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NOTE

The Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of forty modules.

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WHAT YOU WILL LEARN

This module on the Settlement of GATS Disputes in the WTO will provide, first, an overview of all of the key rights, obligations, commitments and exemptions/exceptions in the GATS. It is difficult to even begin to discuss dispute settlement in the context of the GATS without first providing a general knowledge of the general obligations and specific commitments that comprise the Agreement. The first Section covers the scope of application of the Agreement and definition of certain key terms, which have been interpreted in the sparse WTO jurisprudence to date.

The next Section gives an overview of the general obligations and disciplines that apply to all measures affecting trade in services. These rules of general application include MFN treatment, transparency, increasing participation of developing countries, economic integration, domestic regulation, recognition of standards, and general exceptions and security exceptions. It examines the articles of the GATS relating to specific commitments which Members could choose to undertake for certain services sectors and sub-sectors. These subjects include market access, national treatment and additional commitments (for example, on standards and licensing and certification procedures).

The unique consultations and dispute settlement rules and procedures in GATS are examined. Although the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the “DSU”) applies to dispute settlement arising under the GATS, there are some important special and additional provisions in Articles XXII and XXIII of the GATS relating to consultations and setting forth specific causes of action for trade in services disputes. Finally, the module concludes with a number of problems designed to test overall knowledge and a list of suggested readings for further reference.

INTRODUCTION

The services sector is the largest and fastest-growing sector of the world economy, providing more than 60 per cent of global output and, in many countries, an even larger share of employment. Although it is difficult to obtain accurate statistics on the value of trade in services, much of which takes place through the establishment of foreign enterprises within countries, it is estimated that the value of cross-border trade in services alone, in 1999, amounted to US \$1350 billion, or about 20 per cent of global trade, in balance-of-payment-terms.

The *General Agreement on Trade in Services* (the “GATS”), negotiated and concluded as a result of the Uruguay Round of multilateral trade negotiations, when it came into effect in 1995 was the first multilateral agreement covering this important and growing area of services trade. The GATS is a product of complex, protracted and difficult negotiations among a large number of countries, both developing and developed. As such, it is a complex and intricate agreement. It has a potentially broad scope of application, in the sense that most measures imposed by governments – national, regional and local – affecting trade in services are covered, with the important exception of services supplied in the exercise of governmental authority and certain specific sectors, such as air transport services. However, the general obligations that apply to all measures affecting trade in services are few, most notably the most-favoured-nation (“MFN”) and transparency obligations. Many other key obligations, such as market access and national treatment, apply only when and if a WTO Member has decided to make specific commitments relating to a particular service sector in its Schedule.

The GATS is a complex web of rights, obligations, exemptions/exceptions and specific commitments. Its obligations cannot be understood without reference to all of the relevant legal documents: the text of the GATS itself; the MFN exemptions taken pursuant to the Annex on Article II Exemptions and listed in WTO Members’ Schedules; the specific commitments on market access, national treatment, and additional commitments inscribed in Members’ Schedules; the Annexes to the GATS, which deal with certain sectors and subjects such as Air Transport Services, Financial Services, Maritime Transport Services, Telecommunications and Movement of Natural Persons, Ministerial Decisions and Declarations and, subsequent Protocols that have been entered into with respect to certain services sectors. Depending upon the subject matter of a particular dispute, the applicable legal provisions may be contained in a number of these different documents.

Despite its obvious detail and complexity, the GATS remains a “work in progress”. Although there are many important obligations contained in the text of the GATS, most of the real obligations and commitments are contained in Members’ Schedules. The GATS called for negotiations on basic telecommunications and financial services. Sectoral agreements were reached

on these subjects among groups of countries, and their results were implemented as specific commitments in those Members' Schedules. Several important subjects proved too difficult for negotiators in the Uruguay Round, and they are currently the subject of ongoing negotiations on trade in services in the Doha Round. These topics include: subsidies, emergency safeguard measures, domestic regulation, government procurement, movement of natural persons, and a number of sector-specific negotiations. There are also negotiations among Members aimed at further liberalization in market access, national treatment and other areas covered by specific commitments.

Given the obvious importance of the rights and obligations in the GATS for this extensive and growing sector of the world economy, it is perhaps surprising that so few disputes have been brought relating to this Agreement in the WTO to date. Of the approximately 280 complaints that have been brought in the WTO since 1995, only approximately 10 have included claims under the GATS.¹ Most of these 10 cases have also included claims arising under other agreements, such as the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). Thus, claims under the GATS have only been submitted in approximately 3.5 per cent of all complaints brought under the WTO, a very small percentage of the total dispute settlement complaints. Complex and detailed as the rights and obligations and specific commitments and sectoral deals under the GATS may be, these provisions have not as yet benefited from interpretation and clarification by WTO panels and the Appellate Body. Therefore, unlike the situation with the GATT 1994 or many of the other WTO agreements, the GATS remains largely uninterpreted and is not well understood.

¹ Information extracted from the Update of WTO Dispute Settlement Cases, WT/DS/OV/10, 22 January 2003. Completed Panel and Appellate Body Review: Report of the Panel, Canada – Certain Measures Affecting the Automotive Industry, WT/DS139/R, WT/DS142/R, as modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R, adopted on 19 June 2000; Reports of the Panel, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R/GTM, WT/DS27/HND, WT/DS27/R/ECU, WT/DS27/R/USA, WT/DS27/R/MEX, as modified by the Appellate Body Report, WT/DS27/AB/R, adopted on 25 September 1997; Report of the Panel, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador, WT/DS27/RW/ECU, adopted on 6 May 1999. Pending consultations: Nicaragua – Measures Affecting Imports from Honduras and Colombia (II), WT/DS201; Canada – Measures Affecting Film Distribution Services, WT/DS117; Belgium – Measures Affecting Commercial Telephone Directory Services, WT/DS80; Japan – Measures Affecting Distribution Services, WT/DS45. Settled or Inactive Cases: Turkey – Certain Import Procedures for Fresh Fruit, WT/DS237; United States – The Cuban Liberty and Democratic Solidarity Act. The first major GATS dispute is pending before a panel: Mexico – Measures Affecting Telecommunications Services, WT/DS204.

1. SCOPE AND DEFINITION

Objectives

On completion of this section, the reader will be able:

- to evaluate whether a particular measure is covered by the GATS;
- to assess whether, in a particular situation, there is “trade in services”;
- to identify each of the four modes of supply of services;
- to prepare a claim or a defence on the fundamental question of whether or not the GATS applies in a particular dispute settlement case.

This section of the Module examines discuss the scope of application of the GATS. Article II:1 of the GATS expressly provides that it applies to “any measure covered by this Agreement”. The Appellate Body, in *Canada – Certain Measures Affecting the Automotive Industry* (“*Canada – Autos*”)², stated that a threshold question, for a panel in any case involving claims under the GATS, is whether the measure is within the scope of the GATS by examining whether it is a measure “affecting trade in services” within the meaning of Article I of the GATS.³ The relevant part of Article I reads as follows:

Article I Scope and Definition

1. This Agreement applies to measures by Members affecting trade in services.

To understand fully the meaning of Article I:1 each element of the phrase “measures by Members affecting trade in services” must be examined separately. To do so, it is necessary to understand certain definitions contained in Articles I and XXVIII of the GATS.

1.1 Measures by Members Affecting Trade in Services

The phrase “measures by Members affecting trade in services” is defined in Article XXVIII of the GATS. The definition states as follows:

Article XXVIII Definitions

(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;*

² Report of the Appellate Body, WT/DS139/AB/R, WT/DS142/AB/R, adopted on 19 June 2000.

³ Ibid., para. 152.

This definition, in and of itself, does not provide a precise meaning to the phrase “measures by Members affecting trade in services”. It only provides a list of certain types of measures that will be considered as coming within the meaning of that phrase. It is important to note that this definition gives some examples of the types of measures that would come within the scope of the GATS, but it is not an exclusive list.

To give the expression a more precise meaning, it is essential to examine its constitutive elements individually.

1.2 Measures by Members

Article I:3(a) of the GATS defines the expression “measures by Members” very broadly. According to this definition, the GATS covers virtually all levels of government activity – central, regional or local as well as non-governmental bodies that have powers delegated to them by governments. Article I:3(a) reads as follows:

Article I **Scope and Definition**

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;

The term “measure” is defined in Article XXVIII of the GATS as follows:

Article XXVIII **Definitions**

(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;*

As a result of the combined effect of these two definitions, the obligations and disciplines of the GATS apply to all forms of intervention by central, regional and local governments as well as non-governmental bodies with delegated governmental powers. A “measure” includes laws, regulations, rules and decisions of courts and administrative authorities, but it also covers practices and actions of governments or non-governmental bodies with delegated governmental powers. Examples of measures would include legislation of a Member, by-laws of a municipal authority, and rules adopted by professional bodies in respect of professional qualifications and licensing. All such measures could potentially come within the scope of the GATS.

