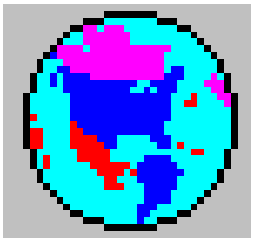
THE LAW OF
REGIONAL ECONOMIC INTEGRATION
IN THE AMERICAN HEMISPHERE



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Unit XVI

Cross-Border Services

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Guiding Questions

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   d. *What kind of services are tradables and non-tradables?*

2. *Different barriers*
   a. *Why do you think there have never been tariffs levied on the cross-border provision of services? Consider reasons of historical coincidence, but also aspects of practicability.*

   b. Consider the nature of regulatory restrictions which impede the cross-border provision of services. Think of typical examples in professions you know where specific licences, diplomas etc. are required for the lawful exercise of a professional activity.

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3. NAFTA Trucking Case

This is an important case law in various aspects. From the perspective of legal realism, why do you think did the US lose the case? What should the US do to comply with this ruling? How did the panel handle the US' main argument based on the wide regulatory discrepancy in public safety existing between the US and Mexico in the area of transportation (trucking business)? Compare the panel's ruling on regulatory justification with those rulings in Gasoline and Shrimp-Turtle. On what grounds could the panel broadly cite and quote the GATT/WTO jurisprudence?

4. Goods versus Services (Periodicals and Bananas III)

The Appellate Body in both cases highlighted the co-existence and mutual inclusiveness of the GATT and the GATS. Would such harmonious and constructive stance be peculiar in international trade law? Or would there be a general principle of (international) law that avoids clash or incompatibility between two or more different legal regime?

I. Introduction

1-1. Overview

OAS Overview of the North American Free Trade Agreement

http://www.sice.oas.org/summary/nafta/nafta12.asp

Chapter Twelve: Cross-Border Trade in Services

The Canada-US FTA marked the first time that cross-border services were addressed in a general trade agreement and subjected to the traditional trade principles of nondiscrimination and transparency. Since then, the Uruguay Round of multilateral trade negotiations has succeeded in concluding a General Agreement on Trade in Services (GATS). It establishes the equivalent for traded services to what the GATT has provided for trade in goods for the past 45 years.

As set out in Article 1201, chapter twelve applies to all measures affecting cross-border trade in all non-financial services not otherwise falling within the ambit of chapter eleven and not specifically excluded from coverage (e.g., procurement, air services other than specialty air services).

The NAFTA requires each Party to list in the Agreement's annexes those sectors, subsectors and activities where it wishes to retain full flexibility to enact new non-conforming measures.

Chapter twelve applies to laws and regulations affecting the provision of services across NAFTA borders. This includes measures affecting the production, distribution, marketing, sale and delivery of a service, as well as those related to the purchase or use of a service. The chapter also applies to measures requiring a service provider to post a bond, while the treatment of the bond or security is subject to chapter eleven.

The chapter does not apply to a number of matters dealt with in other parts of the Agreement, including government procurement (chapter ten), financial services (chapter fourteen), air services (other than aircraft repair and maintenance services during which an aircraft is withdrawn from service and specialty air services) and subsidies and grants provided by a Party. Additionally, each Party maintains the right to take action necessary to enforce measures of general application that are consistent with the Agreement.

Chapter twelve does not require Parties to provide individuals from other NAFTA countries access to their labour market. The chapter affirms that each government may provide public services or perform public functions (e.g., law enforcement, correctional services and public education), in a manner that is not inconsistent with its obligations.

Articles 1202 and 1203 require that each government accord non-discriminatory treatment to cross-border service providers within NAFTA. Under Article 1202, Parties may not discriminate in favour of domestic service providers. Accordingly, Article 1202 commits each Party to treat service providers of the other Parties no less favourably than it treats its own service providers in like circumstances. With respect to measures of a state or provincial government, national treatment means treatment no less favourable than the most favourable treatment the state or province accords to the service providers of the country of which it forms a part.

Article 1203 requires that each Party accord to service providers of another Party treatment no less favourable than it accords service providers from other countries (including non-NAFTA countries) in like circumstances.

Each NAFTA country is committed under Article 1204 to providing the better of the treatment required by Articles 1202 and 1203. The no-less-favourable standard applied in Articles 1202 and 1203 requires that service providers from other Parties be accorded treatment no less favourable than that accorded, in like circumstances, to domestic and non party service providers. Further, while a Party may impose different legal requirements on other NAFTA service providers to ensure that domestic consumers are protected to the same degree as they are in respect of domestic firms.

Article 1205 prohibits a Party from imposing a territorial (e.g., local, state, federal) residency requirement for cross border NAFTA service providers. Specifically, under Article 1205, a Party may not require a service provider of another NAFTA country to establish or maintain a residence, representative office, branch, or any other form of enterprise in its territory as a condition for the cross-border provision of a service.

