lending with the GATS' liberalization purpose.[62] Therefore, there are currently probably very few instances in which a Member could actually invoke the precedence of its rights and obligations under the IMF Agreement.

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[58] *Siegel*, AJIL 96 (2002), 561, 598, 572, footnote 49; see *Footer*, Int'l Law. 27 (1993), 343, 356; see also *Williams*, Fordham L. Rev. 70 (2001), 561, 605.

[59] See *US—Gambling*, WT/DS285/R, para. 6.442.

[60] OECD, Codes of Liberalisation of Capital Movements and of Current Invisible Operations, originally adopted by the OECD Council on 12 December 1961, OECD/C(61) 95, 96.

[61] See *UNCTAD*, 18 *et seq*.; see *Williams*, Fordham L. Rev. 70 (2001), 583.

[62] *Siegel*, AJIL 96 (2002), 561, 566; see *Thomas*, Am. U. Int'l L. Rev. 15 (2000), 1248, 1261–1262.

38 The commitments made under the GATS, in particular those of non-OECD members, still remain relatively narrow in sector coverage. Accordingly, there are only a limited number of circumstances under which restrictions on international transfers and payments issues can actually arise.

39 Nevertheless, Art. XI has had and, as more GATS commitments are made, will increasingly have an important role to play in liberalizing trade in services.[63]

[63] The authors wish to thank *Dr. Rolf Adlung*, Senior Economist Trade in Services Division WTO Secretariat, and *Dr. Carsten Fink*, Senior Economist Trade Team World Bank, for their valuable comments and review of this commentary.

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Article XII GATS
Restrictions to Safeguard the Balance of Payments

1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.
2. The restrictions referred to in paragraph 1:
   a) shall not discriminate among Members;
   b) shall be consistent with the Articles of Agreement of the International Monetary Fund;
   c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other Member;
   d) shall not exceed those necessary to deal with the circumstances described in paragraph 1;
   e) shall be temporary and be phased out progressively as the situation specified in paragraph 1 improves.
3. In determining the incidence of such restrictions, Members may give priority to the supply of services which are more essential to their economic or development programmes. However, such restrictions shall not be adopted or maintained for the purpose of protecting a particular service sector.
4. Any restrictions adopted or maintained under paragraph 1, or any changes therein, shall be promptly notified to the General Council.
5. a) Members applying the provisions of this Article shall consult promptly with the Committee on Balance-of-Payment Restrictions on restrictions adopted under this Article.
   b) The Ministerial Conference shall establish procedures[4] for periodic consultations with the objective of enabling such recommendations to be made to the Member concerned as it may deem appropriate.
   c) Such consultations shall assess the balance-of-payment situation of the Member concerned and the restrictions adopted or maintained under this Article, taking into account, *inter alia*, such factors as:
      (i) the nature and extent of the balance-of-payments and the external financial difficulties;
      (ii) the external economic and trading environment of the consulting Member;
      (iii) alternative corrective measures which may be available.
   d) The consultations shall address the compliance of any restrictions with pararaph 2, in particular the progressive phaseout of restrictions in accordance with paragraph 2 e).
   e) In such consultations, all findings of statistics and other facts presented by the International Monetary Fund relating to foreign exchange, monetary reserves and balance of payments, shall be accepted and conclusion shall be based on the assessment by the Fund of the balance-of-payments and the external financial situation of the consulting Member.
6. If a Member which is not a member of the International Monetary Fund wishes to apply the provisions of this Article, the Ministerial Conference shall establish a review procedure and any other procedures necessary.

Footnote 4: It is understood that the procedures under paragraph 5 shall be the same as the GATT 1994 procedures.

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Cross References

Art. 2104 NAFTA.

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A. General

Under Art. XII Members are entitled, under certain conditions, to restrict trade in services in order to safeguard their external financial position and balance of payments. A country's **balance of payments** is made up of two primary components: the financial account (capital account) which records the net result of public and private international investment flowing in and out of the country, and the **current account** which represents the country's overall balance on goods and services, plus net income such as interests and dividends and net transfer payments.[1] A country's balance of payments may thus be upset either by a current deficit account which is not offset by a net inflow of capital or by a net outflow of capital not made up for by an equivalent current account surplus. Although financial *1*

[1] See *Lowenfeld*, 15–17.

measures like the depreciation of the domestic currency under a flexible exchange rate can be helpful in overcoming balance-of-payment difficulties without having to resort to trade restriction, they may bring about or worsen macroeconomic problems such as imported inflation.[2] Action to eliminate balance-of payments and external financial difficulties will thus often involve measures which aim to strengthen the affected country's current account by reducing imports and/or increasing exports, with resulting negative consequences on free trade. Art. XII preserves the ability of Members to use restrictions on trade in services as an instrument to overcome balance-of-payment problems, subject to a number of substantive and procedural conditions designed to limit the negative impact of such measures on the liberalizing commitments undertaken by the Members under GATS.

2 The right of contracting parties facing balance-of-payments difficulties to impose restrictions on the import of goods as a means to redress those imbalances has long been recognized under the GATT (Art. XII GATT 1994). The need for additional flexibility for those countries whose economies are in an early stage of development or can sustain only low standards of living has been acknowledged equally early on (Art. XVIII Section B GATT 1994). In the Uruguay Round, the operation of the balance-of-payments provisions in the GATT was the object of intense scrutiny and negotiation. As a result, the Understanding on the Balance-of-Payments Provisions (UBOP) of the GATT 1994 was adopted which clarifies a number of substantive and procedural issues with regard to trade restrictions imposed for the purpose of redressing balance-of-payments problems. Among other things, the Understanding expresses a preference for price-based measures over quantitative restrictions when coping with balance-of-payments difficulties.[3] The **GATT provisions** have largely influenced the crafting of disciplines with regard to trade restrictions in the area of services in order to respond to external financial difficulties. To a large extent, Art. XII applies the same concepts, terms and conditions defined by the GATT for the invocation of balance-of-payments safeguard provisions. Procedural requirements are also very similar to those contained in the GATT.[4] Art. XII:5, footnote 4 expressly acknowledges the understanding by Members that the procedures referred to in that paragraph shall be the same as the GATT 1994 procedures.

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[2] *Mah*, World Compet. 21 (1998), 139.

[3] *Mah*, World Compet. 21 (1998), 139, 141.

[4] See Working Group on the Relationship Between Trade and Investment, Exceptions and Balance-of-Payments Safeguards, Note by the Secretariat, WT/WGTI/W/137, 26 August 2002, paras 35–36.

B. Structure of Art. XII

Art. XII:1 defines the situations which may justify recourse to balance-of-payments safeguards and indicates their potential **scope of application**. The second sentence of this paragraph provides for more flexible access to these safeguard measures for developing countries and economies in transition in recognition of their need to maintain monetary reserves adequate to implement their programmes of economic development or economic transition. The conditions to which the safeguards measures are subject are listed in Art. XII:2. They are designed to preserve the main purposes of the GATS Agreement as far as possible under the circumstances by limiting Members to safeguard measures which are strictly necessary, non-discriminatory and temporary, and to avoid frictions with the obligations of Members under the **Articles of Agreement of the International Monetary Fund** (the "IMF Agreement" and the International Monetary Fund, the "IMF").[5] Art. XII:2 adds another condition by prohibiting the use of balance-of-payments safeguards for protectionist purposes. *3*

Paragraphs 4–6 of Art. XII regulate the **formal and procedural requirements** for the application of safeguard measures. Art. XII:4 deals with the notification of such measures while Art. XII:5 addresses some of the issues associated with their periodic review within the framework of multilateral consultations. Art. XII:5, footnote 4 makes it clear that the procedures to be used for these consultations are to be the same as the GATT 1994 procedures, *i.e.* the procedures applied under the GATT 1994 and the Understanding on the Balance-of-Payments Provisions of the GATT 1994. Art. XII:5 lit. e confirms the central role played by the IMF in the consultations. Finally, Art. XII:6 authorizes the Ministerial Council to establish a distinct review procedure for cases in which WTO Members which are not members of the IMF wish to impose trade restrictions in the area of services for balance-of-payments reasons. *4*

C. Scope of Application of BOP Safeguard Measures (Art. XII:1, Sentence 1)

In accordance with Art. XII:1 safeguard measures are available to Members facing serious balance-of-payments and external financial difficulties or the threat of such difficulties. **Balance-of-payments difficulties** arise if a *5*

[5] Articles of Agreement of the International Monetary Fund, adopted at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, 22 July 1944, UNTS 2 (1945), 39, as amended through June 28, 1990, <http://www.imf.org/external/pubs/ft/aa/index.htm> (last visited 1 October 2007).

country is unable to obtain sufficient financing on affordable terms to meet its international payment obligations. They are often the result of various and complex factors which may relate to the country's current account (*e.g.* a sudden drop in export prices) as well as to its capital account (*e.g.* capital flight caused by growing uncertainty among investors about the health of the domestic banking system). Safeguard measures under Art. XII may already be imposed before the balance of payments has started to deteriorate provided that there is sufficient and substantiated reason to expect that such deterioration will take place in the near future. The imbalance and the resulting financial difficulties in terms of shortage of foreign exchange must be **"serious"**, *i.e.* require immediate action to protect the external financial position of the country concerned. Whether these conditions are met has to be determined on the basis of a **case-by-case analysis** which takes into account all the relevant factors. The assessment of the invoking country's financial situation by the IMF plays a central role in this context.[6]

6 The **causes** of the financial difficulties are irrelevant for the application of the safeguard measures. Art. XII:1 does not restrict their use to situations in which the balance-of-payments crisis is due to a net deficit in the exchange of services, or at least to a deficit in the overall balance of trade in goods and services. The financial difficulties which justify the imposition of trade restrictive measures may also result from the deterioration in the country's capital account. While the IMF staff has argued that balance-of-payment restrictions apply to capital outflows but not to inflows given that serious balance-of-payments and external financial difficulties or the depletion of money reserves could occur only through excessive capital outflows, this view has not been accepted by all Members.[7] The wording of Art. XII:1 does not vindicate such a restrictive approach. In the absence of consensus on this issue, the concept of serious balance-of-payments difficulties also covers difficulties caused by capital inflows.

7 In response to balance-of-payments difficulties, a Member may introduce new or maintain pre-existing **restrictions** on trade in services on which it has undertaken specific commitments. By contrast, with regard to services on which it has undertaken no scheduled commitments, the Member concerned may adopt or maintain such restrictions as it deems appropriate, without being subject to the disciplines fixed by Art. XII. The provision authorizes the Member concerned to impose measures which have a restrictive effect on trade in some or all of the scheduled services, such as the introduction or maintenance of limitations on the number of service suppliers, the total value of service transactions, or the total number of service operations

[6] Committee on Balance-of-Payments Restrictions, Reserve Adequacy, Note by the Secretariat, WT/BOP/W/21, 12 September 2002, paras 3 *et seq*. See also para. 14 below.
[7] See WT/WGTI/W/137, para. 68.

mentioned in Art. XVI. The preference for price-based safeguard measures expressed in the Understanding on the Balance-of-Payments Provisions of the GATT 1994 does not apply to safeguard measures taken on the basis of Art. XII.[8] The provision explicitly states that the right to introduce new and maintain existing restrictions also extends to the payments and transfers related to the performance of services covered by the liberalization commitments.

D. Additional Flexibility for Developing Countries and Transition Economies (Art. XII:1, Sentence 2)

8 The second sentence of Art. XII:1 grants **developing countries and economies in transition** additional flexibility in the use of services trade restrictions in order to confront balance-of-payments difficulties. Neither Art. XII nor any other provision of the GATS contains a classification of countries with regard to their membership of either of the two categories. It is up to Members themselves to claim the status of a developing country or a transition economy by invoking the additional faculties offered by Art. XII:1, although their decision may be challenged by others.

9 The provision on the flexible access of developing countries and transition economies to balance-of-payments safeguard measures rests on the recognition that their financial systems are often more fragile and exposed to instability than those of developed countries.[9] In order to be able to use this additional flexibility it is not necessary for the developing country or transition economy to face a full-blown balance-of-payments crisis or the imminent threat thereof. It is enough that it suffers from **particular pressures** on its balance of payments. Such pressures may result from an increased level of imports, a high level of foreign debt, particularly short-term debt, or heightened exposure to volatile short-term investments which may be called off at the first sign of an impending economic crisis, thus leaving the country concerned with a severe shortage of funds for the financing of its international obligations.

10 Countries which are likely to experience such pressures may adopt measures which are necessary to protect their development or transition programmes against external financial threats, in particular through the maintenance of a level of financial reserves adequate for the implementation of their programmes. There are no universally applicable standards for assessing

[8] See below, para. 12.

[9] See Working Group on the Relationship Between Trade and Investment, Communication from the European Community and its Member States, Concept Paper on Balance-of-Payments Safeguards, WT/WGTI/W/153, 28 November 2002, para. 2.

the **adequacy of reserves**. The assessment has to take into account a number of different factors, including the size of the national economy, the nature of the financial threats it is facing, its short and medium term growth prospects and its development or transition plans and strategy. Such an assessment inevitably involves a considerable degree of subjective judgement. The former "rule of the thumb" that reserves should provide at least 3 months of import coverage as a minimum desirable target has largely been abandoned.[10] In its observations submitted to the Panel in the course of the dispute settlement proceedings on *India—Quantitative Restrictions*[11] under the GATT 1994 the IMF estimated that India's monetary reserves, which stood at about 6 months of imports of goods and non-factor services and covered 2,5 times the amount of maturing debt obligations in the next twelve months and 1,5 times the stock of short-term debt and cumulative inflows of portfolio investment, provided sufficient external liquidity and a reasonable degree of protection against unforeseen external shocks. It was followed in this assessment by the Panel.[12] In order to assess whether the particular pressures on the balance of payments **necessitate** the use of restrictions it is necessary to explore whether potential alternative remedies like borrowing from foreign banks, governments or international institutions exist and constitute a viable and sustainable option to finance the balance of payments and to bolster monetary reserves. The information and the assessment provided by the IMF referred to in Art. XII:5 play a central role in the determination of all these issues.[13]

E. Conditions for the Admissibility of BOP Safeguard Measures (Arts XII:2–3)

11 Arts XII:2–3 provide for a number of conditions to which the measures taken to safeguard the external financial position and balance of payments shall be subject. They include the prohibition on using trade restrictions in a selective manner so as to discriminate against other Members (Art. XII:2 lit. a). The requirements to avoid unnecessary damage to the commercial, economic and financial interests of other Members (Art. XII:2 lit. c) and to limit trade restrictions to what is strictly necessary in order to overcome the balance-of-payments difficulties (Art. XII:2 lit. d) are an expression of the general principle that Members shall give preference to those measures which in the particular circumstances are the **least disruptive on trade**. The same applies to the requirement that safeguard measures may be

[10] See WT/BOP/W/21, para. 67.
[11] Panel Report, *India—Quantitative Restrictions*, WT/DS90/R.
[12] *Ibid.*, paras 5.165 and 5.176.
[13] See below, para. 20.

imposed for only a limited period and have to be phased out progressively as the balance of payments and the external financial situation improve (Art. XII:2 lit. e).

12 The question arises whether this also means that Members are under a duty to prefer measures with an impact on the price of imported services over quantitative restrictions. In the Understanding on the Balance-of-Payments Provisions of the GATT 1994 Members commit themselves to avoiding the imposition of new quantitative restrictions for balance-of-payments purposes unless, because of a critical balance-of-payments situation, price-based measures cannot arrest a sharp deterioration in the external payments situation. It is **doubtful**, however, **whether** the **preference for price-based measures** also applies in the GATS context. For one thing, there is no explicit reference to this principle in Art. XII, although the provision was framed with the relevant rules in the GATT and in the Understanding on the GATT balance-of-payments provisions in mind. In addition, price-based safeguard measures are much more difficult to implement in the area of services than in trade on goods. Prices charged by service suppliers can differ widely. Particularly in professional services quality, experience and reputation play an important role in price differential and can render price-based measures unfeasible.[14] There are thus good reasons for allowing Members greater latitude in prescribing safeguard measures for the service trade, given the diverse nature of service transactions and the practical obstacles to the application of price-based safeguard measures.

13 Since balance-of-payments safeguard measures may not be limited to imposing restrictions on trade flows, but may also extend, as expressly provided for in Art. XII:1, to the control of payments or transfers relating to services, attention has to be paid to existing obligations of Members under the **IMF Agreement**. The co-ordination between obligations under the GATS and those resulting from the IMF Agreement with regard to safeguard measures for balance-of-payments purposes is ensured by Art. XII:2 lit. b which requires restrictions introduced or maintained under Art. XII:1 to be consistent with the IMF Agreement. Of particular interest here is Art. VIII:2 lit. a IMF Agreement which provides that no Member shall, without the approval of the Fund, impose restrictions on the making of payments and international transfers for current international transactions. Art. XXX lit. d IMF Agreement defines the term "current international transactions" in an essentially negative manner—all payments other than those made for the purpose of transferring capital—followed by an non-exhaustive list of transactions which are considered current. In cases of doubt the IMF

[14] See *Kulkarni*, in: *Chimni et al.*, 249, 254, who quotes as example the prices charged for the consultation of a lawyer in India which can range from a mere Rs. 200 per hour to Rs. 200,000 per hour.

determines the nature of the transaction.[15] According to the definition of Art. XXX lit. d, current international transactions include, *inter alia*, payments due in connection with foreign trade, other current business, including services, and normal short-term banking and credit facilities. In practical terms this means that a Member is not allowed to impose a restriction on a current account payment linked to a GATS commitment if the restriction has not been previously approved by the IMF.[16] Other provisions of the IMF Agreement which may come into play in the operation of Art. XII GATS are Art. VII IMF Agreement, dealing with the authorization by the Fund to impose limitations on the freedom of exchange operations in a scarce currency, and Art. XIV: 3 IMF Agreement concerning consultation with the Fund on the retention of restrictions on payments and transfers on current international transactions which were already in effect on the day on which the country operating those restrictions became a member.

14 Apart from these cases, the Fund does not have jurisdiction on the imposition of trade restrictions by Members under Art. XII:1. On the other hand, the staff of the IMF provides **information** to the Committee on Balance of Payments of the WTO in review procedures under Art. XII:5 on each consulting party's recent economic development, focusing in particular on macroeconomic indicators that are linked to the country's current and prospective balance-of-payments situation. Under the GATT this information has been used extensively in the Committee's discussions on the justification for the institution, maintenance or intensification of trade restrictions for balance-of-payments purposes.[17]

15 A last condition for the admissibility of restrictions on trade in services for balance-of-payments purposes is defined in Art. XII:3. The provision attempts to ensure that **import instructions** are **not used for protectionist purposes**. While Members are allowed to give priority to the supply of those services which are more essential to their economic or development programmes, they may not use this latitude for the purpose of protecting a particular service sector. If this provision is to be effectively enforced, the burden of proof that specific priority arrangements are indispensable for the implementation of the long term economic or development programme must be imposed on the invoking Member.

[15] See also *Christ & Panizzon*, Article XI GATS, para. 13.
[16] WT/WGTI/W/137, para. 65, footnote 40.
[17] WT/BOP/W/21, para. 4.

F. Notification Requirement (Art. XII:4)

16 The adoption or maintenance of restrictions under Art. XII:1 must be notified promptly, *i.e.* without undue delay. **Notification** has to be made to the General Council instead of the Council for Trade in Services. The notification of measures under Art. XII:4 will normally be made in conjunction with that of measures under GATT disciplines.[18] The rule contained in Art. XII:9 of the Understanding on the Balance of Payments Provisions of the GATT 1994 that significant changes shall be notified to the General Council prior to or not later than 30 days after their announcement therefore also applies to notifications under Art. XII:4. The contents of the notification should also follow the GATT model closely. It should include full information on the type of restriction applied, the criteria used for its administration, the services covered and the trade flow affected.[19] As of the time of writing (1 June 2007) no notifications under this provision had been made.

G. Review Procedures (Art. XII:5)

17 To ensure that Members observe the disciplines laid down for balance-of-payments restrictions in Arts XII:1–3, Art. XII:5 imposes consultation obligations on Members applying BOP safeguard measures. They are required to consult promptly with the Committee on Balance-of-Payments Restrictions on the restrictions adopted by it. The **consultations** shall address the balance-of-payments situation of the Member concerned and the restrictions adopted or maintained to improve that situation. The—non-exhaustive ("*inter alia*")—list in Art. XII:5 lit. c mentions as factors which shall be taken into account in the discussions before the Committee the nature and the extent of the balance-of-payments and external financial difficulties, the external economic and trading environment of the consulting Member, and alternative corrective measures which may be available. The first set of factors focuses on the financial situation of the Member concerned, *i.e.* its balance-of-payments and foreign debt situation, in particular whether the balance of payments is expected to continue to deteriorate or to start improving and whether the level of accumulated foreign liabilities is placing the level of monetary reserves under pressure, while the second set of factors is related to the general trading position of the Member, the increase

[18] Council for Trade in Services, Guidelines for Notifications under the General Agreement on Trade in Services, Adopted by the Council for Trade in Services on 1 March 1995, S/L/5, 4 April 1995, para. 5.

[19] See Technical Cooperation Handbook on Notification Requirements, Understanding on the Balance-of-Payments Provisions of the GATT 1994, WT/TC/NOTIF/BOP/1, 15 October 1996, Part I, Overview of notifications requirements (no. 3).

or decrease in its imports and exports and the number and character of trade and exchange restrictions in place. Alternative corrective measures which have to be considered are primarily those of a financial character, like the encouragement of capital inflows, increased foreign borrowing or the adjustment of monetary and exchange rate policies.

18 Art. XII:5 lit. b authorizes the Ministerial Conference to establish **procedures** for the conduct of the consultations. It provides that the consultations shall be held periodically and that they shall have the objective of enabling the Committee to make specific recommendations to the Member with regard to the maintenance or lifting of its safeguard measures. According to Art. XII:5 lit. b, footnote 4, however, it is understood by the Members that the procedures referred to in Art. XII:5 shall be the same as the GATT 1994 procedures. Under the GATT, Members applying new restrictions or raising the general level of their existing restrictions are expected to enter into consultations with the Committee on Balance-of-Payment Restrictions within four months of the adoption of such measures.[20] The rules of the GATT distinguish between two different forms of consultations: **simplified procedures** and **full consultations**. Simplified procedures have been introduced as a way of getting developing countries to justify the use of import restrictions in accordance with the GATT while relieving them of the burden of periodic consultations. In simplified consultations, the IMF does not submit to the Committee a formal statement on the country's financial situation. The streamlined procedure is followed in order to determine whether the situation of the consulting Member requires the holding of full consultations. Under the rules in force simplified procedures may be held with least-developed country Members and developing country Members pursuing liberalization efforts in conformity with a schedule presented to the Committee in previous consultations, as well as with developing country Members which have their Trade Policy Reviews scheduled for the same calendar year. Except for least-developed country Members, no more than two successive consultations may be held under the simplified procedure.[21] Full consultation procedures, on the other hand, require full consultation on all issues involving balance of payments, monetary reserves or foreign exchange arrangements with the International Monetary Fund which provides documentation and makes a full statement. When full consultation procedures have been used, the Committee shall endeavour to include in its conclusions proposals for recommendations aimed at promoting the

[20] WT/TC/NOTIF/BOP/1, Part V, Understanding on the Balance-of-Payments of the GATT 1994, para. 6.

[21] WT/TC/NOTIF/BOP/1, Part V, Understanding on the Balance-of-Payments of the GATT 1994, para. 8.

implementation of the disciplines provided for in the GATT for balance-of-payments restrictions.[22]

19 In accordance with Art. XII:5 lit. d, the consultations shall address the compliance of the adopted restrictions with the conditions defined in Art. XII:2, and in particular with the provision on the progressive phasing out of restrictions in Art. XII:2 lit. e. The Understanding on the Balance-of-Payments Provisions of the GATT 1994 states that in cases in which a time-schedule has been presented for the removal of restrictive measures taken for balance-of-payments purposes, the General Council may recommend that a Member which adheres to the **schedule** shall be deemed to be in compliance with its GATT 1994 obligations. The same rules apply to the procedure for review of trade restrictive measures under Art. XII:5.

20 In accordance with Art. XII:5 lit. e, all statistical and other facts presented by the **International Monetary Fund** in the consultations shall be accepted and the conclusions of the Committee shall be based on the assessment of the Fund of the balance-of-payments and external financial situation of the consulting Member. As described above, the IMF provides a formal statement in the full consultation procedure, which is reproduced in full in the Committee's report. The statements which have been presented under the GATT consultation procedure deal with recent developments in the real sector of the economy of the Member concerned, its relations with the financial sector and the macroeconomic situation, the current and prospective balance-of-payments position, the trade and exchange restrictions in place and the country's relations with the IMF.[23] Art. XII:5 lit. e distinguishes between the **factual findings** presented by the IMF on the issues falling within its remit, which have to be accepted by the parties, and its (political and economic) **assessment** of those facts which is not binding on the Committee but which shall form the basis of its conclusions. Under the GATT, the information provided by the IMF has always played an important role, not only in the assessment of the financial situation of the Member concerned, but also in the consideration of alternative measures to restore financial stability and thus of the justification for the institution, maintenance or intensification of trade restrictions for balance-of-payments purposes.[24]

21 The consultations shall conclude with a report by the Committee on Balance-of-Payments Restrictions to the General Council. In the case of full consultation procedures, the report shall indicate the Committee's conclusions on

[22] WT/TC/NOTIF/BOP/1, Part V, Understanding on the Balance-of-Payments of the GATT 1994, para. 13.
[23] WT/BOP/W/21, para. 7.
[24] *Ibid.*, para. 4.

the elements referred to in Art. XII:5 lit. c as well as the facts and reasons on which they are based, while in the case of simplified procedures it shall include a summary of the main elements discussed in the Committee and a decision on whether full consultation procedures are required. As already mentioned, the Committee shall also include proposals for **recommendations** to be addressed by the General Council to the Member concerned in order to promote the implementation of the provisions of Art. XII. In the absence of such proposals, the report should record the different views expressed in the Committee.[25] As of the time of writing, recommendations to abolish or to modify restrictive measures introduced or maintained under one of the BOP provisions of the WTO had never been addressed by the BOP Committee or the General Council to a Member.

22 Even if the General Council were to address specific recommendations to modify or to eliminate specific trade restrictive measures at the end of the consultation process, such **recommendations** would legally speaking **not** be **binding** on the Member concerned. As political bodies neither the General Council nor the BOP Committee may adopt legally binding decisions in individual cases. The legal validity of the restrictions would thus remain unaffected even if the Committee report concluded that the invocation of the derogation clause was not justified and that the restrictions should therefore be removed.[26] A Member therefore has to turn to the **dispute settlement mechanism** to preserve its rights which might be impaired by an unjustified trade restriction adopted under Art. XII. In the case of *India—Quantitative Restrictions* the authority of the Dispute Settlement Body to review the justification of quantitative restrictions adopted for balance-of-payments reasons under the GATT came under scrutiny. The Indian government argued that balance-of-payments matters raised delicate technical as well as political issues, and should therefore be left to the consultation proceedings under the authority of the Balance-of-Payments Committee and the General Council. However, based on a careful interpretation of the relevant treaty provisions the Panel rejected this analysis, affirming unequivocally its competence itself to determine the justification of trade restrictions imposed for balance-of-payments reasons.[27] The ruling was subsequently upheld by the Appellate Body.[28]

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[25] See WT/TC/NOTIF/BOP/1, Part V, Understanding on the Balance-of-Payments of the GATT 1994, para. 13.

[26] OECD, Negotiating Group on the Multilateral Agreement on Investment, Expert Group No. 5 on the Balance-of-Payments Clause, DAFFE/MAI/EG5(97)3, 27 February 1997, para. 4.

[27] *India—Quantitative Restrictions*, WT/DS90/R, para. 5.114. On this decision see, *Thomas*, Am. U. Int'l L. Rev. 15 (2000), 1249, 1273–1276.

[28] Appelate Body Report, *India—Quantitative Restrictions*, WT/DS90/AB/R, para. 109.

H. Review Procedure for Non-IMF Members (Art. XII:6)

23 The review procedures provided for in Art. XII:5 would hardly be suitable in cases in which the trade restrictive measures under scrutiny were adopted by a country which was not a member of the IMF, given the central role which it assigns to the IMF in the consultations. Art. XII:6 therefore authorizes the Ministerial Conference to establish specific procedures for the review of trade restrictions for balance-of-payments purposes introduced or maintained by Members which are **not IMF members**. This provision has not yet been put into practice.

I. Assessment and Outlook

24 Art. XII has not been put into practice so far, largely due to the fact that the number of specific commitments on services undertaken by the Members to which it could apply has remained fairly limited. At the conceptual and procedural levels, Art. XII raises few new issues since it does not refer to the existence of service-specific factors as a necessary element of the balance-of-payments crisis which triggers its application. In contrast to what has been said with regard to safeguard measures (Art. X), most of the concepts and procedures which have been developped to define the permissible scope for balance-of-payments measures under the GATT 1994 are therefore equally relevant in determining the scope of application of similar measures under Art. XII. This should in due course facilitate their rational use and review in the services context.

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Article XIII GATS
Government Procurement

1. Articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.
2. There shall be multilateral negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement.

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A. General

I. Background

1 Procurement[1] of products and services by governmental agencies for their own purposes, in particular in the field of infrastructure (*e.g.* utilities, transport, education and health services), represents an **important share of total government expenditure** and, thus, plays a significant role in domestic economies.[2] However, governments have traditionally been reluctant to submit their own purchases to multilateral trade rules. There are a **series of reasons why** they **preferred not to open** up their **procurement regimes to international competition**:

2 At first, procurement measures in many cases focus directly on the **commercial aspects of procurement**, namely value for money, since they aim at ensuring effective delivery on the best possible terms and an efficient procurement process. For example, governments may set qualification conditions of a technical or financial nature, such as minimum turnover requirements, or decide to invite tenders from a limited number of suppliers only (so-called selective tendering) in order to limit tender evaluation costs.[3] These are legitimate objectives of procurement policy; however, the international trade regime may make it necessary to consider whether the commercial justification for the measure outweighs its trade-restricting effects.

3 Furthermore, governments sometimes use procurement as a means of **protecting certain domestic industries** from import competition.[4] Thus, procurement is designed to give domestic industry an advantage in winning contracts, in particular to improve jobs and profits in that industry at the expense of foreign competitors.[5] This may be connected with general economic, employment or tax reasons.

4 Procurement measures are also often directed at **non-economic, "secondary" policies** or **"collateral" policies** which do not relate to the acquisition of the product or service as the main object of the procurement.[6] For example, procurement may serve a policy of placing government contracts with disadvantaged national or ethnic groups or with companies located in poor regions to promote racial or regional equality within the country. Furthermore, it may, under the aegis of national security, serve a

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[1] See on the notion "procurement" *Arrowsmith et al.*, 1.
[2] See *Evenett*, in: *Hoekman et al.* (eds), 417, 418; *Peng*, J. of World Invest. & Tr. 7 (2006), 975; *Eigen*, in: *Moore et al.* (eds), 125, 139.
[3] See *Arrowsmith*, 2003, 17.
[4] *Low et al.*, World Compet. 20 (1996), 5, 6.
[5] *Arrowsmith*, 2003, 14.
[6] See *Trebilcock & Howse*, 292–293.

policy of sourcing military products only from national industry to preserve a national production capability. However, the domestic objective in such a case could well be considered legitimate by the international community. To decide whether a measure should be prohibited, the objective would need to be balanced against any trade-restricting effects. That is quite well-known in WTO law, since a similar balancing exercise applies in cases dealing with exceptions in determining, for example, whether the EU can exclude hormone-treated beef on health grounds[7] or whether the US can exclude tuna fish caught in a "dolphin-unfriendly" manner,[8] to mention only two controversial questions considered under the GATT/WTO system.

Finally, procurement has, on occasion, been a means of carrying out the illicit transfer of funds from government to private hands, as recent **corruption, nepotism and patronage scandals**, *i.e.* the use of procurement to reward political supporters,[9] in several countries have demonstrated.[10] The OECD in 1997 adopted a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which tackles the issue from the supply side by requiring the signatories to prohibit the bribery of foreign public officials by their own companies and to adopt specified compliance measures.[11] *5*

As a consequence of these reasons for a restrictive procurement policy, as early as under the **GATT 1947** government procurement was excluded from the national treatment obligation. Art. III:8 lit. a GATT 1947 reads that the provisions of Art. III GATT 1947 shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of *6*

[7] Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R.

[8] GATT Panel Report, *US—Tuna (Mexico)*, BISD 39S/155; GATT Panel Report, *US—Tuna (EEC)*, DS29/R.

[9] Here the line between the legitimate and the illegitimate use of procurement may be difficult to draw and is not set at the same position in the different national systems.

[10] *Low et al.*, World Compet. 20 (1996), 5, 6; see also *Surjadinata*, Emory Int'l L. Rev. 12 (1998), 1021–1088; *Murphy*, Brook. J. Int'l L. 21 (1995), 385–392; *Nichols*, Yale J. Int'l L. 24 (1999), 257, 270–279; *Salbu*, Yale J. Int'l L. 24 (1999), 223–255; *Salbu*, Cornell Int'l L.J. 33 (2000), 657–688.

[11] ILM 37 (1998) 1, 21 November 1997. See on this Convention *e.g. Abbott*, JIEL 4 (2001), 275, 280–291; *Dietrich*, Austrian Rev. of Int'l and Europ. Law 3 (1998), 159–169; *Gantz*, Nw. J. Int'l L. & Bus. 18 (1997/1998), 457, 483–494; *Miller*, Cardozo J. Int'l Comp. L. 8 (2000), 139–161; *Nichols*, Cornell Int'l L.J. 33 (2000), 627–655; *Zedalis*, JWT 31 (1997) 6, 45–62; *Zucker Boswell*, U. Pa. J. Int'l Econ. L. 18 (1997), 1165–1176. Another important instrument of similar effect is the Inter-American Convention against Corruption, an initiative of the Organization of American States; see further *Shaw*, Cornell Int'l L.J. 33 (2000), 689, 698–699; *Gantz*, Nw. J. Int'l L. & Bus. 18 (1997/1998), 457, 476–483. Other transnational initiatives such as initiatives by the UN and by the EU are outlined in: *Abbott*, JIEL 4 (2001), 275, 276–278; *Harms*, Cornell Int'l L.J. 33 (2000), 159, 174–179; *Gordon et al.*, in: *Arrowsmith & Davies* (eds), 27, 29–55.

products purchased for governmental purposes and not with a view to commercial resale or use in the production of goods for commercial sale.[12]

7 However, a growing awareness of the trade-restrictive effects of discriminatory procurement policies and of the desirability of filling these gaps in the trading system resulted in an effort to bring government procurement under internationally agreed trade rules in the Tokyo Round of Trade Negotiations. Thus, the first plurilateral **Agreement on Government Procurement (GPA)**[13] was signed in 1979 and entered into force in 1981. It contained equal treatment and transparency obligations regarding the award of contracts with central governmental agencies about the delivery of goods.[14] It was amended in 1987,[15] with the amended version entering into force in 1988.[16]

8 The **structure of Art. XIII** reflects the aspect of restriction as well as that of liberalization: on the one hand, Art. XIII:1 exempts government procurement from the central obligations under the GATS, thereby following the formulation of the provision in Art. III:8 lit. a GATT 1994. On the other hand, Art. XIII:2 GATS acknowledges that procurement must not remain outside the reach of rules on trade in services in the indefinite future[17] by setting out that multilateral negotiations on government procurement in services are to take place.

II. Drafting History

9 In the first major draft of the GATS, the **Chairman's July 1990 Draft**,[18] Art. XIII consisted of only one paragraph. This paragraph read that, without prejudice to any obligation of a party under the GATT GPA, the provisions of Arts III (the later Art. II: most-favoured-nation (MFN) principle) and XVII (national treatment) GATS should not apply to procurement covered by public procurement laws and regulations. Nevertheless, parties should endeavour to take an early decision on the expansion of the application of the GATS in its entirety to such procurement of services. Thus, the provision excluded procurement from the treaty obligations laid down

[12] See about this provision *Hestermeyer*, Max Planck CWTL, Vol. 3, Article III GATT 1994, paras 99–101.

[13] BISD 26S/33; see about the content of the GPA *Trebilcock & Howse*, 293–294.

[14] *Göttsche*, in: *Hilf & Oeter* (eds), 468 para. 2; *Sehrschön*, 4; in detail about this GPA *Reich*, 110–132.

[15] BISD 34S/177.

[16] See *Raworth*, Trade in Services, 452.

[17] See *Low et al.*, World Compet. 20 (1996), 5, 7.

[18] Group of Negotiations on Services, Uruguay Round, Draft, Multilateral Framework for Trade in Services, Introductory Note by the Chairman on the GNS Negotiations on a Framework Agreement, MTN.GNS/35, 23 July 1990.

in the two Articles; it did not primarily address the laws and regulations governing procurement. Furthermore, it clarified its relationship with the GPA. Art. XIII should not stand in the way of the trade-liberalizing rules of the GPA. Rather, the GPA should be able to meet the exclusions from the GATS provisions head on and to reduce their effects. Finally, there was a request directed towards the parties to the GPA to extend it to the procurement of services.

10 The **Chairman's December 1990 Draft**[19] no longer contained the clarification concerning the relationship between Art. XIII and the GPA. Instead, the draft version of Art. XIII exempted procurement not only from Arts II and XVII but also from Art. XVI (market access). Accordingly, it stipulated that the provisions of Arts II, XVI and XVII should not apply to procurement covered by (public or government) procurement laws and regulations. Furthermore, it was discussed, as indicated by a note to the draft, whether a second sentence should be added to this stipulation reading that (public or government) procurement would be included in the list of subjects on which there should be multilateral negotiations within two years from the entry into force of the Agreement. Thus, the provision was formulated more vaguely than the previous draft with regard to the outcome of the future multilateral negotiations.

11 Finally, the **Dunkel Draft** of December 1991[20] found the present form and content of Art. XIII, the only difference being that it spoke, at greater length, about "the provisions" of Arts II, XVI and XVII. Thus, in a first paragraph it moved the governmental measure which can now also consist in a "requirement" to the centre and stated more precisely what procurement in the sense of the provision is by naming the actor to whom the procurement of services is to be attributed, determining the suitable primary purposes of the purchased services and excluding some secondary purposes or kinds of use of the services. Moreover, in a second paragraph it provided for multilateral negotiations on government procurement in services without explicitly referring to the GPA and the extension of its scope beyond goods to services.

[19] Trade Negotiations Committee, Uruguay Round, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Part 1, Revision, MTN. TNC/W/35–1/Rev.,13 December 1990, Annex II.

[20] Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA, 20 December 1991.

B. Content of the Provision

I. Exemption of Government Procurement from Central GATS Obligations (Art. XIII:1)

1. Definitional Elements

12 Art. XIII:1 exempts from the obligations laid down in Arts II, XVI and XVII such laws, regulations and requirements governing the procurement by governmental agencies of services on the condition that these services are purchased for governmental purposes and not with a view to commercial resale or to use in the supply of services for commercial sale. Thus, there must be **a procurement of services** by **governmental agencies**. Additionally, the services must be **purchased for governmental purposes** and not with the final target of commercial resale or of use in the supply of services for commercial sale. The service procurement fulfilling these requirements must, eventually, be **governed by laws, regulations or requirements**.

a) "Procurement of Services"

13 **Procurement of services** includes not just sale but, in principle, **acquisition by any contractual means**[21] **from an external entity for valuable consideration**.[22] However, the notion is far from being clear. Problems are caused not least by some sort of contractual arrangements in the framework of so-called **public-private partnerships**,[23] especially when the government retains the ownership of a facility, for example a coal or nuclear power station, sewage works, waterworks or refuse incineration plants,[24] and contracts out certain tasks to a private company.

14 The question whether management, Build-Operate-Transfer (BOT) and concession contracts should be considered a form of government procurement was discussed during several meetings of the Working Party on GATS Rules. Many countries held that the definition of government procurement excluded concessions and BOT, which would, thus, be subject to all GATS disciplines; but this view was not generally accepted, not least because the

[21] See Art. I:2 GPA; Working Group on Transparency in Government Procurement, Work of the Working Group on the Matters Related to the Items I, V of the List of the Issues Raised and Points Made, Note by the Secretariat, WT/WGTGP/W/32, 23 May 2003, para. 13; GATT Panel Report, *US—Sonar Mapping*, GPR.DS1/R, para. 4–5.

[22] *Arrowsmith*, 2003, 100; *Reich*, 111.

[23] See about the notion *e.g. Burgi*, 98; *Tettinger*, DÖV 49 (1996), 764.

[24] See *e.g. Bolkestein*, in: *Robinson* (ed.) 125, 126–132.

discussion took place on the basis of **different concepts** of what are a concession and a BOT.[25]

15 With a **concession contract**, a private company is granted a licence to operate a facility for a specified period of time, and to obtain payment directly from consumers. The private company must maintain the facility and may be required to improve it. Under such an arrangement, there is no purchase of a service from the government; on the contrary, the government generally levies a fee on the concessionaire in exchange for the right granted by the concession. Moreover, the service provided by the company is not for direct consumption by the government, but is supplied to individual consumers on behalf of the public authority. Consequently, such concession contracts cannot be considered a form of government procurement; they are subject to core GATS disciplines.[26]

16 The situation is more complex with regard to **BOT contracts**. These contracts are characterized by the duty of a private company to finance and build a public facility, and to operate it for a specified period; at the end of that period, the facility reverts to the government, normally free of charge.[27] The company must be paid by the government for providing the services, but may also be allowed to bill customers directly. Such BOT contracts combine elements of procurement (construction of the facility) with concessional regimes (the grant of an exclusive right to operate the facility and provide a service to the public). Against this background, it could be argued that the main object and also the primary purpose of BOT contracts is the provision of infrastructure. Thus, BOT contracts could be seen as complementing "normal" procurement methods and offering an avenue for governments which are short of cash to finance basic infrastructural facilities. The right to operate the infrastructure, *i.e.* to provide a service, would be only incidental, since it derived from the construction of the facility; it was the means of making the investment finance itself. Should this interpretation prevail, BOT would have to be considered as procurement and would, thus, escape main GATS disciplines. If, on the contrary, conferring on the private investor the right to provide a service stood at the centre of the contractual relationship, GATS disciplines would apply.[28] The **intention of the government** is not by any means the only decisive factor in finding an adequate classification. Instead, further criteria must be taken into account. This can be *e.g.* the relationship between

[25] See the Reports of the meetings of the Working Party on GATS Rules, in particular S/WPGR/M/14, 2 December 1997 to S/WPGR/M/24, 8 September 1999.

[26] *Cossy*, in: *Brown Weiss et al.* (eds), 117, 130.

[27] *Brüning*, 172; *Jessen*, 65; *Delmon*, 30; *Tettinger*, DÖV 49 (1996), 764, 765; *Zacharias*, DÖV 54 (2001), 454, 457–458.

[28] *Cossy*, in: *Brown Weiss et al.* (eds), 117, 130–131.

the amount of money invested in the construction of the facility and the income resulting from consumers' payments for the use of the services; the relationship between the duration of the contract and the time needed for the investment's amortization; the relationship between the sum of money invested and the residual value of the facility after the normal termination of the contract; the relationship between fixed costs, including deductions, and the variable costs of running the facility.

17 The last option for the government is to conclude a **management contract**. This is a contract entrusting a private company with more specific and limited tasks, such as fixing leaks, billing and meter reading, or laboratory services. Since the government clearly purchased a service, the contract fulfilled the requirements of government procurement and would, if the services were purchased for governmental purposes and not with a view to commercial resale or use in the supply of services for commercial sale, be exempted from the named GATS disciplines.

b) "By Governmental Agencies"

18 Art. XIII:1 requires a procurement "by governmental agencies". The term "governmental agencies" is interpreted broadly in the context of Art. III:8 lit. a GATT 1994. There, it means all government bodies, including local authorities.[29] But it goes even beyond this definition. On the one hand, it extends to **public utilities**. On the other hand, a **private entity's procurement** can be government procurement in cases where such factors as payment by the government, governmental use of or benefit from the product, government possession, government control over the obtaining of the product and particularly governmental regulation of the purchase point towards attribution of the procurement to the government.[30]

19 In the GATS context it seems to be appropriate to identify "governmental agencies" with the entities mentioned in Art. I:3 lit. a (i) and (ii). Thus, the term comprised **any entity falling within the institutional scope of the GATS**. At least three arguments speak in favour of this solution. First, the GATS apparently wants to take up the notion of Art. III:8 lit. a GATT 1994 when using the same formulation as that provision; there is no indication that it should be interpreted more narrowly. Thus, it should not be restricted to agencies established under the central government. Second, the GATT 1994 does not define its institutional scope. A brief and concise term for the institutional starting point for procurement had to be found and "governmental agency" appeared to be suitable, since it indicates a public authority which belongs to the executive and is provided

[29] *GATT*, 191; *Hestermeyer*, Max Planck CWTL, Vol. 3, Article III GATT 1994, para. 100.

[30] See *US—Sonar Mapping*, GPR.DS1/R, paras 4.7 to 4.13.

with own competences to take administrative actions and other measures having external effects. The GATS defines essentially the same legal phenomenon by means of a list in Art. I:3 lit. a (i) and (ii). Third, Art. XIII:1 must be read together with Art. I:3 lit. a for systematic reasons. Art. I:3 lit. a determines which measures fall within the institutional scope of the GATS and Art. XIII:1 governs exceptions to the application of certain individual provisions. Consequently, government procurement can be scrutinized under Art. I:3 lit. a. This suggests that procurement is a specific measure of a WTO Member and that Art. XIII:1 does not intend to cover just a part of the institutional scope of the GATS; otherwise, it ought to have used exactly one of the ideas set out in Art. I:3 lit. a. After all, procurement "by governmental agencies" means procurement which can be attributed to a WTO Member in the sense of Art. I:3 lit. a.

c) "For Governmental Purposes and Not with a View to Commercial Resale"

20 The services must be purchased for governmental purposes and not with a view to commercial resale or to use in the supply of services for commercial sale. Thus, the purchase must take place because the services are intended to be used to fulfil a task of the government. This is particularly the case when they are destined for an infrastructure owned by the government.[31] Moreover, the services must not be purchased in order to be resold as they are on the market or to be used as an intermediate product for the production of other services that are to be sold on the market.[32] This means that the WTO Members are **not** allowed to **supply the services on a commercial basis**. The idea behind this provision is that the state-owned or state-invested enterprise shall not act like an ordinary service supplier on the market in competition with private enterprises.[33]

21 However, the situation is not unproblematic with regard to **public enterprises**. Since, for example, a public utility supplies water services to consumers who pay for them, the argument could be made that the purchase of a service in relation to a water network, *e.g.* fixing a pipeline, is made "with a view to use in the supply of services for commercial sale", *e.g.* water distribution. Thereby, the interpretation of the word "commercial" is crucial; it must lead to considerations similar to those raised in relation to the discussion of Art. I:3 lit. c.[34]

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[31] *Cossy*, in: *Brown Weiss et al.* (eds), 117, 131.

[32] See with regard to the corresponding formulation on Art. III:8 lit. a GATT 1994: Working Party on the Accession of China, Report of the Working Party on the Accession of China, WT/ACC/CHN/49, 1 October 2001, para. 44; GATT Panel Report, *Canada—Provincial Liquor Boards (EEC)*, BISD 35S/37, para. 4.26.

[33] See *Michaelis*, in: *Hilf & Oeter* (eds), 375, 411, para. 113.

[34] See *Cossy*, in: *Brown Weiss et al.* (eds), 117, 131; for the discussion about the meaning of "commercial" in the context of Art. I:3 lit. c *Zacharias*, Article I GATS, 69–75.

d) "Laws, Regulations or Requirements Governing Procurement"

22 The procurement must, finally, be governed by laws, regulations or requirements. The **instruments** which are taken into account are defined broadly. "Laws" are formal acts passed by the legislature, whereas "regulations" are norms of the executive, such as ordinances issued by the government or by individual ministers. Eventually, "requirements" are any binding orders without having the character of a general norm.

23 Regarding the question when laws, regulations and requirements **"govern"** procurement, the GATT Panel in *Belgium—Family Allowances* took a narrow approach. It held that a Belgian law imposing internal taxes or charges on foreign goods purchased by public bodies did not govern procurement by governmental agencies.[35] But this decision misinterpreted Art. III:8 lit. a GATT 1947. It concluded from a comparison of this article with Art. III:1 GATT 1947 that internal taxes and other internal charges stand outside the "laws, regulations and requirements". However, Art. III:8 lit. a GATT 1994 is an exception to the whole Art. III GATT 1994 and, thus, also to its provisions on internal charges.[36] Since "governing" means making binding rules for government procurement and its procedure, in the GATS as well as in the GATT context a law imposing **internal charges** on government procurement is a law governing government procurement.

2. Legal Consequences

24 Art. XIII:1, firstly, exempts government procurement of services from the **national treatment obligation** laid down in Art. XVII. To that extent, it mirrors Art. III:8 lit. a GATT 1994. In both cases, the exemption reflects the continued desire of certain WTO Members to favour national or local products and suppliers when awarding contracts.

25 Moreover, the exemption from the **MFN** rule in Art. II was included in Art. XIII:1 so that signatories to the GPA would not be obliged to extend the benefits of the national treatment and other obligations that they agreed to under the GPA on a MFN basis to countries which have not accepted similar disciplines.[37] The GATT 1994, apart from the stipulation in Art. XVII:2 GATT 1994, does not provide for an MFN exemption for government procurement; in this respect the exemption of procurement of services is more complete than it is for goods.

26 Regarding the exemption for procurement from the obligation of granting **market access** in Art. XVI, it is difficult to see a parallel with goods,

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[35] GATT Panel Report, *Belgium—Family Allowances*, BISD 1S/59, para. 4.
[36] *Hestermeyer*, Max Planck CWTL, Vol. 3, Article III GATT 1994, para. 101.
[37] *Low et al.*, World Compet. 20 (1996), 5, 8.

since there is no equivalent provision in the GATT. Art. XVI deals with a combination of the GATT subject-matter market access as provided for *via* tariff bindings under Art. II GATT 1994 and quantitative restrictions regulated under Art. XI GATT 1994.[38] The Art. XIII:1 exclusion from Art. XVI aims at ensuring that no market access commitments apply to procurement in any way.

27 Although government procurement is exempted from the disciplines of Arts II, XVI and XVII, it remains subject to other GATS disciplines. Perhaps most relevant are the **transparency requirements** of Art. III. Art. III:1 requires each WTO Member to publish promptly and, except in emergency situations, at the latest by the time of their entry into force all relevant measures of general application which pertain to or affect the operation of the Agreement. This obligation could be interpreted as that governments must publish laws, regulations and all other measures of "general application" which concern procurement.

28 Finally, notwithstanding the procurement carve-out in Art. XIII:1, it must be noted that certain disciplines on procurement have already been created in the area of financial services. Section B(2) of the **Understanding on Commitments in Financial Services**, which contains specific commitments with respect to financial services under the GATS on the basis of an alternative approach to that covered by the provisions of Part III of the Agreement, states that each Member shall ensure that financial service suppliers of any other Member established in its territory are accorded MFN treatment and national treatment as regards the purchase or acquisition of financial services by public entities of the Member in its territory. Two aspects of the Understanding should be mentioned in this context. First, the benefits of the Understanding are extended to Members who have not subscribed to it. This means that Members who have accepted the Understanding as the basis for making specific commitments in their Schedules chose to allow those Members not bound by the Understanding to benefit from its procurement provisions as well. Second, the coverage of the obligations laid down in the Understanding has been limited only to entities established in the territory of the Member. Thus, service suppliers wishing to benefit from the procurement commitment in the Understanding would need to have established a commercial presence in the territory of the Member issuing a tender.[39]

[38] *Ibid.*, 5, 9.
[39] See *ibid.*, 5, 10.

II. Multilateral Negotiations on Government Procurement in Services (Art. XIII:2)

1. Working Party on GATS Rules

29 Art. XIII:2 requests WTO Members to take up multilateral negotiations on government procurement in services. Consequently, negotiations were started under the auspices of the Working Party on GATS Rules, established on 30 March 1995 by the Council for Trade in Services.[40] At the end of the 1990s, negotiations began to progress beyond the definitional phase.[41] In the new century, the focus of the multilateral negotiations changed to the **desirability and feasibility of developing disciplines for government procurement in services** and related issues. There appeared to be agreement among the Members to concentrate on developing horizontal disciplines prior to considering sectoral rules and to apply the principle of transparency in government procurement to the criteria used to assess tenders.[42] However, by and large, agreements have so far been reached mainly on data gathering.[43]

2. Working Group on Transparency in Government Procurement

30 Moreover, the 1996 WTO Ministerial Conference in Singapore established a Working Group on Transparency in Government Procurement provided with the limited task of making a study of **transparency in government procurement practices**.[44] From the launch of the study phase on transparency in government procurement after the Singapore Conference and until it was effectively suspended by the WTO Doha Round Framework Package in 2004, the Working Group identified and discussed in detail all elements related to transparency in government procurement capable of being included in a future WTO Agreement.[45] With regard to the nature of a multilateral agreement on transparency in government procurement, the suggestion was made that the agreement did not need to be a complex undertaking. It was noted that the Doha Ministerial Declaration had narrowed the scope of a possible agreement on transparency in government procurement by limiting the parameters of the transparency aspects and by providing explicitly that such an agreement should neither restrict domestic

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[40] See *se.g.* the Reports of the Working Party on GATS Rules to the Council for Trade in Services, S/WPGR/1–8.

[41] *Footer & George*, in: *Macrory et al.* (*eds*), 799, 905.

[42] Working Party on GATS Rules, Report of the Meeting of 25 February 2003, Note by the Secretariat S/WPGR/M/41, 12 March 2003, section B, paras 31–32.

[43] *Wegmann & Müller*, 22.

[44] Ministerial Conference, Singapore Ministerial Declaration, WT/MIN/96/DEC, para. 21; see also *Linarelli*, in: *Arrowsmith & Trybus* (eds), 235, 241–245; *Arrowsmith*, ICQL 47 (1997), 793, 803–816.

[45] See *Evenett*, in: *Evenett et al.* (*eds*), 147–234.

preferences nor require market access commitments. Rather, the agreement should encompass a robust principle-based approach with respect to both transparency and due process aspects. In relation to this, it was stated that a transparency agreement should not interfere with substantive measures taken by procuring entities, such as the evaluation of offers, decision-making processes, the provision of relief for unsuccessful tenders, and review of procuring entities' decisions.[46]

3. Agreement on Government Procurement

31 Eventually, the new GPA contains specific provisions on procurement in services. It was negotiated formally outside, but signed together with the Final Act of, the Uruguay Round and replaced the old GPA (see Art. XXIV:3 lit. c GPA). It came into effect on 1 January 1996 and is, like its forerunner, a **plurilateral agreement**, which means that it is only binding on those WTO Members who choose to sign.[47] Currently, there are 40 signatories, including Canada, the EU, and the US; the rest of the signatories are predominantly developed countries.[48]

32 The GPA, which has the objective of contributing to the liberalization and expansion of world trade, establishes a **framework of rights and obligations** regarding parties' national procurement laws, regulations, procedures, and practices (Rec. 1 of the GPA Preamble). Governments are required to apply the principle of national treatment to the products, services and suppliers of other parties to the GPA and to abide by the MFN rule, which prohibits discrimination among goods, services and practices regarding government procurement (Rec. 2 of the GPA Preamble, Art. III GPA).[49] The GPA emphasizes the transparency of laws, regulations, procedures and practices regarding procurement (Art. XVII GPA); thereby, of particular importance is the transparency of tendering procedures.[50] Five annexes to the GPA specify, for each Member, which government authorities (central government, provincial and municipal governments and other state bodies such as utilities) are covered and which purchases of goods and services are subject to plurilateral disciplines.[51]

33 Several developed countries, in particular the US and Member States of the EU, would like to see the GPA **become a multilateral agreement**,

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[46] See Working Group on Transparency in Government Procurement, Note by the Secretariat, Report on the Meeting of 18 June 2003, WT/WGTGP/M/18, 7 July 2003, in particular para. 48; *Peng*, J. of World Invest. & Tr. 7 (2006), 975, 978.

[47] *Linarelli*, in: *Arrowsmith & Trybus* (eds), 235. See for an introduction into the rules of the new GPA also *e.g. Reich*, JWT 31 (1997) 2, 125–151; *Trebilcock & Howse*, 295–296.

[48] See the actual data, available at <http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm> (last visited 8 November 2007); *Evenett*, in: *Hoekman et al.* (eds), 417, 422–423.

[49] See *Reich*, 116–117.

[50] See *Ibid.*, 118–122.

[51] *Evenett*, in: *Hoekman et al.* (eds), 417, 423.

since such a step would increase market opportunities for their own firms,[52] allowing them to bid for foreign government purchases on a "level playing field". Furthermore, the proponents of a multilateral approach to the GPA see it as part of a "good governance" agenda for the developing world. The more transparent procurement processes are, they argue, the less opportunity there will be for corruption and rent-seeking on the part of domestic governments and suppliers.[53]

34 However, opposition to a multilateral agreement comes from several developing countries, particularly India, Pakistan and Egypt, and relief organizations, such as Oxfam.[54] These parties see the opening of government procurement not as a way to gain a "level playing field" but rather as a situation in which developing and least developed countries are likely to **lose ground to expanding industrial countries**. The developing countries and relief organizations fear that the growing industries of developing nations would be at a disadvantage if large and established foreign companies were allowed to bid for government contracts alongside their own domestic firms, leading to balance of payments problems.

35 In addition, other opposing countries cite government procurement laws as a **restraint on their ability to address certain non-trade issues**, such as the environment, ecolabelling and human rights. They argue that under the current legal situation, for example, if a government had certain labour standards, it might discourage human rights violations in the workplace by purchasing only from firms that meet the government's standards. But this incentive would get lost if foreign companies could obtain the contracts. Government procurement laws would eliminate the government's discretion in deciding similar matters, and, as a consequence, labour standards and environmental protection, among other things, would fall.

C. Outlook

36 Art. XIII exempts government procurement from core GATS principles. Although it is envisaged that these exemptions will be reduced by a future multilateral agreement on government procurement in services under the aegis of liberalization, there appears still to be **a long way** to go to reach this target.

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[52] See *Linarelli*, in: *Arrowsmith & Trybus* (eds), 235, 237.

[53] See *e.g.* the Press Release No. 285/2002 of the WTO titled "Moore welcomes Oxfam report but cites omissions and errors", <http://www.wto.org/english/news_e/pres02_e/pr285_e.htm> (last visited 1 October 2007).

[54] See *e.g.* the Oxfam statement of August 2004 titled "Arrested Development? WTO July framework agreement leaves much to be done", available at <http://www.oxfam.org.uk/resources/policy/trade/downloads/bn_wtoframework.pdf> (last visited 1 October 2007).

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Article XIV GATS
General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

a) necessary to protect public morals or to maintain public order,[5]
b) necessary to protect human, animal or plant life or health;
c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
   (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
   (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
   (iii) safety;
d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective[6] imposition or collection of direct taxes in respect of services or service suppliers of other Members;
e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

Footnote 5: The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

Footnote 6: Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Member under its taxation system which:

(i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Member's territory; or
(ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Member's territory; or
(iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or
(iv) apply to consumers of services supplied in or from the territory of another Member in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Member's territory; or
(v) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or
(vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Member's tax base.

Tax terms or concepts in paragraph d) of Article XIV and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Member taking the measure.

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Cross References

Art. 30, 39.3, 46.1, 55, 58 ECT; Art. 1114, 1410, 2101, 2103 NAFTA; Art. XIII MERCOSUR Montevideo Protocol.

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A. General

I. Purpose and Objective

1 The general and specific obligations undertaken under the General Agreement on Trade in Services ("the Agreement" or "GATS") by Members in relation to non-discrimination and market access and a level playing field in services may, under certain circumstances, considerably restrict the pursuit of equally legitimate, non-economic policy goals and competing public interests and values other than unfettered competition between domestic and foreign services and service suppliers. Quite frequently, the protection of interests such as public health, public order, safety, public morals, environment etc. requires the adoption of **trade-restrictive measures**, technically resulting in a direct conflict with GATS obligations. WTO law seeks to establish a proper balance between different policy goals. Such balance is sought and achieved in part by principles of progressive liberalization and inherent limitations. In part it is sought by allowing for general exceptions applicable to **all** the provisions and existing commitments under an agreement. Art. XIV follows the model of Art. XX GATT 1994 which has been the cornerstone of the multilateral trading system allowing for the pursuit of other legitimate non-economic policy goals and, at the same time, avoiding the use of general exceptions to pursue rent-seeking, protectionist policies, undermining existing obligations and commitments.

2 The general exception provision under Art. XIV allows Members to accommodate other policy goals pursued in line with domestic law and policy choices made in accordance with societal values and preferences. Exceptions therefore vary from Member to Member and do not show uniform traits. WTO law, however, offers a common framework to which domestic policies and law need to respond and comply with in order to establish overall WTO compatibility of measures taken.

3 Compared to GATT and TRIPs, GATS follows a relatively flexible approach, allowing countries to take policy goals into account in shaping specific commitments. Due to the absence of border measures, market

access (Art. XVI) and national treatment obligations (Art. XVII) assume a fundamentally different and more flexible role. Accordingly, the invocation of general exceptions will be necessary to a lesser extent and less frequently than under GATT. It is not a coincidence, and not merely a matter of being a relatively recent agreement, that the case-law relating to Art. XIV is still in its infant stage. In any case, the WTO adjudicating bodies will have recourse to precedents developed under Art. XX GATT 1994, albeit taking into account the different structure and flexibility of the Agreement and commitments made by Members. At the same time, the regulation of services often deals with domestically sensitive issues and transcends concerns of market access. This explains why GATS exceptions are different, more elaborate and more broadly termed than under GATT 1994.

II. Overview of GATS Exceptions

4 The exceptions as provided for under the general exceptions clause of Art. XIV as well as under the security exceptions clause of Art. XIV*bis* need to be distinguished from **other types of GATS exceptions**,[1] namely exceptions as to the scope of application,[2] Art. II exemptions in accordance with Art. II:2 and the Annex on Article II Exemptions,[3] regional integration exceptions of Arts II:3, V and V*bis*,[4] the government procurement exception in accordance with Art. XIII:1[5] and, finally, the balance of payment exceptions of Art. XII.[6]

5 With respect to the **burden of proof**, the application of the provision follows the standard patterns of WTO law. It is incumbent upon the **responding party** to prove that a measure is justified because it falls within the scope of one of the public policy objectives identified under Art. XIV. Thus, after the complaining party has established a prima facie case of inconsistency with a GATS substantive obligation, the burden of proof shifts to the responding party if the latter claims an **affirmative defence**.[7] More specifically, the respondent has to demonstrate that a measure (a) comes within one of the exceptions of Art. XIV, and hence is **provisionally justified**; and (b) when applied, does not amount, generally speaking, to

[1] For an overview of exceptions see also *Van den Bossche*, 596; *Michaelis*, in: *Hilf & Oeter*, 375, 409–411, paras 108–113.

[2] See *Zacharias*, Article I GATS, paras 25, 57 *et seq*.

[3] See *Wolfrum*, Article II GATS, paras 60 *et seq*.

[4] See *Wolfrum*, Article II GATS, para. 69; *Cottier & Molinuevo*, Article V GATS, para. 6; *Bast*, Article V*bis* GATS, para. 5.

[5] See *Zacharias*, Article XIII GATS, paras 12 *et seq*.

[6] See *Grote*, Article XII GATS, para. 7.

[7] Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R, 22–23; Appellate Body Report, *US—Wool Shirts and Blouses*, WT/DS33/AB/R, 15–16; Appellate Body Report, *EC—Tariff Preferences*, WT/DS246/AB/R, para. 88; Appellate Body Report, *US—Gambling*, WT/DS285/AB/R, paras 282, 309.

an **abuse of the right to invoke an exception**. The Appellate Body warned Members that the second prong of the test in Art. XX GATT 1994 "is of necessity, a heavier task than that involved in showing that an exception [...] encompasses the measure at issue".[8] The same applies to Art. XIV which follows the very same structure.

III. Reference to Art. XX GATT 1994

6 The similarities between Art. XX GATT 1994 and Art. XIV are striking. More specifically, the *chapeaux* of both provisions are, for all practical purposes, **identical**. Similar language is also used in the exceptions identified in the main body of both provisions. Nevertheless, important differences exist. Regulation of services does not respond to exactly the same needs as the regulation of goods. Art. XIV embodies **five** (instead of ten, as is the case in Art. XX GATT 1994) legitimate **public interests** that can justify government intervention with respect to trade in services. Moreover, Art. XIV, contrary to Art. XX GATT 1994, identifies the maintenance of **public order** as an additional justification that allows for a departure from the substantive GATS obligations. Thus, the GATS allows for greater **regulatory autonomy** than GATT 1994, as the public order justification is **broad** and fairly **inclusive**. This is further corroborated by footnote 5 to Art. XIV lit. a. The breadth of the public order exception was made clear in the *US—Gambling* case.[9] Unlike Art. XX GATT 1994, Art. XIV also includes provisions relating to the protection of fair competition, privacy and taxation, all areas of particular importance in the regulation of services.

7 While Art. XX GATT 1994 has frequently been invoked and thus Appellate Body jurisprudence is well settled, Art. XIV has so far been raised on only one occasion, namely in the *US—Gambling* case. The *US—Gambling* Panel contended that the GATT/WTO case law relating to Art. XX GATT 1994 is relevant and may be useful in the interpretation of Art. XIV owing to the textual and conceptual similarities between the two provisions.[10] In this regard, the Panel also emphasized the Appellate Body's encouragement in *Bananas III* that panels tackling GATS claims should refer to GATT 1994 only where the obligations are essentially of the same type.[11] These findings

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[8] *US—Gasoline*, WT/DS2/AB/R, 23.

[9] Panel Report, *US—Gambling*, WT/DS285/R, para. 6.467; *US—Gambling*, WT/DS285/AB/R, para. 323.

[10] *US—Gambling*, WT/DS285/R, para. 6.448.

[11] Appellate Body Report, *EC—Bananas III*, WT/DS27/AB/R, para. 231. See also Appellate Body Report, *EC—Sardines*, WT/DS231/AB/R, para. 275, where the Appellate Body criticizes the Panel because it failed to apply a principle articulated under the SPS on the burden of proof in the TBT context, although there were conceptual similarities between the provisions in the two Agreements.

by the *US—Gambling* Panel regarding the relevance of Art. XX GATT 1994 were subsequently confirmed by the Appellate Body.[12]

For the analysis of Art. XIV it is, therefore, crucial to rely on case law and scholarly research developed under Art. XX GATT 1994, to the extent that the language, structure and purpose of these two provisions are identical, or at least similar. At the same time, it is important to keep in mind the differences between the general exceptions clauses of GATS and of GATT 1994 in order to assess the issues for which reliance on the Art. XX GATT 1994 *acquis* is not possible and where a different interpretation may be appropriate.[13] *8*

B. Structure of Art. XIV

I. General Requirements

Art. XIV allows Members to adopt and enforce GATS-inconsistent measures for a *numerus clausus* of pre-defined purposes, and subject to the requirements established therein.[14] In addition, any measure protecting public morals or maintaining public order (lit. a), protecting human, animal or plant life or health (lit. b), securing compliance with regulations which are not inconsistent with GATS provisions (lit. c) may be justified only if it is **"necessary"** to achieve the policy objective in question. Some authors argue that the task of the WTO judiciary does not include an evaluation of the **ends** sought or of their necessity; only the **means** that a Member chooses to attain its **ends** are justiciable before the WTO.[15] It is questionable whether such a distinction can be drawn, as the means to an end need to stay within the bounds of legitimate policy goals. In several instances, the WTO adjudicating bodies emphasized the restrictive nature of measures that may come within the ambit of the general exceptions provision. For instance, in *US—Shrimp*, the Appellate Body recognized that, on the basis of Art. XX GATT 1994, an importing Member may be allowed to make access to its market conditional on whether exporters comply with or adopt policies that are **unilaterally** defined by the importing Member, provided that these policies comply with all the pertinent requirements of Art. XX.[16] *9*

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[12] *US—Gambling*, WT/DS285/AB/R, para. 291.

[13] See also *Condon*, 4 *et seq*.

[14] The list adopted in the final text of the GATS draws heavily on the US proposal for a framework agreement on trade in services. See Group of Negotiations on Services, Uruguay Round, Communication from the United States, Agreement on Trade in Services, MTN. GNS/W/75, 17 October 1989, Art. 16.

[15] *Mavroidis*, 191.

[16] See Appellate Body Report, *US—Shrimp*, WT/DS58/AB/R, para. 121.

10 Like Art. XX GATT 1994, Art. XIV provides for three necessity tests relating to identical overriding objectives (lit. a–c). In contrast, measures falling under lit. d have to be "**aimed at**" the equitable or effective imposition or collection of direct taxes; measures causing less favourable treatment may be covered by lit. e if they are "**the result of**" an international tax agreement (lit. e). While the objectives set out in lit. a-c may remedy any GATS inconsistency, the exceptions set out in Art. XIV lit. d and lit. e allow for deviation from specific GATS obligations. Lit. d applies only to measures which are inconsistent with the national treatment obligation of Art. XVII and lit. e justifies measures that are exclusively in conflict with the MFN treatment obligation in Art. II.

11 The introductory paragraph or the *chapeau* of Art. XIV focuses on additional qualifications which the application or enforcement of a measure that has been found to be GATS-inconsistent needs to comply with in order to be justified under GATS. The requirement of applying a given measure in a manner that does not lead to "arbitrary" or "unjustifiable" discrimination, or a "disguised restriction" on trade in services, aims to ensure that a Member's right to invoke Art. XIV is exercised **reasonably** and in a manner that does not unduly frustrate the rights of other Members.[17] The *chapeau*, therefore, qualifies all grounds for justification in that it sets out a requirement not unduly to discriminate as well as a prohibition on disguised restrictions on trade. According to the Appellate Body, both requirements emanate from the **principle of good faith** generally recognized in public international law which aims at preventing any misuse or abuse of the general exceptions provision.[18]

II. Two-Tier Analysis

12 This structure, combining a list of public policy objectives as grounds for justification with a *chapeau* aimed at the prevention of abuse and misuse, corresponds to Art. XX GATT 1994. For this reason, the Appellate Body confirmed in *US—Gambling* that the **two-tier analysis** developed by dispute settlement practice with respect to Art. XX GATT 1994 may be used *mutatis mutandis* for the application of the general exceptions clause under GATS.[19] There is no reason why this should not apply in all cases. It is therefore a matter of first assessing whether a measure can be justi-

[17] See *US—Gasoline*, WT/DS2/AB/R, 22; also *US—Shrimp*, WT/DS58/AB/R, para. 156.

[18] *US—Shrimp*, WT/DS58/AB/R, para. 158; also *Panizzon*, 51 *et seq.*; *Van den Bossche*, 627 *et seq.*; *Bender*, in: *Hilf & Oeter* (eds), 167, 193–194, para. 76; *Michaelis*, in: *Hilf & Oeter* (eds), 375, 410, para. 110; *Jackson et al.*, Legal Problems, 555.

[19] *US—Gambling*, WT/DS285/AB/R, para. 292; *Trachtman*, AJIL 99 (2005), 861, 864; Committee on Trade and Environment, GATT/WTO Dispute Settlement Practice Relating to Article XX, Paragraphs (b), (d) and (g) of GATT, Note by the Secretariat, Revision,

fied under the specific provisions of lit. a–e. Just as in the case of goods, it should be determined whether the impugned measure comes under one of the Art. XIV justifications and thus is provisionally justified. For this, it is necessary for the measure at stake to address (or to be designed to address)[20] the particular interest of the relevant paragraph and to establish a sufficient nexus—or degree of connection—between the measure and the interest to be protected. To the extent that this is the case and a preliminary justification is established, it is secondly a matter of examining whether the measure is compatible with the precepts of the *chapeau*.[21]

13 As to the degree of connection required, it is recalled that the Appellate Body emphasized in *US—Gasoline* that, with respect to Art. XX GATT 1994 exceptions, each paragraph thereof may call for a different degree of connection between the measure at issue and the objective sought.[22] In *US—Gambling*, the Appellate Body confirmed that the required degree of connection is spelled out in each of the paragraphs of Art. XIV, through the use of terms such as "relating to" and "necessary to".[23]

14 By strictly applying the two-tier analysis to Art. XIV, the Appellate Body failed to note that, unlike GATT 1994, the GATS **general** exceptions clause only provides for one **single degree** of connection with respect to the grounds for justification applying to **all** GATS obligations (lit. a–c), which is "necessary to". The expression "aimed at" of lit. d is primarily to be interpreted in the light of the explanatory footnote 6, which lists examples of measures falling within this provision. The term "the result of" according to lit. e simply connects the measure to an international tax agreement, but it cannot be construed as a "degree" of connection between the measure and the interest in the sense imputed to the words "necessary to" or "relating to". Moreover, due to the restricted scope of lit. d and e,[24] the practical importance in view of future WTO disputes is limited compared with lit. a–c.

15 Consequently, instead of referring to a "sufficient nexus requirement" developed for Art. XX GATT 1994, it seems more appropriate under Art. XIV to speak directly of a **necessity test**. Based on this understanding, the two-tier analysis consists of examining whether the measure addresses one of the interests of Art. XIV and, in the case of lit. a–c, is necessary

WT/CTE/W/53/Rev.1, 26 October 1998, para. 10. For a criticism against the utility of the two-tier test, see *Mavroidis*, 213.

[20] Appellate Body Report, *Mexico—Taxes on Soft Drinks*, WT/DS308/AB/R, para. 72; also *US—Shrimp*, WT/DS58/AB/R, para. 116.

[21] *US—Gambling*, WT/DS285/AB/R, para. 292; *US—Shrimp*, WT/DS58/AB/R, paras 119, 157; also *Cottier & Oesch*, 429.

[22] See *US—Gasoline*, WT/DS2/AB/R, 18.

[23] *US—Gambling*, WT/DS285/AB/R, para. 292.

[24] See above, para. 10.

to achieve the objective pursued. If the measure is provisionally justified it must be subsequently analysed with respect to its compliance with the good faith principle of the *chapeau*.

C. Public Interests Serving as Grounds for Justification

16 The analysis of whether or not a certain measure is covered by one of the listed objectives of Art. XIV consists of the following steps: firstly, the **content** or scope of a listed objective must be determined by examining whether the policy objective sought (*e.g.* averting lung cancer; preventing under-age gambling) falls within one of the listed public interests (*e.g.* health or public morals). Second, it must be analysed whether trade in the goods or services in question (*e.g.* import of products containing asbestos under GATT 1994; remote supply of gambling under GATS) impairs or jeopardizes the achievement of the policy objective at stake (*e.g.* averting lung cancer; preventing under-age gambling). The complexity of either of the two analytical steps varies with respect to the nature of the specific interest set out in the relevant paragraph.[25] Finally, these two analytical steps need to be distinguished from the Member's right to determine its own **level of protection** (*e.g.* zero-risk level), which primarily relates to the question of the adequacy and necessity of a given measure in relation to the level of protection chosen by the Member.[26]

17 The **interests** serving as grounds for justification under Art. XIV are public morals and public order (lit. a), human, animal or plant life or health (lit. b), securing compliance with laws which are consistent with GATS obligations (lit. c) as well as interests regarding the equitable imposition of direct taxes (lit. d) or the avoidance of double taxation (lit. e).[27] This list of exceptions

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[25] See below, paras 27–29, 32–33; See also *Condon*, 5.

[26] See below, paras 55 *et seq*.

[27] Other public interests discussed during negotiations were: **consumer protection** in relation to tourism services, Group of Negotiations on Services, Working Group on Tourism Services, Uruguay Round, Note on the Meeting of 1–2 August 1990, MTN.GNS/TOUR/1, 29 August 1990, para. 15; **cultural identity and values** in relation to audiovisual services, Group of Negotiations on Services, Working Group on Audiovisual Services, Uruguay Round, Note on the Meeting of 27–28 August 1990, MTN.GNS/AUD/1, 27 September 1990, paras 25–30; **environment,** see below, para. 35. Sector-specific discussions: exceptions as applied to **telecommunications services**, Group of Negotiations on Services, Uruguay Round, Note on the Meeting of 5–9 June 1989, MTN.GNS/23, 11 July 1989, paras 124–138; to **transport services**, Group of Negotiations on Services, Uruguay Round, Note on the Meeting of 17–21 July 1989, MTN.GNS/24, 28 August 1989, paras 100–115; to **tourism services**, *ibid.*, paras 173–187; to **financial services**, Group of Negotiations on Services, Uruguay Round, Note on the Meeting of 18–22 September 1989, MTN.GNS/25, 23 October 1989, paras 67–86; to **insurance services**, *ibid.*, paras 107–109; to **professional services**, *ibid.*, paras 178–188. On request of Canada (see MTN.GNS/24, para. 260), the Secretariat prepared an informative background Note on issues addressed during negotiations regarding the applicability of the safeguards and exceptions of GATT

is **exhaustive**, *i.e.* a measure seeking to achieve any other public interest, such as consumer protection or cultural values, may not be justified under Art. XIV unless it can be subsumed under lit. a–e.[28] Comparing this list of exceptions with Art. XX GATT 1994, it is obvious that Art. XIV contains **fewer** grounds for justification than the general exceptions clause of GATT 1994.[29] This is due in part to the intangible nature of services. However, certain interests listed under the general exceptions clause of GATT 1994 could well have been adapted to services, namely those with respect to prison labour (Art. XX lit. e GATT 1994) or exhaustible natural resources (Art. XX lit. g GATT 1994). Yet, the GATS drafters apparently did not consider these interests to be relevant to services. Nevertheless, the absence of a paragraph on natural resources under Art. XIV has given rise to discussion as to whether or not the ability of Members to implement trade restrictive legislation or other measures in order to protect the environment is limited under GATS as compared to GATT 1994.[30]

18 It may be argued that the adoption of a closed list of legitimate public interests was unreasonable. This is all the more so, since the WTO agreements constitute incomplete contracts. In the longer term, one would reasonably expect a development similar to EC law. The ECJ, through its case law, transformed the exhaustive list of exceptions laid down in Art. 30 ECT into an illustrative one, as it acknowledged the existence of additional non-discriminatory requirements that can justify a national measure otherwise inconsistent with the Treaties (*Cassis de Dijon* principle).[31] Also, it subsequently excluded the so-called "selling arrangements" from the scope of Art. 28 after the judgment in *Criminal Proceedings Against Keck and Mithouard*, provided that these arrangements apply to all relevant operators within a Member State and affect in the same manner, in law and in fact, the marketing of domestic and foreign products.[32] In the same vein, one might

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to trade in services, Group of Negotiations on Services, Uruguay Round, Safeguards and Services, Note by the Secretariat, MTN.GNS/W/70, 13 September 1989. The discussion of this note by the GNS can be found at MTN.GNS/25, paras 218–236.

[28] *Mavroidis*, 184; Council for Trade in Services, Work Programme on Electronic Commerce, Progress Report to the General Council, Adopted by the Council for Trade in Services on 19 July 1999, S/L/74, 27 July 1999, para. 14. During the Uruguay Round, Members reflected on the possibility of establishing a review mechanism with regard to the list of exceptions under Art. XIV: Group of Negotiations on Services, Uruguay Round, Draft, Elements for a Draft Which Would Permit Negotiations to Take Place for the Completion of all Parts of the Multilateral Framework, MTN.GNS/28, 18 December 1989, para. h (2).

[29] Group of Negotiations on Services, Uruguay Round, Note on the Meeting of 17–27 September 1991, MTN.GNS/45, 18 October 1991, para. 17: "[The co-chairman] had detected a concern on the part of many to keep this list as concise as possible and to define as tightly as possible the need for, and scope of, such exceptions".

[30] See below, paras 34 *et seq.*

[31] ECJ, Case 120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein*, [1979] E.C.R. 649.

[32] ECJ, C-267/91, C-268/91, *Criminal Proceedings Against Keck and Mithouard*, [1993] E.C.R. I-6097, Rec. 16. See ECJ, C-368/95, *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v. Bauer Verlag*, [1997] E.C.R. I-3689, Rec. 12.

expect a flexible interpretation of the subparagraphs of Art. XIV to encompass additional legitimate public interests such as environmental concerns, consumer protection (beyond fraudulent practices) or concerns associated with compulsory labour. Arguably, public order under Art. XIV lit. a could be widely interpreted to cover many of the concerns mentioned above.[33] It remains to be seen to what extent the invocation of additional exemptions will be required in light of the fact that Members enjoy considerable flexibility in conditioning their commitments under Arts XVI and XVII.

I. Public Morals and Public Order (Art. XIV lit. a)

19 As is the case with GATT 1994, Art. XIV provides for a justification for measures necessary to protect public morals. The public order exception, on the other hand, is unique to GATS. Hence, it is necessary to define and distinguish the concepts of "public morals" and "public order", to analyse their relationship and to determine the exact scope and content of the two concepts.

1. General Definitions

20 In *US—Gambling*, the Art. XIV lit. a defence was invoked for the first time in GATT/WTO history, prompting the Panel to develop an interpretation of the terms "public morals" and "public order". The findings of the Panel remained unchallenged before the Appellate Body.[34] They acknowledge that the two concepts can vary in **time** and **space**, as well as from Member to Member, depending on diverging systems and scales of prevailing values.[35] As the Panel had to determine the meaning of the terms in order to apply them to the *US—Gambling* case, the Panel primarily resorted to the relevant dictionary definitions.

21 Basing itself on a literal interpretation of Art. XIV lit. a, the Panel contended that the term **"public morals"** refers to "standards of right and wrong conduct maintained by or on behalf of a community or nation".[36] Scholars interpreted "public morals" as encompassing measures relating to alcohol, sex, gambling, slavery, torture of animals and drugs.[37]

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[33] Also *Charnovitz*, Va. J. Int'l L. 38 (1998), 689; and *Bagwell et al.*, AJIL 96 (2002), 56, 75.

[34] *US—Gambling*, WT/DS285/AB/R, para. 296.

[35] *US—Gambling*, WT/DS285/R, para. 6.461. See ECJ, Case 34/79, *Henn and Darby*, [1979] E.C.R. 3795, Rec. 15: "In principle, it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory".

[36] *US—Gambling*, WT/DS285/R, para. 6.465. Also *Feddersen*, Minn. J. Global Trade 7 (1998), 75, 106.

[37] *Charnovitz*, Va. J. Int'l L. 38 (1998), 689, 717; *Gonzalez*, Vand. J. Transnat'l L. 39 (2006), 939, 967.

With respect to the term "public order", the Panel, basing itself on the relevant dictionary definition in combination with footnote 5, held that **public order** "refers to the preservation of the fundamental interests of a society, as reflected in public policy and law. These fundamental interests can relate, *inter alia*, to standards of law, security and morality".[38] The Panel's reference to standards of security must not lead to the misapprehension that the public order exception also covers **national security interests**. Such interests are exclusively subject to Art. XIV*bis*, whereby only **societal interests** fall under Art. XIV lit. a.[39] Finally, the Panel resorted to supplementary means of interpretation to determine the meaning and scope of public order.[40] In civil-law systems, this concept derives from private international law. It basically prevents foreign court judgments from being recognized and implemented, or foreign law being applied in a country where such a foreign judgment or law would conflict with fundamental values and concerns of the country's society.[41] *22*

2. The Relationship Between Public Morals and Public Order

Basing itself on the definitions of Art. XIV lit. a, the Panel concluded that, although the two terms stand for two distinct concepts, some **overlap** exists, since both seek to protect similar values.[42] While it is unproblematic to comprehend the overlapping of the two concepts, the Panel did not further elaborate on exactly what manner they differ from one another. The Panel largely avoided the issue by holding that, in this specific case, it was not necessary to assign the various policy objectives invoked by the respondent to either public morals or public order. It concluded that the measures at issue are designed to protect public morals and/or to maintain public order.[43] *23*

Therefore, the distinction and relationship between the two concepts needs to be analysed more closely.[44] As the Panel itself stated, **public order** refers to the preservation of the fundamental interests of a society, includ- *24*

[38] *US—Gambling*, WT/DS285/R, para. 6.467. See the US stance in paras 3.278, 6.458, where the United States equates the term "public order" to the concepts of "ordre public" in French law and "public policy" in common law.

[39] See also *Krajewski*, National Regulation, 158.

[40] *US—Gambling*, WT/DS285/R, paras 6.470–6.473. For a different view, see *Marwell*, N.Y.U. L. Rev. 81 (2006), 802, 811 *et seq*.

[41] See ECJ, C-7/98, *Krombach*, [2000] E.C.R. I-1935, Rec. 37.

[42] *US—Gambling*, WT/DS285/R, para. 6.468.

[43] *US—Gambling*, WT/DS285/R, paras 6.469, 6.474 and 6.487; the United States argued that its measures restricting online gambling were based on concerns relating to (i) organized crime; (ii) money laundering; (iii) fraud; (iv) risks to youth, including under-age gambling; and (v) public health. *Ibid*., para. 6.479.

[44] See also *Diebold*, JIEL (forthcoming 2008), section V; *Feddersen*, Minn. J. Global Trade 7 (1998), 75, 118–120.

ing standards of law, security and **morality**.[45] This assertion demonstrates that, instead of amounting to two different concepts with some overlap, the concept of public order is broader. It actually includes public morals. In fact, it seems impossible to think of any interest relating only to public morals without it, at the same time, being somehow part of the public order. In more generalized terms, "public order" can be regarded as a **catch-all** term. It includes all other legitimate objectives identified under Art. XIV. Even the prevention of under-age gambling or the protection of pathological gamblers, which, according to the Panel, primarily relate to public morals, may equally be deemed a matter of public order.[46] On the other hand, various interests, such as those regarding standards of safety[47] or the fight against organized crime and access to essential facilities may relate only to public order, without touching on public morals.

25 As the notion of public morals is construed as an element of the concept of public order, there is an obvious question: for what reason did the GATS drafters specifically stipulate public morals as a separate ground for justification under Art. XIV lit. a? The **key in separating the two concepts** lies in footnote 5. This footnote **limits** the scope of the public order exception with respect to the required **seriousness** of the threat on the one hand, and the **importance** of the interest of society at stake on the other hand. In contrast, the scope of the public morals exception is not limited in any specific manner. Assume that a certain policy objective invoked by a Member qualifies as a matter of public order, but that the objective at issue, or the threat it is exposed to, does not reach the level of importance or seriousness required by footnote 5. Any measure adopted in order to pursue this policy objective may, therefore, not be justified under the public order exception. If the policy objective at issue qualifies, at the same time, as a matter of public morals, the inconsistent measure may thus still be justified under Art. XIV lit. a, given that the additional requirements of footnote 5 do not apply to the public morals exception.

26 Against this background, it appears that the correct analysis of Art. XIV lit. a consists of **two steps**:[48] first, one must examine whether the specific policy objective protected by a measure inconsistent with GATS is a matter of public morals. If so, the measure may be provisionally justified under lit. a and the analysis ends there. If the public morals exception is not applicable, then it remains necessary to analyse whether the objective in

[45] See above, para. 21.

[46] *US—Gambling*, WT/DS285/R, para. 6.469; in para. 6.470, however, the Panel noted that "[Judge Lauterpacht] further stated that 'the **protection of the interest of minors**…falls naturally within the notion of *ordre public*.'" (emphasis added).

[47] Note, however, that policy objectives related to safety may possibly be justified under the health exception of Art. XIV lit. b.

[48] *Diebold*, JIEL (forthcoming 2008), section V(B).

question qualifies as any matter relating to public order other than public morals. If this is the case, then the measure at issue may still be justified under Art. XIV lit. a, provided that (i) it is aimed to protect "one of the **fundamental** interests of society" which (ii) is exposed to a **"genuine** and **sufficiently serious threat"**[49] in accordance with footnote 5. Of course, this analysis strongly depends on the arguments that the respondent will advance regarding Art. XIV lit. a.

3. Content and Level of Protection

27 Based on the definitions developed by the Panel, it is necessary to determine the specific content and scope to be accorded to the concepts of public morals and public order.[50] According to the Panel, the question of content is closely linked to the issue of **level of protection**. The Appellate Body held with regard to the general exceptions clause of GATT 1994 that each Member is free to determine its own appropriate level of protection or enforcement of WTO-consistent laws.[51] In *US—Gambling*, the Panel considered this practice developed by the Appellate Body and held that it is also to be applied with regard to the analysis of public morals and public order in terms of Art. XIV lit. a.[52] In the Panel's view, the content of this provision is **evolutionary** and can be **unilaterally defined**.[53]

28 The Panel's conclusion that Members should have a certain **degree of leeway** in determining the content of "public morals" and "public order" is correct. Unlike, for example, "health", morals and order strongly depend on the prevailing values and ideals of a specific society or nation. Nevertheless, by holding that Members should generally be given some scope to define and apply for themselves the concepts of public morals and public order, the Panel did not sufficiently assess footnote 5. In fact, the requirements of footnote 5 **limit** the Member's scope for defining the concept of public order (other than public morals) to (i) "fundamental interests of society" which (ii) are exposed to a "genuine and sufficiently serious threat".[54] Hence, while Members are to a large extent **free** to determine their concept of

[49] Emphasis added.

[50] See above, para. 16; for an analysis of the justifiability of 'extraterritorial' measures on grounds of public morals or public order, see *Diebold*, JIEL (forthcoming 2008), section IV.

[51] See, Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, para. 168 (level of health); Appellate Body Report, *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 176 (level of enforcement).

[52] *US—Gambling*, WT/DS285/R, para. 6.461. Also above, para. 20 and footnote 35.

[53] *Ibid*.

[54] The concept of public policy in the ECJ's case law has also been interpreted in an identical manner. See ECJ, C-54/99, *Eglise de Scientologie*, [2000] E.C.R. I-1335, Rec. 17; also ECJ, C-36/02, *Omega*, [2004] E.C.R. I-9609, Rec. 30.

public morals,[55] they are considerably restricted in defining the content of any other matter of public order (*e.g.* standard of safety), in that they must show that the interest at stake is **"fundamental"** to society and that the threat is **"genuine** and **sufficiently serious"**. The high standards required by footnote 5 reflect Members' shared willingness to avoid minor deviations from the substantive GATS obligations.[56]

29 It follows that Members are accorded a certain **flexibility** in determining whether a specific interest sought to be protected by an inconsistent measure falls within the Member's concept of "public morals"; this scope, however, is considerably **narrower** with respect to the concept of "public order", given that the interest must meet the demanding requirements of footnote 5.[57] Once a certain policy objective is found to be covered by lit. a, such as, for example, the prevention of under-age gambling, then the Members have the right to choose any level of protection to pursue that specific objective, including a "zero-risk" level.[58]

II. Human, Animal or Plant Life or Health (Art. XIV lit. b)

30 Art. XIV lit. b serves to justify measures which are aimed at the protection of **human**, **animal** or **plant life** or **health**. The provision exactly corresponds to Art. XX lit. b GATT 1994. For this reason, and since this exception has hitherto not been invoked under GATS, the jurisprudence relating to Art. XX lit. b GATT 1994 is highly relevant for the interpretation of Art. XIV lit. b. Yet, unlike the general exceptions clause of GATS, Art. XX GATT 1994 explicitly provides for the possibility of justifying an inconsistent measure "relating to the conservation of exhaustible natural resources" (lit. g). This absence of a similar provision under GATS needs to be taken into account in the interpretation of Art. XIV lit. b in relation to GATS-inconsistent measures aimed at the protection of the environment. Furthermore, it can reasonably be argued that the protection of human life also embodies concerns relating to the protection of consumers beyond Art. XIV lit. c (i).[59]

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[55] The Members' scope for determining "public morals" is, however, limited by the good faith requirements of the *chapeau* (see below, paras 70 *et seq.*); See also *e.g.* ECJ, Case 121/85, *Conegate v HM Customs & Excise*, [1986] E.C.R. 1007, Rec. 4.

[56] See also *US—Gambling*, WT/DS285/AB/R, para. 308.

[57] According to the Appellate Body, a Panel is not obliged to make a separate, explicit determination that the standard set out in footnote 5 is satisfied: *US—Gambling*, WT/DS285/AB/R, para. 298.

[58] *Ibid.*, paras 308, 311.

[59] For a similar argumentation in the EC context, see *Craig & de Búrca*, 661.

1. Health Measures

31 Analysing the relationship between measures aimed at the protection of "life" and measures relating to "health", it may be concluded that any objective aimed at the protection of "life" qualifies at the same time as a matter of "health".

32 The issue of what **content** is to be accorded to the "public health" interest in terms of Art. XIV lit. b is, contrary to the concepts of "public morals" and "public order", comparatively clear and significantly less controversial. In fact, there is no need to impute a meaning or content to the public interest of "health"—which is identical for all human beings—in the same way as it is necessary with regard to the concepts of Art. XIV lit. a. For example, curbing the spread of diseases, preventing the occurrence of injuries, accidents or of mental disorder are, without doubt, all policy objectives falling within the public interest of "health". Most disagreements are likely to occur with respect to a policy objective aimed at preventing the occurrence of mental disorder. In the *US—Gambling* case, for example, the parties disputed whether the objective relating to "health concerns" associated with pathological gambling should fall within "public morals" in lit. a or within "health" in terms of lit. b.[60] While the Panel analysed these "health concerns" under lit. a without discussing its delimitation from lit. b, the Appellate Body did not explicitly rule on this issue at all.[61] Given that health concerns regularly also qualify as a matter of public morals and/or public order, lit. b can be seen as constituting a *lex specialis* as compared to lit. a. Therefore, all concerns relating to health should exclusively be examined under Art. XIV lit. b. However, when health is just **one** of the interests that a measure aims to protect and the other interests fall under Art. XIV lit. a, then the measure should be examined under lit. a. This is the conclusion that can be drawn from the *US—Gambling* ruling.[62] In any event, this differentiation remains of no practical consequence, given that both lit. a and lit. b require the application of the necessity test.

33 Whilst the content of "health" is relatively straightforward, the difficult issue with respect to lit. b frequently lies in answering the question whether or not trade in certain goods or services actually poses a **risk** to human, animal or plant health.[63] For example, in *EC—Asbestos* it was not disputed that the policy objective aiming at the prevention of lung cancer was a matter of interest to health. However, the parties did not agree on the question whether or not trade in products containing asbestos would actually constitute a

[60] *US—Gambling*, WT/DS285/AB/R, paras 75, 94.
[61] *US—Gambling*, WT/DS285/R, paras 6.510–6.514, and *US—Gambling*, WT/DS285/AB/R, paras 283–284.
[62] *Ibid.*
[63] See above, para. 16.

risk to human health.[64] According to the case law relating to Art. XX lit. b GATT 1994, the responding Member needs to make a *prima facie* case for the existence of a health risk in connection with trade in specific goods.[65] In order to establish a *prima facie* case, the responding Member is only required to present evidence which **tends to show** the **existence** of health risks and the need for the adoption of the impugned measures.[66] Once the *prima facie* case has been established by the respondent, the claimant has the burden of **rebutting the allegation** and demonstrating that, in fact, no health risk exists in connection with trade in the product in question.[67]

2. Environment and Natural Resources

34 Any measure aiming at the protection of the environment may be justified under Art. XIV lit. b to the extent that it relates to human, animal or plant life or health. However, the situation is less clear with respect to measures protecting **natural resources**, such as air, water or soil. Art. XX lit. g GATT 1994 sets out specific grounds and requirements for the justification of measures "relating to the conservation of exhaustible resources". This provision has been interpreted by the Appellate Body as including the conservation of "both living and non-living resources" and applying in particular to species threatened with extinction.[68] While policy objectives relating to the protection of **living resources** and diversity of species fall under "animal or plant life or health" in terms of Art. XIV lit. b, an extensive interpretation of this provision would have to be undertaken in order for it also to cover measures relating to **non-living resources**.

35 In this context it is helpful to take into account the *travaux préparatoires* of GATS. On 1 March 1995, the Council for Trade in Services noted that "since measures necessary to protect the environment typically have as their objective the protection of human, animal or plant life or health, it is not clear that there is a need to provide for more than is contained in paragraph (b) of Art. XIV".[69] For such reasons, the Council for Trade in Services adopted the decision that "[i]n order to determine whether any modification of Art. XIV of the Agreement is required to take account of […] measures [necessary to protect the environment], [Ministers] request the Committee on Trade and Environment to examine and report, with recommendations if any, on the relationship between services trade and

[64] *EC—Asbestos*, WT/DS135/AB/R, paras 19, 157–163.
[65] *Ibid.*, paras 157–163.
[66] See below, paras 55 *et seq.*
[67] *US—Gambling*, WT/DS285/R, para. 6.514.
[68] *US—Shrimp*, WT/DS58/AB/R, para. 131.
[69] Council for Trade in Services, Decision on Trade in Services and the Environment, Adopted by the Council for Trade in Services on 1 March 1995, S/L/4, 4 April 1995, preliminary note.

the environment including the issue of sustainable development".[70] As a result of this decision, the Committee on Trade and Environment prepared a background paper on this issue, analysing in particular the negotiating history of Art. XIV.[71] The committee first considered that the draft Art. XIV contained a number of proposals for environmentally related grounds for justification, such as "sustainable development and environment", "the protection of its environment" or "the conservation of exhaustible natural resources".[72] Due to concerns relating to the "vagueness and scope of the term 'environment'", the risk of **unilateral** and **extraterritorial** trade sanctions as well as doubts about the need for these exceptions,[73] only the health exception of today's lit. b was retained. In particular, some negotiators were of the view that intangible services can *per se* not be polluting, meaning that services could cause environmental damage only in connection with trade in goods; in that case, however, Art. XX lit. g GATT 1994 would apply.[74]

According to the Committee on Trade and Environment, there was, by *36*
the end of the negotiations, "a broad agreement among participants that measures necessary to protect human, animal and plant life or health were understood to include measures necessary to protect the environment [...]".[75] Against this background, it is apparent that Art. XIV lit. b is to be interpreted **widely**. It is meant to include all environmental measures designed in any way to protect living creatures or resources. However, considering that during the negotiation of the Agreement an exception similar to that in Art. XX lit. g GATT 1994 was explicitly omitted, the environmental protection of "non-living resources" not relating in any way to any health concern cannot readily be included in Art. XIV lit. b.[76] Yet, such measures

[70] S/L/4, para. 1.

[71] Committee on Trade and Environment, Environment and Services, WT/CTE/W/9, 8 June 1995, paras 3–10; See also, Report (1996) of the Committee on Trade and Environment, WT/CTE/1, 12 November 1996, paras 153–158, 210–211; Committee on Trade and Environment, Environmental Issues Raised in the Services Negotiations, Statement by Mr. A. Hamid Mamdouh at the Regular Session of the Committee on Trade and Environment of 29–30 April 2003, Paragraph 51, WT/CTE/GEN/11, 16 April 2003, para. 3.

[72] WT/CTE/W/9, para. 5, referring to: Trade Negotiations Committee, Uruguay Round, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Part 3), Revision, MTN.TNC/W/35–3/Rev.1, 3 December 1990, Art. XIV; See also *e.g.* MTN.GNS/24, paras 53, 183 (Argentina), 101, 181 (Sweden), 103 (Peru), 178 (Japan); MTN.GNS/40, para. 14 (Switzerland).

[73] WT/CTE/W/9, paras 7, 27, 36.

[74] WT/CTE/1, para. 154; WT/CTE/W/9, para. 9; yet, transport services, for example, could on their own have polluting effects.

[75] WT/CTE/W/9, para. 8.

[76] See also *Michaelis*, in: *Hilf & Oeter* (eds), 375, 410, para. 109; for a different opinion, see *Krajewski*, National Regulation, 160 *et seq.*; however, measures addressing pollution concerns, including those relating to transport services, should, in most cases, fall within the health exception, given that this provision has to be interpreted extensively. See also Art. 2101 NAFTA which provides that the protection of non-living exhaustible natural resources can

may be examined under any of the other GATS exceptions or—to the extent that GATT 1994 also applies to a given case—under Art. XX lit. g GATT 1994. Should a measure addressing the supply of a service in association with polluting goods breach both a GATT 1994 and a GATS obligation, only the GATT 1994 violation could be justified under Art. XX lit. g GATT 1994.

3. Content and Level of Protection

37 Compared to the other interests identified in Art. XIV, the content to be accorded to the interest of "health" is fairly straightforward.[77] As to the level of protection, it primarily relates to the analysis of the **necessity of a measure**.[78] Consistent WTO case law suggests that Members have considerable discretion in determining the **content** of human, animal or plant health.[79] This would signify that Members could, for example, decide for themselves whether a very minor injury or negligible feeling of discomfort caused by trade in a certain service would actually qualify as a health interest in terms of Art. XIV lit. b. In more generalized terms, Members are not obliged to follow a majority scientific opinion in setting their health policies. Hence scientific sources that may represent a divergent viewpoint may also be relied on.[80] By the same token, Members are free to determine their **desired level of protection**, which may entail measures that aim to reduce health risks to **zero**.[81] While such an **objective** cannot be challenged, the chosen **instruments** will be subject to judicial review.[82] The situation is comparable to the analysis made under the SPS Agreement.

III. Compliance with GATS-Consistent Laws or Regulations (Art. XIV lit. c)

38 Art. XIV lit. c exempts measures that are necessary to **secure compliance** with laws or regulations which per se are consistent with GATS. According to this provision, GATS-consistent laws or regulations may relate, *inter alia*, to (i) the **prevention** of **deceptive** and **fraudulent practices** or to dealing with the **effects** of a **default** on services contracts; (ii) the **protection** of the **privacy** of **individuals** in relation to the **processing** and **dissemination** of **personal data** and the **protection** of the **confidentiality**

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justify a measure that violates a provision of the NAFTA Chapter on cross-border trade in services.

[77] See above, para. 32.

[78] See below, paras 55 *et seq*.

[79] See, *inter alia*, *EC—Asbestos*, WT/DS135/AB/R, para. 168.

[80] See *EC—Asbestos*, WT/DS135/AB/R, para. 178.

[81] *Ibid*., para. 168.

[82] See Appellate Body Report, *Australia—Salmon*, WT/DS18/AB/R, para. 200.

of **individual records** or **accounts**; or (iii) **safety**. All these areas are **explicitly** considered to be **consistent** with the GATS.

39 The Appellate Body, in interpreting Art. XX lit. d GATT 1994 which uses similar terms to Art. XIV lit. c, ruled that the term "laws or regulations" refers to "rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system" and do not extend to the **international obligations** of another Member.[83] Therefore, **international countermeasures** intended to induce **another** Member to comply with its obligations under a non-WTO agreement would fall outside the scope of Art. XIV lit. c.

1. GATS-Consistent Regulations

40 The implementation of domestic market regulations in goods and services often depends on appropriate regulation of foreign products accessing domestic markets. The achievement of policy goals adopted and set may render trade restrictions necessary. Art. XIV lit. c builds upon the criteria of Art. XX lit. d GATT 1994. The measure to be justified under Art. XIV lit. c is required to relate **directly** to a measure which in itself is GATS-consistent and the effective implementation of which necessitates departing from GATS obligations. For example, the efficient enforcement of a regime may require treating foreign services or service providers differently from domestically established providers in terms of procedures and administrative controls. In order for a measure to fall within this provision, the responding party invoking this exception must show that (i) the measure for which justification is claimed "secures compliance" with other laws or regulations and (ii) those other "laws or regulations" are consistent with the GATS.[84] In order for a measure to secure compliance, it must "enforce" the relevant GATS-consistent laws and regulations. Additionally, this measure for which justification is sought has to enforce "obligations" contained in the laws and regulations and not merely ensure achievement of the goals of those laws and regulations.[85] WTO case law suggests that the challenged measure would satisfy the standard of Art. XIV lit. c even if it was designed to secure **partial** compliance with the GATS-consistent laws and regulations.[86] Recently, in the *Mexico—Taxes on Soft Drinks* case, the Appellate Body,

[83] *Mexico—Taxes on Soft Drinks*, WT/DS308/AB/R, paras 70, 79.

[84] *US—Gambling*, WT/DS285/R, para. 6.536. See GATT Panel Report, *US—Section 337*, BISD 36S/345, paras 5.22–5.23.

[85] *US—Gambling*, WT/DS285/R, para. 6.538. See *US—Gasoline*, WT/DS2/AB/R, para. 6.33.

[86] *US—Gambling*, WT/DS285/R, para. 6.539. Also Panel Report, *Korea—Various Measures on Beef*, WT/DS161/R, WT/DS169/R, para. 658.

when interpreting the term "to secure compliance" under Art. XX lit. d GATT 1994, contended that a measure that cannot guarantee to achieve its result, that is, to secure compliance, with absolute certainty can still be said to be entitled to a justification under Art. XX lit. d GATT 1994.[87] Furthermore, contrary to the Panel's findings, the Appellate Body rejected the use of coercion as being a necessary element of a measure "designed to secure compliance". In the Appellate Body's view, it is the **design** of the measure that must contribute to securing compliance with domestic WTO-consistent laws and regulations.[88]

41 According to dispute settlement practice under Art. XX lit. d GATT 1994, Members have the right to determine for themselves the **level of enforcement** of their WTO consistent laws and regulations.[89] This practice may be applied *mutatis mutandis* to Art. XIV lit. c. Hence, Members have the right to design measures aimed at the enforcement of GATS-consistent laws in such a way as to achieve even a zero-risk level of protection with regard to the policy objective pursued (*e.g.* accept no deviations from a GATS-consistent law aimed at the prevention of fraud) or simply to reduce the risk to an acceptable level (*i.e.* reduce the number of deviations from the GATS-consistent law), provided that the level of enforcement does not discriminate between domestic and foreign services or service suppliers.[90]

2. Illustrative List of Legitimate Interests

42 Art. XIV lit. c includes a list of interests the enforcement of which may incur measures otherwise inconsistent with GATS obligations and commitments of a Member. The concept strongly resembles Art. XX lit. d GATT 1994, differing only in the list of specific interests to which the relevant laws or regulations may relate. The only common interest is found in the prevention of deceptive practices.[91] While the list of public interests provided for under Art. XIV lit. a–e is said to be exhaustive, the expression "including those relating to" in lit. c clearly indicates that, in addition to the interests set out in sub-subparagraphs (i), (ii) and (iii), laws and regulations relating to other interests may also fall within Art. XIV lit. c. Hence, the list in this

[87] *Mexico—Taxes on Soft Drinks*, WT/DS308/AB/R, para. 74.
[88] *Ibid.*
[89] Appellate Body Report, *Dominican Republic—Import and Sale of Cigarettes*, WT/DS302/AB/R, para. 23; *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 176.
[90] *Ibid.*, para. 181.
[91] Other than that, Art. XX lit. d GATT 1994 specifies customs enforcement, and the enforcement of monopolies as well as the protection of patents, trade marks and copyrights as legitimate interests.

specific provision is not exhaustive, but "merely an indication of legitimate goals".[92] This was also made clear in Art. XX lit. d GATT 1994.[93]

43 This list adopts almost in its entirety para. 16.2 of the United States' proposal for a services agreement submitted during the Uruguay Round.[94] It should be noted that there are only a few indications documenting the negotiating history in respect of the illustrative list of interests identified under Art. XIV lit. c (i)–(iii). Presumably, Members had a common understanding of what should come within the ambit of these notions. Under Art. XIV lit c (i) one can reasonably include most national laws and regulations which aim at the protection of consumers from fraud or deceptive practices that service suppliers may use to attract customers. A reflection of this is also the exclusion (so-called "carve-out") of prudential standards embodied in para. 2 lit. a of the Annex on Financial Services. At the national level the equivalent of such interests is usually protected in the civil law, and more particularly in tort law (*Treu und Glauben im Geschäftsverkehr*). In addition, national competition laws may also come under this paragraph, provided that they are per se GATS-consistent.

44 Particularly with regard to Art. XIV lit. c (ii), the significance of ensuring the privacy of individuals and the protection of sensitive personal data is acknowledged. This may be of great value in the case of financial services or services supplied by electronic means where the confidentiality of personal data and the security of communications are indispensable elements of any transaction.[95] As to **safety** referred to in Art. XIV lit. c (iii), national regulations setting standards that a service supplier needs to meet to ensure a certain level of quality and a low or non-existent probability of hurt or injury to society can fall within this provision. For instance, public safety may be at stake in the liberalization of construction services and the adoption of building regulations or rules relating to inspection, and the awarding of building permits. Viewed from this angle, there appears to be an overlap between Art. XIV lit. c (iii) and Art. VI which also covers measures that aim to ensure the **quality** of the service supplied.

IV. Tax Measures

1. Scope of Application

45 The last two paragraphs of Art. XIV address conditions for derogations from non-discrimination relating to **taxation**. Derogations are allowed

[92] *US—Gambling*, WT/DS285/R, para. 6.540; also *Krajewski*, National Regulation, 158.
[93] *Mexico—Taxes on Soft Drinks*, WT/DS308/AB/R, para. 70.
[94] See MTN.GNS/W/75, Art. 16.
[95] See Council for Trade in Services, The Work Programme on Electronic Commerce, Note by the Secretariat, S/C/W/68, 16 November 1998, para. 26.

from the national treatment obligation when it comes to the imposition or collection of direct taxes. Derogations are equally allowed from the MFN obligation in the case of, usually bilateral, agreements or arrangements that aim at the avoidance of double taxation. Thus, tax measures affecting trade in services may be justified under Art. XIV lit. d and e if they violate Art XVII (national treatment) or Art. II (MFN), respectively. At the outset, both the imposition of a tax on, and the denial of a tax benefit to, a service or service supplier can be deemed a measure affecting trade in services within the meaning of Art. XXVIII lit. a.[96] According to Art. XVII:3, formally identical or formally different treatment amounts to treatment no less favourable if it modifies conditions of competition between like domestic and foreign services or service providers. Art. XIV lit. d only applies to circumstances where such distortions are established by the claimant in the first place. In many instances, differential modes of taxation may not impair conditions of competition, for example if somewhat different procedures apply to imported products but do not affect the overall tax burden. As tax systems often inherently seek to maintain equal conditions of competition, it may be expected that the number of tax measures falling under the provision remains limited. No state practice and experience have evolved so far.

46 The same considerations are applicable *mutatis mutandis* with regard to MFN.[97] For instance, a tax measure which draws a distinction between a foreign service supplier located in a country with low taxes and another foreign service supplier operating from a country with high levels of taxation does not amount to an MFN violation, as the measure seeks to bring about equal conditions of competition for like services. By the same token, a Member could justify the imposition of a higher tax on the basis of the country of the **location** of the affiliate of a supplier. In this case, the MFN obligation would not be violated, provided that the Member at issue thereby seeks to cancel out the tax advantages stemming from the deferral possibilities offered by the use of lower tax regimes that the supplier may make through affiliates abroad.[98]

47 In more generalized terms, a tax policy designed to preserve the Member's tax base, to offset the evasion or avoidance of taxes, or to avoid double taxation and which, consequently, does not discriminate on the basis of nationality cannot be regarded as violating the principle of non-discrimination under GATS in the first place. It is only in relation to measures which

[96] Group of Negotiations on Services, Uruguay Round, Taxation Issues Related to Article XIV(d), Note by the Secretariat, MTN.GNS/W/178, 15 November 1993.

[97] Group of Negotiations on Services, Uruguay Round, The Applicability of the GATS to Tax Measures, Note by the Secretariat, MTN.GNS/W/210, 1 December 1993.

[98] Group of Negotiations on Services, Uruguay Round, Informal GNS Meeting of 10 December 1993, Chairman's Statement, MTN.GNS/49, 11 December 1993.

amount to violations of non-discrimination that Art. XIV lit. d and lit. e apply. It goes without saying that justification depends on compliance with the specific requirements of these provisions as well as those applied under the *chapeau* of Art. XIV.

2. Imposition and Collection of Direct Taxes (Art. XIV lit. d)

48 Art. XIV lit. d allows Members to depart from the national treatment obligation for purposes relevant to the objectives of **equitable** or **effective** imposition or collection of direct taxes.[99] Direct taxation is defined in Art. XXVIII lit. o as encompassing all taxes of total income, on total capital or on elements of income or of capital, including taxes on gains from the sale of property, taxes on estates, inheritances and gifts, and taxes on the total amounts of wages or salaries paid by companies, as well as taxes on capital appreciation. Apart from defining direct taxation, Members had some difficulties in delineating the scope of the terms "equitable" and "effective". Therefore, because of this ambiguity, Members agreed during the Uruguay Round to incorporate in the GATS text an interpretive footnote to Art. XIV lit. d. Thus, footnote 6 sets out an **exhaustive** list of six types of measures that aim at ensuring the equitable or effective taxation of services or service suppliers.[100] The fact that these types of measures form part of the justification set out in lit. d should not be taken to mean that such measures would *ipso facto* violate Art. XVII.

49 The interpretive footnote makes it clear that the tax terms and concepts that are mentioned therein and in Art. XIV lit. d should be interpreted with reference to the national tax legislation at issue. The wording of the footnote, notably the phrase "under its taxation system", implies that all tax terminology included in Art. XIV as well as in the footnote cannot be defined other than by reference to the **national tax legislation** of the country adopting the tax measure at issue.[101] Thus, the terms utilized in Art. XIV may not exactly correspond to tax measures at the national level or may differ from Member to Member.[102] However, the provision suggests that national tax measures may have similar meanings or functions, and the footnote acknowledges this by adopting a wide wording to accommodate such differences. Consequently, important flexibility is provided so that the

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[99] See Panel Report, *US—FSC*, WT/DS108/RW, para. 8.143.

[100] MTN.GNS/W/178.

[101] Group of Negotiations on Services, Uruguay Round, Taxation Issues Related to Article XIV(d), Note by the Secretariat, Addendum, MTN.GNS/W/78/Add.1, 30 November 1993.

[102] See Appellate Body Report, *US—FSC*, WT/DS108/AB/RW, para. 143. Importantly, the Appellate Body correctly pointed out that while differences between national systems exist, a common element among all is that a Member will tax a non-resident on income which is generated by activities that are linked to the territory of that Member. *Ibid.*

WTO adjudicating bodies may expand the coverage of the six types of tax measures to encompass relevant national measures with equivalent or similar functions, which at first blush may not fit the terms of the footnote, but which effectively seek to pursue the objectives identified in the footnote.

50 The purpose of the footnote is to give to WTO Members **guidance** on the types of measures that may come under Art. XIV lit. d. Hence, if a national tax measure falls under Art. XIV lit. d, the footnote cannot be interpreted to prevent such an outcome. Under the footnote may come, for instance, withholding taxes or the denial of personal reliefs and reductions; the failure to grant dividend tax credits to non-residents; reporting and collection mechanisms for cross-border transactions; or measures that reduce the tax burden on persons subject to tax on their world-wide income.[103] In the course of the Uruguay Round, Members affirmed their intention to leave unaffected any **bilateral tax treaties** concluded between Members.[104]

3. Agreements on the Avoidance of Double Taxation (Art. XIV lit. e)

51 Finally, Art. XIV lit. e provides for a permissible derogation from the MFN obligation when the discriminatory treatment originates in an agreement on the **avoidance of double taxation**. Double taxation "occurs when the same income, in the hands of the same taxpayer, is liable to tax in different States".[105] Under this exception come, for instance, tax measures applicable in the absence of exchange of information agreements with another jurisdiction or measures and methods of providing for relief from double taxation. Members may also prepare lists of Members that qualify for the avoidance of double taxation and Members that should be excluded. Such lists are not inconsistent with the MFN obligation as long as they are based on **objective** criteria, such as a bilateral agreement on the avoidance of double taxation.[106]

52 It is worth noting that footnote 59 of the SCM Agreement provides for a similar exception. Under this exception a prohibited export subsidy is justified when the measure at stake is taken to avoid the double taxation of income earned by a taxpayer of a Member in a foreign state.[107]

53 A procedural exception relating to the jurisdiction of WTO law on double taxation is to be found in Art. XXII:3 and footnote 11 thereto. Art. XXII deals with obligations to consult prior to formal dispute settlement and requires that Members accord "sympathetic consideration" to representa-

[103] MTN.GNS/49.
[104] *Ibid.*
[105] *US—FSC*, WT/DS108/AB/RW, para. 137.
[106] MTN.GNS/W/178.
[107] *US—FSC*, WT/DS108/AB/RW, paras 132, 137.

tions made and agree to hold consultations within the meaning of Art. 4 DSU with any other Member regarding any issue affecting the operation of the GATS.[108] According to Art XXII:3, these obligations do not extend to the subject matter covered by bilateral agreements on double taxation. Members are not allowed to allege under Art. XXII and Art. XXIII the inconsistency with Art. XVII of a measure that may fall within the scope of a bilateral agreement or an agreement to which the two Members involved are parties. Where the bilateral agreement on the avoidance of double taxation existed **before** the entry into force of the WTO Agreement and parties disagree as to whether a violation of the national treatment obligation took place, the matter can be brought before the Council for Trade in Services (CTS) only with the consent of **both** parties. The CTS can refer the matter to binding arbitration in accordance with Art. 25 DSU.[109]

54 Appendix 2 to the DSU acknowledges the existence of special rules and procedures under Art. XXII:3, which prevail over the ordinary rules of dispute settlement proceedings pursuant to Art. 1.2 DSU. Consequently, if the parties disagree that the measure falls within the scope of the agreement on double taxation, the WTO merely offers the avenue of binding arbitration. To the extent that the scope of the measure is controversial and the claimant alleges a violation of GATS obligations, it may be a matter for a panel to rule on its jurisdiction to assess the case.

D. Necessity Test

I. Overview

55 The necessity of a measure amounts to a key requirement for most of the exemptions and restrictions in WTO law. This holds true for Art. XX GATT 1994 to which most of the WTO jurisprudence on the subject relates. This equally holds true for Art. XIV the structure of which is modelled on Art. XX GATT. Both entail a **necessity test**. The test embodies a number of components, discussed below.[110] It closely resembles the test of proportionality developed and applied in continental European law, albeit without being identical in terms of content and methodology applied. Generally, it allows a line to be drawn between measures that serve important legitimate policy objectives and measures that entail protectionism. In *US—Gambling*, the Appellate Body emphasized that the necessity standard laid down in Art. XIV is an objective one. This "objective" and "independent" assessment

[108] *Grote*, Article XXII GATS, paras 5 *et seq*.
[109] For the negotiating history on the adoption of footnote 11, see MTN.GNS/49.
[110] See, *in extenso, Delimatsis*, International Trade, 211–232.

of the necessity of the measure at stake should be based on the evidence before the panel. Mainly, this includes (a) the respondent's characterization of the objectives of the measure and of the effectiveness of the regulatory approach adopted by the respondent; (b) the structure and operation of the measure; (c) the contrary evidence submitted by the complainant.[111] An important part of this assessment is the panel's examination of whether the respondent already applies a WTO-**consistent** measure to a like or similar kind of illegal behaviour to attain the same objectives as the WTO-**inconsistent** measure at issue.[112] If so, this may be a strong indication that an alternative option that the respondent could reasonably be expected to use is actually available. This, however, should not be taken to mean that a panel is bound to examine only **existing** national measures when it seeks to identify alternative WTO-consistent (or less WTO-inconsistent) measures.

56 As noted earlier,[113] Art. XIV, unlike Art. XX GATT 1994, does not provide for different types of legal relationship between the measures at stake and the interest protected. It does not, in other words, distinguish between measures "necessary" for, and those merely "relating" to, the attainment of a particular interest and policy goal. Rather, a uniform type of relationship and thus a single connection is applied under Art. XIV lit. a–c; the measure at stake has to be "necessary". Essentially, it is a matter of establishing and assessing whether the measure is crucial for the achievement of policy goals adopted. It will be seen that the operation essentially entails a process of balancing interests. Whereas the same factors are to be "weighed and balanced" in order to establish necessity, the final outcome will depend very much on the **relative importance** of the interests at stake. Human life, for instance, may weigh more in the eyes of the WTO judiciary than securing compliance with a law on personal data protection. Hence, in the first case, a higher degree of **judicial deference** and **self-restraint** may be shown.

57 In *US—Gambling*, the Appellate Body seized the opportunity further to clarify the issue of **burden of proof** when it comes to the general exceptions provision.[114] In the first place, it is for the respondent to establish the necessity of its measure to pursue an objective that falls within Art. XIV lit. a–c. This is a considerable task, since it should allow the panel to assess the measure based on the three factors of the *Korea—Various Measures on Beef* "weighing and balancing" process. Provided that the respondent makes out a prima facie case for the necessity of the impugned measure, the burden

[111] *US—Gambling*, WT/DS285/AB/R, para. 304.
[112] *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R para. 172; also *Marceau & Trachtman*, JWT 36 (2002), 811, 847.
[113] See above, paras 13–14.
[114] *US—Gambling*, WT/DS285/AB/R, paras 309–311.

of proof shifts to the complainant who is required to identify a **concrete** WTO-consistent (or less WTO-inconsistent) alternative measure which the respondent could have been reasonably expected to use. To this end, the complainant has to show that the alternative measure can achieve the level of protection sought by the respondent. If the complainant succeeds in this, the respondent is required to explain the reasons why the measure proposed by the complainant is not, in fact, reasonably available, taking into account the interests and values at stake and the respondent's desired level of protection.

II. Determining Necessity Through a "Weighing and Balancing" Process

58 Necessity was interpreted quite narrowly in the years of GATT 1947. The requirement was met only where no other reasonably available measure existed that was consistent (or less inconsistent) with the GATT and which the responding Member could make use of to pursue as effectively its public policy objective falling under one of the Art. XX exceptions.[115]

59 Under GATT 1994 and WTO law, the *Korea—Various Measures on Beef* ruling added some important clarifications with respect to the proper necessity test that is to be applied under the general exceptions provision. The first important clarification was that, while a measure that is "indispensable" or "of absolute necessity" should be regarded as "necessary", other measures which may "make a contribution" to the pursued objective may also be deemed to meet the necessity standard. However, for the purposes of Art. XX GATT 1994 (and, by implication, of Art. XIV), a "necessary" measure is "located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'".[116] Consequently, according to the *Korea—Various Measures on Beef* case law, if a measure is indispensable then it is probably the only one reasonably available, and thus its necessity is uncontested. Nevertheless, there may be cases where alternative measures may exist which were reasonably available to the respondent. For a measure to qualify as an "alternative", it has to be able to achieve the same level of protection. After having found an alternative measure, the Appellate Body suggested that a comparison of alternatives has to take place.

60 In its attempt to identify some elements that could facilitate the comparison of the measure at issue with the alternative measure (proposed by the complainant), the Appellate Body suggested that three important factors are to be "weighed and balanced" to determine necessity: (i) the relative

[115] *US—Section 337*, BISD 36S/345, para. 5.26.
[116] *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 161.

importance of the interests of values furthered by the impugned measure; (ii) the contribution of the measure to the realization of the ends pursued by it; and (iii) the restrictive impact of the measure on international commerce.[117] Hence, there should be a comparison between the impugned measure and an alternative measure on the basis of the weighing and balancing process.[118] Only after this step has taken place can a panel determine whether the WTO-consistent or less WTO-inconsistent alternative is reasonably available. Whereas the list of factors that the Appellate Body identified in *Korea—Various Measures on Beef* is meant to be **illustrative**, the WTO judiciary appears to be satisfied when the measure at stake is tested against these three factors. As will be demonstrated later, the WTO judiciary has a significant margin of appreciation and panels are allowed, as the triers of facts,[119] to favour qualitative over quantitative elements.

1. Relative Importance of the Policy Objective

61 In *Korea—Various Measures on Beef*, the Appellate Body emphasized that the necessity requirement can be more easily satisfied when the common interests or values advanced by the challenged measure are of vital importance. Hence, when the value at stake in a case, such as the protection of human life and health, is deemed "vital and important in the highest degree", even a total prohibition (that reflects a chosen zero-risk level of protection and which is the most severe means of restricting trade)[120] can be justified in order to avoid, for example, life-threatening health risks or the deleterious effects of under-age gambling, provided that it does also fulfil the requirements of the *chapeau*.[121] Indeed, when it comes to such important values and interests, necessity has a very flexible meaning that is relatively easy to fit.[122] Hence, necessity is a flexible concept that, if applied properly, may **protect** rather than curtail **regulatory diversity**.

62 In a broader sense, depending on the importance of the values that the measure at issue is designed to serve, the WTO judiciary will apply diverging levels of scrutiny when determining the necessity of a measure.[123] While

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[117] *Ibid.*, paras 162–164. Also *US—Gambling*, WT/DS285/AB/R, para. 306.

[118] *Ibid.*, para. 307; also *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 166; *Dominican Republic—Import and Sale of Cigarettes*, WT/DS302/AB/R, para. 70.

[119] See Appellate Body Report, *US—Wheat Gluten*, WT/DS166/AB/R, para. 151.

[120] *US—Shrimp*, WT/DS58/AB/R, para. 171.

[121] *EC—Asbestos*, WT/DS135/AB/R, para. 172. Also *US—Gambling*, WT/DS285/R, para. 6.492.

[122] *Matsushita et al.*, 494.