It is important to note that each Member has an obligation to take reasonable measures to ensure that all “sub-national” levels of government and non-governmental bodies with delegated governmental powers within its territory comply with the disciplines of the GATS. This obligation is similar to the obligation found in Article XXIV:12 of the GATT 1994 relating to trade in goods.⁴

The question of whether or not a particular action of a government constitutes a “measure by a Member” within the meaning of Article I:1 has not specifically arisen as yet in any WTO dispute settlement case. However, there could be cases in the future in which this issue could be important. For example, in a case involving actions of a non-governmental body, it could be disputed whether that body exercises governmental powers delegated to it by a government. The scope of the GATS, however, does not extend to actions of purely private persons or enterprises which do not exercise any delegated governmental powers.

1.3 Affecting Trade in Services

The phrase “affecting trade in services” has been interpreted by the Appellate Body. In *Canada – Autos*, the Appellate Body stated that “two key issues must be examined to determine whether a measure is one ‘affecting trade in services’”. Those issues are:

... first, whether there is “trade in services” in the sense of Article I:2; and, second, whether the measure in issue “affects” such trade in services within the meaning of Article I:1.⁵

1.3.1 Trade in Services

The first issue to determine in a particular dispute settlement case is whether there is “trade in services”. Article I:2 of the GATS defines the concept of “trade in services” as “the supply of a service” within one of four defined “modes of supply”. It reads as follows:

Article I **Scope and Definition**

2. For the purpose 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.

⁴ See the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, paras. 13-15.

⁵ Report of the Appellate Body, *Canada – Autos*, supra, note 2, para. 155.

This definition of “trade in services” through the four different modes of supply is fundamental to understanding the scope and operation of the GATS. It is especially important when in relation to specific commitments inscribed by Members in their GATS Schedules relating to market access and national treatment. Each mode is described and examples given below.

Paragraph (a) of Article I:2 – “Mode 1” – describes what is often called the “cross-border” mode of supply. It involves supply of a service *across the border* from the territory of one Member into the territory of another Member. One example is an enterprise in one Member providing transportation services for waste material from one country being transported into another country for disposal. Another example is a transfer of funds from a bank in one country to a financial institution or a customer in another country.

Paragraph (b) of Article I:2 – “Mode 2” – describes the “consumption abroad” mode of supply. It deals with the situation where the consumer of a service travels to the territory of another Member in order to consume the services. The most common example of services provided under Mode 2 is tourism services. Another example is a person resident in the territory of one Member travelling to the territory of another Member in order to receive medical treatment.

Paragraph (c) of Article I:2 – “Mode 3” – describes what is called “commercial presence”. The supply of services under this mode requires that the service provider of a Member has established a commercial presence in the territory of another Member. Article XXVIII of the GATS defines “commercial presence” as follows:

Article XXVIII
Definitions

- (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;*

An example of Mode 3 would be the provision of financial or banking services by a branch office of a Japanese bank operating within the territory of the United States. Another example would be legal services provided by lawyers in an office in China of a law firm based in Singapore.

Finally, paragraph (d) of Article I:2 – “Mode 4” – describes the mode of supply known as “movement of natural persons”. This is where a service provider of one Member travels to the territory of another Member in order to supply the service. An example would be the case of a doctor from one Member who travels to the territory of another Member to perform surgery on a patient.

Another example would be an architect travelling from his or her country to another country to supply architectural services to a client in that other country. This mode requires the presence of natural persons of another country within the territory of the Member where they are supplying a service.

Article I:2 defines “trade in services” as the supply of a service within one of the four enumerated modes of supply, but it does not define what “services” are. Article I:3 defines the term “services” as follows:

Article I
Scope and Definition

3. For the purposes of this Agreement:

...

(b) “services” includes any service in any sector except services supplied in the exercise of governmental authority;

Article I:3 does not define the term “services” precisely, rather, it states that “any service in any sector”⁶ is covered by the GATS, except “services supplied in the exercise of governmental authority”. This provision gives a very broad scope to the GATS with respect to the services potentially covered by its disciplines.

Article I.3(b) of the GATS establishes a significant exception from the scope of application of the GATS for services that are “supplied in the exercise of governmental authority”. This phrase is defined as follows:

Article I
Scope and Definition

3. For the purposes of this Agreement:

...

(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.

However, the meaning of this important exemption has not been tested in any WTO dispute settlement case to date. It is clear that services provided by a government-owned and operated state monopoly, in such areas as health care, education, police or fire protection, would be exempt from the scope and application of the GATS. However, in many countries, governments have been engaged in the process of privatizing certain aspects of the supply of such services. In such cases, very real and difficult questions arise as to whether, by including some competition in certain aspects of, for example, the provision of health care services, the entire service sector would come within the coverage of the GATS.

This question may be considered in the context of the provision of education or penitentiary services, services that are generally associated with the exercise

⁶ Typically, WTO Members have used the United Nations Central Product Classification system (“CPC”) to identify service sectors or individual services. The United Nations Central Classification system lists over 600 types of services. See: Stewart, T. P. (Editor), *The GATT Uruguay Round, A Negotiating History (1986 - 1992): Commentary (Kluwer Law International, 1993)*, page 2341.

of governmental authority. The interpretation of the requirement that services “supplied in the exercise of governmental authority” must be “supplied neither on a commercial basis nor in competition with one or more service suppliers” could potentially bring such services within the scope of the GATS in a Member which has expressly permitted competition in one of these sectors.

1.3.2 “Affecting”

The second issue identified by the Appellate Body as necessary in determining whether there is a “measure affecting trade in services” is whether the measure in question *affects* trade in services.

On this point, the Appellate Body, in *European Communities – Regime for the Importation, Sale and Distribution of Bananas (“EC – Bananas III”)*, concluded that the term “affecting” in Article I:1 had to be given a broad interpretation. The Appellate Body stated that:

In our view, the use of the term “affecting” reflects the intent of the drafters to give a broad reach to the GATS. 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 further reinforced by the conclusions of previous panels that the term “affecting” in the context of Article III of the GATT is wider in scope than such terms as “regulating” or “governing”.⁷

However, the Appellate Body indicated in that case that the scope and coverage of the GATS is not unlimited. It does not cover the same subject matter as the GATT 1994. Nevertheless, a measure could be examined under both the GATT 1994 and the GATS, although the focus of the inquiry would be different for each agreement. In *EC – Bananas III*, the Appellate Body stated as follows:

The GATS was not intended to deal with the same subject matter as the GATT 1994. The GATS was intended to deal with a subject matter not covered by the GATT 1994, that is, with trade in services. Thus, the GATS applies to the supply of services. It provides, inter alia, for both MFN treatment and national treatment for services and service suppliers. Given the respective scope of application of the two agreements, they may or may not overlap, depending on the nature of the measures at issue. Certain measures could be found to fall exclusively within the scope of the GATT 1994, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS.

⁷ Report of the Appellate Body, WT/DS27/AB/R, adopted on 25 September 1997, para. 220.

However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of the services or the service suppliers involved. *Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis.*⁸

Furthermore, the Appellate Body in *Canada – Autos* stated that:

*In cases where the same measure can be scrutinized under both the GATT 1994 and the GATS, however, 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.*⁹

The Appellate Body has not explained to date exactly what is meant by the term “affecting” in relation to the supply of services. However, the panel in *EC – Bananas III* has provided the following insight:

*... the drafters consciously adopted the term ‘affecting’ and ‘supply of a service’ to ensure that the discipline of the GATS would cover any measure bearing upon conditions of competition in supply of a service, regardless of whether the measure directly governs or indirectly affects the supply of a service.*¹⁰

The concept of “affecting” the supply of services could potentially have significant implications for the scope of application of the GATS. In a situation where goods and services are being marketed together, or where one is used in the production of the other, or where the producer of a good or a service is also integrated in the production of related goods or services, any given measure could in theory have *some* effect on the supply of the relevant service.

1.4 Summary

The scope of application of the GATS is very broad. The disciplines of GATS generally cover any service in any sector, except for services supplied in the exercise of governmental authority. Having said this, Members were permitted to exempt certain service sectors from the scope of the GATS by taking Annex II Exemptions in strict compliance with the provisions of Article II and that Annex.