Under Article 1206, each Party can lodge reservations aimed at maintaining existing non-conforming measures or preserving the ability to enact new non-conforming measures in specific sectors, sub-sectors, or activities. Existing non-conforming federal, provincial and state measures will be listed in Annex I to the NAFTA. Each Party will have up to two years after the entry into force of NAFTA (i.e., until January 1, 1996) to complete its list of existing non-conforming provincial and state measures. All non-conforming measures currently in force at the municipal and other local government level may be retained and need not be listed.

While Articles 1202, 1203 and 1205 do not apply to amendments to existing non-conforming measures set out in Annex I, and existing local government measures, this is so only to the extent that such amendments do not decrease the conformity of a measure, as it existed immediately before the amendment, with Articles 1202, 1203 and 1205 of the NAFTA. Funher, each Party has retained the right to enact new non-conforming measures in respect of those sectors, sub-sectors or activities set out in Annex II (including aboriginal affairs and social affairs such as income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care).

Under Article 1207, the Parties may maintain existing quantitative restrictions and adopt new ones in the future respecting the number of service providers in a particular sector. However, to increase transparency, Article 1207 does require the Parties to list any quantitative restriction at the federal, provincial or state level in Annex V. While quantitative restrictions maintained at the federal level are set out in Annex V, the Parties have one year in which to list existing provincial or state quantitative restrictions. The Parties are also required to notify other Parties when adopting a quantitative restriction at the federal, provincial or state level and to periodically endeavour to negotiate the liberalization or removal of the restrictions set out in Annex V. Parties are not required to list existing local measures or notify other Parties of new measures adopted at the local level.

Under Article 1208, each Party is to set out in its schedule to Annex VI its commitments to liberalize quantitative restrictions, licensing requirements, performance requirements or other non-discriminatory measures.

To ensure that the existing or future measures of a Party relating to the licensing or certification of nationals of another Party do not constitute an unnecessary barrier to trade, each Party shall endeavour to ensure under Article 1210 that its licensing and cenification requirements and procedures are based on objective and transparent criteria such as competence; are no more burdensome than necessary to ensure the quality of the service; and are not in themselves a restriction on the provision of a service. However, paragraph three of Article 1210 makes clear that the MFN treatment provisions of Article 1203 do not require a Party, which recognizes the education, experience, licenses or certifications of professional service providers obtained in the territory of a Party or non-Party, to recognize the credentials of the professional service providers of another NAFTA country.

Within two years of entry into force, Parties are required to remove any citizenship or permanent residency requirements, set out in its schedule to annex I, that they maintain for the licensing and cenification of professional service providers of another Party. However, failure to do so does not give rise to recourse under the dispute settlement procedures of chapter twenty. Rather, governments may respond by maintaining or reinstating an equivalent requirement in the same sector. Governments will consult periodically to determine the feasibility of removing any citizenship or permanent residency requirements for each others' service providers not eliminated within two years.

Annex 1210.5 has three sections: general provisions for licensing and cenification, foreign legal consultants and the temporary licensing of engineers.

Section A - Licensing and Cenification:, the Parties will ensure that applications for licensing and cenification by nationals of another Party will be processed by its competent authorities within a reasonable time. Parties will encourage professional and licensing bodies to develop mutually acceptable standards and criteria for licensing and cenification of professional service providers. Paragraph three of Annex 1210.5 sets out the matters that may be developed with regard to these standards and criteria. Parties will

provide any recommendations on mutual recognition to the Commission. The Commission will review the recommendations within a reasonable time to determine whether the recommendations are consistent with the NAFTA. Based on the Commission's review, each Party will encourage the relevant bodies, where appropriate, to implement the recommendations within a mutually agreed time. Where the Parties agree, each Party will encourage the temporary licensing of professional service providers of another Party. The Commission will review implementation of section A to annex 1210.5 at least once every three years.

Section B - Foreign Legal Consultants: the Parties will establish a work program to develop common procedures to authorize foreign legal consultants. Progress will be reported to the Commission one year after entry into force of the Agreement and each year thereafter. In addition, governments will consult with the relevant professional bodies to obtain recommendations on matters relating to foreign legal consultancy.

Section C - Temporary Licensing of Engineers: the Parties will establish a work program, with the relevant professional bodies, to provide for temporary licensing of engineers. Progress will be reviewed by the Commission within two years of entry into force of the Agreement.

Under Article 1211, a Party may deny the benefits of chapter twelve to service providers of another NAFTA country where the Party establishes that the service is being provided by an enterprise owned or controlled by nationals of a non-Party with which it does not have diplomatic relations or to which it is applying economic sanctions. A Party may also deny benefits to cross-border providers of transportation services covered by this chapter if they provide such services with equipment not registered by any NAFTA country. Parties may also withhold the benefits of chapter twelve if the services involved are-provided through an enterprise that is owned or controlled by persons of a non-NAFTA country and the enterprise has no substantial business activity in the territory of any Party. In this case, the denying government is to first give prior notification and to consult in accordance with Articles 1803 and 2006.