[123] Committee on Trade and Environment, GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d) and (g), Note by the Secretariat, WT/CTE/W/203, 8 March 2002, para. 43. In this direction, also *Sykes*, U. Chi. L. Rev. 70 (2003), 403, 416. These varying degrees of judicial review are also to be identified in the ECJ's application of the principle of proportionality. Also *Jacobs*, in: *Ellis* (ed.), 1, 20. See

illustrative, the list of the factors that need to be "weighed and balanced" could arguably be considered as hierarchical in that the most important factor that a panel should take account of is the importance of the interests and values at stake. These interests should be satisfied by the alternative, less trade-restrictive measure **equally effectively** if the WTO judiciary is to outlaw the impugned measure. The *US—Gambling* Appellate Body Report also speaks for this implicit hierarchy. The Appellate Body tellingly pointed to the "privileged" status that the importance of the interests or values at stake should have in the process of determining necessity.[124]

2. Contribution of the Measure to the Achievement of the Ends Sought

63 As a second stage, a panel is expected to examine to what extent the measure at stake (or, more precisely, its general design) contributes to the achievement of the objectives that the respondent seeks to pursue. This is a **means-ends test** where the suitability or aptitude of a measure to achieve the ends pursued is examined. The more the challenged measure contributes to the achievement of the legitimate policy objectives, the more likely it is that the measure will be deemed necessary.[125] In the recent *Mexico—Taxes on Soft Drinks* ruling, the Appellate Body emphasized that a measure can still be regarded as necessary even if it does not guarantee the achievement of the ends sought with **absolute certainty**. The fact that the general design of the challenged measure contributes to the achievement of the ends would suffice.[126] In the case of a high (or zero-risk) level of protection chosen by the respondent, an **outright prohibition** (like in the *US—Gambling* case) may be considered as a measure "clearly designed and apt to achieve" the level of protection.[127] In any case, the analysis of this factor is **qualitative** rather than **quantitative** and panels are allowed a considerable **margin of appreciation**.

3. Effect of the Measure on Trade

64 At the outset, it is worth noting that the Appellate Body identified the **trade impact** of the challenged measure as one of the factors that need to be weighed and balanced on the basis of the Preamble to GATT 1994 which calls for "the elimination of discriminatory treatment in international commerce". While the latter is one of the GATT long-term objectives, there is no similar objective in the Preamble to the GATS. The GATS merely

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also ECJ, C-124/97, *Läärä and Others*, [1999] E.C.R. I-6067, Rec. 36; ECJ, C-384/93, *Alpine Investments v. Minister van Financiën*, [1995] E.C.R. I-1141, Rec. 51.

[124] *US—Gambling*, WT/DS285/AB/R, para. 307.

[125] *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 163.

[126] *Mexico—Taxes on Soft Drinks*, WT/DS308/AB/R, para. 74; also *US—Gambling*, WT/DS285/R, para. 6.494.

[127] *EC—Asbestos*, WT/DS135/AB/R, para. 168.

calls for, *inter alia*, **progressive liberalization**,[128] but not the elimination of discrimination. Therefore, it is questionable whether this third factor is an appropriate one to be weighed and balanced in the services context. In *US—Gambling*, however, the Appellate Body did not take note of the difference in wording between GATT and GATS, and simply endorsed for the purposes of the GATS general exceptions provision the three-factor weighing and balancing process arrived at in *Korea—Various Measures on Beef*.

65 In the analysis of this factor, a panel may identify a measure that is GATS-consistent or less GATS-inconsistent and which has been used by the respondent in similar situations to achieve the same objective or attain a similar level of protection.[129] In fact, it is in the analysis of this factor that the alternative measure may call into question the necessity of the measure at issue. While the Member's conduct in similar or like situations can be instructive as to the objective necessity of the impugned measure, a panel would arguably not be influenced by the fact that other Members employ less trade-restrictive means of tackling similar situations. In other words, the fact that other Members found less trade-restrictive ways to address similar problems would not ipso facto render the challenged measures unnecessary.[130]

66 In *Korea—Various Measures on Beef*, the Appellate Body held that a measure with a serious restrictive impact on international trade would be accepted less easily as being necessary. Hence, a highly trade-restrictive measure would be strictly scrutinized in order to ensure that it does fulfil the necessity standard of Art. XIV. Nevertheless, the **degree** of **trade-restrictiveness** should always be viewed in relation to, and through the lens of, the **importance** of the **objectives** pursued. Thus, as noted earlier, the great importance of the objectives pursued together with a chosen low- or zero-risk level of protection can justify the most trade-restrictive measure possible, that is, a total ban. Nevertheless, the WTO judiciary, when comparing the alternative measures under this rubric, is required to examine whether there is discrimination regarding the burden that the affected traders are called upon to bear. In *Korea—Various Measures on Beef*, the Appellate Body outlawed the challenged measure, *inter alia*, because it entailed higher costs for imported goods and retailers of imported goods than for their domestic counterparts, whereas the alternative WTO-consistent measures would not have such an effect.[131]

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[128] *Delimatsis*, Article XIX GATS, para. 1.

[129] See also above, para. 55.

[130] See ECJ, C-384/93, *Alpine Investments v. Minister van Financiën*, [1995] E.C.R. I-1141, Rec. 51.

[131] *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 181.

III. Identifying Alternative Reasonably Available Measures

There are several characteristics that a given measure has to have in order to qualify as a "reasonably available alternative" one. To start with, the measure should be **apt to achieve** the desired level of protection which a Member has unilaterally defined.[132] Secondly, the measure should be **reasonably available**. In *US—Gasoline*, the Panel, in a finding that was not appealed, found that an alternative measure can still be deemed reasonably available despite the existence of administrative difficulties.[133] The Appellate Body tackled the issue in *EC—Asbestos* and highlighted that the difficulty of implementation, as well as other factors relating to the administrative burden, such as costs, technical difficulties and lack of expertise, can render an alternative measure **reasonably unavailable**.[134] In *US—Gambling*, the Appellate Body again addressed the issue of reasonable availability and summarized its previous case law by emphasizing that a measure is no longer reasonably available "[…] where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties".[135] These arguments, however, that the respondent will invoke will be evaluated on a case-by-case basis. For instance, in *Korea—Various Measures on Beef*, the Appellate Body, given the circumstances of the case, dismissed Korea's argument about the lack of resources and suggested that enforcement costs usually financed by the public purse should not shift to foreign producers and imported goods.[136] In addition, the WTO judiciary will be bound to take into account other factors, such as the level of development of the responding Member. This is something that the Preamble to the GATS implies with its reference to the development of developing countries. *67*

Finally, the measure should be sufficiently **precise** and **concrete**. In *US—Gambling*, the Appellate Body criticized the Panel because it considered that engaging in consultations with Antigua was a "reasonably available" measure for the respondent. The Appellate Body emphasized that consultations are not an appropriate alternative to a measure, as they "are by definition a process, the results of which are **uncertain** and therefore **not capable of** *68*

[132] *US—Gambling*, WT/DS285/AB/R, para. 308.

[133] Panel Report, *US—Gasoline*, WT/DS2/R, paras 6.26–6.28.

[134] *EC—Asbestos*, WT/DS135/AB/R, para. 174; and Panel Report, *EC—Asbestos*, WT/DS135/R paras 8.207–8.216.

[135] *US—Gambling*, WT/DS285/AB/R, para. 308. This ruling was also considered applicable under Art. XX(d) GATT 1994. See *Dominican Republic—Import and Sales of Cigarettes*, WT/DS302/AB/R, para. 70.

[136] *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, paras 180–181.

comparison" with the challenged measure.[137] The Panel erroneously considered as an alternative **measure** that the United States could have chosen to seek a negotiated solution, and thus to extend an invitation to negotiate, rather than to regulate the matter unilaterally. It is true that, in previous cases, the Appellate Body required the respondent, before benefiting from the Art. XX GATT justification, to seek international cooperation. Nevertheless, in these specific cases, namely *US—Gasoline* and *US—Shrimp*, the Appellate Body ruled that the respondent had to pursue negotiations because of the existence of discrimination; in *US—Gasoline* between domestic and foreign producers[138] and in *US—Shrimp* between WTO Members.[139] In addition, in these two cases, this test of discrimination was part of the analysis under the Art. XX 1994 *chapeau* and not under one of the subparagraphs.

69 As noted earlier,[140] in its search for concrete alternatives that could reasonably be expected to be used by the respondent, a panel should examine whether less trade-restrictive (or even GATS-consistent) measures are available to, or have already been applied by, the respondent, with a view to achieving objectives similar to the challenged trade-restrictive measure. This exercise may provide useful input into whether an alternative measure is actually reasonably available. It may also ultimately lead the WTO judiciary to dismiss the objective necessity of the contested measure. The search for possible alternatives used in similar situations is a fairly delicate task. For instance, in the *US—Gambling* case, the United States asserted, and the Panel as well as the Appellate Body agreed, that the **remote** supply of gambling and betting services raises concerns that are peculiar to this mode of supply and which may not be applicable to the ordinary, non-remote supply of such services. Thus, alternatives could not be looked for in the latter situation, because it could not be regarded as "like" the supply through remote means.[141] Moreover, it should be noted that the GATS does not apply *per se* a test requiring policy coherence as the one that can be found in Art. 5.5 SPS Agreement.

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[137] *US—Gambling*, WT/DS285/AB/R, para. 317 (emphasis added). The United States was correct to argue in this case that, when consultations are held, the prospects of reaching a settlement and shape of any possible resulting (alternative) measure are "mere speculation". See United States' appellant's submission, para. 37.

[138] *US—Gasoline*, WT/DS2/AB/R, 27–29.

[139] Appellate Body Report, *US—Shrimp*, WT/DS58/AB/R, para. 172; also Appellate Body Report, *US—Shrimp* WT/DS58/AB/RW, paras 119, 128.

[140] See above, paras 55 and 65.

[141] See *US—Gambling*, WT/DS285/R, paras 6.497–6.498; *US—Gambling*, WT/DS285/AB/R, para. 347.

E. The Introductory Clause of Art. XIV (*Chapeau*)

70 A measure found compatible with the specific requirements of Art. XIV lit. a–e further needs to comply with the conditions set out in the *chapeau* of the provision. As stated above, these conditions seek to ensure that rights granted to derogate from WTO obligations to achieve non-economic policy goals are not applied in an abusive manner. Due to the very similar wording of the *chapeaux* of Art. XIV and Art. XX GATT 1994, and similar functions of these provisions, the extensive GATT 1994 case law is to be applied *mutatis mutandis* for the interpretation of Art. XIV.[142] The slight textual differences, such as "like conditions" compared with "the same conditions", remain of little or no practical impact.

71 The focus of the analysis under the *chapeau* lies on the GATS-consistent **application** or **enforcement** of the measure at stake.[143] As was the case with the subparagraphs of Art. XIV, it is for the respondent to demonstrate that the challenged measure that was provisionally justified also satisfies the requirements of the *chapeau*, as it is applied in a GATS-consistent manner.[144] The *chapeau* has been interpreted by the Appellate Body as containing **three standards**, fairly broad in scope and reach, namely "first, arbitrary discrimination between countries where the same conditions prevail; second, unjustifiable discrimination between countries where the same conditions prevail; and third, a disguised restriction on international trade".[145] These standards are cumulative in nature and serve to prevent any **abuse** of the Art. XIV exceptions (*abus de droit*) or any frustration of the rights accorded to other Members by the GATS substantive obligations.[146] Hence, the *chapeau* aims at balancing the Member's **right** to invoke a justification under Art. XIV and its **duty** to respect the obligations it has undertaken under the Agreement.[147] Consequently, Art. XIV calls for two balancing tests: the first forms part of the attempt to determine the objective necessity of the challenged measure, while the second is to be analysed under the *chapeau*. The Appellate Body equated the latter test with an attempt to locate the line of equilibrium between Members' competing rights. In the Appellate Body's words this line of equilibrium "moves as the kind and the shape

[142] *US—Gambling*, WT/DS285/R, para. 6.571; *Krajewski*, National Regulation, 161; *Van den Bossche*, 627.

[143] See *US—Gasoline*, WT/DS2/AB/R, 22; also *US—Gambling*, WT/DS285/AB/R, para. 339.

[144] See also above, para. 5.

[145] *US—Shrimp*, WT/DS58/AB/R, para. 150; endorsed by the Panel in *US—Gambling*, WT/DS285/R, para. 6.581.

[146] *US—Gambling*, WT/DS285/AB/R, para. 339.

[147] *US—Gambling*, WT/DS285/R, para. 6.575; *US—Shrimp*, WT/DS58/AB/R, para. 156; *Krajewski*, National Regulation, 161; *Van den Bossche*, 627.

of the measures at stake vary and as the facts making up specific cases differ".[148]

72 This prohibition on asserting a legal right in an abusive manner, as set out in the non-discrimination requirement and the prohibition of disguised restrictions on trade, stems from the principle of good faith, a generally recognized principle of national and international law.[149] The notion of good faith applies to all WTO Members equally.[150] Yet, while the three standards of the *chapeau* have frequently been examined by the WTO adjudicating bodies under Art. XX GATT 1994, their application has in the main been case- and fact-specific, considering only the objective and purpose of the *chapeau* without developing generally applicable and abstract rules.[151] The Appellate Body confirmed this approach in *US—Shrimp* by noting that "the actual contours and contents of these standards will vary as the kind of measure under examination varies".[152] In fact, this is true for the entire analysis under Art. XIV as it can only be measure-specific. In any event, the Appellate Body made it clear that the three aforementioned standards can entail both substantive and procedural requirements[153] and may actually overlap.[154] In addition, while the Appellate Body sometimes examines the three standards together and does not feel compelled to distinguish between them, in other instances it analyses the three standards separately.[155] Finally, as all these standards have to be met, the order in which they are analysed in a specific case is insignificant.[156]

I. Unjustifiable or Arbitrary Discrimination

73 The Appellate Body held in *US—Shrimp* that **three elements** need to be considered in order for it to determine whether a measure is discriminatory in terms of the *chapeau*,[157] consisting of analysing whether the **application** of the measure (i) results in discrimination (ii) which is arbitrary or unjustifiable in character and (iii) occurs between countries where like conditions prevail. The measure at issue is contrary to the *chapeau* and may not be justified if it is applied in a way that does not fulfil all three elements.

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[148] *US—Shrimp*, WT/DS58/AB/R, para. 159.
[149] *Ibid.*, para. 158; also *Panizzon*, 51 *et seq.*
[150] *US—Shrimp (Article 21.5—Malaysia)*, WT/DS/58/AB/RW, footnote 97 to para. 134.
[151] WT/CTE/W/53/Rev.1, para. 22; See also, *Krajewski*, National Regulation, 162.
[152] *US—Shrimp*, WT/DS58/AB/R, para. 120.
[153] *Ibid.*, para. 160.
[154] *US—Gasoline*, WT/DS2/AB/R, 25; also *US—Gambling*, WT/DS285/R, para. 6.580.
[155] See the *US—Gasoline*, WT/DS2/AB/R with the *US—Shrimp*, WT/DS58/AB/R Appellate Body ruling.
[156] Panel Report, *Argentina—Hides and Leather*, WT/DS155/R, para. 11.313.
[157] *US—Shrimp*, WT/DS58/AB/R, para. 150; *US—Gasoline*, WT/DS2/AB/R, 23; also *US—Gambling*, WT/DS285/R, para. 6.578.

As to the element of discrimination, the *US—Gasoline* ruling suggested that the standard is not the same as the one used to establish whether a violation of a substantive rule occurred. Under the *chapeau* it is for the respondent to demonstrate that the measure at issue does not discriminate on its face. The respondent may also be called upon to establish that the measure is applied in a consistent manner as between domestic and foreign services or service suppliers.[158] In the absence of proper evidence, the neutral wording of the measure at stake (together with some supporting material from its legislative history, for instance) may suffice for the respondent to establish a *prima facie* case and can be the only decisive element on which the analysis on discrimination may be based.[159] In this regard, proper evidence may entail evidence regarding the **overall** number of service suppliers, and the **patterns of enforcement**, as well as the reasons for particular instances of non-enforcement and whether discrimination may be substantiated by means of this evidence.[160] *74*

A measure sought to be justified and the application of which results in discrimination is inconsistent with the *chapeau* only if the discrimination rises to the level of "arbitrariness" or "unjustifiability".[161] Then, it could be argued that some discrimination can be tolerated under the *chapeau*, as long as it cannot be considered "unjustifiable" or "arbitrary".[162] However, since no test or generally applicable rule has been established in this regard, the WTO adjudicating bodies have a wide discretion when applying these elements. In *US—Shrimp*, for example, the combination of various factors led to the conclusion that there was **unjustifiable discrimination**:[163] first, the United States unilaterally applied its import prohibition without engaging in negotiations with some Members, while it did with others, which "heighten[ed] the disruptive and discriminatory influence of the import prohibition and underscore[d] its unjustifiability".[164] Moreover, the fact that countries were accorded different periods of time by the United States for phasing in compliance with the measure in question also constituted differential treatment among various countries seeking certification. Finally, the United States discriminated with regard to the levels of effort needed to transfer the technology necessary to achieve compliance with its measure. *75*

[158] *US—Gambling*, WT/DS285/AB/R, para. 351.
[159] *Ibid.*, para. 357.
[160] *Ibid.*, para. 356.
[161] *US—Shrimp*, WT/DS58/AB/R, para. 150; also *US—Gambling*, WT/DS285/AB/R, para. 350.
[162] See *Argentina—Hides and Leather*, WT/DS155/R, para. 11.315.
[163] *US—Shrimp*, WT/DS58/AB/R, paras 166–175.
[164] *Ibid.*, para. 172.

76 The Appellate Body then turned to examine the **arbitrary discrimination** standard, holding that rigidity and inflexibility in the application of the measure "also constitutes 'arbitrary discrimination' within the meaning of the *chapeau*".[165] In addition, certain characteristics of the measure at stake (*i.e.* the certification process), such as lack of (i) transparency and predictability;[166] (ii) a formal opportunity for an applicant country to be heard; and (iii) a procedure for the review of the refusal of an application, show that "exporting Members applying for certification whose applications are rejected are denied basic fairness and due process, and are discriminated against, *vis-à-vis* those Members which are granted certification".[167]

77 Third, discrimination must take place **between countries** in which **like conditions** prevail. In *US—Gasoline*, the Appellate Body ruled that this phrase may refer to both exporting Members and importing Members and between exporting countries and the importing country concerned. The comparison is not limited to exporting countries.[168] In *US—Shrimp*, the Appellate Body criticized the United States because the US regulations did not take into account existing differences between the different WTO Members affected.[169] Given that the conditions between various countries will more often than not differ, it appears that, in order for the measure under examination to be consistent with the requirements of the *chapeau*, it should be fairly flexible to take into account the specific conditions prevailing in any exporting Member. This, however, should not be interpreted to mean that a Member, when making regulations, should account for the particular conditions prevailing in each individual exporting Member.[170]

78 No generally applicable rule may be deduced from these fact- and case-specific findings; yet, it is possible to summarize some interpretive and **guiding principles**: firstly, the elements of discrimination, arbitrariness and unjustifiability as well as similar conditions may not be strictly separated, but have to be analysed as a whole in context. They inform each other. Secondly, rigidity or flexibility in the application of a measure constitutes an important factor to be considered.[171] Moreover, in both *US—Gasoline* and *US—Shrimp* the respondents' failure to cooperate or to engage in good faith negotiations with the claimant played a role in the finding that the application of the measure was incompatible with the *chapeau*.[172] Yet, no

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[165] *Ibid.*, para. 177.

[166] To this end, the Appellate Body used arguments based on Art. X:3 GATT 1994 relating to the transparency and administration of regulations relating to goods. See also *Delimatsis*, JIEL 10 (2007), 13, 34–35.

[167] *US—Shrimp*, WT/DS58/AB/R, paras 179–181.

[168] *US—Gasoline*, WT/DS2/AB/R, 24; also *US—Shrimp*, WT/DS58/AB/R, para. 150.

[169] *US—Shrimp*, WT/DS58/AB/R, paras 161–165, 177; also *Mavroidis*, 203.

[170] *US—Shrimp*, WT/DS58/AB/RW, para. 149.

[171] *Ibid.*, para. 144.

[172] See above, para. 68.

general duty to engage in negotiations is provided for in the *chapeau*; the existence of such a duty and the way in which it can be achieved strongly depend on the facts of the specific case.[173] Finally, the different conditions prevailing between different Members affected by a provisionally justified measure need to be taken into consideration when it comes to the application of such a measure. An efficient way in which to overcome differences between exporting Members is to construct the measure at issue in a fairly flexible manner to accommodate such concerns.

II. Disguised Restriction on Trade in Services

The third element of the *chapeau*—disguised trade restriction—has not yet *79*
been the subject of the extensive case law of the Appellate Body on Art. XX GATT 1994. Once a WTO adjudicating body finds the application of a provisionally justified measure to constitute arbitrary or unjustifiable discrimination, it generally refrains from examining whether the application also amounts to a disguised trade restriction.[174] However, according to the Appellate Body, "disguised trade restriction" **encompasses** "arbitrary" or "unjustifiable discrimination", but covers other measures as well.[175] Therefore, while there can be measures the application of which may constitute both unjustifiable or arbitrary discrimination **and** a disguised restriction on trade in services, WTO case law suggests that there are also measures the application of which does not qualify as discriminatory, but which can still be characterized as "disguised restrictions to trade".[176] The Appellate Body also made it clear that concealed or unannounced restrictions do form part of the broader notion of "disguised trade restriction".[177] In *EC—Asbestos*, the Panel elaborated on the Appellate Body's ruling, noting that the focus lies on the word "disguised" rather than on "restriction", given that only trade-restrictive measures are to be examined under the *chapeau* in the first place; hence, a provisionally justified measure "will constitute an abuse if [its] compliance [with the requirements of one of the exceptions listed in Art. XX GATT 1994] is in fact only a disguise to conceal the pursuit of trade-restrictive objectives [other than those listed in Art. XX]".[178] Other than that, the adjudicating bodies have so far not examined how the application of a provisionally justified measure could constitute a disguised restriction

[173] *Condon*, 3; also *US—Shrimp*, WT/DS58/AB/RW, paras 122, 124.
[174] See *US—Shrimp*, WT/DS58/AB/R, para. 184.
[175] *US—Gasoline*, WT/DS2/AB/R, 25; See also *US—Gambling*, WT/DS285/R, para. 6.580.
[176] This seems to apply to the EC legal order as well. See ECJ, Case 42/82, *Commission v. France*, [1983] E.C.R. 1013, Rec. 51, 63, 64.
[177] Again, this obligation cannot be regarded as a "mere transparency exercise". *Mavroidis*, 206.
[178] Panel Report, *EC—Asbestos*, WT/DS135/R, para. 8.236.

on trade in services without, at the same time, qualifying as discriminatory in terms of the *chapeau*.

F. Outlook

80 The multilateral regulation of trade in services is still in its infancy. The experience in case law is limited, and it is difficult to anticipate future needs or developments in appropriately shaping and construing Art. XIV. Regulation of services is primarily a matter of domestic law; it often deals with sensitive issues and Members need appropriate room in addressing regulatory concerns, for example in the field of labour standards or trade-related human rights. It is only when these concerns can be accommodated that Members of the WTO will be willing to engage in enhanced commitments to liberalize trade. The interpretation and application of Art. XIV should keep these competing concerns in mind. Evolutions may thus tend to emphasize greater regulatory flexibility on different accounts.

81 Firstly, flexibility may be found in Art. XVII:3 in defining likeness of products and service provider under the guiding principle of providing for equal conditions of competition. In addition, evolutions may tend to expand the explicit list of exemptions and complete it by recognizing the legitimacy of additional values. Otherwise, the WTO judiciary will be required to advance interpretations adequate to accommodate contemporary concerns that are not reflected in the current closed list of exemptions under Art. XIV.

82 Secondly, a related question arises as to the extent to which a Member is allowed to adopt measures that would apply outside its proper territorial jurisdiction in order to protect public interests and values coming within the ambit of Art. XIV. The answer to this question can greatly expand the scope of Art. XIV lit. a and b. For instance, would a Member be allowed to take trade sanctions against another Member which systematically violated fundamental human rights on the basis of the assertion that such violations breach the public morals of the Member imposing such sanctions? A similar question was at the heart of the *US—Shrimp* dispute. In this case, the Appellate Body avoided answering the question whether Art. XX lit. g GATT 1994 on the protection of exhaustible natural resources implied a jurisdictional limitation.[179] Nevertheless, the Appellate Body implicitly acknowledged that measures adopted to protect such resources **outside** the territory of the Member at hand can be deemed WTO-consistent. Due diligence on the part of the WTO judiciary requires that the WTO-consistency of measures extending their jurisdictional reach beyond the

[179] *US—Shrimp*, WT/DS58/AB/R, para. 133.

territory of the intervening Member entails an examination not only on a case-by-case basis, but also of whether the values at stake amount to common concerns. The authors submit that such concerns can be found in the peremptory norms (*ius cogens*) of international law and those relating to the protection of the global environment and climate change mitigation.

83 Thirdly, with the introduction of the factors that need to be "weighed and balanced" when determining necessity, the WTO judiciary appears to endorse a less rigid approach than the one set out formerly in *US—Section 337* during the GATT 1947 era. Arguably, there is a shift in the post-Uruguay Round case law towards greater regulatory flexibility and diversity when comparing the *US–Shrimp* and *US—Section 337* cases with the *US—Tuna (Mexico)* GATT case law.[180] Depending on the circumstances and the interests at stake, a second-best measure can still satisfy the necessity test of the general exceptions provision. It is noticeable that the interpretations of the WTO judiciary have come closer to the tests that the ECJ advances in order to decide on the legality of a national measure.[181] Indeed, after the introduction of the concept of "weighing and balancing" in *Korea—Various Measures on Beef*, the necessity test in the WTO entails the first and second of the three conditions that render a measure **proportionate** in the EC legal order, commensurate with the principle of proportionality developed in continental European administrative law:[182] firstly, the suitability requirement, which entails an examination of whether the measure is apt or suitable for achieving the Member's desired objective or the level of protection (causal relationship). Secondly, the necessity requirement, which entails an examination of whether the measure is necessary for the achievement of a given objective. The third requirement identified in the ECJ case law is whether the measure at stake is proportionate in a narrow sense (*stricto sensu* proportionality). This entails an examination of whether the measure goes beyond what is required in order to achieve the stated policy goal. This third requirement has not yet found its way to the WTO case law. Future evolutions may further elaborate on the basis of this three-tier approach to the principle of proportionality and further refine the methods of applying the necessity test. In any event, the ECJ did not feel compelled to examine the *stricto sensu* proportionality of a measure in several cases.

84 In conclusion, the recognition of implicit exemptions, comparable to the "mandatory requirements" case law in the EC legal order, as well as extended geographical scope of protecting core values would seem possible

[180] GATT Panel Report, *US—Tuna (Mexico)*, BISD 39S/155.

[181] In fact, the Appellate Body never ruled out the possibility of using in its Art. XX analysis elements contained in a proportionality test. See *US—Shrimp*, WT/DS58/AB/R, para. 141.

[182] *Delimatsis*, EJIL 19 (2008, forthcoming).

and desirable due to the two-step approach of Art. XIV. Both the requirement of necessity or proportionality and the function of the *chapeau* protect Members from excessive and abusive recourse to exemptions for purely protectionist and rent-seeking reasons of a particular domestic service industry.

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Article XIVbis GATS
Security Exceptions

1. Nothing in this Agreement shall be construed:
   a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
   b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:
      (i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;
      (ii) relating to fissionable and fusionable materials or the materials from which they are derived;
      (iii) taken in time of war or other emergency in international relations; or
   c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.
2. The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1 b) and c) and of their termination.

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A. General

I. Introduction

1 Agreed commitments under GATS—both general and specific—amount to substantial qualifications to the exercise of sovereignty and powers in shaping domestic regulation of services. Members therefore agreed to intro-

duce exemptions relating to the protection of national security in line with the long-standing clause of Art. XXI GATT 1947 (now Art. XXI GATT 1994) and in parallel to Art. 73 TRIPS.[1] Together with Art. XIV, Art. XIVbis embodies exceptions introduced by legitimate, **non-economic** policy goals. The *raison d'être* of the **security exception** is to preserve Members' freedom of action in areas relating to national defence and security. Trade liberalization and international regulation do not prevail over Members' vital interests in maintaining the core of sovereignty and cannot restrain Members' freedom to preserve, and defend, their very existence. The provision entails a broad carve-out, as it states that "nothing in this Agreement" shall be construed to prevent Members from taking measures as defined under this provision. All the WTO law provisions relating to national security essentially adopt the same language, irrespective of structural differences in their subject matter and application to goods, services and intellectual property rights, respectively.

2 It would seem at first sight that Members enjoy unlimited discretion in the pursuit of their essential security interests, and that the provision, like Art. XXI GATT 1994 and Art. 73 TRIPS, amounts to a **virtually unlimited escape clause**.[2] Indeed, the language substantially risks undermining WTO obligations. Even if the motive of the Member that acts in order to protect its interests is **political**, the means to these ends are **economic** in nature and affect business and trade relations. Trade measures such as partial or total embargoes on exports and imports, restrictions on transportation (including the right to transit), prohibition of financial transactions or "freezing" of one country's assets have been used for—purportedly—security purposes. Obviously, national security considerations may be frequently invoked in justifying trade-restrictive measures.

3 It is important to note, however, that 50 years of GATT history do not show much evidence of this. Art. XXI GATT 1947 has been invoked only marginally, and Members have relied upon it only exceptionally. There are several possible reasons for such a finding. First, trade restrictions during the Cold War period mainly related to non-Members, and there was no great need for justification under GATT.[3] Secondly, the risks of abuse are obvious. Major trading partners therefore have been reluctant to have recourse to the national security exemption except in case of war, anticipating that others may equally do so on the basis of precedents set by them, undermining

[1] See the discussions in the Group of Negotiations on Services, Uruguay Round, Note on the Meeting of 18–22 September 1989, MTN.GNS/25, 23 October 1989. The need for the inclusion of a provision allowing derogations from any obligation under the GATT due to security concerns was already expressed in the *travaux préparatoires* of the ITO. See *GATT*, 608.

[2] *Hahn*, Mich. J. Int'l L. 12 (1991), 558, 559.

[3] See, generally, *Lowenfeld*.

GATT commitments. Excessive reliance on this exemption could indeed accelerate tit-for-tat recourse to this possibility and lead to undesirable trade wars. Mutual deterrence, reputation costs, and the interest in seeing all trading partners complying with GATT obligations prevailed in state practice.[4] Thirdly, Art. XXI GATT 1994 has been subject to jurisdiction over dispute settlement. While granting broad discretion, national security exemptions are not devoid of normative guidance and impose limitations on recourse to national security. Like Art. XXI GATT 1994 and Art. 73 TRIPS, Art. XIV*bis* seeks to strike a **proper balance** between Members' **prerogative** to pursue or protect a **legitimate security interest** even through WTO-**inconsistent** means, and the **interest** of other Members in avoiding any **frustration** of their **rights** accorded by the GATS substantive rules. With the DSU, multilateral disciplines to bring about such a balance and to enforce it have increased further. Nonetheless, little experience to this effect has developed so far in the case law for the reasons indicated above and deterrence by means of dispute settlement remains of minor importance due to the lack of retroactive remedies and financial compensation for breach of WTO law.

4 Several Economic Integration Agreements (EIAs)[5] adopted in the aftermath of the Uruguay Round echo the wording of Art. XIV*bis*.[6] Likewise, several FTAs adopt identical wording in their security exceptions in other trade areas. These agreements usually follow the GATS structure and wording, but may have more substantial sectoral coverage and strive for more intensive liberalization efforts. Thus, the interpretation of Art. XIV*bis* may have important repercussions and shed light on the interpretation of similar or identical concepts in regional agreements. Conversely, the interpretation of preferential agreements will also be relevant in construing Art. XIV*bis*.

II. Negotiating History and Recourse to Art. XXI GATT 1994

5 During the Uruguay Round negotiations, the United States had proposed the inclusion in the Agreement of a provision relating to general exceptions, which would encompass both exemptions relating to public morals, health, law enforcement etc, and security exceptions.[7] Finally, Members

[4] See *Henkin*, 46–53.

[5] "Economic Integration Agreements" is referred to here as free trade agreements which embody a chapter governing trade in services.

[6] See, for instance, Art. XIV MERCOSUR Montevideo Protocol, 15 December 1997, available in English at <http://www.cvm.gov.br/ingl/inter/mercosul/montv-e.asp> (last visited 1 October 2007), or Art. 19 Singapore-Australia Free Trade Agreement, 17 February 2003, <http://www.dfat.gov.au/trade/negotiations/safta/chapter_7.pdf> (last visited 1 October 2007).

[7] Group of Negotiations on Services, Uruguay Round, Material to be Considered with a View to Fulfilling the Mandate Given to the GNS in Paragraph 11 of the Montreal

agreed upon the GATT 1947 structure by inserting a **separate** national security clause, different from the realm of general exceptions in Art. XIV. The numbering indicates that the provision was inserted at a late stage of the game. Art. XIVbis replicates Art. XXI GATT 1994, but adjusts its wording to encompass analogous cases in the context of trade in services. Since the semantic similarities between these provisions are even more striking than they are between Arts XIV and XX GATT 1994, interpretations and case law under Art. XXI GATT 1994 are relevant and useful when interpreting Art. XIVbis.[8]

6 As indicated above, the security exceptions of Art. XXI GATT 1994 have rarely been relied on; yet no reliable statistical data exist as to the unilateral application of the provision. Unlike under Art. XIVbis:2, Members were not obliged to notify the invocation of national security measures under GATT 1947.[9] An alleged abuse of the security exceptions is reported to have occurred only once.[10] This case points to the potential confusion that may occur between measures that come within the ambit of the security exceptions and measures the WTO consistency of which today can be examined under Art. XIX GATT 1994 in combination with the Safeguards Agreement. Reluctance to invoke the provision is moreover paired with reluctance to challenge measures adopted under the security exemption. Members have generally demonstrated significant levels of **self-restraint** in challenging such measures, as they probably have doubted the appropriateness and effectiveness of the GATT and WTO dispute settlement mechanism to settle **political** and **security** matters.[11] During the period prior to the inception of the WTO, only four cases addressing the interpretation of Art. XXI GATT 1947 reached the panel level.[12] The notorious Helms-Burton Act[13] imposing trade sanctions against Cuba and foreign companies trading with it has been the most prominent case of this kind since the inception

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Declaration (MTN.TNC/11), Note by the Secretariat, MTN.GNS/W/90, 18 December 1989, 28.

[8] Compare Appellate Body Report, *US—Gambling*, WT/DS285/AB/R, para. 291. See also Appellate Body Report, *EC—Bananas III*, WT/DS27/AB/R, para. 231 (encouraging Panels that tackle GATS claims to refer to the GATT only where the obligations are essentially of the same type).

[9] Only in 1982, the GATT Contracting Parties adopted a "Decision Concerning Article XX of the General Agreement [on Tariffs and Trade]" where the Parties agreed to inform their trading partners as fully as possible of national security measures. See below, para. 34.

[10] In 1975, Sweden attempted to justify a global import quota system for certain footwear by recourse to the "spirit of Article XXI". See Group of Negotiations on Goods, Negotiating Group on GATT Articles, Uruguay Round, Article XXI, Note by the Secretariat, MTN.GNG/NG7/W/16, 18 August 1987, para. 24.

[11] Also *Jackson et al.*, Legal Problems, 1047.

[12] See *GATT*, 600 *et seq.*; also *Schloemann & Ohlhoff*, AJIL 93 (1999), 424, 432 *et seq.*

[13] Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 12 March 1996, ILM 35 (1996), 357.

of the WTO because of its **extraterritorial** effects.[14] However, this case has never been adjudicated on, as the United States reached an agreement with the EU. In *US—Section 211 Appropriations Act*, the United States refrained from invoking Art. 73 TRIPS.[15]

7 In accordance with Art. XXI GATT 1994, no provision of the GATT precludes any Member from denying the disclosure of information that relates to its **essential security interests** or from taking such measures as **it considers** appropriate for the **protection** of the essential interests of its security. The provision confers on WTO Members a wide **margin of appreciation** in assessing the kind of activities that come within the ambit of this provision and thus are exempted from the substantive obligations laid down in the GATT. The history of the GATT years reveals several Members' belief that Art. XXI GATT 1994 issues entailed **political questions** that ought not to be subject to judicial **scrutiny** by the WTO (at the time, by the Contracting Parties), and hence no country (nor the WTO through its judiciary) should be allowed to question another country's judgement relating to its security interests.[16] Given the identical language and function of Art. XIVbis, the same arguments apply equally to restricting commitments in services for the purpose of national security. The doctrine of **unfettered discretion** deserves a critical assessment.

III. Justiciability, the Burden of Proof and Principles of Interpretation

8 The perception of unfettered discretion cannot be sustained in connection with the security provisions of WTO law, including Art. XIVbis. This school of thought leads to the result that a Member could invariably circumvent its WTO obligations by simply invoking security reasons.[17] This perception

[14] Nicaragua also invoked the security exception of Art. XXI GATT 1994 to justify an additional tax applicable to any product or service imported, manufactured or assembled, coming from or originating in Honduras or Columbia. Colombia subsequently requested the establishment of a Panel. WTO, Dispute Settlement Body, Nicaragua—Measures Affecting Imports from Honduras and Colombia, Request for the Establishment of a Panel by Colombia, WT/DS188/2, 28 March 2000; WTO, Dispute Settlement Body, Nicaragua—Measures Affecting Imports from Honduras and Colombia, Request for the Establishment of a Panel by Colombia; Corrigendum, WT/DS188/2/Corr.1, 5 April 2000, and the corresponding DSB meetings, Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 7 April 2000, WT/DSB/M/78, 12 May 2000, paras 48–61; Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 18 May 2000, WT/DSB/M/80, 26 June 2000, paras 25–47.

[15] Appellate Body Report, *US—Section 211 Appropriations Act*, WT/DS176/AB/R.

[16] See the Council discussion in the aftermath of the trade restrictions applied by the then EEC, Canada and Australia against Argentina in retaliation for Argentina's attack on the Falkland Islands, *GATT*, 600–601; also *Akande & Williams*, Va. J. Int'l L. 43 (2003), 365, 375–378; and *Shapiro*, Geo. Wash. J. Int'l L. & Econ. 31 (1997), 97. See also above, paras 2–3.

[17] Compare Appellate Body Report, *US—Shrimp*, WT/DS58/AB/R, para. 156.

and interpretation is not compatible with a **rules-based** system that seeks to ensure **stability** and **predictability** in the international trade order.[18] The GATT Panel that was requested to assess the embargo that the United States imposed against imports from, and exports to, Nicaragua tackled this issue only marginally, as its terms of reference did not allow it to examine or judge the validity of, or the motivation for, the invocation of Art. XXI GATT 1947 by the United States. While the Panel found itself unable to rule on whether the United States violated its GATT obligations due to its limited terms of reference, it eloquently asked three rhetorical, but still important questions:[19] (1.) provided one accepts that Art. XXI GATT 1947 can be interpreted exclusively by the country invoking it, how could an abuse of this exception be avoided? (2.) to what extent may a complainant affected have its complaint examined under Art. XXIII:2 GATT 1947, when a Panel is not permitted to examine the justification of an Art. XXI GATT 1947 invocation? (3.) do Members have sufficient powers under Art. XXIII:2 GATT 1947 to provide redress to a Member subjected to an embargo prohibiting exports to, and imports from, that Member?

9 The freedom which Members enjoy in defining their essential security interests is **not unfettered**; rather, decisions taken under the security exceptions are basically subject to legal disciplines and thus subject to review by the WTO judiciary. This also applies to GATS. A Member has indeed the flexibility to choose the measure that it deems appropriate to protect its essential security interests. Yet, if the GATS consistency of this measure is challenged by another Member, the WTO judiciary under standard terms of reference has the jurisdiction to assess whether the respondent seeking to justify its measure under the security exceptions has adduced sufficient evidence showing that the measure remains within the broad bounds of necessity for the protection of its essential security interests or that the information sought falls within its essential security interests and therefore cannot be revealed.[20] Members essentially are entitled to assess necessity on the basis of their own considerations. Other than under Art. XIV, the margin of appreciation is wider in determining necessity and finds its limits in the doctrine of abuse of rights, discussed shortly. As in Art. XIV, however, the allocation of the **burden of proof** is similar to that applicable

[18] *Schloemann & Ohlhoff*, AJIL 93 (1999), 424, 425.

[19] Panel Report, *US—Nicaraguan Trade*, L/6053, para. 5.17.

[20] See ICJ, *Military and Paramilitary Activities (Nicaragua v. USA)*, [1986] ICJ Reports, 14, 117. See the EC statement agreeing that "there is nothing in the DSU to the effect that national security issues were exempt from dispute settlement proceedings. In the EC's view, the panel could examine the facts to determine whether the matter at hand concerned a national security issue or whether the measure in question constituted a trade policy measure", WT/DSB/M/80, para. 35. In the EC legal order, judicial review of measures applying a derogation from the Treaties is equally possible. See ECJ, Case 41/74, *Van Duyn v. Home Office* [1974], E.C.R. I-1337, Rec.7.

in every case in which an affirmative defence or exception to the WTO positive obligations is raised.[21]

10 During the Uruguay Round, Nicaragua proposed the introduction of an interpretive note to the GATT security exceptions provision that would require Members to act **in good faith** when they invoke a security exception. According to the Nicaraguan proposal, no Member would be allowed to have recourse to Art. XXI GATT 1994 unless it had first held bilateral negotiations with the other Member. In the case of unsuccessful negotiations, recourse to the United Nations or another appropriate inter-governmental organization dealing with war or other emergencies in international relations would be equally required before the security exceptions provision could be invoked to justify a GATT-restrictive measure. Even though the proposed amendment did not materialize, it recalls an important principle which applies at any rate in all cases. Acting in accordance with the **principle of good faith** is indeed a significant concept in cases involving the invocation of an **exception**.[22] Nevertheless, the principle of good faith is **pervasive** and is not exhausted in the exception provisions, but should inform **any** provision of the WTO agreements. This principle, which is at once a general principle of law and a principle of general international law, should be observed by WTO Members regardless of whether there is an explicit reference to it.[23] In other words, the performance of all WTO agreements is governed by the principle of good faith.[24] Accordingly, Members are to define their essential security interests in good faith, as they would otherwise undermine the continuation of the multilateral trading system.[25]

11 Before any interpretation of the concepts laid down in Art. XIV*bis*, it is useful to recall the *EC—Hormones* ruling relating to the interpretation of a WTO provision incorporating an exception. In that case, the Appellate Body clarified that the mere characterization of a WTO provision as an exception should not automatically lead to a "stricter" or "narrower" interpretation of that provision. Instead, the WTO judiciary is obliged, as in any case where the interpretation of a WTO provision is required, to apply the customary rules of treaty interpretation pursuant to Art. 3.2 DSU. Panels and the Appellate Body are called upon to examine the ordinary meaning of the actual words that the treaty uses, viewed in context and in the light of

[21] See *Cottier et al.*, Article XIV GATS, paras 5, 57.
[22] *Ibid.*, paras 11, 72.
[23] See Appellate Body Report, *US—FSC*, WT/DS108/AB/R, para. 166; and Appellate Body Report, *US—Hot-Rolled Steel*, WT/DS184/AB/R, para. 101.
[24] Appellate Body Report, *US—Offset Act (Byrd Amendment)*, WT/DS217/AB/R, WT/DS234/AB/R para. 296. See, generally, *Panizzon*.
[25] *Schloemann & Ohlhoff*, AJIL 93 (1999), 424, 444.

the treaty's object and purpose.[26] In international law, there is no principle calling for a different interpretation of rules and exemptions.

12 It should be noted that this is in contrast to the interpretation that the ECJ has advanced with respect to derogations from the fundamental objectives of the EC and the rights conferred by the EC Treaty. Under EC law, and thus the law of regional integration, such derogations are held to be interpreted strictly.[27] Especially with respect to Art. 296 ECT, which replicates Art. XXI GATT 1994, the ECJ held that derogations like this "deal with exceptional and clearly defined cases". It is because of their exceptional character that such provisions, according to the Court, "do not lend themselves to a wide interpretation".[28]

B. Structure of Art. XIVbis:1

I. General Requirements

13 Art. XIVbis provides for three general security exceptions. They allow derogations from any of the GATS provisions for security reasons. The provision, as under Arts XXI GATT 1994 and 73 TRIPS, essentially relies upon a **subjective criterion**. Any measure which **a Member considers** protects its essential security interests may be adopted under this provision. Under Art. XIVbis:1 lit. a, Members retain the right to derogate from any GATS obligation which requires them to supply any information which, if disclosed, would be deemed contrary to their essential security interests. Art. XIVbis:1 lit. c subordinates GATS obligations to the primacy of measures adopted under the aegis of the United Nations Charter, and more specifically under Chapter VII thereof. Art. XIVbis:1 lit. b is at the heart of the provision and the most difficult part from the point of view of interpretation. By invoking Art. XIVbis:1 lit. b, a Member can justify trade restrictions which are aimed at the protection of its essential national security interests: (i) relating to the services supplying a military establishment; (ii) relating to nuclear fission and fusion; and/or (iii) adopted in wartime or other emergency in international relations. Thus, whereas national security can be deemed to encompass many areas or domestic industries, Art. XIVbis:1 lit. b attempts to narrow down this concept.[29] Difficulties mainly emerge under Art. XIVbis:1 lit. b (iii) and the scope of the terms "other emergency in international relations".

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[26] Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 104; also Appellate Body Report, *EC—Tariff Preferences*, WT/DS246/AB/R, para. 98.

[27] ECJ, C-367/89, *Criminal Proceedings Against Richardt*, [1991] E.C.R. I-4621, Rec. 20.

[28] ECJ, C-414/97, *Commission v. Spain*, [1999] E.C.R. I-5585, Rec. 21; ECJ, Case 222/84, *Johnston*, [1986] E.C.R. 1651, Rec. 26.

[29] *Thorp*, AER 50 (1960), 433, 434.

Indeed, the case law reveals that it was under this catch-all provision that most cases were brought before the Contracting Parties during the GATT years. They essentially offer no substantial limitation in terms of the scope and coverage of measures taken.

14 Apart from the latter, rather ambiguous and potentially all-encompassing provision justifying **GATS-inconsistent** measures taken in case of "emergency in international relations", Art. XIV*bis* contains strict conditions for the use of this derogation in an attempt to balance Members' interests in the field of security and defence against the fundamental GATS obligations. The aim of these conditions is to prevent possible **abuse of rights**. Other than under Art. XIV, panels and the Appellate Body cannot apply an objective necessity test as the standard relates to what the Member invoking the measure considers **necessary**. However, panels and the Appellate Body have jurisdiction to assess whether the **right of invocation** has been abused, taking into account the overall context. They are to examine whether security interests are **manifestly** absent. Such constellations may be produced if a Member calls upon security exemptions with a view to preventing or reducing foreign competition, and thus would amount to a disguised restriction of access to the market in services. The distinction between commercial and national security interests is in practice often blurred and may amount to a daunting task as motives may be overlapping and interrelated.

15 As noted earlier,[30] purely commercial threats under GATT 1994 would more often than not be treated under Art. XIX GATT 1994 and the Safeguards Agreement, albeit that the burden of proof for the respondent is more demanding. However, under the GATS no emergency safeguard mechanism (ESM) exists as of today. The text of Art. X amounts to unfinished work and merely calls upon Members to create such a mechanism. Members still disagree on the need to allow for safeguard measures under the GATS. During the discussions within the Working Party on GATS Rules, various Members alleged that Arts XIV and XIV*bis* constitute a sufficient legal basis for Members to deviate from their substantial obligations under the GATS.[31] The absence of an ESM *à la* GATT 1994 in the GATS creates an obvious **disequilibrium** and, therefore, the possibilities of extensive misuse of Art. XIV (notably of the *ordre public* exception) or Art. XIV*bis* (especially of the international relations emergency) are considerably higher. Under GATS, Members may be tempted to have recourse to the security exception clause of Art. XIV*bis* more frequently than under GATT.

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[30] See above, para. 6.

[31] Working Party on GATS Rules, Report of the Meeting of 25 February 2003, Note by the Secretariat, S/WPGR/M/41, 12 March 2003, para. 5.

While measures adopted purely for security reasons qualify for an exception under Art. XIVbis,[32] measures that serve a Member's essential security interests only in part, along with other interests, also fall within the ambit of this provision. To the extent that the measure contributes to securing essential security interests, it may be justified under Art. XIVbis. As with Art. XIV, the WTO judiciary is likely to apply a **balancing test**. The more essential a security interest is and the more the adopted measure contributes to its achievement, the more likely it is that the measure at hand will be justified under the security exceptions provision. *16*

II. Essential Security Interests (Art. XIVbis:1)

The concept common to the first two subparagraphs of Art. XIVbis:1 is that of **"essential security interests"**. This is of key importance and amounts to an **objective criterion**. Not every interest is one that relates to the security of a nation, nor will every security interest qualify as being "essential". The agreement requires a **qualified** interest in the absence of which restrictions cannot be imposed. While military security, for instance, can generally be deemed essential, non-military security can equally be regarded as essential due to new threats and technologies.[33] Of course, not any non-economic military or political motive can be considered essential. Likewise, the protection of economic security interests completely escapes the coverage of Art. XIVbis. Judicial review by the WTO adjudicating bodies may occur *ex post facto* provided that a Member challenges the **factual** and **legal evaluation** made by the Member invoking one of the security exceptions.[34] *17*

It has been suggested that, in cases involving Art. XXI GATT 1994 (and, by implication, Art. XIVbis), the parties to a dispute could agree on special terms of reference.[35] It is, however, argued here that this is not necessary. Parties enjoy wide discretion, subject only to abuse of rights, in determining what **they consider necessary** to protect their interests.[36] This responds to the largely **subjective standard**. As to whether these interests qualify as essential or remain marginal, however, can and should be assessed by panels and the Appellate Body on the basis of objective criteria, taking *18*

[32] See *GATT*, 600.

[33] See European Commission, Interpretative Communication on the Application of Article 296 of the Treaty in the Field of Defence Procurement {SEC(2006) 1554} {SEC(2006) 1555}, COM(2006) 779 final, 7 December 2006, 5.

[34] *Hahn*, Mich. J. of Int'l L. 12 (1991), 558 *et seq*.

[35] WT/DSB/M/80, para. 33.

[36] MTN.GNG/NG7/W/16, para.15, referring to the case of the United States' embargo against Czechoslovakia relating to strategic goods. The United States argued that "every country must be the judge in the last resort on questions relating to its own security". See T-26/01, *Fiocchi Munizioni v. Commission*, [2003] E.C.R. II-3951, Rec. 58.

into account all the circumstances of the case. The distinction offers an avenue to combine margins of discretion and the scope of judicial review in a meaningful way without impairing wide policy avenues enjoyed by Members under Art. XIV*bis*.

19 Additionally, derogation from the GATS rules under Art. XIV*bis*:1 lit. b is permitted only for measures that are deemed necessary to protect essential security interests in **three specific areas**.[37] Under Art. XIV*bis*:1 lit. a, essential security interests include the three areas specified under Art. XIV*bis*:1 lit. b, but, in addition, many other unspecified areas. Thus, unlike with Art. XIV*bis*:1 lit. b, Members did not deem it necessary to limit the exception relating to the disclosure of security-sensitive information. This can be readily understood, as Art. XIV*bis*:1 lit. b covers **positive action**, *i.e.* the trade repercussions may be much more severe than under Art. XIV*bis*:1 lit. a. Such positive action will, *inter alia*, include the strictest trade restriction, that is, a complete embargo based on national security reasons. It follows that, under Art. XIV*bis*:1 lit. a, the impact on trade of non-disclosure of information will more often than not be much less intrusive than in the case of positive action implied under Art. XIV*bis*:1 lit. b. By limiting to three specific areas the possibility of taking positive action based on essential security interests in derogation from the GATS substantive obligations, the GATS drafters sought to contain and avoid the abuse or misuse of the security exceptions provision.

20 It is unclear whether Art. XIV*bis* covers merely **actual** threats or, in addition, **potential** threats. GATT practice demonstrates that at least one member was of the view that potential threats are on an equal footing with actual threats. In 1961, Ghana justified its boycott of Portuguese goods on the basis of its security interests which could **potentially** be affected in a negative manner because of the continuing crisis in Angola. That Art. XIV*bis* covers **potential threats** as well seems plausible, as Members are entitled to define what they consider necessary for the protection of their national interests. This inherently implies the power to take **preventive action**, to the extent that it responds to what is an essential interest and to the extent that it does not amount to an abuse of rights.[38] The threat to a Member adopting the GATS-restrictive measure should be **credible**, as the words "essential" and "necessary" imply. The Ghanaian embargo on Portuguese goods is interesting in this context and raises questions as to whether—despite broad margins of political questions—requirements for preventive action were met. Ghana adopted a measure to protect its essential security interests that were jeopardized because of Portuguese involvement

[37] See above, para. 13.
[38] Of the same view, *Bhala*, U. Pa. J. Int'l Econ. L. 19 (1998), 263.

in **another** African country, namely Angola. Hence, there was **no actual threat** or **physical invasion**, but a fairly abstract claim of an existing potential "threat to the peace of the African continent".[39] It may be doubtful that such a potential threat is credible. Nevertheless, whether this kind of threat is indeed credible will be an element that has to be proven by the party adopting the GATS-inconsistent measure.

In assessing action deemed necessary to protect essential national interests, *21*
it is unclear whether such action includes measures which produce **extra-territorial effect**. This issue was raised notably in the aftermath of the adoption by the United States of the Helms-Burton Act. This legislation essentially imposed economic sanctions against foreign traders who were active in Cuba.[40] Several trading partners of the United States, notably the EC, Canada and Mexico, expressed the view that the act violates various GATT obligations. The EC requested consultations which failed and led to the establishment of a Panel in November 1996, which however never ruled on the case.[41] The issue needs to be addressed in a manner commensurate with general principles applicable to extraterritorial effect. Just like under Art. XIV,[42] there are cases where extraterritorial reach is appropriate since it entails, in effect, the protection of what may be considered a common concern. For instance, when it comes to the protection of exhaustible natural resources, the Appellate Body implicitly recognized the GATT-consistency of measures having extraterritorial effect in the *US—Shrimp* litigation. By the same token, under Art. XIVbis one could accept the WTO-consistency of a measure aiming at the isolation of countries that manifestly harbour terrorists and actively support international terrorism. On the other hand, it is argued that trade sanctions to promote human rights and democratization or the change of political regimes abroad amount to impermissible misuse of Art. XIVbis exceptions.[43] It is submitted that the scope of lawful extraterritorial effect of national security measures, affecting third-party Members, should be assessed on the basis of **explicit** or **inherent** obligations of such Members to support such efforts under international law. Measures taken in support of peremptory norms (*ius cogens*) such as combating slavery, torture or apartheid regimes engage the responsibility of all Members of the WTO which may lead to tolerating related restrictions justified under Art. XIVbis.

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[39] *GATT*, 600.

[40] See, among others, *Browne*, Geo. L. J. 86 (1997), 405; *Kuilwijk*, JWT 31 (1997) 3, 49; *Schloemann & Ohlhoff*, AJIL 93 (1999), 424, 427 *et seq.*; *Shapiro*, Geo. Wash. J. Int'l L. & Econ. 31 (1997), 97.

[41] See WTO, Dispute Settlement Body, *US—Helms Burton*, WT/DS38/2; WTO, Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 20 November 1996, WT/DSB/M/26, 15 January 1997; also *Smis & Van der Borght*, AJIL 93 (1999), 227, 231–236.

[42] See *Cottier et al.*, Article XIV GATS, para. 82.

[43] *Shapiro*, Geo. Wash. J. Int'l L. & Econ. 31 (1997), 97–118.

III. Refusal to Disclose Security-Sensitive Information (Art. XIV*bis*:1 lit. a)

22 Art. XIV*bis* in particular aims at the protection of undisclosed information which Members retain because otherwise they will put in jeopardy their essential security interests. Withholding security-sensitive information relating to intelligence sources would fit into this category. Nevertheless, the demarcation between Art. XIV*bis*:1 lit. a and b is not an easy task. For instance, confidentiality-related information for military equipment could also fall within Art. XIV*bis*:1 lit. b to the extent that it entails a service provided.

23 An interesting interrelationship is the one between Arts XIV*bis*:1 lit. a and III*bis*.[44] In the latter provision, it is stated that no Member is required to disclose information which may be contrary to the **public interest**. In other words, Art. III*bis* equally envisages a **general exception** to all GATS substantive obligations. It may reasonably be argued that "essential security interests" constitute a subset of the broader concept of "public interest". By referring to disclosure which a Member **considers** contrary to its essential interests, Art. XIV*bis*:1 lit. a, when compared to Art. III*bis*, implies a broader margin of discretion and is, other than the information qualifying under Art. III*bis*, merely subject to the prohibition of abuse of rights. The difference may, in practical terms, not be extensive. This is so because in the case of Art. III*bis*, just as under Art. XIV*bis*, it is the party **invoking** the exception which bears the burden of adducing evidence demonstrating that the information at hand can be deemed part of that party's public interest or its essential security interests.

24 Just like Art. III*bis*, Art. XIV*bis*:1 lit. a does not justify a Member's refusal to disclose information of the kind described under this provision when the Panel seeks such information pursuant to Art. 13 DSU. Of course, confidential information, when disclosed, must be treated as such not only by the WTO judiciary but also by any Member or individual having access to it.[45] It may be withheld from other Parties and used in proceedings only on the basis of a summary not revealing its content.

IV. Protection of Essential Security Interests (Art. XIV*bis*:1 lit. b)

25 Under Art. XIV*bis*:1 lit. b, a Member preserves the right to take such action as **it considers necessary** to protect its essential security interests: Art. XIV*bis*:1 lit. b (i) relating to the supply of services in a military establishment; Art. XIV*bis*:1 lit. b (ii) relating to nuclear weapons material; or Art. XIV*bis*:1

[44] *Delimatsis*, Article III*bis* GATS, para. 1 and footnote 1.
[45] *Ibid.*, paras 6 *et seq.*

lit. b (iii) adopted in wartime or other emergency in international relations. While the provision allows for a wide margin of appreciation of what the Member considers necessary, the rule only applies to what amounts to **essential** security interests. As indicated above,[46] the former requirement amounts to a **subjective** standard subject to the restrictions of abuse of rights, while the latter requirement amounts to an **objective** assessment of whether the threshold of the qualification is met. It is submitted that once the qualification is met, the WTO scrutiny will be limited to the identification of a measure that is **manifestly** unnecessary or disproportionate to the threat. In other words, judicial restraint should be expected under this provision more than under any other GATS rule due to the political sensitivity of the issues involved.

26 Under Art. XIVbis:1 lit. b (i), Members are allowed to protect their essential security interests that relate to the services supplied which **directly** or **indirectly** serve a **military establishment**. Military procurement would naturally come within this category. Again, one must not lose sight of the fact that the security interests pursued by the GATS-inconsistent measure at issue need to be "essential", not just important or normal, let alone of minor relevance. It should be recalled that the Agreement on Government Procurement (GPA) also contains a security exceptions provision that allows Members to derogate from the obligations of the GPA when it comes to **essential security interests** relating to "[…] procurement indispensable for national security or for national defence purposes".[47] In matters relating to military procurement, the special rule of the GPA will apply for Members of the GPA.

27 Art. XIVbis:1 lit. b (ii) permits derogations from the scope of the GATS relating to **nuclear fission or fusion**. Hence, fissionable and fusionable materials as well as their parent materials can be targeted by Members which seek to protect their essential security interests. It is unclear how this provision, copied from GATT, applies to the realm of services. It is submitted that it entails all services which relate to nuclear fission or fusion, both for civil and military purposes. Several regional trade agreements elaborate further on this exception and consequently embody security exceptions relating to the non-proliferation of biological, chemical or nuclear weapons, or to the control of dual-use products. Arguably, these exceptions implicitly form part of the more generally-drawn security exceptions provision under GATS as well. *Arguendo*, essential security interests may equally be at stake in the

[46] See above, paras 17–18.
[47] Art. XXIII GPA.

case of nuclear energy services for pacific purposes due to the potential spillovers in the military field.[48]

28 According to Art. XIV*bis*:1 lit. b (iii), Members can justify a GATS-inconsistent measure if it is deemed necessary by a Member for the protection of essential security interests and taken in **wartime** or "other emergency in international relations". While "wartime" does not raise considerable interpretive problems,[49] the concept of "emergency" is more difficult to define. It is reasonable to assume and to argue that the emergency situation that a Member claims has to be as significant as the "time of war", as the word "other" between the two elements suggests.[50] Thus, wartime is one case of an emergency situation and further cases not explicitly mentioned should be of **comparable** gravity and impact in order to fall within the ambit of Art. XIV*bis*:1 lit. b (iii). For instance, an emergency situation under Art. XIV*bis*:1 lit. b (iii) cannot be construed to cover a measure that is taken as a response to an action that occurred many years ago. Rather, the **threat** should be **imminent** or the security measure should reflect a rapid response and action in order to deal with a **dangerous** situation that arose **suddenly** and **recently**. Measures taken in response to a terrorist attack perfectly fit this definition.

29 In the course of the Uruguay Round negotiations, Nicaragua submitted a communication which proposed various clarifications relating to the security exceptions provision of the GATT 1947 to prevent abuse of that provision.[51] With regard to the concept of **emergency**, Nicaragua contended that emergency could only refer to situations which, in Members' view, threatened international peace and security. Moreover, the Member invoking a security exception should first have recourse to the United Nations or another appropriate inter-governmental organization which tackles issues relating to peace and security. Furthermore, Nicaragua suggested that compensation should be available to developing countries the rights of which have been negatively affected by the invocation of a security exception made by a developed country provided that this invocation related to a measure that was not taken in wartime or as a response to an international relations emergency.[52] In any event, emergency is a term that cannot be unilaterally

[48] Council for Trade in Services, Energy Services, Background Note by the Secretariat, S/C/W/52, 9 September 1998, para. 28.

[49] The question whether "wartime" also covers the preparation for war should be answered in the affirmative.

[50] *Schloemann & Ohlhoff*, AJIL 93 (1999), 424, 446.

[51] Group of Negotiations on Goods, Negotiating Group on GATT Articles, Uruguay Round, Article XXI, Proposal by Nicaragua, MTN.GNG/NG7/W/48, 29 June 1988.

[52] *Ibid.*, paras 2–3.

defined. It is rather the WTO judiciary that will rule whether the measure at hand meets the fairly high standard.[53]

V. Obligations Under the UN Charter (Art. XIVbis:1 lit. c)

30 Art. XIVbis:1 lit. c provides that nothing in the GATS shall be construed to prevent a Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security. The provision relates to multilateral measures adopted by the Security Council under Chapter VII (Arts 39–51) or by appropriate regional bodies entrusted with the maintenance of international peace and security under Chapter VIII (Arts 52–54) of the UN Charter. This is in line with Art. 103 UN Charter which provides that the obligations deriving from the UN Charter should prevail over any other obligation under another international agreement. Accordingly, the various trade embargoes or other UN-mandated economic sanctions imposed by the Security Council under Chapter VII, while incompatible with substantive provisions and commitments under GATS, are justified, as they fall within the security exceptions provision.[54] UN Security Council decisions imply that the essential security interests of Members (as understood in WTO terms) are affected and that Members face an actual or potential threat upon which action may be taken. Panels and the Appellate Body do not have jurisdiction to review UN Security Council or regional decisions and the assessment of risk and threat to security they entail as well as the need to take action.

31 Jurisdiction of panels and the Appellate Body, however, exists to review whether measures adopted by Members exceed the severity of the measures approved by the multilateral decisions taken under Chapters VII and VIII of the UN Charter. Panels and the Appellate Body are expected to examine those elements that are necessary in order to "satisfy themselves that they have authority to proceed".[55] Such authority exists for an examination of whether the measure is more infringing than what is required by the relevant resolution adopted.[56] It is commensurate with the claim to be responded to that the measure is not sufficiently founded in Art. XIVbis:1 lit. c and therefore incompatible with WTO obligations.

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[53] *Hahn*, Mich. J. Int'l L. 12 (1991), 558, 589.

[54] See also *GATT*, 605.

[55] Appellate Body Report, *Mexico—Corn Syrup*, WT/DS132/AB/RW, para. 36. Earlier, the Appellate Body had emphasized that "[t]he vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings". See Appellate Body Report, *US—1916 Act*, WT/DS136/AB/R, WT/DS162/AB/R, para. 54.

[56] *Schloemann & Ohlhoff*, AJIL 93 (1999), 424, 431.

32 It is unclear to what extent Art. XIVbis:1 lit. c also includes justification of measures taken in self-defence under Art. 51 UN Charter. It is submitted that such action falls under Art. XIVbis:1 lit. b (iii) addressing war and other emergency in international relations. Such measures do not entail multilateral justification which otherwise is constitutive for action taken under Chapters VII and VIII of the UN Charter.

C. Obligation to Notify Under Art. XIVbis:2

33 Art. XIVbis:2 establishes a **notification requirement**. Thus, Members are required to notify to the Council for Trade in Services (CTS) of those measures that fall within Art. XIVbis:1 lit. b and c to the **fullest extent possible**. The provision is not absolute, and Members enjoy some discretion in defining their practices of notification. Members should equally **notify** to the CTS of the **termination** of related measures, if applicable. The obligation inherently operates on the basis of *ad hoc* notification of measures taken. It does not entail *ex ante* consultations or even approval by the CTS. Discussions in the CTS are purely political and do not impair the jurisdiction of panels and the Appellate Body to review the measure under the DSU. Like all notifications under the GATS, they have to adopt a specific format and include specific information such as the Member notifying, the Member specifically affected, the date of entry into force and the duration of the measure at hand, the agency that is in charge of enforcing the measure, a complete description of the measure indicating the modes of supply covered and the impact on trade in services.[57] A Member that notifies all these pieces of required information relating to a measure falling within Art. XIVbis:1 lit. b and c should be deemed to have complied with the requirement to inform the CTS to the "fullest extent possible". The notification under Art. XIV:2 need not occur before the enforcement of the measure, but can also be made *ex post*.[58]

34 Negotiating history under Art. XXI GATT shows that various Members doubted the existence of an **obligation** to inform other Members of the existence of a GATT-restrictive measure. In the aftermath of the Falkland Islands crisis, the GATT Contracting Parties adopted a "Decision Concerning Art. XXI of the General Agreement [on Tariffs and Trade]".[59] While

[57] Council for Trade in Services, Guidelines for Notifications under the General Agreement on Trade in Services, Adopted by the Council for Trade in Services on 1 March 1995, S/L/5, 4 April 1995, 4.

[58] See Council for Trade in Services, Council for Trade in Goods, Notification Pursuant to Article XXI of the GATT 1994 and Article XIVbis of the GATS, Nicaragua G/C/4, S/C/N/115, 21 February 2000.

[59] GATT, Decision Concerning Article XXI of the General Agreement, BISD 29S/23, 2 December 1982.

the initial aspiration was to set procedural guidelines for the application of the security exceptions under Art. XXI GATT, the Decision merely requires that contracting parties be informed as fully as possible of trade measures adopted under Art. XXI GATT.[60] More importantly, the Decision recognized that other Members retain their full rights under the GATT (including those under Art. XXIII GATT) in the event of action taken in accordance with Art. XXI GATT.

D. Outlook

35 Art. XIVbis aims to achieve a proper **balance** between Members' prerogative to pursue their security interests and the multilateral interest in securing the realization and implementation of WTO rights and obligations. Open markets are an important prerequisite of peaceful relations and thus an important ingredient in preserving peace.[61] Security measures entail trade conflicts, and Harry Hawkins (1944) may be recalled: "Trade conflicts breed non-cooperation, suspicion, bitterness. Nations which are economic enemies are not likely to remain political friends for long".[62] Members are well advised to continue to have recourse to national security exemptions in very exceptional circumstances. They need to keep open markets and access as long as possible in order to avoid a vicious circle of adding to tensions by economic sanctions. The need to strike a proper balance points to the usefulness of an agreement among Members on what "national security" and "essential security interests" would entail. While it is true that such terms should be unilaterally defined, Members could adopt an illustrative list of measures or policy areas which would typically come within the ambit of a permissible derogation from the GATS rules under Art. XIVbis.[63] In addition, the adoption of procedural guidelines when a Member seeks to enforce a measure to respond to a threat to its security interests would enhance transparency and predictability.

36 Both of these recommendations, if accepted by the WTO Membership, would assist panels and the Appellate Body in assessing action taken under

[60] *Hahn*, Mich. J. Int'l L. 12 (1991), 558, 575.
[61] *Cottier & Dengg*, 41.
[62] *Ibid*.
[63] For instance, on the occasion of a complaint raised by Honduras and Colombia against Nicaragua, the latter submitted a statement which proposed that the WTO General Council express an opinion on the competence of any Panel set up within the WTO to decide "on eminently political issues". In Nicaragua's view, an authoritative interpretation (within the meaning of Art. IX:2 of the WTO Agreement) of Art. XXI GATT 1994 would be a possible way forward. See Dispute Settlement Body, Nicaragua, Measures Affecting Imports from Honduras and Colombia, Statements by Nicaragua, Revision, WT/DSB/COM/5/Rev.1, 30 May 2000, 5.

wide margins of discretion and the doctrine of abuse of rights. It would render the conduct of governments more predictable. Finally, it is submitted that remedies available and limited to *pro futuro* suspension of concessions under the DSU render Art. XIV*bis* disciplines largely ineffective as Members may impose unlawful measures for approximately three years before countermeasures may be taken. The situation is comparable to those in the field of trade remedies, in particular safeguard measures under Art. XIX GATT 1994. Efforts to bring about provisional measures and financial compensation in the future of WTO dispute settlement will further enhance the rule-based system and reduce the risk of arbitrarily invoking security exemptions in order to generate short-term effects of protecting domestic industries. While such an interest should be shared by all, it will be difficult to bring about the necessary changes. Traditional perceptions of sovereignty loom large.[64] Nevertheless, Members should consider these possibilities very seriously, given the shared interest of all Members in achieving a proper balance between discretion, predictability, unilateral action and judicial review of measures taken under the provision.

[64] See, generally, *Jackson*, Legal Problems.

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Article XV GATS
Subsidies

1. Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects.[7] The negotiations shall also address the appropriateness of countervailing procedures. Such negotiations shall recognize the role of subsidies in relation to the development programmes of developing countries and take into account the needs of Members, particularly developing country Members, for flexibility in this area. For the purpose of such negotiations, Members shall exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers.
2. Any Member which considers that it is adversely affected by a subsidy of another Member may request consultations with that Member on such matters. Such requests shall be accorded sympathetic consideration.

Footnote 7: A future work programme shall determine how, and in what time-frame, negotiations on such multilateral disciplines will be conducted.

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A. General

I. Overview

Art. XV mandates Members **to negotiate** multilateral[1] disciplines necessary to avoid the distorting effects subsidies may have on international trade in services. *1*

Since they started in 1996, negotiations have been moving at a very slow pace and **so far very little headway** has been made.[2] Services and trade in services differ significantly from goods and trade in goods. Their salient characteristics, such as invisibility, non-storability and intangibility, and the existence of multiple modes of supply, complicate the elaboration of possible disciplines. In addition to evident technical difficulties, negotiators should carefully assess the impact of possible subsidies disciplines on governments' ability to subsidize services activities with high social value. *2*

[1] The term "multilateral" emphasizes the fact that the adoption of the result of the negotiations mandated by Art. XV will not be facultative (plurilateral) and will bind all WTO Members. The Tokyo Subsidies Code negotiated during the Tokyo Round, for instance, was a plurilateral agreement open to facultative adoption.

[2] Negotiations under Art. XV take place within the Working Party on GATS Rules (WPGR). The minutes of the WPGR meetings, classified under S/WPGR/M followed by a sequential number, can be accessed through the WTO official website at <www.wto.org>.

3 **Art. XV:1** contains the **negotiating mandate** itself, including a requirement for Members to address the appropriateness of countervailing procedures. **Art. XV:2** formalizes **consultations** between any Member that considers itself adversely affected by a subsidy and the subsidizing Member.

4 With the notable exception of the European State Aid regime, even the most recent bilateral and regional trade agreements pay little (if any) attention to the issue of services subsidies and to their potentially trade-distorting effects.[3]

II. History

5 Limited discussion on the introduction of disciplines on services subsidies took place during the Uruguay Round.[4] Debates so far have not resulted in the adoption of any concrete provision and the contracting parties agreed solely on the negotiating mandate of Art. XV.

B. The Provision of Art. XV

I. The Rationale for Subsidies Regulation: Avoiding Trade Distortion (Art. XV:1, Sentences 1 and 2)

6 The basic economic justifications for regulatory intervention in the field of services subsidies do not differ from those underpinning the multilateral instruments constraining the use of agricultural and industrial goods subsidies and **aim to prevent misallocation of resources and outputs**.[5]

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[3] See for instance Arts 11 and 19 ANZCERTA Protocol on Trade in Services, 18 August 1988, reprinted in Uruguay Round, Group of Negotiations on Services, Communication from New Zealand and Australia, Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations—Trade Agreement, MTN.GNS/W/47, 16 September 1988, and Arts 69, 96 *et seq.* Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market Economy, 5 July 2001, reprinted in Committee on Regional Trade Agreements, Caribbean Community and Common Market—Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy—Preamble, WT/REG155/1, 8 July 2003.

[4] See Group of Negotiations on Services, Uruguay Round, Subsidies and International Trade in Services, Note by the Secretariat, MTN.GNS/W/98, 20 April 1990.

[5] As with subsidies on industrial and agricultural goods, services subsidies can divert resources by sending a distorted signal to a service supplier concerning its real production costs, thus leading to an artificial overproduction of the subsidized services compared to what the supplier would have been likely to produce in a "distortion free" environment. In addition to a misallocation of resources, which per se remains a domestic problem, subsidies can be responsible for the misallocation of outputs between foreign and domestic markets resulting from the lower costs of subsidized services. In an increasingly globalized world,

At the outset, it bears recalling that the text neither of Art. XV nor of any other provision of the GATS defines the term **"subsidy"**. Members discussed a possible definition of subsidies for the purpose of Art. XV.[6] The point of departure for the elaboration of a definition is Art. 1 of the Agreement on Subsidies and Countervailing Measures (ASCM), which defines a subsidy as a financial contribution by a government conferring a benefit on its recipient. No noticeable progress has so far been made on the question of whether such definition fits the services context.[7] *7*

On the basis of data extracted from the Members' trade policy reviews, subsidies, identified on the basis of the definition of Art. 1 ASCM, appear to be **prevalent in** four service sectors, *i.e.* **tourism, transport, audio-visual and financial services**.[8] Concerning the form of the support, the same source of information highlights the prevalence of tax incentives over direct grants, thus reflecting a preference in the political process for "less obvious", and, at least in terms of immediate disbursement "less costly" forms of support. Information on the trade-distorting effects of the support programmes identified, however, is virtually non-existent. *8*

Despite the current dearth of information on services subsidies, it is possible to identify **three main scenarios of subsidization** with potentially distorting effects on trade.[9] These are: (1.) export-enhancing, (2.) import-displacing and (3.) investment-diverting subsidies.[10] *9*

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this matter can no longer be viewed as a merely domestic issue, hence the need to develop international regulatory frameworks.

[6] See Working Party on GATS Rules, Report of the Meeting of 25 February 2003, Note by the Secretariat, S/WPGR/M/41, 12 March 2003, paras 41–58.

[7] As discussed below, this loophole represents one of the major stumbling blocks in the current negotiations, and is often indicated as a major cause for the non-fulfillment of the information exchange mandate.

[8] See Working Party on GATS Rules, Subsidies for Services Sectors, Information Contained in WTO Trade Policy Reviews, Background Note by the Secretariat, S/WPGR/W/25, 26 January 1998; Working Party on GATS Rules, Subsidies for Services Sectors, Information Contained in WTO Trade Policy Reviews, Background Note by the Secretariat, Addendum, S/WPGR/W/25/Add.1, 29 May 2000; Working Party on GATS Rules, Subsidies for Services Sectors, Information Contained in WTO Trade Policy Reviews, Background Note by the Secretariat, Addendum, S/WPGR/W/25/Add.2, 12 December 2000; Working Party on GATS Rules, Subsidies for Services Sectors, Information Contained in WTO Trade Policy Reviews, Background Note by the Secretariat, Addendum, S/WPGR/W/25/Add.3, 19 September 2002; Working Party on GATS Rules, Subsidies for Services Sectors, Information Contained in WTO Trade Policy Reviews, Background Note by the Secretariat, Addendum, S/WPGR/W/25/Add.4, 12 February 2004.

[9] Members have not yet discussed the issue of trade distortion on the basis of concrete examples. See for instance S/WPGR/M/41, para. 50. The main purpose of the information exchange mandate is precisely the identification and analysis of concrete examples of trade-distorting subsidies in the services context. As discussed above, from an economical standpoint, subsidies matter for the international trade community because of the misallocation of outputs they may cause, resulting from the lower costs of subsidized services.

[10] See *Abugattas Majluf*, 11, 12.

10 **Export-enhancing subsidies** are measures aimed at promoting a country's exports with a view to attaining larger shares in foreign markets. This form of subsidization appears to be rather unusual. There are only a few known instances of direct export subsidization in services.[11]

11 A second category of services subsidies consists of measures that directly support the domestic supply of services. **Import-displacing subsidies** are aimed at strengthening the position of domestic services and service suppliers, thus impeding market access to—or business expansion of foreign suppliers in—a given market. The limited data available so far suggest that import-displacing subsidies represent the broadest and most varied category of support measures in services trade, possibly reflecting the fact that Members may be more concerned with protecting domestic services industries than with enhancing their international competitiveness. Domestic subsidies often serve non-economic policy objectives and attempt to internalize positive externalities.[12] The elaboration of disciplines applying to import-displacing subsidies is therefore likely to be more complex than that of disciplines regulating the use of export-enhancing subsidies, since it would require striking a delicate balance between legitimate policy objectives and distortion of international trade.

12 Lastly, **investment-diverting subsidies,** *i.e.* those measures aimed at influencing locations decisions of service suppliers, matter for international rule-making because of the diversion of investment flows they may cause. The distortion resulting from investment-diverting subsidies negatively affects a host country where a given inflow of foreign direct investment (FDI) might have gone, absent investment incentives in the form of financial or fiscal measures, or the provision of *ad hoc* infrastructures.

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[11] See *Feketekuty*, in: *Bhagwati & Hirsch*, 79, 89. In addition to subsidies to services supplied by means of mode 1 of supply, export-subsidies in the services trade may also take the form of measures aimed at attracting foreign consumers to domestic service industries (mode 2 of supply), for instance in the tourism, health and education sectors.

[12] This may be the case with transport services, where subsidies are aimed at achieving a greater use of public transport and its associated environmental benefits, or to guaranteeing transport services to remote areas. In the case of audio-visual services, subsidies can be justified by the desire to preserve national cultural identity and to combat the risk of cultural standardization; on the other hand, subsidies on health and education services may be aimed at promoting both social stability and social mobility.

II. Appropriateness of Countervailing Procedures (Art. XV:1, Sentence 3)

An assessment of the appropriateness of countervailing procedures[13] in the services context, as requested by Art. XV, involves the questions of their (1.) desirability and (2.) technical feasibility.[14] *13*

In assessing the **desirability** of countervailing procedures, one first has to consider the still debated nature of trade remedies, either as legitimate instruments aimed at safeguarding domestic suppliers against unfair trade practices or as protectionist tools aimed to shield uncompetitive domestic industries. Also relevant to the analysis are the economic effects of countervailing procedures, generally resulting in a welfare loss for the imposing country;[15] their overall limited efficacy,[16] the associated increased risk of rent-seeking behaviour on the part of domestic producer industries,[17] their administrative costs, and the markedly unbalanced recourse to such instruments by some WTO Members.[18] *14*

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[13] The use of the term "countervailing procedures" in Art. XV includes the rules governing the investigation of subsidization and of its damaging effects on a country's service industries, as well as the enforcement of remedial measures on subsidized imports.

[14] See *Benitah*, Subsidies, Services and Sustainable Development, 11. The existence of legislation regulating the application of unilateral measures designed to redress subsidized services, such as EEC Regulation 4057/86 on Unfair Prices Practices in Maritime Transport, OJ 1986 L 378, 14–20, and EC Regulation 868/2004 of the European Parliament and of the Council of 21 April 2004 concerning protection against subsidization and unfair pricing practices causing injury to Community air carriers in the supply of air services from countries not Members of the European Union, OJ 2004 L 162, 1–7, does not invalidate the analysis provided below. Activities such as maritime transport services, which are *per se* invisible and intangible, "materialize" at a certain point in their life cycles in the form of transported goods, either at the initial (loading) and/or at the final (discharging) stage of supply. Similarly, the imposition of extra duties on the subsidized air transport services sector is facilitated by the fact that air transport services "materialize" in the form of passengers and aeroplanes taking off from and landing at an airport within the territory of the country willing to impose the extra duty. This aspect makes them more amenable to the application of quantitative remedies.

[15] See *Sykes*, WTO Rules, 2.

[16] Countervailing duties offer a remedy only in situations where country A subsidizes its exports to country B, thus harming domestic producers of like products of country B. They are, however, toothless when country A subsidizes its domestic production, putting exporters of country B at a disadvantage, or when country A subsidizes exports to a third country, thus unfairly competing with B's exports to the same market.

[17] Domestic industries may seek protection even when they are not subject to unfair competition, but simply find themselves placed in an unfavourable (but fair) situation as regards their foreign competitors. See *Sykes*, Colum. L. Rev. 89 (1989), 199, 215, and generally *Olson*.

[18] According to WTO data, of a total of 108 countervailing duties imposed between January 1995 and December 2004, 76 (or 70.73 per cent) were put in place by developed countries: United States (45), European Union (22), Canada (8) and Australia (1). This led a commentator to question "whether a weapon mostly used by developing countries" should have a place among the future disciplines on services subsidies. See *Benitah*, Subsidies, Services and Sustainable Development, 32.

15 When addressing the appropriateness of countervailing procedures in the services context from the standpoint of **technical feasibility**, it is necessary to consider the complexities that the salient characteristics of services, such as their intangible nature and the lack of detailed and comprehensive statistics on services trade-flows, introduce at both the investigation and enforcement levels of countervailing procedures. For instance, as is the case in the goods context, the determination of material injury requires an objective examination of the volume of subsidized imports, their effects on domestic prices in the importing country market and their consequent impact on the domestic industry.[19] Authorities in charge of conducting countervailing procedures investigations are likely to face the impossibility of establishing the volume of subsidized imports with a sufficient degree of precision, their increase in absolute or relative terms, their effects on prices in the domestic market for like services and the consequent impact of these imports on domestic suppliers of like services.[20] For the same reasons, proving the causal relationship between subsidization and injury would be a complicated exercise.

16 Additional **difficulties** are likely to arise at the **enforcement** level. Under the ASCM, after determining the existence of a subsidy, an injury to the domestic industry and a causal relationship between the two, a country is allowed to impose countervailing measures in the form of additional duties on the imports of the subsidized product which are collected by the customs authorities operating at a country's borders. The effectiveness of this method lies in the fact that virtually all goods entering a country must go through customs procedures at its borders. In the case of international trade in services, such a 'filtering operation' usually does not take place. The invisible and intangible character of services and the existence of the four different modes of supply make the enforcement of border measures difficult, for the simple reason that customs agents will normally not be able to see the service as it "passes the frontier".[21] In the best-case scenario, they will merely register the suppliers (such as the business operator in the case of mode 4) or the consumer (for instance a tourist in the case of mode 2) as they gain access to the market of a given country. Customs authorities, however, will usually not be able to determine the value (or volume) of the service transactions until after the services have been rendered or consumed.

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[19] See Art. 15.1 ASCM. This and other relevant issues, for instance how terms such as "products imported in the territory of a contracting party", "established domestic industry", "amount of estimated bounty or subsidy" and "material injury", could be defined in the services context, and the difficulties of identifying the origin of services were highlighted during the Uruguay Round. See MTN.GNS/W/98; The Impact of Subsidies on Trade in Services, Background Note by the UNCTAD Secretariat, UNCTAD/SDD/SER/3, 4 October 1993, 11.

[20] See Art. 15.2 ASCM.

[21] See in this respect *Cottier & Oesch*, 1001, 1027.

As regards services supplied across borders, such as telecommunications and telecom-based transactions (*e.g.* e-banking), invisibility at the border is virtually absolute.[22]

17 Lastly, the enforcement of countervailing measures in the services context would have to take into account the measures' country- and product-specific character. This brings the question of **rules of origin** into the debate. Criteria such as where (and how much) value was added to a certain product are applied to determine the origin of goods; this is decisive for the decision as to whether a particular import is subject to an extra duty or not. Little attention has so far been paid to the issue of rules of origin for services.[23] The absence of clear procedures for the determination of the origin of services carries a twofold risk: that of arbitrary application of countervailing measures by importing countries, and of quasi-infinite possibilities of circumvention for exporters.

18 Further, one has to consider the constraining effects of the unconditional character of the GATS **MFN obligation** on a country's ability to impose unilateral remedies on subsidized services. As GATS rules stand, the absence of a provision similar to Art. VI GATT 1994 explicitly waiving the MFN obligation of Art. I GATT 1994 which forbids the application of measures on a discriminatory, country-specific basis, makes the imposition of an extra duty on subsidized services open to challenge on grounds of a violation of the GATS MFN provision. Where no MFN exemption has been inscribed in the list of exemptions, a Member wishing unilaterally to counteract subsidized imports through the imposition of remedies would have to impose the remedy on a non-discriminatory basis on all WTO Members in order to avoid breaching the MFN obligation of Art. II.[24]

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[22] Where there is no physical cross-border transit, taxing the service itself is not technically feasible. Government measures that aim to penalize subsidized imports of services may therefore have to focus on the taxation of producers or consumers, for example, by imposing visa fees on the entry of the services suppliers themselves (mode 4) and exit taxes on those citizens leaving their own country in order to consume the subsidized service abroad (mode 2), and taxing consumers (mode 1), branches or subsidiaries (mode 3).

[23] See *Beviglia Zampetti & Sauvé*, in: *Cadot et al.* (eds), 114, 117.

[24] See Working Party on GATS Rules, Subsidies and Trade in Services, Note by the Secretariat, S/WPGR/W/9, 6 March 1996, 10. In this respect, the European Communities' MFN Exemptions List (European Communities and Their Member States, Trade in Services, Final List of Article II (MFN) Exemptions GATS/EL/31, 15 April 1994) contains a reference to "Redressive duties which may be imposed in order to respond to unfair pricing practices, by certain third countries distributors of audiovisual works". Such exemption applies to all WTO Members, is of indefinite duration, and is motivated by the fact that unfair pricing practices may cause serious disruption to the distribution of European audiovisual works. Concerning the two pieces of European legislation mentioned above, it is important to remember that the bulk of air transport services remains not covered by the GATS obligations (see paras 2 and 3 of the Annex on Air Transport Services), while measures affecting maritime transport fall within the scope of the GATS with the exception of MFN (para. 1 of the Annex on Negotiations on Maritime Transport Services).

III. Subsidies and Development (Art. XV:1, Sentence 4)

19 Art. XV:1, sentence 4 says that negotiations shall recognize the role subsidies may play for the development programmes of developing countries and take into account the needs of Members, especially of developing countries, for flexibility in this area. Recognizing the **asymmetry of conditions of development** among Members[25] is necessary in order to avoid setting up mechanisms that may unnecessarily restrict the developing countries' ability to implement much needed development-orientated government policies. Multilateral rules on subsidies would have to reflect the existing uneven level of development. Such recognition fits into the overall development-friendly character of the GATS.[26]

20 The input of subsidies to the process of development of a country may be more important in the services than in the goods trade context.[27] Thanks to their **multiplying effect**, the competitive (in terms of costs and quality) supply of services such as finance, transport and telecommunication not only benefits the direct consumers of such services, but also makes a substantial contribution to a country's overall economic performance.[28]

21 Members did not address the practical question of which approach would be the most suitable for dealing with the development issues in relation to services subsidies. Following the existing regime applying to industrial goods subsidies, **"flexibility"** for developing countries in the area of subsidies may take the form of special and differential treatment allowing for temporary exemption from ordinary subsidies disciplines applying to developed WTO Members, as is the case under Art. 27 ASCM. Alternatively, Members may consider allowing development subsidies in the context of a wider non-actionable category of subsidies, as argued in the goods subsidies context by several developing countries.[29]

IV. Information Exchange Request (Art. XV:1, Sentence 5)

22 The gathering of comprehensive information on services subsidies is a prerequisite for the advancement of the negotiations under Art. XV:1,

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[25] See *Gabriele*, 3.

[26] See Rec. 5 and 6 of the Preamble to the GATS and Art. IV:1.

[27] It bears recalling that the proper role of subsidies in economic development remains controversial in both the goods and services contexts. Of particular concern is the fact that subsidies may end up hurting the economy of the subsidizing country itself in multiple ways, including the sponsoring of unprofitable businesses, the perpetuation of vested interests and the fostering of rent-seeking behaviour.

[28] More broadly, development-friendly rules for services subsidies would send a strong signal of commitment by the WTO Membership to the achievement of a more balanced and sustainable development.

[29] See Committee on Subsidies and Countervailing Measures, Minutes of the Regular Meeting Held on 1–2 November 1999, G/SCM/M/24, 26 April 2000, 5–9.

sentence 2. Art. XV, however, does not define the term **"information"**. The Questionnaire prepared by the WTO Secretariat and largely drafted on the basis of the one used for the notification of industrial subsidies under Art. 25 ASCM includes questions, *inter alia*, pertaining to the **form** and **availability** of a subsidy, possible **time limits**, and its **impact on trade**.[30]

To date, **only five Members** have made written submissions in response *23*
to the information exchange request by **answering** to a **questionnaire** prepared by the WTO Secretariat.[31] Members that had so far failed to comply with the information exchange request invoked the **absence of a definition** of a subsidy for the purpose of such exercise[32] and the **excessive workload**[33] that completing the questionnaire would demand. Both arguments fail to convince. With respect to the first reason the WPGR chairmen repeatedly emphasized the flexibility Members retain in the choice of definitions and sectoral coverage.[34] Above all, however, the few Members that replied to the questionnaire showed that it is possible to use the definition of a subsidy contained in Art. 1 ASCM as a model for the purpose of information exchange on services subsidies. Concerning the claims of the excessive workload compliance with the information-exchange mandate would cause, whereas one cannot deny the resource-intensive character of such a task, in particular where it is necessary to coordinate the review at different levels (*e.g.* federal and sub-federal) and among different ministries and agencies, one can also expect Members to have at least a broad idea of the kind of subsidies they maintain. Further, Members that have been able to prepare comprehensive requests for further services liberalization

[30] See, for instance, Working Party on GATS Rules, Report of the Meeting of 27 April 1998, Note by the Secretariat, S/WPGR/M/16, 10 June 1998, para. 9 and Working Party on GATS Rules, Report of the Meeting of 13 February 1998, Note by the Secretariat, S/WPGR/M/15, 27 February 1998, para. 8.

[31] These are: Norway, Hong Kong China, Poland and Switzerland. See Working Party on GATS Rules, Communication from Norway, Response to the Questions Relevant to the Information Exchange Required Under the Subsidies Negotiating Mandate, Addendum, S/WPGR/W/16/Add.1, 23 June 1997 to Working Party on GATS Rules, Communication from Switzerland, Response to the Questions Relevant to the Information Exchange Required Under the Subsidies Negotiating Mandate, Addendum, S/WPGR/W/16/Add.5, 22 December 2005. Information was provided by answering to a "questionnaire" largely drafted on the base of the one used for the notification of industrial subsidies under Art. 25 ASCM, see S/WPGR/W/16.

[32] See, for instance, S/WPGR/M/16, para. 9 and S/WPGR/M/15, para. 8.

[33] Working Party on GATS Rules, Report of the Meeting of 2 and 3 July 2003, Note by the Secretariat, S/WPGR/M/43, 5 September 2003, 6.

[34] See S/WPGR/M/16, para. 9. With the purpose of increasing participation WPGR Chairmen repeatedly stressed that Members can decide not to answer all questions (see, *e.g.* Note by the Secretariat, S/WPGR/M/16, 10 June 1998; Working Party on GATS Rules, Report of the Meeting of 7 July 2000, Note by the Secretariat, S/WPGR/M/28, 4 August 2000, para. 20) and that they are not obliged to submit all the information in their possession at once, see, *e.g.* Working Party on GATS Rules, Report of the Meeting of 1 October 2003, Note by the Secretariat, S/WPGR/M/44, 28 October 2003, para. 40.

for almost all WTO Members (*i.e.* the totality of developed countries and virtually all developing countries) will find the resources necessary to collect information on the use of subsidies in the different service sectors.[35]

24 All in all, more than to genuine technical obstacles, the lack of compliance with the information exchange mandate seems to owe itself to arguments such as the **political unwillingness to disclose potentially sensitive information** that might induce countries to take action against the reported measures of support, and/or the **preference for the *status quo***, meaning *quasi* regulatory immunity in the area of subsidies.

V. Consultations (Art. XV:2)

25 Pursuant to Art. XV:2, any Member which considers that it is adversely affected by a subsidy of another Member may request consultations with that Member on such matters. Such a request shall be accorded sympathetic consideration. Members have not yet made use of this instrument.

26 At the outset, one may legitimately question **whether** service industries ever perceived **subsidies** bestowed to foreign competitors as **damaging**—or threatening to damage—their own interests when resulting in hardened competition in the market of the subsidizing country, as in the case of import-displacing subsidies or in their domestic market or in common third-country markets of export, as in the case of export-enhancing subsidies. A negative answer to this question would explain why Members have so far refrained from petitioning the competent domestic authorities for intervention against other governments' subsidies.

27 Conversely, if services subsidies do cause trade-distorting effects which are perceived as more than marginal, a **possible explanation for the lack of use of** the provisions of **Art. XV:2** could be the risk of a glass-house effect that a first request for consultation may trigger. It is also pertinent asking whether services industries have a degree of influence on decision makers in the countries' capitals equal to that exerted by industries active in the primary and secondary sectors, such as sugar and cotton producers, steel producers, aircraft manufacturers and shipbuilders, each of them standing behind the initiation of a significant number of disputes involving agricultural and industrial goods subsidies, and behind the imposition of countervailing duties to subsidized imports of such products. Lastly, an additional plausible explanation for the lack of use of the consultation procedure lies in the absence, in Art. XV:2, of any reference to the Dispute

[35] Ironically, one could legitimately ask whether complaints about the excessive burden required by the information exchange could imply that there are too many services subsidies currently in place.

Settlement Understanding (DSU) where no mutually agreed solution can be reached after consultations, a fact that relegates Art. XV:2 to the role of a "best endeavours" clause.

C. Disciplines on Services Subsidies in Other GATS Provisions

28 Subsidies are "measures by Members affecting trade in services" within the meaning of Art. I:1. Absent any specific carve-out provision in the Agreement, the GATS obligations therefore apply to subsidies as well.[36] The following paragraphs provide a synthetic analysis of the extent to which some existing GATS provisions apply to subsidies.

I. Art. XVII (National Treatment)[37]

29 Applying the anti-discriminatory precept of national treatment to subsidies means putting domestic and foreign suppliers on an equal footing. At the outset, one can expect that administering subsidies on a national treatment basis would dramatically reduce their use simply because a country's resources are not infinite.

30 **The following aspects**, however, significantly **water down the efficacy of the GATS national treatment provision** as a discipline on services subsidies.[38] **First**, Art. XVII is a conditional obligation. This means that it applies only to sectors in which commitments have been undertaken.[39] **Second**, even when commitments have been undertaken, the flexible character of the GATS allows Members to maintain mode-specific national treatment limitations.[40] **Third**, Paragraph 10 of the document "Scheduling of Initial

[36] Art. XXVIII lit. a states that a "measure" for the purpose of the GATS means "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form".

[37] The GATS does not exclude production subsidies from the scope of the national treatment obligation, as it is the case under Art. III:8 lit. b GATT 1994.

[38] See generally on the GATS national treatment provision *Mattoo*, JWT 31 (1997) 1, 107–135.

[39] A look at the Members' schedules of specific commitments reveals that many of the sectors in which the level of subsidization is deemed to be particularly high, such as education, health, transport and audiovisuals, rank among sectors in which the lowest number of commitments have been undertaken.

[40] Specific limitations on eligibility for subsidies can be found in sectors such as entertainment services, audiovisuals, education, medical, dental and veterinary services, and telecommunication services. See Working Party on GATS Rules, Limitations in Members' Schedules Relating to Subsidies, Note by the Secretariat, S/WPGR/W/13, 22 May 1996; Working Party on GATS Rules, Limitations in Members' Schedules Relating to Subsidies, Note by the Secretariat, Addendum, S/WPGR/W/13/Add.1, 14 June 2000; Working Party on GATS Rules, Limitations in Members' Schedules Relating to Subsidies, Note by the Secretariat, Addendum, S/WPGR/W/13/Add.2, 30 August 2004. It is equally possible

Commitments in Trade in Services: Explanatory Note" states with respect to subsidies that "[t]here is no obligation in the GATS which requires a Member to take measures outside its territorial jurisdiction. It therefore follows that the national treatment obligation in Art. XVII does not require a Member to extend such [subsidizing] treatment to a service provider located outside the territory of another Member".[41] Thus, even in the absence of any limitations on national treatment, only foreign services suppliers present in the territory of the granting Member (*i.e.* those operating by means of modes 3 and 4 of supply) are entitled to complain about discriminatory treatment if the country's laws or practice do not make them eligible for the subsidy programme benefiting like domestic suppliers.

II. Art. XXIII:3 (Non-Violation Complaints)

31 Although the use of this instrument remains extremely limited—no GATS non-violation complaint has so far reached the panel stage[42]—it is worth recalling that during the GATT era Contracting Parties relied on non-violation complaints as a means to challenge the indirect protection of domestic companies through subsidization.[43]

32 Even though the text of Art. XXIII:3 differs slightly from that of Art. XXIII:1 lit. b GATT 1994,[44] the **'non-violation complaints test'** developed by the GATT and WTO jurisprudence provides a **valuable point of departure** for the application of the non-violation complaints instrument to services subsidies.[45] Accordingly, the complaining party has cumulatively to prove (1.) the application of a measure by a WTO Member

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to inscribe horizontal limitations through which Members can exclude the eligibility of foreign suppliers for subsidy programmes in all services in which commitments have been undertaken.

[41] MTN.GNS/W/164, para. 10.

[42] To date, non-violation claims under Art. XXIII:3 have not gone beyond the request for consultations stage. See, Request for Consultations by the European Communities, *US—Helms Burton*, WT/DS38/1; Request for the Establishment of a Panel by the European Communities, *US—Helms Burton*, WT/DS38/2; Constitution of the Panel, *US—Helms Burton*, WT/DS38/3; Reservation of Third-Party Rights, *US—Helms Burton*, WT/DS38/4, Communication from the Chairman of the Panel, WT/DS38/5; Lapse of the Authority for Establishment of the Panel, *US—Helms Burton*, WT/DS38/6; Request for Consultations by the United States, *Japan—Distribution Services*, WT/DS45/1; Request for Consultations by the United States, *Belgium—Telephone Directory Services*, WT/DS80/1.

[43] See for instance the Working Party Report, *Australia—Ammonium Sulphate*, BISD II/188, para. 12; GATT Panel Report, *EEC—Oilseeds I*, BISD 37S/86; and *Durling & Lester*, Geo. Wash. J. Int'l L. & Econ. 32 (1999), 211, 214.

[44] For instance, whereas under Art. XXIII:1 lit. b GATT 1994 the losing party has no obligation to withdraw the non-violating measure, the remedies available under Art. XXIII:3 are similar to those provided for in the case of violation complaints, and therefore include the possibility for the successful complainant to request the removal of the non-violating measure as one of the possible ways to achieve mutually satisfactory adjustment.

[45] See in this respect Art. XVI:1 WTO Agreement.

(a law or regulation or other governmental actions); (2.) the existence of a benefit accruing under a relevant agreement; and (3.) nullification and impairment of such benefit as a result of the application of the measure referred to in (1.).[46] According to the wording of Art. XXIII:3 a Member's right to claim the existence of a benefit as requested by the non-violation complaints test is conditional upon the existence of specific commitments in the relevant activity.

33 The lack of practical use of this second "cause of action" in addition to the violation complaint is questionable.[47] An in-depth analysis that goes beyond the scope of this work is necessary. There are, however, no obstacles that would *a priori* prevent the application of the non-violation complaints test to services subsidies.

III. Art. II (Most-Favoured-Nation Treatment—MFN)

34 Art. II forbids discrimination among WTO Members. A Member granting a subsidy to a service or service supplier of foreign country A will in principle violate the GATS **MFN obligation** if it does not extend the same treatment to all other Members' like services or like service suppliers. Administering subsidies on an MFN basis guarantees that all foreign services and services suppliers are on an equal footing.

35 However, the very nature of the MFN principle, *i.e.* the requirement not to discriminate among **foreign** services or service suppliers, makes this obligation useless where no subsidy is provided to foreign services or services suppliers, thus confining its application to those (apparently rare) situations where, absent national suppliers, a government is selectively granting subsidies to service suppliers of a specific country.[48] Further, contrary to Art. I GATT 1994, Art. II:2 allows Members temporarily to exempt measures from the field of application of the MFN obligation.[49]

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[46] See Panel Report, *Japan—Film*, WT/DS44/R, para. 10.35; Panel Report, *Korea—Procurement*, WT/DS163/R, paras 7.85, 7.86.

[47] An in-depth analysis that goes beyond the scope of this work would be necessary.

[48] See S/WPGR/W/9.

[49] The few MFN exemptions relating to subsidies are mainly concentrated in the audiovisual services sector, and take the form of limitations on access to joint programmes to finance and diffuse audiovisual works, motivated by the willingness to preserve a regional common cultural identity and/or promote cultural exchange. See, for a comprehensive survey of the MFN exemptions maintained by the WTO Members, Council for Trade in Services, Special Session, Communication from Japan, MFN Exemption: Analysis and Proposal, Supplement, S/CSS/W/42/Suppl.1, 14 May 2001.

IV. Art. VIII (Monopolies and Exclusive Service Suppliers)

36 Cross-subsidization from reserved (*i.e.* activities taking place within the scope of monopoly rights) to unreserved activities may adversely affect undertakings competing with the monopolist in the supply of unreserved activities by artificially strengthening the position of the recipient of the cross-subsidy in the domestic market *vis à vis* competitors. **Cross-subsidization** is rife in industries once operated under a monopoly, such as telecommunications, post, transport and energy. While monopolies have been progressively dismantled, even in economies that underwent major privatization and liberalization, governments tend to maintain narrower monopolies in certain core activities of the above-mentioned sectors, such as the distribution of electricity and gas, fixed telephone services, and the basic letter services market. Profits made in these reserved activities may be used in segments open to competition in a way that is detrimental to the interests of competing, non-cross-subsidized operators.

37 Although Art. VIII, much in the same way as many other provisions of the GATS, is untested and relatively vague, **Art. VIII:2**, stating that a monopoly supplier competing in unreserved markets shall not "abuse its monopoly position", may be read as **prohibiting cross-subsidization** from reserved to unreserved activities.[50] Like Arts. XVII and XXIII:3, the main weakness of Art. VIII for the purpose of services subsidies regulation seems to be its conditional nature.

D. Evaluation and Outlook

38 In spite of the lack of comprehensive data, it is safe to assume that **disciplines on services subsidies** would exert a **beneficial effect on** the current **market access negotiations** by promoting a level playing field for all WTO Members.[51] Prohibiting the use of trade-distorting subsidies, or introducing instruments allowing Members to respond effectively to harmful subsidies, would render markets more contestable thus increasing the value of the negotiated market access commitments.[52] By the same

[50] It bears recalling that cross-subsidization is one of the "anti-competitive practices" listed in para. 1.2 of the Reference Paper on Basic Telecommunications.

[51] As noted by Benitah "it seems that countries perceive subsidies to services [...] as an ace hidden in the liberalization game played by many countries". See *Benitah*, ICTSD, 4.

[52] Members emphasized the importance of knowing the amount of subsidies in existence when undertaking commitments in the context of the request-offer negotiations, see *e.g.* S/WPGR/M/55, para. 37. The reluctance of developing countries to include construction and engineering services in their Uruguay Round Schedules of specific commitments was motivated by the fact that, due to the absence of disciplines on services subsidies and their lack of capacity to compete with developed countries on a level playing field, it would have been unwise on their part to enter into market access commitments.

token, disciplines on subsidies would help Members asked to undertake new commitments in sectors where they provide public support to clarify the WTO compatibility of such support measures. The prevailing regulatory uncertainty may deter Members from undertaking commitments in subsidized sectors.[53]

39 Despite the absence of an explicit reference in the negotiating mandate, the introduction of **disciplines on services subsidies** would have to deal with the thorny issue of **how** the latter may **affect government policies the legitimacy of which is unanimously accepted**, such as measures of support meant to remedy market failures and internalize positive externalities.[54] An issue that captured particular attention in the negotiations under Art. XV, and also caught the public eye, is the impact possible rules may have on the ability of governments to subsidize **public services**. The term "public services" is rather vague, and no definition can be found in the GATS. In the WPGR debates, public services have often been linked to the provisions of Art. I:3 lit. b, which excludes services supplied in the exercise of government authority, such as police, judiciary, central banking and social security, from the scope of the GATS. Art. I:3 lit. b would automatically exclude such services from the scope of any GATS discipline on subsidies.[55] Much less clear is the question whether or not services that cannot be excluded from the scope of the GATS because they are supplied on a commercial basis and in competition with those of one or more service suppliers,[56] as is the case in many countries with health and education services, would be caught by future disciplines. Clarifying the scope of the GATS in relation to public services would also permit one to dismiss many unwarranted concerns voiced by those who view the GATS as a threat to democracy and a danger to the governments' autonomy to supply public services.[57]

40 In the absence of a clear picture of state support to services and consequently of its trade distorting effects, it remains impossible to determine the level of regulatory intervention necessary to avoid such effects, including

[53] *Sauvé*, Aussenwirtschaft 57 (2002), 301, 306.

[54] Among other reasons, subsidies are granted to encourage firms to relocate to a disadvantaged region; to guarantee the provision of services such as telecommunications, transport and postal services in a country's most remote areas, to foster research, development or culture, or to ensure affordable access to education or health services for the entire population. The common denominator of these activities is the fact that they are expected to generate positive spillover effects for society as a whole.

[55] "The GATS has no implications for the public funding of services provided in the exercise of governmental authority. Whatever disciplines are developed" on the basis of Art. XV "will not apply to governmental services, because these are simply outside the scope of the GATS". See *WTO*, GATS—Fact and Fiction, 2001, 8.

[56] See the rather unclear wording of Art. I:3 lit. b and c.

[57] See, *e.g.*, <http://www.attac.org/indexfla.htm>, <http://www.gatswatch.org/> (last visited 1 October 2007).

the question whether a sector-specific approach may be more appropriate than a horizontal one.

41 Although the economic rationale for services subsidies disciplines is largely set, the **advancement of the negotiations** under Art. XV **depends on the availability of concrete data** showing the actual necessity for such disciplines. This aspect magnifies the importance of the fulfilment of the information exchange request. It is only on the basis of comprehensive information that negotiators will be able to identify the issues requiring regulation and design rules aimed to avoid the trade-distorting effects of subsidies while, at the same time, recognizing the importance of government support for developmental and social purposes. An assessment of the measures of discipline offered by the current GATS is subject to similar constraints. Their prevailing conditional character, however, seems greatly to impair their efficacy. Finally, many complex issues are likely to arise in relation to countervailing measures in services trade. A multilateral path available to Members adversely affected by services subsidies therefore seems to be the most appropriate answer, with the exclusion of unilateral remedies.

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PART III SPECIFIC COMMITMENTS

Article XVI GATS
Market Access

1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.[8]
2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:
   a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
   b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
   c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;[9]
   d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
   e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
   f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

Footnote 8: If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2 a) of Article I and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital. If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2 c) of Article I, it is thereby committed to allow related transfers of capital into its territory.

Footnote 9: Subparagraph 2 c) does not cover measures of a Member which limit inputs for the supply of services.

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Cross References

Art. 28 ECT; Art. 1207 NAFTA; Art. IV MERCOSUR Montevideo Protocol.

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A. General

The GATS aims to establish a legally binding set of commitments to enhancing **predictability** and **transparency** under the tenet of **progressive liberalization**.[1] The main tools of liberalization of the GATS, that is, Art. XVI on market access and XVII on national treatment, are to be found in Part III of the Agreement, entitled "Specific Commitments". The *raison d'être* of Part III of the GATS was to capture a wide range of trade barriers to trade in services and establish a mechanism for scheduling specific commitments on them.[2] Part III of the GATS does so by setting disciplines aimed to limit the use of certain quantitative restrictions to the provision of services (Art. XVI) and the adoption or maintenance of discriminatory measures against foreign service suppliers (Arts. XVI and XVII). Additionally, Part III allows Members to undertake commitments regarding other types of restrictions that escape the scope of Arts. XVI and XVII—so called, additional commitments (Art. XVIII). *1*

The market access obligation, like the national treatment obligation, does not apply unconditionally. Rather, it applies only to services sectors that are inscribed in the Members' Schedules of specific commitments and subject to the terms, limitations and conditions set out therein.[3] Furthermore, unlike national treatment, "market access" is **not a general concept** under GATS. The measures covered by Art. XVI are a well-defined set of quantitative restrictions as listed in Art. XVI:2, lit. a–f that may hamper the ability to perform or expand business in the countries' market.[4] *2*

As to the listing of commitments, the GATS adopts a so-called **"hybrid approach"**, which combines elements of both positive and negative listing.[5] In Art. XVI, the market access obligation is negatively defined in that it prohibits several types of restrictions that hamper the supply of services in a given market. At the same time, ensuring **effective** market opening to international trade in services is arguably the overarching objective of the *3*

[1] See Rec. 2 of the Preamble to the GATS. The *US—Gambling* Panel noted that "[p]rogressive liberalization entails including more sectors in Members' schedules and reduction or elimination of limitations, terms, conditions and qualifications on market access and national treatment through successive rounds of negotiations". See Panel Report, *US—Gambling*, WT/DS285/R, para. 6.313; see also *Delimatsis*, Article XIX GATS, paras 1, 4–6.

[2] Committee on Specific Commitments, Additional Commitments Under Article XVIII of the GATS, Note by the Secretariat, S/CSC/W/34, 16 July 2002, para. 3.

[3] In what follows, the term "limitations" is used as encompassing these three types of measures. This is also in accordance with the list of measures/limitations laid down in Art. XVI:2 lit. a–f.

[4] See below, paras 14–15 and 19–66.

[5] *Molinuevo*, Article XX GATS, paras 14 and 22–26. See also, *Delimatsis*, JWT 40 (2006), 1059, 1062; *Fink & Molinuevo*, East Asian Free Trade Agreements, 12–13.

GATS. All GATS substantive obligations aim to achieve meaningful access to domestic services markets. Granting national or MFN treatment, abiding by the GATS transparency obligations and the other GATS obligations should ultimately lead to improved conditions of entry into and operation within the Members' markets.

4 The extent of liberalization is reflected in the number of services sectors that are included in each Schedule in conjunction with the restrictions listed therein. The content of the Schedules also determines the scope of the market access and national treatment obligations for each Member. As a result, the scope of these two obligations **varies** from Member to Member, depending on each Member's Schedule and the commitments undertaken therein.[6] This is the fundamental application in the GATS of the overarching objective of **progressive liberalization** when it comes to trade in services, as each Member may liberalize services trade on varying levels and at different speeds.

5 Whereas both Arts XI GATT 1994 and XVI GATS deal with **quantitative restrictions** on trade, they could hardly be considered analogous. Art. XI GATT 1994 is more comprehensive, as it contains a *per se* prohibition regarding the use of quotas or "other measures" resulting in a restriction or prohibition on the importation or exportation of any product.[7] Art. XVI, instead, can be regarded as a requirement to schedule market access limitations. In this respect, the spirit of Art. XVI is closer to Art. II GATT 1994 on schedules of tariff concessions. At the same time, Art. XVI covers **both** discriminatory and origin-neutral quantitative limitations and, in this sense, has a broader scope than Art. XI GATT 1994. For similar measures regulating trade in goods, the GATT provides that Art. III GATT 1994 should preferably be applicable, by virtue of the *Ad Note* to Art. III GATT 1994.[8]

6 The GATS negotiating history reveals that Members construed market access under GATS as extending beyond any notion of access for foreign service suppliers (tariff bindings in GATT) to encompass all policies, mostly of a **quantitative** nature, that restrict market access; and this even in a **non-discriminatory** manner.[9] Having said this, Art. XVI:2 lit. e is not a quantitative restriction, as it refers to the form of legal entity, whereas

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[6] *Delimatsis*, JWT 40 (2006), 1059, 1062.

[7] Panel Report, *India—Autos*, WT/DS146/R, WT/DS175/R, paras 7.246–7.249.

[8] *Mavroidis*, Commentary, 46.

[9] See, *inter alia*, Group of Negotiations on Services, Uruguay Round, Note on the Meeting of 27 May to 6 June 1991, MTN.GNS/42, 24 June 1991, 1–3; Group of Negotiations on Services, Uruguay Round, Note on the Meeting of 24–28 June 1991, MTN.GNS/43, 15 July 1991, paras 34–36; Group of Negotiations on Services, Uruguay Round, Note on the Meeting of 10–25 July 1991, MTN.GNS/44, 28 August 1991, para. 45; also Group of Negotiations on Services, Uruguay Round, Scheduling of Initial Commitments in Trade in

Art. XVI:2 lit. f relates to **foreign equity participation** and, thus, is a **discriminatory** quantitative limitation. The measures that require the creation of a **joint venture** are also discriminatory, as this type of establishment typically involves cooperation between a **domestic** and a **foreign** company.

7 The introduction of a market access obligation predominantly dealing with quantitative restrictions in the GATS was deemed necessary because, contrary to those to trade in goods, barriers to trade in services typically display **quota characteristics**.[10] Tariff barriers to trade in services are rare due to the services' intangible nature. As services escape any physical control at borders, governments extensively use **quantitative restrictions** or, more generally, **non-tariff barriers** to regulate their domestic markets.

B. Granting Market Access as Provided for in a Member's Schedule (Art. XVI:1)

8 Art. XVI:1 entails a general prohibition on according **less favourable** treatment to foreign services and service suppliers than that provided for in a Member's Schedule. That prohibition extends to the treatment afforded to services suppliers of *any* Member, in a non-discriminatory manner.[11] While the level of market access cannot be lower than that inscribed in the Schedule, Members remain free unilaterally to adopt measures that entail a **higher degree** of liberalization.[12] In this sense, specific commitments resemble tariff bindings under the GATT, which do not necessarily reflect the rates actually applied which can be more liberal (lower) than the tariffs bound at the multilateral level. Thus, despite being commonly expressed in terms of **maximum** quantitative restrictions, WTO Members' entries in their Schedules should be considered **minimum** market access guarantees for foreign services suppliers on which each WTO Member may unilaterally expand.[13] Such guarantees, therefore, do not reveal the actual levels of protection, thereby reducing the significance of the Schedules.

9 In *US—Gambling*, the Appellate Body expressed the view that Art. XVI:1 points to the link that exists between Members' market access obligation in committed sectors, on the one hand, and the **"terms, limitations and**

Services, Explanatory Note, MTN.GNS/W/164, 3 September 1993, para. 4. For a different view, see *Mavroidis*, World Trade Rev. 6 (2007), 1, 9.

[10] See *Francois & Wooton*, Eur. J. Pol. Econ. 17 (2001), 389, 395.

[11] In the view of the Panel of the *US—Gambling* case, Art. XVI:1 hence contains a specific expression of the MFN principle of Art. II (*US—Gambling*, WT/DS285/R, paras 6.263–6.265).

[12] Also *US—Gambling*, WT/DS285/R, paras 6.263–6.264.

[13] *Mattoo*, JWT 31 (1997) 1, 107, 110.

conditions" inscribed in their respective Schedules, on the other.[14] Indeed, the market access obligation is subordinated to, and qualified by, the relevant "terms, limitations and conditions" inscribed in Members' Schedules.[15] The use of the phrase **"terms, limitations** and **conditions"** aims to make it clear that Members wished to establish a broad market access obligation, so that Members feel compelled to schedule any type of measures that may fall within the categories listed in Art. XVI:2.[16] In other words, Members' Schedules specify the trade-restrictive measures that Members wish to maintain with regard to the market access obligation. The terms **agreed and specified** featured in paragraph 1 implicitly allude to the fact that, while Schedules reflect the commitments made by **one** Member, the Schedules represent a **common agreement** among the entire WTO membership.[17]

10 Members may not adopt or maintain measures that provide service suppliers with **less favourable treatment** than that specified in the market access column of each Member's Schedule. Hence, when it comes to the appropriate standard of review, a panel's task is to juxtapose this **minimum** treatment set out in the specific market access commitments in each Member's Schedule with the **actual** treatment that a Member offers when market access is sought to determine whether the "no less favourable" treatment standard of Art. XVI:1 was violated.[18]

11 Art. XVI:1 refers to market access that is sought through the **four modes of supply** as set out in Art. I:2, that is, cross-border supply; consumption abroad; commercial presence; and presence of natural persons.[19] These four modes correspond to the scope of the GATS.[20] In this sense, Members are required to undertake specific commitments under the market access and national treatment columns of their Schedules by reference to a services sector or subsector and a mode of supply.[21]

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[14] See Appellate Body Report, *US—Gambling*, WT/DS285/AB/R, para. 214.

[15] Compare Appellate Body Report, *Canada—Dairy*, WT/DS103/AB/R, WT/DS113/AB/R, para. 134 (referring to Art. II:1 lit. b GATT 1994).

[16] In *US—Gambling*, the Panel noted that the words "terms" and "conditions", which are also used in Art. XX:1, relate to the "measures" to which Art. XVI:2 lit. e and the *chapeau* of Art. XVI:2 refer. See *US—Gambling*, WT/DS285/R, para. 6.294. It can be argued, however, that there is no textual or contextual element that may lead to this interpretation. Art. XX:1 simply replicates the wording of Art. XVI:1 which also refers to "terms, limitations and conditions". On this issue, see also *Molinuevo*, Article XX GATS, para. 11

[17] See Appellate Body Report, *EC—Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 109.

[18] See *US—Gambling*, WT/DS285/R, para. 6.263.

[19] See *Zacharias*, Article I GATS, paras 37–47.

[20] See Council for Trade in Services, Trade in Services, Guidelines for the Scheduling of Specific Commitments under the GATS, Adopted by the Council for Trade in Services on 23 March 2001, S/L/92, 28 March 2001, para. 26.

[21] *Molinuevo*, Article XX GATS, paras 13–19.

Finally, footnote 8 to Art. XVI:1 aims to protect the **movements of capital** resulting from the supply of services in a **cross-border manner** (mode 1) or through **commercial presence** (mode 3), provided that a Member made a commitment on market access with respect to these two modes of supply.[22] In the first case, a Member is obligated to allow the ensuing capital movement if the latter forms an **essential** part of the service supplied cross-border. Any capital movement in the absence of which the service cannot be supplied, such as, for instance, the ability to make outward transfers of funds to benefit from commitments with regard to the cross-border supply of deposit services, should be considered "essential". The drafting of the first sentence of footnote 8 confirms that the capital movements covered are only those inherently linked with the service itself, and do not extend to other types of related transfers, such as payments. The term "cross-border movement of capital" should be regarded as covering both inward and outward movements of capital. However, the obligation to allow movement of capital pertaining to commercial presence suggests that Members are required to allow transfers into their territory. A plain reading of the second sentence of footnote 8 ("[…] allow related transfers of capital *into* its territory") suggests that repatriation of capital does not come within the purview of footnote 8. In any event, the obligation enshrined in footnote 8 to Art. XVI:1 is to be read in conjunction with Art. XI, and the relevant reference to the Members' rights and obligations under the IMF Agreement.[23] *12*

Through the insertion of this interpretative note, and the disciplines of Art. XI, Members wished to make explicit their willingness to allow **transfer of funds** that can be indispensable for the supply of services by means of modes 1 and 3. Conversely, movements of capital associated with the supply of a service by means of mode 2 or 4 are not covered by footnote 8, thus allowing Members to maintain limitations on fund transfers with regard to these modes of supply.[24] In practice, international transfers will not be large in the latter two modes of supply. Rather, transfers of funds will be more significant when they relate to modes 1 and 3. In any event, a Member is allowed to inscribe in its Schedule a restriction regarding the related capital movement for services in committed sectors, as long as such restrictions do not flout the disciplines of Art. XI. *13*

[22] Also *Siegel*, AJIL 96 (2002), 561, 598.

[23] *Christ & Panizzon*, Article XI GATS, paras 29 *et seq*.

[24] *Christ & Panizzon* argue that the obligations enshrined in footnote 8 in regard to modes 1 and 3 may be applied by analogy to modes 2 and 4. See *Christ & Panizzon*, Article XI GATS para. 18. It could be argued, however, that modes 2 and 4 do not necessarily require capital transfers *stricto sensu*, but rather that funds related to these modes are limited to transfers and payments.

C. Outlawing Recourse to Six Types of Limitations (Art. XVI:2)

14 The second paragraph of Art. XVI consists of a list of six different types of limitations on market access. These restrictions may limit: (a) the number of service suppliers; (b) the total value of services transactions or assets; (c) the total number of service operations or the total quantity of service output; (d) the total number of natural persons who may be employed in a certain service sector; (e) the forms of legal entity or joint venture through which a service can be supplied; and/or (f) the participation of foreign capital. Except for lit. e, the limitations set out in this paragraph are **quantitative** in nature and provide for **maximum** limitations. Non-quantitative measures (except for those covered under Art. XVI:2 lit e) and measures that set minimum requirements, rather than maximum limitations, fall outside the scope of Art. XVI. This latter is also corroborated by the use of the term "total" in Art. XVI:2 lit. b, c, d, and f, or the use of the term "maximum" under Art. XVI:2 lit. f.[25]

15 These limitations **exhaust** the types of market access restrictions prohibited by Art. XVI:1 and cannot be maintained or adopted unless a Member inscribes them in its Schedule under the market access column.[26] Regardless of whether or not they are discriminatory, all market access limitations are to be inscribed in the market access column pursuant to the scheduling convention of Art. XX:2. In *Mexico—Telecoms*, the Panel dealt with a limitation in which Mexico was introducing a qualification as to when commercial presence would be allowed. The Panel implicitly confirmed the exhaustive nature of the list of Art. XVI:2 by ruling that **temporal limitations**, such as dates for entry into force or for the implementation of commitments, do not constitute market access limitations within the meaning of Art. XVI:2.[27]

I. The *Chapeau* of Art. XVI:2

16 The *chapeau* of Art. XVI:2 clarifies that the ***per se* prohibition** of market access limitations does not apply across the board, but only to scheduled sectors. Thus, the *chapeau*, like Art. XVI:1, points to the **conditional nature** of the market access obligation. This provision prohibits the maintenance or adoption of certain **measures**. Under Art. XXVIII lit. a, the term "measure" is defined in an all-encompassing manner to cover **any** mea-

[25] On the other hand, the absence of the term "total" in Art. XVI:2 lit. a should not be taken to mean that this provision does not cover maximum limitations. The Scheduling Guidelines lead to the same conclusion. See S/L/92, para. 11.

[26] MTN.GNS/W/164, para. 4; *US—Gambling*, WT/DS285/R, para. 6.298.

[27] Panel Report, *Mexico—Telecoms*, WT/DS204/R, paras 7.357–7.358, 7.361–7.362.

sure by a Member, regardless of the legal form that it may take. It can be, *inter alia*, a law, regulation, rule, procedure, decision, administrative action, but also provisions relative to professional qualifications or licensing adopted by professional bodies with delegated power or, more generally, actions by non-governmental actors that are attributable to a Member's government.[28] To the extent that any of these measures falls under one of the limitations itemized by Art. XVI:2 and applies to a committed sector, they need to be scheduled. The text of the *chapeau* of Art. XVI:2 confirms that the list of prohibited measures is exhaustive and not merely indicative by stating that "the measures which a Member shall not maintain or adopt [...] are defined as" the measures described by lit. a–f.