“Trade in services” is defined as the supply of a service in one of the four

⁸ *Ibid.*, para. 221.

⁹ *Report of the Appellate Body, Canada – Autos*, supra, note 2, para. 160.

¹⁰ *Reports of the Panel, EC – Bananas III, WT/DS27/R/GTM, WT/DS27/R/HND, WT/DS27/R/ECU, WT/DS27/R/USA, WT/DS27/R/MEX*, adopted on 19 June 2000, para. 7.280.

enumerated Modes of Supply described in this Section. In any dispute settlement case, the Appellate Body has stipulated that the threshold question must always be examined as to whether there is a “measure affecting trade in services”. As part of that inquiry, two key legal issues must be examined to determine whether a specific measure is one affecting trade in services. They are: (1) whether a service is supplied through one of the modes of supply listed in Article I:2; and (2) whether the measure in question *affects* trade in services.¹¹ These steps must be followed in each case to determine whether or not the disciplines of the GATS apply to the measure at issue before examining the specific claims in the case.

1.5 Test your Understanding

- 1. What measures are subject to the disciplines of the GATS?
Are there any measures exempted from the scope of application of the GATS? What are they?**
- 2. Are measures in respect of services provided by state police forces covered under the GATS? What about services provided by private security firms engaged to protect government offices?**
- 3. What are the various modes of supply for services that constitute “trade in services”?**
- 4. Could tariffs applicable to rail transportation services for shipment of grain be covered under the GATS? Please explain your reasons.**
- 5. Is it possible for a measure to be covered both by the GATT 1994 and by the GATS? Please give examples.**

¹¹ *Report of the Appellate Body, Canada – Autos, supra, note 2, para. 155.*

2. GENERAL OBLIGATIONS AND DISCIPLINES

Objectives

After studying this section, the reader will be able:

- to analyze and evaluate a claim that a WTO Member has violated a general obligation, such as the obligation to provide MFN treatment, of the GATS;
- to appreciate the importance of the concepts of “like services” and “like service suppliers” in pleading any GATS dispute settlement case;
- to plead certain defences to claims of violation of general obligations of the GATS.

2.1 Introduction

Although the scope of application of the GATS is very broad, there are actually only a few key substantive obligations that have general application to all measures by Members affecting trade in services. These obligations are contained in Part II: General Obligations and Disciplines of the GATS. Of these, the most important substantive obligation that applies to all measures affecting trade in services is the obligation on Members to provide MFN treatment, that is, to provide *services* and *service suppliers* of any other Member *treatment no less favourable* than the Member accords to *like services* and *service suppliers* of any other country.

This Part also establishes certain general transparency obligations and provides important exceptions for certain economic integration agreements and labour markets integration agreements that meet prescribed requirements. In addition, it contains certain provisions designed to ensure transparency and due process on subjects such as domestic regulation, recognition of standards and criteria for the authorization, licensing and certification of service suppliers, monopolies and exclusive service suppliers, business practices, payments and transfers, and government procurement.

There are provisions allowing restrictions on trade in services to be imposed in the event of serious balance-of-payments or external financial difficulties, as well as general exceptions and security exceptions providing legal justification for certain measures taken to protect certain enumerated social, environmental or security policy objectives. Finally, provisions in this Part mandate further negotiations in areas including domestic regulation, emergency safeguard measures, subsidies and government procurement.

2.2 MFN Treatment

Under Article II of the GATS, each Member is required to “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”. This MFN obligation applies generally to all services and all service suppliers (through all modes of supply), except where MFN exemptions have been inscribed in a Member’s List of MFN Exemptions in its Schedule in accordance with the terms and conditions of the Annex on Article II Exemptions.

Article 1:3 (c)

Article XXVIII(g)

Key terms to consider in interpreting the MFN obligation are: “services”, “service suppliers” and “like services and service suppliers”. The term “services” is defined very broadly in Article I:3(c) of the GATS to include “any service in any sector except services supplied in the exercise of governmental authority”.¹² “Service supplier” is defined as “any person who supplies a service”, and includes natural and juridical persons as well as service suppliers which provide their services through forms of commercial presence, such as a branch or a representative office.

It is important in any dispute involving claims under the GATS to first identify the precise nature of the services at issue in the case. Typically, Members have listed service sectors and sub-sectors according to the Services Sectoral Classification List which refers to the more detailed United Nations Central Product Classification system (“CPC”). In the *EC – Bananas III* case, for example, there was a dispute about whether the relevant services were “distributive trade services”, a relatively broad sector, or “wholesale trade services”, a narrower sub-sector, as described in a headnote to section 6 of the CPC.¹³ It is also necessary to identify the relevant *modes of supply* of the service and who the *suppliers* of the service are. This is not as easy as it may seem.

In *EC – Bananas III*, the Appellate Body clarified that the MFN obligation in Article II of the GATS applies both to *de jure* as well as to *de facto* discrimination. A measure may be said to discriminate *de jure* in a case in which it is clear from reading the text of the law, regulation or policy that it discriminates among services or services suppliers of different countries. If the measure does not appear on the face of the law, regulation or policy to discriminate, it may still be determined to discriminate *de facto* if on reviewing all the facts relating to the application of the measure, it becomes obvious that it discriminates in practice or in fact.

In that case, the Appellate Body stated as follows:

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,

¹² See section 2 of this module at pp. 10-11 for a discussion of this term.

¹³ Report of the Appellate Body, *EC – Bananas III*, supra, note 7, paras. 223-228; Reports of the Panel, *EC – Bananas III*, *WT/DS27/R/ECU*, *WT/DS27/R/USA*, *WT/DS27/R/MEX*, supra, note 10, paras. 7.287-7.293.

than in the case of trade in goods – to devise discriminatory measures aimed at circumventing the basic purpose of that Article.¹⁴

In order to determine whether services or service suppliers of different countries – for example, Country A and Country B – are discriminated against, it is necessary to examine: 1) the origin of the services and/or the service suppliers; and 2) whether the services and/or service suppliers of Country A and Country B are “like”. With respect to the supply of services across borders (Mode 1), the location of the service supplier is critical in determining the origin of the service. In other words, if the suppliers of the service at issue are located in Country A as well as in Country B, then the origin of the service is the same as the location of the service supplier. If a service is supplied through commercial presence (Mode 3), the key factor in determining the origin of the service is the origin of the supplier.

Article XXV III

The terminology used in the GATS is “a service supplier of another Member”, which can include either “a natural person of another Member” or “a juridical person of another Member”. A “natural person of another Member” is defined as a natural person who resides in the territory of that other Member or a national or, in certain cases, a resident of that other Member. A “juridical person of another Member” can be either: 1) a juridical person which is constituted or otherwise organized under the law of that other Member and is engaged in substantive business operations in the territory of that other Member; or, 2) in the case of a service that is supplied through commercial presence, a juridical person which is owned or controlled by natural or juridical persons of that other Member.

The issue of whether services or service suppliers of different Members are “like” has only been addressed peripherally in one WTO dispute to date. Although lessons could obviously be drawn from the interpretation of the term “like products” in provisions of other agreements, such as Article III:2 and Article III:4 of the GATT 1994, the terms “like services” and “like service suppliers” in the context of the GATS raise much more difficult conceptual problems.

In *EC – Bananas III*, the panel held that:

... the nature and the characteristics of wholesale transactions as such, as well as each of the different subordinated services mentioned in the headnote to section 6 of the CPC, are “like” when supplied in connexion 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 services 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, ... to the extent that entities provide these like services, they are like service suppliers.¹⁵

¹⁴ Report of the Appellate Body, *EC – Bananas III*, supra, note 7, para. 233.

¹⁵ Reports of the Panel, *EC – Bananas III*, supra, note 10, para. 7.322.

It is reasonably obvious that services that are the same or similar to each other should be determined to be “like”. A determination of the “likeness” of services should include an examination, on the facts, of the characteristics of the service, its classification and description in the CPC, and an analysis of consumer preferences.

In *EC – Bananas III*, the panel found that wholesale transactions and subordinated services described in the headnote to section 6 of the CPC were “like” when supplied in connection with bananas originating from certain countries with the same type of wholesale services supplied in connection with bananas originating from other countries. That panel, however, also assumed that when there are suppliers which are providing services that are “like”, those suppliers will also be “like service suppliers”. There has been no case to date other than the first panel report in *EC – Bananas III* that has examined the question of whether services are “like services” or whether service suppliers are “like service suppliers”.