Annex 1212 addresses matters related to cross-border land transportation services. Each Party is to establish contact points to provide information published by that Party pertaining to several areas including safety requirements and taxation. During the fifth year after the date of entry into force of the Agreement (i.e., 1998) and periodically thereafter, the Commission will consider reports from the Parties assessing their respective liberalization of bus and truck transportation services as set out in the Parties Schedules to annex 1. Within seven years after the NAFTA comes into effect (i.e., by 2000), the Parties will consult to consider further liberalization commitments.

1-2. Legal Text (Edited Version)

From the NAFTA Secretariat Website
http://www.nafta-sec-alena.org/english/index.htm?home.htm

PART FIVE: INVESTMENT, SERVICES AND RELATED MATTERS

Chapter Twelve: Cross-Border Trade in Services

Article 1201: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to cross-border trade in services by service providers of another Party, including measures respecting:

(a) the production, distribution, marketing, sale and delivery of a service;

(b) the purchase or use of, or payment for, a service;

(c) the access to and use of distribution and transportation systems in connection with the provision of a service;

(d) the presence in its territory of a service provider of another Party; and

(e) the provision of a bond or other form of financial security as a condition for the provision of a service.

2. This Chapter does not apply to:

(a) financial services, as defined in Chapter Fourteen (Financial Services);

(b) air services, including domestic and international air transportation services, whether scheduled or non-scheduled, and related services in support of air services, other than

(i) aircraft repair and maintenance services during which an aircraft is withdrawn from service, and

(ii) specialty air services;

(c) procurement by a Party or a state enterprise; or

(d) subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance.

3. Nothing in this Chapter shall be construed to:

(a) impose any obligation on a Party with respect to a national of another Party seeking access to its employment market, or employed on a permanent basis in its territory, or to confer any right on that national with respect to that access or employment; or

(b) prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter.

Article 1202: National Treatment

1. Each Party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to its own service providers.

2. The treatment accorded by a Party under paragraph 1 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to service providers of the Party of which it forms a part.

Article 1203: Most-Favored-Nation Treatment

Each Party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to service providers of any other Party or of a non-Party.

Article 1204: Standard of Treatment

Each Party shall accord to service providers of any other Party the better of the treatment required by Articles 1202 and 1203.

Article 1205: Local Presence

No Party may require a service provider of another Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border provision of a service.

Article 1206: Reservations

1. Articles 1202, 1203 and 1205 do not apply to:

(a) any existing non-conforming measure that is maintained by

(i) a Party at the federal level, as set out in its Schedule to Annex I,

(ii) a state or province, for two years after the date of entry into force of this Agreement, and thereafter as set out by a Party in its Schedule to Annex I in accordance with paragraph 2, or

(iii) a local government;

(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 1202, 1203 and 1205.

2. Each Party may set out in its Schedule to Annex I, within two years of the date of entry into force of this Agreement, any existing non-conforming measure maintained by a state or province, not including a local government.

3. Articles 1202, 1203 and 1205 do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its Schedule to Annex II.

Article 1207: Quantitative Restrictions

1. Each Party shall set out in its Schedule to Annex V any quantitative restriction that it maintains at the federal level.

2. Within one year of the date of entry into force of this Agreement, each Party shall set out in its Schedule to Annex V any quantitative restriction maintained by a state or province, not including a local government.

3. Each Party shall notify the other Parties of any quantitative restriction that it adopts, other than at the local government level, after the date of entry into force of this Agreement and shall set out the restriction in its Schedule to Annex V.

4. The Parties shall periodically, but in any event at least every two years, endeavor to negotiate the liberalization or removal of the quantitative restrictions set out in Annex V pursuant to paragraphs 1 through 3.

Article 1208: Liberalization of Non-Discriminatory Measures

Each Party shall set out in its Schedule to Annex VI its commitments to liberalize quantitative restrictions, licensing requirements, performance requirements or other non-discriminatory measures.

(…)

Article 1210: Licensing and Certification

1. With a view to ensuring that any measure adopted or maintained by a Party relating to the licensing or certification of nationals of another Party does not constitute an unnecessary barrier to trade, each Party shall endeavor to ensure that any such measure:

> (a) is based on objective and transparent criteria, such as competence and the ability to provide a service;
>
> (b) is not more burdensome than necessary to ensure the quality of a service; and
>
> (c) does not constitute a disguised restriction on the cross-border provision of a service.