Rationae temporis, Art. XVI applies not only to measures that were adopted **after** the entry into force of the GATS, but also to **pre-existing** measures that are maintained after the entry into force of the Agreement. *17*

Finally, the *per se* prohibition covers measures that may be adopted or maintained at **all levels of government**. This reference in the *chapeau* to the coverage of Art. XVI seems superfluous, since Art. I:3 lit. a already makes it clear that the GATS covers measures taken at lower levels of government. A Member, however, has the right to specify otherwise in its Schedule, and thus limit the **territorial** applicability of Art. XVI. For instance, a Member could commit itself to granting market access to foreign telecommunication service suppliers only in underserved regions of its territory to promote the development of the infrastructures of these regions, or certain sub-federal governments may limit the number of banks established in their region. *18*

II. The Six Limitations Identified in Art. XVI:2

1. Origin-Neutral Quantitative Restrictions (Art. XVI:2 lit. a–d)

The main text of Art. XVI:2 defines the types of limitations and measures that must be eliminated, unless otherwise specified in a given Member's Schedule. Paragraph 2 informs Members of the manner in which they should inscribe such limitations in their Schedules.[29] For instance, under Art. XVI:2 lit a, a Member can limit the total number of service suppliers through the use of **numerical quotas, monopolies, exclusive service suppliers** or the requirements of an **economic needs test**.[30] *19*

More generally, the restrictions of the first four subparagraphs of Art. XVI:2 relate to **numbers**, or else, are **quantitative limitations**. Other than *20*

[28] *Delimatsis*, Domestic Regulations, 22.
[29] *US—Gambling*, WT/DS285/R, para. 6.293.
[30] See *US—Gambling*, WT/DS285/AB/R, paras 231–232.

being expressed **numerically**, these limitations can also be articulated through the criteria identified in Art. XVI:2 lit. a–d;[31] that is, a Member can use numerical quotas, monopolies, exclusive service suppliers or economic needs tests to limit market access.[32] However, as the Appellate Body confirmed in *US—Gambling*, the thrust of Art. XVI:2 lit. a (and, by implication, of the first four subparagraphs of Art. XVI:2) is not about the *form* of limitations, "but on their **numerical**, or **quantitative** nature".[33] Put differently, it is not the form of the measure that will determine the applicability of any of the Art. XVI:2 subparagraphs, but rather its quantitative nature, irrespective of whether this nature is expressed in numerical terms or otherwise.[34]

21 In addition, while Art. XVI:2 describes the limitations that are prohibited unless otherwise specified in a Member's Schedule, it does not contain any indication regarding the **means** that should be used to supply a service. The *US—Gambling* ruling confirmed that, when a Member undertakes a **full** market access commitment for a given service under one mode of supply, it cannot maintain or adopt measures that prohibit the use of **one, several** or **all** means of supply of that service in that mode unless it **explicitly** states so in its Schedule.[35] This interpretation is also in accordance with the concept of **technical neutrality** that is one of the inherent characteristics of GATS.[36] By the same token, a Member that inscribes a market access commitment in a sector or subsector commits itself with respect to **all** services included in that sector or subsector.[37]

22 As noted earlier, the list of the six types of limitations is **exhaustive**.[38] Viewed from this angle, a Member that does not maintain or adopt in a services sector and mode of supply any of the six categories of measures identified in Art. XVI (*i.e.* it inscribed "None" in its Schedule) grants **full** market access in this sector and mode of supply.[39] However, it is questionable whether a Member that provides "full market access" in the terms of Art. XVI is obliged to open its market fully to foreign services providers.[40] In this sense, under the GATS, "market access" is a **legally defined concept** that encompasses a limited set of situations, described in Art. XVI, and is

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[31] S/L/92, para. 8. Also compare *US—Gambling*, WT/DS285/AB/R, para. 225.
[32] See below, para. 44.
[33] See *US—Gambling*, WT/DS285/AB/R, para. 232, emphasis added. As to Art. XVI:2 lit. c, the Appellate Body reached a similar conclusion. *Ibid.*, para. 247.
[34] *Delimatsis*, JWT 40 (2006), 1059, 1068.
[35] *US—Gambling*, WT/DS285/R, para. 6.285.
[36] Also *Wunsch-Vincent*, World Trade Rev. 5 (2006), 319, 332.
[37] *US—Gambling*, WT/DS285/R, para. 6.290.
[38] See above, para. 15. See also MTN.GNS/W/164, para. 4; and *US—Gambling*, WT/DS285/R, para. 6.298
[39] MTN.GNS/W/164, para. 4; S/L/92, para. 8.
[40] *Delimatsis*, JWT 40 (2006), 1059, 1064–1065.

not to be equated with common terms (such as entry, admission, establishment, *etc.*) that imply the general ability to perform business activities in a given market. Textual and contextual elements lead to the conclusion that no obligation to provide for full market openness exists. First, according to footnote 8 to Art. XVI, restrictions on movements of capital with respect to modes 2 and 4 escape Art. XVI. Secondly, Art. XVIII also confirms that there may be restrictions on the supply of services that are **not** subject to scheduling under Art. XVI or XVII.[41] Such an interpretation appears to give full effect to the principle of progressive liberalization and Members' right to regulate.[42] The *US—Gambling* Panel also supports this interpretation.[43]

23 The *US—Gambling* ruling did not offer a straightforward answer to the aforementioned issue other than to confirm that a Member cannot maintain any of the measures listed under Art. XVI:2 if it has made a full market access commitment.[44] But this by no means suggests that a full market access commitment automatically implies **total** market openness.

a) Limitations on the Number of Service Suppliers (Art. XVI:2 lit. a)

24 The standard of review under Art. XVI:2 lit. a requires two elements to be assessed: first, whether the contested measure limits the **number** of service suppliers and, second, whether this measure takes one of the **forms** described under lit. a.[45]

25 **Service supplier** within the meaning of the GATS is defined broadly to cover any **person** that supplies a service.[46] In turn, this person may be either a **natural** or a **juridical person**.[47] A natural person would typically reside in the territory of any WTO Member (including the Member imposing the market access limitation) and would either be a national of another WTO Member or have the right of permanent residence in that Member.[48] A juridical person, on the other hand, is also defined in a broad manner to encompass any legal entity duly constituted or otherwise organized under applicable law, including any corporation, trust, partnership,

[41] *US—Gambling*, WT/DS285/R, para. 6.311.
[42] Ibid., paras 6.313–6.317.
[43] Ibid., para. 6.304.
[44] See *US—Gambling*, WT/DS285/R, para. 6.318, and *US—Gambling*, WT/DS285/AB/R para. 215.
[45] This second element is dealt with under paras 43 *et seq.*
[46] Art. XXVIII lit. g. Also *US—Gambling*, WT/DS285/R, para. 6.321.
[47] Art. XXVIII lit. j.
[48] See Art. XXVIII lit. k. This provision refers only to natural persons of **another** Member. This definition will be used here so as also to include natural persons of the Member imposing the market access limitations, since Art. XVI covers both discriminatory **and** non-discriminatory measures.

joint venture, sole proprietorship or association.[49] An interpretative note to Art. XXVIII lit. g makes it clear that, even in cases where the service is provided through forms of commercial presence other than those described under Art. XXVIII lit. l, such as a representative office or a branch, these entities, and, *a fortiori*, the juridical person that established them, should be treated as service suppliers under the GATS within the territory where the service is supplied through the commercial presence.[50]

26 In *US—Gambling*, the WTO judiciary dealt with the question whether a complete ban (or a *total prohibition*) on the cross-border supply of a service (*in casu*, gambling and betting services) in respect of which a **full** market access commitment was made should be regarded as a market access limitation falling within Art. XVI:2 lit. a and c; and this even if this ban is not **explicitly** expressed in **numerical terms**. The Panel implicitly found, and the Appellate Body explicitly stated, that it is the **numerical** or **quantitative nature** of a measure that the WTO judiciary will focus on in order to classify this measure under Art. XVI:2 lit. a.[51] Consequently, both adjudicating bodies found that a measure that totally prohibits the supply of certain services effectively limits to zero the number of service suppliers. In the view of the WTO judiciary, such a prohibition results in a "**zero quota**" and hence constitutes a **market access limitation** that takes the form of a numerical quota, as zero is quantitative in nature, and, thus, numerical.[52]

27 A narrower interpretation, like the one suggested by the United States, gave more relevance to the wording "in the form of" found in Art. XVI:2 lit. a–d, and advocated that only measures formally expressed in numerical terms would be covered by the prohibition on quotas.[53] In the Panel's view, this interpretation would lead to absurd results.[54]

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[49] Art. XXVIII lit. l; also Art. XXVIII lit. m and n.

[50] Footnote 12 to Art. XXVIII lit.g.

[51] *US—Gambling*, WT/DS285/R, para. 6.330–6.332; *US—Gambling*, WT/DS285/AB/R, para. 232. As noted earlier (above, para. 20), this applies to all four quantitative limitations under Art. XVI:2.

[52] *US—Gambling*, WT/DS285/AB/R, para. 227. See also *Mexico—Telecoms*, WT/DS204/R, para. 7.85. While it cannot be contested that a prohibition leads, by definition, to a limitation of the number of service suppliers equal to zero—a quantity –, it is arguable whether, by this mere result, a prohibition can straightforwardly be assumed to constitute a measure of a "quantitative nature". The rationale behind a non-discriminatory ban on a given business operation would commonly be found in certain qualitative elements of that activity that, in the view of the regulator, make it undesirable in that market, in *any* quantity whatsoever. In plain terms, the question "how much of X is desirable" assumes that X is not inherently undesirable, and aims at finding its right amount; the question "whether X is desirable" would entail instead an examination of its qualititative characteristics.

[53] *US—Gambling*, WT/DS285/AB/R, para. 222.

[54] *US—Gambling*, WT/DS285/R, para. 6.332. The Appellate Body backed this finding. See *US—Gambling*, WT/DS285/AB/R, para. 250.

To reach this conclusion, both the Panel and the Appellate Body turned to the 1993 Scheduling Guidelines to confirm the view that a measure amounting to a zero quota falls within Art. XVI:2 lit. a.[55] In particular, the Panel drew on the example provided by the 1993 Scheduling Guidelines—"nationality requirements for suppliers of services (equivalent to zero quota)"[56]—to conclude that "a measure that is not expressed in the **form** of a numerical quota or economic needs test may still fall within the scope of Article XVI:2(a)".[57] *28*

b) Limitations on the Total Value of Service Transactions or Assets (Art. XVI:2 lit. b)

Art. XVI:2 lit. b prohibits the setting of ceilings to **the total value of service transactions or assets**. As for the other quantitative measures listed in Art. XVI:2 lit. a, c, and d, these restrictions cannot be established in the form of numerical quotas, or as the requirement of an economic needs test. *29*

Prohibiting restrictions on the **value of services transactions**, albeit a rather infrequent measure, may be particularly relevant in some specific **service sectors**, such as **financial services**. In this context, measures that, for instance, limit the total value of lending operations that foreign banks may grant expressed in a monetary figure would be in violation of Art. XVI:2 lit. b, unless otherwise scheduled, and provided that they cannot be justified as prudential measures. *30*

Art. XVI:2 lit. b also bans restrictions on the **total value of assets** of services suppliers. The Scheduling Guidelines provide as an example a measure that would limit foreign bank subsidiaries to x per cent of total domestic assets of all banks.[58] *31*

The prohibition of lit. b on restrictions to the **value** of services transactions and assets, together with lit. c, on the **number** of services operations and service output, ensure that service suppliers are not restricted in their **ability to conduct business** operations in sectors where commitments have been undertaken. *32*

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[55] *US—Gambling*, WT/DS285/R, para. 6.332; *US—Gambling*, WT/DS285/AB/R, para. 237.

[56] MTN.GNS/W/164, para. 6 lit. a.

[57] *US—Gambling*, WT/DS285/R, para. 6.332, emphasis added. It bears noting that the Appellate Body had earlier reversed the Panel's finding that these Guidelines constitute context pursuant to Art. 31 VCLT and, instead, found that the Scheduling Guidelines should be regarded as supplementary means of interpretation within the meaning of Art. 32 VCLT. Nevertheless, the Appellate Body relied on the Scheduling Guidelines, just as the Panel did, to validate the interpretation that it advanced under Art. XVI. On the interpretative value of the Scheduling Guidelines, see *Ortino*, JIEL 9 (2006), 117–148; also *Mavroidis*, World Trade Rev. 6 (2007), 1, 7.

[58] S/L/92, para. 12.

c) Limitations on the Total Number of Service Operations or on the Total Quantity of Service Output (Art. XVI:2 lit. c)

33 Art. XVI:2 lit. c prohibits the adoption or maintenance of measures that limit the **total number** of **service operations** or the **total quantity** of **service output**, expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test. The term "total" hints that this subparagraph covers **maximum** limitations imposed on services operations and/or service output.[59] These limitations are **quantitative**.[60]

34 Service operations or service output are not defined in the GATS. The *US—Gambling* Panel, however, offered an interpretation of these two concepts.[61] As to **service operations**, the Panel contended that they mean activities comprised in the **production** of a given service. **Service output**, on the other hand, was defined as describing the **result** of the production of the service. The Panel based this conclusion on the example that the 1993 Scheduling Guidelines contain regarding Art. XVI:2 lit. c, that is, "restrictions on broadcasting time available for foreign films".[62]

35 As the definitions of the two concepts also imply, there is scope for **overlap** between limitations on the total number of service operations and limitations on the total quantity of service output. The overall structure of this subparagraph also suggests that the delineation between the elements used is not an easy task. In fact, such delineation is not necessary, since all these elements demonstrate Members' **willingness** to ensure that certain types of **quantitative, market-access limitations** would be caught by the purview of this provision.[63] The Panel's analysis under this subparagraph also hints at this. Indeed, when the Panel attempted to categorize the federal and state laws at issue, it did not feel compelled to decide whether the measures at hand limit the number of service operations or the quantity of service output.[64]

36 Thus, the Panel's finding that domestic laws that prohibit the cross-border supply of a committed services sector or subsector limit to **zero** the **total** number of service operations and/or the total quantity of service output (zero quota) was upheld by the Appellate Body. Consequently, both adjudicating bodies rejected the respondent's view that only limitations that contain express reference to numbered units are subject to Art. XVI:2. The Appellate Body held that: "[…] a prohibition on the supply of services in respect of

[59] *US—Gambling*, WT/DS285/R, para. 6.345.
[60] *US—Gambling*, WT/DS285/AB/R, para. 246.
[61] *US—Gambling*, WT/DS285/R, para. 6.349.
[62] MTN.GNS/W/164, para. 6 lit. c.
[63] *US—Gambling*, WT/DS285/AB/R, para. 247.
[64] *US—Gambling*, WT/DS285/R, paras 6.355, 6.361, 6.369, 6.376.

which a full market access obligation has been undertaken is a quantitative limitation on the supply of such services".[65] Thus, the Appellate Body explicitly condemned as incompatible with Art. XVI the **maintenance** or **adoption** of domestic measures establishing **prohibitions** in services sectors where **full** market access commitments were made.

37 This finding can have far-reaching implications, as it does not seem to be limited to prohibitions amounting to zero quotas. Arguably, the underlying rationale of this interpretation is that a Member should not be allowed to circumvent its market access commitment by prohibiting the entry into its market either overall (*e.g.*, blanket ban) or with respect to specific means of supply (*e.g.*, ban on service supply through electronic means only).[66]

38 While any limitation on the number of service operations or on the quantity of service output is prohibited, Members are free to maintain or adopt measures that limit **inputs** for the supply of a service. This is made clear in footnote 9 to Art. XVI:2 lit. c. The concept of an "input for the supply of services" hints at a segmented contribution to the production of the service that, added to other elements/inputs, ultimately leads to the supply of services.[67]

39 Historically, footnote 9 was conceived to allow Members to regulate zoning and floor space.[68] Additionally, it seems that Members also wanted to make a clear separation between the main service and services that are inputs to it,[69] *e.g.* accounting services *vis-à-vis* financial services, so that a Member that made a liberalizing commitment under financial services would not be obliged to extend this commitment to its accountancy sector unless it had explicitly said so in its Schedule. On this score, the 1993 and 2001 Scheduling Guidelines make it clear that the existence of a market access and national treatment commitment does not imply that the supplier of a committed service is allowed to supply **uncommitted services** which are **inputs** to the **committed service**.[70] Thus, footnote 9 aims to protect against unwanted liberalization.[71] Even so, the distinction between a service and the inputs of its supply may be very difficult in practice.

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[65] *US—Gambling*, WT/DS285/AB/R, para. 250.
[66] Also *Delimatsis*, JWT 40 (2006), 1059, 1067.
[67] In the view of some commentators, footnote 9 to Article XVI:2 lit. c allows Members to prevent the outsourcing of services, except where outsourcing itself (through mode 1) has been expressely committed. See on this, *Mattoo & Wunsch*, 14.
[68] *Ibid.*
[69] *Ibid.*, 15.
[70] MTN.GNS/W/164, para. 17; S/L/92, para. 25.
[71] *Lapid*, JWT 40 (2006), 341, 355.

d) Limitations on the Total Number of Natural Persons (Art. XVI:2 lit. d)

40 Art. XVI:2 lit. d **prohibits restrictions on the total number of natural persons**. While in principle the provision applies to all modes of supply, it is addressed in particular to services provided by means of modes 3 and 4. The provision applies to discriminatory and non-discriminatory measures, and, like the other subparagraphs of Art. XVI:2, applies only to maximum limitations. In this sense, a measure that requires that a commercial presence employs **at least** a certain number of nationals would arguably not infringe the disciplines of Art. XVI:2 lit. d and would not need to be scheduled under Art. XVI, since it would not limit the *total* number of natural persons.[72]

41 Like other restrictions covered by Art. XVI, lit. d applies to restrictions that take the form of numerical quotas or establish an economic needs test. These types of restrictions are frequently used with regard to the employment of foreigners. The 2001 Scheduling Guidelines list a limitation that reads "foreign labour should not exceed x percent and/or wages xy percent of total" as an example of a prohibited restriction on the total number of natural persons.

42 Art. XVI:2 lit. d clarifies that the prohibition affects restrictions on the number of natural persons employed in a given **service sector** or by **a service supplier**. Measures covered by this provision may read: a) "full-time teachers employed by private education institutions may be limited" or b) "beyond x employees, employment in gambling casinos is subject to an economic needs test".

43 The scope of the prohibition is, however, restricted to those measures that limit the number of natural persons **necessary for**, or **directly related to**, the supply of a service. The text of the provision suggests that a restriction on the number of natural persons that does not **directly relate** to the provision of the service would not be covered by lit. d. This relationship, however, could be assessed only on a case-by-case basis.

2. Forms of Origin-Neutral Quantitative Restrictions

44 The first four subparagraphs of Art. XVI:2 contain quantitative limitations, be they origin-neutral or not. These limitations may take several forms. **Quotas** and **economic needs tests** are common forms that the limitations set out in Art. XVI:2 lit. a-d may take. In addition, under Art. XVI:2 lit. a, limitations may take the form of **monopolies** or **exclusive service suppliers**. The Appellate Body stated that these limitations impart

[72] However, measures requiring the employment of nationals, or limitations on the employment of foreigners could eventually be challenged as a national treatment violation.

meaning to the phrase "in the form of" that appears in lit. a–d, and not the other way round.[73]

45 Two elements bear mention: first, a plain reading of Art. XVI:2 lit. a–d shows that the forms of limitations identified therein comprise an **exhaustive** list. The Panel in *US—Gambling* dismissed Antigua's argument that the measures listed under Art. XVI:2 lit. a, *i.e.* numerical quotas, monopolies, exclusive service suppliers or requirements of an economic needs test, are part of an indicative list of measures that can limit the number of service suppliers because of the use of the word "whether". The Panel suggested that this word alone cannot be construed as automatically suggesting an illustrative list of the forms that quantitative restrictions under lit. a can take.[74] Instead, the Panel found that Art. XVI:2 lit. a embodies an exhaustive list of forms of such restrictions. Other forms of quantitative restrictions not expressly listed under Art. XVI:2 lit. a–d fall outside the scope of the provision and need not to be scheduled. Second, in the view of the WTO adjudicating bodies, the word "form" appears to have a **broad** meaning.[75] The Appellate Body considered that the phrase "in the form of" should **not** be construed as prescribing a **"rigid mechanical formula"**, nor could it be read to imply a **single** form or be constrained in a **"formulaic manner"**.[76] Notably this latter element seems to have been the yardstick that led the Appellate Body to its conclusions with regard to Art. XVI:2 lit. a and c.[77] In this regard, however, the Appellate Body issued a caution by noting that "this is not to say that the words 'in the form of' should be ignored or replaced by the words 'that have the effect of'".[78]

46 Art. XVI:2 lit. a, b and d indicate that limitations may take the form of **numerical quotas**. It is only under Art. XVI:2 lit. c that the adjective "numerical" is not used with respect to quotas, but, again, a quota will typically be numerical. In the latter case, it may be argued that the phrase "in the form of quotas" should be read together with the phrase that precedes it, namely "limitations [...] expressed in terms of designated numerical units" to clarify the scope of a limitation on the quantity of service output.

47 In *US—Gambling*, the Appellate Body, when interpreting Art. XVI:2 lit. a, submitted that a numerical quota equates to a quantitative limit that is explicitly framed in quantitative or numerical terms or, alternatively, has the **characteristics** of a number, even if numbers are not explicitly used.[79]

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[73] *US—Gambling*, WT/DS285/AB/R, para. 227.
[74] *US—Gambling*, WT/DS285/R, paras 6.322–6.325, 6.341.
[75] *US—Gambling*, WT/DS285/AB/R, para. 226.
[76] *Ibid.*, paras 231, 247. See also above, para. 20.
[77] *Delimatsis*, JWT 40 (2006), 1059, 1066.
[78] See *US—Gambling*, WT/DS285/AB/R, para. 232.
[79] *Ibid.*, para. 227.

Therefore, in the Appellate Body's view, a limitation that would limit the **number** of potential service suppliers to **zero** does take "the form of" a **numerical quota**.[80] As Art. XVI covers both discriminatory **and** origin-neutral measures, since it is not addressed just to "foreign" service suppliers, the fact that the imposed zero quota does not discriminate between domestic and foreign service suppliers becomes irrelevant. This interpretation of quotas would also apply *mutatis mutandis* for Art. XVI:2 lit. b, c and d.

48 Limitations under Art. XVI:2 lit. a may also take the form of **monopolies**. A monopoly supplier under GATS is **broadly** defined to include "**any person**, public or private, which in the relevant market of the territory of a Member is authorized or established **formally** or **in effect** by that Member as the sole supplier of that service".[81] A person, in turn, can be either natural or juridical.[82] A third type of limitation under lit. a can take the form of **exclusive service suppliers**. Art. VIII:5, entitled "Monopolies and Exclusive Service Suppliers",[83] suggests that such suppliers exist when a Member "**formally** or **in effect**, (a) authorizes or establishes a small number of service suppliers and (b) **substantially** prevents competition among those suppliers in its territory".[84] The Appellate Body concluded from these two definitions that, as regards limitations on the number of service suppliers in the form of monopolies or exclusive service suppliers, they encompass limitations that are **in form** or **in effect** monopolies or exclusive service suppliers.[85]

49 An **economic needs test**[86] refers to a mechanism controlled by a Member or an entity with **delegated** power (*e.g.* a professional association) that allows them to decide whether the entry into the market of new (domestic or foreign) service suppliers is required on economic grounds.[87] Hence, economic needs tests typically have the effect of restricting market access, based on an **assessment** of the "**needs**" of the domestic market.[88] While such mechanisms may be established due to legitimate policy considerations, such as prudential policies, they have often been criticized because

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[80] *Ibid.*; also *US—Gambling*, WT/DS285/R, para. 6.338.

[81] Art. XXVIII lit. h, emphasis added. Also *US—Gambling*, WT/DS285/AB/R, para. 228.

[82] Art. XXVIII lit. j–n.

[83] *Bigdeli & Rechsteiner*, Article VIII GATS, paras 38–40.

[84] Emphasis added.

[85] *US—Gambling*, WT/DS285/AB/R, para. 230.

[86] Economic needs tests should not be confounded with necessity tests like the one set up in Art. VI:4 GATS. Measures in the form of of ENTs are quantitative and thus are based on criteria the fulfilment of which is **beyond the control** of the service supplier affected. See S/CSS/W/118, para. 6.

[87] *Goode*, 123.

[88] OECD, Working Party of the Trade Committee, Assessing Barriers to Trade in Services, The Scheduling of Economic Needs Tests in the GATS, An Overview, TD/TC/WP(2000)11/FINAL, 20 September 2000.

of their opaque and discretionary nature.[89] Economic needs tests do not have a standard format, but their common denominator is that the needs of the domestic economy or the relevant service industry will be taken into account before granting market access to a new supplier. In *US—Gambling*, this was a further element in the Appellate Body's attempt to substantiate its argument that Art. XVI is fairly broad regarding the form that limitations should have to come within the ambit of this provision.[90]

50 In *US—Gambling*, both the Panel and the Appellate Body dealt with the question whether Art. XVI:2 lit. c covers **two** or **three forms of limitations**. For the respondent, the United States, this provision included two limitations and, therefore, quotas were to be expressed only in terms of designated numerical units. The Panel ultimately found that this provision suggests **three** limitations, namely limitations in the form of: (1.) **designated numerical units**, (2.) **quotas**; and (3.) the requirement of an **economic needs test**.[91] On the basis of this conclusion, the Panel found that a zero quota was a limitation "in the form of quotas" falling within Art. XVI:2 lit. c.[92] On appeal, the Appellate Body implicitly dismissed this interpretation. Indeed, as noted earlier,[93] a textual and contextual interpretation can only lead to the conclusion that lit. c identifies **two** types of limitations. Even under this interpretation, however, the thrust is not on the form of the limitations, but on the fact that they limit **quantitatively** the service operations or the quantity of service output. An interpretation that would not be constrained in a "formulaic manner" would include a measure that results in a zero quota.

51 To sum up, it is the **quantitative nature** of a measure that leads to its characterization as a market access limitation within the meaning of Art. XVI. In this respect, it is worth noting that the Appellate Body did not feel compelled to decide whether a **complete prohibition** on the cross-border supply of gambling and betting services is a numerical quota, a monopoly, *etc*. under Art. XVI:2 lit. a, or a designated numerical unit in the form of a quota or the requirement of an economic needs test under Art. XVI:2 lit. c. On the contrary, the Appellate Body appeared to terminate its legal analysis when finding that the measures at issue were measures of a quantitative nature limiting to **zero** the number of service suppliers that could deliver their gambling and betting services across borders or the service operations and the output relating to such services. Indeed, it is surprising that the

[89] See *Low & Mattoo*, in: *Sauvé & Stern* (eds), 449, 456. Also Council for Trade in Services, Special Session, Economic Needs Tests, Note by the Secretariat, S/CSS/W/118, 30 November 2001, paras 11, 12, 14, 17.

[90] *US—Gambling*, WT/DS285/AB/R, paras 231–232.

[91] *US—Gambling*, WT/DS285/R, para. 6.344.

[92] *Ibid*., para. 6.355.

[93] See above, para. 46.

Appellate Body did not classify the measures at issue as numerical quotas under lit. a in an explicit manner, but instead excluded the adoption of any rigid mechanical formulas. This was made clearer notably in the Art. XVI:2 lit. c analysis, where the form of the limitations remained unclear.[94]

3. Limitations on the Forms of Establishment (Art. XVI:2 lit. e)

52 Art. XVI:2 lit. e prohibits measures that limit the **forms of establishment** of the service supplier by outlawing measures that restrict the type of legal entity through which a service supplier may supply a service, or measures that require the establishment of a joint venture. Art. XVI:2 lit. e significantly differs from the rest of the measures covered by Art. XVI:2, as it does **not** concern measures of a quantitative nature. Restrictions on the **type of legal entity** are **qualitative requirements** imposed on the service supplier. In the absence of lit. e, these restrictions would have been covered either by Art. XVII if they were discriminatory or by Art. VI if they were non-discriminatory.

53 The provision contains two distinct—albeit related—prohibitions that apply to **different situations**. On the one hand, the ban on measures that limit certain types of legal entity applies equally to modes 1, 2 and 3, and covers both **discriminatory** and **non-discriminatory** measures. On the other hand, the ban on the requirement of establishing joint ventures as a means to provide services applies exclusively to **discriminatory** measures affecting **commercial presence**.

a) Limitations on the Types of Legal Entity

54 When a Member undertakes commitments with regard to Art. XVI:2 lit. e, it may not require that the service be supplied by only certain **types** of **legal entities**. All **forms of legal establishment** are to be allowed to supply services, independently of their incorporated or non-incorporated nature, and whether or not of limited liability.

55 Unlike for measures requiring the establishment of joint ventures, this requirement **concerns** also services provided through cross-border supply, consumption abroad, or the establishment of a commercial presence. As it concerns services supplied by a legal entity, however, lit. e does not have any bearing on services supplied by means of mode 4.

56 Restrictions on the type of legal entity abound, for instance, with regard to professional services, which under some WTO Members' internal legislation can only be provided by natural persons or organizations through **non-limited liability** structures. On the other hand, some banking and

[94] Also *Delimatsis*, JWT 40 (2006), 1059, 1068.

financial services can only be provided by limited liability corporations. Where a Member wishes to maintain these sorts of restrictions in scheduled sectors, it should **inscribe** them in all the relevant modes, particularly modes 1 and 3.

57 The ban on legal entity requirements affects foreign and domestic service suppliers alike in a **non-discriminatory fashion**. For this reason, the failure of a Member to inscribe measures requiring only certain types of legal entities—such as those described above—would lead to an obligation on that Member to modify its regulatory framework in order to allow **any type of legal establishment** to provide services.[95]

58 In addition to the non-discriminatory measures outlined above, the prohibition on limitations on the type of legal entity also prohibits measures that limit the **means of establishment of foreign services providers** when they wish to provide services through commercial presence. The Scheduling Guidelines provide three examples of measures prohibited by Art. XVI:2 lit. e that relate exclusively to foreign services, namely: a) commercial presence excludes representative offices; b) foreign companies required to establish subsidiaries; and c) in sector x, commercial presence must take the form of a partnership.[96] This obligation, complemented by the prohibition on requiring the establishment of joint ventures, ensures that foreign services suppliers are not restricted in their choice of the form of establishment.

b) Prohibition on Requiring Joint Ventures

59 Art. XVI:2 lit. e also outlaws **measures that require the formation of joint ventures** in order to provide services. Since joint venture requirements are a limitation in the form of establishment of foreign companies,[97] this provision applies only to measures of a **discriminatory** nature. In addition, by definition, this provision only affects measures with regard to services supplied through commercial presence.

60 While joint ventures do not necessarily entail one specific legal form, this form of establishment involves an **agreement** between two or more enterprises engaged in one defined project that the group intends to carry out,

[95] While this reading stems from the text of the provision and is confirmed by the entries in the Schedules, it may not necessarily be the understanding of all WTO Members. In that regard, it is likely that the coming FTAs promoted by the European Union will feature a provision inspired by Art. XVI, but whose lit. e has been re-drafted in order to exclude non-discriminatory measures from its scope.

[96] S/L/92, para. 12.

[97] It would theoretically be possible to envisage a measure of this nature that applies equally to both domestic and foreign service suppliers. However, such a scenario would rarely be found in reality, since there would arguably be no *raison d'être* for such a requirement for local service suppliers.

which will be conducted **jointly**, and for which the partners will **share profits** and **losses**.[98] Establishment through joint ventures may be a valuable option for foreign investors in services since it allows them to benefit from the domestic partner's experience in the local market. On the other hand, joint ventures may also be preferred by governmental authorities to foster the transfer of technology and know-how from international enterprises to domestic companies. For this reason, **a great number of joint venture requirements** can be found in the Schedules of several WTO Members, such as China. However joint venture requirements can also be used to coerce foreign service suppliers into alliances with inefficient rent-seeking domestic companies.

61 With the prohibition on joint venture requirements, plus the prohibition on WTO Members to limit service suppliers in their ability to establish themselves through any type of legal entity (representative offices, subsidiaries, or branches), Art. XVI ensures that foreign investors in services are not restricted in their **choice of the entry mode** in order to supply services through commercial presence, provided that commitments have been undertaken in that regard.

4. Limitations on the Participation of Foreign Capital (Art. XVI:2 lit. f)

a) Limitations on Foreign Equity Participation

62 Absent any limitations to the contrary, Art. XVI:2 lit. f **prohibits measures that limit foreign equity participation**. Like the restriction of joint venture requirements, this provision applies by definition only to **discriminatory** measures with regard to services supplied through **commercial presence**. Indeed, joint venture requirements are commonly accompanied by **foreign equity limitations** restricting foreign participation to less than 50%.

63 The measures covered by Art. XVI:2 lit. f are those that impose **maximum percentage limits** on foreign participation. The 2001 Scheduling Guidelines provide as an example an entry that reads: "foreign equity ceiling of x percent for a particular form of commercial presence".[99] Measures that instead require that foreign investors acquire a certain **minimum** amount of equity to participate in the company are not covered by Art. XVI:2 lit. f, and do not need to be scheduled in the market access column.[100]

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[98] *Garner* (ed.), Black's Law Dictionary, 8th ed., 2004.

[99] S/L/92, para. 12.

[100] China, for instance, requires foreign investors to acquire a minimum of 25% of the company's equity share. If applied only to foreign investors, that requirement would be covered by the national treatment obligation.

The prohibition equally concerns measures that limit **individual or aggregate foreign investment**. In that sense, Art. XVI:2 lit. f outlaws (a) measures that set a limit of X% equity participation on each individual foreign shareholder—albeit that a fully foreign-owned company would be allowed if ownership were distributed in different foreign investors; and (b) measures that set a **maximum** ceiling on foreign participation, for instance, the maximum amount of money that can be invested by law, regardless of how that participation is distributed among foreigners. *64*

b) Restrictions Below 50% of Foreign Equity Participation

Art. XVI:1 stipulates that the measures covered by paragraph 2 are those with regard to the treatment of "service supplier of **any other Member**". In the case of a service provided through mode 3, this entails, by means of the definitions set out in Art. XXVIII, that a commercial presence is to be "owned or controlled" by persons of another WTO Member.[101] In the terms of Art. XXVIII lit. n, a juridical person is "owned" by persons of a Member if more than 50 per cent of the equity interest is owned by persons of that Member, and is "controlled" by persons of a Member if such persons have the power to name a majority of its directors or otherwise legally direct its actions. In other words, a services company is a "service supplier of any other Member" only when it is owned or controlled by foreigners; where foreign participation does not reach that threshold, the company is considered a domestic service supplier, falling outside the scope of Art. XVI. From this perspective, limitations that fall below the threshold sufficient to acquire ownership or control are not covered by Art. XVI:2 lit. f, and hence need not be scheduled, since they do not affect "service suppliers of any other Member", as required by Art. XVI:1. This means that measures that **restrict foreign participation** to **less than 50%** and/or do not allow for foreign control are not affected by the prohibition on imposing foreign equity restrictions set out in Art. XVI:2 lit. f and may be introduced or maintained by Members regardless of their Art. XVI commitments.[102] *65*

On the other hand, however, it is notable that Art. XVI:2 lit. f is the only GATS provision that refers to **"foreign investment"**, rather than "commercial presence" or, more broadly, "service supplier". The concept of "foreign investment" is defined or otherwise utilized nowhere else in *66*

[101] See Art. XXVIII lit. d and m.

[102] However, a foreign investor may acquire "control", *i.e.* the power to name a majority of its directors or otherwise legally direct its actions, over the commercial presence by holding less than 50% of its equity shares, if the remaining shares are widely spread in a number of shareholders, or the shareholder owns mulitple voting shares. In this case, a measure that limits foreign equity to, for instance, 40% may still fall within Art. XVI:2 lit. f if the foreign investor is still able legally to direct the actions of the company.

the GATS, which may arguably expand the scope of this provision in a unique manner. Indeed, a reference to "commercial presence" or "service supplier of another Member" would have made it clear that Art. XVI:2 lit. f is limited to service suppliers that are owned or controlled by foreigners, as explained above. Instead, the broad reference to "foreign investment" may suggest that Art. XVI:2 lit. f is not limited to "commercial presence" in the terms of Art. XXVIII, but is intended to cover **all** measures that **limit** the **individual** or **total value** of **"foreign investment"**, including those cases where the foreign participation does not suffice to establish a "commercial presence"—that is, it is insufficient for the acquisition of ownership or control over the company. In other words, under this broad reading of the term "foreign investment" in Art. XVI:2 lit. f, **all foreign equity limitations** would be **covered** by Art. XVI and need to be scheduled.[103]

D. The Relationship Between Art. XVI:1 and Art. XVI:2

67 The *US—Gambling* Panel suggested that Art. XVI:2 **complements** Art. XVI:1 in that it **exhausts** the types of market access restrictions that Art. XVI:1 outlaws.[104] The relationship, however, between Art. XVI:1 and Art. XVI:2 is not so straightforward. The complexity stems from the textual differences between Art. XVI:1 and Art. XVI:2. On the one hand, Art. XVI:1 refers to the treatment that one Member grants to "services suppliers of **any other Member**". A textual reading of paragraph 1 suggests that the scope of Art. XVI deals **exclusively** with measures of a **discriminatory** nature. While it is clear that there are a number of measures that belong exclusively to the ambit of either Art. XVI or XVII, Art. XX:2 recognizes the existence of measures that can be **simultaneously inconsistent** with both the market access and national treatment obligations.

68 On the other hand, Art. XVI:2 **prohibits** a series of quantitative limitations that affect **nationals** and **foreigners alike**. In this sense, a reading exclusively based on paragraph 2 would suggest that the scope of Art. XVI comprises only **non-discriminatory** quantitative restrictions (with the exception of the situations covered by Art. XVI:2 lit. f and the reference to joint ventures in Art. XVI:2 lit. e).

[103] In this scenario the question remains, however, how a violation of a partial commitment to allow 50% or less of foreign equity would be considered in WTO dispute settlement procedures, particularly with regard to retaliatory measures. See on this, *Molinuevo*, Foreign Inverstors, 27.

[104] *US—Gambling*, WT/DS285/R, para. 6.298.

The **principle of effectiveness** (*effet utile*) requires the WTO judiciary to "give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[105] The ostensibly conflicting meanings of Arts. XVI:1 and XVI:2 must be overcome by finding a **harmonious** interpretation that gives meaning and effect to **all** the terms of Art. XVI. *69*

It has been noted that Art. XVI:1 entails a general obligation to provide to **foreign** service suppliers the treatment specified in the Schedules. Thus, Art. XVI:1 does not enshrine a **self-standing** obligation, but constitutes an **introduction** to the limitations described in Art. XVI:2. Art. XVI:1 influences Art. XVI:2 by noting that the listed measures have to relate to a service supplier of **another** Member in order to be covered by the GATS. This is also confirmed by the reference to the Schedules and the modes of supply. *70*

The language of Art. XVI:1, however, does not specifically require a comparison between foreign and domestic service suppliers of the type found in the national treatment obligation. Rather, the reference to foreigners is made so as to **delimit** the scope of Art. XVI. That is, Art. XVI:1 does not necessarily require **discriminatory** treatment towards foreigners; it simply requires that the measure at issue concerns the treatment of **foreign** suppliers. Whether it negatively affects foreigners more than, or the same as, nationals is not relevant under these terms; the **key element** is that **foreign** service suppliers are reached by the measures at issue. **Discriminatory** measures will naturally fall into this category. But **non-discriminatory** measures that affect the treatment of foreign service suppliers should also comply with this requirement set out in paragraph 1. *71*

Art. XVI:2 itemizes the measures prohibited under Art. XVI and broadly covers quantitative measures, without any specific reference to foreigners or nationals. However, when these quantitative measures are read under the lens of Art. XVI:1, the result is that **quantitative restrictions** are **outlawed** insofar as **foreign** service suppliers are concerned. Therefore, quantitative **discriminatory** measures—that affect exclusively foreign service suppliers—fall within the scope of the provision. Furthermore, **non-discriminatory** measures that affect domestic and foreign service suppliers equally are also covered, to the extent that they affect **foreign** service suppliers. *72*

A reading of the broad terms of Art. XVI:2 in isolation would suggest that quantitative measures are reached by the scope of the prohibition, *73*

[105] Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R, 23.

regardless of their impact—or lack thereof—on foreigners. Nonetheless, when Art. XVI:2 is read under the optic of Art. XVI:1, which requires that the measures concern **foreign** service suppliers, the result is that measures that apply **exclusively** to nationals are **out of the reach** of Art. XVI.

74 In practice, however, the scope of Art. XVI remains significantly **broad**. Indeed, where a Member undertook a full commitment under market access it is compelled to eliminate **all** Art. XVI restrictions **at least** with regard to **foreign** service suppliers. Any restriction, be it applicable **exclusively** to foreigners or to **both foreigners** and **nationals**, would be inconsistent with the full commitment. On the other hand, maintaining discriminatory measures that set restrictions **exclusively** on nationals would be allowed under GATS. In effect, a Member would retain the ability to apply any of the measures of Art. XVI:2 only when it had inscribed "unbound", or an entry equal to "only domestic service suppliers may supply services". This latter entry, which at first glance would suggest that the country has undertaken a partial commitment, is equal in effect to "unbound", since the Member at hand does not undertake any commitments with respect to foreigners.[106] Under this constellation, measures that concern only **domestic** service suppliers, as explained above, can be applied at any time.[107]

75 In sum, the relationship between Arts. XVI:1 and XVI:2 clarifies that the seemingly broad scope of Art. XVI:2, when read together with Art. XVI:1, is **narrowed** in such a manner that **quantitative** restrictions that do **not affect foreign** service suppliers fall **outside the scope** of the market access obligation.

[106] On the other hand, it could be argued that where a Member autonomously admits a certain number of foreign suppliers to provide services in its market, that Member may not maintain any Art. XVI limitations with regard to them.

[107] On the relationship between Art. XVI:1 and Art. XVI:2, *Mavroidis* has advanced a slightly different interpretation from the one suggested in this study. See *Mavroidis*, World Trade Rev. 6 (2007), 1, 9. While it is agreed that the reference to "service suppliers of any other Member" in Art. XVI:1 sets a limit to the scope of Art. XVI:2, the conclusion is not drawn here—as *Mavroidis* does—that Art. XVI:2 exclusively deals with *discriminatory* measures. *Mavroidis*' interpretation restricts the scope of Art. XVI to measures listed in this contribution in category a), since he inaccurately equates measures that *apply* to foreigners with measures of a *discrminatory* nature, failing to note that non-discriminatory measures—category b)—can, also, affect foreigners in a manner inconsistent with paragraph 1. As explained above, the reading favoured here allows one to conclude that non-discriminatory quantitative measures—category b)—are also covered by the GATS market access obligation. It is conceded to *Mavroidis*, however, that measures that exclusively affect domestic service suppliers—category c)—fall outside the scope of Art. XVI.

E. The Relationship of Art. XVI with Other GATS Provisions

To the extent that the measures covered by Art. XVI can be of **both** a non-discriminatory and a discriminatory nature, the most obvious interplay of two GATS provisions is between Arts XVI and XVII. More specifically, any measures of the types mentioned in Art. XVI:2 lit. a–f in their **discriminatory** form fall within the scope of both Arts XVI and XVII. Art. XX:2 provides that all quantitative limitations that come within the purview of Art. XVI:2 should be scheduled under the market access column even where they constitute an Art. XVII limitation as well.[108] Consequently, according to this provision, a Member should inscribe in the national treatment column **discriminatory** measures that do **not** fall within Art. XVI:2 lit. a–f. This scheduling convention provided for in Art. XX:2, however, offers only limited clarification of situations where a Member undertakes commitments under one of the columns but not the other. The issue is less than clear and has been discussed in the current negotiations, but also in academic literature.[109] *76*

The relationship between Arts. XVI and VI is not defined in the GATS.[110] The *US—Gambling* Panel, in a clear *obiter dictum*, examined this relationship and found that "Arts VI:4 and VI:5 on the one hand and XVI on the other hand are **mutually exclusive**".[111] However, it is unclear whether this is a correct interpretation, as this mutual exclusivity does not seem to have any foundation in the negotiating history established in the meetings of the Working Party on Domestic Regulation. The Appellate Body avoided commenting on the issue. Academic discussions have identified the advantages and disadvantages of both approaches.[112] *77*

F. Outlook

As GATS is still in its infancy, there are several issues that remain open and may raise problems in the near future. The clarification of the relationship between Arts XVI and XVII can be identified as an issue needing immediate attention. Possible solutions have been proposed, but Members are **reluctant** to advance any of them. Nevertheless, Members would be *78*

[108] See also *Molinuevo*, Article XX GATS, paras 34–35.

[109] *Ibid.*, paras 34–42; *Krajewski & Engelke*, Article XVII GATS, paras 59–65; See also *Delimatsis*, JWT 40 (2006), 1059, 1072; *Mattoo*, JWT 31 (1997) 1, 107, 113; *Pauwelyn*, World Trade Rev. 4 (2005), 131, 148.

[110] *Krajewski*, Article VI GATS, paras 70 *et seq*.

[111] *US—Gambling*, WT/DS285/R, para. 6.305, emphasis added.

[112] See *Pauwelyn*, World Trade Rev. 4 (2005), 131, 152; *Delimatsis*, JWT 40 (2006), 1059, 1069; *Krajewski*, Article VI GATS, paras 73–74.

well advised to reach an agreement regarding the **interplay** of these two provisions, for instance through the adoption of a Decision by the CTS, sooner rather than later. Otherwise, it is possible that, as a result of a dispute, the WTO adjudicating bodies will comment on the issue in a way that several Members would not necessarily agree to. The implications of such a decision would be even more significant if it led one to construe a given Schedule as implying a **higher level** of **liberalization** than the scheduling Member had actually intended.

79 Another important issue under Art. XVI is whether prohibitions on **consumers** should be covered by this provision.[113] In accordance with Art. XXVIII lit. i, any person that **receives** or **uses** a service is considered to be a service consumer. In the *US—Gambling* dispute, the Panel, when interpreting Art. XVI:2 lit. a, submitted that Art. XVI only addresses limitations to **suppliers**, that is, any person that supplies a service. In contrast, limitations to **consumers** fall outside the scope of this provision. Therefore, the Panel, after an examination of the scope of four of the United States' state laws at issue, rejected Antigua's view that **prohibitions on consumption** are covered by Art. XVI:2 lit. a and/or lit. c.[114]

80 However, a similar interpretation is not so straightforward when it comes to Art. XVI:2 lit. b and c.[115] In both cases, arguably, limitations on consumers could also fall within the latter provisions. The GATS covers measures **affecting** trade in services. By the same token, Art. XXVIII lit. c defines such measures very broadly to encompass any measures in respect of "the purchase, payment or **use** of a service". The main argument justifying an interpretation covering **prohibitions on consumption** is that a Member that undertook a **full** commitment would easily evade its commitments by imposing a prohibition on **consumers** rather than on **suppliers**.

81 From another perspective, however, **prohibitions on consumption** would entail a questionable interpretative expansion of the terms of Art. XVI, which, as noted by the Appellate Body, does not cover all measures that **have the effect** of limiting the number of service suppliers or the total number of service operations, but only those that are **quantitative** in nature.[116] The main *travaux préparatoires* of the GATS, that is, the Scheduling Guidelines, bear on the issue. Para. 19 lit. b of the Explanatory Note on the Scheduling of Initial Commitments in Trade in Services[117] provides that the GATS obligations relate to the treatment of services and service **suppliers**.

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[113] Also *Krajewski*, LIEI, 32 (2005), 417, 436.

[114] *US—Gambling*, WT/DS285/R, paras 6.382–6.383 (Colorado), 6.397–6.398 (Minnesota), 6.401–6.402 (New Jersey) and 6.405–6.406 (New York).

[115] See the EC arguments in *US—Gambling*, WT/DS285/AB/R, para. 101.

[116] See *US—Gambling*, WT/DS285/AB/R, paras 225 and 232.

[117] MTN.GNS/W/164, 9.

The only case in which they also concern **consumers** is when services or service suppliers of other Members are also affected.[118] Nevertheless, this statement can be construed as supporting both approaches described above, since, in the case of a total prohibition on consumers, suppliers of other Members will, more often than not, be affected as well. In *US—Gambling*, the Appellate Body did not tackle the issue, since it had previously found that Antigua had not established a *prima facie* case with regard to the United States' state laws.[119]

[118] Also S/L/92, para. 30.

[119] The authors are grateful to *Rudolf Adlung* and *Carsten Fink* for valuable comments and suggestions on this study.

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Article XVII GATS
National Treatment

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.[10]
2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

Footnote 10: Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

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Cross References

Art. 1202 NAFTA; Art. V MERCOSUR Montevideo Protocol; Art. 11.2 CAFTA-DR; Art. 12.4 Trans-Pacific SEP Agreement.

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A. General Remarks

Art. XVII contains the **national treatment** provision of the GATS. It obliges WTO Members not to discriminate between domestic and foreign services and service suppliers by treating foreign services and suppliers less favourably than like domestic services and suppliers. Art. XVII aims to eliminate discriminatory impediments to trade and ensures that both foreign and domestic services and service suppliers are subject to the same conditions of competition. Since Art. XVII is a provision of Part IV GATS, national treatment applies only in sectors with **specific commitments** and subject to any limitations or modifications inscribed in the Schedules of specific commitments of the WTO Members. *1*

2 The **three paragraphs** of Art. XVII form a **single and uniform obligation**: paragraph 1 lays down the general standard of national treatment requiring foreign services and service suppliers to be treated no less favourably than like domestic services and service suppliers. Paragraphs 2 und 3 define the meaning of "no less favourable treatment". According to Paragraph 2, both formally identical and formally different treatment can amount to less favourable treatment and are therefore covered by Art. XVII. Paragraph 3 states that the decisive aspect of less favourable treatment is the modification of the conditions of competition to the detriment of the foreign service or service supplier.

3 National treatment and most-favoured-nation treatment constitute the two elements of non-discrimination in WTO law. Hence, **Art. II**—the GATS provision on most-favoured-nation treatment—is an important element of the context of Art. XVII. However, Art. II is a general obligation and therefore applies regardless of the commitments undertaken by a WTO Member in its Schedule. In *EC—Bananas III*, the Appellate Body rejected a direct comparison between Arts II and XVII. Instead, the Appellate Body indicated that the interpretation of **Art. III GATT 1994**—GATT's national treatment provision—was more relevant to the interpretation of Art. XVII.[1] In fact, Art. XVII has been modelled on Art. III GATT 1994, in particular Art. III:4 GATT 1994, and codifies certain aspects of the relevant GATT case law regarding this provision.[2]

4 In order to determine whether a measure violates the requirements of Art. XVII a **three-step test** should be utilized: first, does the measure fall within the **scope** of Art. XVII? Second, does the measure affect foreign and domestic services or service suppliers which are **like**? Third, does the measure treat the foreign service or service supplier **less favourably** than the domestic service or service supplier?

B. Scope of Application (Art. XVII:1)

5 Art. XVII applies to **"*all* measures affecting the supply of services"**.[3] Unlike the national treatment obligation of Art. III GATT 1994, Art. XVII does not distinguish between fiscal measures (Art. III:2 GATT 1994) and other regulatory means (Art. III:4 GATT 1994).[4] By referring to "all" measures, Art. XVII:1 indicates a potentially broad scope. However, Art. XVII

[1] Appellate Body Report, *EC—Bananas III*, WT/DS27/AB/R, para. 231.
[2] See below, paras 16, 18 and 40.
[3] Italics added.
[4] See *Hestermeyer*, Max Planck CWTL, Vol. 3, Article III GATT 1994, paras 25 *et seq.*, 66 *et seq.*

applies only **"in the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein"**.

I. "Measures Affecting the Supply of Services"

6 Unlike the term "measures by Members affecting trade in services", which is further defined in Art. XXVIII lit. c, the phrase "measures by Members affecting the supply of services" is not specifically clarified in the GATS. The meaning of this term must hence be determined on the basis of its elements: as defined in Art. XXVIII lit. a, a **"measure"** includes "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form" and is not limited to a particular form.

7 **"Affecting"** indicates that the measure must have at least some effect on the supply of a service. However, it is not necessary for a measure to regulate or directly aim at the supply of services. Interpreting the similar term "affecting trade in services" in *EC—Bananas III*, the Appellate Body held: "The ordinary meaning of the word 'affecting' implies a measure that has 'an effect on', which indicates a broad scope of application. This interpretation is reinforced by the conclusions of previous panels that the term 'affecting' in the context of Art. III of the GATT 1994 is wider in scope than such terms as 'regulating' or 'governing'".[5]

8 National treatment under GATS applies only to measures affecting the **"supply of services"** and is hence narrower than the general scope of GATS, which covers measures affecting "trade in services" (Art. I:1). The "supply of services" is defined in Art. XXVIII lit. b to include "the production, distribution, marketing, sale and delivery of a service". In contrast, according to Art. XXVIII lit. c, "measures affecting trade in services" include measures in respect of "the purchase, payment or *use* of a service".[6] Based on the differences in these definitions, it can be concluded that Art. XVII **does not extend to measures affecting (merely) the consumption of services**.[7]

II. Schedules of Specific Commitments

9 Art. XVII applies only to **sectors with specific commitments**. Thus, national treatment does not have to be observed in sectors in which the relevant WTO Member has not made any commitments. Apart from choosing

[5] *EC—Bananas III*, WT/DS27/AB/R, para. 220.
[6] Italics added.
[7] *Pitschas*, in: *Prieß & Berrisch* (eds), 495, 512, paras 44–45; *Michaelis*, in: *Hilf & Oeter*, 375, 398, para. 64.

which sectors and subsectors they want to subject to national treatment, WTO Members can also specify the **"conditions and qualifications"** of such a commitment. WTO Members can thus limit the impact of the national treatment obligation by including specific measures in their Schedules which would otherwise violate Art. XVII, or submit their commitments to other restrictions.

10 The exact scope of the national treatment obligation in GATS is therefore determined by the individual Schedule of specific commitments of each WTO Member. Allowing WTO Members to determine whether and to which extent they are bound by Art. XVII is part of the **flexibility of the GATS**. This flexibility is one of the constituent elements of the compromise between developed and developing countries which made the GATS possible during the Uruguay Round negotiations. It also allows for a reconciliation between trade liberalization and national regulatory autonomy if commitments are scheduled wisely and cautiously.

11 Art. XVII does not specify the **structure and terminology** of the Schedules of specific commitments. Some guidance can be found in Art. XX,[8] but, apart from this provision, the Agreement leaves much to the practice of the WTO Members. The negotiating parties of the Uruguay Round and subsequently the WTO Members have agreed on general **Scheduling Guidelines** which serve as the basis of many Schedules.[9] Even though the Scheduling Guidelines are not binding, the Appellate Body held in *US—Gambling* that they should be taken into account as supplementary means of interpretation in accordance with Art. 32 VCLT[10] when interpreting the individual Schedules.[11] As a consequence, WTO Members which want to deviate from the Scheduling Guidelines need to say so specifically and clarify any deviation.

12 Pursuant to the Scheduling Guidelines and general practice, WTO Members should schedule specific commitments **according to sectors and subsectors** based on the Services Sectoral Classification List, which was produced by the GATT Secretariat on the basis of the United Nations Central Product Classification (CPC).[12] The Scheduling Guidelines also state that national treatment commitments should be scheduled on the basis of **modes of supply** even though Art. XVII—unlike Art. XVI—contains no reference to the modes of supply.[13]

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[8] *Molinuevo*, Article XX GATS, paras 9 *et seq*.

[9] Council for Trade in Services, Trade in Services, Guidelines for the Scheduling of Specific Commitments under the GATS, Adopted by the Council for Trade in Services on 23 March 2001, S/L/92, 28 March 2001.

[10] Vienna Convention on the Law of Treaties, 23 May 1969, ILM 8 (1969), 679.

[11] Appellate Body Report, *US—Gambling*, WT/DS285/AB/R, para. 196.

[12] S/L/92, para. 23.

[13] S/L/92, paras 26–35. See also *Molinuevo*, Article XX GATS, paras 18 *et seq*.

There are generally three alternatives for a WTO Member when making specific commitments:[14] first, the Member may fully subject a particular sector and mode of supply to national treatment. In this case, the Member should enter **"none"** in the relevant section of its Schedule. Second, if the Member does not want to commit a particular mode of supply or subsector, it should enter **"unbound"** in the appropriate section of the Schedule. Third, the Member may want to undertake a commitment but limit it to specific circumstances or exempt particular measures. In this case the Member should **specify the exempted measures** by providing a short description or summary of the particular regulation. *13*

The WTO Secretariat published an **illustrative list of frequently occurring limitations to national treatment**, which is attached to the Scheduling Guidelines.[15] This list gives a useful impression of the kind of measures WTO Members consider possible violations of the national treatment obligation. Measures scheduled as national treatment limitations include eligibility for subsidies reserved to nationals; nationality and residency requirements; the requirement for foreign companies to have a registered office in the country; the requirement of Central Bank approval of loans to non-residents; technology transfer requirements; rules requiring the use of local services or local personnel (local content rules); and restrictions of ownership of property/land by foreigners and non-residents. *14*

C. Likeness (Art. XVII:1)

Like other typical non-discrimination provisions, Art. XVII establishes a **pair of comparison** (foreign and domestic services and service suppliers) and states that there shall be no (negative) discrimination of one of the compared units (foreign). In order to determine whether foreign and domestic services or service suppliers can be compared, Art. XVII requires that they be "like". Thus, the **basis of the comparison** in Art. XVII **is the likeness** of services and service suppliers. *15*

I. General Interpretation of "Like"

The starting point of an enquiry into the notion of "likeness" should be the **ordinary meaning** of "like". Quoting the New Shorter Oxford English Dictionary, the Appellate Body stated in *EC—Asbestos* with regard to Art. III:4 GATT 1994: "'Like' means: Having the same characteristics or qualities as some other [...] thing; of approximately identical shape, size, *etc.*, *16*

[14] S/L/92, paras 41–46. See also *Molinuevo*, Article XX GATS, paras 23–25.
[15] S/L/92, Attachment 1.

with something else; similar".[16] Following this definition, "like services" and "like service suppliers" should have the same or similar characteristics. While this understanding serves as the basis of likeness, it does not clarify which characteristics should be taken into account and from whose perspective likeness should be determined.[17]

17 The general **object and purpose** of national treatment is to provide for "equality of competitive conditions for imported products in relation to domestic products".[18] The drafters of the GATS incorporated this objective into Art. XVII:3, which stipulates that national treatment is violated when the competitive relationship is altered to the detriment of a foreign service or service supplier. In *EC—Bananas III*, the Appellate Body confirmed the general understanding of Art. XVII as a provision protecting equality of competition between foreign and like domestic products.[19] Therefore, characteristics of services and service suppliers which reflect the **competitive relationship between foreign and domestic services and service suppliers** should be taken into account when determining likeness.

18 Regarding the **context** for interpreting likeness in Art. XVII, the notion of "like" in **Art. III:4 GATT** 1994 and the corresponding WTO case law need to be considered. However, it is important to highlight that Art. XVII, unlike Art. III:2 GATT 1994 read in conjunction with its Ad Note, does not distinguish between like products on the one hand and directly competitive and substitutable products on the other hand. Furthermore, the national treatment obligation of Art. XVII extends to like service suppliers. In contrast, Art. III GATT 1994 accords national treatment only to goods, but not the producers of the goods. The scope of national treatment under GATS is therefore potentially wider than the scope of national treatment under GATT.

19 The relevance of the GATT experience can also be seen in the **negotiating history**. The negotiating parties discussed different concepts during the drafting of GATS, including "like circumstances".[20] This standard of national treatment is used, *inter alia*, in Art. 1202 NAFTA and other regional trade agreements. It can also be found in bilateral investment treaties. However, the negotiators eventually opted for the notion of likeness of services and service suppliers, which suggests that they considered the GATT

[16] Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, para. 90.
[17] *EC—Asbestos*, WT/DS135/AB/R, para. 92.
[18] *EC—Asbestos*, WT/DS135/AB/R, para. 97.
[19] *EC –Bananas III*, WT/DS27/AB/R, paras 244 and 246.
[20] Group of Negotiations on Services, Uruguay Round, Draft, Multilateral Framework for Trade in Services, Introductory Note by the Chairman on the GNS Negotiations on a Framework, MTN.GNS/35, 23 July 1990. For a detailed analysis of the concept of "like circumstances" and its possible implications for the interpretation of likeness, see *Cossy*, 28–38.

standard of national treatment more relevant than the national treatment standard of regional agreements and international investment law.

II. Likeness of Services

When approaching the likeness of services, GATT and WTO **practice regarding likeness of goods** can provide **some guidance** even though not all factors used in the goods context are equally relevant in the services context. In general, likeness of goods is determined on the basis of a product's end-uses in a given market, consumer tastes and habits, the product's properties, nature and quality, and tariff classification.[21] As services are intangible, physical properties are irrelevant in the services context. Equally, tariff classification cannot be used to determine likeness, because services are not subject to tariffs. However, consumer tastes and end-uses are pertinent in the services context. *20*

1. Characteristics of the Service

Like the (physical) properties, nature and quality of goods, the **nature and characteristics of a service** can play a role in determining the likeness of two services.[22] For example, in *US—Gambling*, the US discussed the characteristics of gambling, *e.g.* the nature of the different kind of games and the different risks of games.[23] It has also been suggested to consider intrinsic elements, *i.e.* activities encompassed in the service, such as cutting, dressing and styling of the hair in the case of hairdressing services.[24] *21*

2. Consumers' Tastes and End-Uses

In addition to the characteristics of the service, **consumer tastes and habits** and **end-uses** are of particular relevance.[25] Using these criteria services can be considered like if they are regarded as substitutable by the consumers or if they are used for similar purposes. Since an enquiry into likeness should not be based on anecdotal evidence, one could ascertain whether there is cross price elasticity in demand.[26] Cross price elasticity in demand exists between products A and B if the increase in price of product A prompts consumers to switch to the consumption of product B.[27] However, this requires an existing market, where two or more services are already offered in a generally competitive environment. For example, *22*

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[21] See *e.g. EC—Asbestos*, WT/DS135/AB/R, para. 101.
[22] Panel Report, *EC—Bananas III*, WT/DS27/R/USA, para. 7.322.
[23] Panel Report, *US—Gambling*, WT/DS285/R, para. 3.185–3.196.
[24] *Cossy*, 18–21.
[25] *Cossy*, 21; *Zdouc*, in: *Ortino & Petersmann* (eds), 381, 395; *Krajewski*, National Regulation, 99.
[26] *Mattoo*, JWT 31 (1997) 1, 107, 128.
[27] *Choi*, 56.

in *EC—Bananas III*, it was possible to determine the likeness of foreign and domestic bananas wholesale trading services because foreign and domestic service suppliers were supplying the same service in an identifiable market to the same group of consumers.[28]

3. Services Classification

23 Another criterion which is sometimes compared with tariff classification in the goods context is the classification of services.[29] During the Uruguay Round, the GATT Secretariat developed a **Services Sectoral Classification List** based on the United Nations Central Product Classification (CPC).[30] The GATT Secretariat's classification is contained in the "W/120" list[31] and is also attached to the Scheduling Guidelines. As suggested by these guidelines, many WTO Members used the "W/120" list and the corresponding CPC classification in their Schedules of specific commitments. The categorization of services according to this classification can therefore be seen as an indication of likeness. Indeed, so far WTO panels have always considered services classifications while disregarding other, arguably more relevant, factors like end-uses or consumers' tastes and habits when determining likeness.[32]

24 However, it should be noted that the **CPC** has been developed by the United Nations for **statistical purposes** and is **not based on the competitive relationship** between services, which is, however, a key aspect of national treatment.[33] In addition, some WTO Members have used more detailed sub-sector descriptions in their Schedules while other Members utilized more aggregated categories than the ones suggested by the WTO's list. Services classification could therefore differ from one Member to another. Consequently, services classification can be used as a **first approximation** to the likeness of services, but **not as a decisive factor**.

4. Likeness Across Modes

25 Another issue concerning the determination of likeness of services is whether different modes of supply are to be taken into account when establishing

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[28] *EC—Bananas III*, WT/DS27/R/USA, para. 7.322.

[29] *Mattoo*, JWT 31 (1997) 1, 107, 128.

[30] The UN CPC which was the basis for the GATT secretariat's classification and has been replaced by the 2002 version, which contains different subcategories and classification numbers from the Provisional CPC. The current version is Central Product Classification Version 1.1, ST/ESA/STAT/SER.M/77/Ver.1.1, E.03.XVII.3, see also <unstats.un.org/unsd/cr/family2.asp?Cl=16> (last visited 1 October 2007).

[31] Group of Negotiations on Services, Uruguay Round, Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120, 10 July 1991.

[32] *EC—Bananas III*, WT/DS27/R/USA, para. 7.322; Panel Report, *Canada—Autos*, WT/DS139/R, WT/DS142/R, para. 10.289.

[33] *Krajewski*, National Regulation, 101.

likeness (likeness across modes).[34] In *Canada—Autos*, the Panel held: "[I]t is reasonable to consider for the purposes of this case that services supplied in Canada through modes 3 and 4 and those supplied from the territory of other Members through modes 1 and 2 are "like" services".[35] According to the Panel's view, the **mode of supply does not change the likeness of a service**. This view is supported in the literature, based on the argument that Art. XVII, unlike Art. XVI, does not refer to modes of supply as a factor in determining its scope. According to one commentator, taking modes of supply into consideration would imply a "fragmented" non-discrimination principle because Members might retain the right to discriminate between "identical services supplied through different modes of supply".[36]

26 The notion of likeness across modes is not convincing. First, it should be remembered that all **commitments and limitations are scheduled on the basis of different modes of supply**. If services supplied through different modes of supply could be regarded as like services, this distinction would be rendered meaningless.[37] Secondly, and more fundamentally, likeness across modes entails a logical flaw: services supplied through different modes of supply are always foreign, *i.e.* determining **likeness "across modes"** logically entails a comparison between the **supply of two foreign services** rather than comparing the supply of a foreign service to the supply of a domestic service.[38] Hence, likeness across modes may play a role regarding MFN treatment, but not regarding national treatment.

27 As one commentator rightly pointed out, the question really lying at the heart of the debate about likeness across modes is whether different **means of supply**, *i.e.* ways and methods in which services are supplied, should be considered when determining likeness. For instance, in *Canada—Autos*, the Panel could have asked whether services supplied by a physically present (domestic) service supplier ("face-to-face" supply) and services supplied across the border without the physical presence of the (foreign) service supplier (remote supply) were like services. Similarly, in *US—Gambling* it could have been discussed whether casino gambling services provided by domestic service suppliers ("face-to-face" supply) were like gambling services supplied online (electronic transactions). These examples already indicate that services supplied through different means of supply do not have the same or similar characteristics. Furthermore, there is usually **no full competitive relationship between services supplied through**

[34] *Mattoo*, JWT 31 (1997) 1, 107, 119–121; *Verhoosel*, 59–60.
[35] *Canada—Autos*, WT/DS139/R, WT/DS142/R, para. 10.307.
[36] *Mattoo*, JWT 31 (1997) 1, 107, 121.
[37] *Krajewski*, National Regulation, 102.
[38] *Cossy*, 14.

different means of supply because they may have different end-uses.[39] Therefore, services supplied through different methods of supply should generally be considered unlike.

5. Process and Production Methods

28 As in the context of GATT, the question whether process and production methods (PPMs) should be taken into account when determining the likeness of the product also arises in the GATS context. Traditionally, the consideration of PPMs to determine the likeness of goods has been rejected.[40] Regardless of the validity of this view in the goods context,[41] applying it to the GATS may be difficult because the production and consumption of a service often coincide. The service supplier, the method of producing and supplying the service, and the service itself are often part of a continuum. This makes **a distinction between the service and its production difficult**, if not impossible. Additionally, the inclusion of service suppliers in Art. XVII justifies the consideration of supplier-related facts when determining the likeness of services. As a consequence, the characteristics of the provision of the service and of the service supplier can be taken into account when determining the likeness of services.

III. Likeness of Service Suppliers

29 The extension of likeness to service suppliers reflects the fact that **service providers** are "**part of the continuing nature of the service**".[42] It was considered necessary because many national regulatory policies apply to the supplier rather than the service.

1. Actual or Potential Service Supplier

30 A preliminary question concerning the likeness of service suppliers is **who can be considered a service supplier**. In *EC—Bananas III*, the question arose whether only entities actually providing a service could be regarded as service suppliers (actual service suppliers), or whether all companies with the capability and opportunity to provide those services are service suppliers within the meaning of GATS (potential service suppliers). The Panel indicated that "since Article XVII of GATS is concerned with conditions

[39] See also Communication from Brazil to the Council for Trade in Services, MFN, National Treatment and Like Circumstances, JOB(01)/165, 30 November 2001, para. 11.

[40] *Hudec*, Int'l Law. 32 (1998), 619, 624.

[41] For a critical view on the "orthodox" reading of GATT law see *Howse & Regan*, EJIL 11 (2000), 249–289.

[42] *Nicolaïdis & Trachtman*, in: *Sauvé & Stern* (eds), 241, 253.

of competition", it would be appropriate also to **consider potential service suppliers as service suppliers**.[43]

31 The Panel's view contradicts the definition of service supplier in Art. XXVIII lit. g as "any person that supplies a service". The ordinary meaning of "supplies" suggests that the person is currently supplying the service. Therefore, **potential service suppliers are not included in the notion of service suppliers** according to Art. XVII. This understanding seems to be shared by the Appellate Body. In *Canada—Autos*, the Appellate Body criticized the Panel for not making any findings "as to which companies **actually** provide wholesale trade services of motor vehicles".[44]

2. Characteristics of the Supplier

32 At the outset, the likeness of service suppliers can be based on the **characteristics of service suppliers**. Relevant aspects in this context could include the legal constitution or the size of a company measured on the basis of its assets, turnover or number of employees. Regarding individual service suppliers, qualifications and expertise could be taken into account: For example, a nurse who received a university education may be considered "unlike" a nurse who received "only" vocational training.

3. Relevance of the Likeness of the Service

33 In addition to the characteristics of the supplier, the **likeness of the service** is an important factor when determining the likeness of service suppliers. Suppliers of unlike services are often not "like service suppliers". However, it is questionable whether the likeness of the service should be the **only factor to determine the likeness of suppliers**. This was suggested by the Panel in *EC—Bananas III* when it stated: "[T]o the extent that entities provide these like services, they are like service suppliers".[45] As this part of the Panel Report was not appealed, the Appellate Body did not address this question. In *Canada—Autos*, the Panel made the same finding.[46]

34 The approach taken by the panels regarding likeness of service suppliers has been criticized in the literature.[47] Indeed, determining the likeness of service suppliers solely or primarily on the basis of the likeness of services without taking into account the supplier's characteristics seems to be **incompatible with the ordinary meaning of Art. XVII**, which obliges Members to

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[43] *EC—Bananas III*, WT/DS27/R/USA, para. 7.320.

[44] Appellate Body Report, *Canada—Autos*, WT/DS139/AB/R, WT/DS142/AB/R, para. 164, emphasis added. For a similar understanding of this aspect of the decision see *Zdouc*, in: *Ortino & Petersmann* (eds), 381, 410.

[45] *EC—Bananas III*, WT/DS27/R/USA, para. 7.322.

[46] *Canada—Autos*, WT/DS139/R, WT/DS142/R, para. 10.248.

[47] *Verhoosel*, 61 and *Zdouc*, JIEL 2 (1999) 2, 295, 332.

accord treatment no less favourable than that accorded to "like services *and* service suppliers".[48] If only the likeness of the services were to be considered, Art. XVII would have been worded differently. This understanding is also supported by the negotiating history: whereas the December 1990 Draft Final Act solely focussed on the likeness of services referring to "like domestic services and providers of like services", this formulation was finally dropped and replaced by the current text of Art. XVII.[49] Likeness of services can therefore be one factor in determining likeness of service suppliers, but not the dominant, let alone the only one.

IV. Cumulative or Disjunctive Test

35 There is considerable controversy in the literature whether the inclusion of services and service suppliers in Art. XVII leads to a cumulative or a disjunctive test.[50] Under a **cumulative test**, a measure would first be tested as to whether it treats foreign services less favourably than domestic like services and subsequently as to whether it treats foreign service suppliers less favourably than like domestic service suppliers. Two different consequences of such an approach can be distinguished. According to a **broad cumulative approach**, a measure would already violate Art. XVII if it affected either like services *or* like service suppliers. For example, a regulation requiring a bank to maintain higher reserves than an insurance company before granting a loan treats the service suppliers (which can be seen as unlike) differently.[51] However, since the measure also affects the supply of the services (which can be seen as like), it could be argued that the measure discriminates between like services and therefore violates national treatment. A broad cumulative test would greatly **enhance the liberalizing effect** of national treatment, **but could lead to unwanted results**, because any measure which treats service suppliers differently could be invalidated if it (also) affected the supply of like services. Furthermore, the inclusion of supplier-related factors in the determination of likeness of service suppliers[52] would be rendered meaningless, because demonstrating the existence of like services would suffice to establish likeness.

36 A **narrow cumulative test** would require a complaining party to demonstrate both likeness of services and likeness of service suppliers for a national treatment violation to be established. In this case, only measures

[48] Italics added.

[49] Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.GNS/W/35–3/Rev.1, 3 December 1990.

[50] *Cossy*, 10–11; *Krajewski*, National Regulation, 106–107; *Nicolaïdis & Trachtman*, in: *Sauvé & Stern* (eds), 241.

[51] Example taken from *Nicolaïdis & Trachtman*, in: *Sauvé & Stern* (eds), 241, 253–254.

[52] See above, para. 32.

affecting like services *and* like service suppliers could be inconsistent with Art. XVII. Applying the narrow cumulative test to the abovementioned example, the regulation would comply with Art. XVII because the service suppliers are unlike and the measure therefore does not discriminate between both like services and like service suppliers. This understanding would **reduce the scope of national treatment** and provide Members with greater **regulatory autonomy**.

37 Under a **disjunctive test**, WTO panels and the Appellate Body would first need to decide whether the measure in question concerns a service or a service supplier. If it applied to services, the likeness of services would have to be demonstrated. Conversely, if it applied to service suppliers, the existence of like service suppliers would have to be established.[53] In the above example, the measure concerning maintenance of reserves clearly applies only to service suppliers and not to the service. Given the fact that banks and insurance companies are not like service suppliers, the measure in question would not violate Art. XVII. Presumably, the results of a narrow cumulative and a disjunctive test would be similar.

38 The ordinary meaning of the wording of Art. XVII neither precludes nor requires either of the two tests. However, in light of the possible results of a broad cumulative test, the narrow cumulative and disjunctive tests seem to strike a more **careful and adequate balance between liberalization of trade and the regulatory autonomy** of the WTO Members.

D. Treatment No Less Favourable (Art. XVII:1–3)

I. Standard of National Treatment

39 A measure which differentiates between like services and service suppliers violates Art. XVII only if it treats foreign services and service suppliers less favourably than like domestic services and suppliers. National treatment requires **treatment no less favourable**, but **not equal treatment**. Positive discrimination, *i.e.* a more favourable treatment of foreign services or service providers, is therefore not prohibited.

40 Art. XVII:2 and 3 further specify what is meant by "less favourable treatment". Art. XVII:2 stipulates that the national treatment obligation can be fulfilled by granting either **formally identical treatment or formally different treatment**. This mirrors the classical GATT standard of non-discrimination formulated by the Panel in *US—Section 337*, which held that "there may be cases where application of formally identical legal provisions

[53] *Nicolaïdis & Trachtman*, in: *Sauvé & Stern* (eds), 241, 253–254.

would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in fact no less favourable".[54]

41 Art. XVII:3 states that formally identical or formally different treatment shall be considered to be less favourable if it **"modifies the conditions of competition in favour of services or service suppliers"**. This definition reflects the standard of non-discrimination developed by the Panels in *Italy—Agricultural Machinery* and *US—Section 337* with respect to Art. III:4 GATT 1947.[55] It should be noted that the term "modify the conditions of competition" was not used by these panels to determine less favourable treatment, but to support the finding that the measure in question was "affecting" the sale of goods.[56] Nevertheless, subsequent panels as well as the Appellate Body have used the term to interpret no less favourable treatment.[57] This reflects the general objective of national treatment to ensure equal conditions of competition for domestic and foreign services and suppliers.

II. *De Jure* Discrimination

42 As stipulated in Art. XVII:2 and 3, national treatment prohibits measures which **openly link a difference in treatment to the origin** of a service or service supplier ("formally different treatment") and therefore **modify the conditions of competition** in favour of domestic services and service suppliers. This is generally considered as *de jure* discrimination. It should be emphasized that a formal difference in treatment between foreign and domestic services and service suppliers is not sufficient to show *de jure* discrimination. Rather, it is also necessary to examine whether the measure modifies the conditions of competition in the relevant market to the detriment of foreign services or service suppliers.[58]

43 **Examples** of measures which can be considered *de jure* discriminatory include nationality requirements, *i.e.* the requirement that a service supplier is a national of the WTO Member in question. The prohibition of *de jure* discrimination also affects measures specifically promoting domestic services

[54] GATT Panel Report, *US—Section 337*, BISD 36S/345, para. 5.11.

[55] *Zdouc*, in: *Ortino & Petersmann* (eds), 381, 404.

[56] GATT Panel Report, *Italy—Agricultural Machinery*, BISD 7S/60, para. 12; *US—Section 337*, BISD 36S/354, para. 5.10.

[57] See *e.g.* Appellate Body Report, *Korea—Various Measures on Beef*, WT/DS169/AB/R, paras 135–137.

[58] *Korea—Various Measures on Beef*, WT/DS169/AB/R, para. 137 regarding Art. III:4 GATT 1994.

and suppliers, such as subsidies or requirements of transfer of technology or local content rules.

III. *De Facto* Discrimination

44 In addition to formally different treatment, a national treatment obligation can also be violated through formally identical treatment. This is the case if the measure does not distinguish between services and service suppliers on the basis of their origin, but with respect to a **"neutral" criterion**, and still **modifies the conditions of competition** in favour of domestic services and service suppliers. Art. XVII hence also covers *de facto* discrimination.[59] In *EC—Bananas III*, the Panel clarified that it is not sufficient for any foreign service supplier to be treated less favourably than any like domestic service supplier.[60] Rather, for *de facto* discrimination to exist, the whole group of like foreign service suppliers must be accorded less favourable treatment as compared to the treatment accorded to the whole group of like domestic service suppliers (so-called **asymmetric impact test**).[61] Otherwise, any differential treatment within a group of like services or service suppliers would amount to *de facto* discrimination irrespective of whether the differential treatment predominantly and typically disadvantaged foreign services.

45 The **interpretative footnote 10 to Art. XVII** sheds some light on the question of which measures that have a detrimental effect on foreign services and suppliers are nevertheless permitted by Art. XVII. According to this footnote, national treatment commitments **do not require compensation for inherent competitive disadvantages** which result from the foreign character of the relevant services or service suppliers. An inherent disadvantage due to the foreign nature of a service or service supplier must be distinguished from a disadvantage caused by *de facto* discrimination. If the detrimental (= discriminatory) effect of a regulatory measure solely reflects the inherent competitive disadvantage of the foreign service or supplier, *i.e.* if the measure does not add an additional discriminatory effect to the one that already exists, the measure does not constitute *de facto* discrimination. For example, it may be more burdensome for a foreign service supplier to understand regulations in the language of the importing country. These language difficulties are typical inherent disadvantages resulting from the foreign character of the service supplier.[62] Footnote 10 therefore states which measures can**not** be considered *de facto* discriminatory.

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[59] *EC—Bananas III*, WT/DS27/AB/R, para. 233.

[60] *EC—Bananas III*, WT/DS27/R/USA, paras 7.332–7.338.

[61] For a detailed analysis of the asymmetric impact test, see *Ehring*, JWT 36 (2002), 921–977.

[62] Example taken from *Michaelis*, in: *Hilf & Oeter*, 375, 399, para. 69.

46 However, there is still no **positive** concept which determines *de facto* discrimination. Various views have been put forward in the literature.

1. Necessity

47 Some commentators suggested that non-discrimination should be understood as necessity.[63] They argue that any measure which is **more burdensome than necessary for foreign services and service suppliers** should be regarded as discrimination. This would resemble the obstacle-based approach to free movement of goods and services developed by the ECJ and could have a similar **liberalizing effect as EC law**.[64] According to the ECJ's approach, any measure constituting an obstacle to inter-community trade can be regarded as a violation of a fundamental freedom, even if it applies indistinctively to domestic and imported products. Taken to its extreme, this concept looks only at the trade-distorting effects of a regulatory measure and does not consider whether there actually *is* different treatment of foreign and domestic services or suppliers. Within the EC context, the far-reaching consequences of this concept are considerably reduced because measures restricting the freedom to provide services can be justified on the grounds of mandatory requirements of public policy if the measure is proportionate.[65]

48 Understanding *de facto* discrimination in the same way as the obstacle-based approach of EC law would **threaten many origin-neutral regulatory instruments with legitimate purposes** because there are no mandatory requirements of public policy in Art. XVII which could justify such regulatory instruments. If this broad understanding of national treatment is not to limit national regulatory autonomy excessively, the policy grounds upon which a measure can be justified must be broadened by extending the list of legitimate policy objectives in Art. XIV.[66] However, such extension is not on the horizon within the foreseeable future.

49 A broad approach to *de facto* discrimination also **blurs the distinction between national treatment and disciplines on domestic regulation**.[67] Art. VI:4 mandates negotiations on disciplines for domestic regulation to ensure that measures including qualification requirements and procedures, technical standards and licensing requirements are not more burdensome than necessary to ensure the quality of the service. These disciplines may include a necessity test. If such a test were also to be read into Art. XVII,

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[63] *Mattoo*, JWT 31 (1997) 1, 107, 131–133; *Mattoo*, Working Paper No. 2596, 15. On equating national treatment with necessity *Mattoo & Subramanian*, JIEL 1 (1998), 303, 315–316.

[64] *Verhoosel*, 78–88.

[65] See for example, ECJ, C-384/93, *Alpine Investments v. Minister van Financiën*, [1995] E.C.R. I-1141, paras 43–56.

[66] *Mattoo & Subramanian*, JIEL 1 (1998), 303, 307.

[67] For a more detailed analysis of this relationship, see below, paras 66–68.

the distinct meaning and purpose of future disciplines negotiated on the basis of Art. VI:4 would be minimized.

2. Indirect Discrimination or Foreseeable Discriminatory Effect

50 In order to avoid the structural problems of a broad standard of *de facto* national treatment outlined above, it has been suggested that the notion of **indirect discrimination** could be utilized.[68] Indirect discrimination plays an important role in EC law concerning non-discrimination on grounds of nationality. Indirect discrimination exists if the regulation **favours a group which predominantly consists of nationals of one country**. This approach is similar to the asymmetric impact test used by the Panel in *EC—Bananas III*.[69] Examples of measures which do not formally discriminate between foreign and domestic services and service suppliers, but which apply requirements which are usually more easily fulfilled by domestic services and service suppliers, include residency requirements, requirements of prior professional practice in the importing country or requirements of graduation from a domestic university.

51 Another approach considers measures *de facto* discriminatory if the WTO Member in question **could have scheduled them as limitations** on its national treatment commitment. Under this approach, regulations with detrimental effects on foreign services and service suppliers would violate Art. XVII only if these **discriminatory effects were foreseeable** at the time of scheduling, *i.e.* if the WTO Member actually had the opportunity to schedule these measures as limitations on its national treatment commitment. Since WTO Members have a right to maintain discriminatory measures if and as long as they schedule them, and an obligation to schedule both *de jure* and *de facto* discriminatory measures,[70] only those measures should be seen as discriminatory which can at least theoretically be scheduled. Otherwise, the right of WTO Members to schedule discriminatory measures they wish to maintain would be restrained and the fundamental structure of the national treatment obligation would be altered. Hence, if regulatory measures cause adverse effects on foreign services and service suppliers on a *de facto* basis, but these effects were not foreseeable, the measures could not have been scheduled and therefore do not violate Art. XVII. Adverse effects on foreign services and service suppliers are "foreseeable" if the regulatory measure uses a distinguishing **condition, which is apparently and typically more easily fulfilled by domestic service suppliers**. Such conditions include residency, prior practice in the country, or local content rules.

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[68] *Eeckhout*, in: *de Búrca & Scott* (eds), 211, 233–234.
[69] *EC—Bananas III*, WT/DS27/R/USA, paras 7.332–7.338.
[70] S/L/92, para. 13.

52 The consequences of the notion of indirect discrimination or foreseeable discriminatory effects reflect the **scheduling practice and common understanding of WTO Members**. All *de facto* discriminatory measures mentioned in the Secretariat's list of examples of frequently occurring national treatment restrictions are covered by the categories of indirect discrimination or foreseeable discriminatory effects.[71]

3. Aims and Effects Test

53 As under Art. III GATT 1994, the so-called "aims and effects" test has also played an important role in the context of Art. XVII.[72] According to this test, a measure which does not pursue a protectionist intent, *i.e.* which does not *aim* at affording protection, and which does not have a protectionist *effect*, is not considered discriminatory. In *EC—Bananas III*, the **Appellate Body rejected the aims and effects test concerning GATS** because it saw "no specific authority either in Art. II or in Art. XVII of the GATS for the proposition that the 'aims and effects' of a measure are in any way relevant in determining whether that measure is inconsistent with those provisions".[73] The outright rejection of the aims and effects approach by the Appellate Body has been considered unfortunate by many commentators because this rejection makes it more difficult to consider regulatory aims in the context of national treatment.[74]

54 Some commentators have therefore argued for an **"improved" aims and effects test** when determining *de facto* discrimination.[75] Under this approach, *de facto* discrimination only occurs if, **first**, the **group of like foreign services** and suppliers is **treated less favourably** than the group of like domestic services and suppliers, *i.e.* if the measure has a detrimental effect on foreign services and suppliers within the meaning of the asymmetric impact test, and **second**, if the detrimental effect related to the foreign origin of the service or supplier, *i.e.* if the measure was **aimed at protecting the domestic industry**. Conversely, if the measure pursued policy objectives unrelated to the foreign origin of the service, it cannot be considered *de facto* discriminatory. An "improved" aims and effects test is particularly desirable regarding the narrow list of legitimate policy objectives of the general exception clause of Art. XIV.

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[71] S/L/92, Attachment 1.

[72] *Eeckhout*, in: *de Búrca & Scott* (eds), 211, 235; *Zdouc*, JIEL 2 (1999), 295, 340–342. On this test in general see *Hudec*, Int'l Law. 32 (1998), 619, 626–633 and *Howse & Tuerk*, in: *de Búrca & Scott* (eds), 283, 293–299.

[73] *EC—Bananas III*, WT/DS27/AB/R, para. 241 (footnotes omitted).

[74] *Eeckhout*, in: *de Búrca & Scott* (eds), 211, 235; *Zdouc*, JIEL 2 (1999), 295, 341–342 and *Hudec*, Int'l Law. 32 (1998), 619, 641.

[75] *Pauwelyn*, Likeness, 7–12. Similarly, but in the context of likeness: *Cossy*, 39–45.

An "improved" aims and effects test provides for an **objective analysis of the intent of a measure** in that the intentions of the legislator are considered only in so far as they are **reflected in the design, structure and application of the measure**.[76] Furthermore, this "improved" test requires a **considerable nexus to be established between the measure and the allegedly non-protectionist policy objective** pursued. However, this nexus should not be necessity, as suggested by one commentator.[77] Rather, it will be sufficient if the measure "relates to" the policy objective it pursues.[78] This "improved" aims and effects test seems to coincide with more recent case law such as the *Dominican Republic—Import and Sale of Cigarettes* Appellate Body Report and the *EC—Approval and Marketing of Biotech Products* Panel Report which have emphasized the importance of determining whether an allegedly discriminatory measure indeed differentiates in relation to the *origin* of a product in the context of national treatment.[79] *55*

In this context, some commentators discussed whether the reasoning employed by the **NAFTA Panel in *Cross-Border Trucking***[80] concerning the **relevance of the regulatory purpose** of a measure when examining the NAFTA national treatment obligation could be utilized to interpret Art. XVII.[81] The Panel held in this case that a US moratorium which excluded all Mexican motor carriers from obtaining operating authority to provide trucking services for safety reasons violated Art. 1202 NAFTA. Art. 1202 obliges a NAFTA Party to provide "treatment no less favourable than that it accords, *in like circumstances*, to its own service providers".[82] The Panel argued that the phrase "in like circumstances" may warrant differential treatment based on legitimate regulatory purposes, but only if the differential treatment was necessary to achieve the aspired purpose.[83] However, this **reasoning cannot be read into GATS** since the Panel based its reasoning on the wording "in like circumstances" which is not contained in the GATS.[84] Furthermore, advocating a necessity test, the Panel referred to *56*

[76] Panel Report, *EC—Bananas III*, WT/DS27/RW/ECU, para. 6.127.
[77] *Cossy*, 41.
[78] *Pauwelyn*, Likeness, 12–14.
[79] Appellate Body Report, *Dominican Republic—Import and Sale of Cigarettes* WT/DS302/AB/R, para. 96; Panel Report, *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.2514.
[80] NAFTA, Arbitral Panel Report, *Cross-Border Trucking Services*, USA-MEX-98–2008–01.
[81] *Cossy*, 28–38; *Leroux*, JIEL 10 (2007), 749, 783 *et seq*.
[82] Emphasis added.
[83] NAFTA, Arbitral Panel Report, *Cross-Border Trucking Services*, USA-MEX-98–2008–01, para. 258.
[84] See above, para. 19.

the predecessor of Art. 1202 NAFTA which explicitly required necessity.[85] The specific negotiating history of NAFTA cannot provide any guidance on how GATS law should be interpreted.

57 A variation of the "aims and effects" test could be developed on the basis of the notion of the **mere incidental burden** of a trade measure. This concept has been developed in US constitutional law to interpret the **Dormant Commerce Clause** which prescribes that measures restricting inter-state trade within the US must be non-discriminatory.[86] Interpreting the Dormant Commerce Clause, the US Supreme Court held that where the "effects [of a statute] on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits".[87] Applying this understanding to Art. XVII, an origin-neutral measure which does not aim to restrict trade in services, but has such effects only incidentally, is not *de facto* discriminatory if it pursues other policy objectives ("local benefits") and if these benefits outweigh the incidental burden caused by the measures.

E. Relationship with Other Provisions of the GATS

58 The relationship between national treatment and other GATS obligations is a **crucial aspect of the GATS framework**, because it determines the scope of each obligation. The relationships between national treatment and market access (Art. XVI) and between national treatment and future disciplines on domestic regulation in accordance with Art. VI:4 are of particular relevance, because they relate to some of the cornerstones of the GATS. As neither the WTO Members nor the dispute settlement organs have yet decided these questions, they are subject to controversial debates in the literature.

I. Market Access (Art. XVI)

59 Art. XVI prohibits quantitative and qualitative restrictions on the supply of a service which are specifically mentioned in Art. XVI:2. The relationship between this obligation and national treatment is not clear, because Arts XVI and XVII are silent on their relationship with each other. The only reference in the agreement is Art. XX:2, which states that measures inconsistent with both Articles shall be inscribed in the column relating to

[85] NAFTA, Arbitral Panel Report, *Cross-Border Trucking Services*, USA-MEX-98–2008–01, para. 249–250, 260.

[86] See *Farber & Hude*c, Vand. L. Rev. 47 (1994), 1401, 1413.

[87] U.S. Supreme Court, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Art. XVI. This provision assumes an **overlap between Art XVI and XVII** in particular regarding discriminatory market access restrictions, such as quotas for foreign services or service providers, or limitations on foreign capital participation. This overlap is particularly problematic if **market access and national treatment commitments differ**. For example, if a WTO Member scheduled a full national treatment commitment, but remained unbound regarding market access, it is uncertain whether the Member could still apply discriminatory quantitative restrictions on foreign service suppliers.[88] Similarly, it can be asked whether a WTO Member could maintain discriminatory measures restricting market access in light of a full market access commitment.

60 A textual reading of Art. XVII suggests that discriminatory market access restrictions are subject to Art. XVII, because this provision covers "all measures affecting the supply of services" and **does not exclude any measures** *a priori*.[89] Accordingly, a measure falling within the ambit of Art. XVI would also have to comply with Art. XVII unless the measure has been specifically scheduled as a limitation to Art. XVI in both its discriminatory and non-discriminatory forms. However, such an interpretation **would render meaningless** those **elements of Art. XVI** which address market access restrictions existing only in a discriminatory form, such as regulations prescribing joint ventures (Art. XVI:2 lit. e) or limitations on foreign capital and shareholding (Art. XVI:2 lit. f). If the discriminatory effect of these measures were already covered by Art. XVII, it would not have been necessary to include them in Art. XVI.[90]

61 It is also not convincing to understand **Art. XVI as a sub-set of Art. XVII**, as argued by one commentator.[91] According to this view, Art. XVI would cover only discriminatory market access restrictions and therefore becomes irrelevant once a Member has undertaken a full national treatment obligation. This approach disregards the fact that **Art. XVI contains** measures which exist only in a discriminatory form *as well as* **measures which can exist in discriminatory and non-discriminatory forms**. In fact, many WTO Members have scheduled non-discriminatory market access restrictions as limitations to Art. XVI.

62 According to proposals submitted in the context of the technical review of GATS provisions carried out by the Council for Trade in Services, **Art. XVI**

[88] *Mattoo*, JWT 31 (1997) 1, 107, 114; *Delimatsis*, JWT 40 (2006), 1059, 1072–1075. See also Council for Trade in Services, Special Session: Technical Review of GATS Provisions, Informal Note by the Secretariat, 16 February 2001, JOB(01)/17, para. 5.

[89] *Mattoo*, JWT 31 (1997) 1, 107, 116–117; *Pauwelyn*, World Trade Rev. 4 (2005), 131, 150–151 (footnote 69).

[90] JOB(01)/17, para. 6.

[91] *Mavroidis*, World Trade Rev. 6 (2007), 1.

should be understood **as *lex specialis* to Art. XVII**.[92] Consequently, measures falling within the scope of market access would—even if they were discriminatory—be excluded from the scope of national treatment. In this case, Art. XVII would cover only discriminatory measures other than restrictions on market access. A Member who remained unbound concerning market access would be allowed to introduce discriminatory quantitative restrictions or other limitations within the meaning of Art. XVI because they would be excluded from the scope of Art. XVII.[93]

63 **Art. XX:2** supports the understanding that non-discriminatory and discriminatory market access restrictions are exclusively covered by Art. XVI. Art. XX:2 is one of the few provisions about the structure and content of the Schedules of specific commitments. It can therefore be assumed that GATS negotiators wanted to create more than just a scheduling rule in Art. XX:2 because they did not include other rules on scheduling in the Agreement. Hence, Art. XX:2 addresses not only scheduling, but also the **substance of the relationship between market access and national treatment**. Since scheduling a measure as a limitation on market access automatically includes a limitation on national treatment, **Art. XVI generally prevails regarding discriminatory market access restrictions**.

64 As a consequence of the view that Art. XVI prevails over Art. XVII regarding discriminatory market access restrictions, any **market access limitation applies to discriminatory and non-discriminatory forms** of the measure in question. For example, if a WTO Member simply entered "numerical quota" in its market access column, it can be inferred that it wished to retain its right to impose non-discriminatory and discriminatory numerical quotas. Since the limitation "numerical quota" is to be considered to provide a condition to Art. XVII as well, discriminatory numerical quotas would not violate the national treatment obligation in this case. The entry "unbound" in the market access column can also be seen as a limitation within the meaning of Art. XX:2, and therefore also serves as a "condition or qualification on national treatment".[94] By virtue of Art. XX:2, the "unbound" entry in the market access column would prevail over the commitments undertaken with respect to national treatment.[95]

65 From a dogmatic point of view, it therefore does not seem plausible to understand the relationship between Arts XVI and XVII as one where Art. XVII also covers discriminatory market access restrictions. However, until this relationship is clarified through case law or an authoritative interpreta-

[92] JOB(01)/17, para. 6.
[93] JOB(01)/17, para. 6; *Mattoo*, JWT 31 (1997) 1, 107, 116.
[94] *Footer & George*, in: *Macrory et al.* (eds), 799, 848.
[95] Similarly, *Delimatsis*, JWT 40 (2006), 1059, 1074 and *Molinuevo*, Article XX GATS, paras 34 *et seq*.

tion, WTO Members are **well-advised to schedule discriminatory market access restrictions**, which they wish to maintain, in accordance with Art. XVII even if they did not undertake any commitment with regard to market access.

II. Disciplines on Domestic Regulation (Art. VI:4)

66 The relationship between national treatment and potential disciplines on domestic regulation in accordance with Art. VI:4 is also unclear, because **national treatment also applies** to **domestic regulation**. Whereas Art. XVII subjects domestic regulations ("all measures affecting the supply of services") to national treatment, Art. VI:4 mandates negotiations on disciplines which prescribe that domestic regulations (licensing and qualification requirements and technical standards) are not more trade-restrictive than necessary.[96] In general, a **measure could fall within the ambit of Art. XVII *and* future disciplines**: for example, the requirement of prior residency before supplying a service can be perceived as both *de facto* discrimination within the meaning of Art. XVII *and* a measure more burdensome than necessary to ensure the quality of the service within the meaning of Art. VI:4.

67 The possible overlap between Art. XVII and future disciplines raises the question whether **measures which have been scheduled as exceptions** to a national treatment commitment **can violate future disciplines** under Art. VI:4. Different opinions have been voiced in the literature on how to approach such an overlap. According to one view, Art. VI:4 disciplines should apply only to measures which are neither discriminatory nor a limitation to market access.[97] This view can be based on the Panel Report in *US—Gambling*, which considered Arts VI and XVI to be mutually exclusive, *i.e.* a measure either qualifies as a market access restriction in accordance with Art. XVI or falls within the ambit of disciplines of domestic regulation.[98] This approach could be applied to the relationship between Art. XVII and disciplines on domestic regulation. Hence, measures scheduled as exceptions under Art. XVII could be maintained irrespective of any disciplines on domestic regulation because disciplines would not

[96] *Krajewski*, Article VI GATS, paras 50 *et seq*.

[97] Working Party on Domestic Regulation, Report on the Meeting Held on 29 November 2001, Note by the Secretariat, S/WPDR/M/14, 29 January 2002, para. 18; Working Party on Domestic Regulation (WPDR), Summary of Discussions on the Checklist of Issues for the WPDR, Revision, JOB(02)/3/Rev.3, 3 December 2002, No. 4, 3. S/L/92, Attachment 4, Working Party on Professional Services (WPPS), Discussion of Matters Relating to Articles XVI and XVII of the GATS in Connection With the Disciplines on Domestic Regulation in the Accountancy Sector, Informal Note by the Chairman, Job No. 6496, 25 November 1998, para. 2.

[98] *US –Gambling*, WT/DS285/R, para. 6.305.

apply to discriminatory measures. Other commentators have argued that measures scheduled under Arts XVII (and XVI) could still be subject to disciplines on domestic regulation developed under Art. VI:4.[99]

68 The general structure of the GATS and the different purposes of the general obligations and specific commitments mitigate **in favour of the mutual exclusiveness of Arts XVII and VI**. The right of WTO Members to maintain discriminatory measures included in their Schedule would be diminished if these measures were also to fall within the scope of disciplines on domestic regulation. However, since the wording of Arts XVII and VI does not clearly establish the mutual exclusiveness of these two provisions, **disciplines under Art. VI:4 should explicitly exempt discriminatory measures** from their scope.

F. Outlook

69 Despite the fact that Art. XVII is a key provision of the GATS and raises significant legal questions, its **practical impact has so far remained limited**. The commercial value of the national treatment commitments in the Schedules of WTO Members is difficult to assess, because many Members made commitments below their actual level of liberalization. Art. XVII has also played only a limited role in dispute settlement. It has been discussed only in *EC—Bananas* and *Canada—Autos*. Apart from the question of likeness, neither case touched upon the complicated problems of the interpretation of Art. XVII. Most recently, Art. XVII has been mentioned in the request for consultations concerning *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*.[100] However, based on an assessment of the request, it is not unlikely that the case will not address any fundamental legal question with respect to Art. XVII.

[99] *Janda*, in: *Mattoo* & *Sauvé* (eds), 109, 120.

[100] Request for Consultations by the United States, *China—Trading/Distribution of Publications and Entertainment Products*, WT/DS363/1.

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Article XVIII GATS
Additional Commitments

Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.

Case Law

Panel Report, *Mexico—Telecoms*, WT/DS204/R; Appellate Body Report, *US—Gambling*, WT/DS285/AB/R.

Documents

Council for Trade in Services, Guidelines for the Scheduling of Specific Commitments under the GATS, Adopted by the Council for Trade in Services on 23 March 2001, S/L/92, 28 March 2001; Committee on Specific Commitments, Additional Commitments under Article XVIII of the GATS, Note by the Secretariat, S/CSC/W/34, 16 July 2002.

Cross References

Art. 1208 NAFTA; Art. VI MERCOSUR Montevideo Protocol.

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A. General Remarks

Art. XVIII belongs to the provisions relating to specific commitments (Part III of the GATS). It enables WTO Members to make **commitments beyond the scope of Arts. XVI and XVII** by providing a legal framework for addressing and negotiating the reduction of trade-restricting measures not covered by market access and national treatment obligations.[1] As indicated by the heading "Additional Commitments" the commitments under Art. XVIII supplement those under Arts XVI and XVII. Like market access and national treatment commitments, Art. XVIII commitments **aim at the progressive liberalization of trade in services** as stipulated in the Preamble to GATS. The main function of Art. XVIII is to ensure that Members which negotiated additional commitments **enter them in their Schedules of specific commitments**. This ensures that such additional commitments are known to all WTO Members and the benefits *1*

[1] Committee on Specific Commitments, Additional Commitments under Article XVIII of the GATS, Note by the Secretariat, S/CSC/W/34, 16 July 2002, para. 5; *Footer & George*, in: *Macrory et al.* (eds), 799, 853.

of the additional commitments are extended to the entire WTO Membership on a most-favoured-nation basis.[2]

B. Scope of Additional Commitments

2 Art. XVIII covers measures affecting trade in services not subject to scheduling under Arts XVI and XVII. The term **"measures affecting trade in services"** must be interpreted in the same way as the term in Art. I:1.[3] Art. XVIII therefore applies generally to all measures covered by GATS. However, **measures subject to scheduling under Arts XVI and XVII are excluded** from the scope of Art. XVIII. Market access and national treatment commitments are therefore not covered by Art. XVIII. Consequently, limitations on market access and national treatment cannot be scheduled under Art. XVIII. Additional commitments under Art. XVIII can, however, be limited to sectors and subsectors with specific commitments under Arts XVI and XVII. The Panel in *Mexico—Telecoms* held that a limitation entered in either the market access or the national treatment column of a Schedule of specific commitments can (also) limit the applicability of an additional commitment under Art. XVIII, for example if the additional commitments are taken "on the basis of the specific commitments undertaken".[4]

3 Art. XVIII mentions as examples of measures subject to additional commitments those "regarding qualifications, standards or licensing matters". This mirrors the scope of Art. VI:4 ("measures relating to qualification requirements and procedures, technical standards and licensing requirements") and indicates that Art. XVIII is **linked to the provisions on domestic regulation**, in particular to Art. VI:4 and the negotiations of disciplines on domestic regulation.[5] Both Arts XVIII and VI address measures which are neither discriminatory nor restrictive of market access. Both provisions are based on the perception that effective market access also requires the liberalization of non-discriminatory and non-restrictive regulations. The link between additional commitments and the provisions on domestic regulation is also evidenced by the proposal that future disciplines on domestic regulation under Art. VI:4 should be incorporated into the GATS framework as additional commitments.[6] However, since measures regarding qualifications, standards or licensing matters are used merely as

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[2] *Pitschas*, in: *Prieß & Berrisch* (eds), 495, 535, para. 114.
[3] *Zacharias*, Article I GATS, paras 27–36.
[4] Panel Report, *Mexico—Telecoms*, WT/DS204/R, para. 7.94.
[5] S/CSC/W/34, para. 4; on the scope of Art. VI:4, *Krajewski*, Article VI GATS, paras 46–47.
[6] *Adlung*, JIEL 9 (2006), 889–890.

indicative examples in Art. XVIII, the **scope Art. XVIII is broader than that of Art. VI:4**.[7] In particular, additional commitments do not have to be restricted to domestic regulatory measures,[8] but can also apply to the cross-border supply of services.[9]

4 Art. XVIII **covers only commitments and not limitations**.[10] Unlike Arts XVI and XVII which allow the scheduling of "limitations and conditions" (Art. XVI:1) and "conditions and qualifications" (Art. XVII:1), Art. XVIII does not mention any qualifications of additional commitments. This is a consequence of the open character of Art. XVIII. Whereas the standards of market access and national treatment are defined in the relevant provisions, Art. XVIII does not contain specific standards or obligations. There is hence no need for limitations and qualifications. However, additional commitments may contain limitations and qualifications which are inevitably part of the whole commitment. For example, if a Member commits itself to certain regulatory standards for professional services with the exception of legal services, it may schedule this commitment and specifically exclude legal services from it instead of positively listing all other sectors which are subject to the commitment.

C. Scheduling Practice

5 The over all level and scope of additional commitments is low compared to the commitments made under Arts XVI and XVII.[11] By the end of 2006, **79 WTO Members** had made additional commitments on the basis of Art. XVIII. Almost all of these made them in the telecommunications sector. 29 Members made commitments in other sectors, in particular in financial, maritime transport, and professional services.[12]

I. Scheduling Methods

6 Art. XVIII does not specify the methods or forms of additional commitments. It only states that the commitments shall be entered **in the Schedules of specific commitments**. There is also no further guidance on the scheduling methods for additional commitments in other

[7] Council for Trade in Services, Guidelines for the Scheduling of Specific Commitments under the GATS, Adopted by the Council for Trade in Services on 23 March 2001, S/L/92, 28 March 2001, para. 19; *Footer & George*, in: *Macrory et al.* (eds), 799, 853.

[8] This was argued by Mexico in *Mexico—Telecoms*, WT/DS204/R, para. 7.98.

[9] *Mexico—Telecoms*, paras 7.96–7.144.

[10] S/L/92, para. 19.

[11] *Pitschas*, in: *Prieß & Berrisch* (eds), 495, 535, para. 115.

[12] See *Hartridge et al.* (eds), *passim*; S/CSC/W/34, Attachment 2 for commitments made until 2002.

GATS provisions. However, WTO Members have agreed that additional commitments should be recorded in the **fourth column of a Schedule** of specific commitments.[13] Apart from this general practice there are no common scheduling methods under Art. XVIII.

7 The lack of a common methodology and the fact that Art. XVIII applies to a large number of diverse measures explain why the Schedules of **additional commitments vary significantly** as between sectors and Members.[14] In some cases, the Schedules record individual measures in their fourth columns. In other cases, a separate attachment is incorporated into the Schedule by reference to the attachment in column four. WTO Members have also used instruments aiming at uniform (or very similar) additional commitments in a particular sector. **Reference Papers**, such as the Reference Paper on Basic Telecommunications,[15] or **model schedules**, such as the Maritime Model Schedule,[16] lead to a degree of "harmonization" of additional commitments.

II. Examples of Additional Commitments

8 One of the most common commitments under Art. XVIII contains the so-called **Reference Paper on Basic Telecommunications**, an outcome of the Uruguay Round negotiations on telecommunications.[17] The Reference Paper strengthens regulatory disciplines to **ensure competition in the telecommunications sector**. Its purpose is to ensure that the market power of a former (public) monopoly operator is not used to the detriment of new market entrants. In particular, the Reference Paper targets anti-competitive cross-subsidization, the use of information obtained from competitors with anti-competitive results and withholding technical and commercial information from other service suppliers. The Reference Paper also incorporates elements of transparency (Art. III), the requirement of adequate remedies (Art. VI:2) and on the necessity test (Art. VI:4). Most WTO Members with additional commitments on the basis of the Reference Paper committed themselves to all elements of it, but some Members chose to opt out of certain aspects of it.

9 A number of Members have also used a **Maritime Model Schedule**, which contains additional commitments with regards to "access and use of port services" and "multimodal transport" (*i.e.* road, rail and inland

[13] S/L/92, para. 5; on the structure of Schedules see also *Molinuevo*, Article XX GATS, paras 9 *et seq*.
[14] S/CSC/W/34, para. 6.
[15] See below, para. 8.
[16] See below, para. 9.
[17] For further details see *Gao*, Telecommunications Services: Reference Paper, para. 5 and *Krajewski*, National Regulation, 169–172.

waterway services for the onward transportation of international cargo carried by sea).[18] This model schedule was developed in the Uruguay Round negotiations to reach an "ideal level" of commitments and further to define the sector. The additional commitments refer to practical needs of maritime services suppliers. Port services and multimodal transport services are **key infrastructural services for maritime transport** and key elements of the maritime transport chain. The additional commitments of the Maritime Model Schedule therefore make market access and national treatment commitments in maritime services economically more meaningful.

10 A number of Members have also made additional commitments in **financial services** including domestic deregulation of the banking and insurance sectors, product approval procedures and best endeavours commitments with regard to the processing of applications for licensing.[19] These commitments address **typical regulatory aspects** of financial services. In other sectors, Members made commitments relating to regulatory issues such as licensing provisions, approval procedures, the use of firm names, and a final-user price-setting mechanism.[20] Members have also entered **future actions**, *e.g.* future activities conditional upon the passing of legislation, in the column for additional commitments. However, it should be noted that Art. XVIII is not the only way in which to make future commitments, because time-frames can also be scheduled under Arts XVI and XVII, as clearly indicated by Art. XX:1 lit. d.[21]

11 In some cases, Members have **repeated or concretized obligations of other GATS provisions**, in particular Arts III and VI. For example, one Member concretized Art. VI:2 lit. a by stating that appeals against the decisions of a particular authority might be filed in the High Court. Another Schedule concretizes Art. VI:3 by stating that "applications for new products will be reviewed and responded to within three months of receipt of the completed documentation".[22]

12 Finally, some Members seem to have scheduled commitments on the basis of Art. XVIII which **should have been recorded in the columns for market access and national treatment** commitments. For example, one Member stated in the column for additional commitments in financial services that credit card services would be granted national treatment if such services were in the future defined by the legislature as financial

[18] For a short description see S/CSC/W/34, paras 30–39; see also *Parameswaran*, Annex on Negotiations on Maritime Transport Services, paras 9, 27.
[19] S/CSC/W/34, paras 40–64.
[20] S/CSC/W/34, para. 7.
[21] *Mexico—Telecoms*, WT/DS204/R, para. 7.370; see also *Molinuevo*, Article XX GATS, paras 30–31.
[22] S/CSC/W/34, Attachment 1, lit. c.

services.[23] This commitment should have been scheduled under Art. XVII. Such scheduling mistakes highlight the complexity of making specific commitments. From a legal perspective, these commitments violate Art. XVIII, because Art. XVIII does not apply to measures subject to scheduling under Arts XVI and XVII.[24] However, the consequences of such a violation are not clear. It would be unconvincing to argue that such commitments are meaningless because they are scheduled in the wrong way. Rather, they should be interpreted in a way which takes into consideration both the intentions of the drafters of the Schedule and the legitimate expectations of other Members. Taking the intention of the drafters of the Schedule into account is justifiable even if the Appellate Body in *US—Gambling* held that this intention is generally not relevant for the interpretation of a Schedule.[25] However, it would be manifestly absurd to assume that scheduling mistakes reflected the common intention of the WTO Members. In most cases, an interpretation considering the intention of the drafters and the expectations of the other Members will lead to an **understanding** of the commitments **as if they were scheduled in the correct column**.

[23] S/CSC/W/34, para. 56.
[24] See above, para. 2.
[25] Appellate Body Report, *US—Gambling*, WT/DS285/AB/R, paras 159–160.

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PART IV PROGRESSIVE LIBERALIZATION

Article XIX GATS
Negotiation of Specific Commitments

1. In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.
2. The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV.
3. For each round, negotiating guidelines and procedures shall be established. For the purposes of establishing such guidelines, the Council for Trade in Services shall carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of this Agreement, including those set out in paragraph 1 of Article IV. Negotiating guidelines shall establish modalities for the treatment of liberalization undertaken autonomously by Members since previous negotiations, as well as for the special treatment for least-developed country Members under the provisions of paragraph 3 of Article IV.
4. The process of progressive liberalization shall be advanced in each such round through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement.

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Cross References

Art. 1207.4 NAFTA; Art. XIX MERCOSUR.

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A. Scope and Negotiating History

Art. XIX is located in Part IV of the GATS, entitled "Progressive Liberalization". Both Part IV of the GATS and its Preamble underscore Members' choice to allow a very broad scope for the new multilateral framework governing trade in services, as no services sector is *a priori* excluded. This means that each services sector is to be progressively liberalized as a result of the negotiations that Members will hold pursuant to Art. XIX. The **principle of progressive liberalization** is an integral part of the services negotiations. It informs the GATS objective of promoting liberalization of trade in services. Indeed, negotiations on trade in services have striven for the expansion of trade in services "under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners and the development of developing countries" from the outset.[1] Rec. 2 of the Preamble to the GATS also makes it clear that the principle of progressive liberalization forms part of the object and purpose of the GATS.[2] Progressive liberalization allows Members initially to include fewer services sectors in their Schedules of specific commitments and gradually add new liberalization commitments and open more sectors. At the same time, progressive liberalization aims to reduce or phase out limitations, terms, conditions and qualifications impeding market access and national treatment.[3] The Preamble to the GATS emphasizes that Members seek the **early** achievement of higher levels of liberalization.[4] *1*

To attain higher levels of services trade liberalization progressively, Members were required to initiate negotiations on services five years **at the latest** after the end of the Uruguay Round pursuant to Art. XIX:1. This is one of the prominent GATS peculiarities, since Members have the **contractual obligation** to initiate regular negotiating rounds on services to achieve higher levels of liberalization regardless of whether Members decide to start negotiations in other trade areas, such as goods or trade-related intellectual property rights, at the same time. For instance, the current negotiations on services started almost two years before their incorporation in the Doha *2*

[1] Contracting Parties, Punta del Este, Uruguay, 5–20 September 1986, Draft Ministerial Declaration on the Uruguay Round, MIN(86)/W/19, 20 September 1986; also GATT, The Uruguay Round, Decisions of 28 January 1987, GATT/1405, 5 February 1987, 25.

[2] Panel Report, *US—Gambling*, WT/DS285/R, para. 6.317 and Appellate Body Report, *US—Gambling*, WT/DS285/AB/R, para. 235 and footnote 271.

[3] See *US—Gambling*, WT/DS285/R, para. 6.313.

[4] Rec. 3 of the Preamble to the GATS.

work programme in November 2001.[5] The need for a mechanism mandating future negotiations aiming at further liberalization was identified by several Members during the Uruguay Round, as various Members' Schedules of specific commitments do not reflect the actual levels of liberalization.[6] The obligation to initiate liberalizing rounds after five years, and periodically thereafter, forms part of the so-called "**built-in agenda**" embedded in the GATS. This term also reflect the fact that several GATS provisions, that is, Arts VI, X, XIII and XV, represent "unfinished business".[7]

3 **Art. XIX**, entitled "Negotiation of Specific Commitments" **clarifies the manner in which negotiations under GATS should proceed** in order progressively to achieve higher levels of liberalization and, at the same time, identifies various factors that should be taken into account during the future negotiations on services. These factors include notably respecting Members' national policy objectives and their level of development, and ensuring appropriate flexibility for developing countries. An examination of the GATS negotiating history demonstrates that Members appear to have had a fairly clear idea of the elements that they should bear in mind when negotiations on further services trade liberalization take place.[8] Art. XIX:1–2 use the wording that Members employed as early as in the mid-term review at Montreal in 1989 to describe their understanding of progressive liberalization.[9] Importantly, Art. XIX, along with Art. IV, constitutes a development-friendly set of provisions laid down in the GATS and should be read together.[10] Developing countries sought to ensure before the mid-term review of the Uruguay Round negotiations that the GATS would encompass development-enhancing provisions.[11]

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[5] See Ministerial Conference, Fourth Session, Doha, 9–14 November 2001, Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, para. 15.

[6] Group of Negotiations on Services, Uruguay Round, Communication from Canada, Progressive Liberalization, MTN.GNS/W/63, 14 July 1989, 5; more explicitly Group of Negotiations on Services, Uruguay Round, Communication from the European Communities, The Basis for the Progressive Liberalization Process, MTN.GNS/W/66, 20 July 1989, 3 and Group of Negotiations on Services, Uruguay Round, Communication from Switzerland, General Agreement on Trade in Services, A Draft Blueprint, MTN.GNS/W/69, 15 September 1989, 2.

[7] *Sauvé*, Aussenwirtschaft 57 (2002), 301, 302–303.

[8] Uruguay Round, Group of Negotiations on Services, Material to be Considered with a View to Fulfilling the Mandate Given to the GNS in Paragraph 11 of the Montreal Declaration (MTN.TNC/11), Note by the Secretariat, MTN.GNS/W/90, 18 December 1989, 10–11.

[9] Trade Negotiations Committee, Mid-Term Meeting, MTN.TNC/11, 21 April 1989, 39.

[10] Group of Negotiations on Services, Uruguay Round, Note on the Meeting of 7–11 May 1990, MTN.GNS/33, 8 June 1990, 7.

[11] Trade Negotiations Committee, Meeting at Ministerial Level, MTN.TNC/7(MIN), 9 December 1988, Part II (b) on progressive liberalization and (f) on increasing participation of developing countries, 41–42.

B. Mutually Advantageous Progressive Liberalization (Art. XIX:1)

4 The entire GATS is based on the premise that **liberalization** of trade in services has to be **progressive**. Art. XIX:1 implies a **dynamic process** by mandating the progressive improvement of the conditions that govern access to a given market with a view to achieving the objectives of the GATS, as depicted in the Preamble to the GATS. These objectives are: the expansion of trade in services to promote the economic growth of all Members and the development of developing countries; the promotion of the interests of all Members on a mutually advantageous basis; the achievement of a balance between rights and obligations; the Members' right to regulate and to introduce new regulations to meet national policy objectives; the increasing participation of developing countries in trade in services and the expansion of their service exports. Successive negotiating rounds should aim to pursue these objectives.

5 A review of the levels of liberalization of trade in services through **negotiating rounds** is to be undertaken periodically. Such reviews should gradually lead to Members opening more sectors to, and eliminating restrictions against, international competition. The GATS, however, remains silent as to when services negotiations should start after the conclusion of the current negotiations. The only indication that Art. XIX:1 gives is that Members should initiate negotiations **"periodically"**. While the ordinary meaning of the term would suggest that such negotiations should occur at regular recurring intervals, the provision does not specify the exact minimum or maximum number of years that should intervene between two rounds of negotiations on services. Obviously, these intervals will be subject to negotiations and Members will be called upon to determine them after the end of the current negotiations.

6 **Market access** should be effective, and this can be achieved through the gradual extension of the sectoral coverage of Members' Schedules and the reduction or elimination of the restrictive effects of measures.[12] Arguably, progressive liberalization should aim at reducing or eliminating the trade-restrictive and distorting effects of measures that form part of Members' Schedules, but also of measures that should **not** be scheduled, *e.g.* those that come within the ambit of Art. VI.[13] This conclusion is in line with the objective of achieving effective market access, since domestic regulations can have grave effects on market access.[14] **Effective market access** should therefore not be confounded with market access within the meaning of

[12] *WTO*, Market Access, 114.
[13] *Krajewski*, Article VI GATS, para. 2.
[14] *US—Gambling*, WT/DS285/R, para. 6.304.

Art. XVI. Under Art. XIX:1, sentence 2, effective market access should be understood as encompassing national treatment. Indeed, ensuring effective access to markets would involve the dismantling of domestic regulatory measures discriminating against foreign services or service suppliers, but also measures that, while origin-neutral, have a negative trade impact.

7 Art. XIX:1, sentence 3 replicates Rec. 3 of the Preamble to the GATS. Accordingly, services negotiations should aim to promote the interests of all participants. Thus, all WTO Members are to benefit from higher levels of liberalization and their interests, as a whole, should be taken into account when negotiations are held. Negotiations should also be **mutually advantageous**, ensuring a **balanced** outcome. The term "mutually advantageous" in GATT/WTO law is usually interpreted as implying demands for **reciprocity**. For instance, in the GATT, reciprocity is considered as inextricably associated with mutually advantageous negotiations. Indeed, Art. XXVIII*bis* GATT 1994 calls for tariff negotiations "on a reciprocal and mutually advantageous basis".[15] Reciprocity has been a crucial factor in the effort to substantially reduce tariff protection under GATT.[16] The fact that reciprocity does not appear in Art. XIX should have some meaning. Indeed, the absence of this term allows for a more flexible interpretation of the manner in which the promotion of the interests of all participants can be attained. This is corroborated by Art. XIX:2 and 3 which allow developing country Members to open their domestic services markets at a slower pace. Article XIX:1, sentence 3 also calls for a process that will ascertain the "**overall balance of rights and obligations**".[17] Ensuring a balance of rights and obligations is an objective that WTO Members (and previously the GATT Contracting Parties) had to abide by whenever negotiations on amending or modifying multilateral obligations have occurred. In essence, the balance of rights and obligations that was achieved when the GATT was first adopted in 1947 should not be upset by subsequent negotiations and changes in the multilateral trade rules.[18]

[15] See Rec. 2 of the Preamble to the GATT, but see also Rec. 3 of the Preamble to the GATS.

[16] *Mattoo*, in: *B. Hoekman et al.* (eds), 280, 285.

[17] Also, Council for Trade in Services, Guidelines and Procedures for the Negotiations on Trade in Services, S/L/93, 29 March 2001, para. 1.

[18] The prompt settlement of disputes equally aims to maintain a proper balance between the rights and obligations of Members. See Art. 3.3 DSU.

C. Sovereignty- and Development-Friendly Liberalization (Art. XIX:2)

8 Negotiating rounds in the service sector should take into account **national policy objectives** and the Members' **level of development**. The respect of Members' national policy objectives usually refers to the recognition of Members' **right to regulate** and to introduce new regulations to attain such objectives.[19] Therefore, Art. XIX:2 suggests that the liberalization process should not put in jeopardy Members' regulatory autonomy when this autonomy allows Members to attain their legitimate policy objectives. Rec. 3 and 4 of the Preamble to the GATS also lend support to this conclusion. As to the respect of the Members' development level, it can refer to the overall level of development of a given Member, but it can also relate to an individual sector. When the overall level of development does not match with the level of development of a given services sector, it is unclear what should be regarded as more relevant for the purposes of Art. XIX. For instance, *quid* when a Member's overall development level corresponds to that of a developing country, but its tourism sector is highly developed and dynamic? Should this Member be allowed to benefit from the developing-country-friendly provisions of Art. XIX? This should be answered in the affirmative on condition that this Member does not seek flexibility for tourism services.

9 In the absence of special and differential treatment provisions like those laid down in Part IV GATT 1994, Art. XIX:2, sentence 2 allows for **developing country Members offering fewer specific commitments than developed countries**. The wording that Art. XIX employs was reflected in the Montreal Declaration where the major developing countries vigorously advocated the inclusion of provisions allowing for additional flexibilities that would facilitate the participation of developing country Members in the multilateral trading system.[20] In this respect, Art. IV is inextricably linked to Art. XIX, as the latter provision somehow operationalizes the former with respect to GATS negotiations. In the Uruguay Round, and the subsequent negotiations on basic telecommunications and financial services, developing countries availed themselves of the flexibility accorded pursuant to Art. XIX:2. According to the WTO Secretariat, 98 out of the 99 Members who made commitments on 80 services sectors or fewer were developing countries.[21]

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[19] *Delimatsis*, 162.

[20] *Hoekman*, Working Paper No. 1220, 15–16.

[21] Council for Trade in Services, Recent Developments in Services Trade, Overview and Assessment, Background Note by the Secretariat, S/C/W/94, 9 February 1999, 11.

10 More specifically, in accordance with Art. XIX:2, developing countries are permitted to liberalize their services markets at their own pace. Importantly, **developing countries can condition access** to a given services sector on the achievement of one of the objectives set out in Art. IV:1.[22] The most relevant of the three objectives listed in Art. IV:1 is the strengthening of the developing countries' domestic services capacity, its efficiency and competitiveness. For instance, a mode 3 entry which would condition market access to the transfer of technology from the foreign supplier who aims to establish himself in a domestic market to domestic service suppliers would be consistent with this provision. Another example would be to make a commitment clarifying that no more than 50% of the employees in a subsidiary of a foreign supplier can be of foreign nationality, or demanding that the majority of the staff should come from the local area, ensuring in that way the dissemination of knowledge to the local population. Joint venture requirements and regular training of local personnel equally come under the Art. IV:1 lit. a objectives. Conversely, Art. XIX:2 would not cover a demand from developing countries that developed countries liberalize services sectors and modes of supply of export interest to developing countries. Such a demand would come exclusively within the ambit of Art. IV:1 lit. c. In any event, this element is central to the course of the ongoing negotiations, as it was endorsed in the Negotiating Guidelines[23] and the Hong Kong Ministerial Declaration.[24]

D. The Mechanics of Services Negotiations (Art. XIX:3)

11 The **adoption of negotiating guidelines and procedures** for each round of services negotiations is the prerequisite for the actual beginning of negotiations (Art. XIX:3, sentence 1). **Before the adoption** of negotiating guidelines, however, Members are called upon to undertake an **assessment of trade in services** not only in general terms, but also **sectorally** (Art. XIX:3, sentence 2). By the same token, Members are required to **establish modalities** for the treatment of **autonomous liberalization** undertaken between two negotiating rounds and for the **special treatment of LDCs**, as requested by Art. IV:3 (Art. XIX:3, sentence 3). These four tasks have to be accomplished for every prospective negotiating round on services.

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[22] *Grote*, Article IV GATS, paras 8 *et seq*.

[23] S/L/93, para. 5.

[24] Ministerial Conference, Sixth Session, Hong Kong, 13–18 December 2005, Doha Work Program, Ministerial Declaration, WT/MIN(05)/DEC, 22 December 2005, para. 27.