There could be much more difficult situations in other cases in which it would not be as clear that all service suppliers supplying the same or similar services would necessarily be “like service suppliers”. In addition to the characteristics of the services that the service suppliers provide, there could be other supplier-related factors that could demonstrate that the suppliers are not “like”. Such factors might include the size of the enterprises, the nature of their businesses, the number of employees, the types of assets they possess, the nature of their technological activities, or in the case of professionals, their education and training. There could be situations in which the service suppliers, examined from the perspective of supplier-related factors rather than the characteristics of the service, are sufficiently different from each other that they could be found to be not “like service suppliers”.

In *Canada – Autos*, the Appellate Body stated that the analysis of whether or not a measure is consistent with Article II:1 of the GATS should proceed in several steps. First, a threshold determination must be made under Article I:1 that the measure is covered by the GATS. This requires that a demonstration that there is “trade in services” in one of the four modes of supply, and also that the measure at issue “affects” this trade in services. Once that is demonstrated, the next step is to compare, on the facts, the treatment by the Member concerned of the services or service suppliers at issue of one Member with the treatment of the “like services” or “like service suppliers” of any other country. In *Canada – Autos*, the Appellate Body emphasized that panels must be careful to analyze the effect of the measure on the conditions of competition among the service suppliers “*in their capacity as service suppliers*”.¹⁶

The MFN obligation in Article II:1 applies to both *de jure* and *de facto* discrimination, as determined by the Appellate Body in *EC – Bananas III*.¹⁷

¹⁶ Report of the Appellate Body, *Canada – Autos*, supra, note 2, para. 181.

¹⁷ Report of the Appellate Body, *EC – Bananas III*, supra, note 7, para. 234.

Therefore, in order to determine whether or not services or services suppliers of one Member have been treated less favourably than services or service suppliers of another country, a panel must analyze, on the facts, whether the measure has altered, or has the potential to alter, the conditions of competition between the services or service suppliers of one Member as compared with like services or like service suppliers of another country. This analysis will necessarily be very fact-intensive.

Finally, it is important to note that the MFN obligation in Article II:1 applies very broadly to all “measures by Members affecting trade in services” in all service sectors, with the important exceptions of services supplied in the exercise of governmental authority, and measures listed in a Member’s Schedule and meeting the conditions of the Annex on Article II Exemptions. Such measures include subsidies.

2.3 Transparency

Article III

There is a general obligation in Article III of the GATS requiring each Member to “publish promptly” “all relevant measures of general application which pertain to or affect the operation of” the GATS. Members are required to “promptly or 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 the Agreement. Members are also required to respond promptly to all requests from other Members for specific information on any of their measures of general application, and also to establish enquiry points to provide such specific information to other Members.

2.4 Increasing Participation of Developing Countries

Article IV

In Article IV of the GATS the special needs of developing and especially least-developed countries are recognized. In particular, the increasing participation of developing country Members in world services trade is to be facilitated through negotiated specific commitments, by different Members, in their Schedules, relating to: the strengthening of developing countries’ domestic services capacity, efficiency and competitiveness, including through access to technology; the improvement of developing countries’ access to distribution channels and information networks; and the liberalization of market access in sectors and modes of supply of export interest to developing countries.

Special priority is to be given to least-developed countries, and particular account shall be taken of the serious difficulties such countries have in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.

2.5 Economic Integration and Labour Markets Integration Agreements

Article V:1

Economic integration, or regional, agreements are permitted under Article V of the GATS, but only if such agreements meet the following conditions: (a) they must have substantial sectoral coverage (which is understood in terms of the number of sectors, the volume of trade affected and the modes of supply); and (b) they must provide for the absence or elimination of substantially all discrimination, in a national treatment sense, between or among the parties in all of the covered sectors, either at the time of entry into force of the agreement or, within a reasonable time-frame.

Article V:3

Where developing countries are parties to an economic integration agreement, flexibility is to be provided with respect to the above requirements, particularly with reference to paragraph (b) above, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.

Article V:4

There is also an obligation, similar to the provision in Article XXIV of the GATT 1994, that any such agreement shall be designed to facilitate trade between the parties to the agreement and shall not raise the overall level of barriers to trade in services with respect to any Member outside the agreement.

Article V bis

The GATS also does not prevent any of its Members from being a party to an agreement establishing the full integration of the labour markets between or among Members, provided that such an agreement: (a) exempts citizens of parties to the agreement from requirements concerning residency and work permits; and (b) is notified to the Council for Trade in Services.

2.6 Domestic Regulation and Recognition

It is specifically recognized in the Preamble to the GATS that Members have “the right to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives”. Moreover, “the particular need” of developing countries is especially recognized in this respect. Article VI sets out a number of general disciplines designed to protect the legitimate right of Members to regulate in order to meet certain public policy objectives while, at the same time, ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade.

Article VI:1

Article VI of the GATS contains very general obligations which require Members to comply with the basic and fundamental principles of transparency and due process. In sectors where specific commitments are undertaken, each Member is obliged to ensure that all measures of general application affecting trade in services are “administered in a reasonable, objective and impartial manner”.

Article VI:2

Members are also required to maintain or establish judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and appropriate remedies for, administrative decisions affecting trade in services.

Article VI:4

The Council for Trade in Services was mandated with the task of developing necessary disciplines aimed at ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute “unnecessary barriers to trade in services”. These disciplines, which are currently under negotiation in the Doha Round, shall be directed at ensuring that such requirements are: (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; and (c) in the case of licensing procedures, not in themselves a restriction on the supply of a service.

Article VI:5

In sectors in which a Member has undertaken specific commitments, pending the completion of the multilateral negotiations on disciplines for qualification requirements and procedures, technical standards and licensing requirements, each Member is obliged to not apply licensing and qualification requirements and technical standards in a manner that does not comply with subparagraphs (a), (b) or (c) of Article VI:4, quoted above, and could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

Article VII:1, 3

Article VII of the GATS encourages Members to enter into mutual recognition agreements or arrangements with other Members for the purpose of recognizing the education or experience achieved, or the standards, licences or certification granted in particular countries. Furthermore, Members are required, in recognizing foreign standards, education, certification or licensing, not to discriminate 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.

Article VII:5

Members are also encouraged to work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment of common international standards and criteria for recognition and for the practice of relevant services trades and professions. Negotiations are currently underway under the GATS relating to a number of professional services sectors on aspects of domestic regulation and recognition of standards, licensing and certification requirements.

2.7 Monopolies and Exclusive Service Suppliers; Restrictive Business Practices

Article VIII

With respect to monopolies and exclusive service suppliers, each Member is required to ensure that such suppliers within their territories do not act in a manner inconsistent with that Member’s MFN obligations and specific

commitments. Furthermore, where a Member's monopoly supplier competes, either directly or indirectly, in the supply of a service outside of the scope of its monopoly rights, that Member is required to ensure that such a supplier does not abuse its monopoly position to act in a manner inconsistent with that Member's commitments under the GATS. These requirements apply also to exclusive service suppliers where a Member, through its regulation, authorizes or establishes a small number of service suppliers and substantially prevents competition among those suppliers.

Article IX

Members also recognize that certain business practices of service suppliers may restrain competition and restrict trade in services. Members are required to enter into consultations with other Members, upon request, with a view to eliminating such restrictive business practices.

2.8 Payments and Transfers; Restrictions to Safeguard the Balance of Payments

Article XII

Similar to the GATT 1994, there is a provision in the GATS permitting a Member to adopt restrictions on trade in services on which it has taken specific commitments in the event of serious balance-of-payments and external financial difficulties or threat thereof. This applies only to services with respect to which that Member has made specific commitments. This Article recognizes the pressures on balance of payments that may occur particularly in developing countries or countries in economic transition. Any restrictions taken for balance-of-payments reasons, however, must: (a) not discriminate among Members; (b) be consistent with the *Articles of Agreement of the International Monetary Fund*; (c) avoid unnecessary damage to the commercial, economic and financial interests of any other Member; (d) not exceed those necessary to deal with the serious balance-of-payments and external financial difficulties which led to their imposition; and (e) be temporary and be phased out progressively as the situation improves.

Article XI

Except under the circumstances envisaged above, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.

2.9 Emergency Safeguard Measures; Subsidies; Government Procurement

Articles X, XIII, and XV

With respect to emergency safeguards measures, subsidies and government procurement, there are no substantive disciplines contained in the GATS. However, multilateral negotiations are mandated to take place on these subjects, and such negotiations are part of the ongoing agenda in the Doha Round.