(…)

Article 1213: Definitions

1. For purposes of this Chapter, a reference to a federal, state or provincial government includes any non-governmental body in the exercise of any regulatory, administrative or other governmental authority delegated to it by that government.

2. For purposes of this Chapter:

cross-border provision of a service or **cross-border trade in services** means the provision of a service:

(a) from the territory of a Party into the territory of another Party,

(b) in the territory of a Party by a person of that Party to a person of another Party, or

(c) by a national of a Party in the territory of another Party,

but does not include the provision of a service in the territory of a Party by an investment, as defined in Article 1139 (Investment Definitions), in that territory;

enterprise means an "enterprise" as defined in Article 201 (Definitions of General Application), and a branch of an enterprise;

enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there;

professional services means services, the provision of which requires specialized post-secondary education, or equivalent training or experience, and for which the right to practice is granted or restricted by a Party, but does not include services provided by tradespersons or vessel and aircraft crew members;

quantitative restriction means a non-discriminatory measure that imposes limitations on:

(a) the number of service providers, whether in the form of a quota, a monopoly or an economic needs test, or by any other quantitative means; or

(b) the operations of any service provider, whether in the form of a quota or an economic needs test, or by any other quantitative means;

service provider of a Party means a person of a Party that seeks to provide or provides a service; and

specialty air services means aerial mapping, aerial surveying, aerial photography, forest fire management, fire fighting, aerial advertising, glider towing, parachute jumping, aerial construction, helilogging, aerial sightseeing, flight training, aerial inspection and surveillance, and aerial spraying services.

Annex 1210.5

Professional Services

Section A General Provisions

Processing of Applications for Licenses and Certifications

1. Each Party shall ensure that its competent authorities, within a reasonable time after the submission by a national of another Party of an application for a license or certification:

> (a) where the application is complete, make a determination on the application and inform the applicant of that determination; or
>
> (b) where the application is not complete, inform the applicant without undue delay of the status of the application and the additional information that is required under the Party's law.

(…)

Development of Professional Standards

2. The Parties shall encourage the relevant bodies in their respective territories to develop mutually acceptable standards and criteria for licensing and certification of professional service providers and to provide recommendations on mutual recognition to the Commission. (…)

Temporary Licensing

5. Where the Parties agree, each Party shall encourage the relevant bodies in its territory to develop procedures for the temporary licensing of professional service providers of another Party.

Review

6. The Commission shall periodically, and at least once every three years, review the implementation of this Section.

Section B Foreign Legal Consultants

1. Each Party shall, in implementing its obligations and commitments regarding foreign legal consultants as set out in its relevant Schedules and subject to any reservations therein, ensure that a national of another Party is permitted to practice or advise on the law of any country in which that national is authorized to practice as a lawyer.

Consultations With Professional Bodies

2. Each Party shall consult with its relevant professional bodies to obtain their recommendations on:

(a) the form of association or partnership between lawyers authorized to practice in its territory and foreign legal consultants;

(b) the development of standards and criteria for the authorization of foreign legal consultants in conformity with Article 1210; and

(c) other matters relating to the provision of foreign legal consultancy services.
(…)

Future Liberalization

4. Each Party shall establish a work program to develop common procedures throughout its territory for the authorization of foreign legal consultants. (…)

II. NAFTA Trucking Case (2001)

2-1. NAFTA Panel Report

See Unit X, Ch 3

2-2. Recent Developments

NY Times, January 17, 2003

U.S. Court Bars Mexican Trucks Pending an Environmental Study

By STEVEN GREENHOUSE

"The court, the United States Court of Appeals for the Ninth Circuit, in San Francisco, concluded that the government had acted "arbitrarily and capriciously" by deciding to open the borders to tens of thousands of Mexican trucks without conducting an environmental review. The National Environmental Policy Act requires such reviews for all government actions that might significantly affect the environment."

(…)

International Trade Reporter, Vol. 20, No. 50 (Dec. 18, 2003)

Supreme Court Grants Review to Case On Mexican Trucks' Environmental Impact

By Rossella Brevetti

"The U.S. Supreme Court Dec. 15 granted the Bush administration's request to review a decision requiring the preparation of an environmental impact statement before Mexican trucks are allowed full access to U.S. highways under North American Free Trade Agreement provisions (Dept. of Transportation v. Public Citizen, USSupCt, No. 03-358, 12/15/03)."

(…)

III. Comparative Perspective (WTO GATS)

3-1. Overview

http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm5_e.htm

Services - rules for growth and investment

The General Agreement on Trade in Services (GATS) is the first ever set of multilateral, legally-enforceable rules covering international trade in services. It was negotiated in the Uruguay Round. Like the agreements on goods, GATS operates on three levels: the main text containing general principles and obligations; annexes dealing with rules for specific sectors; and individual countries' specific commitments to provide access to their markets. Unlike in goods, GATS has a fourth special element: lists showing where countries are temporarily not applying the "most-favoured-nation" principle of non-discrimination. These commitments - like tariff schedules under GATT - are an integral part of the agreement. So are the temporary withdrawals of most-favoured-nation treatment.