I. Assessment of Trade in Services (Art. XIX:3, Sentence 2)

12 According to Art. XIX:3, Members are required to perform a general and sector-specific **assessment of trade in services** before establishing negotiating guidelines and procedures for each round of negotiations. Indeed, while the current round started in early 2000 as required by Art. XIX:1, Members carried out an assessment of trade in services beforehand.[25] Nevertheless, at Members' request, this assessment has continued even after the adoption of Negotiating Guidelines and Procedures, as Members felt that the information that was generated was very valuable. Furthermore, the results of the assessment are to inform the negotiations and the latter should be adjusted accordingly. It bears noting that the assessment of trade in services is not an exercise *in abstracto*; rather, it should refer to the objectives of the GATS.[26] Special reference is made to the objective of the increasing participation of developing countries in trade in services and the expansion of their service exports, as identified in the Preamble and explained in more detail in Art. IV:1.

13 Members started the assessment by developing an **information exchange programme** that aimed to facilitate the access of all Members, particularly developing countries, to information with respect to laws, regulations and administrative guidelines and policies affecting trade in services. This information exchange exercise would allow Members, notably developing countries, to understand the issues at stake better and identify their interests and priorities before starting with the formal negotiations.[27] The Secretariat was also requested to assist in this exercise by preparing a series of background papers on several services sectors and on services overall.[28] Members have equally contributed to this exercise by submitting their experiences regarding the economic effects of services trade liberalization in their respective domestic services markets. The identification of factors that could assist Members in assessing the impact of services liberalization in their economies was an important element of this exercise.[29] Nevertheless, the lack of statistical data in services has been identified as the major factor jeopardizing the reliability of a quantitative assessment and undermining every Member's capability of preparing a thorough and accurate assessment

[25] Council for Trade in Services, Special Session, Report of the Meeting Held on 25 February 2000, Note by the Secretariat, S/CSS/M/1, 12 April 2000, para. 38.

[26] See above, para. 4.

[27] Ministerial Conference, Singapore, Singapore Ministerial Declaration, WT/MIN(96)/DEC, 18 December 1996, para. 19.

[28] A list of these documents is to be found in S/CSS/W/104, 38 *et seq*. The background sectoral papers are available at: <www.wto.org/english/tratop_e/serv_e/symp_assessment_serv_march02_e.htm> (last visited 1 October 2007).

[29] Council for Trade in Services, Special Session, Assessment of Services Liberalization: Potentially Relevant Considerations and Criteria, Note by the Secretariat, S/CSS/W/117, 15 November 2001.

of the effects that the liberalization of services brought about.[30] Moreover, there have been voices challenging the positive effects of the GATS and its development-enhancing aspects, and underscoring the failure of the GATS to ascertain an overall balance of rights and obligations, notably with respect to mode 4 liberalization and the opening of services sectors of export interest to developing countries.[31]

II. The Establishment of Negotiating Guidelines and Procedures (Art. XIX:3, Sentence 1)

14 Procedural Guidelines were adopted during the Uruguay Round. They set deadlines in accordance with which Members had to submit their offers and requests.[32] Nevertheless, the **Negotiating Guidelines and Procedures** that the Council for Trade in Services (Special Session) adopted for the current round of services negotiations were much more detailed.[33] It was only after adopting these Guidelines and Procedures in March 2001 (that is, more than a year after the formal initiation of services negotiations) that Members were actually in a position to initiate negotiations. Negotiations on trade in services have become part of the Doha work programme and the "single undertaking" that the latter implied, as the Doha Ministerial Declaration referred to these negotiations and the Guidelines and Procedures as the document on the basis of which negotiations are held.

15 The Guidelines are brim full of development-friendly objectives and principles, elaborating on the spirit of Art. XIX and its relation to Art. IV. In several instances, the Guidelines echo the wording of Art. XIX:1 and 2. More generally, they spell out flexibilities for developing countries and Members and the need to promote the **increasing participation of developing countries** in the multilateral trade in services pursuant to Art. IV. To this end, priority is to be given to least-developed countries in line with Art. IV:3.[34]

16 A significant development-friendly provision of the Guidelines is to be found in para. 15. It suggests that any subsequent review of the progress of negotiations should take into account whether the objectives of Art. IV have been pursued and, if not, identify ways and means to promote these

[30] Council for Trade in Services, Report (1999) to the General Council, S/C/10, 26 October 1999, para. 13.

[31] Council for Trade in Services, Special Session, Communication from Cuba, Dominican Republic, Kenya, Nigeria, Pakistan, Senegal and Zambia, Assessment of Trade in Services, TN/S/W/3, 10 June 2002.

[32] Group of Negotiations on Services, Uruguay Round, Procedural Guidelines for Negotiations on Initial Commitments, MTN.GNS/W/119, 2 July 1991.

[33] S/L/93.

[34] *Ibid.*, para. 2.

objectives. This process would ensure the **effective implementation** of Arts IV and XIX:2. While para. 15 of the Guidelines was fiercely negotiated in order to form part of the Guidelines, negotiating history does not demonstrate any significant or formal attempt by the WTO Membership to abide by this provision. Members, however, are called upon to evaluate, **before** the end of the negotiating round, the results achieved that contributed to the realization of the Art. IV objectives.[35] In other words, the current negotiating round cannot be regarded as concluded unless Members conduct an evaluation of the contribution of the results achieved at that point in time to the objectives set out in Art. IV.

17 As to the modalities, Members negotiate within the Council for Trade in Services in the form of Special Sessions. In addition, requests for further liberalization should be based on the current Schedules.[36] This implies that Members are expected to be more ambitious than in the previous negotiations, in terms both of offers and requests. Hence, para. 10 of the Guidelines has a **standstill** function. Finally, the Guidelines did not refer to a time frame for the conclusion of negotiations. In any case, Members failed to respect subsequent timeframes in many instances in the course of the GATS 2000 negotiations.

III. Credit for Autonomous Liberalization (Art. XIX:3, Sentence 3)

18 Art. XIX:3, sentence 3 requires the establishment in each negotiating round of modalities that determine the treatment of **autonomous liberalization** undertaken since the end of previous negotiations. The Negotiating Guidelines and Procedures agreed to during the current round of negotiations required, in para. 13, that Members establish criteria that would allow giving credit where a Member undertook liberalization commitments unilaterally after the end of the Uruguay Round negotiations.[37] Art. XIX:3 does not limit the granting of such credit to developing countries that liberalized unilaterally, but extends this to **any** Member.[38]

19 After a prolonged period of discussion and several proposals submitted by Members, the Special Session of the Council for Trade in Services adopted the **Modalities for the treatment of autonomous liberalization** (hereinafter "the Modalities").[39] According to the Modalities, a liberalization measure **undertaken autonomously** can benefit from credit provided

[35] *Ibid.*, para. 15.
[36] *Ibid.*, para. 10.
[37] *Ibid.*, para. 13.
[38] *Türk & Speed*, Autonomous Services Liberalisation, 15.
[39] Council for Trade in Services, Special Session, Modalities for the Treatment of Autonomous Liberalization, TN/S/6, 10 March 2003.

that it is: (a) subject to scheduling under Arts XVI, XVII or XVIII, and/or terminates an earlier MFN exemption; (b) MFN-compatible; (c) undertaken unilaterally; and (d) applicable to any or all services sectors. These conditions should be met cumulatively. Regarding the third criterion, measures that are adopted as part of an economic reform programme, including those led by the IMF or the World Bank, can still be regarded as autonomous liberalization measures. The Modalities clarify that liberalizing Members are not obliged to write these measures into their Schedules. Rather, these Members are expected to negotiate this in exchange for appropriate credit in the bilateral market access discussions.[40] The Modalities do clarify, however, that the willingness of a liberalizing Member to schedule the measure at stake at the end of the negotiating round should have considerable weight when the trading partner assesses the value of that measure autonomously undertaken.[41]

20 The **Modalities lay down** several **criteria** that a **negotiating partner can use to assess the value of an autonomous liberalization measure**. To be sure, a given autonomous liberalization measure can be valuable for one or some negotiating partners, but not for others. Liberalizing part of a sector or sectors where the liberalizing Member has an interest in making or refraining from pursuing a request addressed to the liberalizing Member can be deemed as "credit" granted for an autonomous liberalization measure within the meaning of the Modalities. Members can nevertheless agree bilaterally that credit take another form. Additionally, the Modalities urge Members to take account of the level of development of developing countries and the objective of increasing their participation in services trade during the evaluation, recognition and granting of credit for an autonomous liberalization measure. The Modalities were accompanied by a statement submitted by the chairperson that highlighted the special treatment that might be appropriate for newly acceding Members which, admittedly, had made more thorough commitments than those Members at the same level of development which had acceded before the end of the Uruguay Round negotiations. The statement urged Members to take this into account when they address requests to those Members. In turn, it suggests that sympathetic consideration should be given to requests for concessions from those new Members. In addition, the modalities for the special treatment of LDCs[42] called upon Members to refrain from requesting credit for autonomous liberalization from LDCs.

21 **Giving credit for autonomous liberalization** undertaken between two rounds of negotiations may be useful in that it can constitute an **incentive**

[40] *Ibid.*, para. 9.
[41] *Ibid.*, para. 4 lit. i and footnote 3.
[42] See below, paras 22 *et seq.*

for Members to undertake autonomous liberalization.[43] From a policy perspective it may be correct to have in an international trade agreement an *ex ante* commitment that credit for autonomous liberalization will be given in future negotiating rounds.[44] The lauding of autonomous liberalization is mainly driven by the consideration that voluntary concessions deserve to be recognized. However, economists would argue that unilateral liberalization is usually the best way to enhance domestic welfare. This is so because voluntary liberalization will normally be the result of the recognition that domestic regulatory reforms are needed to enhance the competitiveness of a given domestic services sector or of the domestic economy overall.

IV. Modalities for the Special Treatment of LDCs (Art. XIX:3, Sentence 3)

22 Art. XIX:3 requires that Members establish **modalities for the special treatment of LDCs** (hereinafter "the LDC Modalities"). This provision aims to bring Art. IV:3 into operation. The structure of Art. XIX:3 reveals that such modalities, just like those on autonomous liberalization, should form part of the negotiating guidelines. In practice, however, Members managed to agree on both types of modalities only two years after the adoption of the Negotiating Guidelines for this round of negotiations.

23 While LDCs strived for full market access and national treatment in sectors of export interest to them for this negotiating round,[45] the Council for Trade in Services ultimately adopted a text that did not meet the LDCs' high expectations.[46] That was partly because it would be difficult to expect that developed country Members would undertake full market access commitments, given that such commitments would be subject to the MFN principle and, thus, the liberalizing Members would be obliged to open their services markets in these specific sectors to **every** Member. Hence, neither Art. XIX:3 nor Art. IV:3 has ever been interpreted as implying the granting of preferential access for services and service suppliers originating in LDCs. This is in sharp contrast with the GATT, where such mechanisms do exist and allow the granting of preferential treatment to LDCs.[47] The

[43] *Mattoo*, in: *Hoekman et al.* (eds), 280, 288.

[44] *Mattoo & Olarreaga*, Research Working Paper No. 2374, 12.

[45] Council for Trade in Services, Special Session, Communication from the LDC Group, Draft Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services, TN/S/W/13, 7 May 2003.

[46] Council for Trade in Services, Special Session, Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services, TN/S/13, 5 September 2003.

[47] The most prominent example is the so-called "Enabling Clause". See Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, L/4903, 28 November 1979. For the historical development and the importance of this clause, see Appellate Body Report, *EC—Tariff Preferences*, WT/DS246/

LDC Group recognized this setback and submitted a proposal that would create a mechanism allowing the granting of non-reciprocal special priority to LDCs in derogation from the MFN principle.[48]

24 In the absence of this option, what **LDCs can expect** to receive is **technical assistance** during and after the services negotiations to facilitate the effective access of LDCs' services and service suppliers to foreign markets. The LDC Modalities also seem to confirm this. However, Members confirmed during the Hong Kong Ministerial Meeting that LDCs should **not** be **expected to make new commitments**. Viewed from this angle, then, LDCs will benefit from the new liberalization commitments that the rest of the WTO Membership will undertake, without nevertheless the LDCs being requested to make more substantial commitments in exchange than they did during the Uruguay Round.

25 Para. 7 of the LDC Modalities urged Members to develop the necessary mechanisms that would achieve full implementation of Art. IV:3 and facilitate effective access of LDCs to foreign markets. Divergent views were expressed regarding the issue of the implementation of the LDC Modalities during the course of services negotiations. The Hong Kong Ministerial Declaration incorporated specific language as to the **implementation** of these modalities and urged Members to expedite the procedures.[49] In addition, the LDC Group submitted a fairly comprehensive **collective request** in mode 4. The LDC Group requested that Members undertake specific commitments in respect of four categories of natural persons (independent professionals, business visitors, contractual service suppliers, and others), with each category applying to a wide number of specified sectors of export interest to this group. In Hong Kong, Members affirmed that priority should be given to the sectors and modes of supply of export interest to LDCs, notably with respect to mode 4.[50] In any event, discussions relating to the LDC Modalities and the review of their implementation are undertaken within the Council for Trade in Services in its Special Session.

AB/R, paras 106–109. Another S&D (special and differential treatment) mechanism in the goods realm is: Council for Trade in Goods, Preferential Tariff Treatment for Least-Developed Countries, Decision on Waiver, WT/L/304, 17 June 1999.

[48] Council for Trade in Services, Special Session, Communication from the Republic of Zambia on behalf of the LDC Group, A Mechanism to Operationalize Article IV:3 of the GATS, TN/S/W/59, 28 March 2006.

[49] WT/MIN(05)/DEC, Annex C, paras 3, 9, 11 lit. e.

[50] WT/MIN(05)/DEC, para. 47.

E. Negotiating Techniques (Art. XIX:4)

26 Art. XIX:4 provides that progressive liberalization of trade in services can be achieved through **bilateral**, **plurilateral** or **multilateral** negotiations. Thus, Article XIX:4 entails an open definition of possible negotiating methods.[51] At first blush, it appears that the three **negotiating techniques** stand on an equal footing. Nevertheless, as in other trade areas, Members consider the **bilateral request-offer** method as the main technique for their negotiations. Members expressed their preference for the request-offer method of negotiations in the Negotiating Guidelines and Procedures,[52] although there are other negotiating techniques that may be more advantageous and effective than the traditional request-offer approach.[53] On the other hand, the request-offer approach allows Members to harness the negotiating process and may prevent *demandeurs* from advancing more ambitious and efficient options.

27 Under the **request-offer approach**, negotiations aiming at higher levels of liberalization mainly take the form of a **bilateral bargaining process** based on requests and offers. Requests will typically be addressed bilaterally to other Members or a group of Members, while offers will circulate multilaterally for transparency's sake. This approach entails an initial exchange of requests and offers, which may be followed by subsequent rounds of "revised" requests and offers until the commitments are adopted in the form of final Schedules. In the meantime, consultations may take place between the *demandeurs* and the countries that received the requests, as well as between the Members that submitted their offers and the rest of the Membership. These bilateral consultations allow Members to clarify terms and conditions included in the offers and requests that circulated previously.

28 As to the content, requests and offers usually seek or offer: (1.) the addition of new sectors in a Member's Schedule; (2.) the removal of present limitations or the introduction of bindings in modes that have so far been unbound; (3.) the undertaking of additional commitments under Article XVIII; and/or (4.) the termination of MFN exemptions, if applicable. A **request** generally takes the form of a letter where a Member (or group of Members in plurilateral requests) explains what it requests of another Member. On the other hand, a Member will circulate its **offer** in response to all the requests that it has received. Many governments have used the process for technical amendments with a view to clarifying existing commitments without improving the level of access implied. The—conditional—offer does not prejudice a Member's right to add, withdrew or modify its content at

[51] *Adlung*, JIEL 9 (2006), 865, 884.
[52] S/L/93, para. 11.
[53] *Thompson*, in: *OECD*, 51; also *Nielson et al.*, in: *OECD*, 61.

any time prior to the conclusion of the negotiations. It had been agreed at the beginning of this process that an informal document that consolidates all Schedules that Members had previously submitted (including, where applicable, the results of the extended negotiations on financial services and basic telecommunications) would be used as a basis. It follows that the draft Schedules are negotiating documents without legal status. A number of Members, mostly developed countries, nevertheless circulated them as derestricted documents that are publicly available.

29 It was acknowledged in the Hong Kong Ministerial Declaration that, **in addition to** bilateral request-offer negotiations, Members can negotiate on a **plurilateral** basis, allowing Members to prepare **collective requests** and **offers**.[54] Under the plurilateral request-offer approach, collective meetings on sectoral or modal lines are organized between *demandeurs* and *addressees*. That happened because the bilateral request-offer technique can be very resource-intensive and time-consuming. Another reason for this preference is that some of the initially reluctant Members have become more ambitious and pro-active in services negotiations.[55] Informally, plurilateral approaches had already been used before the Hong Kong Ministerial meeting.[56] In fact, the plurilateral request and offer process is the logical extension of the so-called "Friends" groups. Such groups typically aim to advance a negotiating agenda that reflects their collective interests. Thus, groups of Members coordinated together and prepared requests collectively. Such requests can be addressed to one or several trading partners with respect to any services sector or mode of supply. To ascertain compliance with the MFN requirement, the Hong Kong Ministerial Declaration clarifies that the final results of these negotiations must be applied on a MFN basis.

30 **Formula** techniques have also been put forward in the services negotiations as a complement to the request-offer type of negotiations. Such approaches seek to implement shared goals for the market access part of a negotiation or to enhance transparency and compatibility of the results by way of mutually coordinated scheduling techniques and/or understandings.[57] Formulae and models can be used with respect to a specific services sector or mode of supply, but also with regard to *all* services sectors, *i.e.* horizontally. They can be **quantitative** (*e.g.*, numerical targets or minimum sectoral coverage) but also **qualitative** (for instance, common disciplines with regard to measures not falling within Arts XVI and XVII such as the regulatory and competition principles laid down in the Reference Paper on Basic Telecommunications). Formulae can also build on the so-called "cluster"

[54] WT/MIN(05)/DEC, Annex C, para. 7.
[55] *Hoekman*, Fed. Reserve Bank St. Louis Rev. 82 (2000) 4, 31.
[56] *Jara & del Carmen Domínguez*, JWT 40 (2006), 113, 122.
[57] *Thompson*, in: *OECD*, 51.

approach.[58] This approach aims at the liberalization of clusters of interrelated sectors, for instance health care and health insurance services.

31 Both **quantitative** and **qualitative** formulae can be useful in the case of services. Qualitative formulae in the form of model schedules were utilized, *inter alia*, in sector-specific negotiations in the aftermath of the Uruguay Round. Indeed, standardized approaches to scheduling and additional regulatory commitments are evident in the model schedule for basic telecommunications, the draft model schedule on maritime transport, the Reference Paper on Basic Telecommunications, or previously in the Understanding on Commitments in Financial Services. Model schedules do not normally specify the content of commitments, but improve their clarity and consistency by (1.) identifying a core set of sub-sectors for which commitments are sought from a "critical mass" of participating Members; (2.) proposing measures for joint liberalization, modification, or abolition (for instance, vague Economic Needs Tests (ENTs)); or (3.) specifying areas where additional commitments may be undertaken. For example, the Reference Paper on Basic Telecommunications entails a set of regulatory principles to be inscribed in Members' Schedules as additional commitments. The underlying rationale has been that, given the long tradition of public monopolies in this sector, the commercial value of the newly undertaken commitments on market access and national treatment in telecommunications needs to be protected through the adoption of rules on enhanced regulatory transparency, access to essential facilities and competitive safeguards.

32 **Formulae approaches** have been **extensively used in merchandise trade**. This fact, however, does not necessarily mean that these are equally applicable under the GATS.[59] However, their use in the negotiating process can reduce transaction costs, minimize the risk of scheduling errors, and thus help to achieve better results across a broader range of Members than the traditional request-offer process.[60]

33 The framework of negotiating objectives promulgated in Annex C to the **Hong Kong** Ministerial Declaration can be viewed as a **formula-type "best endeavours" approach**.[61] Members are encouraged to take into account several mode- and measure-specific objectives during the request-offer negotiations.[62] For instance, Members are called on to make status

[58] *Nielson et al.*, in: *OECD*, 61; also Council for Trade in Services, Special Session, Communication from the European Communities and Their Member States, The Cluster Approach, S/CSS/W/3, 22 May 2000.
[59] *Adlung*, JIEL 9 (2006), 865, 885.
[60] *Ibid.*
[61] WT/MIN(05)/DEC, Annex C, para. 1.
[62] *Ibid.*, para. 2. For this (non-binding) list of objectives see, Council for Trade in Services, Special Session of the Council for Trade in Services, Report by the Chairman to the Trade Negotiations Committee; TN/S/23, 28 November 2005, Annex B.

quo bindings in modes 1 and 2 on a non-discriminatory basis and remove or reduce the number of ENTs under modes 3 and 4.

F. Outlook

34 The current round of services negotiations is the first one during which Members have attempted to operationalize the requirements and conditions of Art. XIX in order to start the second round of services negotiations, as they were required pursuant to Art. XIX:1. While Members did not in various instances manage to meet the deadlines that they had agreed on before and during the current services negotiations, one should take into account that Members did not have any guidance and thus much "learning-by-doing" was involved. Because services negotiations were incorporated in the Doha work programme, the fact that Members set new deadlines for several issues, from submitting initial offers to establishing LDC modalities or bringing to a close the unfinished business on the GATS regulatory front, did not really affect the final outcome because the multilateral trade negotiations overall have been more time-consuming than initially anticipated.

35 On the other hand, the fact that services negotiations were included in the Doha work programme arguably resulted in Members considering this area as a negotiating chip rather than an autonomous trade area where the potential gains abound. As Members are required to start new negotiations at intervals after the end of the current services negotiations, it would be interesting to observe Members' behaviour in a context devoid of negotiations in other trade areas. This, however, seems to be unlikely, given the single-undertaking nature of the WTO Agreement. Members would prefer starting negotiations in all areas simultaneously in the form of the traditional negotiating rounds, so that possibilities for trade-offs multiply. Viewed from this perspective, Art. XIX may function as a liberalizing vector in other trade areas as well, because Members, when they start services negotiations periodically, will have an incentive to start negotiations for further liberalization in all areas covered by the WTO. Even so, services negotiations will not generate meaningful liberalization unless they are driven by domestic priorities and forces that gradually encompass the extensive payoffs associated with the pursuit of regulatory reforms in the service sector.[63/64]

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[63] *Hoekman & Mattoo*, J. Int'l Dev. 12 (2000), 283, 295.

[64] The author wishes to thank *Petros Mavroidis* for valuable comments on an earlier draft.

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Article XX GATS
Schedules of Specific Commitments

1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:
   a) terms, limitations and conditions on market access;
   b) conditions and qualifications on national treatment;
   c) undertakings relating to additional commitments;
   d) where appropriate the time-frame for implementation of such commitments; and
   e) the date of entry into force of such commitments.
2. Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.
3. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof.

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Cross References

Arts 31.1, 32 VCLT.

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A. Introduction

1 The value of the GATS for the regulation of international trade and investment in services would be limited if all there was to it were its twenty-nine Articles and a handful of sectoral Annexes. The GATS addresses the regulation of trade and investment in services at three levels: 1) through general disciplines that apply to domestic rules and practices that affect services; 2) through Annexes on the regulation of particular services sectors or modes of supply; and 3) through the undertaking of commitments on market access and national treatment in trade and investment in services.[1] The first level is reflected in the text of Part II the GATS itself, from Arts II–XV. The second level is found in the sectoral Annexes which provide for specific disciplines on particular sectors and modes of supply.[2] **The Schedules of specific commitments establish the link between the GATS obligations on market access, national treatment and additional commitments, and the internal disciplines on services of each WTO Member**, completing the third level of trade regulation of the Agreement.

2 The Schedules of commitments are the instrument provided for by the Agreement to carry out its guiding principle of progressive liberalization. Indeed, Art. XX, together with Art. XIX on Negotiation of Specific Commitments and XXI on Modification of Schedules, falls within the

[1] *Feketekuty*, in: *Stephenson* (ed.), 19, 25.
[2] Namely, the Annex on Movement of Natural Persons, the Annex on Financial Servicess, and the Annex on Telecommunications.

framework of Part IV of the GATS, which sets the mechanisms directed to achieving the removal of barriers to trade and investment in services. The content of the Schedules of specific commitments is the result of the multilateral round of negotiations conducted according to the principles set out in Art. XIX. While the negotiations are aimed, according to Art. XIX:1, at achieving a "progressively higher level of liberalization", it is worth noting that **the Schedules of commitments do not necessarily entail liberalization obligations** on the country concerned. Whether or not the commitments undertaken by each WTO Member imply the introduction of more liberal measures than those already in force is subject to the bargaining during the negotiating round. In fact, the GATS has been said to provide only limited—or none at all—liberalization of domestic trade in services regimes.[3]

3 Art. XX deals with the Schedules of specific commitments. A **Schedule of specific commitments is a list of undertakings a Member enters into with regard to market access (Art. XVI), national treatment (Art. XVII) and other disciplines (Art. XVIII)**.[4] As such, the Schedule of commitments operates as the link between the domestic measures on trade and investment in services and the obligation enshrined in Arts XVI and XVII of the Agreement. GATS Schedules of specific commitments are comparable to the GATT's bound tariffs, which set a ceiling on the tariff rates that a country may apply, but countries remain free to apply lower rates than the bound rates. Similarly, WTO Members remain free to apply a more liberal services regime than that laid down in the GATS Schedules of commitments, but may not restrict trade in services where commitments were undertaken.

4 The purpose of the scheduling guidelines set out in Art. XX is to ensure clarity and precision with regard to the scheduling of commitments undertaken by the Members.[5] In this context, **the main achievement of GATS Schedules of commitments consists in establishing a multilateral framework for binding domestic policies in trade in services**, providing for greater transparency and predictability for international trade and investment in services.

[3] See, for instance, *Adlung & Roy*, 3; also *Altinger & Enders*, World Econ. 19 (1996), 307, 326; *Hoekman*, Tentative First Steps, 17–18 and 25.

[4] For the content and structure of GATS Schedules of specific commitments, see below, para. 9 *et seq*.

[5] Panel Report, *Mexico—Telecoms*, WT/DS204/R, para. 7.368.

B. GATS Obligations Relating to Specific Commitments (Art. XX:1, Sentence 1)

5 Art. XX:1, sentence 1, provides that "[e]ach Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement". In the first place, the provision indicates the **country-specific nature of the Schedules of commitments**, which entails that the commitments undertaken therein bind only the WTO Member concerned.[6]

6 The GATS is divided into six parts[7], of which only Parts II and III contain substantive obligations. Part II on "General Obligations and Disciplines" sets out, *inter alia*, the core disciplines governing services, such as most-favoured-nation treatment (Art. II), rules on domestic regulation (Art. VI) and transparency (Art. III), rules on economic integration agreements (Art. V) and provisions on transfer of funds (Art. XI) and balance of payments (Art. XII). Disciplines enshrined in Part II of the Agreement are general in scope and apply, in principle, either across all scheduled sectors, or even all services sectors covered by the GATS. By contrast, the provisions found in Part III on "Specific Commitments" (Art. XVI on Market Access, Art. XVII on National Treatment, and Art. XVIII on Additional Commitments) are not universal and enshrine obligations only with regard to the services sectors and modes of supply in which each WTO Member has undertaken commitments. **The Schedule of specific commitments therefore determines to what services activities, and modes of supply, and under what conditions, the market access and national treatment obligations apply to each WTO Member.**

7 Despite this general rule, however, a **number of obligations enshrined in Part II of the GATS are also limited by the Schedules of commitments**. That means that some general obligations of Part II are only applicable to the services with regard to which the country has undertaken specific commitments. A cursory review of Part II of the GATS shows that

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[6] In the case of the European Union, both the European Community and its Member States share compentences in the ambit of trade in services. In light of this fact, a single GATS Schedule of commitments—the EC's Schedule- features the specific commitments of the Union and each of its members. The fact that EU Member States share certain competences in services is reflected, in practical matters, in commitments and restrictions undertaken by only some of the EU Members and not others, albeit that all of them are included in the same Schedule, in the same fashion as the Schedules of some federal countries. On the shared competences between the EU and its Members States, see ECJ, Opinion 1/94, Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property—Article 228 (6) of the EC Treaty, [1994] E.C.R.-I. 5276.

[7] Namely, Part I Scope and Definition, Part II General Obligations and Disciplines, Part III Specific Commitments, Part IV Progressive Liberalization, and Part V Institutional Provisions, and Part VI Final Provisions.

the "general" disciplines in Part II which are subject to specific commitments include: the obligations on transparency regarding the introduction of or changes in regulation affecting trade in services (Art. III:3); the obligation to provide for reasonable, objective and impartial administration of domestic regulation affecting trade in services (Art. VI:1); the stand-still obligation coupled with a soft "necessity test" on licensing and qualifications requirements and procedures and technical standards (Art. VI:5); the obligation to provide adequate procedures for verifying the competence of professionals of other WTO Members (in specific commitments regarding professional services) (Art. VI:6); the obligation to ensure that the conduct of monopolistic service suppliers does not impair the operation of specific commitments (Art. VIII:1–2); the obligation to inform the Council for Trade in Services (CTS) where monopoly rights are granted (Art. VIII:4); and the prohibition on applying restrictions on international current transactions (Art. XI:1).

8 The market access and national treatment obligations established in Part III of the GATS apply to the services and modes listed in the Schedules of commitments *in the terms and conditions* established therein. The general disciplines enshrined in Part II mentioned above also apply only to services sectors where specific commitments were undertaken, but **Members are not entitled to introduce further qualifications to general obligations established in Part II**, as they are with regard to the market access and national treatment obligations.

C. Structure and Content of the Schedules of Commitments (Art. XX:1, Sentence 2)

9 Art. XX:1, sentence 2, requires that each Schedule of specific commitments, with respect to the service sectors in which specific commitments are undertaken, specify the:

(a) terms, limitations and conditions on market access;
(b) conditions and qualifications on national treatment;
(c) undertakings relating to additional commitments;
(d) where appropriate the time-frame for implementation of such commitments; and
(e) the date of entry into force of such commitments.

10 In the terms of the Panel in the *Mexico—Telecoms* case, "specifying" requires that an entry describes each measure concisely, indicating the elements that make it inconsistent with the market access and national treatment disciplines.[8]

[8] *Mexico—Telecoms*, WT/DS204/R, para. 7.76.

11 The provision reproduces the language found in **Arts XVI and XVII** with regard to the "terms, limitations and conditions" that pertain to commitments on market access, and the "conditions and qualifications" on commitments in national treatment. In essence, commitments under both obligations require the scheduling country to specify to what extent and under what conditions the market access and national treatment obligations are applicable to the service sector concerned. This is also confirmed by the scheduling practice of WTO Members, where the measures lodged in one or the other column do not present formal differences.[9] The **different language utilized in both provisions does not seem to entail a difference between the elements to be inscribed** under market access or national treatment.[10]

12 The structure of the Schedules of specific commitments is one of the GATS' distinct characteristics. GATS Schedules broke new ground in the landscape of international trade agreements as they pioneered an innovative mechanism of undertaking commitments in the area of trade in services, reflected in the structure and content of the Schedules of commitments. Remarkably, however, the Agreement itself—and Art. XX in particular—says little about the GATS Schedules, and many of the specifications on the scheduling of commitments have been clarified in the "Scheduling Guidelines" of 1993, and the revised version of 2001.[11]

I. Sectoral Classification

13 A first element of the Schedule of commitments is given by the indication of the services activities in which specific commitments are undertaken, reflected in the first column of the table. GATS market access and national treatment provisions refer to the services "sectors" where commitments are undertaken. **Members are to list the services activities with regard to which they wish to undertake specific commitments**

[9] Occasionally, measures that should have been lodged as national treatment limitations appear under the market access column and *vice versa*. A number of offers and requests exchanged in the course of the services negotiations of the Doha Round have taken account of these misplacements, and Members have sought to correct them in the Schedules to enter into force at the end of the round.

[10] See below, footnote 24.

[11] See Group of Negotiations on Services, Uruguay Round, Scheduling of Initial Commitments in Trade in Services, Explanatory Note, MTN.GNS/W/164, 3 September 1993; Group of Negotiations on Services, Uruguay Round, Scheduling of Initial Commitments in Trade in Services, Explanatory Note, Addendum, MTN.GNS/W/164/Add.1, 30 November 1993; Council for Trade in Services, Trade in Services, Guidelines for the Scheduling of Specific Commitments under the GATS, Adopted by the Council for Trade in Services on 23 March 2001, S/L/92, 28 March 2001.

in market access or national treatment—or where they want to undertake additional commitments.[12]

14 **The GATS thus features a positive list of sectors**, whereby countries are required expressly to indicate the services sectors subject to the market access and national treatment obligations. Unlike in so-called 'negative list' agreements, market access and national treatment obligations in the GATS do not apply across the board to all services, but rather are limited to those activities that Members have inscribed in their Schedules of commitments. Services not included in the Members' Schedules fall outside the scope of Arts XVI and XVII, and are subject only to the disciplines enshrined in Part II of the GATS, as described above.

15 In general, **the classification of sectors and subsectors should be based on the "Services Sectoral Classification List" ("W120" list)**,[13] which records close to 160 different services. **Countries may further refine a services sector into the desired degree of specificity**. To this purpose, countries may resort to the UN Provisional Central Product Classification (CPC).[14] Commitments may hence be taken at the sectoral level (*e.g.* construction and related engineering services, CPC code 51), subsectoral level (*e.g.* construction work for buildings, CPC code 512), or for individual services (*e.g.* construction work for commercial buildings, CPC code 51240).[15] The undertaking of a commitment at a 'sectoral' level entails a commitment in all the subsectors included in that sector. The use of either the Services Sectoral Classification List or the CPC was not mandatory for countries, but only encouraged, so that they may also resort to any other international classification system or use their own definitions.

16 Where countries choose to depart from the W120 or CPC nomenclature, the **classification and definition of services should clearly depict the intended activity, so as to avoid ambiguities in the scope of the commitment**. The Appellate Body has in this regard stated that "the sectors and subsectors in a Member's Schedule must be mutually exclusive",[16] so that one service activity cannot be covered by two or more services sectors or subsectors. With regard to questions concerning the scope

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[12] See Appendix 1 below, para. 52, for an illustration of a Schedule of commitments.

[13] Group of Negotiations on Services, Uruguay Round, Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120, 10 July 1997.

[14] Provisional Central Product Classification, Statistical Papers, Series M No. 77, United Nations, 1991. The UN CPC which was the basis for the GATT secretariat's classification has been replaced by the 2002 version. The current version is Central Product Classification Version 1.1, ST/ESA/STAT/SER.M/77/Ver.1.1, E.03.XVII.3, see also <unstats.un.org/unsd/cr/family2.asp?Cl=16> (last visited 1 October 2007).

[15] Art. XXVIII lit. e clarifies that "'sector' of a service means, (i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule, (ii) otherwise, the whole of that service sector, including all of its subsectors".

[16] Appellate Body Report, *US—Gambling*, WT/DS285/AB/R, para. 180.

of the commitments, the Appellate Body has considered the W120 list to constitute a "supplementary means of interpretation" in the terms of Art. 32 VCLT[17],[18] which may shed light on the interpretation of the Schedule, including in those cases where the country has not explicitly drawn up a Schedule in accordance with the W120 definitions.

17 Additionally, as much as countries may detail the service activity in regard to which they wish to make commitments, **countries may also make commitments (or introduce restrictions) for all services with one single entry**. This occurs through so-called horizontal commitments which apply to all services listed in the country's Schedule of commitments.[19] Furthermore, some WTO Members have listed commitments with regard to all services falling within a given sector or subsector (*e.g.* all professional services), in a sort of "sectoral horizontal commitment".[20]

II. Division by Modes of Supply

18 **Once a Member has listed the service sector, it must describe the specific commitments it undertakes under both market access and national treatment disciplines**. Commitments with regard to one or the other obligation are set out in two different columns, one for each provision, as illustrated in the Appendix. Countries are further to specify the mode of supply affected by the individual specific commitments, resulting in four different entries in each column. In practice, this is reflected in the fact that each market access and national treatment column provides four lines where commitments can be undertaken, indicated by the numbers (1), (2), (3) and (4), for each of the four different modes of services supply. This way in which countries are required to inscribe commitments is another distinct feature of the GATS.[21]

19 In this way, **GATS Schedules "treat" each of the four modes of supply separately**, and therefore WTO Members are required to enter the commitments they undertake individually with regard to each differ-

[17] Vienna Convention on the Law of Treaties, 23 May 1969, ILM 8 (1969), 679.

[18] *US—Gambling*, WT/DS285/AB/R, paras 196–197.

[19] See below, para. 20 for an explanation on how horizontal commitments operate.

[20] One Member, for instance, has introduced an entry under the heading "4. Distribution Services" that affects all commitments undertaken in this regard, in the following terms "4. Distribution Services (Excluding distribution of pyrotechnical goods, ignitable articles and blasting devices, firearms, ammunition and military equipment, tobacco and tobacco products, pharmaceutical products, medical and surgical devices, toxic substances, certain medical substances and objects for medical use)" (Austria, Schedule of Specific Commitments, GATS/SC/7, 15 April 1994, 20).

[21] For a detailed explanation of the scope and definition of the four modes of supply covered by the GATS, see *Zacharias*, Article I GATS, para. 37–47. See also *WTO*, Handbook, 4; S/L/92, 8–10.

ent mode of supply. This distinction is usually not made in the text of the Agreement, which more generally refers to "services and services suppliers" or to "sectors where specific commitments are undertaken", thus giving the idea that commitments may be differentiated by sectors, but not saying anything about different commitments in different modes. Nonetheless, given the important differences that each mode of supply contains with regard to its regulation, countries involved in the Uruguay Round felt the need to tackle commitments in each mode of supply individually.[22]

III. Commitments

1. Horizontal Commitments

20 Entries in the horizontal section follow the divisions in market access, national treatment and additional commitments as described below, except for the fact that they do not necessarily indicate all four modes of supply within the market access and national treatment columns, but only those modes with regard to which a horizontal commitment is effectively undertaken. Importantly, **horizontal commitments qualify all entries—for the mode of supply concerned—in the Schedule of commitments**. A horizontal entry is understood to be replicated in each sectoral entry.

21 For this reason, **sector-specific commitments must be read together with the horizontal section of the Schedules**, in order to grasp the full extent of the commitments. In this regard, according to the 2001 Scheduling Guidelines a "none" in the sectoral section must be read as meaning "none except the conditions set out in the horizontal section". To indicate in a given sector that no restrictions whatsoever are imposed, Members must make clear—whether in the sectoral or horizontal section—that the horizontal restriction does not apply in the sector concerned. In the case of sector-specific restriction the entry must be read as the combination of the horizontal restrictions and the sector-specific restriction, unless otherwise explicitly provided in the entry.[23]

2. Commitments Under Market Access and National Treatment Obligations

22 Art. XX:1, in line with the text of Arts XVI:1 and XVII:1, indicates that the Member's Schedule of commitments shall specify, *inter alia*, the "(a) terms, limitations and conditions on market access" and "(b) conditions and qualifications on national treatment". As noted above, notwithstanding the different language, both provisions are addressed to point out that **Members**

[22] The scheduling using modes is laid down in paras 3 and 26 of the Scheduling Guidelines, S/L/92.

[23] S/L/92, para. 37.

may introduce in their Schedules the desired limitations and qualifications under which they will apply the market access and national treatment commitments.[24]

23 Under these terms, the GATS grants flexibility to Members to undertake commitments in the scheduled sector at any degree of openness—subject, naturally, to the negotiating dynamics, or the resistance of domestic vested interests. Countries may hence undertake full commitments, whereby they commit to apply no measures denying either market access or national treatment to the relevant sector and mode of supply. **A full commitment is undertaken by inscribing the term "None" (*i.e.* "no limitations") for the obligation and mode of supply concerned**.[25]

24 Alternatively, countries may also exclude a given mode of supply from the scope of the market access and/or national treatment provisions, while making commitments in other modes of supply. **The lack of commitments in a scheduled sector is indicated by the entry "Unbound" in the mode of supply concerned in the market access and national treatment columns respectively**. It may be recalled that, where all modes of supply are "unbound" for both market access and national treatment obligations, the sector should not be listed in the Schedule of commitments unless an additional commitment is undertaken in this regard. In some cases, the provision of a service by means of a given mode of supply may not be technically feasible. In such cases, Members are required to enter "Unbound" with regard to that mode of supply, with the addition of an asterisk (*) to signal that event.[26] The Appendix[27] provides an example.

25 Finally, **countries may undertake commitments with certain limitations for a given mode of supply and provision—so called, partial commitments—**, by inscribing the relevant qualifications to the obligation concerned. In doing so, Members may indicate the restrictions they wish to maintain—or be free to introduce in the future—, while making clear that all other measures will be consistent with the market access and

[24] The different language utilized in both provisions ("terms, limitations and condition", as opposed to "conditions and qualifications") seems not to have a relevant legal meaning in terms of scope. This is also confirmed by the scheduling practice of WTO Members, which seem to make no formal difference with regard to the measures that can be inscribed under either provision. Indeed, both market access and national treatment columns in the Schedule of commitments are headed the same ("limitations on"), as illustrated in the Appendix, below, para. 52.

[25] For a detailed review of the obligations enshrined in the market access and national treatment provisions, and, hence, the precise type of measures to be scheduled in each case, see *Delimatsis & Molinuevo*, Article XVI GATS and *Krajewski & Engelke*, Article XVII GATS. See also S/L/92, paras 8–18; *Mattoo*, Working Paper TISD-96–02, 8–14; *Pauwelyn*, World Trade Rev. 4 (2005), 131, 148–151.

[26] See S/L/92, para. 47.

[27] See below, para. 52.

national treatment obligations. This would be reflected in an entry in the terms "None, except […]". The fictional Schedule of commitments featured in the Appendix[28] illustrates a partial commitment of this kind with regard to national treatment for mode 3. On the other hand, it is also possible to specify that only certain types of measures, or measures affecting only a given category of suppliers within a mode, will conform to GATS obligations on either market access and/or national treatment. A partial commitment of this kind will be reflected in the term "Unbound, except […]". In practice, Members have heavily resorted to this latter type of partial commitments in their commitments on the presence of natural personal (mode 4), so as to limit the scope of the market access and national treatment obligations to the movement and residence of only certain types of services suppliers—namely managerial staff and skilled personnel.[29]

26 This mechanism of inscribing trade-restrictive measures in GATS Schedules does not perfectly match the procedures of either positive or negative scheduling techniques. Indeed, in positive list agreements countries are required to indicate the measures that will be applied in conformity with the agreement's obligations, while no commitment is undertaken with regard to non-listed measures. On the contrary, Schedules in negative list agreements feature only the measures that do not conform to the agreement's disciplines. Hence, taking into account that services sectors are listed in a positive way, but measures can be inscribed in either a positive or a negative manner, **GATS Schedules of commitments have been described as *hybrid lists*, as they feature elements of both positive and negative lists**.[30]

3. Additional Commitments

27 Art. XVIII on additional commitments provides a legal framework for Members to negotiate and undertake commitments with regard to measures affecting trade in services that are not covered by the market access and national treatment obligations of Arts XVI and XVII. This is reflected in a **fourth column that completes the table of GATS Schedules, in which Members can inscribe the undertakings relating to additional commitments**, as indicated by Art. XX:1 lit. c. The column on additional commitments differs from those with regard to market access and national treatment to the extent that it does not feature the classification of the different modes of supply.

[28] *Ibid*.

[29] *WTO*, Mode 4, 3–4. See the Appendix, below, para. 52, for an illustration. For a broader analysis of GATS commitments, see: *Altinger & Enders*, World Econ. 19 (1996), 307–332; S/C/W/99; see generally *Adlung & Roy*, also *Hoekman*, Tentative First Steps.

[30] *Fink & Molinuevo*, East Asian Free Trade Agreements, 12. See also, *UNCTAD*, 17–18.

28 **Undertakings regarding additional commitments stem from Art. XVIII**, which allows Members to "negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Arts XVI or XVII". According to the provision, such additional commitments may relate, *inter alia*, to "qualifications, standards or licensing matters".[31] However, since Art. XVIII does not contain any legal obligation in itself, additional commitments should take the form of stand alone undertakings, with a full description of the measures established therein. Entries under Art. XVIII need not mention the modes of supply where no additional commitments are undertaken.[32]

29 As noted by the WTO Secretariat, more than 70 Member have undertaken additional commitments. The majority of these commitments relate to telecommunications, where the additional commitments column has been utilized to inscribe the adoption by that Member of the so-called Reference Paper on Basic Telecommunications. Additional commitments on access to certain port services have been scheduled with regard to maritime transport services. A number of other undertakings with regard to different sectors can also be found in Members' Schedules. In practice, **Members have resorted to the additional commitments column of their Schedules to inscribe a number of measures of various varieties** ranging from key obligations such as the Reference Paper to best-endeavours provisions, including notes for transparency purposes.[33]

IV. Time-Frame for Implementation and Entry into Force of Commitments

30 Art. XX:1 lit. d requires that the Members' Schedules of commitments indicate "where appropriate the time-frame for implementation of such commitments" and Art. XX:1 lit. e "the date of entry into force of such commitments".

31 The first requirement relates to the so-called 'pre-commitments', whereby **countries commit to eliminate in the future trade-restrictive measures currently being applied**. The words "where appropriate" in Art. XX:1 lit. d refer to situations where the date of implementation differs from the date of entry into force of a commitment.[34] Some Members have resorted to this mechanism to highlight the ongoing undertaking of structural

[31] See *Krajewski*, Article XVIII GATS, for a comprehensive analysis of the provison.

[32] Committee on Specific Commitments, Additional Commitments Under Article XVIII of the GATS, Note by the Secretariat, S/CSC/W/34, 16 July 2002, para. 3; S/L/92, para. 19.

[33] For a number of examples of additional commitments found in Members' Schedules, see S/CSC/W/34.

[34] *Mexico—Telecoms*, WT/DS204/R, para. 7.368.

reform measures, and their wish to comply with GATS specific disciplines, while currently applying non-conforming measures. For instance, in the context of the accession negotiations, China has undertaken a number of pre-commitments with regard to market access disciplines due to enter into force within a given number of years (usually between one and five) of its accession to the WTO, which will be fully phased in by 2008.[35]

32 The requirement set out in Art. XX:1 lit. e to specify "the date of entry into force" of the commitments is, as pointed out by the WTO Secretariat, "a rather odd requirement".[36] Indeed, **the entry into force of the commitments cannot be individually established**, but the date is that of the entry into force of the Schedule of commitments. Furthermore, this date is not for each Member to set, but depends on the agreed conclusion of the negotiating round and applies equally to all Members and to all agreements and instruments, including annexes such as the Schedules of commitments. As noted by the WTO Secretariat, the date of entry into force of a commitment is relevant to rights under Art. XXI and to possible non-violation cases.[37] In the case of the Uruguay Round, for instance, that date was agreed to be 1 January 1995. For countries which acceded after the conclusion of the Uruguay Round, the date of entry into force of the commitments is that of their formal accession to the WTO. In the case of China, for instance, that date was 11 December 2001.

33 Even in the case of pre-commitments, **the date of entry into force is that of the Agreement, or the Schedule itself**. In that case, the Member assumes at that date the commitment to reform a measure in the future, but the obligation is binding from the entry into force of the Schedule. This entails that if by the date indicated in the 'pre-commitment' the country has not adopted and implemented the promised measures, it may be found to be in violation of its commitments under the GATS.

D. Relationship Between Market Access and National Treatment Commitments (Art. XX:2)

34 Art. XX:2 seems to set out a simple scheduling convention. According to it, measures inconsistent with both market access and national treatment obligations are to be listed in the market access column. It further clarifies

[35] *Fink*, in: *Gao & Lewis* (eds), 164.

[36] Committee on Specific Commitments, Draft, Report of the Committee on Specific Commitments to the Council for Trade in Services, S/CSC/W/19, 5 March 1999, para. 13.

[37] *Ibid.*, para. 13.

that in such cases the inscription under market access shall be considered to provide a limitation on national treatment too. In this way, **Art. XX:2 absolves a Member from the need to inscribe the same inconsistent measures in both the market access and national treatment columns**. From this perspective, Art. XX:2 can be characterized as a rule to ease the scheduling process.

35 Nonetheless, this 'bookkeeping' convention goes to the core of one of the most sensitive and controversial debates of the GATS, as **it tackles the relationship between commitments in market access and national treatment disciplines**. A number of controversies surround this discussion, questioning the scope of Art. XX:2, its terms, and whether or not it may be of assistance in the broader discussion of the overlap between market access and national treatment obligations, as well as the scope of Arts XVI and XVII.

I. Possible Solutions Identified by WTO Members

36 There is an understanding among WTO Members that Art. XVI applies, in addition to non-discriminatory quantitative measures, to a number of discriminatory restrictions. In particular, there would be an overlap between market access and national treatment measures with regard to discriminatory quantitative restrictions, covered by both Art. XVI:2 lit. a-d and Art. XVII. In this context, the **discussion on the overlap** between these disciplines is **relevant where, for the same sector and mode of supply, a full commitment** (**"none"**) has been inscribed **in the national treatment column, and no commitment** (**"unbound"**) has been entered into **under market access**. In these cases, what entry should prevail? May the Member introduce a discriminatory quantitative restriction, as allowed by its "unbound" entry under Art. XVI? Or it is prevented from doing so by its full commitment under Art. XVII?[38]

37 In the context of the Committee on Specific Commitments (CSC) in the WTO, Members have identified **four possible solutions** to these questions:[39] 1) that the entry under market access prevails: Art. XVI would be *lex specialis* with regard to quantitative restrictions, whether or not

[38] For a broader analysis of the relationship between Arts XVI and XVII, see *Krajewski & Engelke*, Article XVII GATS, paras 59–65. See also, *Delimatsis & Molinuevo*, Article XVI GATS, paras 76–77.

[39] Council for Trade in Services, Consideration of Issues Relating to Article XX:2 of the GATS, Report by the Chairman of the Committee on Specific Commitments, S/C/W/237, 24 March 2004, paras 16–19. The discussion has also been subject to scholarly debate. See *Mattoo*, Working Paper TISD-96–02, 8–14; *Pauwelyn*, World Trade Rev. 4 (2005), 131, 148–151; *Delimatsis*, JWT 40 (2006), 1059, 1072–1077; *Mavroidis*, World Trade Rev. 40 (2007), 1, 9–21. See also, *Krajewski*, LIEI 32 (2005), 417, 430–437; *Ortino*, JIEL 9 (2006) 117, 132–148.

discriminatory; 2) that the entry under national treatment prevails: Art. XVI:2 would not cover discriminatory measures, except those indicated in paragraphs e and f; 3) that the "unbound" entry prevails: thus allowing a Member to introduce a discriminatory quantitative restriction; 4) that the "none" entry prevails: thus safeguarding Members' expectations based on the full commitment.

II. Role of Art. XX:2 in the Debate

38 While a definitive answer to the questions posed above would require a more comprehensive assessment, the analysis of **the text of Art. XX:2 may shed some light on the debate**.

39 Art. XX:2, sentence 1, stipulates that "[m]easures inconsistent with both Art. XVI and XVII shall be inscribed in the column relating to Art. XVI". Art. XX:2, senctence 2 clarifies that "[i]n [that] case the inscription will be considered to provide a condition or qualification to Article XVII as well". A **first question** in this context relates to **whether Art. XX:2 effectively covers the cases where there is no commitment under market access** (***i.e.*** **"unbound"**) and there is a full commitment under national treatment.

40 **Some WTO Members have argued that "unbound" entries under market access would not be covered by Art. XX:2** since they could not be assumed to provide a "condition or qualification" to national treatment. Under this view, Art. XX:2 would only apply where partial commitments had been made under Art. XVI.[40] In effect, at first sight, an "unbound" entry seems not to describe a "measure"—rather, it covers all possible measures falling under the market access provision -, nor to provide a precise "condition or qualification" that may be applicable to the national treatment obligation. Nonetheless, a number of Members' entries in the Schedules of commitments do not necessarily provide an accurate description of a "measure", nor precise "conditions and qualifications". Indeed, inscriptions in the market access column are not required to be "measures" *per se*, but, according to Arts XVI:1 and XX:1 lit. a, "terms, limitations and conditions" in more general terms. Scheduling practice by WTO Members has further shown that these terms are to be interpreted in the broadest terms, and that entries that do no provide detailed and precise "terms, limitations and conditions" can be inscribed.

41 Indeed, an entry under market access that indicates that for a given service the "number of licenses is limited", or merely states that "100% foreign

[40] S/C/W/237, para. 11, and Annex IV, para. 50.

ownership is allowed", does not describe a "measure" in itself. In the case of this latter example, it is unclear what is the "condition or qualification" that it entails with regard to national treatment. Nonetheless, in accordance with Art. XX:2 that entry under market access will be considered to provide a condition or qualification to national treatment as well. Hence, licenses could be granted in a discriminatory fashion, or any market access measures other than those relating to lit. f—foreign ownership—could be imposed in a manner inconsistent with Art. XVII. An "unbound" entry under market access operates in exactly the same vein, although it is broader in scope. It signals that the Member remains free to undertake any of the measures covered by Art. XVI. From this perspective, nothing seems to prevent that, to the extent that broad inscriptions that do not set "conditions and qualifications" *stricto sensu* are covered by Art. XX:2, "unbound" entries also fall within its scope. In sum, **Art. XX:2 applies when either a partial or no commitment has been undertaken with regard to Art. XVI**.

42 This entails that the discriminatory restrictions allowed by the inscription in the market access column, will also be legitimate under Art. XVII, although such inscription has not been formally replicated in the national treatment column. As a result, **where "unbound"** has been entered **under market access, and "none" under national treatment,** the **Member** would be **allowed to introduce discriminatory quantitative restrictions.**

43 This reading of the provision suggests that **the second and fourth approaches** identified by WTO Members as a solution to the overlap between market access and national treatment would **not conform to the disciplines of Art. XX:2**.

44 The second approach, whereby discriminatory measures in all their forms—quantitative or not—would be covered only by Art. XVII is further refuted by the text of Art. XX:2. Indeed, this so-called "strong national treatment" approach sets a clear demarcation between market access and national treatment disciplines. In this view, Art. XVI on market access would apply exclusively to non-discriminatory quantitative restrictions—plus measures expressly covered by lit. e–f—, and Art. XVII on national treatment would be exclusive in its coverage of discriminatory measures—minus Art. XVI:2 lit. e and f. There would be no possible overlap between the two provisions, since they were mutually exclusive. Nonetheless, while this interpretation provides the benefit of a logical division between the different provisions, it runs counter to the text of Art. XX:2, which expressly recognizes that there is a realm of measures covered by both disciplines. As mentioned above, however, **a definitive solution** to the questions posed by the **interrela-**

tionship between market access and national treatment would require a broader analysis than the scheduling rule of Art. XX:2.

E. Legal Status of the Schedules of Commitments (Art. XX:3)

45 Art. XX:3 sets out the legal status of the Schedules of specific commitment annexed to the GATS. The Schedules "form an integral part" of the GATS. Additionally, by virtue of Art. II:2 of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), the GATS itself forms an integral part of the WTO Agreement, to which it is annexed. Technically, the GATS, together with its own Annexes and Schedules of commitments, constitutes Annex 1B of the WTO Agreement. In this context, **the legal status of GATS Schedules of commitments is that of an international treaty**.

46 The fact that the Schedules of commitments form an integral part of the Agreement is relevant for the purposes of the interpretation of the Schedules, as it allows the same interpretative approach to be used in this regard as is used for the main text of the Agreement. In this sense, the Appellate Body has noted that "the task of identifying the meaning of a concession in a GATS Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention* of Members".[41] To this end, **Members' Schedules of commitments must be interpreted "according to the rules codified in Art. 31 and, to the extent appropriate, Art. 32 of the Vienna Convention**".[42] Hence, Members' commitments are to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms […] in their context and in the light of its object and purpose".[43] Where the meaning of the commitments remains ambiguous or obscure, one may resort to supplementary means of interpretation, such as the *travaux preparatoires*, or the "circumstances of the conclusion" of the Agreement (Art. 32 VCLT).

47 In the *US—Gambling* dispute, the Appellate Body found assistance in other Members' Schedules of specific commitments as relevant "context" in the terms of Art. 31 VCLT. However, the Appellate Body, confirming the reasoning of the Panel, recalled that, while it is the **common intention**

[41] *US—Gambling*, WT/DS285/AB/R, para. 160.
[42] *Ibid*.
[43] Art. 31.1 VCLT.

of the Members what is to be determined, **the use of other Members' Schedules must be tempered by the recognition that each Schedule has its own intrinsic logic**,[44] which is different in every case. In addition to the context, the Appellate Body resorted to the W120 document and the 1993 Scheduling Guidelines as relevant "supplementary means of interpretation" in the terms of Art. 32 VCLT.

F. Outlook

48 GATS Schedules of commitments have been successful in granting Members the flexibility to undertake international obligations in trade and investment in services at the desired level of openness. As such, they have proved a useful tool for providing greater clarity and transparency in trade in services. Nonetheless, they have so far fallen short of reducing domestic limitation in services, or even of consolidating current regulatory domestic frameworks, allowing for the eventual adoption of restrictions not currently maintained. **Multilateral negotiations could learn from regional and bilateral experiences** which offer interesting alternative solutions to some of the shortcomings of the GATS.

49 Bilateral agreements undertaken by Japan with Malaysia and the Philippines, for instance, have introduced a mechanism directed to bind the regulatory status-quo of the parties. Under these free trade agreements, which feature a GATS-like hybrid list of commitments, the parties may indicate in an additional column the services sector or subsectors in which they will not adopt restrictions other than those currently in place. Furthermore, unilateral liberalization measures undertaken by the parties in those signalled services sectors will automatically be locked in their bilateral commitments—the so-called ratcheting effect. By these means, the schedules of commitments of the Japan-Malaysia and Japan-Philippines FTAs **enhance the liberalization effects** of the agreement by providing for binding of the regulatory *status-quo*, while maintaining the flexibility inherent in GATS-like hybrid lists.[45]

50 WTO negotiations may also learn from the experience of the Australia-Thailand FTA, which has followed the GATS hybrid list scheduling technique but provided for a simplified schedule of commitments. The structure of these schedules, likely also to be adopted by the European Union's future bilateral agreements in services, features commitments with regard to both market access and national treatment in one single column, rather than

[44] *US—Gambling*, WT/DS285/AB/R, para. 182.
[45] *Fink & Molinuevo*, East Asian Free Trade Agreements, 13 and 18.

two. This model is likely to **reduce interpretation difficulties** regarding commitments on those disciplines.[46]

51 These improvements on GATS Schedules may help in realizing the progressive liberalization goal of the Agreement, and providing for greater clarity in the undertaking of commitments. The benefits of services liberalization suggest that Members should be actively involved in negotiations and utilize GATS Schedules of commitments as a means to seek market opening by their partners and bound domestic opening measures. Nonetheless, Members would be well advised to **pay careful attention to their commitments**, and to make sure that such undertakings are legally and politically feasible in their internal regulatory framework. The *US—Gambling* case has shown that even rich countries with experienced negotiators have misjudged the scope and depth of their own Schedules of commitments.

[46] See above, paras 36–37.

Appendix—Illustration of GATS Schedule of Specific Commitments

52 UQBAR—SCHEDULE OF SPECIFIC COMMITMENTS

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
I. HORIZONTAL COMMITMENTS			
ALL SERVICES INCLUDED IN THIS SCHEDULE			
		3) Unbound for research and development subsidies	
	4) Unbound, except for measures concerning the following categories of personnel: managers, executives and specialists. Entry for these intra-corporate transferees is limited to a 3-year period that may be extended for one more 3-year term.	4) Unbound, except for measures concerning the categories of personnel indicated in the market access column	
II. SECTOR-SPECIFIC COMMITMENTS			
9. TOURISM AND TRAVEL RELATED SERVICES			
A. Hotels and restaurants (incl. catering) CPC 641–643	1) Unbound * 2) None 3) None 4) Unbound, except as indicated in the horizontal section	1) Unbound * 2) None 3) None, except that at least half of the directors must be nationals of Uqbar. 4) Unbound, except as indicated in the horizontal section	

* Unbound due to lack of technical feasibility. (See para. 24).

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Article XXI GATS
Modification of Schedules

1. a) A Member (referred to in this Article as the "modifying Member") may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.
   b) A modifying Member shall notify its intent to modify or withdraw a commitment pursuant to this Article to the Council for Trade in Services no later than three months before the intended date of implementation of the modification or withdrawal.
2. a) At the request of any Member the benefits of which under this Agreement may be affected (referred to in this Article as an "affected Member") by a proposed modification or withdrawal notified under subparagraph 1. b), the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the Members concerned shall endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations.
   b) Compensatory adjustments shall be made on a most-favoured-nation basis.
3. a) If agreement is not reached between the modifying Member and any affected Member before the end of the period provided for negotiations, such affected Member may refer the matter to arbitration. Any affected Member that wishes to enforce a right that it may have to compensation must participate in the arbitration.
   b) If no affected Member has requested arbitration, the modifying Member shall be free to implement the proposed modification or withdrawal.
4. a) The modifying Member may not modify or withdraw its commitment until it has made compensatory adjustments in conformity with the findings of the arbitration.
   b) If the modifying Member implements its proposed modification or withdrawal and does not comply with the findings of the arbitration, any affected Member that participated in the arbitration may modify or withdraw substantially equivalent benefits in conformity with those findings. Notwithstanding Article II, such a modification or withdrawal may be implemented solely with respect to the modifying Member.
5. The Council for Trade in Services shall establish procedures for rectification or modification of Schedules. Any Member which has modified or withdrawn scheduled commitments under this Article shall modify its Schedule according to such procedures.

Documents

Decision of the CONTRACTING PARTIES, Procedures for Modification and Rectification of Schedules of Tariff Concessions, Adopted on 26 March 1980, L/4962, 28 March 1980, <http://www.wto.int/gatt_docs/English/SULPDF/90970413.pdf>; Council for Trade in Services, Guidelines for Notifications under the General Agreement on Trade in Services, Adopted by the Council for Trade in Services on 1 March 1995, S/L/5, 4 April 1995; Council for Trade in Services, Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS) (Modification of Schedules), Adopted by the Council for Trade in Services on 19 July 1999, S/L/80, 29 October 1999; Council for Trade in Services, Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments, Adopted by the Council for Trade in Services on 14 April 2000, S/L/84, 18 April 2000; Council for Trade in Services, Notification from the European Communities and its Member States Pursuant to Article V of the GATS, S/SECRET/8, 11 June 2004.

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A. General

I. Overview

1 Each WTO Member is required to have a **Schedule of Specific Commitments** which identifies the services for which the Member guarantees market access and national treatment and any additional commitments or limitations that may be attached.[1] The Schedule may also be used to assume additional commitments regarding, for example, the implementation of specified standards or regulatory principles.

2 Once accepted, the Schedules become **an integral part of the GATS**, as provided for in Art. XX:3, and are thus binding on the Members concerned. Therefore, the failure to "accord services and service suppliers of any other Member"[2] treatment provided for in the Member's Schedules is a breach of Arts XVI and XVII and can be raised as a claim under the WTO dispute settlement procedure.

3 However, **Art. XXI** allows WTO Members to modify or withdraw their specific commitments without violating their obligations under the GATS. It can be done at any time after three years have lapsed from the date of entry into force of a commitment, with at least three months' notice of the proposed change. Furthermore, at the request of affected trading partners, the modifying Member is required to negotiate any necessary compensatory adjustment and, if unsuccessful, to accept arbitration the results of which are binding.

[1] See Art. XX:1.
[2] See Art. XVI:1.

Pursuant to Art. XXI:5, in 1999 the Council for Trade in Services (CTS) enacted detailed **procedures for the modification of Schedules**.[3] Improvements to Schedules, *i.e.* the inscription of new sectors or the removal of existing limitations, are subject to more streamlined procedures.[4] *4*

II. History of the Provision

The debate whether commitments could be modified independently of GATT's amendment procedures had started in the 1950s.[5] Later, in the 1980s, the Contracting Parties had adopted the Decision on Certification Procedures, which made it clear that "[c]hanges in the authentic texts of Schedules annexed to the General Agreement which reflect modifications resulting from action under Article II, Article XVIII, Article XXIV, Article XXVII or Article XXVIII shall be certified by means of Certifications. A draft of such change shall be communicated to the Director-General within three months after the action has been completed".[6] This certification procedure is still in use for the modification of Schedules pursuant to Art. XXVIII GATT 1994. *5*

Although it could be argued that, as services Schedules are an integral part of the GATS, their modification requires an amendment to the GATS pursuant to the amendment procedures of Art. X WTO Agreement, the GATS explicitly permits the WTO Members in Art. XXI to modify their Schedules. As for the procedural issues, in 1999 the CTS adopted a certification procedure similar to that under the GATT as a formal procedure for the modification of Schedules of commitments pursuant to Article XXI: "Modifications in the authentic texts of Schedules annexed to the GATS which result from action under Article XXI, shall take effect by means of Certification. The draft schedule clearly indicating the details of the modifications shall be communicated to the Secretariat for circulation to all Members".[7] *6*

III. Purpose and Function of Art. XXI

The **purpose** of Art. XXI is to provide a framework of rules for modifying or withdrawing specific commitments. By listing certain procedures that *7*

[3] Council for Trade in Services, Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS) (Modification of Schedules), Adopted by the Council for Trade in Services on 19 July 1999, S/L/80, 29 October 1999.

[4] Council for Trade in Services, Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments, Adopted by the Council for Trade in Services on 14 April 2000, S/L/84, 18 April 2000.

[5] See *Nottage & Sebastian*, JIEL 9 (2006), 989–1016.

[6] Decision of the CONTRACTING PARTIES, Procedures for Modification and Rectification of Schedules of Tariff Concessions, Adopted on 26 March 1980, L/4962, 28 March 1980, para. 1.

[7] S/L/80, para. 20.

allow countries to modify or withdraw their specific commitments, Art. XXI enables WTO Members to **adjust their commitments to new circumstances** or policy considerations. This provides scope for political flexibility, despite the existence of scheduled commitments, in critical circumstances, and can also serve the process of progressive liberalization, since there is no provision for the withdrawal of existing commitments except under the procedure provided in Art. XXI. While Art. XXI does not intend to reduce a general level of mutually advantageous commitments, it permits Members to liberalize trade in accordance with their individual policy objectives and constraints.

8 The modification of Schedules also provides a method of giving legal effect to certain results of WTO trade negotiations, if negotiations resulted in less favourable treatment in new Schedules than was provided for in the old.

9 The **core advantage** of changing Members' obligations through modifications of Schedules according to Art. XXI is that it does not require the cumbersome GATS amendment procedures.

B. Modification of the Schedule (Art. XXI:1)

I. Scope

10 Art. XXI allows to **modify or withdraw existing commitments** by the Members. However, not every modification of an existing commitment falls within the scope of Art. XXI, which limits itself to the situations in which new Schedules provide less favourable treatment than the old. Modifications falling under the procedures of Art. XXI do **not** include **new commitments, improvements** to existing ones, or **rectifications** or changes of a purely technical character that do not alter the scope or the substance of the existing commitments.[8] Hence, to the extent that trade negotiations result in the addition of new commitments to Members' Schedules, recourse to the procedures of Art. XXI is not required since no abolished commitments have to be compensated for.

11 In order for proceedings to modify or withdraw a commitment to be commenced, at least **three years** must have **elapsed from the date of the entry into force of that commitment**. A shorter period would have a negative impact on the sustainability of trade in services and liberalization. The purpose of Art. XXI is to provide Members with the flexibility to react to economic and political changes in the country or in the world,

[8] See S/L/84, para. 1.

rather than give a power immediately to open the next round of negotiations starting from a new *status quo*.

II. Format for Notification

12 The **notification should** be given no later than **three months** before the intended date of implementation of the modification or withdrawal to allow sufficient time for the Secretariat to circulate the document and for WTO Members to estimate the effects of the modification or withdrawal. The notification should also **specify** the commitments which it is intended to modify or withdraw, together with an indication of whether the intention is to modify or to withdraw it, in whole or in part; the proposed date for implementing such modification or withdrawal; the complete description of any proposed modification, and the Members specifically affected, if any.[9]

13 The Secretariat will distribute the notification to all other Members and the intention by a Member to modify or withdraw scheduled commitments will be included in the agenda for the next meeting of the CTS.[10]

14 Documents relating to the modification of specific commitments under Art. XXI **remain restricted** until the relevant negotiations have been completed and the changes are set out in the Schedules.

15 The modifying **Member may at any time withdraw its notification** under Art. XXI:1 by notice to the Secretariat. Upon receipt of such a withdrawal, Art. XXI and the related procedures shall cease to apply and the modifying Member shall be required to maintain the commitment in question in conformity with its Schedule and Part III of the Agreement.[11]

C. Compensatory Adjustment (Art. XXI:2)

16 An essential aspect of the Art. XXI procedure for the modification of a WTO Member's Schedule is reaching an agreement on necessary compensatory adjustment. This does not mean monetary compensation but the **replacement of the commitment** withdrawn by another commitment of an equivalent value, *i.e.* more liberal bindings in a different sector.[12] However, it is important to note that the modifying Member has no obligation to offer or negotiate a compensatory adjustment, unless a Member which considers that its interests under the Agreement may be affected by

[9] S/L/80, para. 2.
[10] *Ibid.*, para. 1.
[11] *Ibid.*, para. 19.
[12] See *WTO*, GATS—Fact and Fiction, 13.

the proposed modification or withdrawal ("affected Member") has identified itself in writing and **requested** such negotiations.

17 Since Art. XXI does not specify the nature of the compensation or how it should be calculated, **these matters are left for negotiation** between the "modifying Member" and a Member which considers that its benefits or rights under the Agreement may be affected (reduced) by the proposed modification or withdrawal ("affected Member"), at least at the initial stage of the process. Delegations may accordingly offer views on whether the concept of compensation should be defined or circumscribed in some way.

18 Compensatory adjustment crucially depends upon the affected Member **demonstrating** the **extent to which it is affected**. If it cannot demonstrate this, there is no justification for any compensation.

19 Any affected **Member shall communicate its claim in writing** to the modifying Member and to the Secretariat, which will notify the claim to all other Members. Such claims of interest must be made no later than **45 days** after the date of circulation by the Secretariat of the notification referred to above.[13]

20 If by that date no Member has submitted a claim that it is an affected Member, the modifying Member shall be free to complete the certification procedure and implement the proposed modification or withdrawal. It shall also submit a notification of the date of such implementation to the Secretariat, for circulation to the WTO Members.[14]

21 The modifying Member and any affected Member shall enter into negotiations with a view **to reaching agreement within three months** following the last date on which such a claim of interest may be made. This period of negotiation may be extended by mutual agreement and the terms of such an agreement, including the period of extension, shall be notified to all other Members through the Secretariat.[15]

22 In any such negotiations, the objective is and effort should be made to maintain "a general level of mutually advantageous commitments **not less favourable** to trade than that provided for in Schedules of specific commitments prior to the negotiations".[16] Apart from this benchmark, negotiating Members are free to decide what adjustment is "necessary" for this particular modification. Any compensatory adjustments agreed through negotiation with affected Members must be made on an most-favoured-nation (MFN) basis, *i.e.* more liberal treatment elsewhere should

[13] S/L/80, para. 19.
[14] *Ibid.*
[15] *Ibid.*, para. 4.
[16] *Ibid.*, para. 13. Emphasis added.

be given to all WTO Members and not just to the affected Member who requested an adjustment.

23 **Upon completion** of each negotiation conducted under Art. XXI:2 lit. a, the modifying Member shall send to the Secretariat a joint letter signed by the Members concerned, together with a report concerning the results of the negotiations, which shall be initialled by the Members concerned. The Secretariat will distribute the letter and the report to all Members in a secret document. [17]

D. Arbitration

I. Option for Arbitration (Art. XXI:3)

24 If an agreement cannot be reached between the modifying Member and the affected Members, the matter may be referred to **arbitration**. Such a request shall be made **in writing** by the affected Member to the modifying Member and the Secretariat no later than **45 days** after the end of the period of negotiations.[18] If an affected Member submits a timely arbitration request, the modifying **Member shall not implement any modification or withdrawal** until it has received the arbitration body's findings and is in conformity with those findings.[19]

25 If there is no arbitration request submitted by an affected Member, the modifying **Member shall be free to implement** the proposed modification or withdrawal. Also, in cases where agreement has been reached with some but not all affected Members and no request for arbitration has been made, the modifying Member shall be free to implement the proposed modification or withdrawal with the compensatory adjustments applying as agreed upon in the negotiations.[20]

26 The **appointment of the arbitration** body shall be subject to the mutual agreement of the parties concerned. If the parties to the arbitration cannot agree on the arbitration body within twenty days from the date of request for the arbitration, the arbitration body shall be appointed within a further 10 days at the request of any party by the Director-General of the WTO, after consulting the parties. The arbitration body shall consist of three arbitrators unless the parties agree to a different uneven number, and shall be chosen from among persons with relevant legal, economic,

[17] *Ibid.*, para. 5.
[18] *Ibid.*, para. 7.
[19] *Ibid.*, para. 9.
[20] *Ibid.*, para. 8.

financial or technical expertise, including expertise in the agreement, with respect to the matter referred to the arbitration body. Except as the parties may otherwise agree, the arbitration body shall not consist of citizens of any of the parties to the arbitration. Where a party to an arbitration is a **developing country Member**, the arbitration body shall, if the developing country Member so requests, include at least one arbitrator from a developing country Member.[21] The arbitration body may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. The arbitration body shall inform the parties to the arbitration of any consultations with experts. There shall be no *ex parte* communications with the arbitration body concerning matters under consideration by it.[22]

27 Any **affected Member** that wishes to enforce a right that it may have to compensation **must participate** in the arbitration, by submitting a request for arbitration and involving itself in the appointment of the arbitration body. However, if an affected Member has reached an agreement with the modifying Member prior to arbitration and decided not to participate in the arbitration, it shall nonetheless be deemed to have participated in the arbitration with respect to the modification or withdrawal in question,[23] which means that its interests will be taken into account in arbitration should it take place. So, the rationale of this provision is to facilitate active participation of an affected Member in negotiations making efforts to reach an agreement and to eliminate possible incentives to resort to arbitration.

28 The arbitration body shall have the following **terms of reference** unless the parties to the arbitration agree otherwise within ten days from the request for arbitration: To examine the compensatory adjustments offered by the modifying Member or requested by the affected Member requesting the arbitration and to find a resulting balance of rights and obligations which maintains a general level of mutually advantageous commitments not less favorable to trade than that provided for in Schedules of specific commitments prior to the negotiations.[24] In such examination, the arbitration body shall take into account any agreement reached, in negotiations between the modifying Member and any affected Member.[25]

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[21] *Ibid.*, para. 10.
[22] *Ibid.*, para. 11.
[23] *Ibid.*, para. 12.
[24] *Ibid.*, para. 13.
[25] *Ibid.*

The arbitration body's findings shall be communicated to the parties to the arbitration through the Secretariat within **three months** of the appointment of the arbitration body.[26] *29*

II. Compliance with the Findings of the Arbitration (Art. XXI:4)

Where arbitration has been requested by an affected Member, the modifying Member **must make compensatory adjustments** in accordance with the findings of the arbitration **before** taking action to **modify or withdraw** its commitment. The prohibition on implementing the modification or withdrawal of commitments prior to such adjustments reinforces the findings of the arbitration. Also, the modifying Member shall notify the date of implementation to the Secretariat for circulation to the Members of the WTO together with the findings of the arbitration.[27] *30*

If the modifying Member implements its proposed modification or withdrawal and does not comply with the arbitration's findings, any affected Member that participated in the arbitration may modify or withdraw substantially **equivalent benefits** in conformity with the findings (Art. XXI:4 lit. b). Moreover, an interpretation of Art. XXI:4 lit. b suggests that an affected Member may invoke this right also in a case of violation of Art. XXI:4 lit. a. There are no criteria set for the determination of a **substantially equivalent benefit** and an affected Member has the right itself to select particular commitments for withdrawal, taking into account the assessment performed by the arbitration body. Such a modification or withdrawal may be implemented solely with respect to the modifying Member; in other words: **MFN treatment is not applied.** *31*

If the affected Member intends to take such measures under Art. XXI:4 lit. b, it shall notify the CTS one month before exercising its right to take these measures. Furthermore, any such modifications or withdrawals shall be terminated if the modifying Member complies with the findings of the arbitration body.[28] *32*

E. Certification Procedure (Art. XXI:5)

According to the procedures,[29] **modifications** of the authentic texts of Schedules annexed to the GATS which result from action under Art. XXI, *33*

[26] *Ibid.*, para. 14.
[27] *Ibid.*, para. 15.
[28] *Ibid.*, para. 18.
[29] See *ibid.*, para. 20.

shall **take effect by** means of **certification**. The draft Schedule shall be communicated to the Secretariat for circulation to all Members. The modifications shall enter into force upon the expiry of a period of **45 days** from the date of their circulation or on a later date to be specified by the modifying Member, provided no objection has been raised by a Member.

34 A Member making **an objection** shall submit a notification to the Secretariat, identifying the specific elements of the modifications which gave rise to that objection, and shall enter into consultations with the modifying Member with a view to reaching a satisfactory solution. If these consultations result in any changes to the draft Schedule submitted for certification, the modifying Member shall promptly submit them to the Secretariat for circulation to all Members.

35 At the end of the 45-day period, if no objection has been raised, or upon the withdrawal of the objections, the Secretariat shall issue a communication to all Members to the effect that the certification procedure has been concluded, indicating the date of entry into force of the modifications.[30]

36 Art. XXI:5 also provides that, along with procedures for the modification of Member's Schedules, the CTS shall establish procedures for **rectification** which includes alterations of a technical nature, *i.e.* a more accurate description, renumbering or rearrangement *etc.*, that would not in any way alter the scope of Members' concessions, in contrast to the modification of Schedules, which is altering Members' commitments and provides less favourable treatment to other Members.[31]

37 This document on the procedures for the certification of rectifications is aimed at modifications in the authentic texts of Schedules annexed to the GATS not resulting from action under the procedures for the implementation of Art. XXI (modification of Schedules) adopted by the CTS on 19 July 1999, and which consist of new commitments, improvements to existing ones, or rectifications or changes of a **purely technical nature** that do not alter the scope or the substance of the existing commitments. Such modifications shall also take effect by means of certification.[32] The **certification procedure for rectifications and improvements** to commitments[33] is **easier** than that for modifications of Schedules, supporting the initiatives for further trade liberalization and taking into account that there need not be any negotiations on compensation.

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[30] See *ibid.*

[31] See for the procedures for the certification of rectifications or improvements to Schedules of specific commitments: S/L/84.

[32] *Ibid.*, para. 1.

[33] S/L/84.

F. Relationship with Other Provisions

I. Art. II

38 While Art. XXI covers the modification and withdrawal of specific GATS commitments, it does not address modifications of a WTO Member's MFN exemptions pursuant to Art. II. The Annex on Article II Exemptions provides that any modifications to a WTO Member's MFN exemptions, after entry into force of the WTO Agreement, require a Member to seek a waiver pursuant to Art. IX WTO Agreement.

II. Art. V

39 Art. V provides that the GATS does not prevent a WTO Member from being a party to an economic integration agreement liberalizing trade in services provided that, *inter alia*, the agreement has substantial sectoral coverage and provides for the absence or elimination of substantially all discrimination between the parties in the sectors covered by such an agreement.[34] Art. V:5 provides that if such an agreement is later enlarged or significantly modified, and a WTO Member intends to modify or withdraw a specific GATS commitment as a result, it must provide 90 days' advance notice of such modification and follow the applicable procedures set out in Art. XXI. Hence, while providing a WTO Member with a choice of its integration strategy, GATS provisions offer any negatively affected WTO Member tools to keep the balance of rights and obligations: negotiation of adjustment, binding arbitration and the possibility to retaliate.

III. Art. X

40 Although Art. XXI:1 provides that a WTO Member may modify or withdraw its commitment at any time after three years have elapsed from the date on which that commitment entered into force, Art. X:2 allows a country to modify or withdraw a commitment after only **one year** in the period before the entry into effect of the results of the negotiations on an emergency safeguard mechanism.[35] The Member may, however, notify the CTS of its intention to take such a measure and show cause that the modification cannot await the lapse of the three-year period.[36]

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[34] See *Cottier & Molinuevo*, Aricle V GATS, paras 10–27.
[35] See *Grote*, Article X GATS, paras 18–19.
[36] *Ibid.*

G. Previous Application of Art. XXI

41 **The first Member to initiate proceedings** to modify its Schedules was the EC and its Member States (collectively, the EC). In 2003 the EC notified the CTS of its intention to modify its Schedules in order to synchronize its Schedule with those of Austria, Finland and Sweden, which joined the EC after the end of the Uruguay Round. Parts of the Schedules of these three countries were less restrictive than the EC's Schedule and the EC intended to harmonize the commitments. The EC therefore wanted to withdraw some commitments made by these countries. It especially wanted to extend their horizontal restriction on market access concerning public utilities and their restriction on national treatment concerning subsidies.

42 On 10 July 2003, the EC notified the CTS of its intention to modify or withdraw specific commitments.[37] It stated that previous GATS Schedules of specific commitments and lists of MFN exemptions would be replaced by new commitments as from 30 April 2004.

43 On 6 August 2003, the US indicated its **claim of interest** in the modification or withdrawal of specific commitments and requested negotiations with the EC pursuant to Art. XXI with a view to reaching an agreement on any necessary compensatory adjustment. The US also requested the EC to clarify the legal and procedural basis for any modifications in the Art. II MFN exemptions of the EC or its Member States that might be included in the EC's consolidated list of Art. II exemptions, reflecting changes in the EC's WTO obligations resulting from the 1995 enlargement.

44 The Office of the United States Trade Representative (USTR) and other agencies were engaged in an **assessment of the potential impact** on US services trade of the 1995 enlargement of the EC, and in particular of what compensation the EC might owe to the US under WTO rules. The EC's proposed consolidated Schedule of specific commitments and consolidated list of MFN exemptions were restricted WTO documents;[38] therefore the public was advised to examine the existing GATS Schedules of specific commitments and lists of MFN exemptions of the EC, Austria, Finland and Sweden to determine whether changes implied through consolidation of the Schedules and lists would impact on US commercial interests.

45 On 28 May **2004**, the EC transmitted **another notification**, this time **with regard to** the **accession** of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Austria, Poland, Slovenia, the Slovak

[37] The EC consolidated its Schedule of commitments with those of Austria, Finland and Sweden. These changes were notified to the WTO Secretariat in documents S/C/N/231, S/CIN/231/Corr.I and S/DCS/W/EEC, restricted.

[38] See above, footnote 37.

Republic, Finland and Sweden **to the EC**.[39] Each of these countries had previously undertaken commitments individually under the GATS. In harmonizing their individual commitments with those of the EC as a whole, they had to modify their laws and regulations in a manner inconsistent with their prior commitments.

46 In the same document, the EC announced the **withdrawal of the notification** circulated by the WTO Secretariat on 10 July 2003,[40] resulting from the enlargement of the EC to include Austria, Finland and Sweden, and, as a consequence thereof, declared that the current negotiations with those WTO Members that had submitted claims of interest with regard to this notification were deprived of their subject.

47 In this document the EC also declared its preparedness to enter into negotiations with any Member that considered itself affected by any of the proposed modifications or withdrawals under the procedures set out in Art. XXI:2–4. With a view to ensuring effective negotiations and that the grounds for such requests were clearly discernable, the EC asked that affected Members should indicate the following information: which modifications or withdrawals of commitments listed in the annex to the communication the other Member claimed affected its trade in services; how such modifications or withdrawals affected its trade in services and the extent to which its trade in services was affected.

48 The US worked closely with Brazil, Hong Kong, Japan, Canada and 12 other WTO Members to negotiate the compensation package with the EC. Eventually in September 2006 it was announced that the negotiations had been completed.

49 The agreed compensation package provides new benefits to suppliers of services in the huge European services market. It contains new commitments on telecommunications that provide important clarity concerning the coverage of all basic and value-added telecommunications services. In addition, the compensation package provides new or enhanced commitments in several other sectors, including public utilities, engineering, computer, advertising, and financial services.

50 The outcome of this process is important, because it illustrates that Art. XXI works and gives a certain degree of flexibility to WTO Members to change and modify the impact of the Agreement on their regulatory regimes while respecting the interests of Members affected by such modifications.

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[39] See Council for Trade in Services, Notification from the European Communities and its Member States pursuant to Article V of the GATS, S/SECRET/8, 11 June 2004.

[40] *Ibid.*, para. 2.

H. Recent Implementation

51 In the course of a dispute originally filed by Antigua and Barbuda in 2003, the US' GATS Schedule was found to have included a market access commitment covering internet gambling. The dispute has now completed the compliance phase, and the report of the compliance panel was adopted by the WTO Dispute Settlement Body (DSB) on 22 May 2007. In light of these developments, the US has decided to invoke procedures under Art. XXI in order to clarify its commitment involving "recreational services" insofar as to reflect the original US intention to exclude gambling from the scope of the US commitments under the GATS. Antigua and Barbuda has announced that it will seek compensation for the negative effect on it of the US Schedule's change.

I. Conclusion and Outlook

52 In some circumstances a government may wish to retract something it has given in past negotiations. Art. XXI allows the WTO Members to do so, but only at a price and after due notice. As for the notice, no commitment can be modified or withdrawn until at least three years (or one year, in case of Art. X) after it entered into force and at least three months' notice must be given of the proposed change. The price to be paid is a readjustment of commitments with any WTO Member affected by the modifications. The negotiations do not always lead to agreement, and in such cases an affected Member which believes it has a right to compensation may take the matter to arbitration. If the arbitrator finds that compensation is due, the proposed modifications may not be put into effect until the compensatory adjustments are made. If the changes are made without compliance with the arbitrator's findings, the affected Member has the right to retaliate by withdrawing commitments "substantially equivalent" to the arbitrator's findings, and such withdrawal will apply only to the country making the change.

53 The use of **certification procedures** to give legal effect to various improvements to commitments in Schedules is of interest in the context of the current WTO trade negotiations. Such improvements include autonomous improvements, bilaterally negotiated improvements and plurilaterally negotiated improvements.[41]

54 In recent developments in the context of Art. XXI, the US' request to change its services commitments for "other recreational services" to explicitly

[41] *Nottage & Sebastian*, JIEL 9 (2006), 989, 1000.

exclude gambling and betting services was circulated to WTO Members on 8 May 2007. According to standard procedures, the other Members have had 45 days in which to file a request for compensation. On 22 June the US received notice from eight WTO Members that they considered that their benefits under the GATS might be affected by the proposed modification.[42] Consequently, consistent with Art. XXI:2 lit. a, the US has entered into negotiations with these WTO Members with a view to reaching agreement on any necessary compensatory adjustment.

[42] These Members are: Antigua and Barbuda, Australia, Canada, Costa Rica, the EC, India, Japan and Macao.

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PART V INSTITUTIONAL PROVISIONS

Article XXII GATS
Consultation

1. Each Member shall accord sympathetic consideration to, and shall afford adequate opportunity for, consultation regarding such representations as may be made by any other Member with respect to any matter affecting the operation of this Agreement. The Dispute Settlement Understanding (DSU) shall apply to such consultations.
2. The Council for the Trade in Services or the Dispute Settlement Body (DSB) may, at the request of a Member, consult with any Member or Members in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.
3. A Member may not invoke Article XVII, either under this Article or Article XXIII, with respect to a measure of another Member that falls within the scope of an international agreement between them relating to the avoidance of double taxation. In case of disagreement between Members as to whether a measure falls within the scope of such an agreement between them, it shall be open to either Member to bring this matter before the Council for Trade in Services.[11] The Council shall refer the matter to arbitration. The decision of the arbitrator shall be final and binding on the Members.

Footnote 11: With respect to agreements on the avoidance of double taxation which exist on the date of entry into force of the WTO Agreement, such a matter may be brought before the Council for Trade in Services only with the consent of both parties to such an agreement.

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Cross References

Arts 1118, 1413, 2006 NAFTA; Arts 4, 5 MERCOSUR Olivos Protocol; Art. VII ASEAN Framework Agreement on Services, Art. 3 ASEAN Enhanced Dispute Settlement Protocol.

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A. General

1 Consultations are the first step in the settlement of disputes which may arise between Members with regard to the operation of the GATS Agreement. Art. XXII regulates consultations as a necessary prerequisite for the initiation of panel proceedings under Art. XXIII in conjunction with the DSU. Only if bilateral consultations between the parties fail, and if multilateral negotiations are either not requested by the complaining party or are unsuccessful, is the way open to panel proceedings under the DSU. The negotiations between the parties are intended to clarify the issues which form the object of the dispute and facilitate a satisfactory resolution of the matter. As such, they are primarily a **diplomatic method of conflict prevention or resolution**.[1] The fact that the GATS dedicates a whole provision to the resolution of disputes through consultations is, just like the preference for mutually acceptable solutions expressed in Art. 3.7 DSU and reiterated in numerous other WTO provisions, evidence of the drafters' desire to retain the diplomatic process as the standard instrument of dispute settlement in the WTO. On the other hand, the integration of consultations into a tightly regulated legal procedure inevitably leading, in the absence of a mutually agreed solution, to the establishment of a panel is bound to have an impact upon the way in which the negotiations at the pre-panel stage are conducted and to emphasize their legalistic aspects. Although consultations continue to be the preferred method of dispute settlement, their nature has been fundamentally changed by the recognition of the automatic right to a panel in the event of their failure.[2] The implications of this new approach to dispute settlement for the application of the consultation mechanism does not always seem to have been fully understood by the drafters, especially with regard to the multilateral consultations stage provided for in Art. XXII:2.[3]

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[1] *Horlick*, Int'l Law 32 (1998), 685, 692; *Schorkopf*, Max Planck CWTL, Vol. 2, Article 4 DSU, para. 2.
[2] Art. 4.7 DSU.
[3] See below, paras 9 *et seq.*

B. Structure

Art. XXII provides for **two distinct consultation procedures**.[4] The first, regulated in **Art. XXII:1**, concerns the right to **bilateral consultations**. The provisions of the DSU, and in particular Art. 4 DSU, fully apply to these consultations (Art. XXII:1, sentence 2). **Art. XXII:2**, by contrast, deals with **multilateral consultations** which may be initiated under the auspices of either the Council for Trade in Services or the Dispute Settlement Body (DSB) once bilateral consultations have failed to produce a satisfactory solution. There is no equivalent for such multilateral consultations under the DSU.[5] Both provisions are modelled on, and are virtually identical with, Art. XXII GATT 1994.[6] **Art. XXII:3**, which has no equivalent in Art. XXII GATT 1994, excludes from the ambit of the consultation mechanisms provided for in the first two paragraphs (and also of the dispute settlement provision of Art. XXIII) certain disputes regarding the scope of application of double taxation agreements. *2*

C. Scope of Application and Relationship with DSU

The relationship between the rules on consultations under the GATS and those of the DSU is governed by various provisions. Art. XXII:1 expressly provides that the DSU shall apply to **bilateral consultations** with respect to any matter affecting the operation of the GATS. There is no corresponding provision with regard to the multilateral consultations provided for in Art. XXII:2. This omission is perhaps not surprising, as the DSU does not contain any provisions with regard to **multilateral consultations** as a prerequisite for the initiation of panel proceedings. It would be premature, however, to conclude that the DSU does not apply to matters which have been raised unsuccessfully in the multilateral consultation procedure of Art. XXII:2. Such a narrow interpretation would run counter to the broad wording of Art. 1.1 DSU which stipulates that the rules and procedures of the Dispute Settlement Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement procedures of the agreements listed in Appendix 1 to the DSU, which includes the GATS as one of the "covered agreements" in Appendix 1(B). The word "disputes" must be read here as a reference to "all disputes" brought pursuant to one of the procedures referred to in Art. 1.1 DSU, including those brought under Arts XXII:1 and XXII:2. *3*

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[4] *Zdouc*, JIEL 2(1999), 295, 296.
[5] *Ibid.*, 295, 297.
[6] *Weiss*, in: *Cameron & Campbell* (eds), 148, 155.

4 On the other hand, the rules and procedures of the Dispute Settlement Understanding apply subject to those **special or additional rules** and procedures on dispute settlement contained in the agreements covered by the DSU which are set out in Appendix 2 to the DSU (Art. 1.2 DSU). The Appendix lists Art. XXII:3 as one of the special rules which prevail over conflicting provisions of the DSU to the extent that there is a difference between them. Art. XXII:3 thus constitutes the *lex specialis* to the DSU.[7]

D. Bilateral Consultations (Art. XXII:1)

5 The request for bilateral consultations under Art. XXII:1 may refer to **any matter affecting the operation of the GATS Agreement**.[8] The broad wording of the provision suggests that any issues, not just legal ones, which are of particular interest to one of the Members may be brought up as a matter for consultation. The scope of Art. XXII:1 is somewhat reduced, however, if it is read together with **Art. 4.4 DSU, which applies by virtue of the second sentence of Art. XXII:1** and stipulates that any request for consultations shall give reasons, including the identification of the measures at issue and the indication of the legal basis of complaint. Although Art. 4.4 DSU nominally deals only with the form and required minimum content of a request for consultations and not with its scope, it is hard to avoid the conclusion that a formal obligation to consult arises only with regard to claims which meet the requirements set out in the provision and could form the object of a panel procedure at a later stage of the dispute settlement proceedings.

6 The requested Member is to accord **sympathetic consideration** to and afford **adequate opportunity for consultations** regarding such representations as may be made by the requesting Member. The statement of the Panel in the *Brazil—Dessicated Coconuts* case with regard to the identically worded Art. 4.2 DSU that there is **an absolute duty to consult** imposed on the requested Member[9] also applies to consultation requests which are made under Art. XXII:1. Thus the request for consultations may not be refused even if the requested Member considers that it has no sufficient basis in the GATS.[10] If the requested Member does not agree to hold consultations within 10 days after receiving the request, or does not

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[7] *Ibid.*, 148, 153. Other special rules include Art. XXIII:3, para. 4 of the Annex on Air Transport Services and para. 4 of the Annex on Financial Services.

[8] Consultations are specifically required with regard to the introduction or modification of measures which restrict the access of foreign service providers to the public telecommunication transport networks and services of the host country, see para. 5 lit. c of the Annex on Telecommunications.

[9] Panel Report, *Brazil—Desiccated Coconut*, WT/DS22/R, para. 28.

[10] *Horlick*, Int'l Law 32 (1998), 685, 689.

enter into consultations within a period of 30 days, the requesting Member may proceed directly to initiate the contentious phase of the proceedings by asking for the establishment of a panel (Art. 4.3 DSU).

7 The consultations have to be conducted in accordance with **rules set out in Art. 4 DSU**. The Member requesting consultations is to **notify** the request to the DSB and the relevant Council and Committees, *i.e.* in particular the Council for Trade in Services (Art. 4.4 DSU). Members are under a duty to **negotiate in good faith** with a view to obtaining a **mutually satisfactory solution** of the matter (Art. 4.5 DSU). Consultations are to be **confidential and without prejudice** to the rights of any Members in the further proceedings (Art. 4.6 DSU).[11] Third parties having a substantial trade interest in the consultations may be allowed to join in if the requested Member accepts that their claim to a substantial interest is well-founded. Particular attention is to be given to the needs and interests of developing country Members (Art. 4.10 DSU),[12] especially through extended efforts to reach a mutually agreed solution in cases involving a least-developed country Member.[13]

8 The requesting Member may, at any point in the consultation stage, ask for the establishment of a panel if both parties agree that the negotiations have failed. If no such agreement is reached, the requesting Member has a right to the establishment of a panel if the consultations fail to produce a mutually acceptable solution of the matter within 60 days of the receipt of the request for them (Art. 4.7 DSU). This period is reduced to 20 days in **cases of urgency**: Art. 4.8 DSU expressly refers to the case of perishable goods. Services are not explicitly mentioned since they lack the physical qualities of goods and therefore do not perish in the way certain goods (*e.g.* foodstuffs) do. This does not, however, rule out the application of the provision for other reasons since timeliness and prompt delivery also play a central role in the supply of many services (*e.g.* transportation services or medical services).

E. Multilateral Consultations (Art. XXII:2)

9 If the bilateral consultations under Art. XXII:1 fail to produce a satisfactory solution of the matter, Art. XXII:2 authorizes Members to **request multilateral consultations under the auspices of the DSB or the Council for Trade in Services**. The multilateralization of consultations

[11] *Schorkopf*, Max Planck CWTL, Vol. 2, Article 4 DSU, paras 24–25.
[12] Critical on this *lex imperfecta*, *Weiss*, in: *Cameron & Campbell* (eds), 148, 165.
[13] *Schorkopf*, Max Planck CWTL, Vol. 2, Article 4 DSU, para. 34.

was clearly seen by the drafters as an escalation of the dispute:[14] the dispute which has hitherto been the object of confidential talks between the parties directly concerned (Art. 4.6 DSU) is now submitted to a multilateral forum, a step which will often be resented by the requested Member. Multilateral consultations are therefore to be available only once attempts for a bilateral solution have failed.

10 Art. XXII:2 does not lay down any criteria which would allow one to determine the moment when **bilateral consultations** are deemed to have **failed**. However, since it refers to paragraph 1 which stipulates, in its second sentence, that bilateral consultations are to be governed by the rules of the DSU, the relevant provisions of the latter apply. According to Art. 4.7 DSU, the consultations have failed if either a period of 60 days starting with the receipt of the request expires without a settlement or if the parties jointly consider that the consultations have failed, whichever occurs first.

11 Art. XXII:2 does not remove the right of the requesting Member to ask for the establishment of a panel in accordance with the provisions of the DSU after the bilateral consultations have failed. This results clearly not only from Art. XXII:1, but also from Art. XXIII:1 and 3, sentence 1, which grant Members the express right, in the cases defined in both paragraphs, to have recourse to the DSU, including its provisions on the establishment of a panel. Since the right under Art. XXII:2 to request multilateral consultations is discretionary, the requesting Member thus has the **choice** between the establishment of a **panel** and the initiation of **multilateral consultations**.

12 While the request of a panel does not affect the right of the parties to the dispute to continue with bilateral negotiations and to ask for suspension of the panel if they reach a mutually acceptable solution, it rules out any future request for the opening of multilateral consultations.[15] Conversely, the request for multilateral consultations does not pre-empt the later establishment of a panel should the consultations fail. Art. XXII:2 cannot be construed so as to rule out the recourse to panel proceedings in such event, at least with regard to situations covered by Arts XXIII:1 and 3 which, by reference to the DSU, unequivocally grant this right to the complaining party. However, Art. XXII:2 does not indicate at what point **multilateral consultations may be deemed to have failed**, and the right to the establishment of a panel may thus be exercised. Art. XXII:2 does not contain any reference to the DSU similar to that in paragraph 1. It is thus up the Council for Trade

[14] See on the parallel provision of Art. XXII:2 GATT 1994: *Schorkopf*, Max Planck CWTL, Vol. 2, Article XXII GATT 1994, para. 4.

[15] This becomes clear from the wording of Art. XXII:2 which only refers to consultations under Art. XXII:1 but not to panel procedures.

in Services or the DSB, whichever is competent to conduct the multilateral negotiations, to determine whether and when the consultations have failed. However, the basic idea of the DSU that there should be a time limit for the consultation phase in order to put pressure on the parties to reach an agreed solution also applies to multilateral consultations. The CTS or the DSB should therefore generally stick to the timeframe established in Arts 4.7 and 4.8 DSU in the conduct of the multilateral negotiations.

13 The **conduct of the consultations** itself is also largely left to the discretion of the CTS or the DSB. Unlike Art. XXII:1, Art. XXII:2 does not provide for the application of Art. 4 DSU, the rules of which are not designed for multilateral negotiations anyway. The CTS or the DSB is thus free to frame its own rules. In doing so it has to take into account the main principles of the WTO Dispute Settlement mechanism, however, especially its commitments to mutually agreed solutions and to the settlement of disputes within a fixed timeframe.

F. Exemption of Double Taxation Issues (Art. XXII:3)

14 Art. XXII:3 exempts certain disputes altogether from the scope *ratione materiae* of the GATS consultation and dispute settlement provisions.[16] The exemption covers disputes concerning the admissibility of measures taken under double taxation agreements with regard to the requirements of the national treatment principle set out in Art. XVII. **Taxation measures** by a Member which do not conform to the national treatment principle of Art. XVII may not be made the object of bi- or multilateral consultations pursuant to Art. XXII or of a panel procedure pursuant to Art. XXIII if they are covered by a double taxation agreement concluded between that Member and the complaining Member. In this case a special agrerement governing the admissibility of the disputed measure exists, and the interpretation of its provisions is to be left to the (bilateral) dispute settlement procedure provided for by the agreement. By contrast, the preliminary issue whether the controversial tax measure is indeed one which falls within the scope of application of the double taxation agreement may be raised before the Council for Trade in Services by either Member, in accordance with footnote 11. If, however, the double taxation agreement already existed on 1 January 1995, *i.e.* the date of entry into force of the WTO Agreement, the matter may be submitted to the CTS only if both parties to the agreement consent to it, so as to avoid an interference with existing rights and obligations of Members. The Council is obliged to refer the matter to an arbitrator whose decision on the preliminary issue shall be final and

[16] *Weiss*, in: *Cameron & Campbell* (eds), 148, 156.

binding on the Members. While the terms of reference of the arbitration are those defined in Art. XXII:3, the provision offers no guidance on how the arbitration is to be set up and conducted. It is thus up the Council to determine the procedure before the arbitrator.

G. Evaluation

15 So far the **practical relevance** of the consultation provisions in the GATS has remained limited. While a number of requests for bilateral consultations under GATS have been brought over the years, only some of these have led to a formal settlement[17] or the initiation of panel proceedings.[18] This scarcity is to be explained mainly by the lack of substantial progress on market access commitments in the Uruguay and Doha Rounds. The right to request multilateral consultations under Art. XXII:2 has not been used to date.

[17] Notification of Mutually Agreed Solution, *Turkey—Fresh Fruit Import Procedures*, WT/DS237/4, 29 November 2002; Joint Communication from China and the United States, *China—Integrated Circuits*, WT/DS309/7, 16 July 2004.

[18] In particular, Panel Report, *Mexico—Telecoms*, WT/DS204/R; Panel Report, *US—Gambling*, WT/DS285/R; Appellate Body Report, *US—Gambling*,WT/DS285/AB/R.

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Article XXIII GATS
Dispute Settlement and Enforcement

1. If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU.
2. If the DSB considers that the circumstances are serious enough to justify such action, it may authorize a Member or Members to suspend the application to any other Member or Members of obligations and specific commitments in accordance with Article 22 of the DSU.
3. If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply.

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Cross References

Arts 1414, 1415, 2003–2019 NAFTA; Arts 9–32 MERCOSUR Olivos Protocol; Art. VII ASEAN Framework Agreement on Services, Arts 5–16 ASEAN Enhanced Dispute Settlement Protocol.

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A. General

1 Whereas Art. XXII:1–2 are virtually identical to the corresponding paragraphs of Art. XXII GATT 1994, Art. XXIII differs in several important respects from Art. XXIII GATT 1994 on which it is modelled. The first adjustment concerns the title, which has been changed from "Nullification or Impairment" (Art. XXIII GATT 1994) to "Dispute Settlement and Enforcement", a change which suggests a broader **shift of emphasis** from the correction of distortions in competitive trade relations, which was the dominant concern of dispute settlement under the GATT 1947,[1] to effective law enforcement as the central concept of dispute settlement systems based on the rule of law.[2] The system of causes of action which, under Art. XXIII GATT 1994, rests on a casuistic distinction of types of damage sustained—nullification or impairment of a benefit accruing directly or indirectly to one of the contracting parties or impediment of an objective of the Agreement—has been much simplified. Of the three types of complaints recognized under Art. XXIII GATT 1994 (violation and non-violation complaint and the complaint about the existence of any other situation impairing benefits) Art. XXIII has retained only two, the violation and the non-violation complaints. This reflects the fact that under the GATT, only violation and non-violation complaints have actually been used, the former accounting for more than 90 per cent of the cases brought until the entry into force of the WTO Agreement.[3] The so-called "situation complaint" has therefore not been retained in the GATS. Whereas the violation and non-violation complaints are grouped together with the situation complaint in one paragraph of Art. XXIII GATT 1994, they are neatly separated in Art. XXIII. The scope of these concepts has also been adjusted. The nullification or impairment of a benefit as a result of a disputed measure no longer constitutes a necessary element of a violation complaint; it is retained only as a prerequisite for the admissibility of non-violation complaints. The alternative requirement of the impediment of a treaty objective has been

[1] *Stoll*, Max Planck CWTL, Vol. 2, Article XXIII GATT 1994, para. 2.
[2] *Weiss*, in: *Cameron & Campbell* (eds), 148, 159.
[3] *Ibid.*, 148, 160 and footnote 63.

eliminated from GATS dispute settlement altogether.[4] Art. XXIII:2 deals with the implementation of decisions issued by the DSB in the violation complaint procedure, while Art. XXIII:3 defines the cause of action in non-violation complaints under the GATS and regulates the enforcement awards obtained in such procedure. While the provision of Art. XXIII applies to all disputes arising under the Agreement and one of the Annexes (with the exception of disputes concerning measures covered by Art. XXII:3), para. 4 of the Annex on Air Transport Services limits its application to cases in which obligations or specific commitments have been assumed by the Members concerned and dispute settlement procedures under bilateral or other multilateral agreements have been exhausted.

B. Structure and Relationship with the DSU

2 Art. XXIII:1 determines who may raise **what matters** in a violation complaint under the GATS and the **procedure** by which those claims shall be settled. Art. XXIII:2 provides for special regulation of a particularly important aspect of the **implementation** of DSB decisions in violation cases, *i.e.* the authorization of the complaining Member to suspend obligations and specific commitments under the GATS in response to the failure of the Member concerned to comply with the recommendations and rulings of the DSB. By contrast, Art. XXIII:3 determines the scope of application of non-violation complaints under the GATS, the procedure applicable to those complaints and the remedies which are available to the complaining Member if the measure is found by the DSB to have nullified or impaired a benefit accruing to it under a specific GATS commitment.

3 Art. XXIII:1 and 3 define the admissible claims and causes of action of GATS complaints and thus determine what kinds of disputes concerning the operation of the Agreement may be brought within the WTO dispute settlement system. The rules and procedures to be applied to admissible complaints are those codified in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). This results from Art. XXIII:1 and 3 which expressly stipulate that for the settlement of both violation and non-violation complaints Members "may have recourse to the DSU". For its part, the DSU provides in Art. 1.1 that its rules and procedures shall apply to "disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1" to the DSU which also include Art. XXIII. The rules of the DSU govern the whole of dispute settlement proceedings, from the request for consultations to the adoption

[4] *Spitzer*, 73.

of the panel or Appellate Body report by the DSB and the implementation of its rulings or recommendations. While there is no overlap and thus no area of potential conflict with regard to the rules governing procedures at the consultation, panel and Appellate Body stages, the situation is somewhat different at the implementation stage, since both paras 2 and 3 of Art XXIII have something to say about the implementation of DSB rulings and recommendations concerning GATS violation and non-violation complaints respectively. The status of the two provisions, however, is not the same. While Art. XXIII:3 is expressly recognized in Appendix 2 to the DSU as one of the "special or additional rules and procedures on dispute settlement" to which the application of the DSU is subject (Art. 1.2 DSU), Art. XXIII:2 does not enjoy such precedence. This suggests that the application of this provision may not give rise to any modification of or deviation from the DSU rules, and in particular from Art. 22 DSU.[5]

C. Conditions for Violation Complaints (Art. XXIII:1)

4 Art. XXIII:1 determines the scope of application for violation complaints under the GATS. **Jurisdiction *rationae personae*** is defined by the identification of the potential subjects of the dispute settlement proceedings as **"any Member"** and **"any other Member"** respectively.[6] This means that only Members of the WTO can bring controversies with other WTO Members to the dispute settlement system. Non-Members of the WTO can neither bring claims nor be made to answer those claims as respondents under the system. "Members" within the meaning of Art. XXIII:1 are only the states or the autonomous separate customs territories[7] as such. Neither any territorial or functional sub-entities within the public sector nor private sector firms, non-governmental organizations or individuals can formally constitute themselves as parties to WTO dispute settlement proceedings, although the interests of private businesses affected by the disputed measure—*i.e.* the interests of the domestic service suppliers in the case of GATS disputes—will often be the driving force behind the claims and counter-claims submitted by Members to the dispute settlement mechanism. By way of *amicus curiae* briefs, they may also make their views known directly to panels and the Appellate Body.[8]

5 **Jurisdiction *rationae materiae***, on the other hand, is determined by reference to **"this Agreement"**. Art. XXIII:1 thus admits only claims

[5] See below, para. 15.
[6] See *Stoll*, Max Planck CWTL, Vol. 2, Article XXIII GATT 1994, para. 14.
[7] See Art. XII WTO Agreement.
[8] See Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, paras 55–56, footnotes 31 and 32.

which relate to the operation of the rules and disciplines governing the international trade in services codified in the GATS. Complaints concerning the operation of one of the other WTO agreements are thus inadmissible, although they may be validly brought on the basis of a dispute settlement provision in one of the other covered agreements, like Art. XXIII GATT 1994.[9]

6 The complaints admitted by Art. XXIII:1 must have as their **object** the alleged **failure of any other Member to carry out its obligations or specific commitments under the GATS** (so-called violation complaints). The failure therefore has to be related to any of the obligations in the GATS or any specific commitments entered into under this Agreement. **"Obligations"** refers to the general obligations and disciplines applicable to all services covered by the Agreement which are laid down in Part II of the GATS, *e.g.* most-favoured-nation treatment (Art. II), transparency (Art. III), avoidance of abuse of a dominant position (Art. VIII), but also the disciplines applying to the use of general (Art. XIV) or security exceptions (Art. XIV*bis*) and balance-of-payment measures (Art. XII).[10] The **"specific commitments"**, on the other hand, are those concessions in the field of services which are negotiated by Members pursuant to Parts III and IV of the GATS and bound in Schedules annexed to the Agreement.[11] All cases involving the application of GATS rules, including those concerning individual service providers and their acquired rights, are therefore justiciable under the WTO dispute settlement system.[12]

7 The complaining Member must allege that another Member has **failed** to carry out a GATS obligation or a specific commitment made under the Agreement. This failure may take various forms, including omissions, *e.g.* the failure to take regulatory action needed to remove market-access barriers in accordance with commitments made under the GATS, as well as positive measures, *e.g.* the introduction of safeguard measures for public policy, balance-of-payment or other reasons which fail to meet the requirements defined in the relevant GATS provisions. The violation complaint covers **all types of State conduct** preventing the full implementation of the obligation or commitment concerned, legislative measures as well as administrative regulations or judicial decisions of domestic courts which introduce or maintain anti-competitive or discriminatory measures or practices. With regard to violations of GATS obligations by legislative action, the distinction between mandatory and discretionary legislation developed in the GATT

[9] On this provision see *Stoll*, Max Planck CWTL, Vol. 2, Article XXIII GATT 1994, para. 16.
[10] See *Grote*, Article XII GATS, para. 22.
[11] See Art. XX.
[12] *Petersmann*, CMLRev. 31 (1994), 1157, 1230.

dispute settlement practice also seems to apply. According to this doctrine, mandatory legislation may be challenged for alleged inconsistency with WTO obligations and commitments after it has been adopted and even before it is actually enforced. In the case of discretionary legislation, on the other hand, the mere enactment of the law does not constitute a breach of WTO obligations; a party has to wait until a prohibited measure is actually adopted under the discretionary law in order to bring a complaint.[13]

8 The **responsibility** of Members for GATS violations is not restricted to the conduct of its central government organs. In accordance with the general rules of international law on state responsibility,[14] it also covers acts of territorial units of the Member (municipal government, regional government *etc.*) and the conduct of entities or persons which, while not enjoying the formal status of organ of state of the relevant Member, are empowered by its law to exercise certain governmental prerogatives.[15]

9 In contrast to Art. XXIII GATT 1994 Art. XXIII:1 GATS does **not require** the **nullification or impairment** of a benefit or the impeding of a treaty objective as a prerequisite for violation complaints. Under the GATT 1947 a practice had developed which presumed the nullification or impairment of benefits once a violation of GATT obligations had been shown to exist. This practice was codified in Art. 3.8 DSU which stipulates that there is normally a presumption that a breach of the WTO rules has an adverse impact on other Member parties, and that it is up to the Member against whom the complaint has been brought to rebut the charge. In practice, however, it has never been possible to rebut the presumption.[16] It is thus with good reason that Art. XXIII:1 goes one step further and eliminates the requirement altogether.[17] Similarly, any reference to the impeding of treaty objectives as an element of violation complaints (as well as of non-violation complaints) has been dropped. In GATT practice, it has remained unclear what this condition aims at; it has been invoked in only three cases, and in none of them with success.[18]

10 Violation complaints under Art. XXIII:1 may be brought when a Member **considers** that the conditions for doing so are met. This indicates that Members have a broad **discretion** when deciding whether to bring a case against another Member for violation of GATS obligations or commitments.

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[13] See *Stoll*, Max Planck CWTL, Vol. 2, Article XXIII GATT 1994, para. 28.

[14] On their relevance for the determination of the issue which acts are attributable to Members see Panel Report, *Turkey—Textiles*, WT/DS34/R, para. 9.43.

[15] See Arts 4 and 5 of the ILC Draft Rules on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission 53rd session 2001, GAOR 56th session Supplement No. 10, A/56/10, 43–59.

[16] *Stoll*, Max Planck CWTL, Vol. 2, Article XXIII GATT 1994, para. 30.

[17] See below, para. 11.

[18] *Stoll*, Max Planck CWTL, Vol. 2, Article XXIII GATT 1994, para. 25.

This interpretation is confirmed by Art. 3.7 DSU which provides that it is up to the Member considering a complaint to exercise its judgement as to whether action under WTO dispute settlement procedures would be fruitful. It is also clear, however, that this judgement does not bind the panel and the Appellate Body when they have to decide on their jurisdiction in accordance with the criteria fixed in Art. XXIII:1 for the admissibility of GATS violation complaints. A requirement of prior exhaustion of local remedies which had been discussed during the GATS negotiations was finally rejected as unduly restricting the governments' discretion in bringing cases before the WTO dispute settlement system.[19]

11 The **procedures** to be applied to matters brought under Art. XXIII:1 are those laid down in the **DSU**. While the "Decision on Certain Dispute Settlement Procedures for GATS" initially provided for the establishment of a roster from which experts for the adjudication of GATS cases should be drawn,[20] the roster has been integrated into a general list of all potential panellists, with indications of whether they have GATT, GATS and/or TRIPS expertise.[21] By emphasizing the need to strive for a mutually satisfactory solution Art. XXIII:1 reiterates and confirms the preference for **mutually acceptable solutions** expressed in the DSU.[22] Provisions of the DSU which rest on the assumption that the nullification or impairment of benefits is a necessary element of the complaint do not apply to violation complaints brought under Art. XXIII:1. With regard to these complaints, the issue of nullification is not part of the "dispute brought" within the meaning of Art. 1.1 DSU.[23]

D. Suspension of Concessions in Violation Cases (Art. XXIII:2)

12 **Art. XXIII:2** deals with the **enforcement** of DSB rulings and recommendations in cases of violation complaints. If a violation of GATS obligations or commitments is found by the panel or Appellate Body, the DSB

[19] *Petersmann*, CMLRev. 31 (1994), 1157, 1230.

[20] Council for Trade in Services, Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services, Adopted by the Council for Trade in Services on 1 March 1995, S/L/2, 4 April 1995, para. 1.

[21] Dispute Settlement Body, Indicative List of Governmental and Non-Governmental Panelists, WT/DSB/33 of 6 March 2003; last amended by WT/DSB/33/Add. 13 of 3 August 2007. Para. 4 of the Annex on Financial Services emphasizes that the members of panels on prudential issues and other financial matters shall have the necessary expertise relevant to the financial service in question.

[22] See Art. 3.7 DSU.

[23] Consequently, the Appellate Body in, Appellate Body Report, *EC—Bananas III*, WT/DS27/AB/R, para. 250, stated that the Panel in that case "erred in extending the scope of the presumption in Article 3.8 of the DSU to claims under the GATS".

may authorize the complaining Member to suspend the application to the Member against whom the complaint had been brought of obligations and specific commitments in accordance with Art. 22 DSU. The **purpose of this provision** is **twofold**. It makes clear that the provisions on the suspension of concessions in **Art. 22 DSU also apply to specific commitments** entered into under the GATS. However, this would seem already to result from the text of Art. 22 DSU which expressly, notably in Art 22.3 lit. f and g DSU, provides for its application to services. The second purpose of the provision is to **grant the DSB broad discretion** with regard to the **decision** whether the complaining **Member** is to be **authorized to suspend the application of GATS obligations or specific commitments** where the Member which has been found to be in violation of the GATS fails to comply with the rulings and recommendations of the DSB. The DSB "may authorize" the suspension, but only if the "circumstances" are serious enough to justify such action. The **factors** to be taken into account in the decision of the DSB are thus defined very broadly. They cover all considerations which the DSB may deem relevant, not just the object and the gravity of the violation, but also the potentially negative effects of the suspension on trade relations between the Members and on services trade in general. If authorization is given, the proper **subject and the level of suspensions** have to be determined in accordance with Art. 22 DSU, and in particular with Art. 22.4 DSU.

13 Art. XXIII:2 is obviously intended to act as a safeguard against the quasi-automatic enforcement of panel and Appellate Body rulings in a field where there is as yet not much experience with the application of multilateral disciplines. In particular it would give the DSB the authority to check whether the violations found in the panel report justify the negative impact on the overall balance of rights and obligations and the level of mutual commitments which may result from the suspension of commitments by the aggrieved party. It seems doubtful, however, whether Art. XXIII:2 can really have the desired effect. The provision is modelled on Art. XXIII GATT 1947 which had introduced the requirement of authorization by the Contracting Parties in order to limit the **customary law right of unilateral reprisals** the exercise of which had contributed so much to the rule of the "law of the jungle" in international economic relations during the 1930s.[24] When incorporating a similar rule into Art. XXIII GATS the drafters seem to have overlooked, however, that the WTO has created an integrated dispute settlement system with its own rules on the enforcement

[24] *Petersmann*, CMLRev. 31 (1994), 1157, 1184.

of panel rulings which largely supersede the specific rules hitherto contained in the individual trade agreements.[25]

14 In particular, Art. 22.6 DSU regulates the power of the DSB to authorize the suspensions of concessions under the GATT and the GATS in a manner which gives the complaining Member a semi-automatic right to countermeasures.[26] If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith within a reasonable period of time and if no agreement is reached on mutually acceptable compensation within 20 days of the expiry of that period the DSB **shall**, upon the request of the invoking Member, **grant** the authorization to suspend concessions or other obligations unless it decides by consensus to reject the request. The wording of the provision shows that the authorization is a rather **formal act** in which **the DSB does not have any discretion**.[27] By granting such discretion to the DSB in the enforcement of rulings and recommendations concerning the GATS the right to countermeasures would be seriously restricted, although the DSU clearly intends to grant this right in all cases in which a Member successfully invokes the violation of WTO obligations, regardless of whether the obligations in question concern goods or services.

15 Thus a **conflict** arises between the provision of Art. XXIII:2 conferring broad discretion on the DSB with regard to the authorization of the suspension of commitments on the one hand and the quasi-automatic right of the complaining Member to the granting of such authorization under Art. 22.6 DSU on the other. According to the general rule on conflicts between DSU rules and the consultation and dispute settlement provisions in covered agreements only those special rules of the covered agreements which are listed in a special Appendix—Appendix 2—to the Dispute Settlement Understanding prevail over the DSU. Unlike Art. XXII:3, Art. XXIII:3 and the rules contained in the Decision on Certain Dispute Settlement Procedures for the GATS, Art. XXIII:2 is not listed in Appendix 2. It is therefore superseded by the rules and procedures of the DSU, including Art. 22.6. This result makes sense. If the authorization to suspend the application of specific commitments were to depend on a discretionary decision by the DSB, the Member affected would enjoy more far-reaching rights in the case of a non-violation than a violation complaint, since under Art. XXIII:3 **the right to retaliate** of the Member whose benefit is found to have been impaired is not so limited.[28]

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[25] For Art. XXIII:2 GATT 1994 see *Stoll*, Max Planck CWTL, Vol. 2, Article XXIII GATT 1994, paras 1 and 8.

[26] *Valles & McGivern*, JWT 34 (2000) 2, 63, 67.

[27] *Stoll*, Max Planck CWTL, Vol. 2, Article 22 DSU, para. 63.

[28] See below, para. 29.

E. Non-Violation Complaints (Art. XXIII:3)

16 The non-violation complaint is the second type of complaint which may be brought in disputes concerning the operation of the GATS. It offers additional safeguards against the impairment of benefits arising from commitments entered into under the GATS through unforeseen subsequent policy measures that are not prohibited by WTO law.[29] It was first introduced in the GATT 1947 in response to the widely felt need for some form of "equity law jurisdiction" as a means of allowing for multilateral decision-making in times of unforeseen crisis.[30] As explained by the Panel in *EEC—Oilseeds*, its main idea is "that the improved competitive opportunities that can be legitimately expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of any measure, whether or not it conflicts with the General Agreement".[31] With the adoption of the non-violation complaint, the GATS thus moves beyond a mere law enforcement perspective in order to include the **protection of reasonable expectations**, based on the negotiations on specific commitments concerning the liberalization of services, as to the maintenance of the conditions of competition prevailing at the time of the binding of the commitments, within the purview of the WTO dispute settlement system.

17 The formulation of the non-violation complaint in the first sentence of Art. XXIII:3 is based on the **jurisprudence** which had developed on the elements of the non-violation complaint in Art. XXIII:1 lit. b **GATT 1947** at the time of the Uruguay Round negotiations. It could therefore easily dispense with the alternative requirement of impediment to the attainment of any objective of the Agreement, which in almost fifty years of GATT panel practice had not once been used.[32] On the other hand, it incorporates the concept of "reasonable expectations" which did not figure in the text of Art. XXIII:1 GATT 1947 but was regularly used in GATT panel reports to determine the benefits accruing to a Contracting Party under the General Agreement within the meaning of Art. XXIII:1 lit. b GATT 1947.[33] Other textual changes from Art. XXIII:1 GATT 1994 (the lack of reference to the "direct or indirect" nature of the benefit, the express

[29] *Petersmann*, The GATT/WTO Dispute Settlement System, 171.
[30] *Petersmann*, CMLRev. 31 (1994), 1157, 1171.
[31] GATT Panel Report, *EEC—Oilseeds I*, BISD 37S/86, para. 144.
[32] *Spitzer*, 73.
[33] Working Party Report, *Australia—Ammonium Sulfate*, BISD II/188, para. 12.

reference to the consistency of the targeted measures with the GATS) seem to be of little significance.

I. Cause of Action

18 Since no GATS cases have so far been brought to the WTO dispute settlement under the non-violation procedure, the analysis of the main elements of a non-violation complaint in Art. XXIII:3 must use as its starting point the criteria developed by the **jurisprudence** on the non-violation complaint under **GATT**. This jurisprudence recognizes **three elements** that a complaining party must demonstrate in order to make out a cognizable claim under Art. XXIII:1 lit. b GATT 1994.[34]

19 Firstly, a **"measure"** must be in dispute between the parties. Although this term generally applies only to policies or actions of government, not those of private parties, it may occasionally also cover action taken by private parties if there is sufficient government involvement with it.[35]

20 The second requirement is the existence of a **benefit** which a Member could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of the GATS. "Benefit" in this context does not refer to any legal right or interest, but to the **improved competitive opportunities** which the complainant may legitimately expect to result from the concessions made at the end of the multilateral round of trade negotiations.[36] In the case of Art. XXIII:3, the relevant concessions are not tariff concessions but the specific commitments concerning market access and the national treatment of the services and service suppliers from other Members as well as additional commitments (Art XVIII) which are made pursuant to Part III of the Agreement. In order for such expectations with regard to benefits to be recognized as **"reasonable"**,[37] they must take into account all measures of the party making the commitment that could have been reasonably anticipated at the time of the commitment.[38] As with the requirement of a benefit, the complaining party has the burden of demonstrating the benefit accruing to it under the commitment.[39]

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[34] See the detailed analysis in Panel Report, *Japan—Film*, WT/DS44/R, paras 10.42–10.89.

[35] *Ibid.*, para. 10.56. On the term "measure", see also *Feinäugle*, Article XXVIII GATS, paras 4 *et seq.*

[36] *EEC—Oilseeds I*, BISD 37S/86, para. 144.

[37] On the debate in the literature whether the terms "reasonable" and "legitimate" are two words for the same concept or designate different concepts see *Böckenförde*, Max Planck CWTL, Vol. 2, Article 26 DSU, para. 23.

[38] *Japan—Film*, WT/DS44/R, para. 10.61.