2.10 General Exceptions and Security Exceptions

Article XIV

Article XIV of the GATS provides certain General Exceptions to the obligations and commitments entered into under this Agreement. This provision has many similarities with Article XX of the GATT 1994, but there are also some important differences. In essence, Article XIV provides for exceptions from the obligations and commitments under the GATS for any measures of a Member that are necessary to protect or maintain certain specified public policy goals. These exceptions are subject to the general requirement in the chapeau that such measures must not be “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”.

Article XIV reads as follows:

Article XIV 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 of any Member measures:

- (a) *necessary to protect public morals or to maintain public order;*
- (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 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 in any other international agreement or arrangement by which the Member is bound.*

In any dispute settlement case in which claims are brought against a Member relating to obligations or specific commitments under the GATS, the defending Member may plead one of the exceptions contained in Article XIV in its defence. The burden of proof in pleading an exception is on the party seeking to invoke it. In order to claim the benefit of this defence, the defending party must first demonstrate that its measure meets the requirements of one of the enumerated paragraphs.

For example, if such a party seeks to invoke paragraph (a) of Article XIV, it would have to prove that its measure is “necessary to protect public morals or to maintain public order”. This provision has never been interpreted, and neither has a similar provision in Article XX(a) of the GATT 1994. With respect to the “public order” justification, there is a footnote to paragraph (a) which clarifies that this exception “may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society”.

The term “necessary” also appears in many of the paragraphs of Article XX of the GATT 1994. It is reasonable to assume that decisions interpreting the term “necessary” in relation to Article XX of the GATT 1994 would be relevant to the interpretation of the same term in Article XIV of the GATS. In *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (“*Korea – Beef*”), the Appellate Body stated:

As used in Article XX(d), the term “necessary” refers, in our view, 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”. We consider that 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”.¹⁸

In order to demonstrate that a measure is “necessary” to protect public morals therefore, a defending party would have to show that the measure is close to “indispensable” to the public policy objective of protecting public morals. Other factors to be taken into consideration would include the importance of the common interests or values protected by the measure, and the impact of that measure on imports or exports. Ultimately, determining whether or not a measure is “necessary” to protect public morals would depend on a weighing and balancing of the evidence establishing a connexion between the measure and the public policy objective it seeks to protect.¹⁹

Finally, in order to claim justification for a measure under Article XIV of the GATS, a defending party would have to prove that its measure meets the requirements of the chapeau of that Article. In other words, the defending party would have to show that the measure is “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”. This language is almost identical to the chapeau of Article XX of the GATT 1994. The Appellate Body has interpreted the chapeau of the latter provision in *United States – Standards for Reformulated and Conventional Gasoline* (“*US – Gasoline*”) and *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (“*US – Shrimp*”).²⁰

¹⁸ Report of the Appellate Body, WT/DS161/AB/R, WT/DS169/AB/R, adopted on 10 January 2001, para. 161.

¹⁹ Ibid., para. 164.

²⁰ Report of the Appellate Body, US – Gasoline, WT/DS2/AB/R, adopted on 20 May 1996; Report of the Appellate Body, US – Shrimp, WT/DS58/AB/R, adopted on 6 November 1998.

In *US – Gasoline*, the Appellate Body interpreted the chapeau to Article XX of the GATT 1994 as follows:

*“Arbitrary discrimination”, “unjustifiable discrimination” and “disguised restriction” on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that “disguised restriction” includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of “disguised restriction”. We consider that “disguised restriction”, whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to “arbitrary or unjustifiable discrimination”, may also be taken into account in determining the presence of a “disguised restriction” on international trade. **The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.**²¹*

While it is not easy to prove a general exception in Article XIV of the GATS, in certain cases, this provision may afford a justification for a measure that would otherwise be found to be inconsistent with a Member’s obligations and specific commitments under the GATS. Although there has not been a case to date in which a defending party has claimed a defence under Article XIV of the GATS, there have been a few important cases interpreting similar terms in Article XX of the GATT 1994 and there are many lessons that could be drawn from the Article XX jurisprudence.

Article XIV bis

Article XIV bis also provides for Security Exceptions to the obligations and specific commitments entered into under the GATS. It provides an exception for any action taken by a Member necessary to protect its essential security interests or any action taken in pursuance of a Member’s obligations under the United Nations Charter for the maintenance of international peace and security. The language of this provision is identical to Article XXI of the GATT 1994. However, neither of these provisions has been interpreted in a dispute settlement case to date.

2.11 Test Your Understanding

1. **What does MFN treatment mean in the context of the GATS?**
2. **How would you describe “like services” and “like services suppliers” under the GATS? What is the significance of these terms?**
3. **Describe the general obligations on domestic regulation. What do they mean?**

²¹ *Report of the Appellate Body, US – Gasoline, supra, note 20, page 25.*

- 4. Are there any rules in the GATS on subsidies? Are subsidies considered “measures” currently covered by GATS obligations? Which obligations apply?**
- 5. What are the general exceptions in the GATS, and under what conditions can they be invoked?**

3. SPECIFIC COMMITMENTS

Objectives

Upon completion of this section, the reader will be able:

- to assess dispute settlement claims relating to specific commitments on market access or national treatment made by WTO Members;
- to read and analyze specific commitments inscribed in Members' GATS Schedules;
- to explain how modifications can be made to specific commitments contained in Members' Schedules.

3.1 Introduction

Unlike the GATT 1994, the obligations contained in Part III of the GATS relating to market access, national treatment and additional commitments apply only to the extent that a Member has inscribed specific commitments with respect to specific service sectors²² in its Schedule of Specific Commitments ("Schedule").

Market access commitments for specific service sectors are similar to market access concessions made in Members' Schedules to the GATT 1994. They are bindings which prescribe the *minimum* treatment that a foreign service or service supplier must be accorded by the Member concerned. The Member may always accord better treatment in practice than that to which it has committed itself in its Schedule. However, the specific commitment, with any particular conditions, qualifications or limitations inscribed in the relevant column, indicates the lowest, or the worst permissible treatment that the Member concerned is required to accord in regard to that service sector to foreign services and service suppliers.

The principle of national treatment, which is a cornerstone of the GATS, is applied very differently than it is under the GATT 1994. In the GATS, this fundamental principle of non-discrimination applies only to those service sectors specifically designated by a Member in its Schedule.

Even when a Member decides to make specific commitments on market access or national treatment for specific services sectors, such commitments may be made subject to certain conditions, qualifications and limitations specified in the relevant columns of its Schedule. Thus, the obligations of a Member on market access and national treatment in particular, cannot be understood without reference to the specific commitments made in relation to specific service sectors in that Member's Schedule.

²² The term "sector" of a service is defined in Article XXVIII(e) of the GATS as: "(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".

3.2 Market Access

Article XVI

Article XVI of the GATS provides for each Member to undertake market access commitments relating to specific service sectors by inscribing them in its Schedule. In contrast with the general obligations which apply to all services and service suppliers, market access commitments are limited in application to the service sectors inscribed in a Member's Schedule. With respect to sectors not included in its Schedule, a Member is not subject to any commitments on market access.

Market access under the GATS has a different meaning than market access under the GATT 1994, which is concerned with trade in goods. The rules of the GATT 1994 reflect the fact that, in order to be traded, goods must be transported physically from their country of origin to their ultimate destination. When the Uruguay Round negotiators faced the prospect of liberalizing trade in services, it became evident that services can be traded in *more* and *different* ways than goods. For this reason, Article I of the GATS defines trade in services with reference to four modes of supply.²³

Given that services can be internationally traded through four different modes of supply, market access in the GATS means more than simply importing the service into the national market in which it will be consumed. Mode 1 (cross-border supply) contemplates the cross-border movement of the service from the supplier in one country to the consumer in another country, similar to trade in goods. However, Modes 2, 3 and 4 contemplate the movement of the service consumer, capital or the service supplier from the territory of one Member into the territory of another Member. A Member wishing to make market access commitments relating to specific sectors under the GATS must identify and make inscriptions for each of the four modes of supply.

Article XVI:1

Paragraph 1 of Article XVI requires each Member to accord, with respect to market access through the modes of supply identified in Article I, *treatment no less favourable* than that provided for under the terms, limitations and conditions agreed and specified in its Schedule. This obligation is similar to that contained in Article II of the GATT 1994. In inscribing a market access commitment for a particular service sector in its Schedule, a Member binds itself to the *minimum*, or the lowest possible, treatment that it is required to accord to foreign services or suppliers in that sector. In practice, any Member may always accord to foreign services and service suppliers *better*, or a higher level of treatment than that inscribed in its Schedule.