A WTO Council for Trade in Services oversees the operation of the agreement. Negotiations on commitments in four topics have taken place after the Uruguay Round. A full new services round will start no later than 2000.

The framework: the GATS articles

Basic principles

- All services are covered by GATS.

- Most-favored-nation treatment applies to all services, except the one-off temporary exemption.

- National treatment applies in the areas where commitments are made.

- Transparency in regulations, inquiry points

- Regulations have to be objective and reasonable

- International payments: normally unrestricted

- Individual countries' commitments: negotiated and bound

- Progressive liberalization: through further negotiations

Total coverage

The agreement covers all internationally-traded services. This includes all the different ways of providing an international service - GATS defines four:

- services supplied from one country to another (e.g. international - telephone calls), officially known as "cross-border supply"
- consumers or firms making use of a service in another country (e.g. tourism), officially known as "consumption abroad"
- a foreign company setting up subsidiaries or branches to provide services in another country (e.g. foreign banks setting up operations in a country), officially "commercial presence"
- individuals travelling from their own country to supply services in another (e.g. fashion models or consultants), officially "presence of natural persons"

Most-favoured-nation (MFN) treatment

Favour one, favour all. MFN means treating one's trading partners equally. Under GATS, if a country allows foreign competition in a sector, equal opportunities in that sector should be given to service providers from all other WTO members. (This applies even if the country has made no specific commitment to provide foreign companies access to its markets under the WTO.)

MFN applies to all services, but some special temporary exemptions have been allowed (see below).

What about national treatment?

National treatment - equal treatment for foreigners and one's own nationals - is treated differently for services. For goods (GATT) and intellectual property (TRIPS) it is a general principle. In GATS it only applies where a country has made a specific commitment, and exemptions are allowed. (See below.)

Transparency

GATS says governments must publish all relevant laws and regulations. Within two years (by the end of 1997) they have to set up inquiry points within their bureaucracies. Foreign companies and governments can then use these inquiry points to obtain information about regulations in any service sector. And they have to notify the

WTO of any changes in regulations that apply to the services that come under specific commitments.

Regulations: objective and reasonable

Since domestic regulations are the most significant means of exercising influence or control over services trade, the agreement says governments should regulate services reasonably, objectively and impartially. When a government makes an administrative decision that affect a service, it should also provide an impartial means for reviewing the decision (for example a tribunal).

Recognition

When two (or more) governments have agreements recognizing each other's qualifications (for example, the licensing or certification of service suppliers), GATS says other members must also be given a chance to negotiate comparable pacts. The recognition of other countries' qualifications must not be discriminatory, and it must not amount to protectionism in disguise. These recognition agreements have to be notified to the WTO.

International payments and transfers

Once a government has made a commitment to open a service sector to foreign competition, it must not normally restrict money being transferred out of the country as payment for services supplied ("current transactions") in that sector. The only exception is when there are balance-of-payments difficulties, and even then the restrictions must be temporary and subject to other limits and conditions.

Specific commitments

Individual countries' commitments to open markets in specific sectors - and how open those markets will be - are the outcome of negotiations. The commitments appear in "schedules" that list the sectors being opened, the extent of market access being given in those sectors (e.g. whether there are any restrictions on foreign ownership), and any limitations on national treatment (whether some rights granted to local companies will not be granted to foreign companies.)

These commitments are "bound": like bound tariffs, they can only be modified or withdrawn after negotiations with affected countries - which would probably lead to compensation. Because "unbinding" is difficult, the commitments are virtually guaranteed conditions for foreign exporters and importers of services and investors in the sector to do business.

Progressive liberalization

The Uruguay Round was only the beginning. GATS requires more negotiations, the first to begin within five years. The goal is to take the liberalization process further by increasing the level of commitments in schedules.

The annexes: services are not all the same

International trade in goods is a relatively simple idea to grasp: a product is transported from one country to another. Trade in services is much more diverse. Telephone companies, banks, airlines and accountancy firms provide their services in quite different ways. The GATS annexes reflect some of the diversity.

Movement of natural persons

This annex deals with negotiations on individuals' rights to stay temporarily in a country for the purpose of providing a service. It specifies that the agreement does not apply to people seeking permanent employment or to conditions for obtaining citizenship, permanent residence or permanent employment.

Financial services

Instability in the banking system affects the whole economy. The financial services annex says governments have the right to take prudential measures, such as those for the protection of investors, depositors and insurance policy holders, and to ensure the integrity and stability of the financial system. It also excludes from the agreement services provided when a government exercising its authority over the financial system, for example central banks' services. Negotiations on specific commitments in financial services continued after the end of the Uruguay Round and ended in late 1997.