[39] *Ibid.*

21 Finally, the benefit accruing to the complaining Member must be **nullified or impaired** as a result of the application of a measure by another WTO Member. It has thus to be demonstrated that the **competitive position** of the imported services benefiting from a relevant market access commitment **is being upset** by the application of a measure not reasonably anticipated. While it is not necessary that the measure is the only or the dominant cause for the impairment, it must have made more than a *de minimis* contribution to nullification or impairment.[40]

22 While there is large consensus on the main elements of non-violation complaints, the need to resort to this type of complaint in the GATS context has been questioned. It has been argued that its scope of application is greatly reduced by GATS obligations which **limit the freedom of national regulatory policies** of Members and thereby protect the "specific commitments" from being nullified or impaired by subsequent policy measures. Art. VI:5 lit. a is seen as an example of this approach. By establishing the legal obligation of Members in sectors where they have undertaken specific commitments not to apply licensing and qualification requirements and technical standards that nullify or impair such commitments in a manner which could not reasonably have been anticipated at the time the specific commitments in those sectors were made, Art. VI:5 lit. a reduces the need to use the non-violation complaint of the GATS, since a violation of this obligation would justify a violation complaint.[41] However, while Art. VI:5 lit. a can indeed be seen as a *lex specialis* with regard to the application of the nullification and impairment concept, its scope of application is limited to licensing and qualification requirements and technical standards and does not cover other policy measures which may have a negative impact on the competitive opportunities created by specific commitments, *e.g.* the subsequent introduction of subsidies.

23 Moreover, it has been pointed out that the GATT concept of nullification or impairment has been designed specifically to protect the balance of tariff concessions.[42] Under the GATT, the reasonable expectations relate to the moment in time when the tariff concessions are agreed upon between two Members. Members ideally accord each other improved market access conditions of similar total value. This is the basis on which a "reasonable expectation" of a Member that the value of concessions which it received from another Member may not be nullified or impaired by subsequent measures can rest. In services, on the other hand, there is no concept of "tariff binding". Each Member submits, on a sector by sector basis, a

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[40] *Ibid.*, para. 10.84.

[41] *Roessler*, in: *Petersmann* (ed.), 125, 135; *Petersmann*, The GATT/WTO Dispute Settlement System, 148, 149.

[42] See GATT Panel Report, *US—Sugar Waiver*, BISD 37S/228, para. 5.21.

Schedule of specific commitments that includes market access commitments as well as national treatment conditions and qualifications in accordance with a view to achieving a progressively higher level of liberalization (Art. XIX:1). In this context the concept of "reasonable expectation" is much more difficult to apply.[43]

24 While this discussion has the merit of highlighting the theoretical and practical difficulties relating to the application of the "reasonable expectations" concept in a GATS context, it seems premature to conclude that no scenario justifying the existence of the non-violation complaint under GATS could ever arise.[44] Such conclusion would, after all, clearly frustrate the will of the parties which, despite their knowledge of the secondary role non-violation complaints had played in the GATT practice, insisted on incorporating a parallel provision in the GATS. Nor does it seem impossible to adapt the concept of "reasonable expectations" to the specific requirements of the GATS context. Instead of focusing on the "equal value" of tariff concessions the concept would be used to safeguard the broader principles of **effectiveness and reciprocity of market access commitments** which, in accordance with Art. XIX:1, shall guide the multilateral negotiations on the progressive liberalization of trade in services. It would thus prevent Members from using their right to regulate and to introduce new regulations expressly recognized in the Preamble to the GATS in order to undermine or to circumvent specific commitments resulting from such negotiations rather than withdraw or modify those commitments *de iure* in exchange for compensation or equivalent withdrawal of commitments under Art. XXI. The details would have to be fleshed out on a case-by-case basis by the relevant panel case law.

II. Procedure

25 The procedural rules to be applied to non-violation complaints under the GATS are those of the DSU. These rules do not include Art. 26 DSU, which applies to non-violation complaints of the type described in Art. XXIII:1 lit.b GATT 1994 only and which does not mention Art. XXIII:3 GATS. There is thus no general requirement for a detailed justification supporting the complaint (Art. 26.1 lit. a DSU).[45] The general rules on the **burden of proof** in non-violation cases also apply to complaints brought under Art. XXIII:3, however. It is thus up to the complaining party to demonstrate that a benefit which it could reasonably expect to accrue to it under a specific

[43] *Cho*, Harv. Int'l. L.J. 39 (1998), 311, 325; *Spitzer*, 79.
[44] *Petersmann*, CMLRev. 31 (1994), 1157, 1231.
[45] On the implications of this requirement on evidentiary standards see *Böckenförde*, Max Planck CWTL, Vol. 2, Article 26 DSU, para. 28.

GATS commitment has been impaired by a measure of the defending party. Depending on the circumstances, this burden may be more or less easy to satisfy. In cases of alleged *de facto* discrimination, for example, the complaining party will be called upon to demonstrate in detail a claimed disproportionate impact on imports of the challenged measure which on its face is neutral as to the origin of the services concerned.[46]

III. Remedies

26 If the measure challenged by way of non-violation complaint is found by the DSB to have nullified or impaired a benefit which the complaining Member could legitimately claim under a specific GATS commitment, the latter shall be entitled to a mutually satisfactory adjustment. The adjustment shall be based on the principles contained in Art. XXI:2. Under this provision the Member which has taken the measure is obliged to enter into negotiations with a view to reaching agreement on any necessary **compensatory adjustment**. Whereas the term "compensation" used in Art. 22.2 DSU is understood to cover also monetary compensation,[47] the term "compensatory adjustment" seems to point to an adjustment in the level of commitments. This interpretation is confirmed by the exhortation in Art. XXI:2 lit. a that the parties to the compensation negotiations shall endeavour to maintain a level of mutually advantageous commitments not less favourable to trade than that which had resulted from the scheduled specific commitments prior to the negotiations. This objective could be reached by the undertaking of new or additional commitments specifically advantageous for the complaining party—although not restricted to it, since the adjustment is subject to the most-favoured-nation principle (Art. XXI:2 lit. b).

27 An alternative which is expressly mentioned in Art. XXIII:3 is the **modification or withdrawal of the measure** which has upset the balance of commitments in the first place. This provision rejects the principle developed under the GATT 1947 and preserved in Art. 26.1 lit. b DSU for GATT non-violation complaints that the withdrawal of the measure under attack cannot be required. It equally excludes the suggestion in Art. 26.1 lit. d DSU that compensation may be a permanent solution or part of a final solution of the dispute. Instead, it reaffirms and emphasizes the preference for full implementation of the DSB rulings and recommendations expressed in Art. 22.1 DSU which may well ask for the modification or withdrawal of the measure in dispute.

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[46] *Japan—Film*, WT/DS44/R, para. 10.85.
[47] See *Stoll*, Max Planck CWTL, Vol. 2, Article 22 DSU, para. 27.

The second sentence of Art. XXIII:3 fixes no timeframe for the negotiations on a mutually satisfactory adjustment. It is *lex specialis* to Art. 22 DSU only with regard to the objectives and content of the negotiations, not in respect of the **procedural rules** by which these negotiations shall be conducted. The Member against whom the successful complaint was lodged thus must enter the negotiations on the compensatory adjustment on the expiry of the reasonable period of time as determined pursuant to Art. 21.3 DSU at the latest. According to Art. 22.2 DSU, the negotiations are to be concluded successfully within 20 days after the date of expiry of the reasonable period of time. *28*

If no agreement can be reached before the end of this period of 20 days, Article 22 DSU shall apply (Art. XXIII:3, sentence 3). In accordance with Art. 22.6 DSU, the affected Member may request authorization to suspend concessions and other obligations under the GATS or under another covered agreement. The request has to be granted by the DSB, bar a negative consensus to the contrary (Art. 22 DSU). In considering the concessions or obligations to be suspended, the affected Member shall follow the principles in Arts 22.3 and 22.4 DSU. Art. 22.3 DSU determines the **proper subject** of the suspensions, while their extent is subject to the **principle of equivalence** enshrined in Art. 22.4 DSU. *29*

With regard to the proper subject of the suspension, Art. 22.3 DSU lays down a three-tiered rule which is designed to ensure that the subject of the suspension is related as closely as possible to the economic sector concerned and the agreement involved.[48] The suspension shall apply to the same sector as that in which the panel or Appellate Body has found a nullification or impairment. With respect to services, the relevant sectors are defined by the "Services Sectoral Classification List" (Art. 22.4 lit. f (ii) DSU). According to the Classification List, measures affecting trade in services and countermeasures may be assigned to one or more of **eleven principal sectors**: business services, communication services, construction and related engineering services, distribution services, educational services, environmental services, financial services, health related and social services, tourism and travel related services, recreational, cultural and sporting services, and transport services.[49] *30*

If the Member considers that suspension in the same sector is not practicable or effective, it may seek to suspend concessions or obligations in other sectors of the same agreement. The most far-reaching countermeasure is *31*

[48] *Ibid.*, para. 33.

[49] The list is contained in document: Group of Negotiations on Services, Uruguay Round, Group of Negotiations on Services, Services Sectoral Classification List, Note by the Secretariat MTN.GNS/W/120, 10 July 1991.

the suspension of concessions or other obligations under **another covered agreement**, for example under the GATT or the TRIPS in the case of nullification or impairment of benefits accruing under the GATS. The requesting Member shall have recourse to such a measure only if it considers that measures taken under the same agreement would either be impractical or ineffective, and that the circumstances are serious enough. The circumstances to be taken into account in this appreciation are specified in Art. 22.3 lit. d DSU.

32 The **modes of service supply** do not form part of the definition of service sectors for the purpose of determining the proper subject of the suspension. But they may still be taken into account in order to determine whether the **level of the suspension** of concessions is equivalent to the level of nullification or impairment sustained for the purpose of Art. 22.4 DSU. This would require a practically difficult adaptation of the concept, however, which in the GATT context has been defined primarily in monetary terms.[50]

33 The conformity of the proposed suspension with the requirements of Arts 22.3 and 22.4 DSU is not subject to the control of the DSB when it adopts its decision on the authorization request. The only substantial issue involved in the decision on authorization concerns Art. 22.5 DSU which obliges the DSB not to authorize suspensions which are prohibited by a covered agreement. Other issues relating to the level and the proper subject of the proposed suspensions cannot be reviewed by the DSB. This contrasts with the regulation of non-violation complaints under GATT 1994 in Art. 26.1 lit. c DSU which allows for the inclusion of the determination of the level of benefits which have been nullified or impaired in the **arbitration under Art. 21.3 DSU**, thus establishing a clear reference for the exercise of the right to suspension under Art. 22 DSU. While it has been argued that this omission was probably not intended and calls for some creative interpretation if the issue arises, it has to be emphasized that the text of both Art. XXIII:3, sentence 3 and Art. 26.1 DSU is clear and that it is hard to see why panel arbitration under Art. 22.6 DSU should be sufficient to deal effectively with issues concerning the level and proper subject of suspensions in violation cases but not in disputes relating to non-violation complaints.

[50] See Decision by the Arbitrators, *US—1916 Act (EC)*, WT/DS136/ARB, paras 5.17, 5.23, 5.35.

F. Outlook

The GATS rules on dispute settlement and enforcement are **as yet largely untested** in practice. While they reflect the experience which has been gathered from the application of violation and non-violation complaints in panel practice based on Art. XXIII GATT 1947 prior to the entry into force of the WTO Agreement, they essentially limit themselves to the codification of the main elements of GATT jurisprudence, without any major attempt to adapt the relevant concepts to the specificities of services trade. It will thus be the task of the WTO panels and the Appellate Body to confront the problems raised by the application of the WTO dispute settlement provisions to the field of services trade and to clarify and reformulate the concepts which govern their application. So far the opportunity for a detailed analysis of the provisions of Art. XXIII has not arisen in WTO dispute settlement practice. Of the five cases brought before the dispute settlement system by the end of 2006, only two were exclusively related to trade in services. The *Mexico—Telecoms* case dealt with Mexico's alleged failure to open up its telecommunications sector to foreign competitors,[51] while in *US—Gambling* Antigua challenged the US ban on internet gambling as being incompatible with its commitment to allow the cross-border-supply of internet gambling services.[52] Both cases focused on the substantive issues at hand, however. The analysis of the specific rules on dispute settlement procedures under GATS did not play a significant role in either of them. *34*

[51] Panel Report, *Mexico—Telecoms*, Panel Report, WT/DS204/R.

[52] Panel Report, *US—Gambling*, WT/DS285/R; Appellate Body Report *US—Gambling*, WT/DS285/AB/R.

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Article XXIV GATS
Council for Trade in Services

1. The Council for Trade in Services shall carry out such functions as may be assigned to it to facilitate the operation of this Agreement and further its objectives. The Council may establish such subsidiary bodies as it considers appropriate for the effective discharge of its functions.
2. The Council and, unless the Council decides otherwise, its subsidiary bodies shall be open to participation by representatives of all Members.
3. The Chairman of the Council shall be elected by the Members.

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A. General

In line with Art. IV:5 WTO Agreement, Art. XXIV provides for the institutional set-up of GATS. Like all multilateral agreements, the GATS Agreement has an organ of its own tasked with administering the Agreement. The Council for Trade in Services (CTS) is a **separate organ of the WTO**, not a subsidiary organ of either the Ministerial Conference or the General Council. But both the Ministerial Conference and the General Council have guidance authority over the CTS by virtue of their position in the overall organization.[1] *1*

In standard WTO institutional terms, the **structure** of Art. XXIV provides for the mandate of the CTS within the overall organization (Art. XXIV:1), its composition (Art. XXIV:2), and chairmanship (Art. XXIV:3). *2*

B. The Council for Trade in Services: Functions, Subsidiary Bodies, Procedure (Art. XXIV:1)

I. Functions (Art. XXIV:1, Sentence 1)

Functions are powers to be used for specific purposes. *3*

The **extent** of the CTS's functions is delimited both negatively and positively. *4*

Its functions are delimited negatively, *i.e.* **limited**, **vertically**, by those powers reserved to the General Council (in particular the power to interpret the Agreement authoritatively), to the Dispute Settlement Body (DSB) (formally to enforce the Agreement), and to the Trade Policy Review Council *5*

[1] See Art. IV:1 and Art. IV:5, sentence 1 WTO Agreement.

(to review Members' policies).[2] **Horizontally**, the exclusive competence of the councils of other multilateral agreements is to be respected (see Art. IV:5 WTO Agreement).

6 **Positively**, the CTS carries out the functions assigned to it under the GATS Agreement. Art. XXIV positively delimits the contours of the CTS's functions by indicating their **objects**. These objects are: furthering the Agreement's objectives and facilitating the operation of the Agreement. These two terms overlap considerably.

1. Facilitating the Operation of the Agreement

7 On a literal interpretation, facilitating the operation of the Agreement is concerned with the implementation of the Agreement as it stands, with respect both to detailing the individual provisions of the Agreement and to the application of the Agreement by Members. The terminology also reflects that the Agreement first and foremost relies on coordination and cooperation between Members, in line with the conception of the WTO as a member-driven organization.

8 The CTS fulfils this function of facilitating the operation of the Agreement through, in particular:

a) Continuous Review and Surveillance of the Application of the Agreement

9 As may be deduced from the wording of **Art. IV:5 WTO Agreement**, the CTS is charged with the continuous review and surveillance of the application of the GATS Agreement, its Annexes and any accession agreements.[3] Such review and surveillance are particularly important given the relative lack of experience with the regulation of trade in services as opposed to the trade in goods. They can be carried out, *inter alia*, through research and the undertaking of studies, and may provide the background for initiatives to improve the operation of the Agreement in general or in specific sectors.

10 Specifically **mandated reviews** concern exceptions to the obligatory most-favoured-nation (MFN) treatment (Art. II, Annex on Article II Exemptions) and the Annex on Air Transport Services.

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[2] Relevant information gained in the trade policy review process is passed on to the CTS, see, *e.g.*, Working Party on GATS Rules, Subsidies for Services Sectors, Information Contained in WTO Trade Policy Reviews, Background Note by the Secretariat, Addendum, S/WPGR/W/25/Add.5, 27 March 2007.

[3] See Council for Trade in Services, Transitional Review under Section 18 of the Protocol on the Accession of the People's Republic of China, Report to the General Council, S/C/27, 12 December 2006.

b) Implementation of GATS Negotiating Mandates

11 An important function of the CTS lies in the implementation of **negotiating mandates** provided for in the Agreement. The GATS Agreement essentially sets out a regulatory framework for future negotiations to liberalize trade in services. The Agreement presupposes that its rules (*e.g.* Arts XIII and XV), the matter of domestic regulation (Art. VI:4), and specific commitments (Art. XIX) will be subject to further negotiations both through the CTS and among Members.

12 The CTS's mandate to negotiate "disciplines" for domestic regulation under Art. VI:4 comprises the function of **standardizing** the domestic regulation of services.[4] It is true that, unlike the position in the case of trade in goods, the GATS does not contain a general obligation for Members to base their domestic regulation on international standards. But it may well be presumed that the CTS has the implied power either to enter into such activities or to promote the use of any relevant external standardization processes in place.

13 The CTS facilitates the implementation of the negotiating mandate on specific commitments by, *inter alia*, drawing up **negotiating guidelines** (Art. XIX:3).

14 More generally the CTS may elaborate **standard procedures** to be applied by Members in the implementation of the Agreement (Art. XXI:5).[5]

c) Transparency

15 A mainstay of the GATS is the transparency of Members' provisions. The CTS facilitates the operation of the **transparency** approach by receiving the relevant information from Members. This is provided for, *inter alia*, in Arts III:5, VII:4 lit. b and VIII:3.

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[4] The CTS has approved the Disciplines on Domestic Regulation in the Accountancy Sector (Council for Trade in Services, Decision on Disciplines Relating to the Accountancy Sector, Adopted by the Council for Trade in Services on 14 December 1998, S/L/63, 15 December 1998) negotiated by the Working Group on Domestic Regulation (WGDR), which are applicable, however, only to Members having scheduled specific commitments on accountancy. These disciplines are to be integrated into the GATS at the end of the current Round.

[5] In 1999, the CTS enacted detailed procedures for the modification of Schedules pursuant to Art. XXI (Council for Trade in Services, Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS) (Modification of Schedules), Adopted by the Council for Trade in Services on 19 July 1999, S/L/80, 29 October, 1999). Improvements to Schedules, *i.e.* the inscription of new sectors or the removal of existing limitations, are subject to more streamlined procedures, laid down in: Council for Trade in Services, Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments, Adopted by the Council for Trade in Services on 14 April 2000, S/L/84, 18 April 2000. Guidelines for the scheduling of specific commitments under the GATS are contained in: Council for Trade in Services, Trade in Services, Guidelines for the Scheduling of Specific Commitments under the GATS, Adopted by the Council for Trade in Services on 23 March 2001, S/L/92, 28 March 2001.

16 This includes the implied power to elaborate standard procedures.[6]

d) Consultation, Conciliation and Negotiation

17 Consultation is to be understood in the **broadest sense** and covers any interaction that is aided by an institutionalized venue.

18 The consultation among Members may cover **any issues** arising under the Agreement, including disputes concerning the interpretation or application of the Agreement (*e.g.* Arts IX:2 and XV:2). The CTS may identify needs for consultation and negotiation, encourage Members to start negotiations, and assume an active, expertise-based role in the consultations and negotiations by providing a forum for technical discussions and conducting studies on measures of Members and on any other technical matters affecting trade in services.

19 Members may also bring **specific trade concerns** to the attention of the CTS. These concerns may be related to specific notifications or trade measures and may serve as warning signals of potential disputes.

e) Enforcement

20 Legal enforcement of the Agreement is provided for in Art. XXIII and in the Dispute Settlement Understanding (DSU). However, the CTS also has a role to play in the Agreement's **enforcement** by, *inter alia*, asking Members to provide information requested by other Members (Art. VIII:3).

21 More generally, the CTS provides **indirect enforcement** through review of Members' practice under the Agreement and development of review procedures.

22 Positively, the CTS may provide **compliance assistance**, which is not limited to technical studies, but includes more general provision of technical expertise.

f) Developing Country Members

23 Generally, the CTS may provide technical assistance to developing country Members and developing countries negotiating accession to the WTO Agreement (Art. XXV:2).

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[6] See Council for Trade in Services, Report of the Meeting Held on 1 March 1995, Note by the Secretariat S/C/M/1, 22 March 1995, para. 10 with Council for Trade in Services, Guidelines for Notifications under the General Agreement on Trade in Services, Adopted by the Council for Trade in Services on 1 March 1995, S/L/5, 4 April 1995.

g) Cooperation with Other International Bodies

In order to facilitate the operation of the Agreement, the CTS may **cooperate** with any other subsidiary bodies established under the WTO Agreement, or any international organizations the activities of which touch on the GATS Agreement.[7] Such cooperation can be taken to be required under general international law.[8] The CTS may formalize its cooperation by entering with these organizations into memoranda of understanding, which are a generally accepted means of coordinating the action of international bodies with overlapping remits in international law. *24*

2. Furthering the Agreement's Objectives

Everything transcending the implementation of the Agreement as it stands and its individual provisions falls under the heading of "**Furthering the Agreement's objectives**". This includes considering proposals for amendments of the Agreement and making appropriate proposals or recommendations to the General Council for consideration by the Ministerial Conference in connection with any matter relating to trade in services falling under the Agreement. *25*

3. Assignment of Functions

The CTS carries out "such functions as may be assigned to it". The **assignment of functions** to the CTS may take place in three ways: *26*

The substantive **GATS** provisions assign specific functions to the CTS.[9] *27*

The **Ministerial Conference** and the **General Council**[10] may formulate tasks for the CTS given their overall responsibilities for the WTO Agreement and the annexed GATS. *28*

Other than that, the **CTS** may generally take up any matter falling under the GATS and does not need a mandate from the General Council. In line with the general law of international organizations, it is for the CTS, at least primarily, to determine the reach of its competences pursuant to the foundational treaty.[11] *29*

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[7] See as a document in that context Working Party on GATS Rules, List of Publications from International Organizations Relating to Subsidies in Services, Note by the Secretariat, S/WPGR/W/47, 12 November 2003.

[8] See *Röben* in: *Wolfrum & Röben* (eds), 523.

[9] See, for example, Art. V:7, Art. VI:4, Art. VIII:3, Art. XIX:3, Art. XXI:5, Art. XXII:2, Art. XXII:3, Art. XXV:2.

[10] See Art. IV:5 WTO Agreement.

[11] ICJ, *Certain Expenses of the United Nations*, Advisory Opinion, [1962] ICJ Reports, 151, 168.

II. Subsidiary Bodies (Art. XXIV:1, Sentence 2)

1. Role of Subsidiary Bodies

30 The CTS may institute **subsidiary bodies**, *i.e.* organs of the CTS that are to assist the latter by concentrating on certain areas (sectors) or horizontal matters within the overall CTS mandate for the trade in services. Such subsidiary bodies are subject to the CTS's authority and report to it. Participation in these subsidiary bodies must be open to all parties unless decided otherwise by the CTS (Art. XXIV:2). Each such body decides on its own rules of procedure. Each such body may also set up its own subsidiary bodies as appropriate.[12]

31 The provision mentions only the **competence** of the CTS to establish any subsidiary bodies. The Ministerial Conference may, however, take general decisions on the responsibilities and procedure of such subsidiary bodies given its overall authority over the institutional set up under the WTO Agreement.

32 The CTS may institute subsidiary organs to the extent required for the effective discharge of its **functions** within the meaning of Art. XXIV:1. The extent of the GATS CTS's functions determines and limits those of its subsidiary bodies. In consequence, subsidiary bodies may be charged both with facilitating the operation of the GATS Agreement as it stands ("committees", "working groups") and with making negotiated recommendations for amendments ("negotiating groups").

33 **Effectiveness** is to be understood broadly and as a matter of the CTS's assessment as would be the case under the general law of international organization.[13]

2. Types of Subsidiary Bodies and Council Practice

34 Among the subsidiary bodies are (sub)committees, working groups and negotiating groups.

a) Committees

35 In line with its competence under Art. XXIV:2, the **CTS** has further specified, in general terms, the functions of committees.[14] Essentially, the responsibilities listed are those of the CTS itself, albeit limited to a specific sector. According to the Council Decision on Institutional Arrangements

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[12] Council for Trade in Services, Decision on Institutional Arrangements for the General Agreement on Trade in Services, Adopted by the Council for Trade in Services on 1 March 1995, S/L/1, 4 April 1995, para. 1.

[13] ICJ, *Certain Expenses of the United Nations*, Advisory Opinion, [1962] ICJ Reports, 151, 168.

[14] S/L/1, para. 2

for the General Agreement on Trade in Services, any sectoral committee shall afford Members the opportunity to consult on any matters relating to trade in services in the sector concerned and the operation of the sectoral annex that may exist in the relevant sector and shall carry out responsibilities as assigned to it by the CTS.[15] Any recommendation for amendment of the GATS or its Annexes shall be made to the CTS.[16] Also, subsidiary bodies may and shall cooperate with any other subsidiary bodies established under the GATS and any international organizations active in the sector concerned.[17]

36 Among the committees created are the Committee on Trade in Financial Services[18] and the Committee on Specific Commitments.[19]

b) Working Parties

37 Working parties are subsidiary bodies used for matters that transcend any given sector.

i) Domestic Regulation

38 The **Working Party on Domestic Regulation (WPDR)** set up by the CTS is responsible for carrying out all the work provided for under Art. VI:4.[20] It would give priority to the development of horizontal disciplines applicable to all services sectors, while retaining the possibility of developing further disciplines applicable to specific sectors or groups of sectors, including the development of general disciplines for professional services.[21] The WPDR reports to the CTS.[22]

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[15] *Ibid.*

[16] *Ibid.*

[17] *Ibid.*

[18] *Ibid.*, para. 3.

[19] Council for Trade in Services, Report of the Meeting Held on 4 October 1995, Note by the Secretariat, S/C/M/6, 3 November 1995, paras 22–25; Council for Trade in Services, Annual Report to the General Council (2006), Adopted by the Council for Trade in Services on 22 November 1995, S/L/16, 1 December 2006.

[20] Council for Trade in Services, Decision on Domestic Regulation, Adopted by the Council for Trade in Services on 26 April 1999, S/L/70, 28 April 1999, paras 1 and 2. The WPDR replaced the former Working Party on Professional Services (WPPS) in order to manage the two overlapping mandates of Art. VI:4 which called upon the Council to develop disciplines on domestic regulation on **all** services sectors and the Decision on Professional Services (Council for Trade in Services, Decision on Professional Services, Adopted by the Council for Trade in Services on 1 March 1995, S/L/3, 4 April 1995) which called upon the Working Party on Professional Services to fulfill the same task for **professional** services. The WPDR should then carry out all the work encompassed in Article VI:4, see Report (1999) of the Council for Trade in Services to the General Council, S/C/10, 26 October 1999, para. 25.

[21] S/C/10, para. 25.

[22] S/L/70, para. 4. The Disciplines on Domestic Regulation in the Accountancy Sector (Council for Trade in Services, Disciplines on Domestic Regulation in the Accountancy Sector, Adopted by the Council for Trade in Services on 14 December 1998, S/L/64, 17 December 1998) were approved by the CTS in 1998. The relevant Council Decision (Council for Trade in Services, Decision on Disciplines Relating to the Accountancy Sector, Adopted by the Council for Trade in Services on 14 December 1998, S/L/63, 15 December

ii) GATS Rules

39 In 1995, the CTS established a **Working Party on GATS Rules** (WPGR) to carry out the negotiating mandates contained in the GATS Agreement on emergency safeguard measures (Art. X), government procurement (Art. XIII) and subsidies (Art. XV).[23]

c) Negotiating Groups

40 **Negotiating Groups** on Natural Persons,[24] Maritime Transport Services[25] and Basic Telecommunications[26] were also established.

III. Procedure

41 Art. XXIV does not contain any explicit provision on the rules of procedure of the CTS. Under general organizational law, it is thus within the competence of the CTS to adopt such rules.

42 The CTS decides by **consensus**, *i.e.* a decision is regarded as agreed if there is no formal objection from a Member present at the meeting.[27]

43 The exceptional voting procedures provided for under Arts IX and X WTO Agreement do not apply to the CTS. However, it has been the practice of the CTS to follow the General Council in this respect. Thus, the CTS adopted the Rules of Procedure of the General Council, along with appropriate modifications.[28] Also, the CTS took note of the decision by the General Council in which it granted observer status to a number of governments and separate territories and which also covered observer status to the subsidiary bodies to the General Council, including the CTS.[29] It also took note of the decision of the General Council in which it agreed on an *ad hoc* arrangement whereby the IMF, the World Bank, the UN and UNCTAD were invited to participate as observers in the first meetings of

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1998) provides that the "accountacy disciplines" are applicable only to Members who have scheduled specific commitments on accountancy. The disciplines are to be integrated into the GATS, together with any new results the WPDR may achieve in the interim, at the end of the current Round. A core feature of the disciplines is their focus on (non-discriminatory) regulations that are not subject to scheduling under Arts XVI and XVII.

[23] Council for Trade in Services, Report of the Meeting Held on 30 March 1995, Note by the Secretariat, S/C/M/2, 28 April 1995, paras 22–25; S/C/M/6, paras 22–25; S/L/16 (procedure).

[24] Decision on Negotiations on Movement of Natural Persons, LT/UR/D-5/6, 15 April 1994, para. 2.

[25] Decision on Negotiations on Maritime Transport Services, LT/UR/D-5/5, 15 April 1994, para. 2.

[26] Decision on Negotiations on Basic Telecommunications, LT/UR/D-5/4, 15 April 1994, para. 3.

[27] Art. IX:1 WTO Agreement, footnote 1.

[28] S/C/M/6, paras 2 and 3.

[29] General Council, Minutes of Meeting, Held in the Centre William Rappard on 31 January 1995, WT/GC/M/1, 28 February 1995.

the General Council and its subsidiary councils.[30] At its meeting on 14 April 2000, the CTS granted the World Health Organization and the World Tourism Organization observer status on an *ad hoc* basis.[31]

44 Hitherto, the CTS has not organized consultations with **non-governmental organizations** (**NGOs**). Yet Art. V:2 WTO Agreement provides authority for holding such consultations. Until the General Council reaches a consensus to do so, the chair of the CTS could and should meet with interested NGOs on a regular basis.[32]

45 With respect to the **legal status of CTS acts**, one needs to draw distinctions. Decisions concerning the **procedure** of the CTS and its committees are **binding**. Whether a **committee decision** achieves such legal quality is first and foremost a matter of **interpretation** of the decision's wording. Decisions addressed to Members may flesh out and detail the legal obligations incumbent on Members by virtue of the GATS Agreement and, to that extent, enjoy indirectly legally binding status.

C. Composition (Art. XXIV:2)

46 The CTS follows the principle of comprehensive membership generally applicable to the institutional set-up of the WTO. Members may send representatives of their choice.[33]

D. Chairman (Art. XXIV:3)

47 The CTS has its own chairman to be elected by the full membership at the first meeting of the year. The chairperson shall hold office until the end of the first meeting of the following year.[34] The Chairman shall declare the

[30] S/C/M/1, para. 4.

[31] Council for Trade in Services, Report of the Meeting Held on 14 April 2000, Note by the Secretariat, S/C/M/42, 9 May 2000, paras 68–69.

[32] See on the participation of NGOs in international conferences convened by the UN: ECOSOC, Consultative Relationship Between the United Nations and Non-Governmental Organizations, ECOSOC Resolution 1996/31, 49th Plenary Meeting, 25 July 1996, Part. VII, <http://www.un.org/esa/coordination/ngo/Resolution_1996_31/Part_7.htm> (last visited 1 October 2007).

[33] See Rules 8 and 9 of the Rules of Procedure for the Meetings of the General Council, Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council, WT/L/161, 25 July 1996.

[34] See modified Rule 12 of the Rules of Procedure for the Meetings of the General Council, Council for Trade in Services, Rules of Procedure for Meetings of the Council for Trade in Services, Adopted by the Council for Trade in Services on 4 October 1995, S/L/15, 19 October 1995.

opening and closing of each meeting, shall direct the discussion, accord the right to speak, submit questions for decision, announce decisions etc.[35]

48 The chairperson shall not normally participate in the proceedings as the representative of a Member but may request permission to do so.[36]

E. Assessment and Outlook

49 It is welcome that the CTS has understood its mandate under Art. XXIV broadly and attempted to implement all relevant provisions of the Agreement. It will need to take the negotiating mandates of the Agreement seriously. But, in the future, the CTS may also want to use its implied powers to implement the Agreement through standardization action and in particular through closer cooperation with external organizations.

[35] See Rule 17 of the Rules of Procedure for the Meetings of the General Council, WT/L/161.

[36] See *ibid.*, Rule 15.

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Article XXV GATS
Technical Cooperation

1. Service suppliers of Members which are in need of such assistance shall have access to the services of contact points referred to in paragraph 2 of Article IV.
2. Technical assistance to developing countries shall be provided at the multilateral level by the Secretariat and shall be decided upon by the Council for Trade in Services.

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A. General

I. Overview

1 Art. XXV creates the **basis for an international regime** between WTO Members concerning **technical cooperation and** the **increasing participation of developing countries**.

2 Art. XXV:2 explicitly mentions the need for the WTO Secretariat to provide technical assistance to developing countries. In this perspective, the Article needs to be read in conjunction with the Negotiating Guidelines and Procedures of March 2001[1] and, even more important, the Doha Ministerial Declaration of November 2001,[2] which further emphasize the role and necessity of technical cooperation and capacity building.

II. History of Technical Assistance

3 In GATT 1947, there was no formal recognition of any difference between the Contracting Parties, even though 11 out of the 23 original GATT 1947 Contracting Parties would today be classified as developing countries. Technical assistance for trade in services was one of the new elements introduced during the Uruguay Round.

4 Today, multilateral, regional, and bilateral donors and providers of technical assistance abound, some having provided technical assistance for more than 40 years. The World Bank, the International Monetary Fund, the United Nations Conference on Trade and Development (UNCTAD), the WTO, and the World Customs Organization are the leading multilateral donors and providers.

B. Access to Contact Points' Services (Art. XXV:1)

I. Scope

5 Art. XXV:1 refers to **service suppliers**, instead of WTO Members, and although it refers to Art. IV:2 which deals with developing countries, Art. XXV:1 **applies to all Members** regardless of their level of development. It aims to strengthen international cooperation.

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[1] Council for Trade in Services, Special Session, Guidelines and Procedures for the Negotiations on Trade in Services, Adopted by the Special Session of the Council for Trade in Services on 28 March 2001, S/L/93, 29 March 2001.

[2] Ministerial Conference, Fourth Session, Doha, 9–14 November 2001, Ministerial Declaration, Adopted on 14 November 2001, WT/MIN(01)/DEC/1, 20 November 2001.

The provision makes explicit reference to Art. IV ("Increasing Participation of Developing Countries") and thus responds to the main concern voiced by developing countries, *i.e.* better participation in world trade. While Art. IV:2 obliges developed country Members to establish contact points, Art. XXV:1 envisages for the service suppliers of a WTO Member the access to the services of such contact points. *6*

Art. XXV:1 should be interpreted in line with Art. IV:2, thus the term "**such assistance**" used here refers to the services of the contact points listed in Art. IV:2.[3] Unlike similar provisions in the TBT, SPS and TRIPS agreements,[4] Art. XXV:1 does not provide a list of activities that could constitute "**assistance**" but reiterates by referring to Art. IV:2 the service suppliers' right to information concerning commercial and technical aspects of the supply of services, registration, recognition, obtaining of professional qualifications and the availability of services technology. *7*

Art. XXV:1 does not address all service suppliers of any Member but those "**which are in need of such assistance**". A needs assessment is a necessary condition for making technical assistance more effective and sustainable. A **needs assessment** is the identification of the main constraints for trade policy and trade in general of a country and a prioritization of the issues that need to be addressed.[5] The WTO Secretariat could assist the country concerned in establishing to what extent an adequate needs assessment has already been carried out or in identifying ways to get a needs assessment done. The solution and format of the needs assessment can differ from country to country. *8*

II. Contact Points

The contact point is an **agency** to which any relevant enquiries can be made. It has the responsibility of obtaining answers from the relevant national bodies and **replying to the country making the enquiry**. There are two common choices for a Member to operate a contact point: an existing standards information office or a government department that is most concerned with trade in services. The contact points set out under the WTO are generally, except for a few cases, organized in the form of a single central enquiry point within a government ministry. *9*

The **purpose** of establishing such **contact points** is to **facilitate** the **access** of services suppliers, particularly developing country services *10*

[3] For the definition of these services see *Grote*, Article IV GATS, para. 15.

[4] See Art. 11 TBT, Art. 9 SPS and Art. 67 TRIPS for not-exhaustive list of activities considered to constitute technical assistance.

[5] See WTO Trade Facilitation Technical Assistance Program 2007, <http://www.wto.org/english/tratop_e/tradfa_e/ta_capac_build_negoti_e.htm> (last visited 1 October 2007).

suppliers, **to information on the Member's services market**. The Contact Point provides **liaison services** in the exchange of information between the WTO and its Members regarding notifications of projects and standards, and information assessment procedures. Such services may include: background on the services regulatory regime; information on the modes of service supply in the particular country Member, on registration, on recognition of, and on obtaining professional qualifications and on the availability of services technology.

11 According to Art. XXV:1, WTO Members are committed to cooperate through the contact points in the Members' national administrations. There is **no positive duty to offer technical cooperation** to other Members, **but** relevant assistance must be made available **upon request**.[6] The existence of such contact points must be notified to the Council for Trade in Services and then to the other Members.[7] By December 2006, 119 countries had notified the Council for Trade in Services on enquiry and contact points. Some of them are developing and least-developed country Members.[8]

12 **Several countries have taken measures to increase the role played by** those **contact points**. A significant step towards improving regulatory transparency in the services area was taken by the countries of the Asia-Pacific Economic Cooperation (APEC) with the agreement upon the format for electronic Individual Action Plans (e-IAPs).[9] The e-IAPs services, which have been underway since November 2000, is set out to provide information on market access conditions and requirements for the 13 major services sectors defined for the purpose of the GATS negotiations. The information in the e-IAPs is accessible to all interested parties—individuals, services providers, regulators, policy makers and researchers—via the APEC Web site. Canada has also developed a "contact point" website that provides a gateway to various information resources on services trade. Canada's on-line General Agreement on Trade in Services (GATS) contact point is an initiative aimed at providing information on the Canadian services market that will help developing country service suppliers sell their services in Canada,[10] and it is directly accessible by service suppliers.

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[6] S/L/93, para. 14.

[7] Council for Trade in Services, Decision on the Notification of the Establishment of Enquiry and Contact Points, Adopted by the Council for Trade in Services on 28 May 1996, S/L/23, 27 June 1996.

[8] Council for Trade in Services, Contact and Enquiry Points Notified to the Council for Trade in Services, Note by the Secretariat, Revision, S/ENQ/78/Rev. 7, 20 January 2005.

[9] See more at <http://www.apec-iap.org/> (last visited 1 October 2007).

[10] Council for Trade in Services, Special Session, Transparency: Market and Regulatory Information of Interest to Service Providers, Communication from Canada, TN/S/W/41, 25 May 2005.

C. Multilateral Technical Assistance (Art. XXV:2)

I. Technical Assistance Provided by the Secretariat

13 Unlike Art. XXV:1, the obligation to provide technical assistance to developing countries in Art. XXV:2 **relates to WTO Members directly** (instead of service suppliers) and shall be decided upon by the Council for Trade in Services. This obligation is neither bilateral nor automatic, as it is subject to agreement by the Council.

14 On 28 March 2001, the Council for Trade in Services adopted the **Guidelines and Procedures for the Negotiations on Trade in Services**,[11] where in para. 14 it re-affirms that "[t]he Council for Trade in Services in Special Sessions shall continue to carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of the GATS and of Art. IV in particular. This shall be an ongoing activity of the Council and negotiations shall be adjusted in the light of the results of the assessment. In accordance with Article XXV of the GATS, technical assistance shall be provided to developing country Members, on request, in order to carry out national/regional assessments".[12]

15 From a developing country perspective, three elements in para. 14 of the Negotiating Guidelines are of particular importance, namely, assessment with reference to developing countries' increased participation (Art. IV) as an ongoing activity of the Council; the idea that negotiations should be adjusted in the light of the results of the assessment and that developing countries should be provided with technical assistance to undertake national and regional assessments.

16 Furthermore, the **Least Developed Countries** modalities adopted by the Special Session of the Council for Trade in Services on 3 September 2003[13] repeat that targeted and coordinated technical assistance and capacity building programmes shall continue to be provided to LDCs in order to strengthen their domestic services capacity, build institutional and human capacity, and enable them to undertake appropriate regulatory reforms. In pursuance of para. 14 of the Guidelines and Procedures for the Negotiations on Trade in Services cited above, technical assistance shall also be provided to LDCs to carry out national assessments of trade in services in overall

[11] S/L/93.
[12] *Ibid.*, para. 14.
[13] Council for Trade in Services, Special Session, Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services, Adopted by the Special Session of the Council for Trade in Services on 3 September 2003, TN/S/13, 5 September 2003.

terms and on a sectoral basis with reference to the objectives of the GATS, and Article IV in particular.

17 The delivery of WTO technical assistance is **aimed** at assisting developing and least-developed countries and low-income countries in transition to adjust to WTO rules and disciplines, implement obligations and exercise the rights of membership, including drawing on the benefits of an open, rules-based multilateral trading system.

18 There are **no mandatory rules or methods of cooperation imposed on developed country Members** under this provision. The Secretariat assists developing countries in three areas: the information exchange programme, the assessment of trade in services in overall terms and on a sectoral basis and the establishment of negotiating guidelines and procedures.

19 For the purpose of **assessments of trade in services,** a number of studies by the Secretariat and other international organizations have been finalized or initiated to assess the impact of the liberalization of trade in services in developing countries and LDCs. **Sector—specific studies** in areas, sectors and modes of interest to developing countries were undertaken. Mode 4 has received particular attention through assistance of the Geneva Migration Group.[14] Analytical work on **business and professional services** identified ways in which the temporary mobility of professionals could be made possible through Mutual Recognition Agreements (MRAs) and in which putting in place mechanisms to facilitate developing country participation in the MRAs could improve the implementation of Art. IV.

20 Assistance to developing countries in establishing **negotiating priorities** and negotiating trade agreements, including on GATS and regional trade agreements is provided to Geneva-based and capital-based trade negotiators. Customized assistance is provided to individual delegations upon request, and also collectively to a number of developing countries concerning some issues of their common interest.

II. Technical Assistance Provided by Other Agencies

21 Art. XXV:2 aims to solve particular problems at the **multilateral level** experienced by developing and least-developed country Members. Six international agencies have established an integrated framework to supply technical cooperation in trade. It includes three trade-related institutions: the WTO, the United Nations Conference on Trade and Development

[14] For more See Progress Report on the Implementationof Agreed Conclusions and Recommendations of the Commission, Including Post-Doha Follow-Up, Note by the UNCTAD Secretariat, TD/B/COM.1/78.

(UNCTAD), and the International Trade Centre (ITC). In addition, it includes three financial/development institutions: the World Bank, the International Monetary Fund (IMF) and the United Nations Development Programme (UNDP). The joint efforts of the above institutions are focusing on several issues with regard to trade in services.

22 For example, the **OECD and UNCTAD** have provided technical assistance through a joint project on managing request-offer negotiations under the GATS. Under this project, several generic and sector-specific negotiating checklists have been prepared to assist WTO Members in identifying the key issues to consider in the negotiations, particularly with regard to formulating requests and offers.

23 The **World Bank** Institute has developed a week-long training course on trade in services that focuses on the economics of services reforms, the rules of international agreements and the institutional challenges of trade negotiations in services. Key GATS issues are discussed and analysed in the course. The World Bank Institute launched the course in April 2004 in Washington, DC, and it has since been delivered in Latin America, Europe and East Asia.

24 The **European Commission** has launched a project to promote trade in services in some developing countries by enhancing public and private consultation through the creation of a coalition of service industries. As a result of this project, a framework will be established to help increase exports of services from developing countries. Various studies, surveys and workshops will be undertaken in order to capture information on export capacity and potential.

D. Further Developments

25 The WTO and the OECD jointly established the **Doha Development Agenda Trade Capacity Building Database** (TCBDB) in November 2002 to provide qualitative and quantitative data on trade-related capacity building projects, including the provision of technical assistance. The TCBDB tracks assistance in several services areas, such as identifying markets, sectors and modes of export interest, assessing the impact of services trade generally, and helping countries to effectively participate in the Doha Round negotiations by providing support in the formulation of requests/offers and scheduling, among other areas.

26 It appears that technical assistance in services is a relatively small part of the overall technical assistance effort provided at the multilateral level. In the period 2001–2005, for example, about 5% of all technical assistance funding was spent on technical assistance in services.

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Article XXVI GATS
Relationship with Other International Organizations

The General Council shall make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies as well as with other intergovernmental organizations concerned with services.

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Cross References

Art. 2 VCLT; Arts 87, 89 Havana Charter; Arts 55, 63 UN Charter.

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HESTERMEYER & ROMERO

A. History

The International Conference on Trade and Employment that drafted the **Havana Charter** of the ITO envisaged an international organization with legal personality[1] and the power to "make arrangements with other intergovernmental organizations, which have related responsibilities, to provide for effective co-operation and the avoidance of unnecessary duplication in the activities of these organizations".[2] The failure of the ITO left the **GATT** without any such provisions, operating as a *de facto* international organization and conducting its relations to the UN and other international organizations on a more informal basis.[3] *1*

The GATT Contracting Parties were not content with the functioning of the system and in the Punta del Este Ministerial Declaration of 20 September 1986 launching the Uruguay Round included a **negotiation** mandate on increasing "the contribution of the GATT to achieving greater coherence in global economic policy-making through strengthening its relationship with other international organizations responsible for monetary and financial matters".[4] A 1990 proposal by the European Communities suggested Art. XXVII with the wording "The PARTIES shall make whatever arrangements are appropriate for consultation and co-operation, including enactment of provisions for observer status in the organs of the Agreement where appropriate, with the United Nations and its specialized agencies as well as other international bodies concerned with services".[5] The December 1990 Chairman's Draft[6] suggested an Art. XXVII that was almost identical to the present Art. XXVI with only one significant exception, namely that it still referred to the "PARTIES" rather than the General Council. With this provision external relations of the WTO in the area of GATS have gained a solid legal basis. *2*

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[1] Art. 89 Havana Charter for an International Trade Organization, 24 March 1948, Canada Treaty Series, No. 32, 3, UN Doc. E/CONF. 2/78 (1948).

[2] Art. 87.1 Havana Charter, Canada Treaty Series, No. 32, 3, UN Doc. E/CONF. 2/78 (1948).

[3] *Jackson*, Law of GATT, 119 *et seq.*, 141 *et seq.; Kaiser*, Max Planck CWTL, Vol. 2, Article V WTO Agreement, para. 3.

[4] Ministerial Declaration on the Uruguay Round, MIN.DEC, 20 September 1986.

[5] Group of Negotiations on Services, Uruguay Round, Communication from the European Communities, Proposal by the European Community, Draft General Agreement on Trade in Services, MTN.GNS/W/105, 18 June 1990.

[6] Trade Negotiations Committee, Uruguay Round, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Part 3, Revision, MTN. TNC/W/35–3/Rev.1, 3 December 1990.

B. General

3 Art. VIII:1 WTO Agreement endows the WTO with legal personality.[7] As an international legal person, the WTO can clearly enter into international relations,[8] a significant change to the situation under the GATT. Even without an explicit basis in the founding treaties that power would be part of the implied powers of the organization.[9] Nevertheless, the cooperation of the WTO with other international organizations, whether governmental or non-governmental, is regulated by several provisions of the WTO agreements. These provisions establish the regime on **external relations** of the WTO.

4 The most important of these provisions can be found in the **WTO Agreement and the DSU**. Art. III:5 WTO Agreement governs cooperation with the IMF, the International Bank for Reconstruction and Development and its affiliated agencies, implying preferential relationships between the WTO and these organizations.[10] Art. V WTO Agreement empowers the General Council to make appropriate arrangements for both "effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO" and "consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO". Art. 13 DSU allows panels to seek information and technical advice from individuals and bodies and consult experts.[11]

5 Apart from these provisions valid for the whole WTO, several of the WTO agreements also contain provisions on external relations for the relevant **sector**. *E.g.* Arts 12, 13 SPS Agreement concern cooperation in the field of sanitary and phytosanitary protection and Art. 68 TRIPS Agreement cooperation in the field of intellectual property.[12] Whereas those provisions charge the relevant specialized body (Committee on Sanitary and Phytosanitary Measures, Council for TRIPS) with ensuring inter-institutional cooperation, Art. XXVI mirrors Art. V WTO Agreement in charging the General Council with this task.[13] It bears mention that GATS also contains provisions on Members' cooperation with intergovernmental and

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[7] *Minnerop*, Max Planck CWTL, Vol. 2, Article VIII WTO Agreement, paras 2–6.

[8] *Schermers & Blokker*, § 1686 *et seq*.

[9] *Seidl-Hohenveldern & Loibl*, para. 0314.

[10] *Von Bogdandy & Wagner*, Max Planck CWTL, Vol. 2, Article III WTO Agreement, paras 15 *et seq.; Ahn*, JWT 34 (2000) 4, 1 *et seq*.

[11] See in detail *Arend*, Max Planck CWTL, Vol. 2, Article 13 DSU, paras 1 *et seq*.

[12] See *Kaiser*, in: *Busche & Stoll* (eds), 743 *et seq*. For a complete list of provisions relevant to cooperation with other organizations see Sub-Committee on Institutional, Procedural and Legal Matters, The WTO and Other Inter-Governmental Organizations, Note by the Secretariat, PC/IPL/W/2, 29 June 1994.

[13] Contra, *Footer & George*, in: *Macrory et al.* (eds), 799, 872, who state that "it is the Council for Trade in Services rather than the General Council which is charged with undertaking

non-governmental organizations (Art. VII:5 and paras 6 lit. c and 7 lit. b of the Annex on Negotiations on Maritime Transport Services).

6 With both Art. V WTO Agreement and Art. XXVI regulating the same issue the question of the **relationship between the two rules** must be considered. Both norms entrust the General Council with the task of inter-institutional cooperation, and the wording of Art. XXVI is very similar to that of Art. V:1 WTO Agreement—with Art. V:1 WTO Agreement being broader as it relates to the whole WTO. The most significant difference is that Art. V:2 WTO Agreement entrusts the General Council with making arrangements for consultation and cooperation also with NGOs in WTO-related matters, whereas Art. XXVI does not mention NGOs. This, however, does not imply that cooperation with NGOs concerned with services is excluded in accordance with the *lex specialis* rule. Rather Art. V:2 WTO Agreement remains applicable even with respect to services. Two alternative arguments support this position. Either there is a conflict between Art. V WTO Agreement and Art. XXVI, in which case Art. XVI:3 WTO Agreement states that the WTO Agreement prevails. Or one considers both provisions as applicable as they do not explicitly contradict each other, following the approach of the Appellate Body's Decision in *Argentina—Footwear (EC)*.[14]

7 The **purpose** of Art. XXVI is to enhance cooperation between intergovernmental organizations in the field of services. The need for cooperation results from the fact that the work of other intergovernmental organizations directly impacts on the work of the WTO in the area and vice versa.[15] Effective cooperation achieves greater coherence of the work of the organizations and avoids duplication of effort. Finally, it also promotes an exchange between experts in different aspects of similar issues, increasing participation in multilateral rule-making and enabling new and more complete analyses of the relevant topics.[16]

C. Detailed Interpretation of the Provision

8 According to Art. XXVI, (I.) the General Council shall make appropriate arrangements for (II.) consultation and cooperation with (III.) the United Nations and its specialized agencies as well as with other intergovernmental organizations (IV.) concerned with services.

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such inter-institutional co-operation". That position contradicts the clear wording of the provision.

[14] Appelate Body Report, *Argentina—Footwear (EC)*, WT/DS121/AB/R, para. 89. See also *Hestermeyer*, 178.

[15] *Tietje*, JWT 36 (2002), 501, 507.

[16] *Abbott*, JIEL 3 (2000), 63.

I. Acting Body

9 The provision charges the **General Council** with making appropriate arrangements. As both Art. 5 WTO Agreement and Art. XXVI entrust the General Council with this task, the General Council enjoys an exclusive external relations power in the area of services. However, the Council for Trade in Services as a specialized body operating under the general guidance of the General Council in accordance with Art. IV:5 WTO Agreement and its subsidiary bodies at times exercise the external relations power. For example, they have received requests for observer status in the Council for Trade in Services by intergovernmental organizations,[17] granted *ad hoc* observer status to them,[18] consulted with them[19] and cooperated with some of them more closely on cross-cutting issues.[20] The Council for Trade in Services discussed proposals for cooperation agreements with the UPU and the ICAO.[21] On 26 May 2000 it approved the text of a cooperation agreement with the ITU before that agreement was approved by the General Council.[22] Because of the specialized character of the Council for Trade in Services, the need for effective cooperation on that specialized level (*i.e.* within the Council for Trade in Services) and the openness of Council membership to all WTO Members, the exercise of some of the external relations power by the Council for Trade in Services, particularly where limited to consultations, does not pose major problems.

II. "Consultation and Cooperation"

10 The General Council shall make appropriate arrangements for consultation and cooperation with intergovernmental organizations. **Appropriate** is

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[17] See, *e.g.*, Council for Trade in Services, Report (2000) to the General Council, S/C/12, 23 November 2000.

[18] *E.g.*, to the Universal Postal Union in 2006, see Council for Trade in Services, Annual Report to the General Council (2006), S/C/26, 1 December 2006.

[19] *E.g.* the Working Party on Domestic Regulation heard a presentation on the work of the International Organisation for Standardization (ISO) and the Working Party on GATS Rules heard a presentation by an UNCTAD representative, see Council for Trade in Services, Annual Report to the General Council (2005), S/C/24, 28 September 2005. One year earlier the Committee on Specific Commitments circulated a document by the OECD, Council for Trade in Services, Annual Report to the General Council (2004), S/C/22, 2 December 2004.

[20] *E.g.* on the review of the understanding on accounting rates with the ITU see Council for Trade in Services, Report (2001) to the General Council, S/C/14, 9 October 2004 and S/C/12.

[21] S/C/14.

[22] Council for Trade in Services, Agreement between the International Telecommunication Union and the World Trade Organization S/C/11, 21 September 2000; S/C/12; General Council, Minutes of Meeting, Held in the Centre William Rappard on 10 October 2000, WT/GC/M/58, 8 November 2000, paras 65 *et seq*.

defined as "suitable or proper".[23] **Consultation** is defined as "the act of giving professional advice to others working in the same field or subject".[24] **Cooperation** means "the process of working together to the same end; assistance"[25] or "joint action of two or more international organizations in pursuit of a common goal".[26] The difference in the wording from that of Art. V:1 WTO Agreement that merely speaks of "effective cooperation" seems to put more emphasis on the informal character of the exchange by including consultation and not mentioning effectiveness. However, the difference for practical purposes is negligible, particularly as "cooperation" in Art. V:1 WTO Agreement has to be read broadly.

11 Consultation and cooperation **can be conducted by** granting observer status, concluding cooperation agreements, and other, particularly less formal, forms of cooperation and consultation.[27]

12 **Observer status** is granted according to the guidelines on observer status for international organizations[28] that require a request from the intergovernmental organization. The only exception is the International Trade Centre, which is invited to attend the meetings of any of the WTO bodies as a joint subsidiary organ of the WTO and UNCTAD.[29] The IMF and the World Bank have observer status also in the Council for Trade in Services according to the WTO agreements with them,[30] as does the ITU.[31] Other intergovernmental organizations with observer status in the Council for Trade in Services are the United Nations, UNCTAD and the UPU. The ICAO, the WHO and the World Tourism Organization have *ad hoc* observer status in the Council.[32] Numerous intergovernmental organizations have notoriously been blocked from gaining observer status within the WTO system because of Members' fears of undue political posturing.[33]

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[23] *D. Thompson* (ed.), The Concise Oxford Dictionary of Current English, 9th ed. 1995, 61.

[24] *Ibid.*, 287.

[25] *Ibid.*, 294.

[26] *Kaiser*, Max Planck CWTL, Vol. 2, Article V WTO Agreement, para. 1.

[27] *Ibid.*, para. 7.

[28] General Council, Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council, WT/L/161, 25 July 1996, Annex 3; see in detail *Benedek*, in: *Weiss et al.* (eds), 479, 490 *et seq.*

[29] General Council, Minutes of Meeting, Held in the Centre William Rappard on 10 December 1997, WT/GC/M/25, 4 February 1998, para. 1.

[30] General Council, WTO Agreements with the Fund and the Bank, Approved by the General Council at its Meeting on the 7, 8 and 13 November 1996, WT/L/195, 18 November 1996, Annex I, § 6.

[31] S/C/11, Annex I, § 3.

[32] WTO, International intergovernmental organizations granted observer status to WTO bodies, <http://www.wto.org/english/thewto_e/igo_obs_e.htm> (last visited 1 October 2007).

[33] See only General Council, Minutes of Meeting, Held in the Centre William Rappard on 27 and 29 July 2005, WT/GC/M/97, 5 October 2005, paras 132 *et seq.*; General Council,

13 While several **cooperation agreements** have been concluded under the WTO's general provision on external relations, in particular Art. V:1 WTO Agreement,[34] only one such agreement has been concluded under Art. XXVI: the cooperation agreement with the ITU. The agreement provides for cooperation between the WTO and the ITU in areas of common interest in telecommunications, reciprocal representation, exchange of agendas and documents of relevant meetings, cooperation in technical assistance and cooperation for developing countries, cooperation between the staffs of the institutions and exchange of information.[35]

14 Finally, numerous **other forms of cooperation and consultation** are conceivable. These range from inviting speakers or studies from other organizations to use their expertise[36] to closer cooperation such as conducting joint studies[37] or establishing joint programmes.[38] Using these flexible forms of cooperation and consultation the WTO Secretariat division on Services has working relationships with 57 intergovernmental organizations.[39]

III. "Intergovernmental Organizations"

15 The provision covers cooperation with the United Nations and its specialized agencies as well as with other intergovernmental organizations concerned with services. **Specialized agencies** of the United Nations are international organizations established by intergovernmental agreement, which serve to achieve the aims of the United Nations as indicated in Art. 55 UN Charter and which are connected with the United Nations by way of an agreement in accordance with the provisions of Art. 63 UN Charter.[40] According to the ILC, **intergovernmental organizations** are organizations established by a treaty or other instrument governed by international law and possessing their own legal personality.[41] Some authors prefer not to include a requirement of legal personality.[42] Intergovernmental organizations

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Minutes of Meeting, Held in the Centre William Rappard on 7, 8, 11 and 15 December 2000, WT/GC/M/61, 7 February 2001, paras 155 *et seq*.

[34] *Kaiser*, Max Planck CWTL, Vol. 2, Article V WTO Agreement, para. 10.

[35] S/C/11.

[36] See note 19.

[37] See *e.g. WTO & WHO* (eds).

[38] *Kaiser*, Max Planck CWTL, Vol. 2, Article V WTO Agreement, para. 12.

[39] WTO, IGOs with which WTO Secretariat Divisions Have Working Relationships, <http://www.wto.org/English/thewto_e/coher_e/igo_divisions_e.htm#serv>(last visited 1 October 2007).

[40] See Art. 57, para. 2 UN Charter. *Seidl-Hohenveldern*, in: *Wolfrum & Philipp* (eds), 1202.

[41] See Draft Art. 2 of the still ongoing ILC work on the responsibility of international organizations: UN, Report of the International Law Commission. Report of the Fifty-fifth session, A/58/10 (2003), Chapter IV para. 41 *et seq*. and Art. 2, para. 1 lit. (i) VCLT (Vienna Convention on the Law of Treaties, 23 May 1969, ILM 8 (1969), 679).

[42] *Schermers & Blokker*, § 29A.

include not only universal organizations, but also regional organizations, including those covered by Art. V.

16 In practice, the WTO has made broad use of its external relations power. Thus, the General Council and even the Council for Trade in Services and its subsidiary bodies have consulted and cooperated with **non-governmental organizations**, *e.g.* by distributing documents drafted by them and inviting experts to contribute.[43] This cooperation, however, is based not on Art. XXVI, but on Art. V:2 WTO Agreement, which remains applicable in the area of services.[44]

IV. "Concerned with Services"

17 The only requirement the provision imposes for the selection of the intergovernmental organizations is that they have to be "**concerned with services**". Footer and George seem to read that part of the provision as modifying "consultation and cooperation".[45] However, the French version ("*ainsi qu'avec d'autres organisations intergouvernmentales s'occupant des services*") and the parallel provision in Art. V:1 WTO Agreement make it abundantly clear that the phrase modifies "other intergovernmental organizations". The term "services" is addressed in Art. I:3 lit. b.[46] Where the intergovernmental organization is not concerned with services, but has responsibilities otherwise related to those of the WTO, cooperation has to be based on Art. V:1 WTO Agreement.

D. Evaluation and Outlook

18 Art. XXVI reinforces the external relations provisions contained in the WTO Agreement. It thus stresses the particular need for cooperation in the area of services. However, in contrast to Art. V WTO Agreement the provision fails to mention cooperation with NGOs. Given that Art. V:2 WTO Agreement remains applicable that failure has no practical consequence, but it demonstrates a lack of attention to cooperation with NGOs.

19 The provision also lacks concreteness. This lack is both an opportunity and a risk. It could enable the WTO to approach its external relations flexibly, responding to the needs and necessities imposed by its work and learning from its experiences. Thus, the provision could *e.g.* serve as an opening to

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[43] *E.g.* the Committee on Specific Commitments circulated a document by the International Bar Association, S/C/22; see also *Footer & George*, in: *Macrory et al.* (eds), 799, 873.

[44] For more on cooperation with NGOs see *Kaiser*, Max Planck CWTL Vol. 2, Article V WTO Agreement, paras 14 *et seq*.

[45] *Footer & George*, in: *Macrory et al.* (eds), 799, 873.

[46] See *Zachrias*, Article I GATS, paras 11–22.

provide for the much needed cooperation between organizations established by regional integration instruments. However, experience with the observer status of intergovernmental organizations has shown that fears of politicization of processes, particularly where regional organizations are concerned, can significantly hamper the process of coordination with other organizations due to the decision-making procedures of the WTO. It remains to be seen whether a solution to this problem can be found.

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PART VI FINAL PROVISIONS

Article XXVII GATS
Denial of Benefits

A Member may deny the benefits of this Agreement:

a) to the supply of a service, if it establishes that the service is supplied from or in the territory of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement;
b) in the case of the supply of a maritime transport service, if it establishes that the service is supplied:
   (i) by a vessel registered under the laws of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement, and
   (ii) by a person which operates and/or uses the vessel in whole or in part but which is of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement;
c) to a service supplier that is a juridical person, if it establishes that it is not a service supplier of another Member, or that it is a service supplier of a Member to which the denying Member does not apply the WTO Agreement.

Case Law

GATT Panel Report, *EEC—Oilseeds I*, BISD 37S/86.

Cross References

Art. 1211 NAFTA; Art. 94 UNCLOS; Art. 26 VCLT.

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A. General

1 The WTO Agreement and the GATS annexed to it are international treaties and, under the **law of treaties**, Members extend the rights and obligations flowing from the WTO Agreement only to each other, but not to (third) non-Member states.[1] Art. XXVII spells out the **reciprocal nature of treaty obligations** and rights flowing from the WTO Agreement in the GATS context.

2 A similar concern of reciprocity arises in the relationship between states that are Members of the WTO but which do not apply the WTO Agreement in their bilateral relations. **Art. XIII WTO Agreement** provides for this power under the condition that either Member declares at the time of becoming a Member that it does not consent to such application. Art. XIII WTO Agreement applies to all Multilateral Agreements including the GATS. But Art. XXVII details the application of Art. XIII WTO Agreement in the GATS context.

3 The **structure** of Art. XXVII is as follows. It first sets out the measures that a Member may take to give effect to the reciprocity of treaty obligations. It then identifies instances in which a Member may take such measures. The provision spells out three situations in which it may do so: services supplied from or in the territory of a non-Member, maritime transport services, and services supplied by a juridical person of a non-Member.

B. Member, Non-Member, and Members to Which the Agreement is Not Applied

4 The term "**Member**" in accordance with Arts XI, XII WTO Agreement comprises original Members and later acceding Members. All other states are non-Members within the meaning of Art. XXVII. As indicated above, a Member may not apply the multilateral trade agreements such as the GATS in relation to another Member if either of the Members, at the time of the accession of either, does not consent to such application (Art. XIII WTO Agreement).

[1] See Art. 26 Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, ILM 8 (1969), 679, 690: "Every treaty in force is binding upon the parties to it [...]".

C. Denial of the Benefits of the GATS Agreement

The ***chapeau*** of Art. XXVII specifies the **measures** that a Member of the WTO may take to give effect to the reciprocity of treaty obligations incurred under the WTO Agreement: it may **deny the benefits of the GATS Agreement**. *5*

The provision talks of **benefits** that are affected. "Benefits of the Agreement" in this context refers to **improved competitive opportunities**.[2] The term is used in contradistinction to rights (concessions) which exclusively pertain to the Members under the Agreement and cannot be denied under normal circumstances (see Art. 22 DSU). Benefits, therefore, encompass the **actual economic advantages** that accrue to an exporter because an importing Member fulfils its obligations to liberalize trade in services under the GATS.[3] *6*

Art. XXVII allows Members to **deny** the benefits of the GATS to certain service supplies. A Member does so by not applying the commitments made and the national laws based on these commitments in the case in question. It will instead apply the trade in service provisions that it continues to keep on the books in order to apply it to services coming from a state that is not a WTO Member. *7*

D. Services Supplied from or in the Territory of a Non-Member (lit. a)

I. Services from or in the Territory of a Non-Member

Substantively, Art. XXVII lit. a applies across the board to all services covered by the GATS except maritime transport services in the strict sense, which come under the special provision of lit. b. Port services which are not covered by lit. b are also subject to Art. XVII lit. a. *8*

The comprehensive definition of service **supply modes** provided for in Art I:2 applies. On a literal reading ("from or in the territory"), modes 1 and 2 (services supplied from the territory of one Member into the territory of any other Member and services supplied in the territory of one Member to *9*

[2] GATT Panel Report, *EEC—Oilseeds I*, BISD 37S/86, para. 144. See also *Grote*, Article XXIII GATS, para. 20.

[3] A similar concept is reflected in Art. 26 DSU, which provides for so-called *Non-Violation Complaints* where a party to the dispute considers that any "benefit" accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired. However, Art. XXVII is broader in its scope of application to the extent that it also covers benefits that would result from the application of concessions.

the service consumer of any other Member) are covered. Under a narrow reading of Art. XXVII lit a it may be doubtful whether modes 3 and 4, *i.e.* a service supplied through commercial presence or through the presence of natural persons also fall under lit. a. In these modes, the service is actually supplied in the territory of the other Member. However, the preferable reading of Art. XXVII would cover modes 3 and 4 as well. For even here the service supplied ultimately originates in the territory of a non-Member and is therefore supplied "from" the territory of a non-Member.

10 Art. XXVII lit. a refers to the service supply originating in or from the **territory** of another Member. This reflects the general international law principle of territorial sovereignty. Accordingly, what counts as the territory of a non-Member is a matter of national law within the limits of international law.

II. "If it Establishes"

11 The **burden of proof** is on the Member wishing to deny any benefits. The Member needs to establish that the conditions of Art. XXVII lit. a are fulfilled in an individual case. The specific language of the provision ("establishes") confirms the general procedural rule that the party invoking an exemption has to prove the preconditions for it.

E. Supply by a Vessel (lit. b)

I. General

12 Under the United Nations Convention on the Law of the Sea (UNCLOS)[4] as well as customary international law, ships have to fly the flag of a state. The flag state has jurisdiction over the registered ship.[5] Ships flying the flag of a given state may invoke the international law rights of that state and are protected by it. Consistently, the principles in Art. XXVII lit. b can be likened to the nationality of natural persons as set out in lit. a.

II. "Supply of a Maritime Transport Service"

13 **"Maritime transport service"** within the meaning of Art. XXVII lit. b comprises only maritime transport services in the strict sense and not port services. This is due to the fact that Art. XXVII lit. b complements Art.

[4] The United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982, ILM 21 (1982), 1261.

[5] See Art. 94 UNCLOS, ILM 21 (1982), 1261, 1287.

XXVII lit. a for services not supplied territorially and the wording "service" (singular) in contrast to "services" in the Annex on Negotiations on Maritime Transport Services which covers also auxiliary and port services.[6] "Maritime transport service" may be understood in the sense given to it by Members' commitments in international shipping made at Marrakesh and later that include both freight and passenger transportation services. Services auxiliary to maritime transport,[7] port services,[8] and the maintenance and repair of vessels do not fall under Art. XXVII lit. b but are covered by Art. XXVII lit. a or c respectively.

All **modes of supply** set out in Art. I:2 are covered. *14*

III. "Vessel Registered Under the Laws of a Non-Member"

Art. XXVII lit b (i) requires that the vessel must be **registered** under the laws of a non-Member. Under Art. 91 UNCLOS, the conditions for registring a vessel are to be determined by the relevant domestic law. International law has not developed any standards applicable to the registring of vessels by a state.[9] However, the International Tribunal for the Law of the Sea has made it clear that the issue of whether a vessel is actually registered as alleged is an international law issue and can be ascertained in international proceedings.[10] Thus, the denying Member may argue before a panel or the Appellate Body that a vessel is not actually registered as claimed under the laws of a Member but registered in another state. *15*

IV. Operator or User of the Vessel

A second condition is that the natural or legal **person operating or using the vessel** must be the national of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement. *16*

Conditions under Art. XXVII lit. b (i) and (ii) need to be met **cumulatively** ("and"). Consistently, the operator or user of a vessel who is a national of a Member may not be denied the benefits of the Agreement even if the vessel operated or used flies the flag of non-Member. If a national of a non-Member operates or uses a vessel flying the flag of a Member, Art. *17*

[6] See *Parameswaran*, Annex on Negotiations on Maritime Tranport Services, para. 16.

[7] Including cargo handling, storage and warehousing, freight agency and freight forwarding, pre-shipment inspection, custom clearance, container station and depot.

[8] Such as towing, pushing, tug assistance, port dredging, and port captain's services, while some Members have scheduled additional commitments relating to access for consumers of port services on non-discriminatory and reasonable terms.

[9] See International Tribunal for the Law of the Sea, The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), ILM 38 (1999), 1323, 1340.

[10] *Ibid.*

XXVII lit. b does not apply either. However, the Member may rely on Art. XXVII lit. c if the operator or user is a legal person of a non-Member.

V. "If it Establishes"

18 The **burden of proof** of the facts is on the denying Member invoking the provision.

F. Service Supplier That is a Juridical Person (lit. c)

I. Service Supplied

19 **Substantively**, Art. XXVII lit. c applies across the board to all services covered by the GATS including maritime transport services in the strict sense.

20 Art. XXVII lit. c covers all four **modes of service supply** set out in Art. I:2 provided the service supplier is a legal person. What is decisive is that the service is ultimately supplied by a legal person of a non-Member even if the commercial presence is staffed with natural persons who are nationals of a Member. This corresponds both to the wording of the provision and its purpose.

21 The more important question arises whether a Member may invoke Art. XXVII lit. c even if the service is supplied in or from the territory of another Member. This is indeed the case under the clear wording of the provision. This harsh treatment of legal persons by Art. XXVII seems to be justified by their economic potential.

22 Also, under Art. XXVII lit. c the benefits of the Agreement may be denied to the operator or user of a vessel that is a juridical person of a non-Member even if it uses or operates a vessel flying the flag of a Member.

II. "Juridical Person"

23 The service supplier must be a juridical person. The notion "juridical person" is defined in Art. XXVIII lit. l as meaning any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association.

III. "Not a Service Supplier of Another Member"

24 The service supplier must be a legal person in accordance with the law of a state which is not a Member of the WTO. The **wording** of Art. XXVII lit. c is slightly different from that of Art. XXVII lit. a and b in that it requires the denying Member to establish that the legal person is not from another Member instead of from a non-Member. This is semantic only, however.

25 There is **no** additional requirement of **territoriality**. Consistently, Art. XXVII lit. c is applicable to services supplied by a legal person of a non-Member from the territory of another Member.

IV. "If it Establishes"

26 The **burden of proof** of establishing the relevant facts is on the denying Member.

G. Relationship with Art. XXVII lit. a, b and c

27 There is an **overlap** between the several variants of Art. XXVII. A number of hypotheses need to be distinguished: A legal person supplying services in or from the territory of a non-Member may be denied the benefits of the Agreement under either Art. XVII lit. a or c. However, in the case of services supplied by a legal person of a non-Member from the territory of another Member only Art. XXVII lit. c is applicable. Furthermore, a legal person of a non-Member operating a vessel flying the flag of a non-Member may be denied the benefits of the Agreement under either Art. XVII lit. b or c. However, in the case of services supplied by a legal person of a non-Member using a vessel flying the flag of another Member only Art. XXVII lit. c is applicable.

H. Assessment

28 Art. XXVII spells out a legal situation that is largely predetermined by the international law of treaties, diplomatic protection, and the law of the sea. Its merit lies in two points: Art. XXVII removes any doubts that these rules apply under the GATS Agreement, and it makes them operational by adding detailed provisions in particular on maritime services and legal persons.

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Article XXVIII GATS
Definitions

For the purpose of this Agreement:

a) "measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;
b) "supply of a service" includes the production, distribution, marketing, sale and delivery of a service;
c) "measures by Members affecting trade in services" include measures in respect of
   (i) the purchase, payment or use of a service;
   (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally;
   (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member;
d) "commercial presence" means any type of business or professional establishment, including through
   (i) the constitution, acquisition or maintenance of a juridical person, or
   (ii) the creation or maintenance of a branch or a representative office,
   within the territory of a Member for the purpose of supplying a service;
e) "sector" of a service means,
   (i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule,
   (ii) otherwise, the whole of that service sector, including all of its subsectors;
f) "service of another Member" means a service which is supplied,
   (i) from or in the territory of that other Member, or in the case of maritime transport, by a vessel registered under the laws of that other Member, or by a person of that other Member which supplies the service through the operation of a vessel and/or its use in whole or in part; or
   (ii) in the case of the supply of a service through commercial presence or through the presence of natural persons, by a service supplier of that other Member;
g) "service supplier" means any person that supplies a service;[12]
h) "monopoly supplier of a service" means any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service;
i) "service consumer" means any person that receives or uses a service;
j) "person" means either a natural person or a juridical person;
k) "natural person of another Member" means a natural person who resides in the territory of that other Member or any other Member, and who under the law of that other Member:
   (i) is a national of that other Member; or
   (ii) has the right of permanent residence in that other Member, in the case of a Member which:
      1. does not have nationals; or
      2. accords substantially the same treatment to its permanent residents as it does to its nationals in respect of measures affecting trade in services, as notified in its acceptance of or accession to the WTO Agreement, provided that no Member is obligated to accord to such permanent residents treatment more favourable than would be accorded by that other Member to such permanent residents. Such notification shall include the assurance to assume, with respect to those permanent residents, in accordance with its laws and regulations, the same responsibilities that other Member bears with respect to its nationals;
l) "juridical person" means any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association;
m) "juridical person of another Member" means a juridical person which is either:
   (i) constituted or otherwise organized under the law of that other Member, and is engaged in substantive business operations in the territory of that Member or any other Member; or

(ii) in the case of the supply of a service through commercial presence, owned or controlled by:
1. natural persons of that Member; or
2. juridical persons of that other Member identified under subparagraph (i);

n) a juridical person is:
(i) "owned" by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member;
(ii) "controlled" by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions;
(iii) "affiliated" with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person;

o) "direct taxes" comprise all taxes on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, and taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

Footnote 12: Where the service is not supplied directly by a juridical person but through other forms of commercial presence such as a branch or a representative office, the service supplier (i.e. the juridical person) shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under the Agreement. Such treatment shall be extended to the presence through which the service is supplied and need not be extended to any other parts of the supplier located outside the territory where the service is supplied.

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Cross References

Arts 201, 1213 NAFTA, Arts II, XVIII MERCOSUR Montevideo Protocol.

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C. Assessment **54**

A. Introduction

1 Art. XXVIII is a provision of Part VI of the GATS Agreement entitled "Final Provisions" and deals with "Definitions". Such definitions are concerned with **determining the scope of obligations**, and are important in building a workable GATS.[1] Art. XXVIII aggregates altogether seventeen explanations of the most important notions and expressions used in the GATS. Since the GATS is the only multilateral WTO agreement containing an explicit catalogue of definitions,[2] it may be desirable to use some definitions of this catalogue which are common also to the other multilateral agreements like, *e.g.* "measure" or "supply" in GATT 1994 in the context of these other agreements. However, before the individual notions are defined in Art. XXVIII, the *chapeau* of the Article, stating "[f]or the purpose of this Agreement", shows that all definitions given in what follows apply only to the GATS. That implies that the meaning of **notions** common also to the

[1] Group of Negotiations on Services, Uruguay Round, Definitions in the Draft General Agreement on Trade in Services, Note by the Secretariat, MTN.GNS/W/139, 15 October 1991, para. 2 on the predominantly verbatim identical definitions in the Chairman's December 1990 Draft: Trade Negotiations Committee, Uruguay Round, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Part 3, Revision, MTN.TNC/W/35–3/Rev.1, 3 December 1990.

[2] Definitions in the GATT 1994 are mainly scattered around the "Notes and Supplementary Provisions" of Annex I to the GATT 1994 that provide additional information on a number of Articles of the GATT 1994. The TRIPS uses mostly footnotes to explain expressions directly at the places where these expressions are used in the text. See, for example, footnote 1 to Art. I:3 TRIPS on "nationals" or footnote 3 to Art. III:1 TRIPS on "protection".

other multilateral agreements **cannot be** taken from Art. XXVIII to be **used in** the context of these **other agreements**.

The **catalogue of definitions** in Art. XXVIII is **not exhaustive**: Art. I defines in the context of the scope of the GATS the term "trade in services" (Art. I:2) and gives explanations as regards the terms "measures by Members", "services" and "a service supplied in the exercise of governmental authority" (Art. I:3). Also, the Annex on Air Transport Services (para. 6), the Annex on Financial Services (para. 5), the Annex on Telecommunications (para. 3) and the Reference Paper on Basic Telecommunications have their own definitions. *2*

Since Art. XXVIII is a provision on definitions, *i.e.* a provision that itself explains notions, to comment on it may seem superflouos. But since the meaning of the key notions of the GATS plays a **pivotal role in the application of the Agreement**, it seems worthwhile looking at how terms are defined here and what the specific background may be in each case. While some critics argue that the catalogue of definitions was rather an array of tautologies and many definitions had to be put together from other definitions,[3] as, for example "service supplier",[4] this aspect would seem to make some explanation even more necessary. *3*

B. The Definitions in Art. XXVIII

I. "Measure" (Lit. a)

Art. XXVIII lit. a defines **"measure"** as any measure by a Member taking any form. The first idea that may come to mind if one thinks of measures in the context of trade in services may be the ordinary meaning of "measure", which is "legislative enactment".[5] A typical example would be a national law that requires foreign service suppliers to apply for special licences as a precondition to being admitted to the national market. But the provision lists several other forms a measure can take, *i.e.* law, regulation, rule, procedure, decision or administrative action.[6] While the first three forms seem to point to the legislature, the inclusion of "decision" and "administrative *4*

[3] See *Zdouc*, JIEL 2 (1999), 295, 328.

[4] The term "service supplier" (lit. g) requires some further definitions of Art. XXVIII to be defined, since "service supplier" is "any person" (lit. i), which in turn is "a natural or juridical person" (lit. j) with the further definition of "juridical person" in lit. l.

[5] *Hawkins & Allen* (eds), The Oxford Encyclopedic English Dictionary, 1991, 899.

[6] This catalogue can be found nearly verbatim in Art. XVIII of the Protocol of Montevideo on Trade in Services in MERCOSUR (Montevideo Protocol), 15 December 1997, <http://www.cvm.gov.br/ingl/Inter/mercosul/montv-e.asp> the articles of which closely follow the GATS. A similar catalogue is laid down in Art. 201 NAFTA, ILM 32 (1993), 298.

action" shows that the term "measure" under the GATS is not confined to legislative acts. Rather, it comprises acts of the executive and judicature as well. No regulatory instrument is excluded *a priori*, and fiscal activities and even inactivity may also be qualified as "measures"; measures by private actors, however, may do so only if they are supported by or are in another way attributable to the government.[7] To delimit a "measure" from mere permissive action, however, the measure must be obligatory, in the sense that it is not only authorizing but requiring a government to act or that it is not only recommending private behaviour but giving an incentive or disincentive to act in a certain way.[8] Thus, by defining "measure" by the possible forms it may take rather than with reference to a specific issuing body (*e.g.* "the legislature"), Art. XXVIII lit. a gives this notion a **broad** scope. It is rightly pointed out that at the same time the fact that lit. a gives only an illustrative list of conceivable forms of a measure ("or any other form") aims at hindering Members to avoid the applicability of the GATS regime by labelling an act as a certain form not covered by lit. a.[9] An advantage of the general notion of "measure" is that it also allows for the coverage of future developments in trade barriers.[10]

5 The **case law** confirms this broad scope of the term "measure": according to the Panel in *US—Gambling* the use of the words "any other form" at the end of the definition indicates the illustrative character of the named list of instruments and actions[11] and the **broad** interpretation of the term "measures" in the context of the GATS.[12] Referring to other Articles, the Panel stated that the term "measure" was defined by Art. I:3, Art. XXVIII lit. a and Art. XXVIII lit. c together.[13] This is convincing, since these provisions complement each other by approaching the term "measure" from different angles: while Art. XXVIII lit. a addresses conceivable forms of a measure and Art. XXVIII lit. c focuses on the effect of such measures on trade by dealing with their content, Art. I:3 lit. a[14] speaks of the authority or body

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[7] This can be drawn from Art. I:3 lit. a (ii) stating that "measures by Members" include measures taken by non-governmental bodies in the exercise of delegated governmental powers. *Krajewski*, National Regulation, 64–65. For an analysis of regulatory instruments falling under the term "measure" see *Zacharias*, Article I GATS, paras 49–50.

[8] MTN.GNS/W/139, para. 6 on the terms contained in Draft Final Act Embodying the Results of the Uruguay Round, MTN.TNC/W/35–3/Rev.1.

[9] See von *Bogdandy & Windsor*, Annex on Financial Services, para. 13.

[10] For this and further remarks on Art. XXVIII lit. a, see *Zacharias*, Article I GATS, paras. 48–50.

[11] See Panel Report, *US—Gambling*, WT/DS285/R, para. 6.323. The Panel referred to Art. XXVIII lit. a here to support its point that Art. XVI:2 contained an exhaustive list of limitations, arguing that it was not the word "whether" but the words "any other form" which made Art. XXVIII lit. a an illustrative list and which were not used in Art. XVI:2.

[12] See *US—Gambling*, WT/DS285/R, para. 6.172.

[13] See *US—Gambling*, WT/DS285/R, para. 6.150; *Michaelis*, in: *Hilf & Oeter*, 375, 390, para. 38.

[14] On Art. I:3 lit. a, see *Zacharias*, Article I GATS, paras 48–56.

taking action. Thus, put together, these provisions give information on the form and possible content of and the jurisdiction concerning a "measure" in the sense of the GATS. The Panel proceeded to state that the term also influenced dispute settlement since, to the extent that the definition of a "measure" under the GATS was broader than that under Art. 6.2 DSU, this broader definition contained in the GATS supplemented the meaning of "measures" under Art. 6.2 DSU.[15]

6 The term "measure" is **widely used** throughout the GATS Agreement, occurring in nearly every Article. As the comprehensive notion for the national form of action it is central not only with regard to the domestic regulation (Art. VI) but also with respect to the GATS obligations of liberalization (especially market access, Art. XVI, and national treatment, Art. XVII) which are implemented by national acts.

II. "Supply of a Service" (Lit. b)

7 Starting from the ordinary meaning of the term, **"supply"** is defined as the "act of providing what is needed".[16] The GATS customizes this rather general definition to the particular context of services: according to the definition in lit. b "supply of a service" includes the production, distribution, marketing, sale and delivery of a service. The notion of "supply" is intended to encompass the whole range of activities necessary to produce and deliver a service.[17] It can be seen as a comprehensive concept including all increments of the added value that the service gains on its way from the producer to the consumer.[18] The second element of the "supply of a service", *i.e.* the term **"service"**, is not defined in the GATS.[19] What Art. I:3 lit. b says about services ("'services' includes any service in any sector")[20] can be seen more as tautology than as a useful definition. Because of the problematic characteristics of a service, such as invisibility, intangibility and the lack of transportability, there was no agreement on a uniform defintion of "service", and the GATS opted for an enumerative approach using different service sectors instead.[21] This approach is based on the "Services

[15] See *US—Gambling*, WT/DS285/R, para. 6.150.

[16] *Hawkins & Allen* (eds), The Oxford Encyclopedic English Dictionary, 1991, 1454.

[17] MTN.GNS/W/139, para. 11 on the terms contained in Draft Final Act Embodying the Results of the Uruguay Round, MTN.TNC/W/35–3/Rev.1.

[18] See *Michaelis*, in: *Hilf & Oeter* (eds), 375, 388, para. 32.

[19] MTN.GNS/W/139, para. 8 on the terms contained in Draft Final Act Embodying the Results of the Uruguay Round, MTN.TNC/W/35–3/Rev.1.

[20] In the context of intellectual property rights, there is a similar formulation, see Art. I:2 TRIPS.

[21] See on a detailed discussion of the term "services" Zacharias, Article I GATS, paras 11–22.

Sectoral Classification List"[22] which followed the "Provisional Central Product Classification" of the United Nations (UN CPC).[23] The **wording** of Art. XXVIII lit. b suggests a **broad scope**[24] for "supply of a service" by saying that it "includes" the named aspects of supply, a formulation which could be completed by "but is not limited to".

8 The **Panel** in *EC—Bananas III* held that the text of Article XXVIII lit. b as well as its *travaux préparatoires* indicated that the choice of the term "supply of a service" involved the coverage of a wider range of activities than would have been the case had the drafters chosen to use the term "delivery".[25] The **Appellate Body** upheld this finding by stating that there was nothing at all in Art. XXVIII lit. b to suggest a limited scope of application for the GATS.[26]

9 The term figures prominently in Art. I:2 where it—together with the four modes—makes up the definition of "trade in services" as one of the most important notions in the GATS.

III. "Measures by Members Affecting Trade in Services" (Lit. c)

10 "Measures by Members affecting trade in services"[27] in Art. XXVIII lit. c is a notion composed of several independent terms. "Measure" is defined by Art. I:3, Art. XXVIII lit. a and Art. XXVIII lit. c together,[28] "trade in services" is laid down in Art. I:2.[29] The new term here is **"affecting"**.[30] The ordinary meaning of "to affect" is "to produce an effect on"[31] which would indicate a broad scope of application.

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[22] Group of Negotiations on Services, Uruguay Round, Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120, 10 July 1991.

[23] Provisional Central Product Classification, Statistical Papers, Series M No.77, United Nations, 1991. The UN CPC which was the basis for the GATT Secretariat's classification has been replaced by the 2002 version, which contains different subcategories and classification numbers from the Provisional CPC. The current version is Central Product Classification Version 1.1, ST/ESA/STAT/SER.M/77/Ver.1.1, E.03.XVII.3, see also <unstats.un.org/unsd/cr/family2.asp?Cl=16> (last visited 1 October 2007).

[24] *Krajewski*, National Regulation, 96.

[25] See Panel Report, *EC—Bananas III*, WT/DS27/R/MEX, para. 7.281; *Zdouc*, JIEL 2 (1999), 295, 319, footnote 83, adds that "supply" was understood to give a broader connotation to the field of application of the GATS than "delivery" by covering those measures directly governing as well as those indirectly affecting the supply of the service.

[26] See Appellate Body Report, *EC—Bananas III*, WT/DS27/AB/R, para. 220.

[27] Art. II MERCOSUR Montevideo Protocol, see above, note 6, uses a similar notion directly for the definition of the scope of the Protocol.

[28] See *US—Gambling*, WT/DS285/R, para. 6.150; *Michaelis*, in: *Hilf & Oeter* (eds), 375, 390, para. 38; see above, para. 5.

[29] See *Zacharias*, Article I GATS, paras 37–47.

[30] For an analysis of this notion in the context of Art. I, see *Zacharias*, Article I GATS, paras 28–36.

[31] *Hawkins & Allen* (eds), The Oxford Encyclopedic English Dictionary, 1991, 21.

The **Panel** held in *EC—Bananas III* that "affecting" (in Art. I:1) referred to measures in terms of their effect, which meant that they could be of any type or relate to any area of regulation.[32] The **Appellate Body** upheld the Panel's finding and rejected the view that "affecting" should be interpreted narrowly as "in respect of", in the sense that the purpose and aim of the measure had to be to regulate or at least influence services as services.[33] Rather, the ordinary meaning of "affecting" as having "an effect on" indicated a broad scope of application.[34] In the Appellate Body's view it is decisive that the measure affects the supply of a service—regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services.[35] The applicability of the GATS is not precluded by the applicability of GATT to a particular measure.[36] Rather, the measure can be subject to GATS and GATT if it affects trade in services and trade in goods.[37] Thus, the term "affecting" has a **broad scope** of application. *11*

On other aspects of lit. c, the **Panel** held in *EC—Bananas III* that the word **"include"** demonstrated the illustrative drafting of Art. XXVIII lit. c and stated that "[s]ub-paragraphs (i)–(iii) do not contain a definition of 'measures by Members affecting trade in services' as such, but rather are an illustrative list of matters in respect of which such measures could be taken".[38] To this extent, the term **"in respect of"** would not describe any measures affecting trade in services, but rather what such measures might regulate.[39] Art. XXVIII **lit. c (i)** names measures in respect of the puchase, payment or use of a service and thus deals with the consumer side of the transaction.[40] One example of this could be licensing requirements, numerical limitations or foreign exchange regulations[41] which, independently of their form, might affect the purchase of or payment for a service. It seems to be surprising that the **"use"** of a service is also mentioned in this provision, since the GATS is drafted from a supplier's perspective. But to include measures in respect of consumption in the scope of the GATS is appropriate since otherwise Members could escape their commitments under GATS by adopting prohibitive legislation *12*

[32] *EC—Bananas III*, WT/DS27/R/MEX, para. 7.280; *Zdouc*, JIEL 2 (1999), 295, 318.
[33] See *EC—Bananas III*, WT/DS27/AB/R, para. 220; see also *EC—Bananas III*, WT/DS27/R/MEX, para. 7.278.
[34] See *EC—Bananas III*, WT/DS27/AB/R, para. 220.
[35] See *EC—Bananas III*, WT/DS27/AB/R, paras 217, 220 upholding *EC—Bananas III*, WT/DS27/R/MEX, para. 7.285.
[36] *Krajewski*, National Regulation, 68.
[37] See *EC—Bananas III*, WT/DS27/AB/R, para. 221.
[38] See *EC—Bananas III*, WT/DS27/R/MEX, para. 7.280.
[39] See *EC—Bananas III*, WT/DS27/R/MEX, para. 7.280.
[40] MTN.GNS/W/139, para. 12 on the terms contained in Draft Final Act Embodying the Results of the Uruguay Round, MTN.TNC/W/35–3/Rev.1.
[41] See *EC—Bananas III*, WT/DS27/R/MEX, para. 7.280.

on consumption.[42] Measures under **lit. c (ii)** in respect of access to and use of, in connection with the supply of a service, services which are required to be offered to the public generally may typically include restrictions on transportation and communication services such as the obligation to provide information on one's business before access to a telecommunications network is granted.[43] Measures concerning the presence of persons of a Member for the supply of a service in the territory of another Member, as mentioned in **lit. c (iii)**, may occur, *e.g.*, as the condition for foreign service suppliers to take on a certain percentage of workers of that other Member in order to receive permission to establish a presence in that Member.

13 The notion of "measures by Members affecting trade in services" appears only once in the GATS, namely in Art. I:1. There it defines the scope of the whole Agreement.

IV. "Commercial Presence" (Lit. d)

14 Art. XXVIII lit. d defines **"commercial presence"**[44] as any type of business or professional establishment, and expressly names two kinds of such an establishment: It may be achieved through (i) a **juridical person** or just through (ii) a **branch or representative office** without legal personality.[45] Hence, "commercial presence" covers not only the presence of juridical persons in the strict legal sense, but also that of entities which share some of the same characteristics, and includes, *inter alia*, corporations, joint ventures, partnerships, representative offices and branches.[46] Thus, the GATS leaves to the Members the discretion to define different types of juridical persons according to their domestic law. On the other hand, it treats branches or representative offices without legal personality as equivalent to juridical persons, although the juridical person behind the branch is not located in the territory of that Member, which means that full incorporation of a foreign supplier in the host state is not required.[47] This is in line with the broad **wording** that shows the scope of the definition: "commercial presence" comprises **"any"** type of business or professional establishment, and the term **"including"** indicates that other kinds of

[42] In the same sense, *Delimatsis & Molinuevo*, Article XVI GATS, para. 80.

[43] MTN.GNS/W/139, para. 12 on the terms contained in Draft Final Act Embodying the Results of the Uruguay Round, MTN.TNC/W/35–3/Rev.1.

[44] "Commercial presence" as one mode of service supply is discussed in *Zacharias*, Article I GATS, para. 43.

[45] *Zdouc*, JIEL 2 (1999), 295, 325.

[46] See Council for Trade in Services, Guidelines for the Scheduling of Specific Commitments under the GATS, Adopted by the Council for Trade in Services on 23 March 2001, S/L/92, 28 March 2001, para. 32; *Zdouc*, JIEL 2 (1999), 295, 324.

[47] *Zdouc*, JIEL 2 (1999), 295, 324–325.

establishment also fall under lit. d.[48] While the **"presence"** in "commercial presence" points to the juridical person or representative office mentioned in lit. d (i)–(ii), the term **"commercial"** indicates that if the establishment is not set up for reasons of profit-making, it is at least necessary that services are delivered in exchange for payment.[49] After all, "commercial presence" is defined **broadly** in the GATS.

15 The **"juridical person"** dealt with under **lit. d (i)** is defined in Art. XXVIII lit. l.[50] Under **lit. d (ii) "branch"** and **"representative office"** are examples of professional establishments which are not incorporated in the host Member as juridical persons. While the term "maintenance" appears both in lit. d (i) and lit. d (ii) and the notion of "creation" is similar to "constitution", the "acquisition" of a branch or representative office is not provided for in lit. d (ii). The reason for this omission may be that branches are usually not the object of an acquisition since they are not legally incorporated. But the omission of "acquisition" in lit. d (ii) may also simply be an accidental slip.

16 The commercial presence must be established **for the purpose of supplying a service**. This shows that the originally neutral notion of commercial presence is expressly linked to services for the purpose of its use in the GATS. The provision says "for the purpose of supplying" instead of just stating "for the supply" since in the case of commercial presence establishment in the territory of a Member must take place first before the services supply can start. So, in this phase it is only the plan to supply the service, and the future service supplier bears the burden of proof for this "purpose of supplying a service" in cases before a panel or the Appellate Body. If the alleged supplier is just producing goods, for example, it does not fulfil the purpose of supplying a service.[51] The later redirection of a goods-producing business to one supplying services would be allowed, however, as the "maintenance" of a juridical person or branch which is also covered by lit. d.

17 The term is **most important in Art. I:2 lit. c** where mode 3 is defined, the main characteristic of which is the supply of a service through commercial presence. Section D(2) of the Understanding on Commitments

[48] Art. XVIII MERCOSUR Montevideo Protocol, see above, note 6 using the words "[…] establishment, through, among other means […]" makes the open character of the provision even clearer.

[49] See for the term "commercial" in the context of Art. I:3 lit. c, *Zacharias*, Article I GATS, para. 72.

[50] See below, paras 42–43.

[51] Cases in which the supply of both goods and services are involved may be decided on a case-by-case basis. In the same sense for the question whether a certain measure affecting the supply of a service relating to a particular good is scrutinized under the GATT 1994 or the GATS, *EC—Bananas III*, WT/DS27/AB/R, para. 221.

in Financial Services defines "commercial presence" independently as an enterprise within a Member's territory for the supply of financial services, which includes wholly- or partly-owned subsidiaries, joint ventures, partnerships, sole proprietorships, franchising operations, branches, agencies, representative offices or other organizations. This definition appears to be even wider[52] in scope than Art. XXVIII lit. d insofar as it covers subsidiaries that are only partly-owned by the service supplier.

V. "Sector" (Lit. e)

18 The ordinary meaning of **"sector"** is "distinct part or branch".[53] Such a service "branch" differs in the GATS depending on whether a specific commitment is involved: for the definition of the term "sector" lit. e differentiates between the sector of a service with reference to a specific commitment (i) and otherwise (ii).[54] A **specific commitment** is a commitment undertaken under Part III of the GATS, *i.e.* with respect to market access (Art. XVI), national treatment (Art. XVII) or as an additional commitment (Art. XVIII).[55] According to **lit. e (i)** with reference to a specific commitment, "sector" of a service means one or more, or all subsectors of that service, as specified in a Member's Schedule. **For all cases outside** Part III, however, *e.g.* in ART. IV in Part II, "sector" is **not Member-defined** but, in the interst of legal certainty and conformity with the general obligations **legally defined** by **lit. e (ii),** as comprising the whole of the sector, including all of its subsectors. Although the Members are free to define their sectors within Part III,[56] in practice for reasons of clarity they use the classification provided for in the **"Services Sectoral Classification List" ("W120" list)**[57] or the more refined UN Provisional Central Product Classification (UN CPC).[58] While the GATS does not directly refer to the "W 120" list, Art. 22.3 lit. f (ii) DSU in the context of the suspension of concessions defines "sector" with respect to services expressly as "a principal sector as identified in the current Services Sectoral Classification List".

19 This **differentiation** between sectors with reference to specific commitments and otherwise mirrors the distinction in the GATS between the **general obligations** in Part II and the **specific commitments** in

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[52] See *von Bogdandy & Windsor*, Understanding on Commitments in Financial Services, para. 29.

[53] *Hawkins & Allen* (eds), The Oxford Encyclopedic English Dictionary, 1991, 1311.

[54] Art. XVIII MERCOSUR Montevideo Protocol, see above, note 6, contains a similar provision.

[55] See Art. XX:1 and *Molinuevo*, Article XX GATS, para. 3.

[56] See *Molinuevo*, Article XX GATS, para. 15.

[57] MTN.GNS/W/120.

[58] See above, note 23.

Part III: in the field of market access and national treatment (Part III) where the GATS negotiators could not agree on a general obligation, the Members are given full flexibility as to the number and definition of their obligations, and thus the content of their commitments. In this context, mention must be made of the fact that some of the most prominent general obligations that refer to the term "sector", such as Art. VI:1 and 5 or Art. VIII:2, are applicable only if specific commitments are undertaken.[59] In these cases "sector" must be understood also as used "with reference to a specific commitment", since otherwise the Members would be deprived of their flexibility in scheduling.

20 Although Members are flexible in defining sectors for the purpose of undertaking specific commitments, the **Panel** in US-Gambling stated that a **specific commitment in a** given **sector** or sub-sector **guarantees** that **the whole** of that **sector** is covered by the commitment, since any other interpretation would make market access commitments under the GATS largely meaningless.[60] If a Member planned to restrict its specific commitments sector, it should set out the **restrictions** or limitations on this commitment in the appropriate place in the Member's **Schedule**. [61] This is in line with the wording of lit. e (i) ("as specified in a Member's Schedule"). In addition to that, the Appellate Body concluded from the GATS scheduling system of specific commitments that, since a Member's obligations depended on a specific commitment in a sector,[62] the **sectors and sub-sectors** in a Member's Schedule had to be **mutually exclusive** for reasons of clarity.[63] These points of the case law reflect the complexity of the scheduling system of the GATS and the ensuing necessity to provide safeguards for **legal certainty and clarity** of scheduled commitments, not only for the Member invoking market access or national treatment but also for the scheduling Member as guidance for a comparable and unambiguous scheduling of its commitments.

21 The term appears on numerous occasions throughout the Agreement, most prominently in Part III dealing with the specific commitments undertaken in the Schedules of specific commitments.

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[59] The usual language then is "in sectors where sepecific commitments are undertaken".

[60] *US—Gambling*, WT/DS285/R, para. 6.290.

[61] *Ibid*.

[62] See the wording of Art. XVI:2 ("In sectors where market-access commitments are undertaken") and Art. XVII:1 (In the sectores inscribed in its Schedule").

[63] Appellate Body Report, *US—Gambling*, WT/DS285/AB/R, para. 180.

VI. "Service of Another Member" (Lit. f)

22 In defining "service of another Member", the reading of lit. f shows that the main problem, and at the same time the reason for differentiation within this definition, lies in the element of **"another"** Member: whereas **modes 1 and 2** allow for a determination of the foreign character of a service by reference to the **territory** from which the service comes (mode 1) or where it is supplied (mode 2), the determination becomes more difficult in cases of maritime transport, where no territory is available to refer to. In the case of **modes 3 and 4,** where the service supplier is present in the territory of another Member and therefore the determination using the territorial element is impossible, it is exchanged for the **supplier** and his belonging to another Member.

23 Art. XXVIII **lit. f lit.** (**i**) addresses services supplied "from" (**mode 1**) or "in" (**mode 2**) the territory of the other Member. In the special case of **maritime transport** there is no territorial link which would allow for the attribution of the services supply to "another Member". Lit. f, therefore, refers in the case of services supplied by **vessels** to their registration under the laws of the other Member,[64] or to the **person**[65] which supplies the service through the operation of the vessel or its use. At first sight it is surprising that a vessel is seen as being capable of supplying a service. That does not comply with lit. g which defines a service supplier as "any person" which is a natural or juridical person but not a vessel. In the context here, however, the aim is to enable the other WTO Members to identify the Member to which the service supply is attributable. Since a service supply by a vessel and a person coincide in the case of maritime transport, the option to determine the origin of the service by the registration of the vessel is to be seen as a mere facilitation, and alternative to the nationality of the person in cases where the nationality is doubtful. A services supply by a person **"through the operation of a vessel"** could, for example, be a cruise, whereas an example of the **"use"** of the vessel **"in whole or in part"** in the interest of the service supply is the maritime transport of goods.

24 **Lit. f** (**ii**) names as a "service of another Member" a service which is supplied in the case of supply through commercial presence (mode 3) or through the presence of natural persons (mode 4) by a service **supplier**[66] of that other Member. This special provision for modes 3 and 4 is necessary since, in the cases of commercial presence and presence of natural persons, a determination of the origin of the services in another Member cannot be correctly conducted, as is possible with regard to the territory

[64] See on the registration of vessels, *Röben*, Article XXVII, para. 15.
[65] For the definition see below, para. 34.
[66] See below, para. 26.

from which or in which the service is supplied in the cases of modes 1 and 2. The supplier's nationality therefore substitutes the territorial aspect as an indicator of the foreign nature ("of another Member") of the service supplied.

25 The term "service of another Member" as such does not appear in other Articles of the GATS. It gains importance in the form of services or service suppliers of "any" other Member which can be found more frequently.

VII. "Service Supplier" (Lit. g)

26 "Service supplier" is any person that supplies a service. For the definition of "person" one must refer to Art. XXVIII lit. j, which defines "person" as a natural or juridical person.[67] "Juridical person" in turn is defined in Art. XXVIII lit. l; the "supply of a service" is defined in lit. b.[68] The notion of "service supplier" is important, especially insofar as it is the service supplier (besides the services) to whom market access and national treatment must be accorded.[69] Since the definition in lit. b of "supply of a service" includes the whole range of activities necessary to produce and deliver a service,[70] the "service supplier" is any person who produces, distributes, markets, sells and delivers a service. Since not just the notion of "supply of a service" but also the term "person" is broad,[71] it is certainly right to assume that the GATS concept of "service supplier" could hardly be more compehensive in its coverage of economic actors.[72]

27 In *EC—Bananas III*, the question at issue was whether a vertically-integrated company engaged in banana distribution could be seen as a potential supplier of wholesale servcies covered by the GATS. On the question whether **potential service suppliers** were covered by the GATS, the Panel held: "Where operators form part of vertically integrated companies, they have the capability and opportunity to enter the wholesale service market. They could at any time decide to re-sell bananas which they have imported or acquired from EC producers [...] instead of further transferring or processing bananas within an integrated company. Since Article XVII of GATS is concerned with conditions of competition, it is appropriate for us to consider these vertically integrated companies as service suppliers [...]".[73] This

[67] See below, para. 34.
[68] See above, para. 7.
[69] See Art. XVI:1 and Art. XVII:1.
[70] See above, para. 7.
[71] See above, para. 34.
[72] *Zdouc*, JIEL 2 (1999), 295, 324.
[73] *EC—Bananas III*, WT/DS27/R/MEX, para. 7.320; in Art. 1213 NAFTA the inclusion of service suppliers not (yet) actually providing a service becomes apparent from the wording: "service provider of a Party means a person of a Party that seeks to provide or provides a service".

finding was upheld by the Appellate Body.[74] But this finding goes against the clear wording of lit. g: "any person that **supplies** a service",[75] which suggests that only actual service suppliers are covered. Also a contextual argument challenges the finding: para. 5 lit. b of the Annex on Financial Services expressly includes persons "wishing to supply or supplying financial services", which *a contrario* shows that this was not intended to be included in Art. XXVIII lit. g. It even seems that the object and purpose of the GATS do not require the interpretation found by the Panel: although a broader scope no doubt adds to trade liberalization, the Members' intention was certainly not to have an unidentifiable number of potential service suppliers when they bound themselves to specific commitments. Members could no longer calculate their obligations stemming from a specific commitment, given that there would be no statistical data available on service suppliers which were only potential suppliers. The Appellate Body later criticized the Panel in *Canada—Autos* for not having made any factual finding as to which companies actually provided wholesale trade services in the case.[76] This is seen as a hint that the Appellate Body rejects the approach of including potential service suppliers in the scope of the GATS.[77] That **vertically-integrated companies** could be regarded as service suppliers was challenged by the argument that they provided such services in-house in the production and distribution chain, and that thus only the products and not the services appeared on the market.[78] In this regard, the Appellate Body stated that "[…] even if a company is vertically-integrated, and even if it performs other functions related to the production, importation, distribution and processing of a product, **to the extent it is also engaged in** providing 'wholesale trade **services**' […] that company **is a service supplier** within the scope of the GATS".[79] This makes sense since a vertically-integrated company should not be deprived of the advantages under the GATS solely because of the way it is organized.

28 **Footnote 12**[80] provides for a special rule for the services supplied through commercial presence but through other forms[81] than by juridical persons. Whereas in the first sentence of the footnote the **treatment applying to juridical persons** is **also** stipulated **for other forms of commercial presence**, the second sentence contains a limitation of this rule to the

[74] *EC—Bananas III*, WT/DS27/AB/R, para. 228.
[75] Emphasis added.
[76] Appellate Body Report, Canada—Autos, WT/DS139/AB/R, WT/DS142/AB/R, para. 164.
[77] See, *e.g.*, *Krajewski & Engelke*, Article XVII GATS, para. 31.
[78] *EC—Bananas III*, WT/DS27/AB/R, paras 56, 224.
[79] *EC—Bananas III*, WT/DS27/AB/R, para. 227. Emphasis added.
[80] See for a similar wording Art. XVIII MERCOSUR Montevideo Protocol, see above, note 6.
[81] See Art. XXVIII, lit. d (ii).

presences actually supplying the service. In the case of supply through other forms the juridical person behind the branch, for example, is nevertheless seen as being the service supplier. And, although not present itself as a juridical person in the territory of that Member, it is accorded the treatment as if it were directly supplying the service in that Member, *i.e.* market access and national treatment as provided for in the Schedule of commitments of the other Member. The idea of seeing the juridical person behind the branch as the service supplier is convincing, since it is the juridical person that makes use of mode 3, not the branch. To this extent, footnote 12 brings lit. g in line[82] with Art. XXVIII lit. d regulating commercial presence: the rationale behind this benefit for other forms of commercial presence is that otherwise the GATS would not be applicable and the commercial presence in the form of a branch (lit. d) would become meaningless, since treatment of it as if it were a service supplier would not be granted. Thus, footnote 12 **tries to overcome the divergence between** the narrow definition of **"service supplier"** (lit. g) including only natural and juridical persons **and** the wider definition of **"commercial presence"** (lit. d) also comprising branches, which would otherwise lead to a denial of the benefits of Arts XVI and XVII in the case of mode 3. According to the **second sentence**, this treatment is extended only to the presence through which the service is supplied and need not be granted to any other parts of the supplier outside the territory where the service is supplied. This makes it clear that the inclusion of other forms of commercial presence laid down in the first sentence is made only in the interest of the actual service supply and as an exception, but is not to lead to a general treatment of the juridical person as a service supplier with respect to all its parts in any other territory where the service in question is not supplied.

29 **"Service supplier"** is **one of the most frequently used definitions** of Art. XXVIII within the GATS. Para. 5 lit. b of the Annex on Financial Services modifies the term for the purpose of that Annex: the main difference is that a "financial services supplier", although including any natural or juridical person, does not include a public entity. This mirrors, with slight modifications for the term "service supplier", what is laid down in Art. I:3 lit. b for the term "service": the exclusion from the scope of the GATS of services in the exercise of governmental authority. This is different from Art. XXVIII lit. g insofar as a service supplier there is any person, including natural and juridical persons (Art. XXVIII lit. j), the juridical person being privately-owned or government-owned (Art. XVIII lit. l). But also in the case of lit. g the rule excluding governmental activities applies via the notion of "service" which points to Art. I:3 lit. b. Para. 5 lit. b of the Annex on Financial Services is broader, insofar as not only the person

[82] *Zdouc*, JIEL 2 (1999), 295, 324, footnote 98.

who supplies a service but also a person **wishing**[83] to supply a financial service is covered.[84]

VIII. "Monopoly Supplier of a Service" (Lit. h)

30 **"Monopoly supplier of a service"** means any person (lit. j), public or private, which in the relevant market of the territory of a Member is **authorized or established formally or in effect** by that Member as the sole supplier of that service. "Monopoly" (the noun) in its ordinary meaning is "the exclusive possession of control of the trade in a commodity or service".[85] The main difference between lit. h and this ordinary meaning is that the monopoly supplier under the GATS must be authorized or established by the Member as the sole supplier. This reflects a compromise: Although a monopoly supplier not authorized by a Member may also hamper competition to the detriment of trade in services, the GATS imposes obligations on a Member only in those cases where that Member has actively contributed to the rise of a monopoly supplier.

31 The main area of application of the notion "monopoly supplier of a service" is **Art. VIII** concerning "monopolies and exclusive service suppliers". The definition of the "monopoly supplier of a service" in lit. h is at the same time an example of a definition which is especially material for the operation of an Article of the GATS, since the application of Art. VIII is heavily dependent on this definition. It must be admitted, however, that lit. h not only solves problems by explaining the meaning of monopoly services supplier, but rather creates new problems of definition by stipulating that the person in question is "authorized or established" "formally or in effect", which is not explained in Art. XXVIII.

32 The authorization or establishment may take place **"formally or in effect"** by the Member. "Formal" means "in accordance with the recognized forms",[86] whereas "effect" means the "result or consequence of an action".[87] These meanings indicate that "formally or in effect" has a wide scope and covers not only an official authorization or establishment but all forms of authorization that result in any way from governmental action. For the person to be **"authorized or established"**, the mere tolerance

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[83] See above, para. 27.

[84] See *von Bogdandy & Windsor*, Annex on Financial Services, para. 20.

[85] *J. M. Hawkins & R. Allen* (eds), The Oxford Encyclopedic English Dictionary, 1991, 938.

[86] *J. M. Hawkins & R. Allen* (eds), The Oxford Encyclopedic English Dictionary, 1991, 551.

[87] *J. M. Hawkins & R. Allen* (eds), The Oxford Encyclopedic English Dictionary, 1991, 456.

or inaction of the Member is not enough,[88] so that natural monopolies that emerged without government interference are not covered by the definition.[89] The degree of governmental action needed for a person to be "authorized or established" by a Member is still under discussion.[90] While, on the one hand, the involvement of the government is necessary,[91] on the other hand informal action having the effect of an authorization will suffice. Thus, *e.g.* a Member's law allocating telecommunications licences which features preconditions tailor-made for one specific competitor might suffice as an authorization "in effect" of this competitor as the sole supplier of the telecommunications services in question, since it has the effect that only this competitor will receive a licence. Since circumstances may differ considerably in different cases, however, it seems appropriate to plead for a decision taken on a **case-by-case basis**.

IX. "Service Consumer" (Lit. i)

"Service consumer" means any person (lit. j) who receives or uses a service. *33*
Whereas the ordinary meaning of "consumer" is a person who consumes and especially purchases a product or service,[92] the more passive aspect of receiving, *i.e.* accepting something offered,[93] as laid down in lit. i points to the special use of the term in the context of the GATS, which is drafted from the angle of the supply of services. The notion of "service consumer" is not widely used in the GATS, probably for the same reason. The same is true for the GATT 1994 which mentions "consumer" only twice in its whole text.[94] The only, but nevertheless prominent, area of the application of "service consumer" in the GATS is the definition of mode 2 in Art. I:2 lit. b.

X. "Person" (Lit. j)

The term **"person"** comprises natural as well as juridical persons.[95] *34*
"Natural person" did not deserve further explanation in the eyes of the drafters of the GATS—except for "natural person of another Member" in lit. k, and is sufficiently defined by its ordinary meaning of "an individual

[88] See *Bigdeli & Rechsteiner*, Article VIII, para. 5 *et seq*. for an explanation of "authorized or established".
[89] See *Adlung*, JIEL 9 (2006), 473; *Krajewski*, National Regulation, 87, rightfully recalling that the GATS only applies to government measures.
[90] See *Bigdeli & Rechsteiner*, Article VIII, paras 5–7.
[91] *Krajewski*, National Regulation, 87.
[92] *Hawkins & Allen* (eds), The Oxford Encyclopedic English Dictionary, 1991, 313.
[93] *Hawkins & Allen* (eds), The Oxford Encyclopedic English Dictionary, 1991, 1206.
[94] See Arts IX:2 and XI:2 lit. c (ii) GATT 1994.
[95] There are similar definitions in Art. XVIII MERCOSUR Montevideo Protocol, see above, note 6 and Art. 201 NAFTA.

human being".[96] In contrast, **"juridical person"** is further defined in lit. l[97] and "juridical person of another Member" in lit. m.[98] Thus, the term is mostly used in such compositions and experiences its strongest application in the Annex on Movement of Natural Persons.[99]

XI. "Natural Person of Another Member" (Lit. k)

35 The definition of a "natural person of another Member" sets up **two preconditions** which must be fulfilled **cumulatively**: the natural person must **reside** in the territory of any other Member **and** must be a **national** of that other Member, whereby this latter precondition is substitutable under certain circumstances. While the first precondition ("reside") addresses the factual relationship of the natural person to the other Member, the second precondition ("national") stipulates a legal tie.

36 The natural person must **reside** in the territory of that other Member. The ordinary meaning of reside is "to have one's home" or "to dwell permanently".[100] From this pure **wording** it is not clear whether the term just means the factual presence of the person in the territory or whether it also refers to a right of residence as a legal status. A **systematic** interpretation which looks at lit. k (ii) indicates that "resides" in the *chapeau* of lit. k does not refer to a right of residence, since the GATS, as the wording "right to permanent residence" in lit. k (ii) shows, explicitly speaks of such a right if this was the drafters' intent. The definition's text names the territory of "that" other Member and "any" other Member. That shows that the natural person may choose its residence freely. This part of the definition is, however, not totally meaningless, since the phrase "any other 'Member'" limits the scope of countries where the natural person may reside to those which are WTO Members.

37 As a second precondition, the natural person must be a **national** of that other Member. Nationality denotes the existence of a legal tie between an individual and a State, by which the individual is under the personal jurisdiction of that state.[101] Nationality is in principle regulated by domestic law.[102] This is also the case in the GATS: in order to take the different domestic

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[96] *Hawkins & Allen* (eds), The Oxford Encyclopedic English Dictionary, 1991, 1083.
[97] See below, para. 42.
[98] See below, para. 44.
[99] See *Bast*, Annex on Movement of Natural Persons Supplying Servies Under the Agreement.
[100] *Hawkins & Allen* (eds), The Oxford Encyclopedic English Dictionary, 1991, 1229.
[101] *Randelzhofer*, in: *Bernhardt* (ed.), 502.
[102] *Ibid.*

regulations of the WTO Members into account the defintion refers to the laws of the Members ("under the law of that other Member").[103]

38 Only in cases where a Member does not have nationals (**lit. k (ii), para. 1**) or accords substantially the same treatment to its permanent residents as it does to its nationals in respect of measures affecting trade in services (**lit. k (ii), para. 2**), the definition refers to the **right of permanent residence** in that other Member. In this context "residence" is to be understood as a legal status and a right of residence[104] for several reasons: the wording says "right", which—as seen—is not the case with "resides". Furthermore, the term substitutes the precondition of being a "national" of the other Member. That means that this status is thought of as a quasi-equivalent to nationality. Furthermore, the word "permanent" makes it clear that the stay is not just temporary.

39 **Members** that do **not have nationals** (**lit. k (ii), para. 1**) are those WTO Members which are not states in international law,[105] such as, *e.g.* the EC.[106]

40 It may happen more often that the requirement of nationality may be substituted by the second alternative, *i.e.* the right of permanent residence, provided that this right is a quasi-equivalent to nationality with regard to the treatment of the natural person. Therefore, **para. 2 of lit. k (ii)** contains several safeguards that are to ensure that the right of permanent residence approximates as closely as possible to the conditions of nationality: the Member must accord **substantially the same treatment** to its permanent residents as it does to its nationals in respect of measures affecting trade in services. In this respect, the word "substantially" has the function of indicating that the treatment does not have to be identical to the treatment that nationals are granted. The treatment should, however, be nearly identical or at least very similar as the ordinary meaning of "substantial", *i.e.* "of real importance or value" and "of large size or amount", shows.[107] Furthermore, according to the second sentence of para. 2 of lit. k (ii), the other Member must assure to assume the **same responsibilities** with regard to those permanent residents as it bears regarding its nationals, *e.g.* the granting of diplomatic protection. Both commitments must be notified to the Council for Trade in Services. Several Members have made

[103] See MTN.GNS/W/139, para. 13. on the terms contained in Draft Final Act Embodying the Results of the Uruguay Round, MTN.TNC/W/35–3/Rev.1.

[104] See also *Bast*, Annex on Movement of Natural Persons Supplying Servies Under the Agreement, para. 47.

[105] See MTN.GNS/W/139, para. 13. on the terms contained in Draft Final Act Embodying the Results of the Uruguay Round, MTN.TNC/W/35–3/Rev.1.

[106] *Randelzhofer*, in: *Bernhardt* (ed.), 502.

[107] *Hawkins & Allen* (eds), The Oxford Encyclopedic English Dictionary, 1991, 1458.

such a notification.[108] However, no Member must accord treatment more favourable to such permanent residents than is accorded to them by that other Member.

41 The term is important for Art. I:2 lit. d where mode 4 is defined with its main characteristic of the supply of a service through presence of natural persons in the territory of any other Member.

XII. "Juridical Person" (Lit. l)

42 Art. XXVIII lit. l defines "juridical person" as any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned and enumerates examples. The **wording** itself ("any" legal entity, "or otherwise organized", "for profit or otherwise") demonstrates the **broad** definition of "juridical person" under the GATS. Also, the term "entity" is a very general notion meaning a "thing with distinct existence".[109] This entity must be "duly constituted or otherwise organized under applicable law". While "constituted" means "established by law",[110] the term "organized" is much wider, meaning "give an orderly structure".[111] With the wording "or otherwise organized under applicable law" the definition is at pains to accommodate the varying ideas of "juridical person" in the different legal orders of the Members. The entity does not have to be profit-oriented but may be "for profit or otherwise", *e.g.* non-profit services which are, however, not given for free and are therefore "commercial" in the sense of Art. I:3 lit. c.[112] The juridical person may be privately-owned or governmentally-owned. A governmentally-owned juridical person may, however, be a service supplier[113] only if it does not supply the service "in the exercise of governmental authority" (Art. I:3 lit. c), which means that it must—in order to qualify as a service supplier—supply the service on a commercial basis or in competition with other service suppliers. The word **"including"**,

[108] Council for Trade in Services, Notification Pursuant to Article XXVIII (k)(ii) of the General Agreement on Trade in Services, S/C/N/1, 23 January 1995; Council for Trade in Services, Notification Pursuant to Article XXVIII (k)(ii) of the General Agreement on Trade in Services, S/C/N/2, 23 January 1995; Council for Trade in Services, Notification Pursuant to Article XXVIII (k)(ii) of the General Agreement on Trade in Services, S/C/N/3, 23 January 1995; Council for Trade in Services, Notification Pursuant to Article XXVIII (k)(ii) of the General Agreement on Trade in Services, S/C/N/5, 23 January 1995.

[109] *Hawkins & Allen* (eds), The Oxford Encyclopedic English Dictionary, 1991, 476.

[110] *Hawkins & Allen* (eds), The Oxford Encyclopedic English Dictionary, 1991, 312.

[111] *Hawkins & Allen* (eds), The Oxford Encyclopedic English Dictionary, 1991, 625.

[112] See *Zacharias*, Article I GATS, paras 69–75 for the discussion on services supplied on a commercial basis.

[113] As seen above, a "service supplier" is any person that supplies a service (lit. g). "Person" includes juridical persons (lit. j).

which initiates the enumeration of six possible legal entities, indicates the **illustrative character** of this list.

43 The term is found only sporadically in the GATS. It becomes important, however, in the definition of "commercial presence" (Art. XXVIII lit. d) as the main element of mode 3 (Art. I:2 lit. c).

XIII. "Juridical Person of Another Member" (Lit. m)

44 Art. XXVIII lit. m defines "juridical person of another Member". It provides a rule of origin for juridical persons.[114] The definition of "juridical person" can be found in lit. l. Lit. m adds the words "of another Member". The definition is split into two alternatives: lit. m (i) gives the general definition, whereas lit. m (ii) provides for a special defintion in cases of services supply through commercial presence.

45 The general definition of **lit. m (i)** consists of two components: the juridical person must be **constituted or otherwise organized** as in lit. l, but under the law of that other Member. Cumulatively, it has to be engaged in substantive business operations in the territory of that Member or any third Member. This second element customizes the term to the GATS context of trade and business and ensures that the juridical person is not only formally one of another Member but also so in effect by operating in this territory. This is necessary in order to delimit modes 1, 2 and 4 covered by lit. m (i) from services supplied through commercial presence covered by lit. m (ii), in which case the service is supplied by a supplier of one Member in the territory of another Member, *i.e.* with the business taking place there. The meaning of the notion **"substantive business operations"** is not clear from its mere wording and calls for interpretation. "Business operations" has been considered to cover the production, distribution, marketing, sale and delivery of a service as provided for in Art. XXVIII lit. b.[115] "Substantive" means "substantial", which in turn is translated by "of large size or amount".[116] That indicates at least that insignificant business operations are not enough to qualify as "substantive". The term "substantive business operations" appears also in Art. V:6. In that context, it is argued that **a service supplier engaged in regular commercial activity** would meet this requirement.[117] This is closer to a manageable formula but of course leaves open what "regular" means. Given the diversity of possible

[114] See MTN.GNS/W/139, para. 14 on the terms contained in Draft Final Act Embodying the Results of the Uruguay Round, MTN.TNC/W/35–3/Rev.1.

[115] See Negotiating Group on Rules, Compendium of Issues Related to Regional Trade Agreements, Background Note by the Secretariat, TN/RL/W/8/Rev.1, 1 August 2002, para. 111 in the context of regional trade agreements.

[116] *Hawkins & Allen* (eds), The Oxford Encyclopedic English Dictionary, 1991, 1458.

[117] See *Cottier & Molinuevo*, Article V GATS, para. 63.

commercial activities—delivery of postal services would probably happen more frequently than the giving of legal advice—what is "regular" must be examined on a **case-by-case basis**.

46 The special definition of **lit. m (ii)** is dedicated to the supply of a service through commercial presence. This additional definition is necessary since commercial presence as defined in lit. d allows for the establishment of a juridical person within the territory of a Member for the purpose of supplying a service. As the definition of "juridical person" in lit. l shows, this means an establishment "under applicable law", which is the respective domestic law. It follows that the criterion of lit. m (i) of the constitution of the juridical person under the law of another Member no longer suffices to determine the origin of the juridical person since it may be established under the law of that same Member where the service is supplied. The **means of determination of the origin** of the supplier thus **shift to** the criteria of **ownership** and **control** respectively by natural or juridical persons of that other Member. "Natural person of another Member" is defined in lit. k; concerning juridical persons there is a reference back to lit. m (i) resulting in the application of the preconditions set out there. The term "owned" is defined in Art. XXVIII lit. n (i); the term "controlled" in lit. n (ii).