Article XVI:2

Paragraph 2 of Article XVI describes how market access commitments operate. For the service sectors listed in its Schedule, a Member is required not to maintain or adopt any of the limitations or restrictions on market access that are specified in the six subparagraphs of paragraph 2, unless the Member has indicated otherwise in its Schedule. For sectors where a Member makes market access commitments, the list contained in paragraph 2 is a list of limitations

²³ See Section 2 of this module, pages 8-10.

and restrictions that would otherwise be inconsistent with the GATS unless a Member has inscribed specific conditions or qualifications protecting such measures.

These six forms of measures restricting market access that may not be applied to foreign services and their suppliers unless their use is provided for in a Member's Schedule are:

- (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;*
- (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.²⁴*

The following are some examples of the types of market access restrictions that may be found in a Member's Schedule:

- a rule that foreign service suppliers may only establish a specified number of branches or subsidiaries with the territory of a Member;*
- a ceiling on the number of service transactions that can be entered into with foreign service suppliers;*
- a requirement that foreign service suppliers be incorporated or otherwise constituted in a certain legal form under the law of the Member;*
- nationality requirements for suppliers of services or for their boards of directors;*
- a limitation on the time that foreign radio or television signals may be broadcast on a national network; and*
- a restriction on the amount of equity that foreign nationals may have in a domestic service supplier.*

Even in sectors listed in a Member's Schedule, Article XVI does not necessarily impose the obligation to grant unconditional and unfettered market access to

²⁴ GATS, Article XVI:2.

all foreign services and service suppliers. By inscribing limitations, conditions and qualifications in the relevant columns of their Schedule, Members can effectively tailor the extent of the commitments they make so as to preserve their rights to maintain or adopt restrictions on market access in specific scheduled sectors.

In order to determine whether and to what extent market access commitments have been undertaken by a Member in a specific sector relating to particular modes of supply, it is necessary to examine carefully that Member's Schedule. When a Member undertakes a commitment in a specific sector, its Schedule will indicate, for each mode of supply, what limitations or restrictions, if any, it may maintain on market access. When a Member has inscribed the word "none", meaning no limitations, under a specific sector and a particular mode of supply, it means that that Member has committed itself to full market access in that sector. In other words, it has bound itself not to maintain or establish any limitations or restrictions of the types listed in Article XVI:2. Where a Member inscribes "unbound" in a specific sector under a particular mode, that means that it has not made any commitments with respect to that sector in respect of that mode of supply.

3.3 National Treatment

Article XVII

Like Article XVI of the GATS, the national treatment obligation contained in Article XVII does not apply generally to all measures affecting trade in services, but instead is triggered by the specific commitments undertaken by each Member. It applies only to the particular service sectors with respect to which a Member has made specific commitments. These commitments are set out in the national treatment column of each Member's Schedule.

Unlike Article XVI, however, Article XVII does not set out a definitive list of measures that would always be incompatible with the national treatment obligation for scheduled sectors. Rather, it stipulates that in the sectors inscribed in its Schedule, *and subject to any conditions and qualifications set out in that Schedule*, each Member is required to accord to foreign services and service suppliers, 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*.

For the sectors in which a Member has made commitments, the national treatment obligation in the GATS is, in principle, similar to the national treatment obligation in the GATT 1994. The general requirement is that a Member cannot maintain or impose a measure - a law, regulation, policy or practice - that discriminates against foreign services or service suppliers as compared to like domestic services or service suppliers.

Once again, in the sectors in which it inscribed national treatment commitments in its Schedule, each Member was permitted to also inscribe particular conditions or qualifications to its national treatment commitments. By

inscribing particular conditions or qualifications within a specific sector and mode of supply, a Member could limit the scope of application of the national treatment principle to that sector and mode of supply. Thus, as for market access commitments made under Article XVI of the GATS, it is imperative in assessing the national treatment commitments made by a Member in respect of a specific sector and a mode of supply to read and analyze very carefully the inscription made in the relevant column and under the appropriate heading in that Member's Schedule. Ultimately, in determining the scope and extent of a Member's commitments on national treatment with respect to a particular sector, one must refer to the specific entries in a Member's Schedule. Each Member's Schedule indicates the sectors in which, and the conditions and qualifications under which, each Member is prepared to extend national treatment to foreign services and service suppliers.

Article XVII:2

Paragraph 2 of Article XVII clarifies that in order to meet the “no less favourable treatment” standard, a Member may provide “either formally identical or formally different treatment” to foreign services or service suppliers compared to the treatment it accords to its own domestic “like services and service suppliers”. Whether formally identical or formally different, treatment will 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”.²⁵ The key requirement is that Members must not maintain or adopt measures which modify, in law or in fact, the conditions of competition in favour of a Member's own services or service suppliers.

In EC - Bananas III, the Appellate Body stated as follows:

The GATS negotiators chose to use different language in Article II and Article XVII of the GATS in expressing the obligation to provide “treatment no less favourable”. The question naturally arises: if the GATS negotiators intended that “treatment no less favourable” should have exactly the same meaning in Articles II and XVII of the GATS, why did they not repeat paragraphs 2 and 3 of Article XVII in Article II? The question here is the meaning of “treatment no less favourable” with respect to the MFN obligation in Article II of the GATS. There is more than one way of writing a de facto non-discrimination provision. Article XVII of the GATS is merely one of many provisions in the WTO Agreement that require the obligation of providing “treatment no less favourable”.²⁶

A measure may be said to discriminate *de jure* (in law) in a case in which it is clear from reading the text of the law, regulation or policy that it discriminates against services or service suppliers of other Members as compared to “like”²⁷ services or service suppliers of the Member maintaining the measure. When a

²⁵ GATS, Article XVII:3.

²⁶ Report of the Appellate Body, EC – Bananas III, supra, note 7, para. 233.

²⁷ The issue of whether or not services or service suppliers are “like” is a very important legal issue. Unfortunately, however, there is very little WTO jurisprudence as yet on this question. Please refer to “like services and service suppliers” in section 3 of this module, pages 18-19.

measure does not discriminate on its face, it may still be determined that it discriminates *de facto* if, on reviewing all relevant facts relating to the application of the measure, it becomes clear that the measure discriminates in practice.

For example, a government may grant a subsidy to domestic service suppliers, but not to foreign service suppliers. If this measure discriminates on the face of the law, regulation or executive act granting it, then it will be found to discriminate *de jure*. If, however, the measure does not expressly discriminate on its face, it may still be found to discriminate against foreign service suppliers if, in practice, it modifies the conditions of competition to the benefit of domestic service suppliers.²⁸ In practice, such subsidies might place domestic service suppliers in an advantageous competitive position *vis-à-vis* suppliers of other Members. However, subsidies granted exclusively to domestic suppliers will not be inconsistent with Article XVII if:

- *they are granted in a service sector that is not listed in a Member's Schedule;*
- *even if they are granted in a listed sector, their use is expressly provided for by conditions or qualifications inscribed in a Member's Schedule; or*
- *the services or service suppliers of the Member granting the subsidies are not "like" the foreign services or service suppliers.*

To summarize, in inscribing specific commitments on national treatment in respect of particular sectors, a Member could effectively tailor the scope of the national treatment commitments it undertook so as to preserve its rights to maintain or adopt measures that accord less favourable treatment to, or discriminate against, foreign services and service suppliers. In order to determine whether and to what extent national treatment commitments have been undertaken by a Member in a specific service sector and for a particular mode of supply, it is necessary to examine very carefully the inscriptions in its Schedule.

When a Member undertakes a national treatment commitment in a specific sector, the Schedule indicates for *each mode of supply* what conditions or qualifications that Member has reserved on its commitment. Where a Member has made a commitment with respect to a particular sector, but has inscribed no conditions or qualifications, that Member is obliged to accord to foreign services and service suppliers treatment no less favourable than the treatment that it extends to its own "like services and service suppliers" in that sector. This national treatment obligation applies both to measures which discriminate *de jure* and to those which discriminate *de facto* against foreign services or service suppliers.

²⁸ Unlike Article III:8 of the GATT, Article XVII of the GATS does not contain an exception for certain types of subsidies. Furthermore, as yet, there are no specific disciplines for trade distorting subsidies – this is a subject under negotiation in the Doha Round. See Article XV of the GATS.