Telecommunications

The telecommunications sector has a dual role: it is a distinct sector of economic activity; and it is an underlying means of supplying other economic activities (for example electronic money transfers). The annex says governments must ensure that foreign service suppliers are given access to the public telecommunications networks without discrimination. Negotiations on specific commitments in telecommunications resumed after the end of the Uruguay Round. This led to a new liberalization package agreed in February 1997.

Air transport services

Under this annex, traffic rights and directly related activities are excluded from GATS's coverage. They are handled by other bilateral agreements. However, the annex establishes that the GATS will apply to aircraft repair and maintenance services, marketing of air transport services and computer-reservation services.

Countries' commitments: on market-opening

Each country lists specific commitments on service sectors and on activities within those sectors. The commitments guarantee access to the country's market in the listed sectors, and they spell out any limitations on market access and national treatment.

As an example; if a government commits itself to allow foreign banks to operate in its domestic market, that is a market access commitment. And if the government limits the number of licences it will issue, then that is a market access limitation. If it also says foreign banks are only allowed one branch while domestic banks are allowed numerous branches, that is an exception to the national treatment principle.

Market access

The lists of market access commitments (along with any limitations and exemptions from national treatment) are negotiated as multilateral packages, although bilateral bargaining sessions are needed to develop the packages. The commitments therefore contain the negotiated and guaranteed conditions for conducting international trade in services. If a recorded condition is to be changed for the worse, then the government has to give at least three months' notice and it has to negotiate compensation with affected countries. But the commitments can be improved at any time. They will be subject to further liberalization through the future negotiations already committed under GATS. The first of these must start no later than 2000.

National treatment

National treatment means treating one's own nationals and foreigners equally. In services, it means that once a foreign company has been allowed to supply a service in one's country there should be no discrimination between the foreign and local companies.

Under GATS, a country only has to apply this principle when it has made a specific commitment to provide foreigners access to its services market. It does not have to apply national treatment in sectors where it has made no commitment. Even in the commitments, GATS does allow some limits on national treatment.

This contrasts with the way the national treatment principle is applied for goods -in that case, once a product has crossed a border and been cleared by customs it

has to be given national treatment even if the importing country has not made any commitment under the WTO to bind the tariff rate.

MFN exemptions: temporary and one-off

WTO members have also made separate lists of exceptions to the MFN principle of non-discrimination. When GATS came into force, a number of countries already had preferential agreements in services that they had signed with trading partners, either bilaterally or in small groups. WTO members felt it was necessary to maintain these preferences temporarily.

They gave themselves the right to continue giving more favorable treatment to particular countries in particular service activities by listing "MFN exemptions" alongside their first sets of commitments. In order to protect the general MFN principle, the exemptions could only be made once; nothing can be added to the lists. They will be reviewed after five years (in 2000), and will normally last no more than 10 years. The exemption lists are also part of the GATS agreement.

On-going work: even before the next round

At the end of the Uruguay Round governments agreed to continue negotiations in four areas: basic telecommunications, maritime transport, movement of natural persons, and financial services. Some commitments in some of these sectors had been made in the Uruguay Round agreements. The objective of continuing with the negotiations was to improve the package.

Basic telecommunications

This was an area where governments did not offer commitments during the Uruguay Round _ essentially because the privatization of government monopolies was a complex issues in many countries. Sophisticated value-added telecommunications services, which are more commonly provided on a private basis, were, however, included in many of the original GATS schedules. The negotiations on basic telecommunications ended in February 1997 with new national commitments due to take effect from January 1998.

Maritime transport

Maritime transport negotiations were originally scheduled to end in June 1996, but participants failed to agree on a package of commitments. The talks will resume with the new services round due to start no later than 2000. Some commitments are already included in some countries' schedules covering the three main areas in this sector: access to and use of port facilities; auxiliary services; and ocean transport.

Movement of natural persons

"Movement of natural persons" refers to the entry and temporary stay of persons for the purpose of providing a service. It does not relate to persons seeking permanent employment or permanent residence in a country. Some commitments are already included in the schedules but it was agreed that negotiations to improve commitments would take place in the six months after the WTO came into force. These only achieved modest results.

Financial services

Financial services is another area where further negotiations were scheduled to improve on the commitments included in the initial Uruguay Round schedules. Officially the first set of talks ended in July 1995, but the governments decided that more could be achieved if further talks could be held. These latest negotiations ended in December 1997.

Other issues

GATS identifies several more issues for future negotiation. One set of negotiations would create rules that are not yet included in GATS: rules dealing with subsidies, government procurement and safeguard measures.