47 With regard to para. 2 of lit. m (ii) the following problem could arise: from a legal point of view a **chain of legal persons** could be constituted under the domestic law of different WTO Members. For the application of lit. m (ii) it could be difficult to trace back the different juridical persons involved. On the other hand, the correct determination is decisive since thus the juridical person is attributed to a specific WTO Member. The Panel stated in *EC—Bananas III* that for suppliers commercially present in the EC, such as Del Monte Mexico, "it would not matter under Article XXVIII (m) of GATS whether Del Monte Mexico was owned or controlled by natural or juridical persons of Jordan, i.e. a WTO non-Member, as long as Del Monte Mexico was incorporated in Mexico and engaged in substantive business operations in the territory of Mexico or any other Member".[118] This view was confirmed by the Panel in *Canada—Autos* which held that "[i]n order to define a 'juridical person of another Member' Article XXVIII (m) of the GATS does not require the identification of the ultimate controlling juridical or natural person: it is sufficient to establish ownership or control by a juridical person of another Member, defined according to the criteria set out in subparagraph (i)".[119]

[118] *EC—Bananas III*, WT/DS27/R/MEX, para. 7.318, footnote 487.
[119] Panel Report, *Canada—Autos*, WT/DS139/R, WT/DS142/R, para. 10.257.

The term as such does not appear in other Articles of the GATS. But it is included in the more frequently used term "service supplier of any other Member" since "service supplier" means any person (Art. XXVIII lit. g) and therefore also "juridical person" (Art. XXVIII lit. j). *48*

XIV. Juridical Person "Owned", "Controlled", "Affiliated" (Lit. n)

Art. XXVIII lit. n (i) defines when a juridical person is seen as **"owned"** by persons of a Member. It is a definition supporting the operation of Art. XXVIII lit. m (ii) which contains this term. The ordinary meaning of "own" is "to have as property" or "to possess".[120] The definiton in lit. n (i) focuses more on economic aspects, stating that a juridical person is "owned" by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member. *49*

The conditions under which a juridical person is **"controlled"** by persons of a Member are set out in lit. b (ii). This definition is also one supporting the operation of Art. XXVIII lit. m (ii) which contains the term "controlled". The ordinary meaning of "control" is "to have command of" or "to dominate".[121] The definition in lit. n (ii) considers a judicial person "controlled" by persons of a Member if such persons have the power to name a majority of its directors or otherwise legally to direct its actions. The difference from the term "owned" as defined in lit. m (i) might be the slightly weaker expression "controlled". In any case, lit. m (ii) emphasizes legal dominance instead of the economic aspect as in lit. m (i). The Panel held in *EC—Bananas III* that a list of companies owned or controlled by the service supplier without formal records of company registrations might suffice as evidence of the element of "controlled".[122] *50*

What is necessary before one can see a juridical person as **"affiliated"** with another person is set out in lit. n (iii). A juridical person is "affiliated" with another person when it controls or is controlled by that other person; or when it and the other person are both controlled by the same person. The definition of "controlled" is laid down in lit. n (ii). The ordinary meaning of "affiliate" is "to attach" or "to connect".[123] But in the case of lit. n (iii) the relationship is closer, since either of the persons governs the other or they are equally dependent on a third person. The term appears in the *51*

[120] *Hawkins & Allen* (eds), The Oxford Encyclopedic English Dictionary, 1991, 1041.
[121] *Hawkins & Allen* (eds), The Oxford Encyclopedic English Dictionary, 1991, 317.
[122] *EC—Bananas III*, WT/DS27/R/MEX, para. 7.331 with reference to Art. IIIbis which allows for the limitation of information based on confidentiality concerns. The Appellate Body in *EC—Bananas III*, WT/DS27/AB/R, para. 239 declined to rule on this point, characterizing it as a factual conclusion.
[123] *Hawkins & Allen* (eds), The Oxford Encyclopedic English Dictionary, 1991, 21.

context of monopolies and exclusive service suppliers in Art. VIII, whereas para. 3 lit. d of the Annex on Telecommunications assigns the definition of "affiliates" to the WTO Members.

XV. "Direct Taxes" (Lit. o)

52 To define the term "direct taxes" the GATS in Art. XXVIII lit. o enumerates examples of such taxes. The meaning of "direct taxes" is taxes which are levied directly on the individual, in contrast to indirect taxes which are levied on goods or services but are ultimately paid by the consumer in the form of higher prices.

53 The term is used in Art. XIV on general exceptions where one exception to Art. XVII is granted in the interest of an equitable or effective imposition or collection of direct taxes in respect of services and service suppliers of other Members.

C. Assessment

54 This analysis of the definitions laid down in Art. XXVIII shows that the drafters of the GATS intended to give these notions a broad meaning in the interest of trade liberalization. Going through the text the reader gets the impression that what is entitled "definitions" here seems to provide flexible guidance rather than sharp and clear-cut explanations: several of the defintions feature an open catalogue of examples that may give an idea of what the notion in question is all about. Although not setting up obligations for the WTO Members, Art. XXVIII may play an important role in the future in the determination of the scope of obligations under the GATS and the interpretation of the Articles of the Agreement in the case law of the panels and the Appellate Body.

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Article XXIX GATS
Annexes

The Annexes to this Agreement are an integral part of this Agreement.

Cross References

Art XXV MERCOSUR Montevideo Protocol.

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A. Introduction

Art. XXIX integrates individual **Annexes** in the *corpus iuris* of the GATS. *1*
Two other types of texts have to be read as parts of the GATS: **Art. XX:3** says that the **Schedules of specific commitments** are to be annexed to the GATS and are to form an integral part thereof. Following further negotiations carried out after the official end of the Uruguay Round, the so-called **Protocols** were added, which embody specific commitments for particular sectors and supplement the list of Article II exemptions of the relevant Member. These Protocols also form part of the GATS Agreement, either via Art. XX:3 as far as they modify the Schedules of specific commitments or as Annexes via Art. XXIX[1] as part of the Annex on Article II Exemptions. Arts XX:3 and XXIX taken together with the text of the GATS give a **comprehensive idea** of **what belongs to the GATS**, *i.e.* the Articles of the Agreement, the Annexes, the Schedules of specific commitments and the Protocols.

Provisions like Art. XXIX **integrating** further parts into an agreement *2*
are also **well known** in the GATT and other trade agreements: according to para. 1 of its Introductory Note the GATT 1994 consists of the GATT 1947 as modified before the entry into force of the WTO Agreement as well as several protocols and understandings. Art. XXXIV GATT 1994 says that Annexes A-I are an integral part of the agreement. Likewise Art. II:7 GATT 1994 states that the Schedules of tariff concessions annexed to the GATT are integrated. Art. VII para. 4 MERCOSUR Montevideo Protocol

[1] *Stoll & Schorkopf*, Max Planck CWTL, Vol. 1, 199. Concerning the lists of exemptions, the Annex on Article II Exemptions says at the end that "the agreed lists of exemptions […] will be annexed here […]". Thus, the lists of exemptions are annexes to the Annex on Art. II Exemptions and thus Annexes to the GATS covered by Art. XXIX. *Footer & George*, in: *Macrory et al.* (eds), 799, 855, state more generally that the lists of MFN exemptions are also integral to the GATS.

similarly says that "the lists of specific commitments shall be annexed to this Protocol and shall be an integral part of the same".[2]

3 The **effect** of Art. XXIX is that the **Annexes share the legal nature of the GATS**. The GATS is an integral part of the WTO Agreement, Art. II:2 WTO Agreement, which is a **binding** international treaty.[3] As part of an international treaty, the Annexes are **interpreted in accordance with the rules on the interpretation** of treaties in the **Vienna Convention** on the Law of Treaties.[4]

B. The Meaning of Art. XXIX

I. "The Annexes" to the GATS

4 An **"annex"** is an appendix to a book or other document.[5] The term is derived from Latin "*nectere*" which means to bind or attach.[6] There are **eight different Annexes** appended to the GATS, namely the Annexes on Article II Exemptions,[7] on Movement of Natural Persons Supplying Services under the Agreement,[8] on Air Transport Services,[9] on Financial Services,[10] the Second Annex on Financial Services[11] and the Annexes on Negotiations on Maritime Transport Services,[12] on Telecommunications[13] and on Negotiations on Basic Telecommunications.[14] The Annexes mainly contain **definitions** and **exceptions** to the regular GATS obligations in order to cope with the particularities of certain services sectors in which an agreement on the application of the GATS rules could not be reached during the Uruguay Round.[15] Two Annexes refer to matters in the Agreement, namely the Annex on Article II Exemptions and the one on movement of

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[2] MERCOSUR Montevideo Protocol, 15 December 1997, available in English at <http://www.cvm.gov.br/ingl/inter/mercosul/montv-e.asp> (last visited 1 October 2007).

[3] The binding nature is expressly laid down in Art. II:2 WTO Agreement accoding to which Annex 1 b, *i.e.* the GATS, is an integral part of the WTO Agreement, binding on all Members.

[4] Arts 31 *et seq*. Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, ILM 8 (1969), 679, 691 *et seq*.

[5] See *D. Thompson* (ed.), The Concise Oxford Dictionary of Current English, 9th ed. 1995.

[6] *Ibid*.

[7] See *Wolfrum*, Annex on Article II Exemptions.

[8] See *Bast*, Annex on Movement of Natural Persons Supplying Services Under the Agreement.

[9] See *Koebele*, Annex on Air Transport Services.

[10] See *von Bogdandy & Windsor*, Annex on Financial Services.

[11] See *von Bogdandy & Windsor*, Second Annex on Financial Services.

[12] See *Parameswaran*, Annex on Negotiations on Maritime Transport Services.

[13] See *Gao*, Annex on Telecommunications.

[14] See *Gao*, Annex on Negotiations on Basic Telecommunications.

[15] *Hernekamp*, in: *Hilf & Oeter*, 415, 417, para. 2.

natural persons. The other six Annexes deal with specific services sectors and their particularities.

Another **reason for** the attachment of the **Annexes** to the GATS was that in fields that needed specific and extensive regulation the out-sourcing of all the details was necessary to avoid overloading the relevant Articles of the Agreement. *5*

There are different reasons why exactly these eight Annexes were added: the Annex on **Article II Exemptions** specifies the conditions under which a Member is exempted from its MFN obligations[16] because Members felt the need to withhold MFN treatment with respect to many services sectors. While most of the developing countries wanted to liberalize the **movement of natural persons**, developed countries opposed labour mobility since it would have required changes to their visa and immigration policies.[17] That is the reason for the Annex on Movement of Natural Persons. As far as sector specific Annexes are concerned (air and maritime transport, financial and telecommunications services), the relevant sectors reflect issues that were especially **contentious** during the Uruguay Round negotiations.[18] The Members could not agree to apply the regular GATS provisions to these sectors and therefore opted for special rules and modifications in the Annexes. The Annex on **Air Transport Services** was drafted because there were already many bilateral agreements on air transport which ought to be excluded from the new services rules.[19] For the **financial services** sector governments felt the need to regulate providers of finance or financial information because they saw the economic growth and development of their countries as being linked to the stability of their financial institutions.[20] In the negotiations on **maritime transport services** one very contentious issue was cabotage.[21] The reason for the Annex on **Telecommunications** was the US position to deny MFN treatment,[22] the complexity of this sector and national monopolies[23] which at that time were still dominant. *6*

II. The Annexes as an "Integral Part" of the GATS

The Annexes are an "integral part" of the GATS. The term **"integral"** is derived from Latin "integer" (from *"tangere"* which means "to touch") *7*

[16] See para. 1 of the Annex on Article II Exemptions.
[17] *Footer & George*, in: *Macrory et al.* (eds), 799, 908.
[18] *Senti*, WTO: System, 593; *Stoll & Schorkopf*, Max Planck CWTL, Vol. 1, 198.
[19] *Zdouc*, Legal Problems, 13.
[20] *Ibid.*
[21] Cabotage can be defined as the transportation of goods within the borders of one country, see *Parameswaran*, Annex on Negotiations on Maritime Transport Services, para. 5, footnote 9.
[22] *Senti*, Legal Problems, 600.
[23] See *WTO*, Guide to the GATS, 531.

and means "untouched" or "whole".[24] That is to say that the Articles of the Agreement together with the Annexes form a **collective normative whole**[25] of rules on services. That indicates at the same time that there is **no hierarchy** between the provisions of the Agreement and the Annexes. Rather, all rules have equal status.

8 As an integral part of an international treaty, the Annexes are binding and operate as if they were drafted as Articles of the GATS text itself. **Art. XXIX** thus determines the status of the Annexes *vis-à-vis* the GATS text and functions as a **connector** between the GATS text and the Annexes.

[24] *D. Thompson* (ed.), The Concise Oxford Dictionary of Current English, 9th ed. 1995.
[25] See *von Bogdandy & Stelzer*, Max Planck CWTL, Vol. 2, Art. II WTO Agreement, para. 10 for the WTO Agreement.

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Annex on Article II Exemptions

Scope

1. This Annex specifies the conditions under which a Member, at the entry into force of this Agreement, is exempted from its obligations under paragraph 1 of Article II.
2. Any new exemptions applied for after the date of entry into force of the WTO Agreement shall be dealt with under paragraph 3 of Article IX of that Agreement.

Review

3. The Council for Trade in Services shall review all exemptions granted for a period of more than 5 years. The first such review shall take place no more than 5 years after the entry into force of the WTO Agreement.
4. The Council for Trade in Services in a review shall:
   a) examine whether the conditions which created the need for the exemption still prevail; and
   b) determine the date of any further review.

Termination

5. The exemption of a Member from its obligations under paragraph 1 of Article II of the Agreement with respect to a particular measure terminates on the date provided for in the exemption.
6. In principle, such exemptions should not exceed a period of 10 years. In any event, they shall be subject to negotiation in subsequent trade liberalizing rounds.
7. A Member shall notify the Council for Trade in Services at the termination of the exemption period that the inconsistent measure has been brought into conformity with paragraph 1 of Article II of the Agreement.

Lists of Article II Exemptions

[The agreed lists of exemptions under paragraph 2 of Article II will be annexed here in the treaty copy of the WTO Agreement.]

Bibliography

See *Wolfrum*, Article II GATS, Bibliography.

Case Law

See *Wolfrum*, Article II GATS, Case Law.

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Cross References

Art. 1206, Annex I, II NAFTA.

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A. Introduction

1 Due to the heterogeneity of services it was impossible at the time of the adoption of GATS[1] to agree on a most-favoured-nation (MFN) treatment clause governing all sectors of services. Apart from that several states had entered into treaty commitments either bilaterally or in regional groups granting preferential treatment to their partners in particular service sectors.[2] It was therefore agreed—and this was actually a precondition for reaching an agreement on GATS—that the Members would have a right temporarily to maintain these preferences and that they would be permitted to continue discriminatory practices in certain service sectors. To do so, the Members were obliged to list those sector-oriented exemptions to the most-favoured-nation treatment principle already applied by them before the entry into force of the WTO Agreement.[3] The agreed lists of exemptions under Art. II:2 are annexed to the Annex on Art. II Exemptions. Thus, they share the legal nature of the Annex which, in accordance with Art. XXIX is an integral part of the GATS. New Members have the same option when acceding to the WTO Agreement.[4] According to a study undertaken by the Trade Directorate of the OECD 424 exemptions were listed in 2001.[5]

B. Annex on Article II Exemptions: Content

I. Scope (Paras 1–2)

2 Paras 1 and 2 of the Annex describe the **scope** of the exemptions which are covered by this Annex. These are only those exemptions declared and listed before the entry into force of the WTO Agreement. Later exemptions can only be introduced through waivers in accordance with Art. IX:3

[1] *Wang*, JWT, 30 (1996) 1, 91, 99.
[2] *Footer & George* in *Macrory et al.* (eds), 799, 829.
[3] See *Wolfrum*, Article II GATS, para. 64.
[4] *Ibid.*, para. 66.
[5] OECD, Trade in Services, A Roadmap to GATS MFN Exemptions, TD/TC/WP(2001)25/Final, 29 October 2001, para. 9.

WTO Agreement.[6] Subsequently, these exemptions may be limited but not further broadened.

The wording of para. 1, which refers to **"conditions"** under which a Member is exempted from its obligations under para. 1 of Article II, is somewhat misleading. In fact, the Annex on Article II Exemptions does not prescribe conditions, at least not substantial ones. The only conditions Members have to meet are to list the exemptions to the most-favoured-nation treatment clause and to provide the necessary information. This information shall contain the description of the sector or subsector in which the exemption applies; the description of the measure, indicating why it is inconsistent with Art. II; the country or countries to which the measure applies and the intended duration of the exemptions, as well as the conditions creating the need for the exemption.[7] *3*

Most of the listed exemptions refer to transport services and to communication services.[8] A third sector to which many exemptions refer is financial services.[9] Of the 424 exemptions listed in 2001, 151 (35%) are in the transport services sector, 104 (25%) in the communications sector, 78 apply to all sectors (18%), and 53 (13%) are in the financial services sector.[10] *4*

II. Termination (Paras 5–7)

Para. 5 provides implicitly that **exemptions should be limited in time** by stating that the exemption terminates on the date provided for in the exemption. According to para. 6 those limitations, in principle, should not exceed a period of ten years. The wording[11] indicates that the ten year period is not definitive. In fact, most of the exemptions were introduced as indefinite.[12] Para. 6 tries to ensure that the exemptions remain a subject of future negotiations. As a control mechanism and safeguard in the interest of trade liberalization, para. 7 stipulates that a Member shall notify the Council for Trade in Services at the termination of the exemption period that the inconsistent measure has been brought into conformity with the MFN obligation of Art. II:1.[13] *5*

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[6] See *Wolfrum*, Max Planck CWTL, Vol. 2, Art. IX WTO Agreement.

[7] *WTO* (ed.), Guide to the GATS, 655.

[8] OECD, above note 5, para. 17.

[9] *Ibid.*

[10] *Ibid.*

[11] The words "in principle" and "in any event" indicate that an extension over and above ten years is not ruled out.

[12] See the list of exemption of the European Communities and their Member States as published in the documents of the German Bundestag, BT Drucksache 12/7655 (neu) <http://dip.bundestag.de/btd/12/076/1207655.pdf> (last visited 1 October 2007), 292 *et seq*. Of the 28 listed exemptions only two are expressly limited (to ten years).

[13] Such notification follows the guidelines for notifications, Council for Trade in Services,

III. Review (Paras 3–4)

6 Para. 3 provides that all exemptions granted for a period of more than five years shall be reviewed by the Council for Trade in Services. The Council will examine whether the conditions which created the need for the exemption still persist and will determine the date of any further review (para. 4).

7 The Council for Trade in Services started the review on 29 May 2000.[14] It was decided that the review should be primarily of an **educative nature** with a view to providing more information on the exemptions listed by Members.[15] This is corroborated by the fact that the review will not trigger drastic legal consequences, as para. 4 shows. The review is conducted along sectoral lines.[16]

C. Evaluation and Outlook

8 A look at the different paragraphs of the Annex shows that it includes provisions which allow for exemptions to the MFN principle but that it at the same time pursues the clear goal of abolishing all such exemptions in the interest of trade liberalization. This becomes clear from the narrow option for new exemptions (para. 2), the steady review as a reminder of dropping existing exemptions (paras 3 and 4) and the period for the expiry of the exemptions of, in principle, a maximum of ten years (para. 6). The continuing efforts to review the Annex on Article II Exemptions indicate that it will be difficult to reduce these exemptions. In spite of the rhetoric which emphasizes the relevance of the most-favoured-nation treatment clause, many Members defend their exemptions for various reasons.

Guidelines for Notifications under the General Agreement on Treade in Services, Adopted by the Council for Trade in Services on 1 March 1995, S/L/5, 4 April 1995.

[14] Council for Trade in Services, Council Review of MFN Exemptions, Report of the Meeting Held on 29 May 2000, Note by the Secretariat, S/C/M/44, 21 June 2000.

[15] See *ibid.*, para. 3.

[16] *Ibid.*

Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO—Trade in Services.*
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Annex on Movement of Natural Persons Supplying Services Under the Agreement

1. This Annex applies to measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service.
2. The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.
3. In accordance with Parts III and IV of the Agreement, Members may negotiate specific commitments applying to the movement of all categories of natural persons supplying services under the Agreement. Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment.
4. The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.[13]

Footnote 13: The sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment.

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A. Introduction: Significance of the Annex

1 In accordance with Art. XXIX, the Annexes form an integral part of the GATS Agreement. The ousting of GATS provisions into a separate annex shall not indicate lower normative status nor the preliminary nature of these provisions. On the contrary, some clauses of the Annex on Movement of Natural Persons Supplying Services Under the Agreement (Annex MNP) are of **paramount importance for** defining the **scope of GATS**. This is true in particular with regard to measures concerning mode 4 of supply as defined in Art. I:2 lit. d.

2 The decision to include services supplied through the presence of natural persons in the territory of another Member (mode 4) appears to be a logical step towards designing a comprehensive legal framework for international trade in services. Although new technologies increasingly allow for services to be delivered from a distance without demanding face-to-face contact

between consumers and providers, most services still require simultaneous presence at the place where the service is provided (and consumed). Thus, an agreement aiming at progressively liberalizing trade in services should, in one way or the other, address the issue of natural persons moving across state borders to offer and deliver their services abroad. However, at this point the agreement naturally transgresses the narrow confines of "trade" and touches upon the **sensitive issue of migration**. Moreover, once the movement of natural persons is not limited to independent service providers but includes movements of employed personnel of service companies, it enters the equally sensitive field of **domestic labour market policies**. In both sectors policy makers have so far been rather hesitant to bind their hands by means of international law, save for bilateral or regional agreements with close neighbours at a similar level of development. Against this background one has to judge the almost revolutionary approach of placing mode 4 in the multilateral framework of the WTO. The Annex MNP represents the **specific legal regime** which the contracting parties have designed to make such an approach possible.[1] Revealingly, this entails broad limitations on the impact of Art. I:2 lit. d on domestic immigration and labour market regulations.[2]

3 The special regime for movements of natural persons had to **accommodate** the **disparate interests** of the countries involved. Countries from the developed world, likely to find themselves at the receiving end of the migration chain, tend to preserve their discretion to pursue highly selective immigration policies. Their interest in opening and demanding market access mainly targets highly skilled professionals and the personnel of multinational corporations. By contrast, developing and threshold countries could benefit from the comparative advantage of cheaper labour costs and therefore tend to press for market access for semi-skilled and unskilled workers, while types of movement which presuppose foreign investment (such as the intra-corporate transfer of personnel to a subsidiary in the host country) are of little significance for them.

4 This setting of interests shaped the various positions in the **controversial drafting history** of the Annex MNP.[3] While developed countries had much to gain from the inclusion in GATS of services supplied through commercial presence in the territory of other Members (mode 3, as defined in Art. I:2 lit. c), less developed countries insisted on formal **parity in the treatment of capital and labour**, arguing that the movement

[1] A further element of this regime is Art. V*bis*, which shares with the Annex MNP a common negotiating history, see *Bast*, Article V*bis* GATS, para. 4.

[2] See below, paras 30 *et seq*.

[3] For details see *Koehler*, 185 *et seq*. (providing references to the relevant documents); *Self & Zutshi*, in: *Mattoo & Carzaniga* (eds), 27, 30 *et seq.; Lavenex*, in: *Bommes et al.* (eds), 23, 26 *et seq*.

of people is as legitimate as establishing a commercial presence.[4] Under pressure for such "symmetry" in factor movement, consensus was reached in December 1988 also to address the temporary entry of natural persons where such movements are essential with regard to supplies, but there was still no compromise as to which categories of persons should be covered. The initial stance of the developed countries is reflected in a proposal from the US in October 1989, according to which the scope of GATS should be limited to the temporary entry of nationals of any other Member who are senior managerial personnel. This provoked a counter-proposal of June 1990 from a group of eight developing countries, which expressly demanded the inclusion of all personnel without distinction relating to skills or position in corporate hierarchies. While the substantive disagreement persisted, a procedural agreement was reached in December 1990 to deal with the issue in a separate annex on labour mobility. Eventually, the so-called Dunkel Draft of December 1991, which closely resembles the final version of the Annex MNP, moved the issue forward. The draft provided for the express **inclusion of "all categories"** of natural persons, whereas the actual degree of liberalization was to be subject to discussion in the ensuing **negotiations on specific commitments**.

5 At the end of the Uruguay Round, however, these negotiations had not resulted in universally satisfactory results. A Ministerial Decision adopted at Marrakesh on 15 April 1994 established a Negotiating Group on Movement of Natural Persons in order to continue the negotiations.[5] The Group concluded its work in July 1995.[6] The few additional commitments conceded became the annexes to the **Third Protocol to the GATS**, which entered into force on 30 January 1996.

6 Following an unequivocal scholarly opinion, the actual level of liberalization in mode 4 as it results from the present Schedules of specific commitments is fairly low,[7] and largely reflects the interests of developed countries.[8] Almost all Members have preferred to confirm the *status quo* or bind themselves below the present level of market access based on domestic law.[9] Existing horizontal commitments are strongly **biased in favour of highly skilled**

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[4] *Young*, in: *Sauvé & Stern*, 184, 196.

[5] ILM 33 (1994), 1256, para. 2.

[6] *Young*, in: *Sauvé & Stern*, 184.

[7] According to estimates based on data of 1997, trade in mode 4 holds a 0,1 per cent share of the global GDP and a 1,4 per cent share of the value of service trade in all modes of supply, *Karsenty*, in: *Sauvé & Stern* (eds), 33, 54.

[8] *Mukherjee*, JWT 30 (1996) 5, 21, 37 *et seq.; Mukherjee*, World Compet. 21 (1998), 79 *et seq.; Self & Zutshi*, in: *Mattoo & Carzaniga* (eds), 27, 37 *et seq.; Young*, in: *Sauvé & Stern* (eds), 184 *et seq.; Chanda*, World Econ. 24 (2001), 631, 639 *et seq.; Lavenex*, in: *Bommes et al.* (eds), 23, 33 *et seq*.

[9] *Carzaniga*, in: *Mattoo & Carzaniga* (eds), 21; *Nielson & Cattaneo*, in: *Mattoo & Carzaniga* (eds), 113, 114.

workers and/or **dependent on a commercial presence** in the host country. More than two-thirds of the entries concern executives, managers and specialists; of these entries, the majority pertain to intra-corporate transferees, whose economic value is thus determined by commitments on mode 3.[10] Only 17 per cent of all cross-sectoral entries may also cover low-skilled personnel (*e.g.* the category of "business sellers"). The potential economic impact of existing commitments is further lowered by pre-employment requirements, quantitative ceilings, wage parity conditions and economic need tests.

7 It seems as yet too early to give a definite assessment of whether the WTO provides an adequate global forum for addressing the complex issues of labour migration, albeit limited to the service industries and focused on temporary forms of migration. Advocates for deepening this approach stress the huge developmental impact which even modest progress in the liberalization of labour mobility could entail.[11] One may, however, doubt that migration policies can be adequately dealt with from a merely economic point of view, given the multi-dimensional character of the phenomenon and the lack of a legal infrastructure at the WTO level to address other dimensions, such as human rights of migrants, cultural issues or security concerns.[12] Bringing the WTO into the highly contested field of domestic labour law without proper support by and within the Members might even entail unforeseeable political risks to undisputed chapters of world trade law.[13] This militates for a legal construction of the terms of the Annex MNP which aims at preserving the fragile compromise represented therein.

B. Overview of Normative Contents

8 The legal architecture of the Annex MNP is not easy to comprehend. Despite being composed of four paragraphs and one footnote, on closer inspection it contains only **two independent rules**, enshrined in paras 2 and 4 respectively. Both limit obligations that the Members have accepted under the general rules of GATS. None of the provisions of the Annex MNP establishes new obligations for the Members.

9 **Para. 1** of the Annex MNP provides a definition and therefore does not itself contain a rule. It informs the other provisions of the Annex MNP, in particular para. 3.

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[10] *Carzaniga*, in: *Mattoo & Carzaniga* (eds), 21, 25, based on data of April 2002, compiled by the WTO Secretariat.

[11] See, *e.g., Ghosh*, 29 *et seq.; Winters et al.*, Liberalising Labour Mobility, 13 *et seq*.

[12] See *Global Commission on International Migration*, chapter 6, paras 1 *et seq*.

[13] *Winters et al.*, Liberalising Labour Mobility, 29.

10 According to **para. 2** of the Annex MNP, GATS does not apply to measures relating to four listed matters: access to the employment market, citizenship, residence, and employment on a permanent basis. This rule forms the substantive core of the Annex MNP. It limits the scope of GATS, *i.e.* both of general obligations under the Agreement and of possible specific commitments concerning mode 4 of supply.

11 **Para. 3** of the Annex MNP grants permission to negotiate specific commitments that apply to the movement of all categories of natural persons supplying services as defined in para. 1 of the Annex MNP. It operates within the scope of application left by para. 2. The permission is basically declaratory since the Members would have this freedom under Parts III and IV of GATS even in the absence of the paragraph.

12 **Para. 4** of the Annex MNP specifies that GATS shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory (in so far as these measures are not removed from the scope of GATS pursuant to para. 2). This permission is, however, dependent on compliance with certain conditions, namely, that the measure is not applied in such a manner as to nullify or impair benefits under the terms of a commitment as referred to in para. 3. The footnote attached to para. 4 specifies this test with respect to the selective imposition of visa requirements.

13 This set of specific regulations concerning the movement of natural persons reflects a carefully elaborated **compromise**.[14] With paras 1 and 3 of the Annex MNP, developing and threshold countries gained recognition of their interest in having **all categories of natural persons** supplying services in mode 4 as part of the legal framework of GATS, including the transfer of low- and semi-skilled employees. By means of para. 2, developed countries safeguarded their interest in keeping effective control of their labour market and immigration policies by restricting the scope of Art. I:2 lit. d, and thus of any negotiations on issues of market access and national treatment, to forms of **temporary movement**. Para. 4 reflects a well-balanced compromise in safeguarding the powers of receiving countries to police access to their territory, while at the same time ensuring that these policies are not used in order to evade obligations assumed in specific commitments, to the extent to which they may be applicable. In sum, the principal significance of the Annex MNP consists in—positively and negatively—**defining the field for** current and future **negotiations**.

[14] See *Koehler*, 190 *et seq.; Lavenex*, in: *Bommes et al.* (eds), 23, 26.

C. Definition of the Scope of the Annex (Para. 1)

14 Para. 1 of the Annex MNP delivers a definition of the substantive scope of the Annex MNP. More specifically, para. 1 fleshes out the meaning of the phrase "natural persons supplying services" which is used both in the heading of the Annex MNP and in its para. 3.

15 Technically, para. 1 identifies to which kind of measures the Annex MNP applies, rather than to which kinds of natural persons. In addressing the Members instead of the benefited economic actors, this accords with the usual drafting technique of GATS. The term "measures" is defined in Art. XXVIII lit. a. The relevant measures are those "affecting" the specified persons. The broad term "affecting" is repeatedly used in GATS and partially defined in Art. XXVIII lit. c.[15]

I. Two Categories of Natural Persons Involved in Service Supply

16 Para. 1 of the Annex MNP clarifies that the specific regime established by the Annex MNP covers **two distinct categories** of natural persons, whom the Annex generically refers to as "natural persons supplying services". The natural persons are either "service suppliers of a Member" or "natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service".

17 In the first case, the natural persons themselves act as "service suppliers" as defined in Art. XXVIII lit. g (as far as natural persons are concerned, *i.e.* excluding judicial persons). They are usually referred to as **self-employed (or independent) suppliers**, although the term is not used in GATS. According to the economic characteristic of this type of supply, a self-employed service supplier receives his or her remuneration directly from the customers.[16] Notably, no particular level of skill or education is required for an individual to fall within the definition.

18 In the second case, the natural persons are **employed by a service supplier** in the sense of Art. XXVIII lit. g (including judicial persons). Here, the use of the shorthand "natural persons supplying services" is somewhat inaccurate. Precisely speaking, the "supply of services" in the meaning of Art. XXVIII lit. b is not undertaken by the natural persons physically present in the territory of the other Member, but by their employer.[17] The latter only

[15] For a detailed account see *Zacharias*, Article I GATS, paras 28–36.
[16] Council for Trade in Services, Presence of Natural Persons (Mode 4), Background Note by the Secretariat, S/C/W/75, 8 December 1998, para. 55.
[17] *Koehler*, 196.

avails himself of the employees "in respect of the supply of a service". In contrast to the first case, the employed persons receive their remuneration from the employer, rather than from the consumer of the service. Likewise, para. 1 of the Annex MNP does not discriminate according to particular positions in the corporate hierarchy or according to skills.[18] Moreover, it is not necessary for the service supplier to have established a commercial presence in the territory where the service is delivered, *i.e.*, that the presence of the natural persons is linked to mode 3 of supply.[19]

19 The definition in para. 1 of the Annex MNP provides for the exclusion of non-Member nationals since in both variants the natural persons have to be **"of a Member"**. Applying the definition of "natural person of another Member" in Art. XXVIII lit. k, the persons have to be either nationals of a Member or, under the conditions set out in Art. XXVIII lit. k (ii), must have the right of permanent residence in the territory of a Member.[20] In the second variant, the employer has also to be "of a Member"; the definitions laid down in Art. XXVIII lit. k (for natural persons) and Art. XXVIII lit. l to n (for judicial persons) apply.

II. The Critical Case: Supply Through Presence of Foreign Employees

20 Para. 1 of the Annex MNP uses the term **"employed"** (in French "*employées*", in Spanish "*empleadas*") without specifying which elements constitute an **employment relationship** for the purposes of GATS. In modern economies, the dividing line between independent and dependent work is sometimes hard to draw. However, the conception of the Annex MNP demands that the distinction be legally upheld. The classification can be decisive for identifying whether a particular economic activity is governed by GATS since offering oneself for employment does not, as such, constitute a service within the meaning of GATS.[21] Once a contractual relationship involving a natural person is qualified as an employer-employee relationship it may come within the definition of para. 1 only if the other part is a service supplier of a Member supplying services under GATS. This, *inter alia*, excludes persons employed in other sectors of the economy, notably in industrial or agricultural production, and also persons employed

[18] *Chaudhuri et al.*, JWT 38 (2004) 3, 363, 370.
[19] *Worster*, Texas Int'l L. J. 42 (2006), 55, 63.
[20] See *Feinäugle*, Article XXVIII GATS, paras 37–40.
[21] Although for some commentators this is subject to debate, see *Winters et al.*, Liberalising Labour Mobility, 27; *Self & Zutshi*, in: *Mattoo & Carzaniga* (eds), 27, 34; for reasons of clarity, one should avoid the term "labour service" when referring to GATS.

in respect of a service which does not constitute trade within the meaning of Art. I:2.[22]

21 In the absence of guidance from other WTO provisions and of relevant case-law, the construction of the term "employed" should be geared towards solutions commonly developed in the labour laws of the Members. It is submitted here that the **decisive** element for distinguishing employment from other forms of personal service is the **degree of freedom from the instructions of a superior** since a substantial degree of independence is usually seen as a typical feature of self-employment.[23] This criterion will have to be applied on a case-by-case basis. In any event, a natural person who offers personal services on a regular basis to only one particular customer and who enjoys only limited freedom from his instructions is engaged in an employment relationship, other denominations used in the contract notwithstanding.

22 However, in encompassing both self-employed and employed persons, para. 1 of the Annex MNP provides a rather **broad definition**. It preserves and confirms the content of Art. I:2 lit. d in saying that some aspects of labour mobility, namely the cross-border provision of services through the presence of foreign employees, are indeed covered by GATS. This inclusive approach is counterbalanced by another distinction, as demanded by para. 2 of the Annex MNP: the distinction between persons who are "seeking access to the labour market" or who are employed in the receiving country "on a permanent basis", on the one hand, and the remaining forms of employment, on the other.

III. Definitional Problems with Regard to Mode 4

23 The definition in para. 1 of the Annex MNP does not explicitly refer to any cross-border element, either with respect to the natural persons concerned or the supply of the service. As such, it would also include the supply of a service by a service supplier of one Member through **presence** of natural persons **in the** territory of the **same Member**. By contrast, Art. I:2 lit. d defines mode 4 as a supply of service "by a service supplier of one Member, through presence of natural persons of a Member in the territory of any *other* Member".[24]

24 This observation has provoked **legal argument as to** the actual **scope of GATS**. According to some commentators, there is an "important

[22] See below, paras 27 *et seq*.

[23] As to the distinction in the context of the European Union see C-107/94, *P. H. Asscher v. Staatssecretaris van Financiën* [1996] E.C.R. I-3089, Rec. 26; C-337/97, *C. P. M. Meeusen v. Hoofddirectie van de Informatie Beheer Groep* [1999] E.C.R. I-3289, Rec. 15.

[24] Emphasis added.

ambiguity at the very heart of the GATS".[25] While Art. I:2 lit. d rules out the possibility of foreign nationals moving into a country in order to take up **employment with a domestic service supplier**, the wording of para. 1 of the Annex MNP seems open to this variant. If the latter reading proves true, GATS provides a forum for negotiation on labour migration in the whole service industry, irrespective of whether engaged in domestic or in international commerce.

25 The WTO Secretariat, while not being in a position to provide an authentic interpretation, has favoured a **restrictive** view. Although it admits that there appears to be some room for interpretation as to whether the term "employed by a service supplier of a Member" also includes foreigners employed by locally-owned companies, it ultimately rejects such reading in the light of Art. I:2 lit. d.[26]

26 Some authors, in particular among those who stress the development effects of progressively liberalizing labour mobility on a global scale, prefer an **extensive** interpretation, arguing that the issue is not determined by law.[27] From their economic point of view, it seems inconsistent that while foreigners would fall under GATS if they worked as independent suppliers for a domestic firm, they would not be covered if they were employees of that firm, even when offering precisely the same service. In addition, they point at the practice of some Members to include employment-related commitments in their respective Schedules.[28]

27 Whatever the political merits of the latter approach, a **careful analysis** of the relevant GATS provisions reveals that it is hardly in line with the law as it stands. First, according to its clear wording, para. 1 of the Annex MNP defines the scope of application of the Annex MNP, and of no other provisions of GATS ("This Annex applies to [...]"). This language gains further significance when compared with para. 2, which by contrast refers to GATS as a whole ("The Agreement shall not apply to [...]"). There is

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[25] *Winters et al.*, Liberalising Labour Mobility, 27; on the impact of the definitional problems see *Young*, in: *Sauvé & Stern* (eds), 184, 191 *et seq*.

[26] S/C/W/75, 56; not entirely clear is *Karsenty*, in: *Sauvé & Stern* (eds), 33, 50: "strictly speaking [...] excluded from GATS"; "normally not covered by GATS"; undecided are *Nielson & Cattaneo*, in: *Mattoo & Carzaniga* (eds), 113, 115.

[27] *Grynberg*, Estey Centre J. Int'l L. & Trade Pol. 3 (2002), 82, 83 *et seq*.; *Winters et al.*, Liberalising Labour Mobility, 27 *et seq*.; *Winters et al.*, Liberalising Temporary Movement, World Econ. 26 (2003), 1137, 1149; *Chaudhuri et al.*, JWT 38 (2004) 3, 363, 370; by implication also *Chanda*, World Econ. 24 (2001), 631, 640, and *Koehler*, 197 *et seq*. and 238.

[28] In particular the commitment by the US to bind its H-1B visa scheme, which pertains to foreign workers in "specialty occupations" and (arguably) represents a mix of mode 4 and non-mode 4 activities; for a detailed account see *Nielson & Cattaneo*, in: *Mattoo & Carzaniga* (eds), 113, 146 *et seq*. One may, however, argue that by implication the US commitment only goes as far as the substantive scope of GATS. According to *Worster*, Texas Int'l L. J. 42 (2006), 55, 64, only those US employers that are owned by foreign entities are covered.

nothing in the text to support the view that para. 1 is meant to derogate from the general definition of what constitutes "supply of a service" pursuant to Art. I:2. Secondly, a precise reading of para. 1 of the Annex MNP reveals that it contains only a partial definition of what constitutes "movement of natural persons supplying services under the Agreement" since the aspect of "movement" is not reflected at all. Assuming that para. 1 provides an alternative definition of the scope of mode 4, even purely internal situations would be included, *i.e.*, constellations in which all actors involved are nationals or judicial persons of the Member where the service is provided. This stands in stark contrast to the overall notion of GATS as regulating international trade in services.[29]

28 A more convincing construction is based on the assumption that the drafters of GATS did not intend to lay down contradictory regulations.[30] Accordingly, Art. I:2 lit. d and para. 1 of the Annex MNP should be **read together**, with a view to avoiding any tensions. Thus, **mode 4** of trade in services is **defined** as "supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member, *while* the natural persons are either service suppliers or employed by a service supplier, in respect of the supply of a service".

29 A service supplier of a Member offering **services in** his or her **home country** is not engaged in "trade in services" within the meaning of Art. I and therefore does **not** fall **under the Agreement**.[31] The legal qualification of his activity will remain unchanged when he employs foreign nationals in respect of the supply of his services, either from abroad or from the local labour market.

D. Areas Excluded from the Scope of GATS (Para. 2)

I. Significance of the Provision

30 Para. 2 of the Annex MNP states that GATS shall not apply to **four categories of measures**: (1) measures affecting natural persons seeking access to the employment market of a Member, (2) measures regarding citizenship, (3) measures regarding residence, and (4) measures regarding employment on a permanent basis.

[29] See, *inter alia*, the Preamble.

[30] The negotiating history of this issue is not entirely clear, see *Self & Zutshi*, in: *Mattoo & Carzaniga* (eds), 27, 34.

[31] Capable of being misunderstood are *Stoll & Schorkopf*, para. 557.

31 The provision **reduces** the **scope of application** of the **entire Agreement**. Systematically, it modifies Art. I:1. Any measure that falls within one or more of the four categories is not subject to the obligations and disciplines of GATS, even if it affects trade in services as defined in Art. I:2. Para. 2 of the Annex MNP can therefore be invoked as a "defence" by a Member to justify measures which would otherwise be prohibited under GATS. Moreover, it limits the scope of possible specific commitments pursuant to para. 3 of the Annex MNP.[32]

32 These exclusions legally pertain to all modes of supply, though they are most prominently concerned with supply in mode 4. Reading Art. I and para. 2 of the Annex MNP together, the **scope of GATS** with respect to mode 4 is **defined** as follows: "This Agreement applies to measures by Members affecting supply of services by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member, *other than* measures affecting natural persons seeking access to the employment market or measures regarding citizenship, residence or employment on a permanent basis".

33 In effect, para. 2 of the Annex MNP reduces the scope of GATS to various forms of **temporal movement** of natural persons.[33] Notably, in providing a list of excluded areas the Annex carefully avoids using positive terms such as "temporary" or "short-term". The drafting technique of negatively defining the movement allows for higher flexibility[34] since transforming the contested concept of "temporary" movement into a legal concept of WTO law would make it subject to uniform interpretation by DSU bodies.

34 Hereby GATS follows the **example** of **NAFTA**, which predated the WTO agreements and to a certain extent served as a model for the drafting of GATS.[35] In accordance with Art. 1201.1 lit. d NAFTA, the services chapter of NAFTA applies, *inter alia*, to measures of a Party concerning the presence in its territory of a service provider of another Party. Art. 1213.2 lit. c NAFTA confirms that cross-border trade in services under NAFTA includes the provision of a service by a national of a Party in the territory of another Party. This is tantamount to what is called mode 4 under GATS. Then, in language closely resembling that of para. 2 of the Annex MNP, Art. 1201.3 lit. a NAFTA states that nothing in the 12th chapter of NAFTA shall be construed in such a way as to "impose any obligation on a Party with respect to a national of another Party seeking access to its employment

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[32] *Koehler*, 199; according to *Winters et al.*, Liberalising Labour Mobility, 28, such commitments "would presumably be binding"; for a similar view see *Charnovitz*, in: *Aleinikoff & Chetail* (eds), 241, 244.

[33] *Guild & Barth*, EFARev. 4 (1999), 395, 399.

[34] *Self & Zutshi*, in: *Mattoo & Carzaniga* (eds), 27, 35.

[35] See *Nielson*, in: *Mattoo & Carzaniga* (eds), 93, 101.

market, or employed on a permanent basis in its territory, or to confer any right on that national with respect to that access or employment".[36]

35 A point that merits attention is the use of the term **"regarding"** (in French "*concernant*", in Spanish "*en materia de*") in the last three alternatives of para. 2 of the Annex MNP, rather than "affecting". It is not entirely clear whether this is due just to linguistic convenience, or whether the different wordings represent a difference in substance. In view of the ordinary meaning of the terms, the concept of "affecting" seems to have a wider scope than "regarding". For example, a tax rule may be qualified as a measure "affecting" family life while at the same time not being a rule "regarding" family life (rather, a rule regarding taxes), whereas the opposite hardly makes sense. This indicates that a measure "regarding" an area is one the **main objective** or **predominant purpose** of which is to regulate that particular area; a mere indirect effect or incidental impact does not suffice. This narrow construction of the term "regarding" is a plausible finding if one takes into account that para. 2 uses rather broad concepts for defining the areas concerned. Assuming that all measures merely "affecting" citizenship, residence or employment on a permanent basis were removed from the scope of GATS, the exclusion would exceed the intention of the contracting parties, namely, to safeguard the receiving countries' powers to pursue effective labour market and immigration policies.

II. People Seeking Access to Employment

36 The first and fourth prongs of para. 2 of the Annex MNP concern Members' **policies** with respect to **employed persons**. The two listed areas are not mutually exclusive. They rather highlight from different angles the conception of the Annex MNP according to which the Members shall essentially remain free unilaterally to regulate their respective employment markets.

37 The regime set out in these clauses is supplemented by Art. V^{bis}, according to which GATS shall not prevent Members from being a party to a so-called Labour Market Integration Agreement.[37] Art. V^{bis} is only of relevance for measures which are still within the scope of GATS pursuant to para. 2 of the Annex MNP.

1. Measures Affecting Natural Persons Seeking Access to the Employment Market

38 In its English version, para. 2 of the Annex MNP twice uses the term "employment". The other versions avail themselves of slightly different

[36] See, however, the detailed regulations on temporary entry for business persons in Art. 1601 *et seq.* NAFTA.

[37] See *Bast*, Article V^{bis} GATS, paras 5 *et seq.*

language (in French "*marché du travail*" and "*l'emploi à titre permanent*", in Spanish "*mercado de trabajo*" and "*empleo con carácter permanente*"). However, a comparison with Art. V*bis* shows that the Agreement uses the terms **"labour"** ("*travail*", "*trabajo*") and **"employment"** ("*employ*", "*empleo*") interchangeably.[38]

39 The concept of **"employment market"** (or "labour market", as in Art. V*bis*) lacks a definition in GATS. According to its ordinary meaning, "employment" could refer to the state of having paid work in a broad sense.[39] However, in the particular context it does not cover self-employed work, as is demonstrated by the categorical distinction in para. 1 of the Annex MNP. The employment market of a Member is, thus, represented by a set of norms and practices according to which natural persons offer **labour against payment** to a legal or natural person (the employer) under whose instructions the work is to be performed.[40]

40 Para. 2 of the Annex MNP excludes from the scope of GATS any measures affecting persons **"seeking access"** to the labour market, that is to say, it **permits measures preventing** natural persons from **having access** to it. A person has **"access"** to the labour market of a Member if he is, in principle, authorized to offer himself for employment to a domestic employer and therefore competes with other potential employees on that market. However, the concept of "access to the employment market" must not be construed in such a way as to include any kind of foreign employees present in the territory of a Member, although it could well be argued that, in economic terms, these persons almost always compete with the domestic workforce out of which the jobs could be filled. Such an overly broad interpretation would render superfluous the explicit mentioning, in para. 1 of the Annex MNP, of "natural persons [...] who are employed [...] in respect of the supply of a service" and would thus tilt the balance of the compromise enshrined in the Annex MNP. From the perspective of GATS, **employed persons** who are **sent abroad** to supply services are **not** regarded as **seeking access** to the employment market of the host country. This assertion is plausible as long as the presence of the posted employees is **connected to a specific service** for a **defined period of time**.[41]

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[38] See *Bast*, Article V*bis* GATS, para. 14.

[39] *Soanes & Stevenson* (eds), Oxford Dictionary of English, 2nd ed., 2005.

[40] See above, para. 21.

[41] See *Ghosh*, 43; see in the context of the European Union, C-113/89, *Rush Portuguesa v. Office national d'immigration* [1990] E.C.R. I-1417, Rec. 15; C-43/93, *Raymond Vander Elst v. Office des Migrations Internationales* [1994] E.C.R. I-3803, Rec. 21.

2. Measures Regarding Employment on a Permanent Basis

41 The temporariness of the presence of foreign employees is even more pronounced under the forth prong of para. 2 of the Annex MNP. The obligations and commitments under GATS apply only to measures regarding **employment** on a non-permanent, *i.e.*, **on a temporary**, **basis**.

42 However, there is nothing in the text of GATS to provide a clear definition of what constitutes employment **"on a permanent basis"**. In particular, there is no fixed time-limit which separates permanent from temporary forms of employment. Such a static approach would be inappropriate, given the differences between the various service sectors and the related professions. Accordingly, the construction of the term "employment on a permanent basis" has to be made on a **case-by-case basis**, taking into account the nature of the service concerned and the role which the employed persons play in its delivery. As a rule of thumb, one can have recourse to the recognized rules of statistics concerning the balance of payments. According to the IMF Balance of Payments Manual, the earnings of foreign employees in foreign-owned or controlled companies are recorded as non-resident income as long as they are established abroad for less than one year.[42] While it does not seek to define the legal terms of GATS, this statistical guideline nevertheless indicates that from an economic point of view the **presence** of foreign employees **exceeding one year normally** constitutes **permanent** employment. A different finding may be justified in view of the specific service concerned or the particular category of employees (such as intra-corporate transferees).

III. People Seeking Residency or Citizenship Status

43 The second and third prongs of para. 2 of the Annex MNP deal with core aspects of **immigration policies**: the regulation of movements of persons seeking residency or citizenship status in the host country.

1. Measures Regarding Citizenship

44 The first of these matters excluded from the scope of GATS is **"citizenship"** (in French "*la citoyenneté*", in Spanish "*ciudadanía*"). Thus, Members' regulations and practices concerning **naturalization** of foreign nationals or **acquisition** of citizenship **by birth** while being present in the territory of a Member shall not be affected by GATS. As a consequence, the Members remain free to admit or reject foreigners whose intention is to establish themselves as citizens of the host country.

[42] *IMF*, 43 *et seq.*; see *Karsenty*, in: *Sauvé & Stern* (eds), 33, 34 and 50.

45 The clause is **declaratory** in nature.[43] It is hard to identify any GATS provision which could be construed in a way that potentially affects the Members' discretion under public international law to determine their respective nationality laws.[44] Revealingly, there is no corresponding provision in NAFTA. The explicit mention demonstrates the contracting parties' intention to carefully eliminate any unintended consequences of commitments under GATS relating to movement of natural persons and to underline the temporariness of the movements to be dealt with in the framework of GATS.

2. Measures Regarding Residence

46 Another excluded matter listed in para. 2 of the Annex MNP is **"residence"** ("*la residence*", "*residencia*"). In a wide reading, the term refers to the fact of living in a given place for some time, *i.e.*, being bodily present as an inhabitant.[45] In a narrower reading, "residence" refers to a **particular legal status**, namely, that of a foreigner who has acquired the right to be resident in the host country, either on a permanent basis or at least for a considerable period of time.

47 There are **several arguments** which sustain the view that para. 2 of the Annex MNP uses the term **"residence"** in the **narrow** sense. First and foremost, removing from the scope of GATS any measures regarding the bodily presence of foreign nationals would render virtually meaningless the whole purpose of the Annex MNP to provide a forum for negotiations on cross-border movements of natural persons. Members would retain the choice of nullifying any specific commitment concerning mode 4 by simply referring to the non-application of GATS to issues of immigration policy. Secondly, such a construction would leave hardly any scope for para. 4 of the Annex MNP. This paragraph precisely deals with entry to and stay in Members' territories, which implies that measures regarding the presence of foreign nationals are not entirely beyond the scope of GATS. On the contrary, the fact that para. 4 refers to "*temporary* stay"[46] indicates that "residence" is something different, namely, a non-temporary form of stay. Thirdly, a comparison with Art. XXVIII lit. k (ii) reveals that in the language of GATS "residence" means the status of enjoying the right of residence, *i.e.* a legal status. Finally, equating the notion of residence in para. 2 of the Annex MNP with the concept of non-temporary residence is an adequate finding in view of the interests involved. Receiving countries safeguard their powers to pursue independent policies in granting long-term

[43] *Lavenex*, in: *Bommes et al.* (eds), 23, 28; *Koehler*, 200.
[44] For an overview see *Hailbronner*, in: *Bauböck et al.* (eds), 35–104.
[45] See *IOM*, Glossary on Migration, 2004, 56, entry "residence".
[46] Italics added.

resident status according to their preferences, while sending countries make sure that binding commitments on forms of temporary stay are possible, subject to the requirements of para. 4 of the Annex MNP.

48 Hence, measures governing **residence** are those which deal with the **right of a person to stay** in a country **on a non-temporary basis**.[47] This concept includes measures concerning "permanent residents" as referred to in Art. XXVIII lit. k (ii) but is not limited to this special category of long-term residents who enjoy quasi-citizenship status.

E. Negotiations on Specific Commitments for All Categories of Natural Persons (Para. 3)

49 Para. 3 of the Annex MNP consists of two sentences. The first deals with the possibility of negotiating specific commitments with regard to the movement of natural persons, the second with the legal effect of such commitment. Neither of these clauses establishes a particular obligation for the Members. They rather restate and **confirm** the normative content of **other GATS provisions**.[48]

50 Sentence 1 says that Members may (notably not: shall) negotiate specific commitments applying to the movement of natural persons. The term "natural persons supplying services under the Agreement" is to be understood as defined in para. 1 of the Annex MNP. It covers cross-border movement of self-employed service providers as well as natural persons who are employees of a service provider based abroad.[49] For the relevant legal framework for conducting these negotiations, para. 3 of the Annex MNP refers to Parts III and IV of the Agreement. The formulation "in accordance with" makes it clear that para. 3 does not intend to modify the legal regime laid down in Arts XVI to XXI.

51 Sentence 2 states that natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment. This clause seems legally superfluous since there is no doubt that **commitments** under Parts III and IV of GATS **are binding** on the Member which has committed itself to them, subject to the specific procedure for the modification of Schedules in accordance with Art. XXI.[50] One may interpret the confirmation of the binding character of specific

[47] This view is shared by *Koehler*, 200, and *Weiß et al.*, Welthandelsrecht, 2007, para. 845; see also the non-authentic German version of the Annex MNP, which is published in the Official Journal of the EC: OJ 1994 L 336/205, 23 December1994: "*Daueraufenthalt*".

[48] See Arts XIX *et seq*.

[49] See above, paras 16 *et seq*.

[50] See, *e.g.*, *Koehler*, 119.

commitments as a direction that none of the exclusions laid down in para. 2 of the Annex MNP must be used in order to circumvent obligations assumed under the terms of a commitment.

52 The only part of para. 3 which seems to bear some independent legal meaning is the words **"all categories"** in sentence 1. It carries a dual message. On the one hand, it mirrors the main concession of receiving countries (mostly from the developed world) that no particular category of natural persons who are covered by the definitions of para. 1 of the Annex MNP and Art. I:2 lit. d are excluded from the negotiation framework of GATS. On the other hand, inserting the words gives explicit leeway to the Members to **distinguish**, in their respective Schedules, not only between different service (sub-)sectors but also **between different categories** of natural persons.[51]

53 In practice, all Members that have scheduled mode 4 commitments make use of the ability to confine their obligations regarding market access and national treatment to particular categories of natural persons. Usual categories are "intra-corporate transferees", "executives", "managers", "specialists", "business visitors" and "contract suppliers".[52] One of the main practical problems is the lack of a common nomenclature, which negatively impacts on the predictability of the commitments made, and thus negatively affects the whole negotiating process.[53]

F. Visa Requirements and Other Measures to Regulate the Entry and Stay of Natural Persons (Para. 4)

54 The final paragraph of the Annex MNP determines the conditions under which the Members remain free to apply measures to regulate the entry and stay of natural persons. The first part of the sentence defines which kinds of measures are, in principle, not prevented by GATS, thus **limiting the scope of obligations** that follow from other GATS provisions. The second part sets **limits to the limits** in specifying a particular test which such a measure has to meet in order to be compatible with GATS. While the first clause may be invoked as a **defence plea** to a finding of inconsistency, the second may be used for a **counterplea** to sustain the original claim.

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[51] *Carzaniga*, in: *Mattoo & Carzaniga* (eds), 21, 23: "an additional element of flexibility".

[52] For a systematization see *Koehler*, 217 *et seq*.

[53] S/C/W/75, 8; *Self & Zutshi*, in: *Mattoo & Carzaniga* (eds), 27, 47; *Winters et al.*, Liberalising Labour Mobility, 30.

55 Para. 4 of the Annex MNP operates within the scope of GATS as defined by Art. I:2 and paras 1 and 2 of the Annex MNP. A measure which is not covered by the Agreement does not have to be justified according to the yardstick of para. 4. Consequentially, para. 4 of the Annex MNP refers only to "temporary stay" since non-temporary movements of natural persons are already excluded in accordance with para. 2.[54]

I. Limits to GATS Obligations: Measures to Regulate Entry and Stay

56 The formulation "shall not prevent" can be found in several other provisions of GATS or GATT, *e.g.* Arts V:1 and V*bis* GATS and Art. XXIV:5 GATT 1994. In a report concerning the latter, the Appellate Body has defined the ordinary meaning of "shall not prevent" as being equivalent to **"shall not make impossible"**.[55] In contrast to those provisions, para. 4 of the Annex MNP is not designed to preserve the Members' discretion to establish certain bilateral or regional arrangements. It rather grants permission to act unilaterally.

57 The measures which are not to be made impossible to apply are qualified by a particular **purpose**, namely, **to regulate** the **entry** of natural persons into, or their **temporary stay** in, the territory of the Member in question. This broad formulation seems to cover the entire range of policy measures connected with the **admission of foreigners**. A literal reading would even include measures motivated by economic considerations such as the protection of the national labour market. However, such an interpretation would undermine the enterprise of creating a multilateral framework for the movement of natural persons involved in the supply of services. This holds true particularly with respect to permission to deviate from the obligation of most-favoured-nation (MFN) treatment. This militates for a narrower construction.

58 Some guidance on construction can be drawn from the sub-set of measures to regulate the entry and stay which para. 4 of the Annex MNP explicitly mentions ("including [...]"). The permitted measures include those "necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders". Hence, the core of the measures which para. 4 intends to leave to the relevant Member's **discretion** are those put in place in order to **police its borders and** to **administer** cross-border **migration flows**. The most obvious example is the imposition of residence permit or visa requirements and related enforcement measures

[54] See above, paras 41 *et seq*.
[55] Appellate Body Report, *Turkey—Textiles*, WT/DS34/AB/R, para. 45.

(*e.g.*, passport controls or deportations of illegal immigrants). Interestingly, and somewhat illogically, para. 4 seems to require a necessity test for border control measures, while such a requirement is absent in the generic definition of the permitted measures.

59 In generalising the characteristics of the measures explicitly included, para. 4 of the Annex MNP grants permission to take any action **necessary to ensure public order** in respect of the cross-border movement of natural persons, *i.e.*, in the exercise of the police powers of the state. This covers a wide range of measures of immigration policy, namely, those which are traditionally referred to as "aliens' police". It is submitted here, however, that measures which are necessary neither to protect the integrity of the Member's territory nor to ensure the orderly administration of the presence of foreigners do not constitute "measures to regulate the entry [...] or [...] stay" within the meaning of para. 4. Accordingly, para. 4 of the Annex MNP does **not** grant **permission** to take restrictive measures relating to the admission of natural persons supplying services on purely **economic grounds**. Such measures have to comply with the general obligations assumed under GATS, including MFN treatment.[56]

II. Limits to the Limits: Nullification or Impairment of Benefits Under Specific Commitments

60 Permission to depart from general GATS obligations is dependent on compliance with certain conditions laid down in the second clause of para. 4 of the Annex MNP. The measure must not be applied in such a manner as to nullify or impair benefits accruing under the terms of a specific commitment.

61 The concept of nullification or impairment of benefits forms a central part of the WTO system in general and its dispute settlement system in particular (see, *e.g.*, Art. XXIII:1 GATT 1994, Art. XXIII:3 GATS or Arts 3.3, 3.5, 3.8, 10.4, 23.1 and 24 DSU). According to Art. 3.8 DSU, in cases where there is an infringement of obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. The legal terms used in para. 4 of the Annex MNP (benefit, nullification, impairment) have the same meaning as in the cited provisions.

62 However, the second clause of para. 4 of the Annex MNP does **not** refer to **all kinds of benefits**. According to its unambiguous wording, the limits to the permission under the first clause pertain only to benefits "under the

[56] This view is shared by *Worster*, Texas Int'l L. J. 42 (2006), 55, 74.

terms of a specific commitment". A contextual interpretation reveals that the relevant commitments are those referred to in para. 3, *i.e.*, commitments applying to the movement of natural persons undertaken in accordance with Parts III and IV of GATS.[57]

63 The essential benefit relevant in the given context is restated in para. 3 of the Annex MNP, sentence 2: natural persons covered by a specific commitment shall be allowed to supply the service **in accordance with the terms of** that **commitment**. If a measure regulating entry or stay is applied in such a manner as totally to prevent these persons from supplying the service, the Member acts in violation of its commitment and thus *prima facie* nullifies or impairs a benefit.[58]

64 In other, less clear cases it will be difficult to assess what kind of action constitutes an application of measures **"in such a manner" as to nullify or impair the benefit** of supplying the service.[59] Inspiration for adequate standards may be drawn from Art. VI:1, which requires domestic regulations to be applied "in a reasonable, objective and im manner".[60] For instance, while it is settled that, under the first clause of para. 4 of the Annex MNP, a Member may subject a natural person to a visa application procedure, which may entail complex assessments involving several authorities, the second clause of para. 4 requires that such procedures are conducted in a fair and speedy manner in order to allow the service to be supplied effectively. Although the "red tape" issue has been earmarked as an important obstacle to the movement of service providers,[61] as yet no Member has instituted dispute settlement proceedings claiming a violation of para. 4.

65 A **violation of Art. II:1** (**MFN treatment**) as such does **not constitute a nullification or impairment** in the sense of para. 4 of the Annex MNP since it protects only benefits accruing under the terms of a specific commitment, whereas Art. II is a general obligation. At first glance, this is somewhat surprising;[62] one may even question whether the contracting parties have based their draft on the (incorrect) belief that MFN treatment is anyway not required within the scope of the Annex MNP.[63] In the light of the presumption of Art. 3.8 DSU, however, it is consistent to consider as

[57] Art. VI:5 lit. a provides a similar example of such a prohibition on nullifying or impairing specific commitments.
[58] See Art. 3.8 DSU.
[59] See *Worster*, Texas Int'l L. J. 42 (2006), 55, 68; *Guild & Barth*, EFARev. 4 (1999), 395, 400.
[60] *Koehler*, 207 *et seq*.
[61] *Self & Zutshi*, in: *Mattoo & Carzaniga* (eds), 27, 50; *Chanda*, World Econ. 24 (2001), 631, 634 *et seq*.
[62] See S/C/W/75, para. 54.
[63] *Worster*, Texas Int'l L. J. 42 (2006), 55, 76.

relevant only benefits under a specific commitment. Para. 4 of the Annex MNP is intended to permit the infringement of certain obligations assumed under GATS, and therefore cannot extend the limits of this permission to all types of GATS obligations. Hence, para. 4 provides a carefully drafted compromise. It allows receiving countries to take action necessary to ensure public order in the field of migration law, including discriminatory treatment of certain nationalities if necessary, while at the same time facilitating credible commitments on the liberalization of temporary movements of service suppliers.

III. Interpretative Footnote: Selective Imposition of Visa Requirements

66 Para. 4 of the Annex MNP is supplemented by a footnote which contains a binding **interpretative statement** as to the meaning of the second clause. The sole fact of requiring a visa for natural persons of certain Members but not for those of others shall not be regarded as a nullification or impairment of a benefit within the meaning of para. 4. In stating so, the footnote indirectly confirms that the imposition of visa requirements belongs to the measures which the Members may apply in accordance with the first clause.[64]

67 The footnote contains only a statement that the operation of **visa requirements** is **not *per se*** regarded as nullifying or impairing a specific commitment. This does not rule out the possibility that the prohibitive application of a given visa regime may constitute such a nullification or impairment.[65]

68 The footnote is **silent** as regards the violation of Members' obligations under Art. II:1, although different treatment of Members in respect of a visa regime appears to be an issue of **MFN treatment** rather than of market access and national treatment.[66] This silence is, however, a consequence of the fact that the second clause of para. 4 of the Annex MNP does not apply to benefits resulting from general GATS obligations.[67] While the selective imposition of visa requirements for individuals supplying services under GATS does constitute a violation of Art. II:1, such an infringement can be justified if and to the extent that it accords with the first clause of para. 4.

69 One could argue over the precise interpretation of what constitutes a "visa requirement" in the sense of the footnote, in particular as to whether it

[64] *Stoll & Schorkopf*, para. 609.
[65] See above, para. 64.
[66] S/C/W/75, para. 54.
[67] See above, para. 65.

encompasses residence permit requirements as well.[68] The outcome of the argument is of limited legal significance since in either case discriminatory treatment *between*, rather than *of*, foreign nationals appears to be irrelevant for commitments in accordance with Parts III and IV of GATS.

[68] See, in some detail, *Worster*, Texas Int'l L. J. 42 (2006), 55, 76 *et seq.*; see also *Bast*, Article V[bis] GATS, para. 30.

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Third Protocol to the General Agreement on Trade in Services

Members of the World Trade Organization whose Schedules of Specific Commitments to the General Agreement on Trade in Services relating to movement of natural persons are annexed to this Protocol,

Having carried out negotiations under the terms of the Ministerial Decision on Negotiations on Movement of Natural Persons adopted at Marrakesh on 15 April 1994,

Having regard to the results of such negotiations,

Having regard to the Decision on the Movement of Natural Persons adopted by the Council for Trade in Services on 30 June 1995,

Agree as follows:

1. The commitments on Movement of Natural Persons annexed to this Protocol relating to a Member shall, upon the entry into force of this Protocol for that Member, replace or supplement the relevant entries on movement of natural persons in the Schedule of Specific Commitments of that Member.
2. This Protocol shall be open for acceptance, by signature or otherwise, by Members concerned until 30th June 1996.
3. This Protocol shall enter into force on the 30th day after 1st January 1996 for those-Members which have accepted it by that date, and for those accepting it after that date, which date shall not be beyond 30th June 1996, it shall enter into force on the 30th day following the date of each acceptance. If a Member whose schedule is annexed to this Protocol does not accept it by that date, the matter shall be referred to the Council for Trade in Services for consideration and appropriate action.
4. This Protocol shall be deposited with the Director-General of the World Trade Organization. The Director-General shall promptly furnish to each Member a certified copy of this Protocol and notifications of acceptances thereof pursuant to paragraph 3.
5. This Protocol shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Done at Geneva this—day of [month] one thousand nine hundred and ninety-five, in a single copy in English, French and Spanish languages, each text being authentic, except as otherwise provided for in respect of the Schedules annexed hereto.

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See the commentary on the Annex on Movement of Natural Persons Supplying Services Under the Agreement.

1 The Third Protocol of 24 July 1995, which entered into force on 30 January 1996, contains the results of the **extended negotiations** among WTO Members on further commitments relating to the **movement of natural persons**, carried out after the official end of the Uruguay Round.[1] The negotiations were conducted under the terms of the Ministerial Decision on Negotiations on Movements of Natural Persons adopted at Marrakesh on 15 April 1994, which established a Negotiating Group on Movement of Natural Persons.[2]

[1] For details on the different Protocols to the GATS, see *von Bogdandy & Windsor*, Second Protocol to the GATS, para. 1.

[2] ILM 33 (1994), 1256, para. 2.

When the negotiations were eventually terminated in July 1995, only eight participants (the EC and its Member States counting for one) had conceded modest changes to their prior commitments. Upon the entry into force of the Third Protocol, the commitments annexed to it **replaced or supplemented the relevant entries** in the **Schedule of specific commitments** of the relevant Members. The Third Protocol thus merely amended the single Schedule of binding commitments which each of these Members has undertaken. *2*

For a detailed account of the legal framework concerning the movement of natural persons see the commentary on the Annex on Movement of Natural Persons Supplying Services under the Agreement. *3*

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Annex on Air Transport Services

1. This Annex applies to measures affecting trade in air transport services, whether scheduled or non-scheduled, and ancillary services. It is confirmed that any specific commitment or obligation assumed under this Agreement shall not reduce or affect a Member's obligations under bilateral or multilateral agreements that are in effect on the date of entry into force of the WTO Agreement.
2. The Agreement, including its dispute settlement procedures, shall not apply to measures affecting:
   a) traffic rights, however granted; or
   b) services directly related to the exercise of traffic rights, except as provided in paragraph 3 of this Annex.
3. The Agreement shall apply to measures affecting:
   a) aircraft repair and maintenance services;
   b) the selling and marketing of air transport services;
   c) computer reservation system (CRS) services.
4. The dispute settlement procedures of the Agreement may be invoked only where obligations or specific commitments have been assumed by the concerned Members and where dispute settlement procedures in bilateral and other multilateral agreements or arrangements have been exhausted.
5. The Council for Trade in Services shall review periodically, and at least every five years, developments in the air transport sector and the operation of this Annex with a view to considering the possible further application of the Agreement in this sector.
6. Definitions:
   a) "Aircraft repair and maintenance services" mean such activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and do not include so-called line maintenance.
   b) "Selling and marketing of air transport services" mean opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution. These activities do not include the pricing of air transport services nor the applicable conditions.
   c) "Computer reservation system (CRS) services" mean services provided by computerised systems that contain information about air carriers' schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued.
   d) "Traffic rights" mean the right for scheduled and non-scheduled services to operate and/or to carry passengers, cargo and mail for remuneration or hire from, to, within, or over the territory of a Member, including points to be served, routes to be operated, types of traffic to be carried, capacity to be provided, tariffs to be charged and their conditions, and criteria for designation of airlines, including such criteria as number, ownership, and control.

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Cross References

Art. 1 Convention Portant Réglementation de la Navigation Aérienne; Convention on International Civil Aviation; International Air Services Transit Agreement; International Air Transport Agreement.

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A. General

1 The Annex on Air Transport Services (Annex ATS) constitutes the **first multilateral agreement on the economic aspects of air transport services**.[1] While multilateral regulation existed prior to the existence of

[1] As such, it may contribute to the acceleration of liberalization of global air transport services. See *Zhao*, ZLW 50 (2001) 1, 48, 54.

the WTO under the auspices of the United Nations International Civil Aviation Organization (ICAO), this regulation was restricted to technological and logistical matters and did not cover the exchange of traffic rights.[2] **At the same time** though, the Annex ATS largely minimizes its impact by **carving most air transport services out of the scope of the GATS**.

B. Regulation of Air Transport Services in the Chicago System

I. General

2 From the time of the Uruguay Round until the present day, international aviation within the United Nations has been addressed by a specialized agency—the afore-mentioned ICAO.[3] International aviation is regulated by means of a **network of bilateral treaties** among states in which they exchanged traffic and ancillary rights typically based on the notion of reciprocity.[4] This regulatory regime is frequently referred to as the Chicago Bilateral Regulatory System or, in short, the Chicago System, after the ICAO's headquarters in Chicago.[5] Given the fact that there was pre-existing fine-tuned international law, many expressed profound scepticism about the usefulness of the inclusion of international air transport services under the auspices of the WTO during the Uruguay Round.[6]

II. Defining Features

1. Doctrine of Airspace Sovereignty

3 One (if not the) core doctrine underlying the Chicago System is the customary international law **doctrine of airspace sovereignty** where states enjoy full national sovereignty over the use and non-use of the airspace above their territory.[7] The doctrine was first written down in the aftermath

[2] *Ehrenbeck*, South Afr. Y.B. Int'l L. 29 (2004), 217.

[3] See its website at <http://www.icao.int/> (last visited 1 October 2007). The scope of the Annex ATS and impact can only be evaluated against the background of the general regulation of aviation in public international law.

[4] On the regulation of international aviation see generally, *Diederiks-Verschoor*. This is so despite the fact that while air travel was once restricted to the wealthy, flying, like car or train transport, has been made available to almost everybody, at least in the developed world. Once an object of appetency for male adventurers, within less than a century, aeroplanes have become a means of mass transportation. See *von Wrangell*, 1.

[5] *Havel*, 2. On the Chicago System see generally, *Žylicz* 73–85.

[6] *Hubner & Sauvé*, JWT 35 (2001) 5, 973, 975.

[7] This is so although at the beginnning of the 20th century, many of the most prominent voices in international scholarship argued that air space should be free for anyone.

of World War I in Art. 1 of the Paris Convention on the Regulation of Air Navigation of 1919, which represented the first international aviation treaty.[8] Twenty-five years later, the doctrine of airspace sovereignty was affirmed as the basic rule of international aviation at an international aviation conference held in Chicago (hereafter, Chicago Conference) which set the framework for aviation from the end of World War II until today. The resulting Convention on International Civil Aviation (hereafter, Chicago Convention), which established the ICAO and is almost universally ratified, declares in its Art. 1 that "[t]he contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory".[9] A complement to this is Art. 6 Chicago Convention which states that "[n]o scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization".[10] Hitherto, the Chicago Convention has not established a multilateral regime for the economic aspects of international aviation with respect to (core) traffic rights.[11] As a consequence, in the absence of a (bilateral) treaty, each state has the ability to restrict air traffic over its territory to whichever domestic airlines it wishes.

2. Network of Bilateral Agreements

4 As indicated, as a consequence of the failure to embrace multilateralism at the Chicago Conference to allow international aviation, countries entered into negotiations aimed at granting at least some traffic rights into their ter-

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For example, Paul Fauchille declared that "l'air est libre" based on the latin maxim that "Terrae dominium finitur, ubi finitur armorum vis", that the exercise of sovereignty rights and control presupposes the ability of actual control which he deemed non-existing at the time. *P. Fauchille*, RGDIP, 8 (1901), 414, 418. For him, air artillery were insufficient to justify the extension of state sovereignty into the airspace, as this kind of control is not exclusive and the exact reach of cannons into the sky is dependent on the concrete weapons available in a given country which render difficult the emergence of an abstract rule on a certain height expressed in miles in which sovereign rights would exist, as with the law of the sea. *Ibid.*, 414, 419–420. For a good overview of the discussion in the academe, see generally *von Wrangel*, 15–31.

[8] Art. 1 Convention Portant Réglementation de la Navigation Aérienne, 13 October 1919, 11 LNTS. 173. By the outbreak of World War II, 34 states had ratified the convention. See *Havel*, 31.

[9] Convention on International Civil Aviation, signed at Chicago, on 7 December 1944, UNTS 15 (1948), 295, 296. Membership in the ICAO is almost universal. According to ICAO's website, the organization has 189 members. See <http://www.icao.int/cgi/goto_m.pl?/cgi/statesDB4.pl?en> (last visited 1 October 2007).

[10] UNTS 15 (1948), 295, 300.

[11] *Ehrenbeck*, South Afr. Y.B. Int'l L. 29 (2004), 217. At the Chicago Conference, the US, as the only country with a strong and viable air services industry at the end of World War II, was pressing for a multilateral grant of traffic rights, whereas the United Kingdom proposed the establishment of an "Interantional Air Authority" to avoid harmful competition. On the negotiation at the Chicago Conference, see *Stockfish* J. Air L. & Com. 57 (1992), 599, 602–607.

ritories.[12] In practice, this took the form of **bilateral agreements** based on the principle of reciprocity as perceived by Art. 6 Chicago Convention.[13] Since 1944, more than 3000 bilateral agreements have been concluded,[14] and the resulting **complex network** regulates international aviation today[15] and is at the heart of the Chicago System.[16]

In particular, the two bilateral agreements concluded between the US and UK—the so-called **Bermuda Agreements**—became templates for negotiations between other states.[17] A typical Bermuda-type bilateral aviation treaty is characterized by a high level of government intervention and control in respect of capacity, fares, frequency, routes, and type of planes,[18] although the exact content of each bilateral agreement depends on the interests and powers of the country pair in question. Typically, the two contracting states grant each other the right to transport passengers and cargo from the territory of one into the other and *vice versa* by means of one or two airlines that are designated to operate.[19] This is very different from complete market access without restrictions where airlines serve consumers and have a say on how such service is delivered. From governments' perspective, the great advantage of the bilateral system as opposed to a multilateral one is the assurance that a country can determine the pace and direction of the liberalization and opening up of its air service markets.[20] *5*

[12] *Diederiks-Verschoor*, 52.

[13] For the text of the provision, see accompanying text to UNTS 15 (1948), 295.

[14] *WTO*, Report 2005, 246. The exact number varies among sources.

[15] *Ibid.*

[16] *Havel*, 2.

[17] On the so-called Bermuda Agreements, see *Stockfish*, J. Air L. & Com. 57 (1991–1992), 599, 607–616.

[18] For details, see *Diederiks-Verschoor*, 52–55.

[19] Classicaly, international aviation law distinguishes eight freedoms of the air: the first freedom concerns the right to fly across a territory without landing; the second freedom, to land for non-traffic purposes (*i.e.*, technical landing); the third freedom enables a state to carry passenger and cargo from its own territory to a foreign country; the fourth freedom allows a state to transport passengers and cargo from a foreign country to its own territory; the fifth freedom means the right to carry passengers and cargo between two foreign states; the sixth freedom can be described as the privilege to transport passengers and cargo between the territories of two foreign states via the territority of the home state of the airline; the seventh freedom means the right to carry passengers and cargo between the territories of two foreign states on a route which does not begin or end in the territory of the home state (this is the difference from the fifth freedom); the eighth freedom encompasses the right to carry passengers and cargo from one point in the territory of a foreign state to another point in the same territory (cabotage). On the eight freedoms in aviation, see *Żylicz*, 80.

[20] See, *e.g.*, the statement of the representative of Australia under the Review Mechanism of the Annex ATS provided for in Para. 5 of the Annex ATS, Council for Trade in Services, Report of the Second Session of the Review Mandated Under Paragraph 5 of the Air Transport Annex Held on 4 December 2000, Note by the Secretariat, S/C/M/50, 5 March 2001, para. 11.

3. Doctrine of Cabotage

6 A further feature of the Chicago System is the **doctrine of cabotage**. In international aviation language, cabotage has been referred to as the air transportation of passengers, cargo, and mail between two points within a given country.[21] More exclusionary, it is the sovereign right of a state to restrict such transport to its national airlines.[22] The latter variation is set out in Art. 7 Chicago Convention which reserves the right of each contracting state "to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory".[23] In effect, the doctrine of cabotage as provided for by bilateral treaties functions as a legal construct that shields the home air transport service sector from competition by foreign airlines with respect to pure internal, non-international flights.

4. National Ownership and Control Requirement

7 Another crucial characteristic of the Chicago System is the requirement of **national ownership and control**.[24] The requirement limits the traffic rights conferred in a bilateral agreement to either the designated airlines or those which are owned by the government or nationals of a party to the bilateral agreement.[25] The requirement ensures that traffic rights exchanged in a bilateral agreement between countries (and their respective national carriers) are not taken over by airlines from third countries which are not parties to the bilateral agreement at hand.[26] As a consequence, only air-

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[21] See *Cheng*, 314, who defines aerial cabotage as "air transport between any two points in the same political unit, that is to say, in the territory of the State as the term is used in air law". See also the eighth freedom defined above, note 23. Originally, the term "cabotage" can be traced back to maritime law and described a state reserving to itself the right to restrict all coastal navigation between two points in its territory to its own subjects. *Diederiks-Verschoor*, 18. See also *Matte's* definition: "Le terme 'cabotage' comprend, en général, toute activité commerciale de transport, caracterisée par le fait que le transporteur embarque des passagers, du courrier ou des marchandises à un endroit, à destination d'un autre point, tous les deux pints (de départ et de déstination) se trouvant á l'intérieur du même pays". *Matte*, 173.

[22] *Havel*, 49.

[23] UNTS 15 (1948), 295, 300.

[24] *Havel*, 62. The nationality requirement was embraced in two subsidiary agreements reached at the Chicago Conference and found its way into virtually all post-Chicago bilateral agreements and national legislation. See *ibid.*, 63; International Air Services Transit Agreement, Opened for Signature at Chicago, on 7 December 1944, UNTS 84 (1951), 389, (Two Freedoms Agreement), Art. I, § 5; International Air Transport Agreement, Opened for Signature at Chicago, on 7 December 1944, UNTS 171 (1953), 387, (Five Freedoms Agreement), Art. 1 Section 6. The relevant provisions of the two agreements are identical: "Each Contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of a Contracting State".

[25] UNTS 84 (1951), 389, Art. I, § 6; UNTS 171 (1953), 387, Art. 1 Section 6.

[26] UNTS 84 (1951) 389, Art. I, § 6; UNTS 171 (1953), 387, Art. 1 Section 6. While practice is not uniform and different countries apply different limits, even and in particular

lines substantially owned and controlled by the state, or at least nationals of the states parties to the bilateral agreement are eligible for the traffic rights granted in the bilateral agreement. This has tremendous economic consequences:[27] While mergers or share purchase agreements between and among airlines may be legally possible, they are not feasible due to the threat of revocation of flight permissions by national governments which want to retain their **national airline "champions"**. The resulting pattern is the continued existence of a larger number of airlines than would be sustainable in an openly competitive regime where market forces are decisive.[28]

5. Practice of Public Ownership

In addition, in the past, air services were almost exclusively delivered to the consumer by state-owned airlines from state-owned airports. Owning a national flag carrier was once equated to membership of the United Nations. This statement reinforces the prevailing public perception among states throughout the world. Even today, almost every country has its own **national airline "champion"**, commonly referred to as a "flag carrier".[29] Hitherto, flag carriers have dominated a substantial part of the international aviation market.[30] *8*

6. Heavy Government Regulation

Finally, for a long time, air transport was seen by states as a very sensitive domain which, consequently, was subject to intensive and strict government control with respect to entry to the market and market behaviour.[31] In parallel to the Bermuda-style bilateral treaties on the international plane, in domestic aviation regulation, national and international routes, as well as the charges made and the capacity served, were greatly **regulated**.[32] This policy and practice mirrored the prevailing belief that without strong *9*

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in countries which underwent a process of deregulation, the restrictions in this respect are substantial. For example, the EU restricts foreign ownership in an EU carrier to 49 per cent, and in the US, the threshold is even lower at 25 per cent. *Bartkowski*, in: *Immenga et al.* (eds), 109, 128.

[27] *Basedow*, in: *Basedow* (ed.), 1, 7. Over the decades, many in the literature have argued and are still arguing that nationality requirements as a key impediment to the internationalization and consolidation of the aviation markets should be lifted or at least softened. *Bartkowski*, in: *Immenga et al.* (eds), 109, 128. The prospects of such developments on a worldwide, multilateral basis are rather slim after 11 September 2001. Moreover, simply lifting nationality requirements may also lead to a "flag of convenience" problem as is the case for navigation unless certain harmonization is undertaken simultaneously. *Zhao*, ZLW 50 (2001), 48, 50, 64.

[28] *Ebdon*, Air & Space L. 20 (1995) 2, 71.

[29] *Woll*, 244. In recent years, after partial or full privatization of some national carriers in some countries, the picture is less clear-cut. See below, para. 15.

[30] In respect of Europe, see *Woll*, 244.

[31] *WTO*, Report 2005, 224.

[32] *Ibid.*

government intervention, market forces alone would not suffice to guarantee safe and prospering competition among airlines.[33]

7. State Aid

10 As a result of the practice of public ownership and dependence on technology,[34] airlines and the aircraft industry have always been prone to receiving **subsidies** from their respective governments. One of the most disputed issues in the WTO is the subsidizing of aircraft manufacturing. In the past, both Brazil and Canada, two of the most important producers of short-range aircraft, successfully challenged each other's funding of their aircraft industry under the Agreement on Subsidies and Countervailing Measures.[35] Currently, a similar dispute has been initiated between the US and the EC about the possible subsidization of Boeing and Airbus.[36] Economically, the picture is complicated by the common claim that state subsidies are, to a certain extent, desirable. Given the nationality requirement barring access of foreign investment and the absence of viable capital markets in many countries throughout the world, many airlines may urgently need financial input to modernize their fleet in a highly technology-based and capital-intensive industry.

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[33] *Ibid*. Moreover, as with any other transport service sector, international air transport is confronted with a number of environmental concerns and various forms of environmental regulations although it is difficult to assess how much of the pollution is caused by international as opposed to domestic aircraft. The assessment depends on a variety of factors, such as size and model of aircraft, location of airports, density of traffic, and flight schedules in general. Specific environmental concerns address flight as well as ground operations. As to the former, noise from the engines and the emissions produced by the consumption of aviation fuel are the main issues; as to the latter, ground operations, again noise, traffic congestion, land use, and waste are debated. These concerns, especially translated into national legislation and international regulation, have a severe economic impact on international air transport services.

[34] It is common knowledge that almost any service depends on technology, and this is especially true for air transport services. *WTO*, Report 2005, 222. For example, in the post World War II-era, the Lookheed Constellation revolutionized the industry by cutting the average US coast-to-coast flight time to under seven hours. On the technical details of the Lookheed Constellation, see *Wissmann*, 472–476. So did the emergence of jumbo jets such as the Boeing 707, and so will the new Airbus A380 with a seating capacity of 555 when it comes into service. For the Airbus A380 project, see <http://www.airliners.de/industrie/A380/index.php> (last visited 1 October 2007). The major consequence of the rapid technological development in air traffic has been the constantly increasing ability of airlines to reduce their costs. Moreover, in the past, once the technical feasibility was achieved, separate direct routes between final stops were established which bypassed intermediate stops. This will most likely also happen with respect to Boeing's new 787 Dreamliner aeroplane. For the Dreamliner project, see <http://www.boeing.com/commercial/787family/> (last visited 1 October 2007).

[35] See Appellate Body Report, *Brazil—Aircraft*, WT/DS46/AB/R; Appellate Body Report, *Canada—Aircraft*, WT/DS70/AB/R.

[36] Dispute Settlement Body, *EC and Certain Member States—Large Civil Aircraft*, WT/DS316; Dispute Settlement Body, *US—Large Civil Aircraft*, WT/DS317; Dispute Settlement Body, *EC and Certain Member States—Large Civil Aircraft (2nd complaint)*, WT/DS347.

III. Conclusions

Under the still valid Chicago System, international aviation is based on an exchange of traffic rights through a network of bilateral treaties between states. The defining features of the Chicago System are the doctrine of airspace sovereignty, the network of bilateral agreements exchanging traffic rights, the doctrine of cabotage, the nationality principle, the practice of public ownership, and heavy government regulation.[37] *11*

C. Emerging Trends of Air Transport Liberalization

I. General

While the aforementioned characteristics of the Chicago System still generally prevail, in recent decades, some forces gearing towards change on the domestic and international level have introduced **greater flexibility** into international civil aviation. *12*

II. Deregulation

In the United States where the mere size of the home market has led to the emergence of a variety of strong and powerful airlines, the traditional attitude towards air transport services has been increasingly questioned: The United States was one of the first countries in the world to **liberalize** its home air transport market with the Airline Deregulation Act of 1978.[38] The statute for the most part **removed government restrictions** on entry, exit, and pricing in US air transport services.[39] In order for new airlines to enter the domestic market, the newly introduced statutory test to be met was a relatively liberal one of "fit, willing and able", replacing the extremely restrictive one of "public convenience and necessity" of the past.[40] Under the new test, new airlines are licensed if they have shown sufficient financial and operational strength.[41] *13*

The liberalization boosted the entry of new airlines in the market and generally resulted in a **higher degree of competition** among such airlines and, as a consequence, a far-reaching restructuring of the corporate landscape. The experiences gained in the United States were, by and large, positive, although it is not clear whether they can be easily translated into *14*

[37] See generally on the Chicago System, *Żylicz*, 73–85.
[38] *Stockfish*, J. Air L. & Com. 57 (1992), 599, 614; *Woerz*, 31–36.
[39] *WTO*, Report 2005, 224.
[40] *Stockfish*, J. Air L. & Com. 57 (1992), 599, 614.
[41] *WTO*, Report 2005, 225.

a global context. Air fares were reduced on average to almost one third and productivity gains were also achieved.[42] At the same time, contrary to what was predicted by some, deregulation has not significantly impaired air services for small towns and communities.[43] However, the freer competition has triggered the need to tame the airlines by the effective application of antitrust laws as mergers among competitors were one possibility to prevent competition in the newly-gained economic freedom. In the aftermath, other governments have followed the US example.[44] Today, ICAO declares that a very high number of states (157 or 85% of ICAO members) are engaged in some kind of liberalization, although to varying degrees and in different ways.[45]

III. Privatization

15 In addition, many governments have decided to sell their stocks in their previous flag carriers either totally or at least partially in recent years. For example, two of the biggest airlines in the world, British Airways and Lufthansa have been completely privatized, while Air France, Alitalia, Sabena, and Iberia have been partially privatized by their respective governments.[46] The still relatively recent trend towards privatization, which is strong but also by no means universal, has by and large been triggered by two very visible developments: the example of the **sustainable success** of the airline industry in the United States after liberalization[47] and the **strong economic growth** in the **Asia-Pacific region**.[48]

IV. Open Skies Agreements

16 As stated above, international air transport services are regulated on the basis of a network of largely restrictive bilateral agreements based on agreements concluded between the United States and the United Kingdom.[49] Yet, in the aftermath of the domestic success of liberalization in the United States, the

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[42] *Ibid.*

[43] *Ibid.*

[44] The UK's Thatcher government similarly liberalized the aviation sector in 1979. *Woll*, 251. On the European level, the starting point for the liberalization of market entry and pricing was the Single Market Initiative of 1992. See *von Wrangell*, 102–103. In the aftermath, a series of regulations by the Council combined with enforcement and policy activities of the EC Commission led to a higher degree of liberalization. See *WTO*, Report 2005, 226. See generally, *Jung*, ZLW 47 (1998), 308 *et seq.*, 499 *et seq., passim*.

[45] See Council for Trade in Services, Report of the First Session of the Review Mandated Under Paragraph 5 of the Air Transport Annex Held on 28–29 September 2000, Note by the Secretariat, S/C/M/49, 1 December 2000, para. 30.

[46] *Abeyratne*, JWT 35 (2001) 6, 1133, 1166.

[47] See above para. 13.

[48] *WTO*, Report 2005, 226.

[49] See above paras 4–5.

United States and the Netherlands entered into a new agreement in 1992 enshrining a set of **more liberal rules than those previously agreed to in existing bilateral agreements** which became a template for later agreements. Thus, the term "open skies agreement" was coined to reflect this new template for bilateral agreements. Open skies agreements typically completely exchange the five basic freedoms of the air;[50] allow designated carriers the free determination of routes, capacity, and frequency and guarantee the freedom of airlines with respect to fares and rates, subject only to double disapproval if they constitute a threat to competition.[51] Although more liberal than previous agreements, one cannot overstate the fact that open skies agreements are still far from fully liberalizing the whole sector and do not grant full market access in particular in the presence of national ownership and control clauses.[52] Yet, the US initiative constitutes a move towards further liberalization. By 2002, the United States had signed 59 open skies agreements. And according to the ICAO, 97 of its members are parties to bilateral agreements aimed at establishing full market access.[53] Just recently, the EU and the United States have signed an open skies agreement overcoming long-lasting deadlock.[54]

V. Alliances

The remaining market entry barriers, in particular the national ownership *17*
and control requirement,[55] have boosted **new forms of competition** among airlines.[56] The most important is through the formation of **non-equity alliances among international airlines** on international routes.[57] An airline alliance is an agreement between two or more airlines to cooperate for the foreseeable future on a substantial level without actual

[50] See UNTS 171 (1953), 387.
[51] *Woll*, 267. On the various traffic rights, see above note 24.
[52] *Woll*, 267.
[53] S/C/M/49, para. 30.
[54] See hereto: <http://ec.europa.eu/transport/air_portal/international/pillars/global_partners/us_en.htm> (last visited 1 October 2007).
[55] See above, para. 7.
[56] Abeyratne, JWT 35 (2001) 6, 1133, 1136. Today, there are more than 900 airlines offering trade in air transport service. Almost everyone can name at least some of the biggest airlines worldwide. *Woll*, 244. The entry into the market of the so-called low cost carriers or no-frills airlines in Europe and the United States had a significant impact on the way airlines compete. See *Woll*, 246. Traditionally, airlines offered a full range of services during and around the flight. Under the new business model, low cost carriers as a matter of strategy simply focus on lowering prices of tickets by minimizing any service other than transport service as such. *WTO*, Report 2005, 233. The underlying hypothesis is that consumers only want to travel from point A to B at the lowest price possible. This business model has relativized the system of hubs and spokes and revived a system of direct connections. The business concept was originally introduced by the American airline Southwest which made it the sixth largest US carrier. *Woll*, 244; *Woerz*, 49. In Europe, the most well-known low cost carriers are Ryanair, Virgin Express, Easyjet, and AirBerlin.
[57] *Campell*, in: *Immenga et al.* (eds), 63, 71–77; *Abeyratne*, Aviation, 3–12.

merger. In the absence of a right to establishment or to a controlling share in another international airline, national ownership requirements can be legally circumvented.[58] The actual degree of cooperation differs between alliances. Economically, synergy effects occur when an alliance can rely on a hub of one of its members for each region in the world so that alliance can offer fast, seamless, and reasonably priced flight operations from each airport served within the alliance to any other airport served within the alliance.[59] The three largest alliances are the Star Alliance,[60] SkyTeam,[61] and Oneworld.[62] In 2005, the three main airline alliances accounted for some 80 per cent of the total world airline capacity encompassing 19 out of the world's 20 largest airlines.[63] A more recent development is the formation of alliances between cargo airlines, such as that of WOW Alliance among Lufthansa Cargo, Singapore Airlines Cargo, SAS Cargo Group, and Japan Airlines Cargo.[64]

VI. Conclusions

18 Starting in the late 1970s in the United States, the Chicago System has become more open and flexible, especially in recent years through initiatives of deregulation, spread of privatization and open skies agreements, and the formation of airlines' alliances.

D. Specific Provisions of the Annex

I. General

19 The **Annex ATS is a compromise** between those states which wanted to retain the (bilateral) Chicago System at the time of the Uruguay Round and those states which wanted to bring international aviation into the multilateral WTO. The provisions of the Annex ATS reflect this divide.

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[58] See above, paras 7–10.

[59] *Abeyratne*, JWT 35 (2001) 5, 1133, 1137.

[60] See <http://www.staralliance.com/star_alliance/star/frame/main_10.html> (last visited 1 October 2007).

[61] See <http://www.skyteam.com/skyteam> (last visited 1 October 2007).

[62] See <http://www.oneworld.com/> (last visited 1 October 2007).

[63] See <http://www.tourismfuturesintl.com/special%20reports/alliances.html> (last visited 1 October 2007).

[64] WOW Alliance was founded in 2003. See <http://www.wowtheworld.com/news_press8.html>. Since alliances may produce anti- or pro-competitive effects, the formation of airline alliances is subject to antitrust control and regulation; therefore, competition agencies usually evaluate alliances on a case-by-case basis, *WTO*, Report 2005, 239.

II. Scope of Application (Para. 1, Sentence 1)

According to para. 1, sentence 1 of the Annex ATS, the Annex ATS applies to **measures affecting trade in air transport services, whether scheduled or non-scheduled, and ancillary services**. Although neither "trade in air transport services" nor "ancillary services" are defined, it is clear that the scope of application is **broad**: first, any kind of air transport service is covered, be it passenger or cargo transport, scheduled or non-scheduled flights, and all related ancillary services, such as ground handling.[65] Second, it is not just measures directly targeting air transport services that are covered. To fall within its scope, it suffices that a measure affects air transport services.[66] In accordance with the purpose of encompassing any measure which may change the conditions of competition among foreign and domestic services suppliers, "affecting" should be constructed broadly. It should include everything which has a direct or indirect impact on air transport services.[67] *20*

III. General Carve-Out (Para. 2)

Para. 2 of the Annex ATS excludes from the coverage of the GATS "traffic rights" and any "services directly related to the exercise of traffic rights". This wording **excludes almost the whole air transport service industry from the scope of application of GATS**. The carve-out is the only general sector-specific one under the GATS.[68] As already indicated, the **main reason** for the carve-out was the will of the negotiating parties to retain the complex network of **bilateral agreements**.[69] *21*

"Traffic rights" are defined in para. 6 lit. d of the Annex ATS as "the right for scheduled and non-scheduled services to operate and/or to carry passengers, cargo and mail for remuneration or hire from, to, within, or *22*

[65] Scheduled international services were defined by the ICAO Council as a series of flights which (1) pass through the air space over the territory of more than one state, (2) are performed by aircraft in such a manner that each flight is open to use by members of the public, (3) and are operated on the basis of a published timetable or otherwise sufficiently regular or frequent. See, Policy and Guidance Material on the Regulation of International Air Transport, ICAO Document 9587, 1992, 9–13.

[66] In this respect, para. 1, sentence 1 of the Annex ATS follows the wording of Art. I which establishes the scope of application of the GATS also to all measures "affecting" trade in services. Art. I has hitherto copied Art. III:4 GATT 1994. See *Zacharias*, Article I GATS, paras 6 *et seq*.

[67] With respect to the interpretation of "affecting", recourse can be had to the interpretation of the identical term in Art. I. See regarding the term "affecting" in Art. I GATS, *Zacharias*, Article I GATS, paras 28–36.

[68] The exercise of government authority is similarly excluded from the scope of the GATS, but this exclusion is not sector-specific. See Art. I GATS.

[69] S/C/M/50, para. 3. For reasons other than to maintain the status quo, see *Lehner*, Duke L.J. 45 (1995) 2, 436, 446 *et seq*. The argument was that one cannot replace over 2000 bilateral agreements with one multilateral one. See *Woll*, 271.

over the territory of a Member, including points to be served, routes to be operated, types of traffic to be carried, capacity to be provided, tariffs to be charged and their conditions, and criteria for designation of airlines, including such criteria as number, ownership, and control".

23 The notion of **"directly related services"** is not defined in the Annex ATS. The definition may encompass any right of economic importance relating to the performance of international aviation services.[70]

IV. Services Covered

1. Services Explicitly Covered (Paras 3, 6 lit. a–c)

24 Para. 3 of the Annex ATS explicitly names **three types of services** which are covered by the GATS.[71] These are (1) "aircraft repair and maintenance services" (para. 3 lit. a), (2) the "selling and marketing of air transport services" (para. 3 lit. b), and (3) "computer reservation services" (para. 3 lit. c). Each of these services is defined in para. 6 of the Annex ATS. As is generally true for services covered by GATS, Members are generally free to decide upon their commitments with respect to each of the three services covered.[72]

a) Repair and Maintenance

25 According to para. 6 lit. a of the Annex ATS, **"aircraft repair and maintenance services"** encompass such activities "when undertaken on an aircraft or a part thereof while it is withdrawn from service and do not include so-called line maintenance".

b) Selling and Marketing

26 According to para. 6 lit. b, sentence 1 of the Annex ATS, **"selling and marketing of air transport services"** refers to "opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution". Para. 6 lit. b, sentence 2 of the Annex ATS explicitly excludes from the scope of the definition the pricing of air transport services and the applicable conditions.[73]

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[70] See below, paras 29–31.

[71] The negotiating parties could not merely rely on the UN Central Product Classification (Provisional Central Product Classification, Statistical Papers Series M No. 77, Department of International Economic and Social Affairs, Statistical Office of the United Nations, New York, 1991) as its classification was deemed insufficient.

[72] Most members incurred obligations based on the notion of reciprocity.

[73] Para. 6 lit. b, sentence 2 of the Annex ATS.

c) Computer Reservation System

Lastly, para. 6 lit. c of the Annex ATS identifies all services provided by "computerised systems that contain information about air carriers' schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued" as **"computer reservation system (CRS) services"**.[74] *27*

Today, unlike at the time of the Uruguay Round, CRS is no longer restricted to travel agencies. Rapid technological development through the internet has made CRS public. Some airlines have even decided to rely on the **internet** as the exclusive and direct channel of distribution.[75] The interpretational challenge is posed by the fact that—contrary to what was envisaged during the negotiation of the Annex ATS—at least the current wording encompasses the use of the internet by any end-user/traveller. Thus, there is a need for clarification of the exact coverage of para. 6 lit. c of the Annex ATS.[76] *28*

2. Directly Related Services?

As stated, the text of para. 2 of the Annex ATS excludes from the scope of GATS traffic rights and services directly related to the exercise of traffic rights.[77] This has led to uncertainty about the exact coverage of air transport services by the GATS. The issue is whether **services not directly related to the exercise of traffic rights** within the meaning of para. 2 of the Annex ATS are potentially **covered** by GATS **or** whether the **coverage** is **restricted to the subsectors** explicitly listed as covered by GATS **in para. 3 of the Annex ATS** (aircraft repair and maintenance, the selling and marketing of air transport services and computer reservations).[78] Notably, some Members have taken commitments outside the three subsectors listed in para. 3 of the Annex ATS.[79] *29*

Technically, the interpretational challenge is largely due to the fact that para. 2 of the Annex ATS, which enshrines the general rule of exclusion, neither elaborates on its relation to the exception of this rule provided for in para. 3 of the Annex ATS nor follows the common international aviation *30*

[74] The ICAO Council had in 1991 already adopted a comprehensive Code of Conduct for the Regulation and Operation of Computer Reservation Systems. This code was revised in coordination with the WTO in 1996. Council for Trade in Services—Communication from the International Civil Aviation Organization, S/C/W/63, 23 October 1998, 3.

[75] Since customers are able to compare prices themselves at a low cost, the increased transparency has further deepened price competition among airlines.

[76] See the statements of the EC, S/C/M/49 para. 48; *Zhao*, ZLW 50 (2001), 48, 57.

[77] See above, para. 21.

[78] See above, paras 23–26.

[79] *Footer & George*, in: *Macrory et al.*, 799, 909. Wet leasing is one example. *WTO*, Report 2005, 250.

terminology fully.[80] Typically, international aviation terminology distinguishes between **hard rights**, which are also referred to as traffic rights, and **soft rights**, both of which are contained in bilateral agreements. The so-called hard rights include matters such as traffic and route rights, the designation of airlines, capacity controls, and pricing.[81] The so-called soft rights relate to assistance to airline operations such as currency exchanges, ground and baggage handling, catering, marketing, and airport usage.[82]

31 Not surprisingly, discussions among WTO Members are along the same lines as they were during the Uruguay Round. On the one hand, **Members who want to strengthen the (multilateral) role of the WTO** in air transport argue for a slow but constant extension of the scope of not directly related services. These Members have in mind, *inter alia*, ground handling and other services delivered in connection with air transport, by and large because these services have experienced liberalization and expansion since the end of the Uruguay Round.[83] On the other hand, **Members who want to retain the network of bilateral treaties** argue that only those services explicitly referred to in para. 3 of the Annex ATS are actually covered by the GATS.[84] The argument that the one main purpose of the Annex ATS is the maintenance of the bilateral agreements supports the latter view.

V. Grandfather Clause (Para. 1, Sentence 2)

32 Moreover, even in the absence of the general application of GATS, WTO Members are paying further tribute to the existing network of bilateral agreements on aviation. Para. 1 sentence 2 of the Annex ATS contains a **grandfather clause**.[85] It establishes the **primacy of existing bilateral agreements over the Annex ATS**.[86] The Annex ATS prevails only over bilateral or regional agreements which come into effect after the entry into force of the WTO Agreement, *i.e.* 1 January, 1995.[87] This rule favours those WTO Members who had a well-developed, timely, and extensive set of bilateral agreements responding to the needs of their airlines, since such

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[80] *Lehner*, Duke L. J. 45 (1995) 2, 436, 443.

[81] *Żylicz*, 139. The distinction is not always drawn precisely.

[82] *Ibid.*

[83] The Members supporting this view are, inter alia: Australia, Chile, European Communities, New Zealand, Norway, and Switzerland. See Council for Trade in Services, Special Session, Communication from Canada, Japan and the United States, Trade In Air Transport Services, TN/S/W/33, 18 February 2005, para. 1.

[84] The Members behind this view are, *inter alia*: Canada, Japan, and the United States. See TN/S/W/33, para. 2.

[85] The term is employed in respect of para. 1, sentence 2 of the Annex ATS in the *WTO*, Report 2005, 249.

[86] *Zhao*, ZLW 50 (2001) 1, 48, 55.

[87] *Ehrenbeck*, South Afr. Y.B. Int'l L. 29 (2004), 217, 220.

states may not be forced into the negotiation of new agreements then falling within the ambit of the Annex ATS. However, such concerns may be overstated because a substantial number of bilateral agreements to which the Annex ATS applies were concluded in and after 1995.

VI. Dispute Settlement (Para. 4)

33 Para. 4 of the Annex ATS on dispute settlement equals the substantive grandfather clause enshrined in para. 1, sentence 2 of the Annex ATS on a procedural level. Parallel thereto, it declares that the **dispute settlement system of the WTO** under the DSU may be invoked in respect of air transport services **only if**, cumulatively, the **dispute settlement mechanisms in other** bilateral or multilateral (*i.e.* regional) **agreements** have been **exhausted**, and only to the extent that obligations or specific commitments have been assumed by the Member in question. The latter requirement is of a declaratory nature. The former requirement (exhaustion) appears to amount to a **de facto bar** to any kind of dispute settlement in the WTO, given that other dispute settlement mechanisms in respect of international aviation are practically never used although they exist.[88] Thus, it comes as no surprise that no aviation dispute has arisen in the WTO.[89]

VII. Review Mechanism (Para. 5)

34 Para. 5 of the Annex ATS demands a **periodical review** of the air transport sector and the GATS from the perspective of the **broader inclusion of air transport services** in the realm of GATS. During the Uruguay Round, the review mechanism was a compromise between those Members who favoured the far more progressive inclusion of multilateral aviation into the GATS and those who simply did not want to change the status quo of the Chicago System. As compensation for the exclusion of traffic rights and related services from the scope of GATS in para. 2 of the Annex ATS, a periodical review was agreed upon.[90]

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[88] Compare the statement of the representative of Chile in S/C/M/49, para. 20, in respect of the deficiencies of the bilateral system of dispute settlement who declared that "history shows that no bilateral dispute has ever been submitted to the dispute settlement mechanism contained in an agreement, the preference being to exert political or economic pressure, or in many cases, simply to cancel the agreement". It also argued that "the lack of adequate dispute settlement mechanisms stood in the way of the legal certainty required by an air services regime". The representative further explained the exceptionary provisions in the recent US-Chilean Free Trade Agreement which provides for binding dispute settlement for air transport.

[89] *WTO*, Report 2005, 250. The World Trade Report 2005 further notes that the provision has not been the subject of any discussion among WTO Members.

[90] *Ibid.*, 250.

35 The **first review** was held between September 2000 and November 2003 in four sessions of the Council for Trade in Services.[91] The debates among representatives showed nothing more than the **re-emergence of divergent views** which were already seen during the Uruguay Round. There was also no detectable rapprochement among the differing opinions either on open issues regarding the interpretation of the Annex ATS or on the possible extension of the Annex ATS to the air transport sector.[92] While one group of countries stressed the limits of the current bilateral system,[93] others emphasized that the review should be completed first before a possible discussion on the further application of the Annex ATS.[94] Moreover, those Members which preferred the further development of the bilateral system, such as the US, were constantly eager to emphasize that the review does not allow for a definitive interpretation of the Annex ATS. The second review began in September 2006.[95]

E. Outlook

36 The practical consequence of the general carve-out of air transport is that the Annex ATS has so far had only a very limited impact on air transport services.[96] With respect to the future, it is far from obvious that the Annex ATS will pave the way for the future liberalization of air transport services on a multilateral level.[97] Given the discussions among Members under the review mechanism provided in para. 5 of the Annex ATS, a sceptical view appears more realistic. From today's perspective, it is more likely that bilat-

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[91] See S/C/M/50; Council for Trade in Services, Report of the Third Session of the Review Mandated Under Paragraph 5 of the Air Transport Annex Held on 9 October 2001, Note by the Secretariat, S/C/M/57, 13 February 2002. See also *WTO*, Report 2005, 250.

[92] *WTO*, Report 2005, 250–251.

[93] *E.g*, statements of representative of Chile, S/C/M/49, para. 20.

[94] See *ibid*., para. 28 (Egypt); para. 31 (US); para. 33 (Japan).

[95] See Report of the First Session of the Review Mandated Under Paragraph 5 of the Annex on Air Transport Services Held on 12 September 2006, Note by the Secretariat, S/C/M/84, 27 September 2006.

[96] *Ehrenbeck*, South Afr. Y.B. Int'l L. 29 (2004), 217, 221. That this rather radical solution—total carve-out—constitutes one reasonable approach, although not the only one, in the resolution of the regulatory challenge states were confronted with during the Uruguay Round may be shown by reference to other transport regulation. For example, international road transport is likewise mainly shaped by 50/50 cargo sharing agreements. Nonetheless, during the Uruguay Round, Members did not decide to exclude road transport *a priori* from the scope of the GATS. Instead, Members took advantage of the flexibility of GATS and maintained the existing regulation as exceptions to the most-favoured-nation principle. *WTO*, Report 2005, 249.

[97] In fact, there are voices which suggest the opposite: that the Annex ATS has in fact cemented the current Chicago System based on a network of bilateral treaties among like-minded partners. *Ebdon*, Air & Space L. 20 (1995) 2, 71, 75.

eral or at least regional solutions outside the Annex ATS will determine the future of international air transport. In any case, the Annex ATS in its current form and the Chicago System are fully compatible and are able to co-exist on a long-term basis.

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Annex on Financial Services

1. Scope and Definition

a) This Annex applies to measures affecting the supply of financial services. Reference to the supply of a financial service in this Annex shall mean the supply of a service as defined in paragraph 2 of Article I of the Agreement.

b) For the purposes of subparagraph 3 b) of Article I of the Agreement, "services supplied in the exercise of governmental authority" means the following:
   (i) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;
   (ii) activities forming part of a statutory system of social security or public retirement plans; and
   (iii) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government.

c) For the purposes of subparagraph 3 b) of Article I of the Agreement, if a Member allows any of the activities referred to in subparagraphs b) (ii) or b) (iii) of this paragraph to be conducted by its financial service suppliers in competition with a public entity or a financial service supplier, "services" shall include such activities.

d) Subparagraph 3 c) of Article I of the Agreement shall not apply to services covered by this Annex.

2. Domestic Regulation

a) Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.

b) Nothing in the Agreement shall be construed to require a Member to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information in the possession of public entities.

3. Recognition

a) A Member may recognize prudential measures of any other country in determining how the Member's measures relating to financial services shall be applied. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

b) A Member that is a party to such an agreement or arrangement referred to in subparagraph a), whether future or existing, shall afford adequate opportunity for other interested Members to negotiate their accession to such agreements or arrangements, or to negotiate comparable ones with it, under circumstances in which there would be equivalent regulation, oversight, implementation of such regulation, and, if appropriate, procedures concerning the sharing of information between the parties to the agreement or arrangement. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that such circumstances exist.

c) Where a Member is contemplating according recognition to prudential measures of any other country, paragraph 4 b) of Article VII shall not apply.

4. Dispute Settlement

Panels for disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial service under dispute.

5. Definitions

For the purposes of this Annex:

a) A financial service is any service of a financial nature offered by a financial service supplier of a Member. Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance). Financial services include the following activities:

Insurance and insurance-related services
(i) Direct insurance (including co-insurance):
  A) life
  B) non-life
(ii) Reinsurance and retrocession;
(iii) Insurance intermediation, such as brokerage and agency;
(iv) Services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.

Banking and other financial services (excluding insurance)
(v) Acceptance of deposits and other repayable funds from the public;
(vi) Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction;
(vii) Financial leasing;
(viii) All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;
(ix) Guarantees and commitments;
(x) Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:
  (A) money market instruments (including cheques, bills, certificates of deposits);
  (B) foreign exchange;
  (C) derivative products including, but not limited to, futures and options;
  (D) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;
  (E) transferable securities;
  (F) other negotiable instruments and financial assets, including bullion.
(xi) Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;
(xii) Money broking;
(xiii) Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;
(xiv) Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;
(xv) Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;
(xvi) Advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (v) through (xv), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

b) A financial service supplier means any natural or juridical person of a Member wishing to supply or supplying financial services but the term "financial service supplier" does not include a public entity.

c) "Public entity" means:
  (i) a government, a central bank or a monetary authority, of a Member, or an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or
  (ii) a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions.

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A. Introduction

1 The Annex on Financial Services (hereinafter Annex FS) is an integral part of GATS, binding on all WTO Members according to Art. XXIX, containing special provisions for financial services as defined in the Annex FS. The **Annex FS supplements and occasionally replaces general provisions of the GATS framework**, providing in most cases greater detail and definition. Subject to these specific regulations, the provisions of GATS apply to financial services, such as, most importantly, Arts II, XVI, and XVII, but also Art. XIV.[1]

2 Financial services relate mainly to **insurance, banking, and securities services**. GATS defines "financial services" broadly, so as to include a wide array of activities, including services such as acceptance of deposits, direct insurance, stock trading, issue of credit, financial consulting.[2] The **regulation in this sector is more detailed** than in the general framework agreement, **because the financial sector** uniquely **underlies international trade as a whole**. Almost every international transaction, whether for goods or services, requires compensation, which is usually

[1] For the authors' complete assessment of trade in financial services under GATS in this volume, see also *von Bogdandy & Windsor*, Fifth Protocol to the General Agreement on Trade in Services and *von Bogdandy & Windsor*, Understanding on Commitments in Financial Services.

[2] For purposes of GATS, financial services are defined in para. 5 lit. a of the Annex FS. See below para. 19.

monetary, whereby financial services become relevant.[3] Indeed, regulation of financial services is of paramount importance because the financial sector acts as the "central nervous system" of a national economy and the world economy.[4]

3 When assessing the financial services sector under GATS, **various documents** may be of relevance. Thus, in addition to (1) the framework set by **GATS** itself and (2) the **Annex FS**, one may also need to refer to (3) the **Second Annex on Financial Services**, (4) the **Second Protocol to GATS**, also called the Interim Agreement, (5) the **Fifth Protocol to GATS**, more commonly referred to as the Financial Services Agreement, (6) the **Annex on Art. II Exemptions**, (7) the **Understanding on Commitments in Financial Services**, if the Member has inscribed it into its Schedule of commitments, and (8) the **GATS Schedules** of specific commitments which list under section 7 the concrete commitments any Member has made. They form an integral part of GATS[5] and are thus subject to the dispute settlement mechanism.[6] This complexity is a result of negotiations that dragged on after the Uruguay Round. To facilitate a better understanding, part B provides an overview of negotiations, from the 1994 Final Act of the Uruguay Round to the 1997 Financial Services Agreement. Thereafter, part C addresses para. 1 of the Annex FS on the Scope and Definition of the Annex FS, followed by para. 5 of the Annex FS, because this para. further details certain definitions. Thereafter, part D proceeds to the substantive provisions in paras 2–4 of the Annex FS, dealing, respectively, with domestic regulation, recognition, and dispute settlement.

B. History of Financial Services Negotiations

I. Negotiation of GATS, the Annexes on Financial Services, and the Understanding

4 As negotiations on a services agreement in the Uruguay Round drew to a hurried conclusion, the status of the financial services sector remained far from settled.[7] Few actual commitments were on the table, and developing

[3] See *Hernekamp*, in: *Hilf & Oeter* (eds), 415, 418, para. 4; *Jarreau*, N.C.J. Int'l L. & Com. Reg. 25 (1999), 1, 8.

[4] See, *e.g.*, *Shafer*, Law & Pol'y Int'l Bus. 28 (1997), 597; *Morrison*, Sing. J. Int'l & Comp. L. 5 (2001), 593, 593; *Das*, JWT 32 (1998) 6, 79, 83–84; *Jarreau*, N.C.J. Int'l L. & Com. Reg. 25 (1999), 1, 8; *Eckert*, 21–22.

[5] For more detail, see *Feinäugle*, Article XXIX GATS, paras 7 *et seq*.

[6] See Appendix 1 lit. B DSU; Panel Report, *US—Gambling*, WT/DS285/R, paras 6.44–6.55; Appellate Body Report, *US—Gambling*, WT/DS285/AB/R, para. 160.

[7] Similarly unfinished were the basic telecommunications and maritime transport sectors. For a description of the negotiations and the "last moment" compromise on financial

countries were sceptical about how much of the benefits from liberalization of trade in financial services would accrue to them. Many developed countries, the two major players being the USA and the EU, already had financial services markets that were quite open, so they pressed for greater liberalization across the board. Ultimately, as the Uruguay Round drew to a close in 1993, negotiators agreed to **extend negotiations** beyond the entry into force of GATS. Thus, on 1 January 1995, the WTO Agreement including GATS entered into force, along with the GATS **Annex FS**, which regulates the regulation of trade in financial services in more detail and better defines the contours of the sector, and the GATS **Second Annex on Financial Services**, which, in tandem with the Decision on Financial Services,[8] officially extended negotiations for an additional six months. This permitted Members to continue negotiating and to "improve, modify or withdraw" the limited commitments made thus far, without being subjected to the modification and notification procedures and required compensatory adjustments foreseen in Art. XXI.[9]

5 A group of mostly developed, mostly OECD countries had, by the time the WTO Agreement entered into force, also set down a higher level of commitments as an "alternative approach" in the **Understanding on Commitments in Financial Services**.[10] This document forms part of the Final Act of the Uruguay Round but is not part of GATS, unlike the Annexes on Financial Services according to Art. XXIX. Rather, it comprises an optional set of commitments, a sort of model schedule of commitments, that a Member may adhere to by inscribing it in its Schedule of specific commitments. It is usually inscribed as a headnote at the beginning of the Schedule's section on financial services or in the column of additional commitments regulated by Art. XVIII.

6 The **extension of negotiations** had both positive and negative consequences. While it allowed Members to continue to seek common ground in the sector, it also isolated financial services from other sectors of trade in both services and goods. This **eliminated the possibility of cross-sectoral "package deals"** in the GATT/GATS negotiations—a particularly important bargaining technique in a sector where vast differences in

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services, see *Jarreau*, N.C.J. Int'l L. & Com. Reg. 25 (1999), 1, 20–27. The following survey draws on: *WTO*, Financial Services: Negotiations, The results of the financial services negotiations under the General Agreement on Trade in Services (GATS), <http://www.wto.org/english/tratop_e/serv_e/finance_e/finance_fiback_e.htm> (last visited 1 October 2007); *Jarreau*, N.C.J. Int'l L. & Com. Reg. 25 (1999), 1, 20–31; *Gkoutzinis*, Int'l Law. 39 (2005), 877, 890–891, 906.

[8] Decision on Financial Services, LT/UR/D-5/2, 15 April 1994.

[9] See para. 2 of the Second Annex on Financial Services.

[10] Understanding on Commitments in Financial Services, LT/UR/U/1, 15 April 1994. For the authors' discussion of the legal status of the Understanding, see *von Bogdandy & Windsor*, Understanding on Commitments in Financial Services, paras 2–3.

technological advancement exacerbate the economic gap between developed countries and developing and least-developed countries.

II. The Interim Agreement on Financial Services (Second Protocol to GATS)

7 The next six months brought little progress. The USA in particular was vocally dissatisfied with the commitments being offered by especially certain Asian and Latin American Members. At the conclusion of the six-month extension, the US remained frustrated with what it viewed as a "free rider" threat;[11] thus, it withdrew its offer of unconditional most-favoured-nation (MFN) treatment from the negotiating table, instead inscribing a broad MFN exemption based on reciprocity in the financial services sector.[12] This left the EU scrambling to salvage some part of the modest progress made over the eight gruelling years of the Uruguay Round. The EU sought and obtained another extension of negotiations, this time for four weeks.[13] Thus, 28 July 1995 saw the conclusion of a new WTO agreement,[14] the **Second Protocol** to the GATS, often referred to as the **"Interim Agreement"** on financial services.[15] The agreement was reached only by the "Members concerned", that is, those that annexed new commitments in financial services, but their Schedules of specific commitments applied on an MFN basis, except where the Schedule stated otherwise. Then WTO Director-General *Ruggiero*

[11] "A situation of 'free riding' arises when, by virtue of the MFN obligation, a country gets the benefits of the opening of other countries' markets without having itself opened its market or made any significant concessions in that regard". *Leroux*, JWT 36 (2002) 3, 413, 417, footnote 21.

[12] *Leroux*, JWT 36 (2002) 3, 413, 426.

[13] See Council for Trade in Services, Decision on the Application of the Second Annex on Financial Services, Adopted by the Council for Trade in Services on 30 June 1995, S/L/6, 4 July 1995. The Council for Trade in Servcies (CTS) (see Art. XXIV) acted pursuant to the power granted to it in para. 3 of the Second Annex on Financial Services.

[14] Since GATS entered into force, four such agreements-cum-protocols, each with annexed commitments, have been concluded. The Second and the Fifth (see below, paras 9–10) pertain to financial services, and the Third and Fourth Protocols, respectively, to movement of natural persons and basic telecommunications. The First Protocol was originally intended to deal with the Schedules of least-developed country Members, but it was never adopted. See Committee on Trade in Financial Services, Issues concerning the Adoption of a Protocol to Conclude the Financial Services Negotiations, Note by the Secretariat, S/FIN/W/11, 1 May 1997, 1, footnote 1. See also *Footer*, 221–233 (discussing Protocols under GATT/GATS as a form of WTO lawmaking).

[15] Second Protocol to the General Agreement on Trade in Services, S/L/11, 24 July 1995. The Second Protocol was labelled "interim" because "negotiators again decided that the results of the negotiations were not satisfactory and envisaged further negotiations in two-years' time". See *WTO*, Financial Services: Negotiations, The results of the financial services negotiations under the General Agreement on Trade in Services (GATS), <http://www.wto.org/english/tratop_e/serv_e/finance_e/finance_fiback_e.htm> (last visited 1 October 2007).

welcomed the compromise as the "second best result",[16] putting a positive spin on the at best ambivalent results, especially with the absence of the US financial market, which effectively left many major financial actors outside the scope of regulation. According to para. 1 of the Second Protocol, the Schedules of specific commitments and lists of Art. II exemptions that Members annexed to it replaced the financial services section of their previous Schedules and lists. All in all, some twenty-nine Members, counting the EU as one, improved their Schedules of financial services commitments and annexed them to the Second Protocol, but Colombia and Mauritius joined the US in listing broad MFN exemptions in the sector. A year later, on 1 September 1996, after the requisite ratifications according to para. 3, the Interim Agreement became legally binding.

III. The Committee on Trade in Financial Services

Another noteworthy development during this period was the establishment of the **Committee on Trade in Financial Services** by the Council for Trade in Services (CTS) on 4 April 1995 pursuant to its power under Art. XXIV:1, sentence 2.[17] The Committee on Financial Services carries out tasks as assigned by the CTS and consults with Members, as necessary, on the Annex FS. It is further mandated to monitor compliance with GATS in this sector, to make necessary recommendations to the CTS, to consider proposed amendments to the Annex FS, to provide a discussion forum for and to conduct studies on relevant technical issues, to provide technical assistance with financial services to both developing country Members and developing countries seeking membership, and to cooperate with other GATS subsidiary bodies or other relevant international organizations. The Committee has also become responsible both for reviewing the status of ratification and acceptance of the subsequently concluded Fifth Protocol to GATS on financial services[18] and for reviewing the progress of China's implementation of GATS obligations according to the transitional review mechanism prescribed in section 18 of the Protocol on the Accession of the People's Republic of China.[19] *8*

[16] *Jarreau*, N.C.J. Int'l L. & Com. Reg. 25 (1999), 1, 29; *Eckert*, 84.

[17] See Council for Trade in Services, Decision on Institutional Arrangements for the General Agreement on Trade in Services, Adopted by the Council for Trade in Services on 1 March 1995, S/L/1, 4 April 1995, para. 3. The following list of duties and responsibilities is drawn from para. 2 of this document. See also *Röben*, Article XXIV GATS, paras 35–36.

[18] See below, paras 9–10.

[19] Accession of the People's Republic of China, Decision of 10 November 2001, WT/L/432, 23 November 2001.