3.4 Additional Commitments

Article XVIII

Article XVIII of the GATS allows Members to negotiate “additional commitments affecting trade in services not subject to scheduling under Articles XVI and XVII”. Such commitments may include, but are not limited to, undertakings with respect to qualifications, technical standards, licensing requirements or procedures, and other domestic regulations such as those covered by Articles VI, VIII and IX of the GATS. Additional commitments are required to be inscribed in a Member’s Schedule.

An example of additional commitments are the Reference Papers that many Members inscribed in their Schedules as a result of the negotiations on basic telecommunications that took place between 1995 and 1997. Each Member’s Reference Paper contains additional commitments for the regulation of basic telecommunications services, providing certain competitive safeguards in markets in which there is a major supplier with the ability to materially affect the conditions of price and supply of basic telecommunications services within that market.

3.5 Schedules of Specific Commitments

The specific commitments assumed by Members are inscribed in their GATS Schedules. The extent to which, and the conditions under which, the market access and national treatment obligations in Part III of the GATS apply to individual service sectors in any Member can be assessed only by referring to the inscriptions in that Member’s Schedule. The Schedules are annexed to the GATS and form an integral part of the treaty text.²⁹

The general part of any Member’s GATS Schedule takes the form of items arranged in four columns, specifying in each case:

- *the sector subject to commitments;*
- *the terms, limitations and conditions on market access for each scheduled sector designated by mode of supply;*
- *the conditions and limitations on national treatment for each scheduled sector designated by mode of supply;*
- *the undertakings relating to additional commitments, if any;*
- *where appropriate, the time-frame for implementation of such commitments; and*
- *the date of entry into force of such commitments.*³⁰

The sectoral part of a Member’s Schedule is preceded by “horizontal commitments”, that is, a list of the commitments and limitations that apply

²⁹ GATS, Article XX.

³⁰ Ibid.

generally to *all* scheduled sectors. Many of these horizontal commitments relate to derogations from market access and national treatment obligations regarding particular modes of supply, such as “presence of natural persons”. For example, most Members inscribed horizontal commitments to limit the movement of natural persons in all scheduled service sectors to intra-corporate transfers covering essential personnel or short-term (i.e., temporary) business visitors not employed in the host country.

Sector-by-sector entries in the Schedules then indicate the nature and extent of the commitments that each Member has agreed to undertake. Under each designated sector, these commitments are inscribed separately for each of the four modes of supply. The following is a descriptive list of the levels of commitments that could be inscribed in a Member’s Schedule:

- **Full commitment**

“None” is inscribed in the Schedule under the relevant mode of supply. This means that the Member agrees to accord full market access or national treatment rights, with no conditions or qualifications, to services and service suppliers of other Members.

- **Commitment with limitations**

The Member inscribes the specific limitations, conditions or qualifications that limit the scope of its market access or national treatment commitments. Often, Members have inscribed specific measures that they viewed as otherwise inconsistent with the market access or national treatment obligations.

- **No commitment**

“Unbound” is inscribed in the Schedule under the relevant mode. This indicates that the Member remains free to maintain or establish any measures inconsistent with the market access and national treatment obligations.

- **No commitment technically feasible**

The Member indicates that in the sector in question, the supply of the service cannot occur under one of the modes (e.g., cross-border supply of hairdressing services).³¹

Article XXI

Similar to the provisions for modification of Schedules under Article XXVIII of the GATT 1994, Article XXI of the GATS sets forth rules and procedures under which a Member may modify or withdraw any specific commitment in its Schedule. In order to commence proceedings to modify or withdraw a commitment, at least three years must have elapsed from the date of the entry into force of that commitment. At the request of any Member affected by a proposed modification or withdrawal, the Member seeking to modify its commitment must enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In any such negotiations, the

³¹ See WTO, Committee on Specific Commitments, “Draft Revision of the Guidelines for the Scheduling of Specific Commitments”, S/CSC/W/30, 23 March 2001, paras. 41-49.

objective is “to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in the Schedules of specific commitments prior to such negotiations”.³² Any compensatory adjustments agreed through negotiation with affected Members must be made on an MFN basis.

If an agreement cannot be reached between the modifying Member and the affected Members, the matter may be referred to arbitration. Where arbitration has been requested by an affected Member, the modifying Member must make compensatory adjustments in conformity with the findings of the arbitration before taking action to modify or withdraw its commitment. If the modifying Member 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. Such a modification or withdrawal may be implemented solely with respect to the modifying Member, in other words, not applied MFN treatment.

Where no agreement has been reached on compensatory adjustments, and there has been no request for arbitration, the modifying Member is free to implement the proposed modification or withdraw it. Any Member which may be affected by a proposed modification or withdrawal of a commitment must request arbitration if it wishes to enforce its rights to compensatory adjustments pursuant to Article XXI of the GATS.

3.6 Test Your Understanding

- 1. Are the obligations on market access and national treatment contained in Articles XVI and XVII of the GATS generally applicable to all measures affecting trade in services? If not, why not?**
- 2. Does the inscription of a service sector in a Member’s Schedule require that Member to avoid maintaining or establishing measures that discriminate against foreign services and service suppliers? What additional information would you need in order to properly answer this question?**
- 3. Where should you look to determine the nature and extent of a Member’s commitments on national treatment with respect to a particular service sector?**
- 4. Can a Member unilaterally provide better treatment to foreign services and service suppliers than its commitments on market access require it to provide? Having provided a better level of treatment than its commitments require, is that Member bound in future to always provide that better level to all services and service suppliers?**
- 5. Can a Member provide one level of treatment to some service suppliers from certain Members but only provide the scheduled**

³² GATS, Article XXI:2(a).

**level of treatment to other service suppliers from another Member?
Which obligation applies to this question?**

- 6. Can specific commitments be withdrawn or modified by WTO Members? If so, what are the procedures to be followed?**
- 7. Give some examples of types of measures that may be covered by additional commitments inscribed in Members' Schedules under Article XVIII of the GATS.**

4. DISPUTE SETTLEMENT

Objectives

After studying this section, the reader will be able:

- to appreciate the special dispute settlement procedures that apply in any GATS case;
- to distinguish between “violation” and “non-violation” claims made under the GATS.

4.1 Consultations

Under the GATS, as in any other dispute settlement proceeding in the WTO, the parties to a dispute are required to first consult with each other about the matter in contention. The GATS contemplates two types of consultations: bilateral and multilateral.

Article XXII 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 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.*

As a mandatory first step in initiating dispute settlement proceedings about a matter affecting the operation of the GATS, a complaining Member is required to consult in good faith with the defending Member. The provisions of Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the “DSU”) apply to any bilateral consultations initiated under the GATS.

Where it is not possible to find a satisfactory solution through bilateral consultation, a Member may request that the Council for Trade in Services or the Dispute Settlement Body (“DSB”) consult with any Member or Members about the matter. These consultations are multilateral in character.

Finally, a Member may not make a claim under Article XVII of the GATS, dealing with national treatment, in a case involving a measure that falls within the scope of an international agreement between the parties to the dispute relating to the avoidance of double taxation. If there is a disagreement between the Members as to whether a measure falls within the scope of such an international agreement, both parties may agree to bring this matter before the Council for Trade in Services. The Council shall then refer such a matter to arbitration, and the decision of the arbitrator is final and binding on both parties.

4.2 Dispute Settlement and Enforcement

Article XXIII **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. ...*
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. ...*

Under the GATS, a Member may bring a complaint alleging that another Member has failed to carry out its obligations or specific commitments under the Agreement. These are called “violation claims” because they involve allegations that a Member has violated the rules.

A Member can also bring a “non-violation claim” under the GATS, but in such cases, special and additional rules apply. A “non-violation claim” is a dispute in which a Member believes that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member made under Part III of the GATS is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of the GATS. A “non-violation claim” under the GATS does not involve any allegation that a Member has violated any obligations or specific commitments. Rather, the claim is that a benefit that a Member reasonably expected it would receive as a result of a specific commitment made by another Member has been nullified or impaired.

The causes of action for “violation” and “non-violation” claims under the GATS are somewhat different and more specific than the causes of action under Article XXIII of the GATT 1994. However, once a claim is brought pursuant to paragraphs 1 or 3 of Article XXIII of the GATS, the rules and procedures of the DSU apply to that proceeding.

In the case of a “violation” claim, the remedy, as provided under the DSU, is usually the withdrawal or modification of the measure found to be inconsistent with the Member’s obligations or specific commitments. In the case of a “non-violation” claim, however, the remedy is that the Member affected is entitled to a mutually satisfactory adjustment on the basis of Article XXI of the GATS (which deals with the Modification of Schedules). Unlike non-violation claims under the GATT 1994, the remedy for a non-violation case under the GATS may include the modification or withdrawal of the measure.