Another set of negotiations would seek rules on the requirements foreign service providers have to meet in order to operate in a market. The objective is to prevent these requirements being used as unnecessary barriers to trade. The focus is on: qualification requirements and procedures, technical standards and licensing requirements.

As part of this task, a working party on professional services has been set up. It is tackling the accountancy sector first, a priority set by ministers, but eventually all professional services should be covered. The first result of these discussions emerged in May 1997 when the Services Council adopted new guidelines for countries to use when negotiating agreements to recognize each others' professional qualifications in accountancy. The guidelines are not binding.

3-2. Case Law

3-2-1. Canada Periodicals

The Canadian Periodicals dispute dealt with a tax scheme, which intended to preserve Canadian periodicals as distinct publications. Those magazines came under increasing pressure from United States magazines with special editions for the Canadian market. The method of protection was to reserve the advertisement revenue from the Canadian market to Canadian publications. If an United States publication sold a Canadian edition ("split-run edition") on the Canadian market (with advertisements targeting Canadian consumers) the tax took away most of that advertisement revenue. Rather implicitly than explicitly, the case raised the issue of the extent to which a WTO Member is entitled to protect its cultural diversity. The following excerpts deal with another issue, the applicability of the GATT to the tax which is collected due to the provision of a service (advertisement).

Summary of Facts

from Case Note by Chinedu R. Ezetah, (http://www.ejil.org/journal/Vol9/No1/sr1d.html)

(…)

I. Facts

In 1965 Canada enacted *Tariff Code 9958* banning the importation of "split-run" periodicals i.e. special issues containing advertisements primarily directed at the Canadian Market but replicating the editorial content of a foreign issue. However this ban was not applicable to split-run editions printed locally in Canada, and in 1995 this fact became apparent when the United States based Sports Illustrated magazine announced its plan to begin the local publication of *Sports Illustrated Canada* as a split-run issue of the US edition. Based on the recommendations of a Task Force set up by the Canadian Government to study ways of dealing with the possible evasion of the ban of split-runs, Canada in 1995 enacted *Part V.I of the Excise Act*[4] imposing a tax on all split-runs distributed in Canada. The tax, stated to be 80% of the value all the advertisements inserted in the split-run, was levied on each issue. In addition, the State Department of Canadian Heritage commenced an assistance program whereof it paid Canada Post Corporation to provide Canadian Publishers with reduced postal rates. Canada Post Corporation on its own part instituted "Canadian commercial" postal rates for Canadian Publishers that were lower than the "commercial international" rates applied to imported magazines.

Field Code Changed

(…)

Appellate Body Report

Division: Matsushita, Ehlermann and Lacarte-Muró

http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm

Field Code Changed

WORLD TRADE ORGANIZATION

WT/DS31/AB/R
30 June 1997

(97-2653)

CANADA - CERTAIN MEASURES CONCERNING PERIODICALS

AB-1997-2

Report of the Appellate Body

I. Introduction

Canada and the United States appeal from certain issues of law and legal interpretations in the Panel Report, *Canada - Certain Measures Concerning Periodicals*[1] (the "Panel Report"). The Panel was established to consider a complaint by the United States against Canada concerning three measures: Tariff Code 9958[2], which prohibits the importation into Canada of certain periodicals, including split-run editions; Part V.1 of the Excise Tax Act[3], which imposes an excise tax on split-run editions of periodicals; and the application by Canada Post Corporation ("Canada Post") of commercial "Canadian", commercial "international" and "funded" publications mail postal rates, the latter through the Publications Assistance Program (the "PAP") maintained by the Department of Canadian Heritage ("Canadian Heritage") and Canada Post.[4]

The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 14 March 1997. It contains the following conclusions:

> *(a)* Tariff Code 9958 is inconsistent with Article XI:1 of GATT 1994 and cannot be justified under Article XX(d) of GATT 1994; *(b)* Part V.1 of the Excise Tax Act is inconsistent with Article III:2, first sentence, of GATT 1994; *(c)* the application by Canada Post of lower "commercial Canadian" postal rates to domestically-produced periodicals than to imported periodicals, including additional discount options available only to domestic periodicals, is inconsistent with Article III:4 of GATT 1994; but *(d)* the maintenance of the "funded" rate scheme is justified under Article III:8(b) of GATT 1994.[5]

(…)

II. Arguments of the Participants

A. *Canada*

(…)

1. Applicability of the GATT 1994 to Part V.1 of the Excise Tax Act

Canada submits that the Panel erred in law when it applied Article III:2, first sentence, of the GATT 1994 to a measure affecting advertising services. Canada asserts

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[1]WT/DS31/R, 14 March 1997.

[2]Customs Tariff, R.S.C. 1985, c. 41 (3rd Supp.), s. 114, Schedule VII, Item 9958.

[3]An Act to Amend the Excise Tax Act and the Income Tax Act, S.C. 1995, c. 46.