IV. The Financial Services Agreement (Fifth Protocol to GATS)

9 At the 1996 Singapore Ministerial Conference, Members decided to reopen negotiations and set two goals for services negotiations, one of which was to "resume financial services negotiations in April 1997 with the aim of achieving significantly improved market access commitments with a broader level of participation in the agreed time frame".[20] The US decided again to take part in this round of negotiations on trade in financial services, also in the form of the Financial Leaders Group, a lobbying and advising body, set up "to provide unified European-North American financial sector support" specifically at these negotiations.[21] Despite the disruptive background of the Asian financial crisis,[22] negotiators agreed on a **new set of commitments** in financial services in the early-morning hours of 13 December 1997. These commitments are annexed to the **Fifth Protocol** to the General Agreement on Trade in Services, more commonly referred to as the **Financial Services Agreement**.[23] The Financial Services Agreement is thus a new WTO agreement within the scope of Art. II:2 WTO Agreement, negotiated by the Members concerned, that is, those countries annexing new commitments in financial services. It improved the Schedules of specific commitments and lists of Art. II exemptions, and facilitated the withdrawal of the broad, reciprocity-conditioned MFN exemptions of the US, India, and Thailand. The attainment of an agreement owed its success largely to, firstly, a **shift in attitude** on the part **of developing countries**, which felt they desperately needed foreign capital, **and**, secondly, a shift in attitude **among developed countries**, which showed a greater willingness to permit developing countries **gradually** to liberalize their financial markets.[24] The Financial Services Agreement and the commitments annexed to it entered into force on 1 March 1999. Of the Members that annexed commitments, however, the Fifth Protocol has not yet been ratified by Brazil, Jamaica, and the Philippines, despite its

[20] The other goal was to "achieve a successful conclusion to the negotiations on basic telecommunications in February 1997". Ministerial Conference, Singapore, Singapore Ministerial Declaration, WT/MIN(96)/DEC, 18 December 1996, para. 17.

[21] See <http://www.uscsi.org/groups/> (last visited 1 October 2007). The group was organized (and remains active) under the auspices of the US-based Coalition of Service Industries, a non-profit organization, self-described as the "leading business organization dedicated to the reduction of barriers to US services exports". See *CSI*, What Is CSI?, <http://www.uscsi.org/about/> (last visited 1 October 2007).

[22] See generally *Das*, JWT 32 (1998) 6, 79, 103–111.

[23] Committee on Trade in Financial Services, Fifth Protocol to the General Agreement on Trade in Services, S/L/45, 3 December 1997. The Fifth Protocol was open for acceptance until 29 January 1999. For a brief explanation of the four protocols to GATS, see above, footnote 15.

[24] *Das*, JWT 32 (1998) 6, 79, 81–82.

entry into force for the (other) Members concerned.[25] The commitments annexed to the Financial Services Agreement cover approximately 95% of the world's financial services activity.[26]

Despite this broad coverage, WTO commentators generally agree that *10*
the hard-fought Financial Services Agreement did little more, in terms of financial services liberalization, than **bind the *status quo ante***. In other words, many Members committed under GATS only to that which they had already been doing.[27] Throughout the negotiations, developing countries were hesitant to open up their markets in a sector that strongly favoured the technologically superior developed countries. To make matters worse, the extension of negotiations by the Second Annex on Financial Services had the incidental effect of isolating the sector, preventing developing countries from bargaining for package deals by attaching commitments or concessions in labour-intensive sectors where they may have enjoyed a comparative advantage. The modest results, however, are also generally viewed with cautious optimism: even if relatively little new liberalization was attained, trade in financial services is henceforth a sector not only **bound into the legal framework of GATS**, but also thereby subject to a rigorous dispute settlement mechanism.[28]

V. The Doha Round and the Road Ahead

The current round of negotiations, set in motion in January 2000 within the *11*
Doha Round, includes all services sectors, including the financial services sector. To facilitate the ongoing **Doha Round negotiations**, the CTS

[25] As of October 2007. See <http://www.wto.org/english/tratop_e/serv_e/finance_e/finance_status_5prot_e.htm> (last visited 1 October 2007); Committee on Trade in Financial Services, Report of the Meeting Held on 27 November 2006, Note by the Secretariat, S/FIN/M/53, 30 November 2006, paras 3–7. Para. 3 of the Fifth Protocol foresees an entry into force after acceptance by all Members concerned. Notwithstanding some missing ratifications, Members who had accepted agreed that it should enter into force, and the CTS has made a series of decisions extending the period of acceptance for certain Members. See Council for Trade in Services, Communication from Members which Have Accepted the Fifth Protocol to the General Agreement on Trade in Services, S/L/67, 15 February 1999; Council for Trade in Services, Decision on Acceptance of the Fifth Protocol to the General Agreement on Trade in Services, Adopted by the Council for Trade in Services on 15 February 1999, S/L/68, 15 February 1999; Council for Trade in Services, Seventh Decision on Acceptance of the Fifth Protocol, Adopted by the Council for Trade in Services on 3 July 2003, S/L/130, 4 July 2003.

[26] See *WTO*, "The WTO's financial services commitments will enter into force as scheduled", WTO Focus No. 37, January–February 1999, 8.

[27] See *Key*, in: *Macrory et al.* (eds), 955, 969; *Gkoutzinis*, Int'l Law. 39 (2005), 877, 905–906; *Van den Bossche*, 494; *Mattoo*, World Econ. 23 (2000), 351, 369–370; *Leroux*, JWT 36 (2002) 3, 413, 427–428; *Kokott*, RIW 46 (2000), 401, 406; *Ohler*, ZEuS 5 (2002), 321, 358–359; *Murinde & Ryan*, in: *Mullineux & Murinde* (eds), 751, 756–757.

[28] See *Leroux*, JWT 36 (2002) 3, 413, 428; *Jarreau*, N.C.J. Int'l L. & Com. Reg. 25 (1999), 1, 73; *Kokott*, RIW 46 (2000), 401, 406; *Das*, JWT 32 (1998) 6, 79, 82.

adopted the Guidelines and Procedures for the Negotiations on Trade in Services[29] on 28 March 2001. According to para. 11, the main method of negotiation is to be the **request-offer approach**,[30] by which Members make requests for and offers of specific commitments in any given sector. Currently, however, only eleven Members (counting the EU as one) have submitted initial or revised offers in the financial services sector, with no further action since September 2003.[31] The negotiations have generally disappointed expectations with missed deadlines, with some Members resisting the opening of their financial markets, and with other Members at a loss to find new bargaining chips, as their financial services markets are already quite open.[32] Talks were suspended indefinitely in July 2006 but had resumed "fully across the board" by early February 2007.[33] It should be borne in mind, however, that the negotiations in financial services have received little specific publicity since the Fifth Protocol entered into force.[34]

12 A handful of issues can already be identified as significant **challenges for the future progress of negotiations** and liberalization. Although the Asian financial crises of 1997–1998 had little direct effect on the negotiation of the Financial Services Agreement,[35] they still are the cause of some **worries over financial market stability**, inducing developing countries to maintain tighter regulation of their financial sectors in hopes of avoiding a repetition of such crises, while developed countries continue to seek greater liberalization, assuring developing countries of the long-term benefits of opening markets and the concomitant competitive advantage for all.[36] More important to the GATS legal framework in and of itself are the questions that will inevitably continue to arise from technological

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[29] Council for Trade in Services, Guidelines and Procedures for the Negotiations on Trade in Services, Adopted by the Special Session of the Council for Trade in Services on 28 March 2001, S/L/93, 29 March 2001.

[30] For the WTO Secretariat's discussion of the proper content, format, and process of requests and offers, see WTO Seminar on the GATS, Technical Aspects of Requests and Offers, 20 February 2002, <http://www.wto.org/english/tratop_e/serv_e/requests_offers_approach_e.doc> (last visited 1 October 2007).

[31] The offering Members are Australia, Canada, Chile, the EU, Iceland, Japan, Liechtenstein, New Zealand, Norway, Turkey, and the US. For a table summarizing the offered commitments, see *Gkoutzinis*, Int'l Law. 39 (2005), 877, 912.

[32] See *Gkoutzinis*, Int'l Law. 39 (2005), 877, 911–912.

[33] See *WTO*, Talks Suspended. "Today there are only losers", <http://www.wto.org/english/news_e/news06_e/mod06_summary_24july_e.htm> (last visited 1 October 2007); *WTO*, Lamy: "We have resumed negotiations fully across the board", <http://www.wto.org/english/news_e/news07_e/gc_dg_stat_7feb07_e.htm> (last visited 1 October 2007).

[34] The 1998 Geneva Ministerial Declaration welcomed the conclusion of the Financial Services Agreement (General Council, Ministerial Conference, Ministerial Declaration, WT/MIN(98)/DEC/1, 25 May 1998, para. 2), but no specific mention was made in the 1999 Seattle Summaries of Meetings, the 2001 Doha Ministerial Declaration, the 2003 Cancún Concluding Ministerial Statement, or the 2005 Hong Kong Ministerial Declaration.

[35] See *WTO*, Market Access, 109.

[36] See *Das*, JWT 32 (1998) 6, 79, 108–111; *Hernekamp*, in: *Hilf & Oeter* (eds), 415, 421, para. 16; *Murinde & Ryan*, in: *Mullineux & Murinde* (eds), 751, 757.

advancement. Trade in "invisibilities" has already yielded some ambiguity of regulation,[37] but innovative methods of delivery, novel combinations of financial services, and new financial services[38] will test the flexibility of the Financial Services Agreement and the foresight of the drafters of GATS and the Annex FS. Especially such primarily electronic services as **e-banking and e-commerce** may be difficult to fit into the framework as it stands.[39] Furthermore, a **more precise definition of the broadly formulated prudential carve-out**, which permits Members to impose prudential regulation to protect investors or the stability of the market, seems desirable, although developing countries tend to prefer a wider scope and developed countries a narrower.[40] Another crucial, but indirectly relevant, issue will be the continuing process of harmonization, **standard-setting**, and setting of best practices, although this process takes place in parallel with the WTO within other fora, most importantly the Basel Committee on Banking Supervision. As a general rule, developed countries will prefer to keep the two processes parallel but distinct, whereas developing countries will prefer to link standard-setting to the WTO, so as to permit them a relatively higher level of participation and input.[41] Here, a series of institutions and fora,[42] in particular the Basel Committee, will play varying roles in the gradual harmonization and integration of the international financial sector. Finally, as is apparent from several of the mentioned challenges, one should always bear in mind the overarching issue of division in the WTO between the positions of developed countries and those of developing and least-developed countries in sectors such as financial services, where differences are so pronounced in terms of state of technology, stability of financial markets and infrastructure, present levels of expertise, disposable capital, investment levels, available governmental resources, availability and intensity of supervision, and the like.[43]

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[37] For example, the distinction between mode 1 and 2 of service supply in the financial services sector is problematic, as it assumes a recognizable and fixed point of delivery. See *Gkoutzinis*, Int'l Law. 39 (2005), 877, 894.

[38] "New" financial services both in the sense of those newly devised and in the sense of those not yet offered in a Member's territory but already offered in another Member's territory, as defined in section D(3) of the Understanding on Commitments in Financial Services.

[39] See, e.g., Hernekamp, in: Hilf & Oeter (eds), 415, 421, para. 16.

[40] Para. 2 lit. a of the Annex FS. See below, paras 22–24; *Gkoutzinis*, Int'l Law. 39 (2005), 877, 911.

[41] *Gkoutzinis*, Int'l Law. 39 (2005), 877, 911.

[42] Some of the prominent acronyms include: OECD (Organisation for Economic Cooperation and Development), BIS (Bank for International Settlement), IASC (International Accounting Standards Committee), IOSCO (International Organization of Securities Commissioners), IAIS (International Association of Insurance Supervisors), the FSF (Financial Stability Forum, which deals with financial conglomerates), as well as the World Bank and the IMF (International Monetary Fund). See generally *Key*, Int'l Affairs 75 (1999), 61, 69–70; *Delonis*, N.Y.U. J. Int'l L. & Pol. 36 (2004), 563, 583–595.

[43] See *Murinde & Ryan*, in: *Mullineux & Murinde* (eds), 751, 753–755, 761–762 (focusing

C. Scope and Definition (Paras 1 and 5)

I. "Measures Affecting the Supply of Financial Services" (Para. 1 lit. a)

13 The Annex FS applies to **"measures affecting the supply of financial services"**. Art. XXVIII lit. a defines the term "measures" broadly, so that the label a Member gives to a measure (law, regulation, rule, administrative action, etc.) cannot permit that Member to avoid the GATS regime for trade in financial services.[44]

14 Para. 1 lit. a, sentence 2, of the Annex FS defines the **"supply of a financial service"** by simply incorporating the general definition thereof in Art. I:2 into the financial services sector. For its part, Art. I:2 defines the four modes of supply of a service: (a) cross-border, (b) consumption abroad, (c) through a commercial presence, and (d) through the presence of natural persons. Examples of financial services in the banking subsector supplied in modes (a)–(d), thus, would be when (a) a bank issues by written or oral communication a loan to a customer in the territory of another Member, (b) a customer travels abroad and takes out a loan at a foreign bank, (c) a bank establishes a foreign branch in the territory of another Member and accepts deposits, and (d) a bank's in-house counsel travels temporarily to another Member's territory to begin filing the paperwork necessary to open a bank branch or to conclude a contract. The distinction between mode 1 and 2 may not always be readily apparent, especially when the transaction or advising takes place via telephone, fax, or the internet, since distinction between the two modes presumes both that the place of delivery of the service is evident and that the service is delivered at a single point in time.[45]

15 Para. 5 lit. a of the Annex FS defines **"financial services"**.[46]

16 The term **"affecting"** is defined neither here nor in the parallel provision in GATS on the scope and definition of services (Art. I). The Panel in *EC—Bananas III* understood "affecting", for purposes of GATS, very broadly,

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on "know-how" as the key aspect in the gap between developed and developing countries in the financial services sector).

[44] The Annex FS has not yet been the subject of a dispute before the WTO's Dispute Settlement Body (DSB). A WTO panel did, however, reject the argument that the definiton of the Annex's scope could help define the scope of another GATS Annex, the Annex on Telecommunications. See Panel Report, *Mexico—Telecoms*, WT/DS204/R, paras 7.282–7.283.

[45] See *Gkoutzinis*, Int'l Law. 39 (2005), 877, 894; *Key*, in: *Macrory et al.* (eds), 955, 973; *Morrison*, Sing. J. Int'l & Comp. L. 5 (2001), 593, 599–600; S/FIN/W/9, paras 10–12.

[46] See below para. 19.

so as to include "any measure [...] regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services".[47] The Appellate Body reaffirmed this broad interpretation, referring to the "intent of the drafters" of GATS and the "ordinary meaning of the word".[48] Because the Annex FS is an integral part of GATS and because para. 1 lit. a of the Annex FS incorporates the definition in Art. I:2, the term "affecting", for purposes of the financial services sector, has to be interpreted similarly broadly.

II. "Services Supplied in the Exercise of Governmental Authority" (Para. 1 lit. b–d)

17 For financial services, para. 1 of the Annex FS replaces the general framework's definition of **"services supplied in the exercise of governmental authority"**, which are excepted from the coverage of GATS by Art. I:3 lit. b. The general definition of this term in **Art. I:3 lit. c does not apply to the financial services sector** according to para. 1 lit. d of the Annex FS; para. 1 lit. b and c of the Annex FS replace that definition. The Annex FS supplies a broader, more detailed definition, thus affording greater certainty and protection for Members' financial policy. According to para. 1 lit. b of the Annex FS, the sector-specific definition of such services that fall **outside** the scope of GATS comprises:

(i) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;
(ii) activities forming part of a statutory system of social security or public retirement plans; and
(iii) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government.[49]

18 Para. 1 lit. b (i) of the Annex FS focuses on the excepted actor or institution; para. 1 lit. b (ii) focuses in turn on the type of activity; and, notably, para. 1 lit. b (iii) is a broadly phrased catchall. However, **para. 1 lit. c** of the Annex FS is an important **exception to the exception**. Anytime a Member allows its financial service suppliers to **compete** with a public entity or another financial service supplier in any of the activities under para. 1 lit. b (ii) and (iii) of the Annex FS, the activities fall back under

[47] Panel Report, *EC—Bananas III (US)*, WT/DS27/R, para. 7.285.
[48] Appellate Body Report, *EC—Bananas III*, WT/DS27/AB/R, para. 220.
[49] "Public entity", as used in subparas (i) and (iii), is defined in para. 5 lit. c of the Annex FS. See below, para. 21.

GATS's obligations.[50] The core element is the presence of competition and not the nature of the activity: where there is competition, GATS obligations apply, regardless of the nature of the competitors.[51] Thus, even a state bank primarily engaged in non-commercial activity will be subject to GATS to the extent that it competes with private banks in, for example, providing financial retirement plans.

III. "Financial Service" (Para. 5 lit. a)

19 The Annex FS broadly defines **"financial service"** in para. 5 lit. a as "any service of a financial nature offered by a financial service supplier of a Member". The subsequent subpara. defines "financial service supplier". Para. 5 lit. a proceeds with an extensive, non-exhaustive list of financial services, divided into two subgroups, namely, insurance and insurance-related services[52] and banking and other financial services (excluding insurance).[53] These two subgroups include, *inter alia*, insurance, reinsurance, acceptance of deposits, lending, credit services, issue of all kinds of securities, asset and investment management, stock trading, brokerage, and any auxiliary management or advising for insurance or banking services. Again, the list is extensive and non-exhaustive, emphasizing that the applicability of the GATS regime for financial services turns on the nature of the activity offered. The illustrative, non-exhaustive nature of the list can be seen in its repeated use of the formulations "such as", "including", and "all types/forms/kinds".

IV. "Financial Service Supplier" (Para. 5 lit. b)

20 However, in order to be a financial service, the service must be offered by a financial service supplier.[54] Para. 5 lit. b of the Annex FS defines a **"financial service supplier"** broadly as any natural or juridical person[55] of a Member "wishing to supply or supplying" financial services, but not including public entities.[56] This definition is **broader than the general definition** of a service supplier in Art. XXVIII lit. g. That is, a Member must also afford the rights and privileges flowing from GATS to natural or juridical **persons who currently only intend to supply, even if**

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[50] But see *Lipke & van der Stichele*, 24–25 (expressing doubt regarding the clarity of para. 1 lit. b of the Annex FS).
[51] See *Adlung*, JIEL 9 (2006), 455, 467.
[52] Subparas (i)–(iv).
[53] Subparas (v)–(xvi).
[54] Para. 5 lit. a of the Annex FS.
[55] "Juridical person" is defined in Art. XXVIII lit. l.
[56] See below, para. 21.

they are not yet supplying, financial services in the territory of the prospective host Member. Legal services supporting a financial service can be qualified as "advisory" in the sense of para. 5 lit. a (xvi) of the Annex FS.

V. "Public Entity" (Para. 5 lit. c)

As discussed above, para. 1 lit. b of the Annex FS excepts certain activities *21*
frequently carried out by public entities from the obligations of GATS, and certain of these can be excepted from that exception under para. 1 lit. c of the Annex FS, which is to say, they fall back into the scope of GATS.[57] Moreover, para. 5 lit. b of the Annex FS excludes public entities from the definition of financial service supplier. For all of these provisions, para. 5 lit. c of the Annex FS defines the term "public entity" for the financial services sector. A **"public entity"** is a governmental institution—including the government itself, a central bank, a monetary authority, and furthermore institutions owned or controlled by the government—which is **"principally engaged" in governmental functions or activities** for governmental purposes, excluding any such entity that is principally engaged in supplying financial services on commercial terms,[58] that is, under conditions aimed at private financial profit rather than the public interest. The Annex FS provides no legal guidance as to the degree or criteria necessary for an institution to be "principally engaged" in either governmental or commercial activity,[59] but the fact-focused determination will assess the institution's "centre of gravity", distinguishing between main and incidental purposes. Private entities can count as public entities and fall outside of GATS's scope, but they are considered public entities only when exercising functions normally performed by a central bank or a monetary authority.[60] Thus, a Member may in some cases privatize or outsource its governmental fiscal activity without necessarily subjecting such activity to the GATS disciplines. Here, then, the interpretive focus is on the sort of activity carried out and not on the legal nature of the institution performing it.[61]

[57] See above, paras 17–18.
[58] Para. 5 lit. c (i).
[59] See *Leroux*, JWT 36 (2002), 413, 429, footnote 81.
[60] Para. 5 lit. c (ii).
[61] The Annex FS has not yet been the subject of a dispute before the WTO's DSB. A WTO panel did, however, reject the argument that the Annex's definition of "public entity" could help define "public body" in a national measure, as it related to the SCM Agreement. See Panel Report, *Korea—Commercial Vessels*, WT/DS273/R, paras 7.43–7.56.

D. Substantive Provisions (Paras 2–4)

I. Domestic Regulation (Para. 2)

1. The Prudential Carve-out (Para. 2 lit. a)

22 Para. 2 lit. a, commonly referred to as the **"prudential carve-out"**, is perhaps the most significant provision in the Annex FS.[62] Supplementing the exception clauses of GATS, such as Art. XII or Art. XIV, it allows a Member to take **measures for prudential reasons** in the financial services sector. The prudential carve-out functions as a **broad exception to the obligations of GATS**, leaving domestic regulatory authorities a remarkable amount of autonomy to regulate the supply of financial services. Although practice on this point varies, a Member need not inscribe them in its Schedule of commitments or its list of MFN exemptions, because prudential measures are not considered restrictions on market access or national treatment in the usual sense.[63] Para. 2 lit. a of the Annex FS lists two sorts of exceptions, namely, to protect "investors, depositors, policy holders or persons to whom a fiduciary duty is owed" and "to ensure the integrity and stability of the financial system".[64] While this listing of prudential reasons should not be considered exhaustive ("including"), it does provide guidance as to the limits of the permissible **scope of prudential reasons**.[65] Both sorts of prudential reasons are, in international law, recognized exceptions for banking supervision.[66] Guidance for the content of **"prudential"** can be drawn from other financial sectors and the respective institutions that set international standards and best practices, for example, the Basel Committee on Banking Supervision for the banking sector, the IOSCO in the securities sector, the IAIS for the insurance sector, and the cross-sector Joint Forum on Financial Conglomerates.[67] This overabundance of multilateral institutions and standard-setting bodies with a mandate to

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[62] *Key*, in: *Macrory et al.* (eds), 955, 964.

[63] See *Das*, JWT 32 (1998), 6, 79, 96; *Jarreau*, N.C.J. Int'l L. & Com. Reg. 25 (1999), 1, 67; *Key*, in: *Macrory et al.* (eds), 955, 965–966.

[64] Art. 1410.1 NAFTA (North American Free Trade Agreement, 17 December 1992, ILM 32 (1993), 289), Arts 25 and 31 EFTA (Convention establishing the European Free Trade Association, 4 January 1960, UNTS 370 (1960), 4) and Art. 12.10.1 DR-CAFTA (Central America-Dominican Republic-United States Free Trade Agreement, 5 August 2004, <http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html>, last visited 1 October 2007) are somewhat similar in construction to the first sentence of the GATS prudential carve-out. At least two provisions of EU law are also somewhat similar: Art. 58 TEC on the movement of capital and the "general good" provision in Art. 31 of the Banking Directive (Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (Text with EEA relevance), OJ 2006 L 177/1).

[65] *Leroux*, JWT 36 (2002) 3, 413, 430.

[66] *Ohler*, ZEuS 5 (2002), 321, 355.

[67] *Key*, Int'l Affairs 75 (1999), 61, 69–70.

discuss the international financial regulatory framework was one of the impetuses for negotiators to include the prudential carve-out, so as to define and limit the scope of GATS and, thereby, the jurisdiction of the Dispute Settlement Body (DSB).[68] Examples of presumably permissible prudential measures would be (1) capital adequacy requirements, (2) restrictions on credit concentration or portfolio allocation, (3) disclosure and reporting requirements, and (4) some forms of licensing criteria.[69]

23 Para. 2 lit. a, sentence 2 of the Annex FS limits the extent to which a Member can employ domestic regulation for prudential reasons: it **forbids the use of such prudential measures as a means of "avoiding" commitments or obligations under GATS**. This relates not only to the central WTO principles of MFN, market access, and national treatment, but also to important disciplines on the application of domestic regulation, such as Art. VI:1–2, which provide for reasonableness and objectivity in administration as well as judicial, arbitral, or administrative review. No WTO body has yet adjudicated on para. 2 lit. a of the Annex FS.[70] Interpretation of the term **"avoiding"** should take into account the rich case law on the *chapeau* of Art. XX GATT 1994, as it performs a similar function.

24 At the very least, para. 2 lit. a of the Annex FS sets a **good faith standard** as to the avoidance of GATS commitments and obligations.[71] The prudential carve-out may not be misused to undermine GATS liberalization for other than prudential purposes. One can also read the provision as requiring some level of **intent** to circumvent duties under GATS.[72] To further liberalization, one could understand sentence 2 as part of the definition of "prudential". This would mean that any measure with the effect of permitting a Member to circumvent a legal obligation flowing from GATS is *ipso facto* not prudential for purposes of para. 2 lit. a,[73] although this reading seems overly formalistic. In light of the object and purpose of GATS,[74] particularly Recs 3 and 4 of the GATS Preamble,[75] it seems reasonable to interpret the prudential carve-out as affording the Members a **high level of discretion** regarding measures for prudential reasons

[68] See *Gkoutzinis*, Int'l Law 39 (2005), 877, 902.

[69] See *Mattoo*, World Econ. 23 (2000), 351, 354, footote 9.

[70] In any case, *Jarreau* anticipates that any such litigation will be "fact-intensive". *Jarreau*, N.C.J. Int'l L. & Com. Reg. 25 (1999), 1, 67; see also *Morrison*, Sing. J. Int'l & Comp. L. 5 (2001), 593, 609.

[71] *Leroux*, JWT 36 (2002) 3, 413, 430–431. Leroux also looks to the interpretation of GATT XX's *chapeau* in Appellate Body Report, *US—Shrimp*, WT/DS58/AB/R, para. 158, discussing good faith as a general principle of both law and international law.

[72] *Trachtman*, Colum. J. Transnat'l L. 34 (1995), 37, 71–72.

[73] See, *e.g.*, *Gkoutzinis*, Int'l Law 39 (2005), 877, 903.

[74] See Art. 31.1 of the Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, ILM 8 (1969), 679, 691.

[75] See *Hestermeyer*, Preamble General Agreement of Trade in Services, paras 17 *et seq*.

including, but not limited to, the ones listed, but at the same time **not permitting measures that are purely or primarily protectionist *in effect***. Ultimately, dispute settlement regarding this provision may be long in coming, since diplomatic concerns may act as a check on challenges to a Member's claim that a given measure serves prudential purposes.[76]

2. Confidentiality (Para. 2 lit. b)

25 Using broad language, para. 2 lit. b of the Annex FS protects **confidentiality and privacy**: nothing in GATS should be construed to require either disclosure of information relating to the affairs and accounts of individual customers or disclosure of other confidential or proprietary information in the possession of a public entity.[77] This provision reemphasizes the nondisclosure rights of Members, supplementing and overlapping with the general provision on confidentiality in Art. III[bis] and the explicit protection of the privacy of personal data and individual records and accounts in Art. XIV lit. c (ii).[78]

II. Recognition (Para. 3)

1. Discretionary Recognition of Prudential Measures (Para. 3 lit. a)

26 Para. 3 lit. a of the Annex FS foresees a way to further liberalization through **recognition of prudential measures** taken by another country (not just another Member) for purposes of determining how its own financial services measures are to apply. This provision parallels Art. VII:1, regarding the recognition of employment qualifications. The framework agreement foresees a way to further liberalization through a Member's decision to recognize another country's education, licences, certification, etc. As in Art. VII:1, recognition of prudential measures under para. 3 lit. a may be achieved through harmonization or otherwise and may be either unilateral or by agreement or arrangement with the other country.[79] Such selective recognition of the adequacy of other countries' prudential

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[76] *Key*, in: *Macrory et al.* (eds), 955, 965; *Key*, Int'l Affairs 75 (1999), 61, 68. *Lipke & van der Stichele*, however, express concerns over a perceived loss of, or chilling effect on, sovereign economic power to regulate and stabilize the financial sector: if the prudence of measures is subject to WTO dispute settlement, they argue, a central bank or supervisory agency may be hesitant to take the measures it deems most efficient. See *Lipke & van der Stichele*, 29, 31.

[77] The Annex defines "public entity" in para. 5 lit. c; see above, para. 21.

[78] Confidentiality of individual records and accounts is further reemphasized in section B(8) of the Understanding on Commitments in Financial Services for Members who have inscribed that document into their Schedules of specific commitments. See *von Bogdandy & Windsor*, Understanding on Commitments in Financial Services, para. 15.

[79] "Arguably, the existence of the prudential carve-out [in para. 2 lit. a] makes [para. 3 lit. a] unnecessary". *Leroux*, JWT 36 (2002) 3, 413, 432.

measures is a permissible form of MFN exemption;[80] however, in contrast to Art. VII:4, according to para. 3 lit. c of the Annex FS such recognition does not require notice to the CTS. Such recognition agreements usually presume some level of harmonization already attained between the financial sectors of the countries concerned. Due to the difficulty involved in evaluating foreign supervisory and regulatory systems, such agreements are rare, the European Economic Area (EEA) being one prominent exception, as regards its financial market internally.[81] Another example of reciprocal recognition by agreement is the US-Canadian Multijurisdictional Disclosure System, which foresees mutual recognition by securities regulators of the other country's securities registrations.[82]

2. "Adequate Opportunity" (Para. 3 lit. b)

27 In contrast to the discretionary language ("may") in para. 3 lit. a of the Annex FS, a Member is obligated ("shall") under para. 3 lit. b to **afford "adequate opportunity" to other Members to negotiate accession to the same or conclusion of a similar recognition agreement** as has been reached under para. 3 lit. a. The provision rests on the principle of non-discrimination. Where recognition was unilateral, the Member must afford adequate opportunity for other interested Members to demonstrate that similar circumstances exist, such that the demonstrating Member's prudential regulation should be similarly recognized. By its very nature, the adequacy of **"adequate opportunity"** and such negotiations will have to be assessed *ad hoc* and based on any eventual invocations of para. 3 lit. b of the Annex FS. It seems unlikely, though, that a case could actually arise before the DSB, since para. 3 lit. b does not, strictly speaking, require the Member, after such circumstances have been proven, to afford similar recognition. While the complaining Member might then invoke the general MFN obligation, the respondent Member would almost certainly have recourse to the prudential carve-out in para. 2 lit. a of the Annex FS,[83] since the recognition agreement necessarily would involve prudential measures.

3. Waiver of Notice Requirement (Para. 3 lit. c)

28 Para. 3 lit. c of the Annex FS **releases a Member from the requirement to notify** the CTS when the Member begins **negotiating** recognition of prudential measures according to para. 3 lit. b of the Annex FS.

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[80] See *Leroux*, JWT 36 (2002) 3, 413, 432–433, footnote 51.

[81] See *Key*, in: *Macrory et al.* (eds), 955, 967–968. As of February 2007, the EEA includes EU member states, Norway, Iceland, and Liechtenstein.

[82] Multijurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canadian Issuers, Securities Act Release No. 6,902, Exchange Act Release No. 29,354, Investment Company Act Release No. 18,210, 49 SEC Docket 260 (21 June 1991); see also *Jarreau*, N.C.J. Int'l & Com. Reg. 25 (1999), 1, 37, footnote 252.

[83] See above, paras 22–24.

Generally with regard to recognition of qualifications, a Member must make such notice according to Art. VII:4 lit. b. The Annex FS, however, does **not release** a Member from the obligation in Art. VII:4 lit. c to **notify** the CTS of the **adoption** of new recognition measures or the **significant modification** of existent recognition measures.

III. Dispute Settlement (Para. 4)

29 Para. 4 of the Annex FS supplements Art. 8 DSU on the composition of **dispute settlement panels**. It is also included among the special rules applicable to dispute settlement under Appendix 2 DSU. It requires that panels have the **necessary expertise** to adjudicate the specific financial service under dispute, whether on prudential issues[84] or on other financial services matters. This represents the drafters' recognition that the financial sector is uniquely fundamental to a Member's economy and is highly complex. Although it is not explicit whether all panellists, or perhaps only one of them, must have such expertise, the fact that the provision contemplates "panels", instead of "panellists", suggests that the requirement is indeed that at least one panel member be a finance expert. The level of expertise is also not specified, but it seems reasonable to assume that the procedure foreseen in Art. 8 DSU, in conjunction with para. 4 of the Annex FS, will suffice to ensure properly qualified panellists.[85]

30 This supplementing of the DSU does not, however, affect the composition or required expertise of the Appellate Body under Art. 17 DSU, although it may be called on to review a panel report on prudential measures or other financial issues. Yet the Appellate Body's jurisdiction is limited to questions of law, meaning that this possible lack of expertise in specific financial services may be of limited significance.[86] At any rate, the issue of technical competence of judges is not exclusive to the WTO's adjudicatory system and can be handled by the adverse parties' pleadings.

E. Outlook

31 The Annex FS has not yet been the subject of dispute settlement in the WTO, and the sector may, in the foreseeable future, remain free of for-

[84] See para. 2 lit. a; see above, para. 24.

[85] See *Kokott*, RIW 46 (2000), 401, 403 (suggesting representatives from central banks or regulatory commissions); *Jarreau*, N.C.J. Int'l L. & Com. Reg. 25 (1999), 1, 69 (suggesting practitioners with at least five to seven years' experience or persons with a combination of academic and practical qualifications).

[86] See *Leroux*, JWT 36 (2002) 3, 413, 432.

mal legal disputes as a result of the prudential carve-out[87] and the level of diplomatic deference afforded to states in the area of domestic financial policy. Regulation in the sector, however, has certainly not ceased to develop. Negotiations continue in the Doha Round, various fora continue to set minimum standards and best practices, and the WTO's Committee on Trade in Financial Services continues to oversee the financial services sector in the WTO. The importance of national financial market stability, the challenges of e-commerce and e-banking, and the sensitive issue of permissible prudential measures assure that this sector will remain dynamic and debated, whether or not the dispute settlement mechanism becomes involved. As the sector evolves, the Annex FS will provide the framework, fostering the necessary balance between, on the one hand, detailed regulation and legal predictability and, on the other, sufficient flexibility and deference to national policymakers.

[87] See above, paras 22–24.

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Second Annex on Financial Services

1. Notwithstanding Article II of the Agreement and paragraphs 1 and 2 of the Annex on Article II Exemptions, a Member may, during a period of 60 days beginning four months after the date of entry into force of the WTO Agreement, list in that Annex measures relating to financial services which are inconsistent with paragraph 1 of Article II of the Agreement.
2. Notwithstanding Article XXI of the Agreement, a Member may, during a period of 60 days beginning four months after the date of entry into force of the WTO Agreement, improve, modify or withdraw all or part of the specific commitments on financial services inscribed in its Schedule.
3. The Council for Trade in Services shall establish any procedures necessary for the application of paragraphs 1 and 2.

1 The Second Annex on Financial Services was a means of facilitating the **extension of negotiations**, beyond the close of the Uruguay Round, in the sector of financial services. It extended the periods during which Members could list exemptions in the Annex on Article II Exemptions (para. 1) and alter the specific commitments on financial services in their Schedules (para. 2), without being subject to the respective procedures and required compensatory adjustments of Art. II:1–2 and Art. XXI. The extension was **for six months** from the entry into force of the WTO Agreement (that is, from 1 January 1995). Para. 3 empowered the Council for Trade in Services to establish any necessary procedures. Although it is still formally an integral part of GATS according to Art. XXIX, the Second Annex has **no continued legal significance** since the negotiations have been concluded.

2 For a discussion of the Second Annex in the context of financial services generally under GATS, see von *Bogdandy & Windsor*, Annex on Financial Services, paras 4–6.

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Second Protocol to the General Agreement on Trade in Services (Interim Agreement on Financial Services)

Members of the World Trade Organization (hereinafter referred to as the "WTO") whose Schedules of Specific Commitments and Lists of Exemptions from Article II of the General Agreement on Trade in Services concerning financial services are annexed to this Protocol (hereinafter referred to as "Members concerned"),

Having carried out negotiations under the terms of the Ministerial Decision on Financial Services adopted at Marrakesh on 15 April 1994,

Having regard to the Second Annex on Financial Services, and to the Decision on the application of that Annex adopted by the Council for Trade in Services on 30 June 1995,

Agree as follows:

1. A Schedule of Specific Commitments and a List of Exemptions from Article II concerning financial services annexed to this Protocol relating to a Member shall, upon the entry into force of this Protocol for that Member, replace the financial services sections of the Schedule of Specific Commitments and the List of Article II Exemptions of that Member.
2. This Protocol shall be open for acceptance, by signature or otherwise, by the Members concerned until 30 June 1996.
3. This Protocol shall enter into force on the 30th day following the date of its acceptance by all Members concerned. If by 1 July 1996 it has not been accepted by all Members concerned, those Members which have accepted it before that date may, within a period of 30 days thereafter, decide on its entry into force.
4. This Protocol shall be deposited with the Director-General of the WTO. The Director-General of the WTO shall promptly furnish to each Member of the WTO a certified copy of this Protocol and notifications of acceptances thereof pursuant to paragraph 3.
5. This Protocol shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Done at Geneva this—day of [month] one thousand nine hundred and ninety-five, in a single copy in English, French and Spanish languages, each text being authentic, except as otherwise provided for in respect of the Schedules annexed hereto.

The Second Protocol[1] to the General Agreement on Trade in Services *1*
was a new agreement reached in 1995 under the auspices of the WTO. It entered into force on 1 September 1996. It is also known as the **"Interim Agreement"** on financial services. The Third[2] and Fourth[3] Protocols relate, respectively, to movement of natural persons and basic telecommunications; the Fifth Protocol,[4] also referred to as the Financial Services Agreement, relates to financial services. There is no First Protocol: it was to contain special concessions for developing country Members, which were eventually incorporated into the Uruguay Round schedules, so that there was no need for a separate protocol.[5] The Second Protocol does not contain any regulatory content in its text *per se*; rather, it is relevant insofar

[1] Second Protocol to the General Agreement on Trade in Services, S/L/11, 24 July 1995.
[2] Third Protocol to the General Agreement on Trade in Services, S/L/12, 24 July 1995.
[3] Fourth Protocol to the General Agreement on Trade in Services, S/L/20, 30 April 1996.
[4] Fifth Protocol to the General Agreement on Trade in Services, S/L/45, 3 December 1997.
[5] *Stoll & Schorkopf*, Max Planck CWTL, Vol. 1, para. 593.

as Members annexed to it Schedules of specific commitments and lists of Article II exemptions for the financial services sector. All commitments and exemptions annexed to the Interim Agreement, except Morocco's, have subsequently been replaced by new commitments and exemptions annexed to the Fifth Protocol.

2 For a discussion of the Second Protocol in the context of GATS and the Financial Services Agreement, see *von Bogdandy & Windsor*, Annex on Financial Services, para. 7.

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Fifth Protocol to the General Agreement on Trade in Services (Financial Services Agreement)

Members of the World Trade Organization (hereinafter referred to as the "WTO") whose Schedules of Specific Commitments and Lists of Exemptions from Article II of the General Agreement on Trade in Services concerning financial services are annexed to this Protocol (hereinafter referred to as "Members concerned"),

Having carried out negotiations under the terms of the Second Decision on Financial Services adopted by the Council for Trade in Services on 21 July 1995 (S/L/9),

Agree as follows:

1. A Schedule of Specific Commitments and a List of Exemptions from Article II concerning financial services annexed to this Protocol relating to a Member shall, upon the entry into force of this Protocol for that Member, replace the financial services sections of the Schedule of Specific Commitments and the List of Article II Exemptions of that Member.
2. This Protocol shall be open for acceptance, by signature or otherwise, by the Members concerned until 29 January 1999.
3. This Protocol shall enter into force on the 30th day following the date of its acceptance by all Members concerned. If by 30 January 1999 it has not been accepted by all Members concerned, those Members which have accepted it before that date may, within a period of 30 days thereafter, decide on its entry into force.
4. This Protocol shall be deposited with the Director-General of the WTO. The Director-General of the WTO shall promptly furnish to each Member of the WTO a certified copy of this Protocol and notifications of acceptances thereof pursuant to paragraph 3.
5. This Protocol shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Done at Geneva this—day of [month] one thousand nine hundred and ninety-[—], in a single copy in English, French and Spanish languages, each text being authentic, except as otherwise provided for in respect of the Schedules annexed hereto.

Bibliography

See *von Bogdandy & Windsor*, Annex on Financial Services, Bibliography.

The Fifth Protocol to the General Agreement on Trade in Services was a new agreement reached in 1997 under the auspices of the WTO. It entered into force on 1 March 1999 and is more commonly known as the **"Financial Services Agreement"**.[1] The Second Protocol also related to financial services. Both the Second and Fifth Protocols contain no regulatory content in their texts *per se*; rather, they are relevant insofar as Members have annexed Schedules of specific commitments and lists of Art. II exemptions for the financial services sector to them. Every Member that annexed commitments and exemptions to the Second Protocol, except Morocco, subsequently replaced them with new commitments and exemptions annexed to the Fifth Protocol. Of the Members that annexed *1*

[1] See *Footer*, Institutional and Normative Analysis, 221–233 (discussing Protocols under GATT/GATS as a form of WTO lawmaking).

commitments, however, the Fifth Protocol has not yet been ratified by Brazil, Jamaica, and the Philippines.[2]

2 A thorough review of the specific commitments and most-favoured-nation (MFN) exemptions made by WTO Members is beyond the scope of the present entry; instead, the following is meant to provide the reader with a general impression of the **level of commitments made in connection with the 1997 Financial Services Agreement** and the relatively few developments that have taken place since that time.[3]

3 More than two-thirds of WTO Members have made commitments in the financial services sector. Although a precise measurement is difficult, there is general consensus on the fact that the 1997 Financial Services Agreement saw little actual liberalization, with most countries binding at, or even below, the *status quo* of market openness.[4] A given Member's current commitments are listed under section 7, "Financial Services", of its Schedule of specific commitments according to Art. XX, and these are usually annexed either to GATS, according to Art. XX:3, or to the Financial Services Agreement. In addition, a fair number of Members have inscribed MFN exemptions

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[2] As of February 2007. See <http://www.wto.org/english/tratop_e/serv_e/finance_e/finance_status_5prot_e.htm> (last visited 1 October 2007); Committee on Trade in Financial Services, Report of the Meeting Held on 27 November 2006, Note by the Secretariat, S/FIN/M/53, 30 November 2006, paras 3–7. Para. 3 of the Fifth Protocol foresees an entry into force after acceptance by all Members concerned. Notwithstanding some delays, Members who had accepted agreed that it should enter into force, and the Council for Trade in Services has made a series of decisions extending the period of acceptance for certain Members. See Council for Trade in Services, Communication from Members which Have Accepted the Fifth Protocol to the General Agreement on Trade in Services, S/L/67, 15 February 1999; Council for Trade in Services, Decision on Acceptance of the Fifth Protocol to the General Agreement on Trade in Services, Adopted by the Council for Trade in Services on 15 February 1999, S/L/68, 15 February 1999; Council for Trade in Services, Seventh Decision on Acceptance of the Fifth Protocol, Adopted by the Council for Trade in Services on 3 July 2003, S/L/130, 4 July 2003.

[3] The WTO's website provides a useful starting-point list of specific commitments and MFN exemptions in the financial services sector, although the listing is current only up to circa 2000: *WTO*, Financial services commitments and MFN exemptions, <http://www.wto.org/english/tratop_e/serv_e/finance_e/finance_commitments_e.htm> (last visited 1 October 2007). For unilateral or new accession commitments, the reader should consult the individual Member's Schedule of specific commitments, available at *WTO*, Schedules of commitments and lists of Article II exemptions, <http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm#commit_exempt> (last visited 1 October 2007). For other surveys, more thoroughgoing than the present one, see also *WTO*, Non-attributable summary of the main improvements in the new financial services commitments, <http://www.wto.org/english/news_e/news98_e//finsum.htm> (last visited 1 October 2007); Council for Trade in Services, Financial Services, Background Note by the Secretariat, S/C/W/72, 2 December 1998, paras 57–66, appended tables; *Qian*, in: *Claessens & Jansen* (eds), 63; *Werner*, 49–85; *Mattoo*, World Econ. 23 (2000), 351, 351–386.

[4] See *Key*, in: *Macrory et al.* (eds), 955, 969; *Gkoutzinis*, Int'l Law. 39 (2005), 877, 905–906; *Van den Bossche*, 494; *Mattoo*, World Econ. 23 (2000), 351, 369–370; *Leroux*, JWT 36 (2002) 3, 413, 427–428; *Kokott*, RIW 46 (2000), 401, 406; *Ohler*, ZEuS 5 (2002), 321, 358–359.

directly or indirectly relevant to financial services, approximately half of which are broad exemptions based on reciprocity.[5]

4 As a general matter, the core of the financial services sector consists of **direct insurance** (both life and non-life) for the insurance subsector and of **acceptance of deposits and lending** as well as **securities-related services**, such as stock brokerage, for the banking and other financial services subsectors.[6] The first three modes of service supply under Art. I:2 are far more significant, both in terms of their nature and because Members almost uniformly limited their mode 4 commitments to intra-corporate transfer of management and specialists.[7] Commitments made in mode 3 (commercial presence) go significantly further and deeper than do those in mode 1 (cross-border supply); increasing the level of commitments in mode 1 has thus been one of the priorities in the Doha Round negotiations.[8] As a practical matter, **when assessing a Member's Schedule** of commitments in financial services, one should **cross-check any horizontal commitments**,[9] which can be found either at the beginning of the Member's Schedule, usually meaning that they apply to all sectors, or at the beginning of the specific sector, usually meaning that they apply to all subsectors within that sector. Furthermore, one should cross-check to see whether commitments have been made under section 1 (business services) of the Schedule of specific commitments, especially under professional or legal services.

5 Presently, close to forty mostly developed Members (counting EU Member States separately), most of them also OECD states, have inscribed the **Understanding on Commitments in Financial Services** in their Schedules of financial services commitments, thus binding them to that alternative approach.[10] This is usually inserted as a headnote at the beginning

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[5] See *Key*, in: *Macrory et al.* (eds), 955, 977–978.

[6] See *Das*, JWT 32 (1998) 6, 79, 97.

[7] *Mattoo*, World Econ. 23 (2000), 351, 356; *Das*, JWT 32 (1998) 6, 79, 97. See also *Zacharias*, Article I GATS, para. 45; *Bast*, Annex on Movement of Natural Persons Supplying Services Under the Agreement, paras 6 and 53.

[8] See *Gkoutzinis*, Int'l Law. 39 (2005), 877, 905; *Leroux*, JWT 36 (2002) 3, 413, 441; *Morrison*, Sing. J. Int'l & Comp. L. 5 (2001), 593, 615–616.

[9] Horizontal commitments should be examined carefully, as they may often actually be sector-overarching limitations on commitments, disguised and displaced. See *Jarreau*, N.C.J. Int'l L. & Com. Reg. 25 (1999), 1, 46–47. In any case, the relationship between horizontal commitments and modal/specific commitments is not always readily apparent. See *Das*, JWT 32 (1998) 6, 79, 98.

[10] As of February 2007, Members which had inscribed the Understanding were Australia, Canada, the EC and its Member States, Iceland, Japan, Liechtenstein, New Zealand, Nigeria, Norway, Sri Lanka (for banking and other financial services (excluding insurance)), Switzerland, Turkey, and the US, thus accounting for some thirty-nine states, including all OECD states except Mexico and South Korea. See generally *von Bogdandy & Windsor*, Understanding on Commitments in Financial Services.

of the Financial Services portion of the Member's Schedule or sometimes listed in the final column as an additional commitment under Art. XVIII. Many of these countries have come close to opening their financial services markets as far as reasonably possible; in contrast, developing and least-developed Members have generally made few or no commitments and remain sceptical about liberalizing their financial sectors,[11] despite safeguards such as the prudential carve-out in para. 2 lit. a of the Annex on Financial Services and the balance-of-payments provisions in Art. XII. Granted, WTO critics might argue that such scepticism is warranted, especially in the financial sector, the stability and integrity of which are crucial to a state's economy. One critique is often referred to as "cherry-picking": suppliers of financial services from developed Members selectively seek out only lucrative transactions, projects, and clients, to the detriment of both the majority of the host-country's population and the host-country's own suppliers of financial services, who cannot cross-subsidize high start-up costs with funds from elsewhere.[12] There is also a concern that liberalization of the financial services sector may ultimately limit the flow of capital to small- and medium-sized domestic enterprises.[13] Lack of resources and expertise also may leave authorities in developing countries ignorant of the inner workings of GATS.[14]

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[11] See *Key*, in: *Macrory et al.* (eds), 955, 971, 974–975; *Gkoutzinis*, Int'l Law. 39 (2005), 877, 911–913.

[12] See *Lipke & van der Stichele*, 37; *Wallach & Woodall*, 163–166. *Murinde & Ryan*, in: *Mullineux & Murinde* (eds), 751, 753–755.

[13] See, *e.g.*, *Stiglitz & Charlton*, 152, 235.

[14] *SOMO & WEMOS*, 6, cite the example of Kenya, which apparently failed to realize that its financial services commitments would also subject its health insurance sector to the rigours of GATS and concomitant foreign competition.

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Understanding on Commitments in Financial Services

Participants in the Uruguay Round have been enabled to take on specific commitments with respect to financial services under the General Agreement on Trade in Services (hereinafter referred to as the "Agreement") on the basis of an alternative approach to that covered by the provisions of Part III of the Agreement. It was agreed that this approach could be applied subject to the following understanding:

(i) it does not conflict with the provisions of the Agreement;
(ii) it does not prejudice the right of any Member to schedule its specific commitments in accordance with the approach under Part III of the Agreement;
(iii) resulting specific commitments shall apply on a most-favoured-nation basis;
(iv) no presumption has been created as to the degree of liberalization to which a Member is committing itself under the Agreement.

Interested Members, on the basis of negotiations, and subject to conditions and qualifications where specified, have inscribed in their schedule specific commitments conforming to the approach set out below.

A. Standstill

Any conditions, limitations and qualifications to the commitments noted below shall be limited to existing non-conforming measures.

B. Market Access

Monopoly Rights

1. In addition to Article VIII of the Agreement, the following shall apply:
   Each Member shall list in its schedule pertaining to financial services existing monopoly rights and shall endeavour to eliminate them or reduce their scope. Notwithstanding subparagraph 1b) of the Annex on Financial Services, this paragraph applies to the activities referred to in subparagraph 1b)(iii) of the Annex.

Financial Services purchased by Public Entities

2. Notwithstanding Article XIII of the Agreement, each Member shall ensure that financial service suppliers of any other Member established in its territory are accorded most-favoured-nation treatment and national treatment as regards the purchase or acquisition of financial services by public entities of the Member in its territory.

Cross-border Trade

3. Each Member shall permit non-resident suppliers of financial services to supply, as a principal, through an intermediary or as an intermediary, and under terms and conditions that accord national treatment, the following services:
   a) insurance of risks relating to:
      (i) maritime shipping and commercial aviation and space launching and freight (including satellites), with such insurance to cover any or all of the following: the goods being transported, the vehicle transporting the goods and any liability arising therefrom; and
      (ii) goods in international transit;
   b) reinsurance and retrocession and the services auxiliary to insurance as referred to in subparagraph 5 a)(iv) of the Annex;
   c) provision and transfer of financial information and financial data processing as referred to in subparagraph 5 a)(xv) of the Annex and advisory and other auxiliary services, excluding intermediation, relating to banking and other financial services as referred to in subparagraph 5 a)(xvi) of the Annex.
4. Each Member shall permit its residents to purchase in the territory of any other Member the financial services indicated in:
   a) subparagraph 3 a);
   b) subparagraph 3 b); and
   c) subparagraphs 5 a)(v) to (xvi) of the Annex.

Commercial Presence

5. Each Member shall grant financial service suppliers of any other Member the right to establish or expand within its territory, including through the acquisition of existing enterprises, a commercial presence.

6. A Member may impose terms, conditions and procedures for authorization of the establishment and expansion of a commercial presence in so far as they do not circumvent the Member's obligation under paragraph 5 and they are consistent with the other obligations of the Agreement.

New Financial Services

7. A Member shall permit financial service suppliers of any other Member established in its territory to offer in its territory any new financial service.

Transfers of Information and Processing of Information

8. No Member shall take measures that prevent transfers of information or the processing of financial information, including transfers of data by electronic means, or that, subject to importation rules consistent with international agreements, prevent transfers of equipment, where such transfers of information, processing of financial information or transfers of equipment are necessary for the conduct of the ordinary business of a financial service supplier. Nothing in this paragraph restricts the right of a Member to protect personal data, personal privacy and the confidentiality of individual records and accounts so long as such right is not used to circumvent the provisions of the Agreement.

Temporary Entry of Personnel

9. a) Each Member shall permit temporary entry into its territory of the following personnel of a financial service supplier of any other Member that is establishing or has established a commercial presence in the territory of the Member:
   (i) senior managerial personnel possessing proprietary information essential to the establishment, control and operation of the services of the financial service supplier; and
   (ii) specialists in the operation of the financial service supplier.
   b) Each Member shall permit, subject to the availability of qualified personnel in its territory, temporary entry into its territory of the following personnel associated with a commercial presence of a financial service supplier of any other Member:
   (i) specialists in computer services, telecommunication services and accounts of the financial service supplier; and
   (ii) actuarial and legal specialists.

Non-discriminatory Measures

10. Each Member shall endeavour to remove or to limit any significant adverse effects on financial service suppliers of any other Member of:
    a) non-discriminatory measures that prevent financial service suppliers from offering in the Member's territory, in the form determined by the Member, all the financial services permitted by the Member;
    b) non-discriminatory measures that limit the expansion of the activities of financial service suppliers into the entire territory of the Member;
    c) measures of a Member, when such a Member applies the same measures to the supply of both banking and securities services, and a financial service supplier of any other Member concentrates its activities in the provision of securities services; and
    d) other measures that, although respecting the provisions of the Agreement, affect adversely the ability of financial service suppliers of any other Member to operate, compete or enter the Member's market;

provided that any action taken under this paragraph would not unfairly discriminate against financial service suppliers of the Member taking such action.

11. With respect to the non-discriminatory measures referred to in subparagraphs 10 a) and b), a Member shall endeavour not to limit or restrict the present degree of market opportunities nor the benefits already enjoyed by financial service suppliers of all other Members as a class in the territory of the Member, provided that this commitment does not result in unfair discrimination against financial service suppliers of the Member applying such measures.

C. National Treatment

1. Under terms and conditions that accord national treatment, each Member shall grant to financial service suppliers of any other Member established in its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business. This paragraph is not intended to confer access to the Member's lender of last resort facilities.
2. When membership or participation in, or access to, any self-regulatory body, securities or futures exchange or market, clearing agency, or any other organization or association, is required by a Member in order for financial service suppliers of any other Member to supply financial services on an equal basis with financial service suppliers of the Member, or when the Member provides directly or indirectly such entities, privileges or advantages in supplying financial services, the Member shall ensure that such entities accord national treatment to financial service suppliers of any other Member resident in the territory of the Member.

D. Definitions

For the purposes of this approach:

1. A non-resident supplier of financial services is a financial service supplier of a Member which supplies a financial service into the territory of another Member from an establishment located in the territory of another Member, regardless of whether such a financial service supplier has or has not a commercial presence in the territory of the Member in which the financial service is supplied.
2. "Commercial presence" means an enterprise within a Member's territory for the supply of financial services and includes wholly- or partly-owned subsidiaries, joint ventures, partnerships, sole proprietorships, franchising operations, branches, agencies, representative offices or other organizations.
3. A new financial service is a service of a financial nature, including services related to existing and new products or the manner in which a product is delivered, that is not supplied by any financial service supplier in the territory of a particular Member but which is supplied in the territory of another Member.

Bibliography

See *von Bogdandy & Windsor*, Annex on Financial Services, Bibliography.

Case Law

Panel Report, *US—Gambling*, WT/DS285/R; Appellate Body Report, *US—Gambling*, WT/DS285/AB/R.

Cross References

See *von Bogdandy & Windsor*, Annex on Financial Services, Cross-References.

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A. Introduction

1 The Understanding on Commitments in Financial Services ("Understanding")[1] is a part of the Final Act of the Uruguay Round but not of GATS, as are the Annexes to GATS according to Art. XXIX. Instead, the Understanding describes itself, in its introductory clauses, as an **"alternative approach"** to the regulation of specific commitments in Arts XVI–XVIII.[2] It was "designed as a formula or template for commitments"[3] and is, "in effect, a **model schedule**, albeit a particularly complicated one".[4] Dissatisfied with the extent of substantive liberalization in the sector, a group of developed, mostly OECD countries, including the (then twelve) EU Member States, the USA, Japan, Australia, and New Zealand, drafted the Understanding. It has **no legal force *per se*** but is given binding legal force Member-by-Member through reference in the given Member's Schedule of specific commitments.[5] Almost forty Members (counting EU Member States separately) have incorporated the Understanding in their Schedules of specific commitments.[6]

B. Legal Status

2 The Understanding has a **unique legal status** within the WTO.[7] While it shares some characteristics with a ministerial decision, a protocol to GATS, a plurilateral agreement, and especially the Reference Paper on Basic

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[1] Understanding on Commitments in Financial Services, LT/UR/U/1, 15 April 1994.

[2] For the authors' complete assessment of trade in financial services under GATS in this volume, see also *von Bogdandy & Windsor*, Annex on Financial Services and *von Bogdandy & Windsor*, Fifth Protocol to the General Agreement on Trade in Services.

[3] *Trachtman*, Colum. J. Transnat'l L. 34 (1995), 37, 70.

[4] *Key*, in: *Macrory et al.* (eds), 955, 958, 985–986 (emphasis added).

[5] The Understanding has not yet been the subject of a dispute before the WTO's Dispute Settlement Body (DSB). It was used as an example, however, in a dispute over the scheduling of commitments. See Panel Report, *US—Gambling*, WT/DS285/R, paras 3.35, 6.104.

[6] As of February 2007, Members which had inscribed the Understanding were Australia, Canada, the EC and its Member States, Iceland, Japan, Liechtenstein, New Zealand, Nigeria, Norway, Sri Lanka (for banking and other financial services (excluding insurance)), Switzerland, Turkey, and the US, thus accounting for thirty-nine states, including all OECD states except Mexico and South Korea.

[7] See, e.g., *Key*, in: *Macrory et al.* (eds), 955, 957–958 (calling the Understanding "a unique additional element" specific to financial services).

Telecommunications, the Understanding ultimately has a **legal status *sui generis***. It has no legal force *per se*; rather, its provisions acquire binding effect through insertion of a headnote in the financial services section of a Member's Schedule of specific commitments. Other Members have inscribed it as an additional commitment in the sense of Art. XVIII. Such a **headnote or additional commitment** states that the Member's Schedule of commitments is made in accordance with the Understanding or that the provisions of the Understanding apply, **thus incorporating** it into the Schedule and thereby making it an integral part of GATS and subject to the WTO dispute settlement mechanism.[8] Reservations to the Understanding itself can also be written into the Schedule of commitments, as contemplated by the final sentence of its introductory clauses and Art. XX:1–2. During the Uruguay Round, the substance of the Understanding was in negotiation to become part of the GATS Annex on Financial Services but ultimately did not garner sufficient support.[9]

According to para. 1 of the Final Act of the Uruguay Round, the Understanding "form[s] and integral part of this Final Act".[10] As the Understanding is not part of GATS, it appears as an **independent document** after the set of "Ministerial Decisions and Declarations" and before the Marrakesh Declaration of 15 April 1994.[11] Notably, all of these decisions and declarations begin with the formulation "Ministers [...]", usually then using "decide", "invite", or "agree". This is conspicuously lacking at the beginning of the Understanding. The Understanding resembles the four Protocols to GATS,[12] each of which was essentially a negotiated set of new commitments, annexed to the text of the respective Protocol, each of which entered into force at a given date for Members that annexed commitments and lists of most-favoured-nation (MFN) exemptions. The Understanding, in contrast, is not a negotiated set of full commitments; rather, it is only an **option for a Member's Schedule**. Similarly, the Understanding resembles *3*

[8] See Art. XX:3; Appendix 1 lit. B DSU; *US—Gambling*, WT/DS285/R, paras 6.44–6.55; Appellate Body Report, *US—Gambling*, WT/DS285/AB/R, para. 160.

[9] See *Trachtman*, Colum. J. Transnat'l L. 34 (1995), 37, 70.

[10] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, LT/UR/A/1, 15 April 1994.

[11] Respectively, Decisions on Measures in Favour of Least Developped Countires, ILM 33 (1994), 1248–1260 and Marrakesh Declaration, ILM 33 (1994), 1263–1265; Uruguay Round, Trade Negotiations Committee, Communication from the Chairman MTN.TNC/W/143/Rev.1, 05 April 1994.

[12] Regarding the Second and Fifth Protocols on financial services, see *von Bogdandy & Windsor*, Annex on Financial Services, paras 7, 9–10. The Third and Fourth Protocols pertain, respectively, to movement of natural persons and basic telecommunications. The First Protocol was originally intended to deal with the Schedules of least-developed country Members, but it was never adopted. See Committee on Trade in Financial Services, Issues concerning the Adoption of a Protocol to Conclude the Financial Services Negotiations, Note by the Secretariat, S/FIN/W/11, 1 May 1997, 1, footnote 1.

but cannot specifically be categorized as a plurilateral trade agreement.[13] These agreements, like the Understanding, only bind Members that have adopted them. However, within the WTO framework, plurilateral trade agreements have a specific legal status which the Understanding lacks;[14] additionally, the triggering or elimination of the Understanding's normative effect through a Member's Schedule is different than accession to and withdrawal from a plurilateral trade agreement.[15] The Understanding's **closest relative**, in terms of legal status, may be the Reference Paper on Basic Telecommunications, sometimes also referred to as the Reference Paper on Regulatory Principles.[16] Thus far, this is the only reference paper in existence, although others have been proposed.[17] From one point of view, both the Reference Paper on Basic Telecommunications and the Understanding have "no legal status per se"[18] but become binding through incorporation by reference in a Member's Schedule. In terms of its legal effect, then, the Reference Paper on Basic Telecommunications is similar to the Understanding; whether or not the two share a single legal status, however, depends on what legal significance, if any, one ascribes to the fact that the Understanding has both a WTO document symbol (LT/UR/U/1) and is an integral part of the Final Act of the Uruguay Round.

C. Introductory Clauses

4 The Understanding's introductory clauses refer to the Understanding as an **"alternative approach"** to Part III of GATS (Arts. XVI–XVIII) which deals with specific commitments. The introductory clauses contain **four limitations on the applicability** of the Understanding: (i) the approach is not meant to permit conflict with GATS generally; (ii) it does not preju-

[13] The Understanding has been, in passing, compared with plurilateral agreements. See, *e.g.*, *Jarreau*, N.C.J. Int'l L. & Com. Reg. 25 (1999), 1, 39; *Nottage & Sebastian*, JIEL 9 (2006), 989, 1013–1014. It has even been called "one of a small family of plurilateral agreements that are part of the GATT-WTO system". *Kennedy*, Wis. Int'l L.J. 16 (1998), 421, 494, footnote 254.

[14] Plurilateral trade agreements are referred to in Arts II:3, III:1, IV:8, IX:5, X:9–10, XII:3, XIII:5, XIV:4, XV:2, XVI:5 WTO Agreement; Arts 2.1, 3.9, 22.3 lit. g (i), Appendix 1 lit. C, Appendix 2 DSU; section A (i), section D TPRM.

[15] See *Nottage & Sebastian*, JIEL 9 (2006), 989, 1012–1014 (categorizing the Understanding and the Reference Rules together, as a form of new WTO agreement, under the heading "Agreements accepted through entries in Schedules ('Reference Rules')").

[16] ILM 36 (1997), 367; also available at <http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm> (last visited 1 October 2007). See *Gao*, Telecommunications Services: Reference Paper.

[17] The EC, for example, has proposed a Reference Paper for postal and courier services. See Council for Trade in Services, Special Session, Communication from the European Communities and Their Member States, Postal/Courier: Proposal for a Reference Paper, TN/S/W/26, 17 January 2005.

[18] *Nottage & Sebastian*, JIEL 9 (2006), 989, 1013.

dice any Member's right to schedule its specific commitments in accordance with Part III of GATS; (iii) commitments made by inscription of the Understanding must be **on a MFN basis**, even with respect to WTO Members who have not inscribed the Understanding; and (iv) a Member's inscription of this approach in its Schedule sets no presumptive degree of actual commitments or liberalization under GATS. The final sentence of the introductory clauses makes clear that a Member may make reservations to the Understanding when it is inscribed in the Schedule of specific commitments: "Interested Members, [...] subject to conditions and qualifications where specified, have inscribed in their Schedule specific commitments conforming to the approach set out below".

D. Standstill (Section A)

Perhaps the most significant discipline in the Understanding is section A, the standstill provision.[19] This **fixes the *status quo* of financial services regulation** as a minimum, below which a Member, after binding itself to the Understanding, may not lower its level of trade liberalization. Read in conjunction with introductory clause (iii) of the Understanding, this freezes the *status quo* with respect to all WTO Members. In other words, any measures not in conformity with the Understanding's alternative approach to commitments must predate the Member's inscription of the Understanding in its Schedule. This stipulation reflects the interested Members' concern that GATS permits Members to inscribe commitments at a level of liberalization worse than the *status quo*, whether to allow for future restriction or to reserve bargaining chips for future (cross-sectoral) negotiations.[20] *5*

E. Market Access (Section B)

Section B significantly **modifies** the model **list of prohibited market access restrictions in Art. XVI:2**. As with Art. XVI:2, the Understanding is subject to reservations a Member makes when inscribing its commitments; the respective language is "unless otherwise specified in its Schedule" in the *chapeau* of Art. XVI:2 and "subject to conditions and qualifications where specified" in the introductory clauses to the Understanding. *6*

[19] The Annex on Art. II Exemptions has a somewhat similar standstill provision in para. 2, according to which no new MFN exemptions after the WTO Agreement's entry into force may be made without going through the rigorous waiver procedure under Art. IX:3 WTO Agreement. See *Wolfrum*, Annex on Article II Exemptions, para. 2.

[20] See *Mattoo*, World Econ. 23 (2000), 351, 371–372; *Ohler*, ZEuS 5 (2002), 321, 356; *Leroux*, JWT 36 (2002) 3, 413, 433; *Gkoutzinis*, Int'l Law. 39 (2005), 877, 905.

I. Monopoly Rights (Section B(1))

7 Section B(1) applies **in addition to Art. VIII**, which for its part requires a Member to ensure that service suppliers with monopoly rights do not undermine the Member's obligations under the MFN discipline or its specific commitments, regardless of whether such a violation occurs within or beyond the scope of the granted monopoly. Section B(1), firstly, requires the Member to **list in its Schedule any existing monopolies** in the financial services sector and, secondly, obligates the Member to **"endeavour" to eliminate such monopolies or to reduce their scope**. The use of the term "endeavour" does not require any specific level of achievement.[21] These requirements also apply to the supply by public entities of certain financial services (listed in para. 1 lit. b (iii) of the Annex on Financial Services) that would otherwise fall outside the scope of GATS, if not for the inscription of the Understanding in the Member's Schedule. In other words, the requirements of section B(1) also apply to activities performed for the account or with the guarantee or using the financial resources of the government.

II. Financial Services Purchased by Public Entities (Section B(2))

8 Art. XIII exempts government procurement of services for governmental, non-commercial purposes from the disciplines of MFN, market access, and national treatment. This highlights the importance of section B(2) which **puts government procurement by public entities**[22] **under the disciplines of MFN and national treatment**. A Member must ensure that non-national suppliers are accorded MFN and national treatment in competition for government contracts. However, this applies only with respect to financial service suppliers **"established"** within its territory. "Established" is not defined, but the drafters of the Understanding used some form of the word "establish" three times in direct connection with "commercial presence": section B(5), B(6), and B(9) lit. a. In turn, "commercial presence" is defined broadly in section D(2) of the Understanding. While not explicit, it seems reasonable to assume that "established" financial service suppliers means those with a commercial presence in the territory of the Member whose government is procuring financial services.[23]

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[21] See *Leroux*, JWT 36 (2002) 3, 413, 434, footnote 103.
[22] "Public entity" is defined in para. 5 lit. c of the Annex on Financial Services.
[23] See *Zacharias*, Article XIII GATS, para. 28.

III. Cross-Border Trade (Section B(3) and B(4))

1. Cross-Border Trade (Section B(3))

9 Regarding the cross-border mode of financial services supply, the Understanding requires a Member which has committed itself to the Understanding to **permit non-resident suppliers** of financial services,[24] whether as a principal, through an intermediary, or as an intermediary, **to supply certain financial services**. In so permitting, the Member must also afford national treatment. These services are listed in three subparas: The first (lit. a) regards insurance of risks relating to maritime shipping, commercial aviation, space launching, space freight (including satellite transport), and goods in international transit (generally, MAT insurance, that is, *m*arine, *a*viation, and *t*ransport insurance). Such insurance may cover the transported goods, the transporting vehicle, potential liability, or any combination of the above. The next subpara. (lit. b) lists reinsurance, retrocession, and auxiliary services such as consultancy, actuarial services, risk assessment, and claim settlement services. And the third subpara. (lit. c) adds, firstly, the provision and transfer of financial information and financial data processing, including related software by suppliers of other financial services and, secondly, advisory and other auxiliary services, excluding intermediation,[25] relating to banking and other non-insurance financial services. The latter may include credit reference and analysis, investment and portfolio research and advice, and advice on acquisitions and on corporate restructuring and strategy.

10 **"Principal"** and **"intermediary"** are not defined. However, when a given service falls within the above scope, it should not matter exactly what legal nature the financial service provider has. The scope of cross-border services regulated by section B(3) itself may be relatively narrow, approximating the level of integration at the time of drafting among the states most important in the financial services sector. This may have been a result of hesitance due to the difficulty of directly supervising cross-border transactions and the resultant difficulty of protecting domestic investors.[26] Even if the provision did not generally require further liberalization, section B(3) did set a minimum standard of openness to cross-border supply of financial services for relevant Members—and a potential standard for Members that have not yet inscribed the Understanding in their Schedules.

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[24] Section D(1) supplies the definition of "non-resident supplier of financial services". See below, para. 28.

[25] Bloomberg's online Financial Glossary defines intermediation succinctly as "Investment through a financial institution". See <http://www.bloomberg.com/invest/glossary/bfglosi.htm> (last visited 1 October 2007). The Understanding's explicit exclusion of intermediation services was possibly due to the assumption that such services are ancillary to the right to establish a commercial presence, as regulated in section B(5).

[26] *Leroux*, JWT 36 (2002) 3, 413, 435–436.

11 **2. Consumption Abroad (Section B(4))**

Mode 2 of service supply according to Art. I:2 is **consumption abroad**. The Understanding lacks a separate heading for this mode, probably owing to the difficulty in distinguishing between cross-border trade and consumption abroad, since the distinction presupposes that the place of delivery is evident and static.[27] In actuality, both supplier and consumer may not be a single natural person, and the service may not take place only at a single point in time. Technological advances and increasing levels of e-commerce make such an assumption problematic. At any rate, section B(4) obligates adhering Members to **permit their own residents to purchase the listed financial services in any other Member's territory**. Lit. a and b simply make cross-reference to the financial services listed in section B(3) lit. a and lit. b.[28] But section B(4) lit. c is much broader than its counterpart in the previous para. Here, a Member which has scheduled the Understanding must permit consumption abroad of the entire listing of banking and other financial services (excluding insurance), as defined in para. 5 lit. a (v)–(xvi) of the Annex on Financial Services. In line with its more liberalized alternative approach, the Understanding here demands a broad specific commitment regarding consumption abroad, especially of banking services. Section B(4) may be somewhat **broader** in coverage than section B(3) **because** of the apparently lesser need to supervise and regulate consumption abroad as opposed to cross-border supply—although, again, the distinction between the two modes may not always be readily apparent.

IV. Commercial Presence (Section B(5) and B(6))

12 Section B(5) requires a Member to grant other Members' financial service suppliers the **right to establish or expand a commercial presence** in the granting Member's territory. It should be noted that expansion includes acquisition of existing enterprises. With the broader definition of "commercial presence" for purposes of the Understanding,[29] this provision is highly significant, particularly in terms of retail banking and the sale of insurance to individuals.[30] This mode of financial service supply can be roughly equated with foreign direct investment.[31] This right of market

[27] See *Gkoutzinis*, Int'l Law. 39 (2005), 877, 894; *Key*, in: *Macrory et al.* (eds), 955, 973; *Morrison*, Sing. J. Int'l & Comp. L. 5 (2001), 593, 599–600; Committee on Trade in Financial Services, Technical Issues Concerning Financial Services Schedules, Note by the Secretariat, S/FIN/W/9, 29 July 1996, paras 10–12.

[28] See above, para. 9.

[29] In section D(2); see below, para. 29.

[30] See *Leroux*, JWT 36 (2002) 3, 413, 436.

[31] *Key*, in: *Macrory et al.* (eds), 955, 962; *Murinde & Ryan*, in: *Mullineux & Murinde*, 751, 759; *Thomas*, Ann. Rev. Banking L. 21 (2002), 323, 328. *Thomas* points out that the drafters of the Annex on Financial Services avoided any ambiguity as to the differentiation between foreign services and foreign direct investment by including the latter as a service, specifically as a

access granted to foreign financial service suppliers is, in turn, **limited** by the subsequent para., section B(6). This latter provision explicitly **permits a Member to impose terms, conditions, and procedures for authorization** of such establishment or expansion of a commercial presence; however, the imposition of such measures **may not "circumvent"** either the basic obligation in section B(5) or other GATS obligations. The vague term is also used in section B(8). Interpretation of the term should also take into account the term **"avoid"**, as used in, for example, the prudential carve-out in para. 2 lit. a of the Annex on Financial Services[32] and the rich case law on the *chapeau* of Art. XX GATT 1994, as it performs a similar function. It seems reasonable to assume that "circumvent" is equivalent to "avoid".[33]

V. New Financial Services (Section B(7))

Section B(7), in conjunction with section D(3), grants a financial service supplier established in the territory of another Member the **right to offer any new financial service**, meaning one that is already offered in the territory of another Member but not yet in the territory in question.[34] A **"new" financial service** is not one that has not yet been offered anywhere; rather, it must be already being supplied in the territory of another Member. A Member must afford this right to financial service suppliers "established in its territory". **"Established"** is not defined, but the drafters of the Understanding used some form of the word "establish" three times in direct connection with "commercial presence": section B(5), B(6), and B(9) lit. a. "Commercial presence", in turn, is broadly defined in section D(2) of the Understanding. While not explicit, it seems reasonable to assume that "established" financial service suppliers means those with a commercial presence in the territory of the host Member. *13*

This provision **preserves the competitive advantage of innovative financial institutions** in foreign and more traditional markets by preventing the host Member from inhibiting innovation. Thus, for instance, if an international bank is already offering an innovative financial service in its home country, a host country cannot refuse to authorize that service simply because its domestic banks do not (yet) offer the same service and would *14*

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financial service supplied in mode 3, commercial presence. *Ibid.* at 328–329; but see *Jarreau*, N.C.J. Int'l L. & Com. Reg. 25 (1999), 1, 56 (suggesting that foreign direct investment is still only in an "investigative or exploratory stage" in WTO negotiations).

[32] *Jarreau* cites a series of documents as a "non-scientific survey of WTO and GATT dispute settlement records", supporting the equation of circumvention and avoidance within the WTO framework. See *Jarreau*, N.C.J. Int'l L. & Com. Reg. 25 (1999), 1, 60, footnote 397.

[33] For the authors' discussion of the term "avoiding" in the prudential carve-out, see *von Bogdandy & Windsor*, Annex on Financial Services, paras 23–24.

[34] The definition is discussed below, para. 30.

thus be at a competitive disadvantage. However, as always, the prudential carve-out may be invoked if the disadvantage is drastic enough to necessitate prudential measures, for example, to protect investors or policy holders.

VI. Transfers and Processing of Information (Section B(8))

15 The importance of cross-border transfer of information to an internationally active financial institution can hardly be overstated. As technology and e-commerce continue to develop, this importance is likely to increase in step. Therefore, the Understanding **bars a Member from taking two types of measures that prevent transfer of information**: those that prevent transfers of information or the processing of financial information, including electronic transfer, and those that prevent transfers of equipment, subject to importation rules consistent with international agreements (such as GATT). Both of these prohibitions are **subject to two limitations**. First, their scope is limited to (that is, they only prohibit the prevention of) transfers and processing that are necessary for the conduct of a financial service supplier's ordinary business; second, they do not in any way restrict the Member's right to protect personal data, personal privacy, or the confidentiality of individual records and accounts, so long as this right is not used to "circumvent" obligations under GATS. Here, as with section B(6), "circumvent" is not defined, but it is reasonably arguable that circumvention is equivalent to avoidance.[35] The confidentiality provision relates specifically to the market access commitments made under section B(8), and it thus reinforces the confidentiality protections in para. 2 lit. b of the Annex on Financial Services, Art. IIIbis, and Art. XIV lit. c (ii).

VII. Temporary Entry of Personnel (Section B(9))

16 The Understanding also addresses services supplied through the temporary presence of natural persons (mode 4), although section B(9) may actually pertain more to commercial presence (mode 3).[36] Section B(9) requires a Member to **permit the temporary entry of certain personnel** of a

[35] *Jarreau* cites a series of documents as a "non-scientific survey of WTO and GATT dispute settlement records", supporting the equation of circumvention and avoidance within the WTO framework. *Jarreau*, N.C.J. Int'l L. & Com. Reg. 25 (1999), 1, 60, footnote 397. For the authors' discussion of the term "avoiding" in the prudential carve-out, see *von Bogdandy & Windsor*, Annex on Financial Services, paras 23–24.

[36] This is the opinion of *Ohler*, who views section B(9) as an accessory right derived from mode 3. See *Ohler*, ZEuS 5 (2002), 321, 357. *Jarreau* takes a different view, dealing with section B(9) as mode 4. See *Jarreau*, N.C.J. Int'l L. & Com. Reg. 25 (1999), 1, 60–61. Arguably, section B of the Understanding itself seems to understand the provision as relating to the mode 4, since the other modes seem to be covered chronologically in section.

financial service supplier of any other Member into its territory.[37] **Section B(9) lit. a** applies with respect to another Member's financial service supplier "that is establishing or has established a commercial presence", which is to say, the supplier need not already have established a commercial presence in the host country. The entitled personnel are subdivided into two groups. Members of the first group must be **senior managerial personnel** and must possess proprietary information essential to the establishment, control, and operation of the services of the financial service supplier. While this group remains vaguely defined, it is at least clear that not all management, and not even necessarily all senior management, fall within its scope. The second group must be **specialists in the operation** of the financial service supplier. Here, too, the exact contours of the group are not readily identifiable. It seems reasonable to assume that the specialization must be, to some degree, peculiar to the company in question or to the activity it carries out, and this based on objective, articulable criteria.

17 The second provision, **section B(9) lit. b**, applies with respect to another Member's financial service suppliers that have already established a commercial presence in the host Member's territory. This provision is also subdivided into two groups of entitled personnel: the first includes **specialists in computer services, telecommunication services, and accounting**, and the second group comprises **actuarial and legal specialists**. Importantly, this para. is explicitly "subject to the availability of qualified personnel" in the host Member's territory. This qualification permits a Member to prescribe the use of local specialists, when available. It also bears mentioning that section B(9) lit. b applies to the named "personnel **associated** with a commercial presence of a financial service supplier",[38] suggesting that the category "legal specialists" for instance is not limited to **in-house** counsel.

18 Both of the **listings of permissible personnel are vague** in order to apply both to numerous financial sectors, each with its own peculiar employment constitution, and to numerous financial companies, each with its own peculiar corporate policies. Thus, disputes may arise, for example, as to whether a given employee can be considered a **"specialist"** in the operation of a financial service supplier. Such **disputes will have to be dealt with based on, *inter alia*, qualifications, expertise, and experience**. The duration of **"temporary entry"** is also undefined, but a narrow reading would set the expiration of the right to temporary residence, for personnel involved in establishing an enterprise, at the point in time

[37] See *Bast*, Annex on Movement of Natural Persons Supplying Services Under the Agreement, paras 57–59.
[38] Emphasis added.

when the enterprise becomes fully operational and, for personnel involved with an enterprise that is already operational, at the point in time when the specific circumstances that necessitated the involvement cease to exist.[39] However, it seems reasonable to construe "temporary entry" in **contradistinction to "employment on a permanent basis"** as used in para. 2 of the Annex on Movement of Natural Persons.[40] According to Members' practice, under certain circumstances a stay lasting several years can still be considered "temporary". It has also been suggested that the use of the term **"personnel"** may implicitly require an employer-employee relationship to the exclusion of independent subcontractors.[41] Furthermore, section B(9) seems sceptical of professional licences and denominations: it uses the term "legal specialists" instead of "lawyers" or "attorneys"[42] and uses "specialists in [...] accounts" instead of "accountants". The focus, for purposes of establishing or expanding a commercial presence abroad, is on expertise rather than on credentials.

19 Finally, it is worth emphasizing that the Understanding's provisions on temporary entry of personnel do not derogate from the Annex on Movement of Natural Persons, in particular para. 4, which affirms that GATS does not prevent a Member from regulating and controlling its borders.[43] The Understanding does not preclude all restriction of the temporary entry of personnel. Visa requirements and a procedure for determination of expertise come to mind as examples of measures that could reasonably be consistent with both the Annex on Movement of Natural Persons and the Understanding.

VIII. Non-Discriminatory Measures (Section B(10) and B(11))

20 The Understanding also addresses **measures that are facially non-discriminatory** and seeks to **eliminate or reduce any significant, adverse effects they have on liberalization** of trade in financial services. Both section B(10) and B(11) use the term "endeavour" and thus involve only "best efforts" commitments.[44] According to section B(10), each Member following the Understanding's alternative approach must **"endeavour to remove or limit any significant adverse effects"** of the following four types of measures on foreign financial service suppliers: (a) non-discriminatory measures that prevent a financial service supplier from offering the full range

[39] See, *e.g.*, *Jarreau*, N.C.J. Int'l L. & Com. Reg. 25 (1999), 1, 60.
[40] See *Bast*, Annex on Movement of Natural Persons Supplying Services Under the Agreement, paras 41–42.
[41] *Jarreau*, N.C.J. Int'l L. & Com. Reg. 25 (1999), 1, 61.
[42] *Ibid.*
[43] See *Bast*, Annex on Movement of Natural Persons Supplying Services Under the Agreement, paras 54–65.
[44] See *Leroux*, JWT 36 (2002) 3, 413, 434, footnote 103, 438–439.

of financial services permissible within the territory of the host Member, that is, measures that fragment the financial services sector, thereby limiting competition; (b) non-discriminatory measures that limit a financial service supplier's expansion into the entire territory of the host Member, usually through restrictions on establishment of branches or subsidiaries in other regions;[45] (c) measures that apply both to banking services and to securities services when a foreign financial service supplier concentrates its activities on supplying the latter, essentially meaning that non-bank companies dealing largely, but not necessarily exclusively, in securities should not be subjected to the full scope of the regulatory regime for banking services; and (d) any other measures adversely affecting non-national suppliers from operating in, competing in, or entering a Member's financial services market. Importantly, such efforts to eliminate or reduce the adverse effects of these four sets of measures **need not be undertaken if doing so would "unfairly discriminate" against domestic suppliers** of financial services. "Unfair discrimination" is not defined, but, since section B(10) is not a commitment to a certain level of achievement anyway, this final clause can be read as an assurance that combating discriminatory effects need not mean permitting reverse discrimination against domestic service suppliers. Ultimately, any claim that another Member is overextending this proviso would be difficult to maintain against the tempered language of the provision.

21 Section B(11) further regulates the effects of the non-discriminatory measures listed in section B(10) lit. a and lit. b. A Member is to **"endeavour" not to restrict the *status quo* of market opportunities nor generally-enjoyed benefits**, again, provided that this does not result in unfair discrimination against the financial service suppliers of the host Member. This acts as a sort of **standstill provision** specific to facially non-discriminatory measures regarding market access, reaffirming the fundamental obligation in the Understanding, the standstill provision in section A,[46] but also highlighting the fact that *prima facie* non-discriminatory regulation can impede liberalization more invidiously than open discrimination inscribed in a Member's Schedule, because the latter is more susceptible to political pressure, negotiation, and progressive liberalization.

22 It may also be worth noting that section B(11) requires a Member to endeavour not to restrict benefits enjoyed **generally** "by financial service suppliers **of all other Members as a class**".[47] ***A contrario***, market

[45] This may be particularly likely to occur, and particularly problematic to resolve, in federal states where sub-national regulation differs. The US federal system is a former culprit. See *Leroux*, JWT 36 (2002) 3, 413, 439, footnote 126; *Jarreau*, N.C.J. Int'l L. & Com. Reg. 25 (1999), 1, 52–53.

[46] See above, para. 5.

[47] Emphasis added.

access benefits enjoyed **exceptionally** by the service suppliers of select Members may presumably be eliminated. The Understanding apparently permits limited de-liberalization in respect of certain countries as a trade-off for the increase in MFN treatment across the sector.

23 Both section B(10) and B(11) are ambivalent. There is more than a little tension between the respective "shall endeavour" clauses and the "provided that" clauses. **Both paras should be read as seeking to obtain equivalence** of regulation of financial service suppliers, accounting for both the importing and the exporting Member's regulation.[48] The sheer complexity of regulation in the financial sector may subvert the competitive position of foreign companies. In this sense, the problems arise less from discriminatory measures or effects than from the fact of regulatory diversity, which can overburden non-national suppliers of financial services with potentially redundant regulatory regimes. Put succinctly: "differences across countries can increase the cost of transactions consummated and [the costs incurred by] firms operating across national boundaries".[49] Thus, when a supplier of financial services is subject both to home/exporting and host/importing country regulations, it may be proper, in order to promote aggregate equivalence, to **exempt the supplier from host country regulation that is substantially similar** in terms of costs or protection. In addition, the footnote to Art. XVII:1 makes clear that nothing in GATS's national treatment discipline requires a Member "to compensate for any inherent competitive disadvantages" due to regulatory diversity.[50]

F. National Treatment (Section C)

24 Section C expands on the national treatment provision in Art. XVII, providing specific ways in which Members adhering to the Understanding commit to afford national treatment to other Members' financial service suppliers. Section C(1) **requires national treatment** regarding both **access to payment and clearing systems operated by public entities**[51] and **access to official funding and refinancing facilities**. Access to the latter, however, is limited to such funding and financing as is **"available in the normal course of ordinary business"**. Thus, a Member that has inscribed the Understanding in its Schedule need not afford national treatment to a foreign supplier of financial services with respect to extraordinary or emergency funding. Furthermore, section C(1)

[48] *Trachtman*, Colum. J. Transnat'l L. 34 (1995), 37, 78–79.

[49] *Gkoutzinis*, Int'l Law. 39 (2005), 877, 884; see generally *ibid.* at 883–886; *Key*, in: *Macrory et al.* (eds), 955, 976–977, 980–983.

[50] See *Krajewski & Engelke*, Article XVII GATS, para. 45.

[51] The Annex on Financial Services defines "public entity" in para. 5 lit. c.

explicitly excludes from its scope access to lenders of last resort; thus, a lender of last resort, usually a state's central bank acting in such a capacity, is not limited in how it may react to the threat of a major financial crisis. The provision obligates a Member to afford national treatment regarding the abovementioned access only to financial service suppliers of any other Member "established" in its territory. **"Established"** is not defined, but the drafters of the Understanding used some form of the word "establish" three times in direct connection with "commercial presence": section B(5), B(6), and B(9) lit. a. "Commercial presence" is, in turn, defined broadly in section D(2) of the Understanding. It seems reasonable to assume that "established" financial service suppliers are those with a commercial presence in the territory of the Member affording access to payment systems or funding facilities.

25 Section C(2) obligates a Member to ensure that any relevant entity accord **national treatment with respect to membership or participation in, or access to, any financial organization or association**, where such is necessary for another Member's financial service suppliers to supply financial services on an **equal basis with domestic suppliers**. Such organizations include, but are not limited to, self-regulatory bodies, securities or futures exchanges or markets, and clearing agencies. The second clause of section C(2) further extends the scope of national treatment to any situation where a Member, directly or indirectly, provides such entities, privileges, or advantages in supplying financial services. Taken together, the two clauses leave no doubt that the discipline of national treatment is to apply broadly to any and all institutional regulations. However, as with section C(1), the provision is limited in terms of beneficiaries; here, only financial service suppliers of another Member "resident" in the territory of the Member are afforded national treatment.

26 The financial service suppliers to whom national treatment is due under section C(1) and C(2) are respectively those **"established"** and **"resident"** in the territory of the Member under obligation. **Neither term is defined**.[52] The generally broad definitional scope of the Understanding militates in favour of a correspondingly broad scope of application of these two provisions. If, then, both terms can be equated with "commercial presence", as defined in section D(2), the national treatment mandated by section C would extend also to financial service suppliers with merely a representative office or a similarly low level of local presence.[53] This argument is persuasive in the case of "established", especially as a form of the word is used three times in direct connection with the term "commercial presence" in section

[52] See generally *Leroux*, JWT 36 (2002) 3, 413, 439–441.
[53] *Leroux*, JWT 36 (2002) 3, 413, 435.

B(5), B(6), and B(9) lit. a. However, the very use of an alternate term in such proximity is in and of itself a strong argument against a parallel reading of the term "resident". Section D(1) does define the term "non-resident supplier of financial services", from which one might infer that a "resident" supplier is one that supplies financial services within the territory of another Member from an establishment in that Member's territory but regardless of whether the supplier has a "commercial presence" there.[54] Of course, it remains unclear exactly what form of presence or institution could be considered "resident" and still fall below the extensive definition of "commercial presence" in section D(2) but still be something more than, for example, a temporary stay as contemplated in para. 4 of the Annex on Movement of Natural Persons.[55] Possibly, section C(2) is meant to be broad enough to encompass **natural** persons legally residing in a territory and intending to offer financial services, for instance, in the form of financial consulting. Recall that the basic definition of "financial service supplier" in para. 5 lit. b of the Annex on Financial Services encompasses natural or juridical persons wishing to supply, but not yet supplying, financial services.[56]

27 Some light might also be shed on the two terms by a look at which bodies are ultimately bound by the respective paras of section C. Para. 1 binds a Member regarding its public entities and official facilities; para. 2 binds a Member regarding membership and participation in possibly private entities ("the Member shall ensure that such entities accord national treatment"). Seen from this vantage point, the logic of section C may be that para. 1 assures national treatment to **already established financial service suppliers**, that is, those with a commercial presence, regarding official organizations and institutions, while para. 2 assures national treatment to **prospective financial service suppliers**, whether natural or juridical persons, seeking to **become established** through recourse to certain stock markets or exchanges, accrediting bodies, financial associations, etc. This, indeed, would go a long way toward clarifying the drafting intent, although it would still not clarify the ambiguity of content. Other than the natural person legally residing in a territory and wishing independently to supply financial services, it is difficult to find much definitional space between the non-resident supplier defined in section D(1) and the established supplier understood as one with a commercial presence, as broadly defined in section D(2).

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[54] *Leroux*, JWT 36 (2002) 3, 413, 440–441.

[55] See *Bast*, Annex on Movement of Natural Persons Supplying Services Under the Agreement, paras 54–69.

[56] See *von Bogdandy & Windsor*, Annex on Financial Services, para. 20.

G. Definitions (Section D)

I. Non-Resident Supplier (Section D(1))

28 The Understanding defines a "non-resident supplier of financial services" for purposes of its alternative approach.[57] A **non-resident supplier** is one which supplies financial services from an establishment in one Member's territory into the territory of another, regardless of commercial presence in the latter. The term appears only in section B(3),[58] regarding market access in the cross-border supply of financial services. Notably, modes 1, 3, and 4 are explicitly regulated in section B, but section B(4), which apparently deals with consumption abroad, fails to bear such a heading. The "invisibility" of services, as opposed to the tangibility of products under GATT, blurs the distinction between modes 1 and 2;[59] in apparent response, the definition of non-resident supplier perhaps simply reasserts the seamless coverage between cross-border services and consumption abroad, underscoring the fact that any inscribed restrictions on commercial presence (mode 3) do not affect the tradability of cross-border services or consumption of services abroad (modes 1 and 2).

II. Commercial Presence (Section D(2))

29 Section D(2) expands on Art. XXVIII lit. d, defining in detail **"commercial presence"** for the purposes of the financial services sector of Members adhering to the Understanding, in particular for section B(5), B(6), B(9) lit. a, and B(9) lit. b of the Understanding. In a non-exhaustive list, the definition includes enterprises including wholly- or partly-owned subsidiaries, joint ventures, partnerships, sole proprietorships, franchising operations, branches, agencies, representative offices, and other organizations. This definition **significantly broadens the general definition**, applicable to Members which have not inscribed the Understanding in their Schedules.[60]

III. New Financial Service (Section D(3))

30 The Understanding also defines a "new financial service", a term which appears in section B(7). A **new financial service** is one which no financial service supplier yet supplies in a particular Member's territory, but which

[57] Footnote 6 to Art. XIV lit. d also refers to "non-resident service suppliers", which may, under certain conditions, be differently taxed, Art. XVII notwithstanding. See *Cottier et al.*, Article XIV GATS, paras 48–50.

[58] See above, paras 9–10.

[59] See *Mattoo*, World Econ. 23 (2000), 351, 352 n. 3; *Gkoutzinis*, Int'l Law. 39 (2005), 877, 894 table; *Key*, in: *Macrory et al.* (eds), 955, 973.

[60] See *Jarreau*, N.C.J. Int'l L. & Com. Reg. 25 (1999), 1, 59.

is already being supplied in another Member's territory. Thus, as defined in the Understanding, the term does not denote a service that has not yet been offered anywhere. The term includes new services related either to products, whether new or existing, or to the method of product delivery. This expansive definition prevents a Member who follows the Understanding's approach from excluding innovative types of services merely because its domestic financial service suppliers do not (yet) offer the given service and would thus be at a competitive disadvantage.

H. Outlook

31 The Understanding—similar to the plurilateral agreements, the four protocols to GATS, and the Reference Paper on Basic Telecommunications—displays the flexibility of the WTO system. When negotiations have not been able to reach a compromise multilaterally, some subset of Members has been able to go ahead with liberalization of international trade. Although such variability in WTO law does raise the spectre of a WTO with multiple classes, such concerns are largely dispelled insofar as the legal commitments entered into are subject to the MFN discipline. When a Member inscribes the deepened commitments embodied in the Understanding into its Schedule of specific commitments, it *ipso facto* makes a statement about the level of development and openness of its financial sector. As regulation and harmonization continue to progress in the framework of GATS and in other fora in the international financial sector, the Understanding can be seen as a sort of credential for the stability of a state's financial market, not unlike, for example, meeting the minimum criteria for capital adequacy set by the Basel Committee on Banking Supervision in its Basel II framework, which is voluntary, but highly beneficial if met.[61] Particularly in the sometimes unwieldy structure of the GATS Schedules of specific commitments, the common model offered by the Understanding is a welcome means of fostering not only liberalization of trade in financial services, but also transparency in international law.

[61] See *Bank for Internatoinal Settlements*, Basel II: Revised international capital framework, <http://www.bis.org/publ/bcbsca.htm> (last visited 1 October 2007).

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Annex on Negotiations on Maritime Transport Services

1. Article II and the Annex on Article II Exemptions, including the requirement to list in the Annex any measure inconsistent with most-favoured-nation treatment that a Member will maintain, shall enter into force for international shipping, auxiliary services and access to and use of port facilities only on:
   a) the implementation date to be determined under paragraph 4 of the Ministerial Decision on Negotiations on Maritime Transport Services; or,
   b) should the negotiations not succeed, the date of the final report of the Negotiating Group on Maritime Transport Services provided for in that Decision.
2. Paragraph 1 shall not apply to any specific commitment on maritime transport services which is inscribed in a Member's Schedule.
3. From the conclusion of the negotiations referred to in paragraph 1, and before the implementation date, a Member may improve, modify or withdraw all or part of its specific commitments in this sector without offering compensation, notwithstanding the provisions of Article XXI.

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A. General

I. Overview

1 When Uruguay Round negotiations drew to a close in mid-December 1993, the Maritime Transport Services (MTS) sector was one of the few service sectors in which **agreement could not be reached**. While many other sensitive service sectors, such as telecoms or financial services, were eventually able to reach agreement on a general annex covering sector-specific liberalization principles, the maritime transport sector has—until today—found it impossible to do so.

2 Although it forms an integral part of the services agreement, in accordance with Art. XXIX, the Annex on Negotiations on Maritime Transport Services (Annex NMTS) does not contain any provisions of substance providing for the liberalization of the MTS sector. Quite the contrary is true: the Annex, together with the Ministerial Decision on Negotiations on MTS adopted by the Trade Negotiations Committee on 15 April 1994[1] and the Decision on Maritime Transport Services adopted by the Council for Trade in Services on 28 June 1996[2] provide for MTS—although formally covered by GATS—to be in practice mostly **excluded from the service agreement's liberalization disciplines**, despite many years of energetic maritime negotiations.

II. Purpose of the Annex NMTS

3 The Annex NMTS mainly serves **two purposes**: one is to provide—together with the (in this respect much more specific) Decision on Negotiations on MTS—the mandate for extended sectoral maritime negotiations beyond the

[1] Negotiating Group on Maritime Transport Services, Decision on Negotiations on Maritime Transport Services, LT/UR/D-5/5, 15 April 1994.

[2] Council for Trade in Services, Decision on Maritime Transport Services, Adopted by the Council for Trade in Services on 28 June 1996, S/L/24, 3 July 1996.

Uruguay Round,[3] the other is to temporarily suspend the most-favoured-nation (MFN) treatment obligation, Art. II, with regard to maritime transport services, as well as the requirement to register derogations in that sector[4] in order to avoid the recording of a mass of MFN exemptions that most Members would otherwise have undertaken in order to be able to maintain their maritime transport policies. The extensive recording of MFN exemptions in the maritime sector would only have cemented restrictions even further and would have made it even more difficult to negotiate away such explicitly listed MFN exemptions.

III. The Economic Importance of Liberal Maritime Transport Services Regimes

4 The MTS sector has always been of particular **economic significance**: first, as a major service sector in its own right, and, second, as an indispensable ancillary activity to trade in goods. It is estimated that fully 90–95 per cent by volume and weight of today's international trade in goods is carried by sea.[5] While the sector has traditionally been relatively open as compared with other service sectors, shipping is still characterized by a large variety of restrictions entirely excluding or discriminating against foreign MTS suppliers, thereby giving domestic suppliers a competitive advantage and distorting free competition. The effect of these restrictive practices is the artificial inflation of transport costs much to the detriment not only of shippers and end consumers but also of the export and general trade performance of those countries applying the measures.[6]

IV. Maritime Transport Services in the Uruguay Round

5 Once it had been resolved by the trade negotiators that the sectoral coverage of the future service agreement was to be as broad as possible, and that as a rule no commercially tradable service sector was excluded from negotiations on an *a priori* basis,[7] discussions of substance on MTS within the Uruguay Round framework began in 1990.[8] A **Working Group on MTS** was set

[3] See below, para. B.

[4] See below, para. C.

[5] See only *Kite-Powell*, in *Steele et al.* (eds), 2768, 2769; For an overview of the MTS sector including regulatory developments, see Council for Trade in Services, Special Session, Maritime Transport Services, Background Note by the Secretariat, S/CSS/W/106, 4 October 2001.

[6] *Amjadi & Yeats*, 1; for a summarizing overview of the economic impact of maritime transport costs, see *Parameswaran*, 51 *et seq*.

[7] Multilateral Trade Negotiations, Mid-Term Meeting, Review Report, MTN.TNC/11, 21 April 1989, para. 5.

[8] For a detailed overview of maritime transport negotiations in the Uruguay Round, see *Parameswaran*, 247 *et seq*.

up to develop rules for liberalization reflecting the specificities prevailing in the MTS sector. While many crucial issues had been debated (ranging from the applicability of the principles of national treatment, market access and MFN treatment to shipping over prohibitions on countries unilaterally regulating access to their international shipping trades to excluding cabotage trades[9] from coverage), and even a general consensus had developed that a special maritime annex addressing the specificities of that service sector would be needed, the positions taken on the form and function of such an annex or on the specific provisions requiring annotations clearly diverged.

6 In parallel to the discussions in the Working Group, the EC had developed a fairly ambitious **Draft Sectoral Annex on Maritime Transport**[10] that could have provided a solid basis for fostering the maritime discussions. However, due to disagreement among EC Member States on the issue of whether or not cabotage trades should be covered, it was never tabled officially.[11]

7 Likewise, the much less ambitious **Maritime Transport Services Annex prepared by the GATT Secretariat** as part of the Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations,[12] and even the far-reaching so-called Nordic Proposal[13] that covered the politically sensitive cabotage issue and contained standstill and rollback commitments[14] met resistance from many less developed countries and did not obtain a consensus of Members.

8 The informally circulated so-called **Carlisle Paper** suggested a three-way break-down of the maritime sector into the so-called **three pillars of maritime transport**: international shipping ("the first pillar"), auxiliary services ("the second pillar") and access to and use of port services ("the third pillar").[15] The division into three pillars was generally perceived as a means to facilitate negotiations and enable Members to offer substantive

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[9] Cabotage can be defined as the transportation of goods within the borders of one country.

[10] European Commission, Uruguay Round / Trade in Services—Draft Sectoral Annex on Maritime Transport, 113 Committee, Doc. Séance 381/90, 7 September 1990.

[11] See also OECD, GATT Trade in Services Framework and Maritime Transport Sectoral Annex, DSTI/SI/MTC(91)7, 14 May 1991, 3.

[12] Trade Negotiations Committee, Uruguay Round, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Part 3, MTN.TNC/W/35–3/Rev.1, 3 December 1990, Annex II.

[13] Group of Negotiations on Services, Uruguay Round, Communication from Sweden on Behalf of the Nordic Countries, Proposal for a Common Approach to Maritime Transport Services Under the GATS Agreement, MTN.GNS/W/135, 17 September 1991.

[14] A "standstill" commitment implies an obligation not to impose any new restrictions negatively affecting trade in MTS. "Rollback" means that existing restrictive or trade-distorting measures are to be removed.

[15] See OECD, Trade in Services—The Outcome of the GATT Discussions Concerning a General Agreement on Trade in Services, DSTI/SI/MTC(92)15/REV1, 12 June 1992, 4.

commitments, taking due regard of the sector's complexities. However, major maritime players objected to the Paper's proposal to have only developed countries adopt the liberalization instruments provided for by it, while many developing countries would have maintained their protectionist maritime policies.

9 With the aim of reviving some momentum in the maritime negotiations, the EC put forward informal scheduling considerations for shipping, including an illustrative **"ideal" or "model schedule"** based on the three pillars of maritime transport.[16] The model schedule was an acknowledgement of the fact that it was simply not possible in the maritime negotiations to agree on a general annex containing principles for liberalization, so the model schedule had been developed in its place to be used by delegations on a voluntary basis to construct their offers. It was meant to demonstrate what might be appropriate commitments in the three pillars of the MTS sector.

10 Although the EC-led activities to accelerate progress in the maritime negotiations were welcomed, and it was agreed to take the scheduling proposals and the draft ideal schedule on international shipping as a basis for further discussions, the offers submitted by the Members showed that many important maritime nations responded only very hesitantly to maritime sector negotiations, above all the US whose draft offers did not contain any commitments on MTS. When Uruguay Round negotiations drew to a close in mid-December 1993, it became clear that an agreement securing the progressive liberalization of the MTS sector could not be achieved. Despite the fact that **failure to agree on a multilateral package** of comprehensive commitments by a critical mass of important maritime nations can be attributed to a variety of reasons,[17] the main problem was certainly the reluctance of the US to table an offer on MTS. Many less developed countries felt that their poor economic performance did not allow them to make a substantial offer, particularly in the absence of a US offer. But also the EC argued that an agreement was desirable only if it had the full participation of the Americans. The US, on the other hand, stated that the commitments offered by most major developing countries were not sufficient to justify an offer on its part. Moreover, the fact that the shipping industry on both sides of the Atlantic vigorously opposed the inclusion of shipping in the GATS framework has certainly also contributed to the negative outcome of the negotiations.[18] Therefore, despite the fact that a considerable amount

[16] European Commission, Uruguay Round / Trade in Services—Maritime Transport Consultations, Comité 113, Doc. Séance 332/92, 13 November 1992.

[17] For a detailed description, see *Parameswaran*, 278 *et seq*.

[18] While resistance by the European maritime industry was primarily based on the fear that the inclusion of shipping in GATS would lead to a less liberal market for maritime transport services, the US maritime industry was mainly afraid of losing preferences granted to them under a number of US laws (above all under the Jones Act).

of time and work was spent on MTS discussions, the MTS sector was, at the end of the Uruguay Round, one of the few service sectors in which negotiations had failed without having achieved any satisfactory results. It is in this light that the Annex NMTS and the related Ministerial Decision on Negotiations on MTS must be interpreted.

B. Post Uruguay Round Extension of Maritime Negotiations

11 As no consensus had emerged among the participants of the Group for Negotiations on Services towards the end of the Uruguay Round, either on the effective inclusion or on the option entirely to exclude the MTS sector from GATS coverage, a **compromise solution** was adopted. It was decided to carry over the maritime negotiating process for an additional two-year period, to end in June 1996, reflecting the perception of the majority of countries that further negotiations were needed in order to ensure higher levels of liberalization in the sector.[19]

12 The **mandate for the extended negotiations** was explicitly provided by the Ministerial Decision on Negotiations on MTS that was adopted by the Trade Negotiations Committee in parallel to the signing of the WTO Agreement on 15 April 1994. Para. 1 lit. a of the Annex NMTS refers to the Decision. In accordance with para. 1 of the Decision, MTS negotiations shall be entered into on a voluntary basis and shall be comprehensive in scope, aiming at commitments in all three pillars of maritime transport. Para. 4 of the Decision stipulated that the extended negotiations were to begin no later than 16 May 1994 and be concluded by June 1996. The Decision in para. 2 established a specialized Negotiating Group on MTS (NGMTS) to carry out this mandate; the Annex refers to this body in para. 1 lit. b.

13 The renewed maritime negotiations began in May 1994. Between then and the end of June 1996, the NGMTS held 16 formal meetings with 56 governments participating as full members and 16 governments as observers. But even the extended period of sector-specific talks did not lead to the successful conclusion of MTS. 24 conditional offers were submitted in the course of the **NGMTS negotiations**, most of which were again withdrawn, however, due to disagreement on various issues relating mainly to the number and quality of offers made by other countries.[20] At their meeting on 28 June 1996, NGMTS participants agreed to a Decision on MTS that

[19] Negotiating Group on Maritime Transport Services, Negotiations on Maritime Transport Services, Note by the Secretariat, TS/NGMTS/W/1, 2 May 1994, 1; see also *Taylor*, Tul. Mar. L.J. 27 (2002), 129, 162.

[20] For a detailed overview on NGMTS negotiations, see *Parameswaran*, 287 *et seq*.

was adopted later that day by the Council for Trade in Services. Para. 1 of that Decision ordered the suspension of the maritime transport negotiations and called for their resumption on the basis of existing or improved offers, with the next round of comprehensive service negotiations, mandated by Art. XIX:1 to begin no later than five years from the coming into force of the WTO Agreement, *i.e.* no later than January 2000.

C. Non-Application of the MFN Principle (Para. 1)

I. Concept

14 Having been the driving force behind multilateral trade liberalization in the goods sector for over half a century, the MFN principle also constitutes a core principle in the context of international service trade liberalization. **MFN treatment**, enshrined in Art. II, constitutes a general obligation under the GATS, which means that in principle all Members are bound by it and it applies to any measure affecting trade in services and in all sectors, irrespective of whether or not a country has scheduled access commitments. MFN basically means favour one, favour all; it means treating one's trading partners equally. It is a direct obligation on all Members to extend all trade preferences granted in favour of any other country (also non-members) to all other Members. WTO Bodies tend to interpret MFN treatment very broadly as prohibiting not only *de jure* but also *de facto* discrimination. However, GATS expressly allows for MFN derogations provided that a Member has listed specific government measures inconsistent with the MFN principle in the Annex on Article II Exemptions, see Art. II:2. However, in order not to undermine MFN treatment, exemptions by route of the Annex may in principle be made only once by each Member at the time of joining the GATS and must be registered along with a state's Schedule of initial commitments. New MFN exemptions, as clarified by the Annex on Article II Exemptions, can only be granted through the much more complicated WTO waiver procedures (Art. IX:3 WTO Agreement).

15 Para. 1 of the Annex NMTS provides for the **suspension of the MFN treatment obligation** of Art. II as well as for the **non-application of the Annex Article II Exemptions** in the MTS sector. This is also confirmed in para. 5, sentence 1 of the Decision on Negotiations on MTS. Members are thus allowed to maintain measures in that sector inconsistent with the MFN obligation without having to list derogations in the relevant Annex. For instance, bilateral (or multilateral) cargo sharing agreements that stipulate the allocation of cargo on particular routes between the contracting parties and that are still common among many (mostly developing) countries are in principle in violation of the MFN treatment obligation, since such

agreements favour MTS providers from one country over those of another country. Therefore, in order to be able to maintain such an agreement, Members which are parties to cargo sharing regimes would normally have to register the agreement as being inconsistent with MFN, would be legally obliged not to enter into new agreements of this kind and would normally have to specify a time frame within which this non-compliant measure would be faded out. While this is true in other service sectors, cargo sharing agreements, which are inconsistent with MFN treatment as they favour services and service suppliers of one country over like services and suppliers of a Member, as well as other measures that do not comply with MFN may be maintained in the MTS sector without the Member applying such discriminatory measures having to register them as an exemption in the Annex on Article II Exemptions.

II. Scope

16 By making explicit reference to the three pillars of maritime transport, para. 1 of the Annex NMTS leaves no doubt that the non-application of the MFN treatment obligation is to be interpreted broadly: Art. II and the Annex on Article II Exemptions shall be **suspended for all services in the field of maritime transport**, *i.e.* international shipping, auxiliary services and access to and use of port facilities.[21] International shipping refers to the international maritime transport service as such, *i.e.* the actual transportation service performed once the cargo is on board a vessel in one country until the point where the vessel reaches its port of destination in a different state.[22] Maritime auxiliary services are services such as cargo handling, storage and warehousing, container station and depot services; in today's trading reality where carriers increasingly tend to integrate their services, these adjuncts to the primary sea leg are of tremendous importance.[23] Also with regard to granting foreign MTS suppliers access to and allow them the use of port services / facilities (*e.g.* pilotage, towing and tug assistance, provisioning, fuelling, garbage collection, port captain services, navigation aids, emergency repairs, anchorage, berthing), Members retain the right to offer suppliers of other states preferential treatment without violating the provisions of the GATS.

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[21] *Ibid.*, 341 *et seq.*

[22] *Fink et al.*, 6.

[23] OECD, Technical Issues in Respect of the WTO Negotiations, DSTI/DOT/MTC(99)18, 12 October 1999, 4.

III. Limited Standstill

17 While the Annex NMTS leaves no doubt that Members may "maintain" measures that are already in place which would normally be in violation of the MFN obligation, it is silent on the question whether Members may introduce new measures that are inconsistent with MFN treatment. A peace clause providing for a **limited standstill** is, however, contained in para. 7 of the Decision on Negotiations on Maritime Transport Services, which states that, except for retaliatory measures in response to restrictive practices by other countries (NGMTS participants or not), no participant shall apply for the period of the extended post Uruguay Round negotiations any measure affecting trade in services in such a manner as would improve its negotiating position and leverage. Para. 8 of that Decision goes on to state that the NGMTS is responsible for the supervision of this limited standstill, which implies that this undertaking is not legally binding in the sense of the WTO dispute settlement system and thus cannot be the subject of a legal challenge under WTO dispute settlement procedures. The limited standstill was merely to be seen as constituting the necessary political basis for an equitable negotiating climate among participants.[24]

18 The only measure ever investigated under para. 7 of the Decision on Negotiations on MTS was legislation signed into effect by President *Clinton* in November 1995 that lifted the ban on the export of Alaska North Slope Oil, but reserved such shipments exclusively to US-flag vessels on the basis of a unilateral cargo reservation.[25] The EC—backed by other Members—held that, in view of the fact that the legislation was based on newly introduced unilateral cargo reservation as well as the fact that contracts for bulk oil shipments were concluded in advance, it would "clearly constitute a unilateral measure affecting trade in Maritime Transport Services, by reserving exports of certain crude oil to US-flagged vessels" and was thus in **breach of para. 7 of the Ministerial Decision on Negotiations on MTS**, as it not only undermined the objectives of NGMTS work in general but also introduced a new element of cargo reservation and, as such, improved the US negotiating position and leverage.[26] US negotiators opposed the criticism: the legislation did not violate the limited standstill contained in

[24] See also European Commission, GATS—Maritime Transport, Comité 113, Doc. Séance 211/94, 29 June 1994, 2.

[25] See also OECD, Developments in the Negotiating Group on Maritime Transport Services (NGMTS), DSTI/SI/MTC(95)34, 4 October 1995, 3–4; Taylor, Tul. Mar. L. J. 27 (2002), 129, 167; Negotiating Group on Maritime Transport Services, Note of the Meeting of 17–19 July 1995, S/NGMTS/6, 3 August 1995, para. 25; Negotiating Group on Maritime Transport Services, Note of the Meeting of 30 October–1 November 1995, S/NGMTS/7, 16 November 1995, 2; Negotiating Group on Maritime Transport Services, Note on the Meeting of 13 and 16 February 1996, S/NGMTS/9, 8 March 1996; para. 7.

[26] Negotiating Group on Maritime Transport Services, Communication from the European Communities and Their Member States, S/NGMTS/W/5, 17 July 1995, 1.

para. 7 of the Ministerial Decision, since it would not improve the American negotiating position. As Alaskan North Slope Oil could not be shipped in foreign vessels prior to the enactment of the legislation either, as it was only transported to US ports, the new bill would not diminish opportunities for foreign carriers. The issue was addressed at every NGMTS session between July 1995 and May 1996, but remained basically unresolved.

19 Para. 7 of the 1996 Decision on Maritime Transport Services contains similar wording on limited standstill to that of Paragraph 7 of the 1994 Decision on Negotiations on MTS. However, other than in the 1994 Decision, there is no NGMTS or other specialized body to observe compliance with the standstill. To that extent, it may be argued that the implementation of para. 7 of the 1996 Decision is in fact challengeable under WTO dispute settlement procedures.

IV. Timeframe

20 Para. 1 lit. a and lit. b of the Annex NMTS specify the **duration of the suspension** of the MFN treatment obligation in the field of maritime transport. They provide two alternative dates for the entry into force of Art. II and the requirement to list in the Annex on Article II Exemptions any measure inconsistent with MFN treatment.

21 Para. 1 lit. a refers to the Decision on Negotiations on MTS, stating that **MFN shall enter into force for MTS** on the implementation date determined under para. 4 of that Decision. According to this para. 4, post Uruguay Round NGMTS negotiations were to conclude with a final report no later than June 1996 that was to include a date for the implementation of the results of NGMTS negotiations. Para. 1 lit. b of the Annex NMTS provides for MFN—in the event that the extended negotiations do not succeed—to enter into force on the date of the final report of the NGMTS.

22 As provided for in para. 4 of the Decision on Negotiations on MTS, the NGMTS drew up a final report on its work[27] that does no more than briefly summarize the Group's negotiating process. The report was forwarded to the Council for Trade in Services together with a draft Decision on MTS which the Council adopted on 28 June 1996. Para. 4 of this Decision on MTS provides for the **extension of the MFN suspension**, including the requirement to list in the Annex on Article II Exemptions any measures inconsistent with MFN treatment that a Member maintains, until the end of the resumed services negotiations mandated by Art. XIX:1 to begin

[27] Negotiating Group on Maritime Transport Services, Report, S/NGMTS/16, 3 July 1996.

no later than January 2000. The Doha Declaration[28] incorporated these so-called GATS 2000 talks (which were by then already almost two years old) into the new Doha Agenda. Therefore, on the basis of para. 4 of the 1996 Decision on MTS, MFN treatment obligations in the MTS sector are suspended until the termination of Doha Round negotiations. Since the General Council at its July 2006 meeting suspended negotiations under the Doha Development Agenda as a whole,[29] it is currently unclear when the Round will be concluded. There has been a "soft resumption" of the talks and negotiators seem to envisage conclusion of the Doha Round in 2007.[30] Although trade negotiators at the end of the Uruguay Round when the Annex NMTS was adopted were certainly expecting MFN as the service agreement's core liberalization discipline to come into force in 1996 at the latest, it is—ten years later—still suspended for the entire shipping sector.

D. Applicability of MFN in Case of Specific Commitments Undertaken (Para. 2)

Para. 2 of the Annex NMTS clarifies that the non-application of MFN in *23*
the area of MTS is true only as long as a country has not inscribed maritime transport commitments in its negotiated Schedule.[31] Para. 5 of the 1996 Decision on MTS contains a similar wording. This means that in the case **where commitments have been made, those must be applied on an MFN basis**. However, as most NGMTS participants, except for Iceland, Norway and Malaysia who turned their best offers into formal commitments, withdrew their conditional offers[32] (in accordance with para. 3 of the Annex NMTS) as a signal of dissatisfaction at the end of June 1996 with the failure of the extended negotiations, it is legitimate to say that for the bulk of maritime transport operations in terms of trade volume, the MFN treatment obligation does not apply. Since—as a result of the mass withdrawals of offers of commitments on shipping—also the other core liberalization principles of market access and national treatment as specific commitments under GATS in practice did not apply to

[28] Ministerial Conference, Fourth Session, Doha, 9–14 November 2001, Draft Ministerial Declaration, WT/MIN(01)/DEC/W/1, 14 November 2001.

[29] General Council, Minutes of Meeting, Held in the Centre William Rappard on 27–28 July 2006, WT/GC/M/103, 10 October 2006, para. 2 *et seq*.

[30] See the Statement by WTO Director-General Pascal Lamy to the General Council, <http://www.wto.org/english/news_e/news06_e/tnc_chair_report_14dec06_e.htm> (last visited 1 October 2007), 14 and 15 December 2006.

[31] This is also reflected in the Preamble of the Decision on Negotiations on Maritime Transport Services, LT/UR/D-5/5.

[32] For an analysis of the quality of Uruguay Round Schedules and NGMTS offers, see *Parameswaran*, 300 *et seq*.

MTS, the sector was *de facto* entirely excluded from the agreement's major liberalization disciplines.

E. Modification of Specific Commitments Undertaken (Para. 3)

24 Since market access and national treatment obligations are specific commitments under GATS, which means that Members are bound only insofar as they have inscribed commitments in their Schedules that form an integral part of the services agreement (Art. XX:3), the degree of liberalization offered in a given sector essentially depends on Members' commitments. Generally, the **commitments inscribed in Members' Schedules are hard law**. If a country decides to offer a sector and to lift a restriction, for instance a cargo reservation, by inscribing a "none" (meaning no limitations) entry in the market access or national treatment column of its service Schedule, it can no longer apply the restriction nor revive it, as this would constitute a violation of the GATS Agreement.[33]

25 This is, however, different for MTS. In accordance with para. 3 of the Annex NMTS (as well as para 5 of the Decision on Negotiations on MTS), Members (*i.e.* all WTO Members, and not just those actively participating in the NGMTS negotiations) were **free to improve, modify or withdraw** from the conclusion of the NGMTS negotiations, and before the implementation date all or part of any MTS commitments undertaken during the Uruguay Round without offering compensation. This constitutes an important temporary exemption from the general compensation obligation usually associated with the modification of Schedules (Art. XXI). Most important maritime nations—if they made an offer at all—either withdrew their commitments on shipping in the final days of the Uruguay Round anyway or at least reduced them substantially. Of these few countries that had kept commitments in their Schedules or made conditional offers during the NGMTS negotiations, the vast majority made use of their right under para. 3 of the Annex NMTS and withdrew those commitments in late June 1996.[34] Para. 6 of the 1996 Decision on MTS contains a similar right, allowing Members to withdraw any specific commitments offered in the context of the GATS 2000 / Doha Round negotiations towards the conclusion of such negotiations. The same provision also specifies that Members shall also finalize their positions relating to MFN exemptions in the sector.

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[33] Schedules can be modified but this is usually very costly for the relevant country, as other WTO Members are entitled to compensation, see Art. XXI.

[34] An analysis of post-NGMTS commitments is contained in Council for Trade in Services, Maritime Transport Services, Background Note by the Secretariat, S/C/W/62, 16 November 1998, paras 38 *et seq*.

F. GATS 2000 / Doha Round Developments

26 The year 2000 and the first months of 2001 were mainly devoted to the discussion of general guidelines and procedural parameters of the negotiations and achieved only a few tangible results with respect to MTS. The first formal document dealing specifically with MTS in the new service negotiations was a **joint statement on maritime transport** circulated in October 2000 by the EC and their Members, Hong Kong, Japan, Korea, Norway and Singapore.[35] It called for "solutions that would offer meaningful progress for multilateral liberalization" in the MTS sector, and announced the willingness of its sponsoring countries to "real and meaningful liberalization and commitments" in shipping. The statement also contained an invitation to other Members to communicate their views and ideas on the negotiations on MTS.

27 Of the total of approximately 80 **negotiating proposals** received by delegations for all sectors, seven were submitted that had direct implications on maritime transport talks.[36] The proposals coincide in many points: all of them suggest taking the maritime model schedule developed during the Uruguay Round[37] with its three-pillar classification as a basis for the negotiations. The proposals also recognize the need for in-depth discussions on the issue of multimodal transport[38] (sometimes referred to as the fourth pillar). Some countries attribute particular significance to the speedy entry into force for all Members of the temporarily suspended MFN clause and urge other Members to schedule no or only limited MFN exemptions. In view

[35] Council for Trade in Services, Special Session, Joint Statement from the European Communities and Their Member States; Hong Kong, China; Japan; Republic of Korea; Norway and Singapore, The Negotiations on Maritime Transport Services, S/CSS/W/8, 6 October 2000.

[36] Council for Trade in Services, Special Session, Communication from the European Communities and Their Member States, GATS 2000: Transport Services, S/CSS/W/41, 22 December 2000; Council for Trade in Services, Special Session, Communication from Japan, The Negotiations on Trade in Services, S/CSS/W/42, 22 December 2000; Council for Trade in Services, Special Session, Communication from Norway, The Negotiations on Trade in Services, S/CSS/W/59, 21 March 2001; Council for Trade in Services, Special Session, Communication from the Republic of Korea, Negotiating Proposal for Maritime Transport Services, S/CSS/W/87, 11 May 2001; Council for Trade in Services, Communication from Chile, the Negotiations on Trade in Services, S/CSS/W/88, 14 May 2001; Council for Trade in Services, Special Session, Communication from Australia, Negotiating Proposal for Maritime Transport Services, S/CSS/W/111, 1 October 2001; Council for Trade in Services, Special Session, Communication from Colombia, Maritime Transport Services, S/CSS/W/123, 27 November 2001.

[37] See above, para. 9.

[38] For the purposes of the negotiations, multimodal transport can be defined as the carriage of goods by at least two different modes of transport by the multimodal transport operator on the basis of a single "through" multimodal transport contract from a point of loading in one country to a point of delivery in another country, definition as proposed by the Australian Government in a discussion paper on Scheduling Options for Multimodal Transport, OECD, DSTI/DOT/MTC(99)18, above note 23, 5.

of the extensive restrictions that prevail in the maritime cabotage sectors in some Member countries, the EC and Norway proposed the introduction of new issues in the negotiations relating to the politically sensitive subject of cabotage that would address restrictions in parts of the maritime cabotage sectors; proposals could be considered for activities where an international sea leg is involved, particularly feeder services relating to international cargo and the repositioning of equipment/movement of empty containers.

28 **Initial offers** have been submitted since March 2003 whereby the degree of liberalization of the MTS sector contained in these offers varies significantly: while some states commit themselves to substantial and meaningful liberalization in all three pillars, multimodal transport and even parts of the cabotage trades without listing any major MFN exemptions, others have left out maritime transport entirely, thus refusing to bind any specific commitments in that sector.[39]

29 Despite the absence of a formal sub-group dealing exclusively with maritime transport services, an informal group of countries that share a particular interest in the liberalization of maritime transport services, the so-called "Friends of Maritime" group, has emerged and has held meetings on a regular basis to discuss issues relating to the new negotiations in this sector. In early 2006, 14 WTO Members (counting the EC and its Member States as one) submitted a plurilateral request[40] asking 24 developing countries and the US to liberalize their MTS sectors. In general terms, the plurilateral request, *inter alia*, asks for the elimination of cargo reservation, of restrictions on foreign equity participation, of restrictions on the right to establish a commercial presence, and of any other form of preferential treatment, as well as for the elimination of MFN exemptions.

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[39] For a more detailed overview, see *Parameswaran*, 312 *et seq*. An encouraging sign towards liberalization was the joint statement on the MTS negotiations issued in March 2003 by over 35 WTO Members, including important maritime players from both the developed and the developing world. The statement emphasizes the importance of the MTS negotiations and calls for the active participation of all WTO Members in the Doha Round negotiations with a view to achieving meaningful liberalization of the maritime transport service sector, see, Council for Trade in Services, Special Session, Communication from Australia, Canada, Chile, the People's Republic of China, Croatia, Cyprus, Czech Republic, Dominican Republic, Estonia, the European Communities and Their Member States, Gambia, Georgia, Guatemala, Hong Kong, China, Iceland, India, Japan, the Republic of Korea, Kyrgyz Republic, Latvia, Lithuania, Malaysia, Malta, Mexico, New Zealand, Nigeria, Norway, Pakistan, Panama, Papua New Guinea, Peru, Poland, Romania, Singapore, Slovenia, Switzerland, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Joint Statement on the Negotiations on Maritime Transport Services, TN/S/W/11, 3 March 2003.