With respect to enforcement of dispute settlement rulings, the procedures under Article 22 of the DSU apply with respect to both “violation” and “non-violation” cases.

4.3 Special Procedures for Specific Services Sectors

The *Decision on Certain Dispute Settlement Procedures for the GATS* provides that any panel dealing with complaints relating to trade in services should be composed of well-qualified governmental or non-governmental individuals who have experience in trade in services and, include persons with expertise in the sector at issue in the dispute. The *Annex on Financial Services* also requires that in any dispute involving financial services, panellists must have the necessary expertise in prudential issues and other financial matters.

The *Annex on Air Transport Services* precludes the GATS and its dispute settlement rules and procedures from applying to any measures affecting: (a) traffic rights, however granted; or (b) services directly related to the exercise of traffic rights. The GATS does apply, however, to measures affecting: (a) aircraft repair and maintenance services; (b) the selling or marketing of air transport services; and (c) computer reservation systems. However, in these latter areas, the dispute settlement rules and procedures apply only where specific commitments have been assumed by the Member concerned, and where dispute settlement procedures in other bilateral or multilateral agreements and arrangements have been exhausted.

4.4 Test Your Understanding

- 1. What is the mandatory first step that a complainant must take in initiating a dispute?**
- 2. What are the two causes of action that may form the legal basis for a dispute brought under the GATS? Explain each of these in detail and demonstrate the similarities and differences as compared to complaints under the GATT 1994.**
- 3. What are the remedies available in dispute settlement under the GATS?**
- 4. Are there any special rules and procedures relating to the composition of panels in GATT dispute settlement? What are they?**

5. CASE STUDIES

Case Study 1

Since the Republic of Arcadia became a Member of the WTO in 1996, the Government of that country has been preoccupied by the low ratings of Arcadian-origin programmes broadcast on the country's single television network, ArcaTV. In order to change this state of affairs, the government decided to create the Arcadian Broadcasting Control Board (the "ABCB") in 1999. The ABCB is a non-governmental body that has been delegated broad powers to regulate television transmission services in Arcadia, and to issue mandatory directives to promote the development of a national television production industry.

In 2001, the ABCB issued the "Broadcast Directive", which includes a provision requiring that a majority of television transmission time be reserved for Arcadian-produced programmes. The Directive also states that this requirement shall be enforced by "whatever means necessary" and that, in particular, the re transmission of all foreign news bulletins is prohibited.

Numerous WTO Members have criticized the decision of the ABCB, claiming that it discriminates against foreign television production and distribution services and service suppliers. However, Arcadian officials have replied that this Directive is "aimed at protecting Arcadian culture and advancing vital national interests" and, is therefore not subject to the GATS. Moreover, at the time of the negotiation on accession to the WTO, Arcadia did not include Commitments on "Audiovisual services" and "Radio and television services" in its Schedule of Specific Commitments.

- a) Is the "Broadcast Directive" a measure covered by the GATS?
- b) Assuming that the GATS applies to the "Broadcast Directive", is such a measure inconsistent with any provision of the GATS?

In 2002, Arcadia and its neighbour, the Kingdom of Utopia, reached a bilateral agreement on mutual cooperation in the areas of culture and education. By the end of 2002, the ABCB amended the "Broadcast Directive" in order to implement the new bilateral agreement. Under the amended "Broadcast Directive", which entered into force on 1 January 2003, 15 per cent of total television transmission time shall be reserved exclusively for programmes of Utopian origin. The amended Directive also grants to Utopian television production companies the right to establish branches to produce television programmes in Arcadia. Such rights have not been extended to services or services suppliers of other WTO Members.

- c) Is the amended "Broadcast Directive" consistent with Article II of the GATS? (Please note that Arcadia did not schedule any Article II Exemptions).

- d) Is Arcadia under an obligation to inform the GATS Council for Trade in Services of the amendment to the “Broadcast Directive”?

Case Study 2

Please identify the relevant mode of supply in the following services transactions:

- a) A Brazilian law firm prepares a legal opinion for a Mexican client and sends it from its office in Sao Paulo to its client in Mexico via e-mail.
- b) A British Bank opens a branch in Singapore to offer loans and insurance services to Singaporeans.
- c) A Moroccan engineer travels to Paris to provide on-site services at a newly-inaugurated food processing plant.
- d) An American citizen living and working in Detroit, Michigan visits her favourite hairdresser in Windsor, Ontario, Canada.
- e) An Australian student is enrolled in courses at the London School of Economics in London, England.
- f) A Russian architect prepares plans and drawings in Moscow, saves her work on a computer diskette and sends it by courier to her client in Stockholm, Sweden.

Case Study 3

In its Schedule of Specific Commitments (“Schedule”), the Republic of Arcadia undertook specific commitments with respect to financial services. It inscribed these commitments in accordance with the Understanding on Commitments in Financial Services.

In order to protect Arcadian investors, depositors and policy holders, Arcadia applies the same strict prudential measures to all suppliers of financial services, whether domestic or foreign. These measures include, but are not limited to: (i) capital adequacy requirements; (ii) liquidity, credit and risk management requirements; (iii) limits on large credit exposures; (iv) limits on association with non-banks; and (v) disclosure of financial information including financial statements related to the operations of a financial service supplier. These measures are not referenced in any of the limitations that are inscribed in Arcadia’s Schedule nor are they referenced in Arcadia’s Annex on Article II Exemptions.

The prudential measures were put in place in 1996, the year that Arcadia became a Member of the WTO, following a full year of detailed consultations with domestic suppliers of financial services. All Arcadian suppliers of financial services readily complied with the measures. However, given the high level of protection associated with the measures, financial service suppliers of other WTO Members are encountering difficulties in complying with the measures.

Compliance is particularly problematic for financial service suppliers of developing country WTO Members.

Recognizing that formally identical requirements apply to all financial service suppliers irrespective of their nationality:

- a) Does the fact that service suppliers of developing country Members encounter greater difficulties in complying with the measures than suppliers from developed country Members create an inconsistency with the most-favoured-nation treatment obligation in Article II:1 of the GATS?
- b) Does the fact that service suppliers of other WTO Members encounter greater difficulties in complying with the measures than Arcadian service suppliers create an inconsistency with the national treatment obligation in Article XVII of the GATS?
- c) Can the same measure be inconsistent with both Articles II and XVII of the GATS?

Subsection 2(a) of the *Annex on Financial Services* provides that “[n]otwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons...”. It also provides that “[w]here 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”.

- a) Assuming that the prudential measures do not conform with either or both of Articles II:1 and XVII of the GATS, and that they are not being “used as a means of avoiding a Member’s commitments or obligations under the Agreement”, does subsection 2(a) of the *Annex* effectively operate as an exception to the obligations in Articles II:1 and XVII with respect to these measures?
- b) What types of factors should be taken into account in assessing whether the prudential measures were being “used as a means of avoiding [Arcadia’s] commitments or obligations under the Agreement”?

Case Study 4

In the Republic of Arcadia, medical care services are provided by a state-owned and controlled monopoly. However, dental care services are currently provided by private enterprises and persons, outside of the scope of the state-owned and operated medical care system. Moreover, dental care services are regulated by the dentist and dental assistant professions, which have been delegated governmental powers by the Government of Arcadia and which have developed their own licensing and certification boards. These boards have developed educational standards and qualifications and licensing criteria with which all persons wishing to practice as dentists or dental assistants in Arcadia must comply.

Insurance services in respect of dental care are provided by private insurance companies. In Arcadia, there are no restrictions on foreign insurance services or service suppliers providing dental insurance, and Arcadia has inscribed market access and national treatment commitments with respect to the sector, Insurance Services, in its GATS Schedule of Specific Commitments.

As a result of a recent study on the medical care system in Arcadia, the Government of that country is proposing to enact legislation that would bring dental care services, including insurance services relating to dental care, within its state-monopoly health care system.

The Government of Arcadia has retained you to advise it on whether its proposal to extend its state monopoly over medical care services to include dental care services and insurance services related to dental care would be inconsistent with any of its obligations or commitments under the GATS. What would you advise the Government of Arcadia? Please indicate each of the steps that is necessary in preparing your analysis. If you need further information to analyze this question, please state your assumptions clearly when providing your answer.

6. FURTHER READING

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The WTO on the WEB

Useful explanations and documents about the GATS can be found on the WTO website: www.wto.org