[40] The plurilateral request is sponsored by Australia, Canada, the EC and its Member States, Hong Kong China, Iceland, Japan, Republic of Korea, Mexico, New Zealand, Norway, Panama, Switzerland, the SCT of Taiwan, Penghu, Kinmen and Matsu. The requests to some WTO Member States have been made available on the Internet, *e.g.* under <http://commerce.nic.in/wto_sub/services/Plurilateral_Requests.htm> (last visited 1 October 2007).

G. Outlook

30 In view of the fact that the General Council at its July 2006 meeting suspended negotiations under the Doha Development Agenda as a whole, the outcome of the Doha Round negotiations in general and the MTS talks in particular is still difficult to predict. The **benefits of an agreement on MTS** within the WTO framework on the other hand are obvious: from an internal point of view, opening up the maritime transport markets to foreign service suppliers under GATS means more foreign investment, leading to an expansion of the market, the increase of trade volumes and employment opportunities, the achievement of economies of scale, the promotion of the international division of labour and specialization, state-of-the-art technology and the enhancement of effective management of shipping services and free and fair competition, which ultimately leads to improved and diversified services at lower prices for the consumers of maritime transport services. From an external point of view, the opportunities gained from liberalization in all other WTO Member countries outweigh by far any potential "losses" generated by opening up one's own market, a situation referred to in trade jargon as the "win-win effect". Furthermore, creating a global maritime agreement that is legally binding and enforceable will create legal certainty and avert the realistic risk of backtracking to more restrictive maritime policies.[41]

31 With regard to the **application of core GATS principles** to maritime transport, it is fundamental that negotiators ensure the speedy entry into force of the basic MFN obligation for shipping, so that liberalization and market access benefits achieved bilaterally are extended to all Members, cargo sharing agreements are abolished (at least gradually and according to a fixed timetable), unilateral countermeasures legislation will be abandoned in favour of the WTO multilateral dispute settlement system and a satisfactory basis for a liberal regime in international shipping is established. If the Doha Round negotiations on MTS should fail, it seems likely that the MFN suspension will be prolonged in order to avoid the recording of mass MFN exemptions for all pillars of maritime transport which would do no more than cement those restrictions even further.

32 While MFN is good, it is not good enough: in order to provide for effective liberalization and to allow foreign suppliers of maritime transport services to

[41] A relatively recent example of the revival of a restrictive shipping law was to be observed in Bangladesh in 2003, where several privately-owned Bangladeshi shipping companies put enormous pressure on the Shipping Ministry in order to convince the authorities actually to enforce the cargo allocation system provided for in the Bangladesh Flag Vessels Protection Ordinance 1982 which reserves 40% of break bulk cargo emanating from or destined for Bangladesh for national flag vessels, and to extend this law also to containerized cargoes, see *Parameswaran*, 325–326 for a summarizing overview.

compete successfully with national suppliers, they must be granted **national treatment**. Therefore, in order to guarantee the success of a GATS maritime agreement, it is crucial that the maritime transport Schedules of Members include corresponding commitments.

33 The inclusion of a legally binding **standstill obligation** which can be the subject of dispute settlement procedures would be highly desirable, so as to ensure that any backtracking and any incursions on trade in maritime transport services are successfully warded off so that the regulatory status quo is preserved and deliberalization, which has reappeared in a number of countries as a result of the failure of the 1996 negotiations and as a consequence of the world economic crisis, goes no further.

34 In terms of **participation in a maritime agreement**, negotiators should be more flexible than in previous rounds; while meaningful participation by a substantial number of maritime nations that used to have rather closed markets, particularly Asian economies and the fairly new Member China, is fundamental, the absence of a US maritime transport offer must not lead this time to failure in reaching an agreement on maritime transport. The success of the current negotiations will primarily depend on the willingness of key developing countries, such as China, India, Brazil, *etc*., to make meaningful commitments on maritime transport services. In particular China's accession to the WTO has given a new dynamism to this round of maritime talks, as effective access to the Chinese markets is considered essential by industries and businesses in many countries.[42]

[42] The author wishes to dedicate this contribution to *Rainer Lagoni*, Professor Emeritus at the University of Hamburg Law School, on the occasion of his 65th birthday, in deep gratitude for his constant professional and personal support for many years as teacher, doctoral advisor, mentor and friend.

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Annex on Telecommunications

1. Objectives

Recognizing the specificities of the telecommunications services sector and, in particular, its dual role as a distinct sector of economic activity and as the underlying transport means for other economic activities, the Members have agreed to the following Annex with the objective of elaborating upon the provisions of the Agreement with respect to measures affecting access to and use of public telecommunications transport networks and services. Accordingly, this Annex provides notes and supplementary provisions to the Agreement.

2. Scope

a) This Annex shall apply to all measures of a Member that affect access to and use of public telecommunications transport networks and services.[14]

b) This Annex shall not apply to measures affecting the cable or broadcast distribution of radio or television programming.

c) Nothing in this Annex shall be construed:

(i) to require a Member to authorize a service supplier of any other Member to establish, construct, acquire, lease, operate, or supply telecommunications transport networks or services, other than as provided for in its Schedule; or

(ii) to require a Member (or to require a Member to oblige service suppliers under its jurisdiction) to establish, construct, acquire, lease, operate or supply telecommunications transport networks or services not offered to the public generally.

3. Definitions

For the purposes of this Annex:

a) "Telecommunications" means the transmission and reception of signals by any electromagnetic means.

b) "Public telecommunications transport service" means any telecommunications transport service required, explicitly or in effect, by a Member to be offered to the public generally. Such services may include, inter alia, telegraph, telephone, telex, and data transmission typically involving the real-time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information.

c) "Public telecommunications transport network" means the public telecommunications infrastructure which permits telecommunications between and among defined network termination points.

d) "Intra-corporate communications" means telecommunications through which a company communicates within the company or with or among its subsidiaries, branches and, subject to a Member's domestic laws and regulations, affiliates. For these purposes, "subsidiaries", "branches" and, where applicable, "affiliates" shall be as defined by each Member. "Intra-corporate communications" in this Annex excludes commercial or non-commercial services that are supplied to companies that are not related subsidiaries, branches or affiliates, or that are offered to customers or potential customers.

e) Any reference to a paragraph or subparagraph of this Annex includes all subdivisions thereof.

4. Transparency

In the application of Article III of the Agreement, each Member shall ensure that relevant information on conditions affecting access to and use of public telecommunications transport networks and services is publicly available, including: tariffs and other terms and conditions of service; specifications of technical interfaces with such networks and services; information on bodies responsible for the preparation and adoption of standards affecting such access and use; conditions applying to attachment of terminal or other equipment; and notifications, registration or licensing requirements, if any.

5. Access to and use of Public Telecommunications Transport Networks and Services

a) Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its Schedule. This obligation shall be applied, *inter alia*, through paragraphs b) through f).[15]

b) Each Member shall ensure that service suppliers of any other Member have access to and use of any public telecommunications transport network or service offered within or across the border of that Member, including private leased circuits, and to this end shall ensure, subject to paragraphs e) and f), that such suppliers are permitted:
   (i) to purchase or lease and attach terminal or other equipment which interfaces with the network and which is necessary to supply a supplier's services;
   (ii) to interconnect private leased or owned circuits with public telecommunications transport networks and services or with circuits leased or owned by another service supplier; and
   (iii) to use operating protocols of the service supplier's choice in the supply of any service, other than as necessary to ensure the availability of telecommunications transport networks and services to the public generally.

c) Each Member shall ensure that service suppliers of any other Member may use public telecommunications transport networks and services for the movement of information within and across borders, including for intra-corporate communications of such service suppliers, and for access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Member. Any new or amended measures of a Member significantly affecting such use shall be notified and shall be subject to consultation, in accordance with relevant provisions of the Agreement.

d) Notwithstanding the preceding paragraph, a Member may take such measures as are necessary to ensure the security and confidentiality of messages, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services

e) Each Member shall ensure that no condition is imposed on access to and use of public telecommunications transport networks and services other than as necessary:
   (i) to safeguard the public service responsibilities of suppliers of public telecommunications transport networks and services, in particular their ability to make their networks or services available to the public generally;
   (ii) to protect the technical integrity of public telecommunications transport networks or services; or
   (iii) to ensure that service suppliers of any other Member do not supply services unless permitted pursuant to commitments in the Member's Schedule.

f) Provided that they satisfy the criteria set out in paragraph e), conditions for access to and use of public telecommunications transport networks and services may include:
   (i) restrictions on resale or shared use of such services;
   (ii) a requirement to use specified technical interfaces, including interface protocols, for inter-connection with such networks and services;
   (iii) requirements, where necessary, for the inter-operability of such services and to encourage the achievement of the goals set out in paragraph 7a);
   (iv) type approval of terminal or other equipment which interfaces with the network and technical requirements relating to the attachment of such equipment to such networks;
   (v) restrictions on inter-connection of private leased or owned circuits with such networks or services or with circuits leased or owned by another service supplier; or
   (vi) notification, registration and licensing.

g) Notwithstanding the preceding paragraphs of this section, a developing country Member may, consistent with its level of development, place reasonable conditions on access to and use of public telecommunications transport networks and services necessary to strengthen its domestic telecommunications infrastructure and service capacity and to increase its participation in international trade in telecommunications services. Such conditions shall be specified in the Member's Schedule.

6. Technical Cooperation

a) Members recognize that an efficient, advanced telecommunications infrastructure in countries, particularly developing countries, is essential to the expansion of their trade in services. To this end, Members endorse and encourage the participation, to the fullest extent practicable, of developed and developing countries and their suppliers

of public telecommunications transport networks and services and other entities in the development programmes of international and regional organizations, including the International Telecommunication Union, the United Nations Development Programme, and the International Bank for Reconstruction and Development.

b) Members shall encourage and support telecommunications cooperation among developing countries at the international, regional and sub-regional levels.

c) In cooperation with relevant international organizations, Members shall make available, where practicable, to developing countries information with respect to telecommunications services and developments in telecommunications and information technology to assist in strengthening their domestic telecommunications services sector.

d) Members shall give special consideration to opportunities for the least-developed countries to encourage foreign suppliers of telecommunications services to assist in the transfer of technology, training and other activities that support the development of their telecommunications infrastructure and expansion of their telecommunications services trade.

7. Relation to International Organizations and Agreements

a) Members recognize the importance of international standards for global compatibility and inter-operability of telecommunication networks and services and undertake to promote such standards through the work of relevant international bodies, including the International Telecommunication Union and the International Organization for Standardization.

b) Members recognize the role played by intergovernmental and non-governmental organizations and agreements in ensuring the efficient operation of domestic and global telecommunications services, in particular the International Telecommunication Union. Members shall make appropriate arrangements, where relevant, for consultation with such organizations on matters arising from the implementation of this Annex.

Footnote 14: This paragraph is understood to mean that each Member shall ensure that the obligations of this Annex are applied with respect to suppliers of public telecommunications transport networks and services by whatever measures are necessary.

Footnote 15: The term "non-discriminatory" is understood to refer to most-favoured-nation and national treatment as defined in the Agreement, as well as to reflect sector-specific usage of the term to mean "terms and conditions no less favourable than those accorded to any other user of like public telecommunications transport networks or services under like circumstances".

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Cross References

Arts 1301–1310 NAFTA.

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A. Introduction

I. General

In addition to the general rules and obligations provided for under its main text, the GATS also includes several Annexes which deal with specific service sectors or modes of supply. Two of the Annexes are on telecommunication services. The first of the two, the Annex on Telecommunications (Annex Tel.), **supplements and strengthens** the **general disciplines** in the GATS **by further elaborating** these rules in the specific contexts of telecommunication services.[1] According to Art. XXIX, all Annexes are an integral part of the GATS. Thus, the rules in the Annex Tel. shall be read together with the other parts of the GATS. *1*

II. Specificities of the Telecommunications Sector (Para. 1)

Compared with most other services sectors, the telecommunication sector is rather unique since it has a **dual role**: on the one hand, it is a distinct and increasingly important sector of economic activity. According to a survey by the WTO in 1998, for example, the sector had a total revenue of US$ 644 billion and employed 5.4 million staff worldwide.[2] On the other hand, the sector is also the primary underlying means of transport for many other economic activities, such as business services, financial services and tourism services. Thus, in order for the service providers in these sectors to realize the full value of the commitments of a Member, their access to and use of public telecommunications transport networks and services should be guaranteed. *2*

Until very recently, telecommunication services were considered to be **natural monopolies**.[3] Generally, the establishment of telecommunication networks requires considerable initial investment, while the marginal costs decline rapidly once the network has been established. Moreover, as telecommunications are widely regarded as a **public good**, everyone requires access to them. Because the profitability of different market segments differs widely, however, universal service is possible only by way of **cross subsidization** from long-distance to local services, from business to residential access, and from urban to rural customers.[4] Such cross-subsidization is possible only if one operator, *i.e.*, a monopoly, provides services to all markets. *3*

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[1] *Mathew*, 88.

[2] Council for Trade in Services, Telecommunications Services, Background Note by the Secretariat, S/C/W/74, 8 December 1998, para. 12.

[3] *Mathew*, 1–2.

[4] *Ibid.*, 2.

4 In recent years, rapid technological advances have greatly reduced both the fixed and marginal costs of investments in the telecommunication sector. As a result, the high entry barrier has been gradually dismantled and many new competitors have entered the market. From 1996 to 1998, for example, the number of facilities-based international carriers in the world has grown from 500 to more than 1,000.[5] Moreover, rapid economic growth around the world has turned telecommunications services from a luxury which few people can enjoy into a necessity in everyday life. With these **structural and technological changes**, the natural monopoly paradigm is no longer viable. Instead, in response to the criticisms against the inefficient and expensive traditional monopolies, many countries in the world, developed and developing alike, have started to **deregulate** the sector by introducing more competition. In some sense, the regulatory focus has shifted from maintaining the viability of the operator and availability of telecommunications services to guarding against abuse of the dominant power of monopoly operators and ensuring the diversity of choices for consumers. Such changes in the regulatory environment, which took place in the 1980s and early 1990s around the world, contributed to the decision to include negotiations on telecommunications services in the Uruguay Round.

III. Negotiating History

5 When the Uruguay Round was launched in 1986, the GATT Contracting Parties decided for the first time in history to bring trade in services within the rules and disciplines of the multilateral trading system. At first, the services negotiations focused on the following aspects of services trade: definitions and statistics, broad concepts, coverage, and general disciplines and rules.[6] In 1989, the Contracting Parties turned their attention to particular service sectors in an effort to determine how the general principles contained in the draft framework agreement could be applied to specific sectors.[7] Due to their importance, telecommunications services were selected as one of the sectors in this **sectoral testing exercise**.

6 Before the Uruguay Round, the GATT 1947 covered only trade in goods. Traditionally, trade in goods has been conducted by means of physical goods crossing border. On the other hand, trade in services can be supplied *via* different modes of supply. The first mode is cross-border supply, which is defined as the supply of a service "from the territory of one Member

[5] S/C/W/74, para. 2.
[6] *Croome*, 103–109.
[7] *Croome*, 210–211; *Tuthill*, Telecommunications Policy 20 (1996), 89, 90.

into the territory of any other Member".[8] Thus, under mode 1, only the service itself, and not the service provider, crosses the border. Otherwise, the mode of supply would be mode 3 or 4. Thus, mode 1 relies heavily on telecommunications as the chief means of cross-border transit.[9] Thus, the main barriers that confront services supplied by means of mode 1 are not customs regulations, but the **domestic regulations** of national telecommunications authorities and the **questionable practices of dominant** national telecommunications **operators**.[10]

7 In order to deal with these obstacles, the Contracting Parties made efforts to devise a regulatory framework for telecommunications services. In March 1990, the US first produced a Draft Annex on Telecommunications.[11] Less than four months later, five more annex proposals were submitted, by the EC, Japan, Korea, and two developing country groups, respectively.[12] Even though these proposals differ in technical details, they share a common apprehension of negotiators that telecommunications monopolies could **abuse** their **dominant status** to **undermine commitments** in both the telecommunications sector and other services sectors.[13] With such a level of common understanding, the negotiations progressed rapidly and agreement on the contents of the Annex Tel. was essentially reached by the end of 1991.[14]

8 Reflecting the concerns of the negotiators, the Annex Tel. explicitly states that its **objective** is to elaborate the relevant rules of the GATS in the specific context of those measures that affect access to and use of public telecommunications transport networks and services. In order to achieve this objective, the Annex Tel. manages to flesh out the disciplines in the telecommunications sector by providing **notes and supplementary provisions** to some key GATS rules, such as those found in Art. II on

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[8] Art. I:2 lit. a.

[9] *Tuthill*, Telecommunications Policy 20 (1996), 89, 90.

[10] *Ibid*.

[11] Uruguay Round, Group of Negotiations on Services, Communication from the United States, Annex, Access to and use of Services of Public Telecommunications Transport Services, MTN.GNS/W/97, 23 March 1990; cited in *Tuthill*, Telecommunications Policy 20 (1996), 89, 90.

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[13] *Tuthill*, Telecommunications Policy 20 (1996), 89, 90.

[14] This is the version of the Annex included in the Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA, December 20 1991, so-called Dunkel Draft. See *ibid*. See also *Mathew*, 51–53.

most-favoured-nation (MFN), Art. XVII on national treatment, Art. III on transparency, Art. VI on domestic regulation, Art. VIII on monopolies and exclusive service suppliers and Art. IX on business practices.[15]

B. Scope of the Annex (Para. 2)

I. General

9 According to Art. I:1, the GATS "applies to measures by Members **affecting** trade in services". As stated by the Appellate Body in the *EC—Bananas III* case, "[t]he ordinary meaning of the word 'affecting' implies a measure that has 'an effect on', which indicates a broad scope of application".[16] Thus, no measures shall be excluded *a priori* from the scope of the GATS.[17]

10 For an instrument such as the Annex Tel., however, as it sets out the obligations and disciplines specific to a sector, its scope of application must be clearly stipulated. Therefore, para. 2 **specifies** the **scope** of the Annex by including certain measures while excluding others.

II. Measures Covered (Para. 2 lit. a)

11 Para. 2 starts by noting that the Annex shall "apply to **all measures of a Member that affect access to and use of public telecommunications transport networks and services**". This phrase includes several interconnected aspects:

12 As noted in para. 1 of the Annex Tel., telecommunications service has the dual role of both as a distinct sector of economic activity and as the underlying transport means for other economic activities. In the *Mexico—Telecoms* case, Mexico argued that the Annex Tel. did not cover access for the purpose of supplying basic telecommunications services, but covered access only for services that required basic telecommunications services as an underlying means of transport, including enhanced telecommunications services.[18] The Panel, however, disagreed. According to the Panel, para. 2 lit. a provides that the Annex Tel. shall apply to **"*all* measures"** of a Member that affect access to and use of public telecommunications transport networks and services with regard to *all* services, and this should include basic telecommunications services.[19] Moreover, neither para. 1 nor

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[15] *Tuthill*, Telecommunications Policy 21 (1997), 787–794. See also *Tuthill*, Telecommunications Policy 20 (1996), 89, 91.
[16] Appellate Body Report, *EC—Bananas III*, WT/DS27/AB/R, para. 220.
[17] *Ibid.*
[18] Panel Report, *Mexico—Telecoms*, WT/DS204/R, para. 7.276.
[19] *Ibid.*, para. 7.278.

para. 5 of the Annex Tel. contains any language suggesting that access to and use of public telecommunications transport networks and services for the supply of basic telecommunications services is meant to be excluded from the scope of the Annex Tel.[20] The Panel also noted that, contrary to Mexico's argument, even though many Members made substantive specific commitments on basic telecommunications services only in 1997, this should not be confused with the question of whether basic telecommunications was a services sector within the scope of the Agreement as the GATS never explicitly excluded telecommunications services from its coverage at the time the Annex Tel. entered into force.[21] The Panel further recognized that, as access to and use of public telecommunications transport networks and services are indispensable for the supply of basic telecommunications services, Mexico's argument would mean that Members could render most basic telecommunications commitments meaningless by effectively prohibiting any supply other than that which originated and terminated within the same suppliers' network, even where commitments were undertaken.[22] Such interpretation is highly unreasonable, and if Members had really intended to do so, they would have had to make this explicit in the Annex Tel.[23]

13 Even though the meaning of **"access to and use of"** is fundamental for defining the disciplines and obligations under the Annex Tel., no definition is provided there. In some ways, this is very much in line with the tradition of the GATS, as it also fails to provide definitions for such key concepts as "services". In its Draft Annex, the US defines the two terms as follows: "**Access** to public telecommunications transport services" means the ability of a customer of any party to subscribe on reasonable and nondiscriminatory rates, terms, and conditions to any such service offered within or into the territory of the party.[24] "**Use** of public telecommunications transport services" means the ability of a customer of any party to use services obtained in accordance with Article 3 (of the US Draft Annex) for the conduct of business within or into the territory of a party, including intracorporate communications and the provision of a covered service.[25] While such definitions have not been copied into the definitions section of the Annex Tel., they have been incorporated into the Annex Tel. as formal obligations by virtue of its para. 5. This will be discussed later in the chapter.

14 The Annex Tel. "applies to **public telecommunications transport networks and services**". As defined in para. 3 of the Annex Tel., "public telecommunications transport services" and "public telecommunications

[20] *Ibid.*, para. 7.279–7.281.
[21] *Ibid.*, para. 7.284.
[22] *Ibid.*, paras 7.285–7.286.
[23] *Ibid.*, para. 7.287.
[24] MTN.GNS/W/97, Art. 3.5.
[25] MTN.GNS/W/97, Art. 3.6.

transport networks" essentially refer to all basic telecommunications, which typically involve the real-time transmission of customer-supplied information between two or more points without any end-to-end change in its form or content.[26] The definition in para. 3 of the Annex Tel. also reveals that the term **"networks and services"** encompasses both basic telecommunications infrastructures and basic services which may or may not be supplied *via* such infrastructures.[27] On the other hand, the Annex Tel. does not purport to regulate value-added services, which include telecommunications services not supplied on a real-time basis or which transform the form or content of a customer's information.[28] Also, as explained in para. 3 of the Annex Tel., the word **"public"** here does not refer to the ownership structure of the operator; instead, it concerns the telecommunications services to which the government has assigned universal service or public service requirements.[29] Thus, the Annex Tel. applies to privately-owned telecommunications services but not to non-public basic telecommunications services provided within closed user groups.[30]

15 As with other obligations under WTO agreements, the Annex Tel. **obligations** are assumed **by the governments** of WTO Members. Thus, the Members must ensure that all their measures conform to the Annex Tel. obligations. As discussed above, there shall be no *a priori* exclusion of certain measures. While such measures are generally taken by central governments, measures adopted by regional and local governments and authorities are also covered, even though the latter may not be enforced extraterritorially.[31]

16 The Annex Tel. prescribes obligations by specifying the **type of telecommunications** to which it applies **rather than** the **type of operators** it regulates. Initially, the US and EU proposed that obligations should be mainly aimed at monopolies.[32] Many Members which had yet to liberalize the telecommunications markets, however, were unconvinced that they should assume more obligations than those which had introduced competition in the sector.[33] In the end, a compromise was reached. On the one hand, the Annex Tel. obligations apply no matter whether the basic telecommunications services were provided by monopolies or by operators in competitive markets.[34] On the other hand, the Annex Tel. also recognizes

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[26] See S/C/W/74, para. 7; see also *Tuthill*, Telecommunications Policy 20 (1996), 89, 94, *Mathew*, 56, 89.
[27] *Tuthill*, Telecommunications Policy 20 (1996), 89, 95.
[28] *Ibid.*
[29] *Mathew*, 89.
[30] *Tuthill*, Telecommunications Policy 20 (1996), 89, 95.
[31] Panel Report, *US—Gambling*, WT/DS285/R, para. 6.252.
[32] *Tuthill*, Telecommunications Policy 20 (1996), 89, 95.
[33] *Ibid.*
[34] *Ibid.*

that **regulations** are **not always necessary**, especially in deregulated markets. Thus, a **footnote to para. 2** states that Members are required only to ensure that Annex Tel. obligations are applied "by whatever measures are necessary" rather than through any prescribed means. Therefore, so long as market forces are enough to ensure compliance with Annex Tel. obligations, governments in deregulated markets can choose to refrain from imposing regulatory obligations on operators in general and may deal with any problems on a case-by-case basis.[35] In contrast, more "positive" measures may have to be adopted by governments in order to deal with dominant operators in unliberalized markets.[36]

III. Measures Excluded (Para. 2 lit. b and c)

17 The Annex Tel. specifically excludes from its scope measures affecting the cable or broadcast **distribution of radio or television** programming (para. 2 lit. b). These are classified under the sub-sector of audiovisual services[37] and do not come under telecommunications services. This exclusion addresses the concerns of some Members regarding the possible encroachment on their cultures by foreign cultural influences through the provision of audiovisual services. This implies that it is the **content** of such **transmissions** rather than the form of the transmission which matters. Read together with the broad definition of public telecommunications transport networks and services in para. 3, this provision is probably not meant to also exclude telecommunication services provided *via* television cable or radio transmissions.

18 Moreover, para. 2 lit. c states that a Member shall not be required under the Annex Tel. to authorize a service supplier of any other Member to establish, construct, acquire, lease, operate or supply telecommunications transport networks or services other than as provided for in its Schedule. To put it another way, this means that the Annex Tel. obligations should not be used by operators from other Members to request substantive market access **concessions not** explicitly **granted in the Schedule** of the host Member. Similarly, in accordance with para. 2, the Annex Tel. shall not be interpreted so as to impose an obligation to establish, construct, acquire, lease, operate or supply telecommunications transport **networks or services not offered to the public** in general. This explicit exclusion is

[35] *Mathew*, 93.
[36] *Tuthill*, Telecommunications Policy 20 (1996), 89, 95.
[37] See under 2D of the Services Sectoral Classification List, Group of Negotiations on Services, Uruguay Round, Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120, 10 July 1997.

incorporated in order to alleviate the concerns of some developing Members that they might be required by operators from other Members to provide facilities or services beyond their existing technological capacity.[38]

C. Definitions (Para. 3)

I. General

19 Para. 3 defines and clarifies some of the most important terms in the Annex Tel. Presumably, these definitions are binding only for the **interpretations** of the Annex Tel., but they can also provide useful guidance for interpreting relevant instruments which lack definitions.

II. Telecommunications (Para. 3 lit. a)

20 **"Telecommunications"** is defined as the transmission and reception of signals by any electromagnetic means. This definition is simple yet comprehensive. It **defines** telecommunications **by its means irrespective of** whether the **content** is voice, data, image or something else. This definition is heavily influenced by the US as can be concluded from the identical wording of the definition found in Art. 1310 NAFTA.

III. Public Telecommunications Transport Service and Network (Para. 3 lit. b and c)

21 **"Public telecommunications transport service"** is defined as any telecommunications transport service required by a Member to be offered to the public generally. Such requirement can be made either explicitly or on a *de facto* basis. The requirement can be imposed on both monopoly and non-monopoly operators. The definition also further illustrates that both voice and data transmissions are covered, but such transmissions must involve **real-time** transmissions of customer-supplied information **between two or more points without** any end-to-end **change** in the form or content of the customer's information. Thus, communications that do not take place in real time, or that are not between two or more points, or where the form or content of the customer's information has been altered are not covered by this definition, and thus would not be subject to universal service requirements.[39] Under such definition, one can argue that internet telephony does not come under "public telecommunications

[38] *Mathew*, 90.
[39] *Naftel & Spiwak*, 104.

transport service" as it does not occur in real time, is altered in form, and may not occur between two points in a network.[40] The Annex Tel. also defines **"public telecommunications transport network"** as the public telecommunications infrastructure which permits telecommunications between and among defined network termination points. As both public telecommunications transport networks and public telecommunications transport services are covered by the Annex Tel., both facilities-based and non-facilities-based operators should be covered by the Annex. The definitions of both terms were also heavily influenced by the US as both follow closely the definitions under the NAFTA.[41]

IV. Intra-Corporate Communications (Para. 3 lit. d)

22 "Intra-corporate communications" is defined to include three scenarios. First, internal communications **within** a single company; second, communications **between** the **company and its subsidiaries, branches or affiliates**; third, communications **among** the **subsidiaries, branches or affiliates** of a company. Para. 3 does not define subsidiaries, branches or affiliates. Instead, each Member can frame its own definitions. Communications that are supplied to companies that are not related subsidiaries, branches or affiliates or that are offered to customers or potential customers are all excluded regardless of whether such communications are provided on a commercial or non-commercial basis. This definition is slightly different from that under NAFTA, where communications which are provided on a non-commercial basis to other persons that are fundamental to the economic activity of the enterprise and that have a continuing contractual relationship with the company are also included.[42]

V. Reference to a Paragraph of the Annex (Para. 3 lit. e)

23 Para. 3 lit. e does not provide a definition as such, but clarifies in the interests of ease of use of the Annex that any reference to a paragraph or subparagraph of the Annex includes all subdivisions thereof.

D. Transparency Obligation (Para. 4)

24 In order for services providers to enjoy full access to and use of public telecommunications transport networks and services, they need to be aware of the **conditions governing such access and use**. Even though Art. III

[40] *Ibid.*
[41] Art. 1310 NAFTA.
[42] *Ibid.*

sets out certain general obligations regarding the publication of measures affecting trade in services, the unique nature of the telecommunications sector makes it necessary to provide for some sector-specific obligations.

25 In general, any relevant information on conditions affecting such access and use are to be made available to the public. To illustrate the kinds of measures which may be relevant, the section also provides some examples. As the word "including" shows, these examples are **illustrative** rather than exhaustive. The examples include technical requirements such as specifications of technical interfaces with such networks and services, and conditions applying to the attachment of terminal or other equipment; as well as regulatory requirements, such as tariffs and other terms and conditions of service, information on bodies responsible for the preparation and adoption of standards affecting such access and use, and notification, registration or licensing requirements.[43]

26 Unlike Art. III, which stipulates the format, frequency and time-limits for making information available, the Annex Tel. does not have explicit requirements on these. Presumably, however, the **format** and **time-frame** under Art. III should be followed to the greatest extent possible as the Annex Tel. is supposed only to fill in the gaps where Art. III is silent.

27 Some information such as that on cost factors and proprietary technical details may be commercially sensitive and publication would harm legitimate business interests.[44] Also, Members cannot force operators to disclose to the authorities personal data of private individuals transmitted by means of the telecommunications network.[45] Therefore, the transparency obligations provided for under the Annex Tel. must be read together with the rules regarding confidentiality under Art. III*bis*, which states that Members shall not be required to provide **confidential information** the disclosure of which might be contrary to the public interest or which would prejudice the legitimate commercial interests of enterprises.

E. Access to and Use of Public Telecomunications Transport Networks and Services (Para. 5)

I. General

28 As discussed above, the focus of the Annex Tel. is to regulate measures affecting access to and use of public telecommunications transport networks

[43] *Mathew*, 95.
[44] *Ibid.*
[45] *Ibid.*

and services in order to ensure that the supply of services allowed under the Schedule of a Member is not frustrated by restrictions on such access and use. The core obligations in this regard are provided for in para. 5 of the Annex Tel., which includes several parts. Para. 5 lit. a of the Annex Tel. sets out the general obligations, while the remaining subparas provide further illustrations of how the guarantees for the **basic rights of access and use** shall be put into practice.

II. Basic Rights of Access and Use (Para. 5 lit. a)

29 Para. 5 lit. a sets out the basic rights of access to and use of public telecommunications transport networks and services. In the *Mexico—Telecoms* case, the Panel identified the key elements of such basic rights as follows: the "access to and use of" referred to in this provision must be granted: (a) to "any service supplier of any other Member"; (b) with respect to "public telecommunications transport networks and services"; (c) for the supply of a "service included in its schedule"; and (d) on "reasonable and non-discriminatory terms and conditions".[46] These are discussed in detail below.

1. "Any Service Supplier of any Other Member"

30 Para. 5 lit. a uses **broad language**—"any service supplier of any other Member"—to define who may enjoy such basic rights. Thus, they can be suppliers of non-telecommunications services, as well as suppliers of telecommunications services. If among the latter, they can be both facilities-based telecommunications service suppliers, as well as non-facilities based suppliers. They can be suppliers which are currently providing services, as well as potential suppliers which are contemplating entry into the market. There are only two conditions. First, the sector in which the supplier wants to provide a service is one in which the host Member has made commitments. Second, the supplier should be from a Member other than the host Member, even though in reality few Members would want to discriminate against their own domestic suppliers for the benefit of foreign services suppliers.

2. With Respect to "Public Telecommunications Transport Networks and Services"

31 For a discussion on the definition of "public telecommunications transport networks and services", please refer to the analysis of para. 3 above.

3. "For the Supply of a Service Included in its Schedule"

32 As discussed above, the obligation to provide access to and use of public telecommunications transport networks and services would be triggered

[46] *Mexico—Telecoms*, WT/DS204/R, para. 7.313.

only when a Member had made specific commitments on a particular service sector in its Schedule. According to the Panel in *Mexico—Telecoms*, this cannot be taken to mean that the obligation in para. 5 lit. a arises as soon as any level of commitment is inscribed in a Schedule, because para. 5 lit. e (iii) permits the imposition of conditions on access and use "to ensure that service suppliers of any other Member do not supply services unless permitted pursuant to commitments in a Member's Schedule".[47] Thus, the basic rights of access and use may be qualified by **conditions and limitations inscribed in** a Member's **Schedule**.

4. "On Reasonable and Non-Discriminatory Terms and Conditions"

33 In *Mexico—Telecoms*, the Panel noted that, although the words "terms" and "conditions" are closely related and are frequently used concurrently, the two may have different meanings.[48] According to the Panel, in relation to contracts and agreements, the word "terms" is defined to mean "conditions, obligations, rights, price, etc., as specified in contract or instrument", while "condition" is defined, *inter alia*, as "a provision in a will, contract, etc., on which the force or effect of the document depends".[49] Thus, the ordinary meaning of the word "terms" would include **pricing** elements, such as rates charged for access to and use of public telecommunications transport networks and services.[50] On the other hand, para. 5 lit. f, which lists examples of "conditions", does not refer to specific pricing measures.[51] Moreover, pricing measures do not appear to be similar to any of the conditions included in para. 5 lit. f.[52] Thus, access rates are probably not "conditions".[53] As the Panel's analysis is based on a reading of para. 5 lit. e and f, it is unclear whether or not the term "conditions" under para. 5 lit. a also excludes pricing measures. The interpretation probably would not make any practical difference, however, as the obligation under para. 5 lit. a applies to both "terms" and "conditions".

a) "Non-Discriminatory"

34 With regard to such terms and conditions, they must be "reasonable and non-discriminatory". Of the two, the meaning of the word "non-discriminatory" is relatively clear, as the Annex provides for a definition of the term in the **footnote**. According to this footnote, "non-discriminatory" incorporates the following obligations:

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[47] *Ibid.*, para. 7.317.
[48] *Ibid.*, para. 7.325.
[49] *Ibid.*
[50] *Ibid.*
[51] *Ibid.*, para. 7.326.
[52] *Ibid.*
[53] *Ibid.*

First, the **MFN** obligation as defined under Art. II. Under that Article, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country. As this is a general obligation, Members are obliged to provide MFN treatment to any services or service suppliers regardless of whether or not the Member has made a specific commitment regarding that particular sector in its Schedule. Typically, the MFN obligation applies only to measures taken by governments of Members. In the telecommunications sector, however, Member governments frequently delegate regulatory powers to operators. Thus, to the extent that such operators exercise powers delegated by government authorities, they also assume the obligations under para. 5 of the Annex Tel.[54] *35*

Second, the **national treatment** obligation as defined under Art. XVII. According to that Article, each Member shall accord to services and service suppliers of any other Member treatment no less favourable than that it accords to its own like services and service suppliers. Unlike the MFN obligation, the national treatment obligation applies only where a Member has made specific commitments in a particular sector. Moreover, the national treatment obligation may be qualified by conditions and limitations inscribed in the Schedule. By virtue of the Annex Tel., however, with regard to measures affecting the access to and use of public telecommunications transport networks and services, national treatment must be granted in full for a scheduled service.[55] Thus, the national treatment obligation provided for here is even higher than that found under Art. XVII. *36*

Third, to reflect the specificities of the telecommunication sector, the footnote also sets out the sector-specific usage of the term "non-discriminatory" as referring to "terms and conditions no less favourable than those accorded to any other user of like public telecommunications transport networks or services under like circumstances". Thus, the non-discrimination obligation is not confined to situations where the users are providers of like services; instead, no matter what services they provide, so long as they use like public telecommunications transport networks or services under like circumstances, they shall not be subject to less favourable terms and conditions than those accorded to other users. This is another innovation compared to the non-discrimination obligations under the GATS, which generally apply only to like services or like service suppliers. This **broader national treatment obligation** reflects the dual role of the telecommunications sector as a *37*

[54] *Tuthill*, Telecommunications Policy 20 (1996), 89, 92. See also Art. I:3 lit. a.
[55] *Tuthill*, Telecommunications Policy 20 (1996), 89, 92.

service sector and as an underlying transport means for other economic activities.[56]

38 One question regarding this para. is whether the non-discrimination obligation extends on an **intra-country basis**. Some commentators argue that this should be the case.[57] In the view of the author, even though in reality countries rarely treat their domestic service suppliers less favourably than foreign suppliers, there is no legal obligation under the GATS and the Annex Tel. that bars countries from doing so. As discussed above, under both the GATS and the Annex Tel., Members assume obligations only with regard to services and service suppliers of **other** Members but not their own suppliers. Thus, at least legally speaking, there is nothing in the GATS or the Annex that prevents Members from mistreating their own domestic service suppliers.

b) "Reasonable"

39 Unlike "non-discriminatory", the term **"reasonable"** has not been explicitly defined under the Annex. According to the Panel in *Mexico—Telecoms*, as the word "non-discriminatory" addresses the conditions of competition of service suppliers in relation to other suppliers who are **users** of public telecommunications transport networks and services, while the Annex Tel. applies to both **use and access**, the word "reasonable" would include obligations that go beyond the non-discrimination requirement.[58] The Panel further noted that, even though para. 2.2 lit. b of the Reference Paper on Basic Telecommunications (RP) already requires cost-oriented interconnection on reasonable terms and conditions, this does not necessarily mean that the term "reasonable" in para. 5 lit. a of the Annex Tel. cannot refer to rates for interconnection, as the Annex Tel. obligation applies to all operators of public telecommunications transport networks and services while the RP regulates only "major suppliers".[59] Thus, the inquiry into the "reasonableness" of terms would also include questions of **pricing** of that access and use.[60] On the question of what rates would be "reasonable", the Panel started by noting that rates charged for access to and use of public telecommunications transport networks and services may still be "reasonable" even if generally higher than rates for interconnection that are cost-oriented in terms of para. 2.2 lit. b of Mexico's Reference Paper.[61] Otherwise, it would not have been necessary for the Members to impose an additional obligation on major

[56] See above, para. 2.
[57] *Naftel & Spiwak*, 104.
[58] *Mexico—Telecoms*, WT/DS204/R, para. 7.330.
[59] *Ibid.*, para. 7.331.
[60] *Ibid.*, para. 7.333.
[61] *Ibid.*, para. 7.334.

suppliers to provide cost-based rates for interconnection in the RP.[62] Next, the Panel considered whether the rates were reasonable in the case before it. According to the Panel, it is unnecessary to determine the exact point at which a rate for access to and use of public telecommunications transport networks and services would cease to be "reasonable".[63] Instead, the Panel concluded that, in the current case, as the interconnection rates exceeded cost-oriented rates by a substantial margin and were set in a uniform manner to prevent price competition in the relevant market for the telecommunications services, such rates could not have been "reasonable".[64]

c) Relationship with Para. 5 lit. b–f

40 Para. 5 lit. a, sentence 2 states explicitly that the obligations therein shall be "applied, *inter alia*, through para. 5 lit. (b) through (f)". According to the *Mexico—Telecoms* Panel, this means that para. 5 lit. a and the later provisions must be **interrelated** and must **inform each other** as an obligation cannot be applied "through" another provision if that obligation is read in isolation from that provision.[65] Thus, para. 5 lit. a must be read taking into account para. 5 lit. b–f.[66] On the other hand, para. 5 lit. a **informs** para. 5 lit. b–f, which means that any terms and conditions satisfying para. 5 lit. b–f shall also be "reasonable and non-discriminatory" under para. 5 lit. a to be justified under the Annex Tel.[67]

III. Users' Rights *Versus* Regulators' Rights (Para. 5 lit. b–g)

41 Following para. 5 lit. a, para. 5 lit. b–f specify how the guarantees of "reasonable and non-discriminatory" access and use shall be put into practice.[68] These provisions strike a delicate balance between the users' rights provisions in para. 5 lit. b–d and the regulators' rights provisions under para. 5 lit. e–g.[69]

1. Users' Rights (Para. 5 lit. b–d)

42 Under **para. 5 lit. b**, each Member shall ensure that service suppliers of any other Member have access to and use of any public telecommunications transport network or service. Such obligation applies to services provided at **both domestic and international** levels as networks and services offered both within and across the border of the host Member

[62] *Ibid.*
[63] *Ibid.*, para. 7.335
[64] *Ibid.*
[65] *Ibid.*, para. 7.302.
[66] *Ibid.*
[67] *Ibid.*, para. 7.306.
[68] *Tuthill*, Telecommunications Policy 20 (1996), 89, 92.
[69] *Mathews*, 101.

are covered. Moreover, for reasons such as ensuring security or reducing costs, many service providers choose to use private leased circuits to serve their telecommunications needs. Under para. 5 lit. b, access to and use of **private leased circuits** shall be guaranteed to users as well.

43 In order to meaningfully exercise such rights, the user needs first to have access to and use of **terminal equipment** such as telephone or fax machines to interface with the network. Next, the user will need to **interconnect** its private circuits with public telecommunications transport networks and services or with other service suppliers' circuits so as to make it possible for the user to communicate with its potential customers. After connection has been established and when the service supplier provides a service to a particular customer, he may need to use **operating protocols** of his choice to supply services in the most efficient and secure manner. All these rights are guaranteed explicitly to the user under para. 5 lit. b. The only qualification is provided for under para. 5 lit. b (iii), where, mindful of the regulators' need to ensure the availability of telecommunications transport networks and services to the public generally, the user may be required to use mandatory protocols rather than operating protocols of his own choice.[70]

44 Even though the list under para. 5 lit. b encompasses most cases of access and use, it is still possible that there are **other forms of interconnection or usage** which are not mentioned. As the Annex Tel. obligations apply to any public telecommunications transport network or service, the list under para. 5 lit. b must be regarded as illustrative rather than comprehensive to avoid the obligations being circumvented by technological or regulatory innovations.[71]

45 Para. 5 lit. b also states that the obligations therein shall apply **"subject to para. 5 lit. e and f"**. According to the *Mexico-Telecoms* Panel, this means that "the obligations in paragraph (b) are *subordinated to*, and are, therefore, *qualified by*, paragraphs (e) and (f)".[72] Should a Member decide to introduce any condition pursuant to the policy objectives set out in para. 5 lit.e (i)–(iii), the obligations in para. 5 lit. b shall be subsequently qualified.[73] Moreover, as discussed above, para. 5 lit. b is also informed by para. 5 lit. a, which requires that the access and use must be provided on reasonable and non-discriminatory terms and conditions.[74]

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[70] *Tuthill*, Telecommunications Policy 20 (1996), 89, 93.
[71] *Ibid.*
[72] *Mexico—Telecoms*, WT/DS204/R, para. 7.308 (italics added).
[73] *Ibid.*
[74] *Ibid.*

46 Historically, telecommunication networks and services have been most useful in facilitating the real-time transmission of information. With the advance of technology, however, it has become more and more important for users to be able to store information and even to move information around. Recognizing the importance of the ability to move information, **para. 5 lit. c** also explicitly provides users with the right to use public telecommunications transport networks and services for the **movement of information within and across borders**. This includes, for example, intra-corporate communication of such service suppliers, as well as access to information contained in databases or otherwise stored in machine-readable form in the territory of any Member. While a Member might introduce some new or amended measures to regulate such use, if such measures would significantly affect such use, they shall be notified and subject to consultation, in accordance with relevant provisions of the Agreement. It is unclear whether the "consultation" here refers just to consultation in general, or rather to consultation under Art. XXII, which shall also be covered by the Dispute Settlement Understanding (DSU).

47 The right provided for under para. 5 lit. c is qualified by **para. 5 lit. d**, which allows a Member to take such measures as are necessary to ensure the **security and confidentiality** of messages, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services. Presumably, if such messages contain confidential information relating solely to the interests of the user, the user can be trusted to take the necessary steps to guarantee their security and confidentiality. Thus, the right of a Member to intervene is probably most relevant in cases where the message affects the interests of parties other than the user himself, such as consumers or public telecommunications operators.

2. Regulators' Rights (Para. 5 lit. e–g)

48 Para. 5 lit. e–g set out the regulators' rights, or more accurately, the parameters within which the regulators are allowed to impose conditions on access and use.[75] As discussed above, these parameters are relevant to understanding users' rights as well as helping to define which "conditions" might be "reasonable".[76]

49 According to **para. 5 lit. e**, regulators may impose certain conditions to the extent that they are necessary to achieve one of the following three policy objectives: first, to safeguard the **public service responsibilities**, such as universal service; second, to protect the **technical integrity** of

[75] *Tuthill*, Telecommunications Policy 20 (1996), 89, 93.
[76] *Ibid.*

public telecommunications transport networks or services; and, third, to ensure that no services other than those permitted pursuant to the **commitments in** the relevant Member's **Schedule** are provided by suppliers of any other Member. Given the broad nature of the users' rights as discussed above, the list of policy objectives provided for here shall be regarded as comprehensive rather than illustrative. This is supported by the negative wording ("no conditions [...] other than"), which indicates the exceptional and thus narrow character of the list of conditions. Thus, conditions that do not satisfy any of the three shall not be allowed. Even conditions that satisfy one of the objectives are permitted only to the extent that they are necessary for the achievement of such objective.

50 As noted by a leading law dictionary, the term **"necessary"** could vary in meaning: on the one hand, it "may import absolute physical necessity or inevitability"; on the other, "it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought".[77] In short, it "is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity".[78] The Appellate Body recognized this when it noted, under a different provision in a different WTO agreement, that the term "necessary" can refer to a range of degrees of necessity, depending on the context, and the object and purpose of the provision in which it is used.[79] At one end of this continuum, "necessary" can be understood to mean **"indispensable"** to achieving a policy goal; at the other end, "necessary" can be taken to mean simply **"making a contribution to"** a policy goal.[80] In the *Mexico—Telecoms* case, the Panel, after citing the Appellate Body jurisprudence above, discussed what should be the proper meaning of the word "necessary" under para. 5 lit. e.[81] According to the Panel, if the word is interpreted to mean "indispensable", the "reasonable" standard in para. 5 lit. a would have been rendered inutile, as what is "indispensable" surely could not also be unreasonable.[82] On the other hand, even if a particular level of access rate were considered only to be "making a contribution" to one of the policy goals listed in para. 5 lit. e, an examination under para. 5 lit. a of whether that rate was also "reasonable" would still need to be undertaken.[83] Thus, the word "necessary" must be regarded as closer to the meaning of "making a contribution to".[84]

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[77] *Black*, Black's Law Dictionary, 1995, 1029; cited in Appellate Body Report, *Korea—Various Measures on Beef*, WT/DS161, para. 160.
[78] *Black*, Black's Law Dictionary, 1995, 1029.
[79] *See Korea—Various Measures on Beef*, WT/DS161, para. 161.
[80] *Ibid.*
[81] *Mexico—Telecoms*, WT/DS204/R, para. 7.337–7.338.
[82] *Ibid.*, para. 7.341.
[83] *Ibid.*, para. 7.342.
[84] *Ibid.*

As these objectives may be too abstract to provide meaningful guidelines to governments in considering which conditions they may want to impose, **para. 5 lit. f** provides some **specific examples** of acceptable practices. As these examples are provided for illustrative purposes only, as the wording "may include" shows, they are in no way exhaustive and Members shall be free to introduce conditions so long as they satisfy the requirements of para. 5 lit. e. Depending on the objectives they are designed to serve, the examples can be grouped as follows: first, those designed to safeguard public service responsibilities, which include requirements for the inter-operability of public telecommunications services and to encourage the achievement of the goals set out in para. 7 lit. a, *i.e.*, to promote international standards for global compatibility and inter-operability of telecommunications networks and services; second, those designed to protect the technical integrity of public telecommunications systems, which include a requirement to use specified technical interfaces, including interface protocols, for inter-connection with such networks and services, as well as type approval of terminal or other equipment which interfaces with the network and technical requirements relating to the attachment of such equipment to such networks; third, those designed to prevent the supply of uncommitted services, which include restrictions on resale or shared use of such services, restrictions on inter-connection of privately leased or owned circuits with such networks or services or with circuits leased or owned by another service supplier, as well as conditions governing notification, registration and licensing.[85] *51*

As many developing countries have a poor telecommunications infrastructure and limited service capacity, it might put a strain on their limited resources if they were to assume the full obligations under para. 5. Thus, in line with the call under Art. IV to help developing countries to strengthen their domestic services capacity and improve their access to distribution channels and information networks, **para. 5 lit. g** provides some **flexibility to developing countries**, consistent with their level of development, to place reasonable conditions on access to and use of public telecommunications transport networks and services necessary to **strengthen** their **domestic** telecommunications **infrastructure** and service **capacity** and to **increase** their **participation** in **international trade** in telecommunications services. Thus, in addition to the three policy objectives recognized under para. 5 lit. e (safeguarding public service responsibilities, protecting technical integrity and preventing circumvention of Schedules), para. 5 lit. g provides another two policy objectives as possible justification for developing countries for imposing conditions. Unlike the conditions under para. 5 lit. e, those justified under para. 5 lit. g do not have to be *52*

[85] For some practical examples which illustrate these, see *Tuthill*, Telecommunications Policy 20 (1996), 89, 96.

"non-discriminatory" as required under para. 5 lit. a, because para. 5 lit. a does not include para. 5 lit. g as one that should be informed by the general obligations under para. 5 lit. a, while para. 5 lit. g creates an exception to all "the preceding paragraphs of this section". Thus, the conditions only have to be reasonable and necessary to the achievement of the objectives as provided for under para. 5 lit. g.

53 As argued by some commentators, the reference to international trade here could be a recognition of the emphasis placed by developing countries on maintaining high **accounting rates** for the termination of international telephone traffic within their borders.[86] According to developing countries, these high rates are justified as they provide additional revenue which could be used to modernize their domestic networks.[87] Experiences suggest, however, that these revenues are not necessarily directed to their stated uses; instead, privatization and competition probably work better than subsidies in promoting technical progress and consumer welfare.[88]

54 In accordance with para. 5 lit. g, such conditions shall also be **consistent with the level of development** of a developing Member. Thus, some of the conditions may not be maintained as the Member climbs higher on the development ladder. Furthermore, in order for a Member to make use of any condition, such **condition** must have been **specified in** the Member's **Schedule**. Hitherto, no developing country has exercised this option.[89] Thus, it seems that only newly-acceding developing Members can have the opportunity to invoke para. 5 lit. g. Existing Members would have first to follow the procedures provided for under Art. XXI to modify their Schedule before they can resort to para. 5 lit. g.[90] Unless they have done so, they will not be able to make use of para. 5 lit. g, as the *Mexico—Telecoms* case showed.[91]

F. Technical Cooperation (Para. 6)

I. General

55 As telecommunications services provide the underlying transport means for other economic activities, many developing countries find that their overall economic development is handicapped by the lack of efficient and

[86] *Naftel & Spiwak*, 106.
[87] *Ibid.*
[88] *Ibid.*
[89] *Mathew*, 108.
[90] *Ibid.*
[91] In that case, Mexico attempted to invoke para. 5 lit. g as a defense but this was rejected by the Panel. See, *Mexico—Telecoms*, WT/DS204/R, paras 7.386–7.389.

advanced telecommunications infrastructures. In order to help developing countries to **improve** their **telecommunications infrastructures**, para. 6 provides details of how technical cooperation in the telecommunications sector is to be provided.

II. Forms of Technical Cooperation

56 According to para. 6, technical cooperation to developing countries could take several forms:

57 Pursuant to **para. 6 lit. a**, technical cooperation to the developing countries shall be **provided by the developed countries**. Such cooperation is generally channelled through the development programmes of international and regional organizations, which include, among others, the International Telecommunication Union (ITU), the United Nations Development Programme (UNDP), and the International Bank for Reconstruction and Development (World Bank). Such cooperation is generally provided by governments, but could also be provided by suppliers of public telecommunications transport networks and services and other entities.

58 **Para. 6 lit. b** encourages technical cooperation **among the developing countries**. This can take place at the international, regional and sub-regional levels.

59 Under **para. 6 lit. c**, with regard to these two named forms of cooperation, Members shall make available, where practicable, to developing countries information with respect to telecommunications services and developments in telecommunications and information technology to assist in strengthening their domestic telecommunications services sectors.

60 Pursuant to **para. 6 lit. d**, foreign suppliers of telecommunications services shall be encouraged to assist least-developed countries by transfer of technology, training and other activities that support the development of their telecommunications infrastructures and the expansion of their telecommunications services trade.

61 As with other provisions on technical cooperation or development assistance elsewhere in the WTO agreements, the language in para. 6 is very vague and does not create binding legal obligations. Instead, it only calls for the **best endeavours** of Members. Presumably, this paragraph was included in order to provide incentives for developing countries to participate in negotiations on telecommunications services and schedule specific market-opening commitments.[92]

[92] *Mathew*, 111.

G. Relation to International Organizations and Agreements (Para. 7)

I. General

62 As the WTO is not the only international organization with a mandate on regulating telecommunication services, it is important that the WTO recognizes the roles played by other international organizations with similar mandates and tries to coordinate their endeavours where possible. Para. 7 sets out the detailed obligations in this regard.

II. Coordinating Technical Standards and Regulatory Guidelines

63 In order to make international trade in telecommunications services possible, it is very important to have **international standards** which ensure global compatibility and inter-operability of telecommunication networks and services. Generally speaking, the WTO does not purport to be involved in the formulation of technical standards. Instead, such work is usually carried out by other international bodies. With regard to telecommunication services, two of the most important bodies are the ITU and the International Organization for Standardization. Therefore, para. 7 lit. a calls on Members to recognize the importance of such standards and to undertake to promote such standards through the work of these bodies.

64 In addition to setting out technical standards, many intergovernmental and non-governmental organizations, in particular the ITU, have also been active in formulating **regulatory guidelines** to ensure the efficient operation of domestic and global telecommunications services. Thus, para. 7 lit. b requires Members to make appropriate arrangements for consultation with such organizations on matters arising out of the implementation of this Annex.

65 Pursuant to para. 7, the WTO entered into an **agreement with the ITU** on 21 September 2000.[93] The agreement consists of a preamble and 13 paras, with the details as follows:

66 The Preamble recalls the closely-related purposes of the ITU and WTO (the parties) and the growing **links** between the two, which form the background for cooperation between the two institutions. It also points to the relevant provisions in the instruments of both institutions, which provide for the legal basis for the conclusion of the agreement.

[93] Council for Trade in Services, Agreement between the International Telecommunication Union and the World Trade Organization, S/C/11, 21 September 2000.

67 Para. 1 sets out the **basis for the cooperation** by requiring the parties to cooperate in the discharge of their respective mandates in accordance with the provisions of the agreement. Even though this has not been exclusively excluded from para. 1, later provisions, especially paras 3 and 5, seem to suggest that no cooperation is envisaged with regard to the mandate of settling disputes by the WTO, as the ITU cannot join in meetings of **dispute settlement** panels, the Appellate Body or the Dispute Settlement Body (DSB) even when a matter regarding telecommunications is on the agenda. Presumably, this is to guarantee the **confidentiality** of the dispute settlement procedure as required by Arts 14 and 17 DSU.

68 Under para. 2, the parties shall identify **areas of common interest**, especially on **technical, regulatory and development matters** concerning trade in telecommunications. After the relevant areas have been identified, the parties shall endeavour to cooperate on such matters.

69 The next few paras provide for possible **forms** of such cooperation. These include, for example, granting observer status to the other party.[94] In the meetings of the Ministerial Conference and the Council for Trade in Services of the WTO, as well as the treaty-making conferences of the ITU, the other party would be automatically eligible to participate as an observer.[95] For other meetings of both institutions, there is no such automatic right; instead, the other party shall be invited to participate as an observer only when the host institution considers that matters of common interest will be under discussion.[96] In addition, under no circumstances will the ITU be allowed to participate in meetings of the following WTO bodies: dispute settlement panels, the Appellate Body, the DSB, or the Committee on Budget, Finance and Administration.[97] To facilitate the participation of the other party, the host institution shall provide to the other party the agendas and relevant documents for such meetings, as well as information regarding conferences it organizes to discuss matters of common interest.[98]

70 Other forms of cooperation include cooperation in technical assistance activities,[99] cooperation between the staffs of the two institutions, as well as the regular exchange of information on technical, regulatory and policy issues relating to trade in telecommunications.[100] With regard to **information exchange**, restrictions may be placed on the use of the information in order to safeguard materials which may be confidential.[101]

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[94] *Ibid.* paras 3 and 4.
[95] *Ibid.*
[96] *Ibid.*
[97] *Ibid.*, para. 3.
[98] *Ibid.*, para. 5.
[99] *Ibid.*, para. 6.
[100] *Ibid.*, para. 7.
[101] *Ibid.*, para. 9.

71 In view of their **budgetary constraints**, both parties also agree that no additional costs shall be incurred for joint technical assistance, staff cooperation and information exchange activities.[102] Instead, external funding sources shall be explored as necessary.[103]

72 Para. 10 entrusts the Secretary-General of the ITU and the Director-General of the WTO with the responsibility of implementing the agreement and making appropriate arrangements for such purpose.

73 In accordance with para. 13, the agreement shall **enter into force** on the day following the exchange by the Parties of formal confirmation instruments. Afterwards, it shall remain in effect until terminated. Either party may terminate the agreement by written notice to the other.[104] Such **termination** shall take effect six months after the giving of notice unless otherwise agreed.[105] Where there are ongoing projects, the agreement shall survive notwithstanding the termination to ensure the completion of those projects.[106]

74 Either party may also request a **review** of the agreement, and any subsequent **amendment** shall be agreed to in writing by both parties.[107] Should the parties have any **dispute** regarding the interpretation or application of the agreement, they shall settle it by negotiation.[108]

H. Assessment and Outlook

75 As recognized by many commentators, the Annex Tel. deals only with the rights of users to access and use public telecommunications transport networks and services, but does not by itself establish the right to provide and supply such services.[109] Thus, it has only a limited impact on the liberalization of national telecommunications markets.[110] On the other hand, however, a leading commentator has noted that the Annex Tel. represents "a historic turning point", not only because it is a successful effort by so many countries to apply multilateral trade rules to the sector, but also because it symbolizes the changing dynamics of the sector from an era of monopoly-controlled regimes to one of market-based, competitive markets.[111] The impacts of

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[102] *Ibid.*, para. 8.
[103] *Ibid.*
[104] *Ibid.*, para. 12.
[105] *Ibid.*
[106] *Ibid.*
[107] *Ibid.*, para. 11.
[108] *Ibid.*
[109] See *Mathew*, 78. See also *Fredebeul-Krein & Freytag*, 485.
[110] See *Mathew*, 78. See also *Fredebeul-Krein & Freytag*, 485.
[111] *Tuthill*, Telecommunications Policy 21 (1997) 783, 797.

the Annex Tel. extend far beyond the sector itself, including to providing an effective framework of national and multinational rules, improving the efficiency and capacity of government regulators, and supplying a catalyst for investment in telecoms infrastructure, all of which will be essential to reaping the benefits of emerging global information highways and securing sustainable economic development.[112]

One shortcoming of the Annex Tel. is that it purports to impose obligations only on providers of public telecommunications transport networks and services and to grant rights to users of such services within national boundaries. In reality, however, many users are themselves also dominant providers of such services in a foreign country or even at the global level. Thus, while the narrow focus of the Annex Tel. could help foster competition in the domestic market of a particular country, it may unwittingly promote anti-competitive behaviour at a global level by helping such providers to capture markets which are crucial in building their global empires. In this regard, agreements at the global level are needed to harmonize regulatory frameworks and coordinate regulatory practices. *76*

[112] *Ibid.*, 798.

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Annex on Negotiations on Basic Telecommunications

1. Article II and the Annex on Article II Exemptions, including the requirement to list in the Annex any measure inconsistent with most-favoured-nation treatment that a Member will maintain, shall enter into force for basic telecommunications only on:
   a) the implementation date to be determined under paragraph 5 of the Ministerial Decision on Negotiations on Basic Telecommunications; or,
   b) should the negotiations not succeed, the date of the final report of the Negotiating Group on Basic Telecommunications provided for in that Decision.
2. Paragraph 1 shall not apply to any specific commitment on basic telecommunications which is inscribed in a Member's Schedule.

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Council for Trade in Services, Telecommunications Services, Background Note by the Secretariat, S/C/W/74, 8 December 1998.

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A. Background **1**
B. Temporary Exemption from MFN Obligation **2**
C. Subsequent Developments **5**

A. Background

1 Even towards the conclusion of the Uruguay Round, **negotiations on basic telecommunications remained in stalemate**.[1] Even though the term **"basic telecommunications"** is not explicitly defined in the GATS, it is generally understood to include the real-time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information.[2] Regarding the proper regulatory framework for these basic telecommunications, there were great differences between the US on the one hand, and the EC, Canada and Japan on the other.[3] Even though the US pushed for liberalization in the basic telecommunications sector, the US was unwilling to grant full most-favoured-nation (MFN) treatment to other Members unless they agreed to bind themselves to full market access and national treatment in the sector.[4] At the same time, many Members recognized that the potential of the basic telecommunications market could be enormous,

[1] *Mathew*, 53.
[2] Council for Trade in Services, Telecommunications Services, Background Note by the Secretariat, S/C/W/74, 8 December 1998, para. 7. See also *Mathew*, 56, 89.
[3] *Mathew*, 53.
[4] *Bronckers & Larouche*, in: *Macrory et al.* (eds), 989, 992.

given the continuing regulatory reforms and technological developments.[5] Thus, Members wanted to extend negotiations on basic telecommunications beyond the Uruguay Round.[6] The Members were **not sure**, however, **whether the negotiations would lead to commitments** from all Members with major telecommunications markets. **The Annex on Negotiations on Basic Telecommunications** (**Annex NBTel**) **was drafted to allay such concerns**.

B. Temporary Exemption from MFN Obligation

2 MFN is one of the most fundamental obligations under the GATS. Even though it is possible to schedule some exemptions to the **MFN** obligations, this could be done **only before the entry into force of the WTO Agreement or** today only **upon accession by a new Member**[7] and such exemptions should, in principle, not exceed 10 years. Pursuant to the Annex on Article II Exemptions, if a Member wants to schedule any **new** exemptions **after** the WTO Agreement entered into force, it can **only** do so **after obtaining a waiver from the WTO** (**Art. IX:3 WTO Agreement**).[8] This is very difficult in practice as such waiver would require approval from three-quarters of the whole membership. As the negotiations on basic telecommunications continued until after the entry into force of the WTO Agreement, however, a waiver would have been needed in the absence of any other special arrangements.

3 In this scenario, the **Annex NBTel** provided a **special arrangement**. Under this Annex, the **MFN obligation and the Annex on Article II Exemptions** permitting MFN exemptions under the named condititons were **suspended for basic telecommunications** until the implementation of the results of the negotiations or, should the negotiations not succeed, until the time when the Negotiating Group on Basic Telecommunications (NGBT) issued its final report. Thus, Members could still file exemptions to Art. II until the end of the negotiations.[9] From that time on, the commitments had to be applied on an MFN basis, unless a Member had decided to list an exemption for any measures related to basic telecommunications.

4 This suspension did not apply to any **specific commitment** on basic telecommunications which was inscribed in a Member's Schedule at the conclusion of the Uruguay Round. This probably in part explains the

[5] *Mathew*, at 53–54.
[6] *Bronckers & Larouche*, in: *Macrory et al.* (eds), 989, 993.
[7] See *Wolfrum*, Annex on Article II Exemptions, para. 1.
[8] See *Wolfrum*, Max Planck CWTL, Vol. 2, Article IX WTO Agreement, para. 18.
[9] *Bronckers & Larouche*, in: *Macrory et al.* (eds), 989, 993.

paucity of the commitments on basic telecommunications when the Uruguay Round was concluded.

C. Subsequent Developments

5 Pursuant to the Decision on Negotiations on Basic Telecommunications, the Members continued the negotiations, which were originally scheduled to be concluded by 30 April 1996. Shortly before the end, however, the US abandoned the negotiations in dissatisfaction over the liberalization offers made by other Members. The WTO Secretariat intervened and successfully proposed that the negotiations should be extended until early 1997. **On 15 February 1997, the negotiations were finally concluded**. The resulting commitments were annexed to the Fourth Protocol to the GATS. **The Fourth Protocol came into force** on 5 February 1998, **and the temporary exemption from the MFN obligation in the Annex NBTel has expired since then**.

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Fourth Protocol to the General Agreement on Trade in Services

Members of the World Trade Organization (hereinafter referred to as the "WTO") whose Schedules of Specific Commitments and Lists of Exemptions from Article II of the General Agreement on Trade in Services concerning basic telecommunications are annexed to this Protocol (hereinafter referred to as "Members concerned"),

Having carried out negotiations under the terms of the Ministerial Decision on Negotiations on Basic Telecommunications adopted at Marrakesh on 15 April 1994,

Having regard to the Annex on Negotiations on Basic Telecommunications,
Agree as follows:

1. Upon the entry into force of this Protocol, a Schedule of Specific Commitments and a List of Exemptions from Article II concerning basic telecommunications annexed to this Protocol relating to a Member shall, in accordance with the terms specified therein, supplement or modify the Schedule of Specific Commitments and the List of Article II Exemptions of that Member.
2. This Protocol shall be open for acceptance, by signature or otherwise, by the Members concerned until 30 November 1997.
3. The Protocol shall enter into force on 1 January 1998 provided it has been accepted by all Members concerned. If by 1 December 1997 the Protocol has not been accepted by all Members concerned, those Members which have accepted it by that date may decide, prior to 1 January 1998, on its entry into force.
4. This Protocol shall be deposited with the Director-General of the WTO. The Director-General of the WTO shall promptly furnish to each Member of the WTO a certified copy of this Protocol and notifications of acceptances thereof.
5. This Protocol shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Done at Geneva this[—day of month] one thousand nine hundred and ninety-seven, in a single copy in the English, French and Spanish languages, each text being authentic, except as otherwise provided for in respect of the Schedules annexed hereto.

Bibliography

See *Gao*, Annex on Telecommunications.

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A. Background **1**
B. Legal Implications **2**

A. Background

Even though Art. XXI provides for procedures to modify a Member's commitments in its Schedule, it could not serve the needs of the post-Uruguay Round negotiation on basic telecommunications for two reasons. First, under Art. XXI, no modification could be made until after three years had elapsed from the date on which that commitment entered into force, which means that Members would not have been able to continue their negotiation from 1 January 1995 to 31 December 1997. This would further delay the negotiations. Secondly, under Art. XXI, any Member modifying its Schedule would have to provide compensation to affected Members. This would make the negotiations more costly and burdensome. Thus, when the members of the Negotiating Group on Basic Telecommunications concluded *1*

nearly three years of extended negotiations on **market access** for **basic telecommunications services** on 15 February 1997, they drafted the Fourth Protocol to annex the results of the basic telecommunications negotiations to the GATS. As the result of the negotiations, sixty-nine governments made new commitments on basic telecommunications services. Nine Art. II exemption lists were also scheduled.

B. Legal Implications

2 The Fourth Protocol provides the legal basis for the commitments made in the post-Uruguay Round negotiations on basic telecommunications to be incorporated into the GATS. These new commitments could either **supplement** or **modify** the Schedule of specific commitments and the list of Art. II exemptions of the relevant Member. The ordinary meaning of "supplement" is to remedy a deficiency or shortcoming, or to add a part to a document to provide further information.[1] The ordinary meaning of "modify" is to make partial or minor changes to, alter without radical transformation, qualify or moderate (a statement etc.), alter so as to make less severe; or alter so as to improve.[2] To provide some examples, one may note that Hong Kong, China only made commitments on value-added telecommunication services in its Uruguay Round Schedule,[3] while its new commitments annexed to the Fourth Protocol supplemented the old Schedule by including commitments on many basic telecommunication services such as voice services and packet switched data transmission services.[4] On the other hand, Japan modified its commitments for several basic telecommunication services by changing the "Limitations on Market Access" for mode 3 from "None" to "Foreign capital participation, direct and/or indirect, in NTT and KDD must be less than one-fifth".[5]

3 To the extent that a new commitment supplements or modifies the Schedule of specific commitments of a particular Member, the Fourth Protocol overrides the procedure for the modification of Schedules under Art. XXI to incorporate such new commitment as an integral part of the GATS. Similarly, to the extent that a new most-favoured-nation (MFN) exemption supplements or modifies the list of Art. II exemptions of a Member, the Fourth Protocol overrides the procedure for the modification of Schedules

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[1] *Brown* (ed.), Shorter Oxford English Dictionary, 5th Edition, 2002.

[2] *Ibid.*

[3] Hong Kong, Schedule of Specific Commitments, GATS/SC/39, 15 April 1994.

[4] Trade in Services, Hong Kong, Schedule of Specific Commitments, Supplement 2, GATS/SC/39/Suppl.2, 11 April 1997.

[5] Compare Japan, Schedule of Specific Commitments, GATS/SC/46, 15 April 1994 with Trade in Services, Japan, Schedule of Specific Commitments, Supplement 2, GATS/SC/46/Suppl.2, 11 April 1997.

under para. 2 of the Annex on Article II Exemptions and the waiver procedure under Art. IX:3 WTO Agreement to incorporate such new exemption as an integral part of the GATS.

4 Initially, the Fourth Protocol was open for acceptance until 30 November 1997. This deadline was later extended to 31 July 1998 to allow some remaining participants to complete ratification. With the conclusion of the ratifications, the Protocol and the annexed Schedules and MFN exemption lists entered into force on 5 February 1998.

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Telecommunications Services: Reference Paper

The following are definitions and principles on the regulatory framework for the basic telecommunications services.

Definitions
"Users" mean service consumers and service suppliers.
"Essential facilities" mean facilities of a public telecommunications transport network or service that
a) are exclusively or predominantly provided by a single or limited number of suppliers; and
b) cannot feasibly be economically or technically substituted in order to provide a service.

A "major supplier" is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of:
a) control over essential facilities; or
b) use of its position in the market.

1. Competitive safeguards
   1.1 Prevention of anti-competitive practices in telecommunications
   Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.
   1.2 Safeguards
   The anti-competitive practices referred to above shall include in particular:
   a) engaging in anti-competitive cross-subsidization;
   b) using information obtained from competitors with anti-competitive results; and
   c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.
2. Interconnection
   2.1 This section applies to linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken.
   2.2 Interconnection to be ensured
   Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided.
   a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;
   b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and
   c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.
   2.3 Public availability of the procedures for interconnection negotiations
   The procedures applicable for interconnection to a major supplier will be made publicly available.
   2.4 Transparency of interconnection arrangements
   It is ensured that a major supplier will make publicly available either its interconnection agreements or a reference interconnection offer.
   2.5 Interconnection: dispute settlement
   A service supplier requesting interconnection with a major supplier will have recourse, either:

a) at any time or
b) after a reasonable period of time which has been made publicly known to an independent domestic body, which may be a regulatory body as referred to in paragraph 5 below, to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reasonable period of time, to the extent that these have not been established previously.

3. Universal service
Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive per se, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.

4. Public availability of licensing criteria
Where a licence is required, the following will be made publicly available:
a) all the licensing criteria and the period of time normally required to reach a decision concerning an application for a licence and
b) the terms and conditions of individual licences. The reasons for the denial of a licence will be made known to the applicant upon request.

5. Independent regulators
The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.

6. Allocation and use of scarce resources
Any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner. The current state of allocated frequency bands will be made publicly available, but detailed identification of frequencies allocated for specific government uses is not required.

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A. Introduction and Scope

I. General

1 Since state governments are the entities which concluded the WTO agreements, the obligations laid down in these agreements govern only governments and not private firms. In the telecommunications sector, however, the situation is different. Before telecommunications services can be provided, a lot of investment has to be made in order to establish the network. As such costs are rather high and generally irreversible, governments have in the past entrusted the task of establishing the network to **monopoly operators**. Such operators are usually state-owned, and sometimes are private operators with monopoly licences. In return for their investment, they are given monopoly power. In recent years, however, more and more countries have started to liberalize the telecommunications sector. When new suppliers enter the market, they find that they have to rely on the existing network of the former monopolies, as it is not economically feasible for them to construct their own networks. The incumbent operators, however, are naturally reluctant to allow the new entrants to interconnect to their networks. In order to prevent such abuse of market power, the Members drafted the Reference Paper on Basic Telecommunications Service (RP) to provide **competitive safeguards**. The Members also recognized the importance of having a proper regulatory framework, and included in the RP a set of principles to guide the Members in designing their national telecommunications regulations.

2 It is important to note what the RP does and does not do. It provides a set of principles for the Members to follow in formulating their own regulatory frameworks, but does not require the Members to adopt any particular set of ready-made regulations. It stipulates the outcome that should be achieved, but does not specify the means of achieving such outcome.[1] It sets out certain obligations, but does not indicate the entity to be responsible for the implementation of these obligations.[2] It lays down the minimum obligations, but does not prohibit Members from going beyond the bare minimum to enhance the competitive environment. In summary, the RP provides sufficient **flexibility** to the Members to accommodate the differences in the market structures and regulatory philosophies among Members.[3]

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[1] *Mathew*, 125.
[2] *Ibid.*
[3] *Sherman*, Fed. Comm. L.J. 51 (1998), 61, 73.

II. Negotiating History

3 At the beginning of the Uruguay Round negotiations on trade in services, the contracting parties started with discussions on the general principles to be contained in a general framework agreement. Later, they turned their attention to particular service sectors in an effort to determine how the general principles contained in the draft framework agreement could be used to address special problems and issues in particular sectors.[4] Due to their importance, telecommunication services were selected as one of the sectors in this sectoral testing exercise. The result of this exercise reveals that there is a sharp distinction between basic telecommunications services and value-added telecommunications services.[5] On the one hand, value-added services rely primarily on digital technology to manipulate data.[6] While they also need access to the basic telecommunications network, the technologies they utilize emerged only very recently and were not covered by monopolies.[7] Thus, the market for value-added services was already open to competition, and this made it much easier for the contracting parties to negotiate.[8] On the other hand, basic telecommunications services were mostly provided via traditional means and have long been subject to monopolies or heavy regulations.[9] Thus, these were much more difficult to negotiate. Even though several proposals had been submitted by various contracting parties,[10] the negotiations on basic telecommunications remained in stalemate even at the conclusion of the Uruguay Round due to the differences in views on the appropriate regulatory environment between the US on the one hand and the EC, Canada and Japan on the other.[11] At the same time, however, many participants realized that there was great potential for telecommunications market liberalization as the sector had been undergoing both rapid technological development and dramatic regulatory reform.[12] In order to seize the opportunity, the participants agreed to extend the negotiations beyond the end of the Uruguay Round.[13]

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[4] *Croome*, 210.

[5] The term "basic telecommunications" is not explicitly defined in the GATS. As can be deduced from other WTO documents, "basic telecommunications" includes the real-time transmission of customer-supplied information between two or more points without an end-to-end change in the form or content of the customer's information, while services not supplied on a real-time basis or which transform the form or content of customers' information are considered to be value-added telecommunication services, see Council for Trade in Services, Telecommunications Services, Background Note by the Secretariat, S/C/W/74, 8 December 1998, para. 7.

[6] *Mathew*, 48.

[7] *Ibid.*

[8] *Frid*, LIEI 24 (1997), 67, 73, footnote 19.

[9] *Mathew*, 48.

[10] *Ibid.*, 48–49.

[11] *Kennedy*, Int'l Law. 33 (1999), 27, 37.

[12] *Mathew*, 53.

[13] *Ibid.*, 54.

Pursuant to the **Decision on Negotiations on Basic Telecommunications**,[14] the Members continued the negotiations, which were originally scheduled to be concluded by 30 April 1996.[15] At the eleventh hour, however, the US walked out the talks in dissatisfaction over the liberalization offers made by other Members. The WTO Secretariat intervened and successfully proposed that the negotiations be extended until early 1997. At the conclusion of the extended negotiations, the Members made substantial commitments, and all but two countries subscribed to the RP. Finally satisfied with the results, the US agreed to make most-favoured-nation (MFN) commitments in most areas. *4*

During the negotiations on telecommunications, various suggestions were made on how the regulatory principles should be undertaken by the Members. Some proposed that they could take the form of the cover note, headnote, or footnote to a Schedule of commitments.[16] These suggestions were rejected as it was unclear whether such instruments would be legally binding.[17] Suggestions were also made that instead of having the RP, the GATS could be amended to incorporate the regulatory principles contained in the proposed Reference Paper.[18] In the end, the Members decided to proceed with the RP. This is probably a sensible decision as the matters dealt with in the RP were probably too sector-specific to be included in a framework agreement like the GATS. Moreover, such amendment would require the approval of two-thirds of the WTO Members, which would be hard to obtain.[19] In the end, the Members concluded that it would be easier just to schedule the commitments **as additional commitments pursuant to Art. XVIII**.[20] *5*

III. Scope and Coverage

The regulatory principles of the RP **apply only to basic telecommunications services, and not to value-added services**. Although some commentators argue otherwise,[21] for two reasons this should not be much of a concern. First, as discussed above, value-added services are generally more liberalized. Second, with technological advances, the distinction between basic and value-added services has become blurred, and it is possible to *6*

[14] Decision on Negotiations on Basic Telecommunications, LT/UR/D-5/4, 15 April 1994.
[15] *Ibid.*, para. 5.
[16] See *Mathew*, 126.
[17] *Ibid.*
[18] Negotiating Group on Basic Telecommunications, Report on the Meeting of 26 January 1996, S/NGBT/12, 14 February 1996, para. 6.
[19] *Mathew*, 126.
[20] *Ibid.*
[21] *Bronckers & Larouche*, JWT 31 (1997) 3, 5, 23.

provide both services through the same technological means.[22] Thus, even without formally applying the regulatory principles of the RP to value-added services, the suppliers of value-added services should still be able to benefit from the regulatory principles contained in the RP.

7 According to the WTO Secretariat, seventy WTO Members have undertaken additional commitments on regulatory principles.[23] Of these, sixty-four incorporated the RP as an annex attached to their Schedules either in its entirety or with only a few modifications. The remaining six have either included some portions of the RP or drafted texts of their own.

B. Definitions

I. General

8 In order to provide a common basis for understanding the principles in the RP, the key terms must be defined. At the beginning, the RP defines three key terms: "users", "essential facilities" and "major supplier". In a way, the core obligations in the RP are about how to regulate the relationships between the three, *i.e.*, to restrict the anti-competitive behaviour of the major suppliers, so that users can interconnect to essential facilities.

II. "Users"

9 Users are the **beneficiaries** of the regulatory principles in the RP. They are defined as including both "service consumers" and "service suppliers". "Service consumers" and "service suppliers" are also terms of art that have to be interpreted by reference to the definitions provided for in Art. XXVIII since the RP as part of the Schedules of specific commitments and thus an integral part of the GATS (Art. XX:3) is informed by these general definitions. In accordance with Art. XXVIII lit. i, "service consumer" means any person that receives or uses a service, while "service supplier" means any person that supplies a service (Art. XXVIII lit. g). The word "person", in turn, is also defined to include both a natural and a juridical person (Art. XXVIII lit. j). Even though the word "service supplier" is not expressly limited to providers of basic telecommunication services, as the commitments under the RP are usually scheduled as additional commitments to the specific commitments in the basic telecommunications sector,

[22] S/C/W/74, para. 7.

[23] *WTO*, Overview table of the results of the negotiations, available at <http://www.wto.org/english/tratop _e/serv_e/telecom_e/tel10_e.htm> (last visited 1 October 2007).

the service here refers only to the basic telecommunications service, and thus "service supplier" is limited to a provider of basic telecommunications services only.

III. "Essential Facilities"

10 "Essential facilities" are defined in the RP to mean those facilities of a public telecommunications transport network or service that are **exclusively** or **predominantly** provided by a single or limited number of suppliers and cannot feasibly be economically or technically substituted in order to provide a service.

11 This definition includes the following elements:

12 The facilities must be those of a **public telecommunications transport network or service**. Such **service** includes any telecommunications transport service required by a Member to be offered to the public generally and typically involves the real-time transmission of customer-supplied information between two or more points without any end-to-end change in its form or content (para. 3 lit. b of the Annex on Telecommunications).[24] The **network** is the infrastructure which permits telecommunications between and among defined network termination points (para. 3 lit. c of the Annex on Telecommunications).

13 Not everyone can provide such facilities; instead, they have to be **exclusively or predominantly provided** by a single supplier or a limited number of suppliers. During the negotiations, Members proposed different wordings for this condition.[25] Australia, for example, suggested that the relevant carriers should be identified in each Member's Schedule.[26] While such an approach would save Members the trouble of trying to find out who the major suppliers in each market are, Members presumably would have to modify their Schedules every time control over essential facilities changes hands. Thus, the negotiators instead opted for an approach that focuses on the control of facilities.[27] Canada proposed defining facilities as essential if they were available only on a (*de jure* or *de facto*) monopoly basis.[28] This definition, however, would not cover former monopolies now operating in a competitive market.[29] In the end, the current wording was adopted.

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[24] See *Gao*, Annex on Telecommunications, para. 21.
[25] *Mathew*, 136.
[26] *Ibid.*
[27] *Sherman*, Fed. Comm. L.J. 51 (1998), 61, 74.
[28] *Ibid.*
[29] *Mathew*, 136.

14 The facilities **cannot feasibly be economically or technically substituted in order to provide a service**. This includes the following points. First, the facilities must be **indispensable** for the user to supply a service. If the user does not need access to the facilities at all, or if lack of access would result only in competitive disadvantages, the competitive safeguard provided for under the RP would not have been necessary. Even if the facilities were indispensable, if the user could have duplicated the facilities on his own, such facilities would not be regarded as essential. The **duplication of facilities** may, however, be **impossible** for different reasons: first, the network externalities associated with the telecommunications sector could make it **economically unfeasible** for new entrants to try to substitute the existing facilities on their own. Typically, the more people use one network, the more the people outside the network will want to use the same network to communicate with those inside it. Thus, even if the new entrant can construct its own network, it will be worthless unless the new network can be interconnected into the existing networks. Also, even if the new network were viable in the long term, the initial cost of constructing it may be prohibitive for new entrants. Second, **technological difficulties** can also make it impossible to duplicate the facilities. For example, if, due to the geographical conditions in a place, the network could be established only over a particular route but this route has already been utilized by the existing facilities, it would not be technologically feasible to construct the network.[30]

15 The essential facilities doctrine was originally developed in US antitrust law,[31] while the EU has also developed its own version. These two doctrines are mostly similar, but there are important differences, especially regarding the pricing of access to essential facilities.[32] While the use of the concept in the current RP is limited to the provision of technical information about essential facilities (see para. 1.2 lit. c), if the doctrine is extended to cover other areas, questions will arise about whose doctrine should be used to fill in the gaps.[33]

IV. "Major Supplier"

16 The definition section of the RP defines "major supplier" as a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of either control over essential facilities or use of its position in the market. This definition includes three elements. First,

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[30] *Ibid.*, 139.
[31] *Ibid.*, 128–130.
[32] *Naftel & Spiwak*, 108.
[33] *Ibid.*

the supplier has the power, *i.e.*, the ability to materially affect the terms of participation (having regard to price and supply). Second, such power derives from specified sources. Third, such power exists in the relevant market for basic telecommunications services.

1. Market Power

17 The supplier needs to have the power to affect the terms on which the other suppliers can participate in the market. Such **terms of participation** can include many different matters, but only two are deemed to be most relevant and are therefore specified in the RP. These are **price and supply**. With regard to price, the major supplier can either set the price that the other operators must pay to use the essential facilities at such a prohibitively high level, or set the price that consumers pay to use the service of the major supplier at such a low level as to undercut competitors on price. With regard to supply, the major supplier could either refuse to supply or restrict the supply of leased lines to make it impossible for competitors to provide the service.

18 Such power must enable the major supplier to **materially affect** the terms of participation. Theoretically speaking, every operator would have the ability to affect the terms of participation in the market, as the very existence of an alternative operator means that people do not have to stick with one particular operator. What really makes a difference, however, is the **degree of influence** each operator could have on the terms of participation. Thus, the ability to materially affect means that a supplier has quite a radical influence on the market and the power to exclude or control the participation of other market actors.[34]

19 In addition to that, the major supplier only needs to have the **ability** to materially affect the terms of participation, but it does not have to **actually exercise** such power in practice. This is confirmed by the *Mexico—Telecoms* case, where the Panel was satisfied that the *Telmex* company possessed such power after finding that it was required by law to negotiate settlement rates.[35]

2. Sources of Power

20 Such market power may result from either control over essential facilities or use of a supplier's position in the market. The two are alternative sources of power (see the "or"). Thus, so long as the supplier derives its power from one source, it will be deemed to have satisfied this element.

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[34] *Bronckers & Larouche*, in: *Macrory et al.* (eds), 989, 1001.
[35] Panel Report, *Mexico—Telecoms*, WT/DS204/R, para. 7.155.

21 The first source of market power is the **"control of essential facilities"**. Since the control relates to essential facilities,[36] the supplier would not need to be a monopoly or enjoy a substantial market share in order to qualify as a major supplier. As no minimum period of control is specified, it can be argued that even a completely new market entrant that gains control of essential facilities by buying such assets from the former monopolies could immediately become a major supplier. Thus, the criterion of "control" is rather **dynamic** and could be very useful, especially in markets undergoing rapid and significant reform. The word used here is "control", which implies that a supplier does not have to be the owner of the facilities to be deemed to be "in control". For example, a supplier that holds an exclusive lease over the essential facilities could satisfy the "control" requirement. Of course, even though ownership is not required, such control would have to be **legally valid**. Thus, *de facto* control obtained through illegal means probably would not qualify, as others could challenge the validity of such control. Moreover, as access to essential facilities is indispensable for every supplier,[37] the supplier in control of them does not have to actually use such control before it can have market power. Thus, once control is established, no actual use by the supplier in control is required.

22 Some commentators note that, as the word **"facilities"** has not been explicitly limited to domestic facilities, governments will be able to impede market entry by foreign service providers if they control essential facilities in their home countries.[38] Such interpretation is, however, incorrect, as the RP specifies commitments only with regard to the basic telecommunications services of the host country. Thus, unless such foreign suppliers are also major suppliers in the host country, they will not be subject to the regulatory principles contained in the RP for their activities in the host country.

23 The second source of power is the **"use of its position in the market"**. In most cases, those that control essential facilities will also enjoy substantial market share. This is not always the case, however. The negotiators recognized such possibility by adding the second source of power. Generally speaking, the EU puts a lot of emphasis on numerical market share in defining market power, with those with 25% market share generally being presumed to enjoy significant market share.[39] The US, however, adopts a

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[36] See above, para. 10.

[37] See above, para. 14.

[38] *Fredebeul-Krein & Freytag*, Telecommunications Policy 23 (1999), 625, 628.

[39] This market share was laid down in Art. 2.2 (i) of the Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment, OJ 1998 L 101, which was later repealed by the Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ 2002 L 108.

different approach including, besides market share, the number and strength of other competitors, market trends, profit levels or market entry barriers.[40] The RP does not adopt any numerical benchmark. Instead, a case-by-case analysis has to be made. This approach is preferable as even a low market share, if used strategically, could lead to anti-competitive behaviour. On the other hand, a supplier with significant market power would not create problems if it decided not to use such power. Thus, the actual use of such a position seems to be required under lit. b. The heading indicates, however, that the "ability" to materially affect the terms of participation as a result of the use of its position suffices. In order to determine the market position, the **relevant market** has to be defined. Generally, this includes both the product market and the geographic market.[41] The relevant product market comprises all the products (services) which are considered by consumers to be interchangeable or substitutable because of their characteristics, their prices and their intended use.[42] The relevant geographical market comprises the area in which the suppliers are involved in supplying the services, in which the competitive conditions are sufficiently homogenous and which can be distinguished from neighbouring areas as the competitive conditions are different.[43]

3. Relevant Market

24 Only the **basic telecommunications services market** is relevant for considering market power. This makes sense as the other market of the telecommunications services sector, the value-added services market, does not have to operate on a real-time basis and the form and content of customers' information may be transformed. Thus, compared with the supply of basic telecommunications services, there is less urgent a need to ensure that the regulatory principles are followed when value-added services are supplied.

V. Consequence of Determination as a Major Supplier

25 Once determined to be a major supplier, the supplier would have to be subject to the competitive safeguards and interconnection obligations under the RP. These are discussed in the following parts.

[40] *Mathew*, 145–146.
[41] *Ibid.*, 144.
[42] The *Mexico—Telecoms* Panel also applied this defintion in determining the relevant market in that case; see *Mexico—Telecoms*, WT/DS204/R para. 7.152.
[43] *Mathew*, 145.

C. Competetive Safeguards (Para. 1)

I. General

26 With the market power they have, major suppliers usually find it tempting to abuse such power to maintain their dominant position against potential market entrants. In order to prevent such abuse, the RP sets out some competitive safeguards in para 1.

II. Prevention of Anti-Competitive Practices in Telecommunications (Para. 1.1)

27 In accordance with para. 1.1, measures shall be maintained to prevent anti-competitive practices by major suppliers. The paragraph does not specify the forms of such measures. When the definition of **"measure"** under Art XXVIII is applied, such measure could take the form of a law, regulation, rule, procedure, decision, administrative action, or any other form. Some WTO Members apply general competition regulations to telecommunications, while others have sector-specific regulations for telecommunications. Either approach should be sufficient, since the term "appropriate" gives **discretion** to the Members. Regardless of the form of the regulatory approach, what is most important is that anti-competitive practices by major suppliers are prevented.

28 In *Mexico—Telecoms*, the Panel was faced with the question whether the "uniform settlement rate" and "proportionate return" system required by the International Long Distance Rules (ILD Rules) of Mexico constituted **"anti-competitive practices"**. The Panel started by looking at the ordinary meanings of both "competitive" and "practices" and concluded that the term "anti-competitive practices" is broad in scope and includes actions that lessen rivalry or competition in the market.[44] Next, the Panel examined the meaning of the term "anti-competitive practices" by referring to the context of the RP, the use of this term in Members' own competition legislation, the related provisions of some international instruments that address competition policy, and the object and purpose of the RP commitments made by Members.[45] According to the Panel, such analysis reveals that the term "anti-competitive practices" should also include horizontal practices related to price-fixing and market-sharing agreements.[46]

29 In *Mexico—Telecoms*, the Panel also discussed whether "anti-competitive practices" as used in para. 1 of the RP covered practices by a major supplier that

[44] *Mexico—Telecoms*, WT/DS204/R, para. 7.230.
[45] *Ibid.*, paras 7.231–7.237.
[46] *Ibid.*, para. 7.238.

were required by a Member's law.[47] The Panel recognized that, pursuant to doctrines applicable under the competition laws of some Members, a firm complying with a specific legislative requirement of such Member (*e.g.*, a trade law authorizing private market-sharing agreements) may be immune from being found in violation of the general domestic competition law.[48] The Panel argued, however, that while domestic laws might grant legislatures the power to limit the scope of competition legislation, the nature of the RP's obligations is different.[49] According to the Panel, RP commitments undertaken by a Member are international obligations designed to limit the regulatory powers of WTO Members, and as such cannot be unilaterally eroded by the domestic law of Members.[50] It can be argued that this will also apply to the three examples expressly referred to in para. 1.2, which means that even if such actions are mandated by government legislation, they shall be deemed to be "anti-competitive practices" as well.

30 Some commentators have argued that para. 1.1 requires Members only to maintain such measures but not to actually **enforce** such measures.[51] But this can hardly be the case, as measures which are incapable of being enforced would deny Members any benefit they would expect from the incorporation of para. 1 in another Member's Schedule. Moreover, as discussed above, the definition of "measure" under the GATS is very broad and includes decisions or administrative actions which are generally connected with the enforcement action in individual cases. If the negotiators had intended para. 1.1 to absolve Members from the obligation to actually enforce the measures, they would surely have explicitly excluded decisions or administrative actions from the definition of measures.

31 Para. 1.1 also recognizes that such anti-competitive behaviour could be taken either by **one supplier or by several suppliers together**. The first category obviously refers to monopoly or incumbent operators, while the second could include two or more suppliers acting in collusion. Such collusive behaviour could be the result of voluntary choices by the suppliers, as well as the result mandated by the law. Indeed, in the *Mexico—Telecoms* case, the Panel recognized that, in addition to the *Telmex* company, all the other Mexican suppliers who were gateway operators were required by Mexico's ILD Rules to apply a "uniform settlement rate"[52] and to ensure

[47] *Ibid.*, para. 7.239.
[48] *Ibid.*, para. 7.244.
[49] *Ibid.*
[50] *Ibid.*
[51] *Mathew*, 152.
[52] A settlement rate is a rate that an international gateway operator charges a foreign operator for receiving traffic from a given country or a rate that a foreign operator charges an international gateway operator for receiving traffic originating in Mexican territory, see XIV lit. g and h of the ILD Rules, *Mexico—Telecoms*, WT/DS204/R, Annex C.

a "proportionate return" of incoming calls comparable to outgoing calls.[53] Therefore, *Telmex* and all the other Mexican gateway operators together were a "major supplier".[54]

32 While para. 1.1 establishes obligations regarding anti-competitive practices specific to the telecommunications sector, the **general obligations on competition** provided for under the GATS should also be taken into consideration. These include **Arts VIII** and **IX**. Under Art. VIII, Members are required to ensure that their monopolies or exclusive service suppliers shall not act in a manner inconsistent with the MFN obligation or their specific commitments. Art. IX concerns any business practices which may restrain competition and thereby restrict trade in services. As the practices covered are much broader, however, Art. IX does not actually require Members to commit to prohibit such practices. Instead, Members are required only to consult with other Members who may have certain problems with such practices.

III. Specific Examples of Anti-Competitive Practices (Para. 1.2)

33 Recognizing the fact that "anti-competitive practices" could take many different forms, the RP does not attempt to define the term. Instead, the RP includes only three practices that are particularly problematic. These are cross-subsidization, misuse of competitor's information and the withholding of technical and commercial information.

34 The first example is **cross-subsidization** (para. 1.2 lit. a). The paragaph does not provide a definition of what constitutes cross-subsidization. Generally speaking, this refers to the practice of using profits generated in one area of operation to provide financial support to another area which is incurring losses.[55] Sometimes, cross-subsidization could be used for legitimate reasons. For example, to ensure universal services, operators might use the surplus revenue from urban customers to support rural customers. At the same time, cross-subsidization could also be used for the sole reason of distorting competition. For example, in a country which has liberalized international telecommunications services but keeps domestic telecommunications services unliberalized, the monopoly operator in the domestic market may use its revenues from domestic service customers to subsidize customers of international services, even though the latter group is generally better off than the former and does not need to be subsidized. Such practices serve no objective other than to undercut the competitor's ability to compete in the international services market and are thus anti-competitive.

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[53] *Ibid.*, para. 7.228.
[54] *Ibid.*
[55] *Mathew*, 153.

Para. 1.2 lit. a does not prohibit cross-subsidization *per se*; instead, only cross-subsidization that is anti-competitive is prohibited. Thus, Members do not need to maintain measures against cross-subsidization which is undertaken with legitimate reasons. Only that with anti-competitive effects will need to be regulated.

The second example is **misuse of information from competitors** (para. 1.2 lit. b). Any suppliers other than the major supplier will have to provide information to the major supplier in order to be able to provide their services. One reason for this could be that the major supplier controls the essential facilities that the other suppliers will need to obtain access to in order to be able to provide their services at all. Alternatively, with regard to a major supplier which does not control essential facilities, even though the other suppliers do not have to obtain access to its network for every transaction, due to the market position of the major supplier, the other suppliers cannot avoid the need to interconnect with its network for calls to enable their own customers to communicate with the major supplier's. On these occasions, the major supplier may obtain information about the other supplier's market strategy, clientele and the services offered. Once the major supplier obtains such information, it can use it for legitimate purposes such as call connection or anti-competitive purposes such as poaching customers, copying technical solutions or destroying market strategies.[56] Again, as with cross-subsidization, the obligation with regard to such information arises only when it has been misused. Also, sometimes, the same information could be obtained from many different sources. If the major supplier obtains some information on its own, even though it is also available from competitors, the major supplier shall not be prevented from using such information for purposes that it deems fit. *35*

The third example is the **withholding of technical and commercial information** (para. 1.2 lit. c). First, when suppliers decide to enter the telecommunications market, they have to decide whether such decision will make business sense. Cost and profit factors should be carefully evaluated. Apparently, it does not make sense for them to lease an expensive line only to find out that there is no customer to serve on the line. Thus, to the extent that some **commercial information** such as billing details is **necessary** for them **to provide services**, the major supplier shall make such information available.[57] As the term used here is "making available" rather than "provide", the major supplier is probably not required to actively provide such information to specific suppliers. Instead, it should be enough so long as such information is accessible to the general public, *36*

[56] *Bronckers & Larouche*, JWT 31 (1997) 3, 5, 27.
[57] See *Sherman*, Fed. Comm. L.J. 51 (1998), 61, 77.

including specific suppliers. Second, after they decide to enter the market, operators will need to have access to **technical information about the essential facilities** such as network changes or the standards or interface requirements to be able to interconnect their own networks with that of the major supplier. It is unclear whether the criterion "necessary for them to provide services" qualifies only commercially relevant information or also technical information about essential facilities. While one can argue that all technical information about essential facilities could be regarded as **"necessary"**, it seems questionable whether such a broad obligation would make sense as, on the one hand, there is technical information such as the establishment of the essential facilities which is not necessary for suppliers to provide a service; on the other hand, as para. 6 recognizes the right of Members and major suppliers to keep certain information confidential for security purposes, such right might be violated if security-related technical information which was not necessary for provision of services had to be disclosed, so there are arguments on both sides. Another issue is the exact meaning of the word "necessary". In *Korea—Various Measures on Beef*,[58] after reviewing the definitions provided for in the New Shorter Oxford English Dictionary and Black's Law Dictionary, the Appellate Body made the famous statement that "the reach of the word 'necessary' is not limited to that which is 'indispensable' or 'of absolute necessity' or 'inevitable'"; instead, it refers "to a range of degrees of necessity. At one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end, is 'necessary' taken to mean as 'making a contribution to'".[59] According to the Appellate Body, a "necessary" measure is, in this continuum, "located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'".[60] While the interpretation in *Korea—Various Measures on Beef* is specific to the wording of Art. XX lit. d GATT 1994, it does provide useful reference for the meaning of the word "necessary" here. As para. 1.2 aims to provide competitive safeguards, the "necessity" of certain information must be assessed on the basis of whether the availability of such information affects the competitive relationship between the providers. On the one hand, information that is only "making a contribution to" the provision of services probably cannot be regarded as "necessary". On the other hand, information that is "indispensable" probably should be regarded as "necessary". Information that falls in between should be analysed on a case-by-case basis, bearing in mind the effect on the competitive relationship between the providers. The RP also requires such information to be made available on a **"timely basis"**, a

[58] Appellate Body Report, *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 157.
[59] *Ibid.*, para. 161.
[60] *Ibid.*

term which has not been defined. As the information must generally be "necessary [...] to provide services", however, one can argue that it relates to measures which affect trade in services and thus, except in emergency situations, is to be made available at the latest by the time of their entry into force, as required by Art. III:1.

37 As recognized by the *Mexico—Telecoms* Panel, because the list in para. 1.2 is introduced by the phrase "shall include in particular", it is not exhaustive and the three examples listed do not represent all "anti-competitive practices" within the scope of the provision.[61]

D. Interconnection (Para. 2)

I. General

38 In a sense, the interconnection obligation can also be regarded as a specific example of competitive safeguards. Due to the existence of network externalities, new entrants would find it extremely difficult or even impossible to compete against the major supplier unless they were granted interconnection to the networks provided by the major supplier.[62] It is not enough, however, to merely require interconnection to be provided. Instead, the terms and conditions on which interconnection will take place are also very important.[63] Para. 2 of the RP sets out the obligations regarding interconnection in detail. In this regard, it shall be read together with para. 5 of the Annex on Telecommunications, which also obliges Members to provide access to and use of basic telecommunications on reasonable and non-discriminatory terms and conditions.

II. Definition and Scope (Para. 2.1)

39 The term **"interconnection"** is defined in the RP as "linking with suppliers providing public telecommunications transport networks or services". This definition is very broad and applies to **all kinds of "linking"**. It **does not matter what form** such linking takes. During the negotiations, the EU suggested, based on its own legislation, that interconnection should be defined as "physical and logical" linking.[64] This proposal was rejected by the negotiators as they found "linking" without any specifications to be broader and also cover contingencies such as satellite links, leased lines, closed user groups, facilities-based services and resale, and even something

[61] *Mexico—Telecoms*, WT/DS204/R, para. 7.232.
[62] *Mathew*, 157–158.
[63] *Naftel & Spiwak*, 110.
[64] *Mathew*, 159.

not yet provided for as well.[65] Such linking could occur at any location. As stated by the Panel in *Mexico—Telecoms*, the ordinary meaning of "linking" does not imply any particular location of the object being linked and should cover both domestic and international linking.[66]

40 The second part of the definition indicates that only linking **with suppliers providing public telecommunications transport networks or services** is covered by the rules on interconnection. Thus, the interconnection obligation is inapplicable to suppliers which do not provide public telecommunications transport networks or services. Moreover, as can be seen below, not all suppliers providing public telecommunications transport networks or services have to assume obligations under para. 2 either. Instead, only those suppliers which are also major suppliers are governed by the regulatory principles contained therein.

41 Moreover, such linking shall be required for a particular **purpose**, that is, to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier. In other words, the interconnection obligation does not apply to linking with service consumers; instead, it applies only to **linking with** major suppliers by **service suppliers**.

42 The definition also made clear that the interconnection obligation can only be invoked on the basis of the **specific commitments** undertaken. As the RP contains additional commitments attached to the specific commitments on basic telecommunications services, this implies that only suppliers of basic telecommunications services on which a Member has made a commitment in its Schedule can benefit from the interconnection obligation.[67]

III. Interconnection to be Ensured (Para. 2.2)

43 Para. 2.2 first stipulates that interconnection with a major supplier shall be ensured at any technically feasible point in the network. However, the exact meaning of **"technically feasible point"** is not defined. Furthermore, there could be many "technically feasible points" in any given network. Thus, incumbent operators could make things difficult for competitors by either requiring them to route all their traffic through one distant location so as to cause network congestion, or, conversely, requiring them to interconnect at many locations throughout a nation so as to increase their costs. In order to prevent such abuses, the RP also includes some further principles on how interconnection shall be provided.

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[65] *Ibid.*, 159–160.
[66] *Mexico—Telecoms*, WT/DS204/R, paras 7.96–7.143.
[67] See *ibid.*, paras 7.92–7.94.

44 In accordance with para. 2.2 lit. a, the terms, conditions, rates and quality of such interconnection to competitors shall be no less favourable than those the major supplier provides for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates. This is very similar to the national treatment obligation found under Art. XVII. Thus, using Art. XVII as a guideline, the major supplier shall be allowed to meet the requirement by treating competitors in a manner either formally identical to or formally different from that it provides to its own like services and affiliated service suppliers, so long as such treatment does not modify the conditions of competition in favour of its own like services and affiliated service suppliers. This is also in line with economic reality, where interconnection is generally regarded as **non-discriminatory** when the supplier's price for its end-user services is the same, adjusted for cost differences, as competing carriers pay for interconnection for their corresponding services.[68] Furthermore, by virtue of Art. II, the major supplier will also be required to provide MFN treatment to all foreign service suppliers.

45 However, merely having terms, conditions, and rates which are no less favourable than those provided for the major supplier's own services and affiliated service suppliers is not enough. In addition, such terms must also be **transparent** and **reasonable**. The transparency obligation here is another sector-specific application of the general transparency obligation contained in Art. III. The exact scope of the obligation is not defined. In order not to render it inutile, however, it must include something more than the provision of technical information about essential facilities and commercially relevant information which is necessary for them to provide services,[69] the procedures applicable for interconnection to a major supplier,[70] and interconnection agreements or a reference interconnection offer.[71] As to the meaning of the word "reasonable", para. 5 of the Annex on Telecommunications provides some useful guidelines.[72]

46 The key obligation, para. 2.2 lit. b, is to provide **cost-oriented rates** for interconnection. During the negotiations, the term "cost-based" was suggested as an alternative, but rejected due to the difficulty in many countries in determining actual costs.[73] This seems to suggest that such rates do not have to be strictly based on actual cost but need only reflect the underlying costs in some way. This is also confirmed by the *Mexico—Telecoms* Panel, which stated that "[r]ates that are 'cost-oriented' thus suggest rates that are *brought into a defined relation to known costs or cost principles*. Rates that are

[68] *Mathew*, 162.
[69] Para. 1.2 lit. c of the Reference Paper.
[70] Para. 2.3 of the Reference Paper.
[71] Para. 2.4 of the Reference Paper.
[72] See *Gao*, Annex on Telecommunications, para. 39.
[73] *Mathew*, 165.

'cost-oriented' would not need to equate exactly to cost, but should be founded on cost".[74] Unfortunately, this means that cost would still need to be determined, albeit to a lesser degree of precision, before one could conclude whether a rate was "cost-oriented". The problem, however, is that there are many different costing methodologies, ranging from fully allocated costs to various methods of forward-looking and marginal costs.[75] Depending on the different methodologies, the costs derived can be quite different. Because no particular methodology is specified, the *Mexico—Telecoms* Panel held that this implies that more than one costing methodology could be used to calculate "cost-oriented" rates,[76] while the national authorities shall have a margin of discretion in choosing the precise cost method by which to arrive at "cost-oriented" rates.[77] In the Panel's view, the special meaning of "cost-orientated" as defined in International Telecommunication Union (ITU) Recommendation D.140 provided the relevant interpretive framework, as both parties in the case were Members of ITU and such special meaning is consistent with the ordinary meaning.[78] According to this recommendation, the term "cost-oriented rates" can be understood as rates relating to the cost incurred in providing the service.[79] The Panel also held that long term incremental cost methodologies should be used in this case, as such methodologies have been adopted by many WTO Members, including Mexico.[80]

47 The Panel also noted that the term "cost-oriented rates" is qualified by the word **"reasonable"**, which indicates that the application of the cost model chosen by the Member shall reflect the costs incurred for the interconnection service and contain some elements of flexibility and balance.[81] Moreover, it would not permit costs to be included in the relevant rate that were not incurred in the supply of the interconnection service.[82] As to the criterion of **"having regard to economic feasibility"**, the Panel interpreted it to mean that the major supplier is entitled to rates that allow it to undertake interconnection on an "economic" basis, that is, to make a reasonable rate of return.[83] After finding that the rates charged by Mexico were substantially higher than the costs actually incurred in providing the interconnection, the Panel concluded that they were not "cost-oriented".[84]

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[74] *Mexico—Telecoms*, WT/DS204/R, para. 7.168. Italics in the original text.
[75] *Naftel & Spiwak*, 112. See also *Mathew*, 165–166.
[76] *Mexico—Telecoms*, WT/DS204/R, para. 7.168.
[77] *Ibid.*, para. 7.174.
[78] *Ibid.*
[79] *Ibid.*
[80] *Ibid.*, paras 7.175–7.177.
[81] *Ibid.*, para. 7.182.
[82] *Ibid.*, para. 7.183.
[83] *Ibid.*, para. 7.184.
[84] *Ibid.*, para. 7.216.

48 In addition to the requirements above, interconnection rates also need to be **sufficiently unbundled**. This ensures that the supplier will not be forced to pay for network components or facilities that it does not require in order for the service to be provided. The RP does not, however, specify which network elements have to be provided on an unbundled basis.[85] The US and EU differ in their approaches on these issues, and this may be a source of future dispute between the two.[86]

49 The RP also requires interconnection to be provided **in a timely fashion**. No specific time-limit is given, so the analysis has to be on a case-by-case basis. To help competitors to obtain interconnection, the major supplier is also required to make publicly available the procedures applicable to interconnection negotiations. This implies that negotiations have to be conducted in accordance with the procedures and the major supplier cannot indefinitely delay negotiations. In the case of delays in the process, the competitor will have recourse to the dispute settlement process pursuant to para. 2.5.

50 Under para. 2.2 lit. c, the major supplier shall also provide interconnection at **additional points**. Typically, a network includes many points that can be used for interconnection. The major supplier, however, may be reluctant to make all the points available. Instead, it will designate only a few points for all users. These points provide the consumers and other suppliers with access to the network and are known as network termination points. As different users serve different markets, some users may find this rather inconvenient and costly as their transmissions may have to remain in the network for a long time.[87] In such a case, the RP entitles the user to **request** the major supplier to provide some additional points. Such request shall be granted if there are existing available points in the network. Even if there are no existing points, the major supplier will be required to construct such points, while the major supplier is allowed to impose additional charges on the user in order to recover the costs of the construction of any necessary additional facilities. Of course, the major supplier is obliged to provide additional points only if such new points are technically feasible points for interconnection.

IV. Transparency Obligations (Paras 2.3–2.4)

51 Para. 2 also includes two specific transparency obligations. The first (para. 2.3) is to make the **procedures for interconnection** to a major supplier publicly available, so that suppliers can have some idea of the steps they have to take and the possible timeframe for interconnection negotiations. The

[85] *Mathew*, 168.
[86] *Naftel & Spiwak*, 112. See also *Mathew*, 168.
[87] *Mathew*, 170.

second (para. 2.4) concerns **interconnection arrangements**. Historically, interconnection arrangements were generally regarded as private contracts and rarely made available. During the negotiations, some Members argued that interconnection arrangements should not be made available as they were confidential business documents.[88] This concern was addressed when Members agreed that Art. III*bis* should provide the necessary protection for confidential information.[89] Moreover, the major supplier is not required to make actual interconnection agreements available. Instead, it could choose to make available only a reference interconnection offer. Thus, the users will have some idea of what kind of terms they will be subject to with the major supplier should a deal on interconnection be struck.

V. Dispute Settlement (Para. 2.5)

52 Even though the Members are required by Art. VI to provide a mechanism to review administrative decisions affecting trade in services, such mechanism would not be able to deal with interconnection disputes between a service supplier and a major supplier, as no administrative agency is involved here. Thus, the negotiators agreed to provide a domestic enforcement mechanism to deal with disputes that could arise in the process.[90] In accordance with para. 2.5, a supplier can bring a **dispute regarding interconnection agreements**. To accommodate the differences between the regulatory frameworks of different Members, each Member can decide whether to allow such dispute to be brought at any time or after a reasonable period of time has elapsed. In the latter case, such reasonable period should be established and made publicly known in advance. In any case, however, the user will not need to wait until the conclusion of the negotiations before initiating the dispute settlement process. This provides the user with important safeguards against competitive disadvantages which might result from delays caused by disagreement with the major supplier.[91]

53 The **body** deciding such dispute could be either a **domestic court, or an independent regulatory body** which is separate from, and not accountable to, any supplier of basic telecommunications services. While a court might be preferred by some as it is by nature impartial, an independent regulatory body is probably better equipped to deal with the highly technical issues involved and to provide legal certainty and predictability.[92]

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[88] *Sherman*, Fed. Comm. L.J. 51 (1998), 61, 82.
[89] *Mathew*, 172.
[90] *Sherman*, Fed. Comm. L.J. 51 (1998), 61, 83.
[91] *Mathew*, 174.
[92] *Ibid.*

The body will have the **power to resolve disputes** on terms, conditions and rates for interconnection. It is unclear as to whether the body could rule on other issues but the list of issues provided here should be sufficient to cover most situations. In addition, the body's power is limited to the extent that such terms, conditions and rates have not been established previously. Thus, if the parties have already agreed on certain issues, the body is not allowed to reopen discussions on them. The body shall make its decision within **"a reasonable period of time"**, which, as the Appellate Body stated when discussing Art. 5.7 SPS in the *Japan—Agricultural Products II* case, "has to be established on a case-by-case basis and depends on the specific circumstances of each case".[93] *54*

E. Universal Service (Para. 3)

I. General

Recognizing the key role of telecommunications services as an infrastructure service in economic development, many countries around the world have imposed universal service obligations on telecommunications operators. Generally, **universal service** can be defined as the provision of telecommunications permitting access to a defined minimum service of specified quality to all users everywhere and at an affordable price.[94] The need for universal service obligations arises from the fact that there are users, especially those in distant areas, to whom an operator would not provide the services or, in cases where services were provided, would charge a very high price for them, due to the high cost involved in providing such services.[95] *55*

Even though many countries subscribe to the concept of universal service, the content of such concept can be vastly different. In developed countries, universal service is understood as a telephone in every home.[96] The focus of the regulation is typically on the provision of services to socially disadvantaged groups such as the unemployed, the disabled, the elderly or infirm. It would be unrealistic, however, to hold developing countries to the same standard, as they typically lack comprehensive infrastructure and have low tele-densities.[97] Instead, the main goal is to make the telephone accessible to people through village payphones, public call offices or tele-centres.[98] *56*

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[93] Appellate Body Report, *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 93.

[94] Communication from the Commission, Sevices of General Interest in Europe, COM (2000) 580 of 26 September 1996, OJ 1996 C 281/3, para. 14.

[95] *Mathew*, 176.

[96] *Ibid.*

[97] *Ibid.*

[98] Council for Trade in Services, Special Session on Telecommunications Services,

II. Right to Define Universal Service Obligations

57 While there is a need to open up the telecommunications market for competition, totally unregulated competition could result in operators focusing only on the most profitable markets while neglecting the unprofitable ones.[99] Thus, the RP allows Members to impose universal service obligations. Recognizing the differences in the economic, social and technological backgrounds of Members, the RP leaves it to each Member to decide what kind of universal service obligation it wishes to maintain. Presumably, this means that Members can decide questions such as what the scope of the obligation is, which operators shall be subject to the obligation, and how such obligation shall be achieved. As this is a right of Members, they do not have to justify why a particular approach was chosen. However, such wide discretion might lead to abuse as governments may adopt a comprehensive universal service obligation to make it very difficult for new operators to enter the market. To prevent such abuse, the RP also states that, while universal service obligations will not be regarded as anti-competitive *per se*, they could be challenged for the following reasons.

58 The first reason is that universal service obligations are not administered properly. In accordance with para. 3, such obligations shall be administered in a transparent, non-discriminatory and competitively neutral manner. **"Transparent"** means that the relevant rules and procedures relating to universal service obligations shall be made publicly available. **"Non discriminatory"** mans that one operator shall not be subject to a more onerous obligation than another, presumably the incumbent supplier. **"Competitively neutral"** means that such obligation shall not create some competitive advantage for a particular supplier. Overall, these conditions focus mainly on procedural[100] safeguards.

59 The second reason goes into the substance of the obligations, and asks whether they are more burdensome than necessary for the kind of universal service defined by the Member. The phrase **"not more burdensome than necessary"** is not defined. Some worried that it might be interpreted in the same way as in Art. XX GATT 1994, thus making it highly vulnerable to challenges.[101] As discussed above, in the *Korea—Various Measures on Beef* case, the Appellate Body defines the meaning of "necessary" under Art. XX GATT 1994 as "located significantly closer to the pole of 'indispens-

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Communication from the ITU, General Trends in Telecommunication Reform, S/C/W/110/Add. 4, 17 June 1999, para. 1.6.2.

[99] *Fredebeul-Krein & Freitag*, Telecommunications Policy 21 (1997), 477, 482.

[100] See also *Krajewski*, Article VI GATS, paras 3 *et seq*.

[101] *Mathew*, 180.

able' than to the opposite pole of simply 'making a contribution to'".[102] It is doubtful, however, whether the word "necessary" here should be subject to such strict interpretation, because para. 3 recognizes the discretion to set universal service obligations as Members' rights, while Art. XX GATT 1994 only creates an exception to the obligations contained in the other parts of the GATT. Thus, the necessity test under para. 3 is probably more liberal than that under Art. XX GATT 1994 to give Members more discretion. The paragraph also does not make it clear whether such obligations need merely to be "not more burdensome than necessary" for operators in general or whether they are to be "not more burdensome than necessary" for each individual operator. It could be argued that the requirement addresses the obligations only in a general sense, since it is the Member who has the right to formulate such obligations.

60 Para. 3 also requires that the assessment whether such obligations are "more burdensome than necessary" shall be made in the context of the kind of universal service defined by the Member. This implies that the legitimacy of the universal service objectives shall not be called into question. This would create an incentive for Members to define universal service in an ambitious manner, even though the current technological capacity might not be sufficient. While this is entirely permissible, a Member will not be allowed to use this as a trade barrier by enforcing the obligations in a selective manner.

61 Traditionally, the costs of universal service obligations have been met by cross-subsidy.[103] With the introduction of disciplines for such obligations in para. 3, some commentators are of the view that cross-subsidy should no longer be used as a means to achieve such goal.[104] But, as discussed above, cross-subsidization *per se* is not illegal under the RP. Instead, it is only prohibited when, first, such cross-subsidization is anti-competitive (para. 1.2); and, secondly, the operator which engages in such practice is a major supplier (para. 1.1). Thus, if these two conditions are not met, a Member shall be free to use cross-subsidy to fulfill universal service obligations.

62 Regulations on universal service obligations are also specific examples of domestic regulation covering the telecommunications services sector. Thus, they are also required under Art. VI to be "administered in a reasonable, objective and impartial manner".

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[102] See above, para. 36.
[103] *Mathew*, 177.
[104] *Ibid.*, 179.

F. Public Avialability of Licensing Criteria (Para. 4)

I. General

63 Due to the special nature of telecommunications services, most countries require operators to apply for licences before they are allowed to supply telecommunications services. While technological advances have led to the increasing globalization of the telecommunications industry, the licensing regimes of countries remain largely isolated from each other. This can create significant trade barriers for operators as they can be subject to fairly different, or even incompatible, licensing regimes. Thus, it is desirable to try to harmonize the different licensing regimes.

II. Transparency Requirements on Licensing

64 Unfortunately, the obligations on licensing in the RP fall short of harmonizing the substantive contents of the licensing regimes and are only transparency requirements. The requirements include the following:

65 First, information on the **licensing criteria** shall be made publicly available. The RP does not specify what types of criteria would be allowed, so the authorities have some discretion as to which criteria to include. There are, however, some implied obligations when this paragraph is read together with the GATS. For example, Art. VI:4 lit. a would require the criteria to be objective and transparent. Moreover, as the purpose of this obligation is apparently to enable potential operators to make an informed assessment before deciding to enter into the market, authorities probably cannot refer to criteria which have not been made publicly available as reasons for rejecting a licence.

66 Secondly, information on the **time needed in which to make a decision** on a licence application shall be made available. No specific time limit is given, so it is up to the Members to decide. Also, the time limit does not have to be strictly followed in every single case, as Members need to indicate only the "normal" time required. In cases where the normal time limit is not followed, the RP does not explicitly require an explanation, even though arguments can be made that an explanation would be due in such cases as where the licensing requirements have not been administered in a reasonable, objective and impartial manner pursuant to Art. VI:1. Moreover, because the obligations in Art. VI:3 shall be applicable here as well, the time period will also have to be "reasonable".[105] Pursuant to the

[105] On this notion in Art. VI see *Krajewski*, Article VI GATS, paras 24–25.

same provision, the authorities also have an obligation to provide information concerning the status of an application without undue delay even before a final decision is made.

67 Thirdly, information on the **terms and conditions of individual licences** shall also be made available. Again, here the RP does not specify which terms and conditions are permissible. To provide some guidance, this obligation shall also be read together with the principles of Art. VI. In accordance with Art. VI:4, such terms and conditions shall not constitute unnecessary barriers to trade in services, which means that they shall be based on objective and transparent criteria, be not more burdensome than necessary to ensure the quality of the service, and that the procedures shall also not in themselves be a restriction on the supply of the service. Art. VI:5 also adds that any terms and conditions which do not conform to Art. VI:4 shall not be applied in a manner which could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.[106]

68 Fourthly, when a licence is denied, the **reason for the denial shall be made known** to the applicant upon request. Even though there is no explicit requirement to provide reasons for positive decisions where licences have been granted on conditions that applicants find undesirable, the general obligation under Art. VI:2[107] on Members to maintain procedures which allow service suppliers to appeal against administrative decisions in all cases shall provide sufficient incentive for authorities to disclose reasons in such cases.

69 The requirements above apply only when a licence is required, but the RP does not specify situations where a licence could be required. Also, the RP does not provide for any mutual recognition arrangements. Such arrangements will have to be negotiated by the Members on their own pursuant to Art. VII.

G. Independent Regulations (Para. 5)

I. General

70 When the telecommunications operators were state-owned monopolies, no regulators were needed as the monopoly operators were also part of the government structure. Once the telecommunications markets were opened

[106] See *Krajewski*, Article VI GATS, para. 69.
[107] See *Krajewski*, Article VI GATS, paras 15 *et seq*.

up for competition, however, the need for regulators emerged. On the one hand, they are needed to ensure the quality of the services, especially those provided by new entrants; on the other hand, they are needed to prevent abuses of market power, especially by the incumbent operator. There are several different ways of structuring the regulatory body: while many countries entrust most responsibilities to a newly-established telecommunications regulatory body, some countries choose to leave the regulatory issues to general competition authorities.[108] Para. 5 sets out the disciplines regarding regulatory bodies.

II. Independent Regulator

71 The RP seeks to ensure the independence of the regulator in two ways.

72 In terms of the **design** of the regulatory body, it shall be **separate from, and not accountable to, any supplier** of basic telecommunications services. There are several things worth noting about this obligation. First, while this has not been made explicit, separation and accountability shall include both legal and financial relationships. Thus, the lack of independence includes not only cases where the regulator relies on a supplier for its source of power, but also cases where the regulator relies on a supplier for funding even though the regulator has its own power. Secondly, the regulator only has to be independent of suppliers of basic telecommunications services, but it could be dependent on suppliers of other telecommunications services such as value-added services. Thirdly, the regulator is not required to be independent of any government ministry. Thus, the telecommunications ministry, for example, could appoint itself as the regulator.[109] This could create potential problems, especially in countries where the government also owns the incumbent operator, even though the agency that exercises such ownership may be distinct from the telecommunications ministry.

73 Second, in terms of the **operation** of the regulatory body, it shall make sure that its operational **procedures and decisions are impartial**. Such impartiality has to be guaranteed for all market participants, which means that the regulator cannot discriminate between foreign and domestic suppliers, public and private firms, incumbent and new operators, or among members of the same groups. As the decisions of the regulator will be considered to be administrative decisions, such decisions shall also be subject to the judicial review obligation under Art. VI:2.

[108] *Mathew*, 186.
[109] *Ibid.*, 187–188.

H. Allocation and Use of Scarce Resources (Para. 6)

I. General

74 Even with technological advances, the resources needed for the provision of telecommunication services, like those needed for other service sectors, are not unlimited. Thus, for example, **numbers and rights of way** have resource implications for the fixed-line network. With regard to the wireless network, such as radio and satellite based telecommunications, **frequencies** remain a limited resource due to technological restraints. Thus, many countries have rules regulating the allocation and use of scarce resources. Para. 6 sets out the rules Members have to follow regarding the management of scarce resources.

II. Allocation of Scarce Resources

75 The RP does not define **scarce resources**. It includes only an **illustrative list** which names frequencies, numbers and rights of way. This implies that other resources can also be regarded as scarce.

76 The **allocation** of scarce resources can be accomplished in many different ways, including auctions or beauty contests.[110] The RP does not purport to mandate the adoption of particular approaches for such allocation. Instead, the RP regulates only the **manner of such allocation** regardless of the approach adopted. In setting such **procedural safeguards**, the RP combines the requirements under Arts III and VI, and requires that the procedures be carried out in an objective, timely, transparent and non-discriminatory manner.

77 As **frequencies** are invisible, potential users will need to know the current allocation of frequencies before they can decide which frequencies to bid for. Thus, the RP requires Members to make available the current state of allocated frequency bands. At the same time, the RP also recognizes that many Members reserve certain frequencies for government use and does not require the detailed identification of frequencies allocated for such use. The term **"government use"** was not defined in the RP. Normally, this would include uses for armed forces, the civil defence, the police, the rescue services or the civilian authorities.[111] This, however, would not include uses for state-owned telecommunications operators, especially when such uses are for the benefit of the public in general rather than for specific governmental purposes.

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[110] *Naftel & Spiwak*, 114.
[111] *Mathew*, 193.

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