[4]Canada Post Corporation Act, R.S.C. 1985, c. C-10; Publications Mail Postal Rates, Canada Post Corporation, effective 4 March 1996; Canadian Publication Mail Products Sales Agreement, 1 March 1995; International Publications Mail Product (Canadian Distribution) Sales Agreement, 1 March 1994; Memorandum of Agreement concerning the Publications Assistance Program between the Department of Communications and Canada Post Corporation (the "MOA").

[5]Panel Report, para. 6.1.

that the GATT 1994 applies, as the GATT 1947 had always applied previously, to measures affecting trade in goods, but it has never been a regime for dealing with services in their own right. In Canada's view, if the GATT 1994 applied to all aspects of services measures on the basis of incidental, secondary or indirect effects on goods, the GATT 1994 would effectively be converted into a services agreement. More precisely, the GATT 1994 should not apply merely on the ground that a service makes use of a good as a tangible medium of communication. Assuming that the measure at issue is designed essentially to restrict access to the services market, the mere fact that a service makes use of a good as a vehicle or a medium is an insufficient ground on which to base a challenge under the GATT 1994.

Canada asserts that the Panel's decision to consider Part V.1 of the Excise Tax Act as a measure subject to Article III of the GATT 1994 was based largely upon an unwarranted generalization of the terms of Article III:4, as well as a misconstruction of the word "indirectly" in Article III:2, first sentence. Canada argues that it is evident from its text that Article III:4 of the GATT 1994 governs only services measures that affect the ability of foreign goods to compete on an equal footing with domestic goods. Canada submits that advertising services are only subject to Article III:4 to the extent that they affect the "internal sale or offering for sale, purchase, transportation, distribution or use" of a product that is entitled to national treatment under Article III of the GATT 1994. The inference that advertising services in general are covered by Article III:2 of the GATT 1994 is without foundation.

Canada stresses that the concept of "indirectly" in Article III:2 of the GATT 1994 is intended to capture taxes which apply to "inputs" that contribute to the production or distribution of a good, such as raw materials, services inputs and intermediate inputs. It is important to distinguish services inputs that are directly involved in the production or marketing of a good from services that are "end-products" in their own right. In Canada's view, the advertising services of a publisher are not, like labour in the production of a car, an input into the production of a good. Canada asserts that services are often delivered by means of a good, and that the taxation of services that are associated with goods in this way does not "subject" those goods "indirectly" to the tax, because the tax does not affect the costs of the production, distribution and marketing of the goods. Canada argues that, although magazines serve as a tangible medium in which advertising is incorporated, this association, however close, does not meet the tests appropriate to the interpretation of Article III:2 of the GATT 1994. Canada maintains that advertising is not an input or a cost in the production, distribution or use of magazines as physical products. Therefore, the taxation of magazine advertising services is not indirect taxation of magazines as goods within the meaning of Article III:2.

Canada asserts that the Panel mischaracterized Part V.1 of the Excise Tax Act as a measure affecting trade in goods. It is a measure regulating access to the magazine advertising market. Most magazines represent two distinct economic outputs, that of a good and an advertising medium for providing a service, depending on the perspective of the purchaser. According to Canada, the tax is not applied to the consumer good because it is not based on, nor applied to, the price of a magazine. Instead, the tax is calculated

using the value of advertising carried in a split-run edition of a magazine and is assessed against the publisher of each split-run magazine as the seller of the advertising service.

In Canada's view, since the provision of magazine advertising services falls within the scope of the General Agreement on Trade in Services (the "GATS"), and Canada has not undertaken any commitments in respect of the provision of advertising services in its Schedule of Specific Commitments, Canada is not bound to provide national treatment to Members of the WTO with respect to the provision of advertising services in the Canadian market.
(…)

B. *United States*

(…)

1. Applicability of the GATT 1994 to Part V.1 of the Excise Tax Act

The United States submits that Canada's excise tax is not exempt from Article III of the GATT 1994 on the ground that it is a "services measure" subject only to the GATS. Canada has failed to demonstrate any significant conflict between the GATT 1994 and the GATS arising from this case or that, in any event, the GATS should be accorded priority over the GATT 1994. The United States argues that Canada is incorrect in suggesting that the GATT 1994 cannot apply to measures whose application affects both goods and services.

The United States asserts that the question of whether the GATT 1994 and the GATS may overlap to some extent is irrelevant. The fundamental legal question, which the panel addressed, is whether the two agreements impose conflicting obligations with respect to Canada's excise tax, and whether one agreement should be given priority over the other. The United States submits that the Panel was correct in pointing out that nothing in the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*")[6] suggests that a measure that comes within the scope of the GATS cannot be equally subject to the GATT 1994.

The United States maintains that because Canada's general argument forbidding any significant overlap between the two agreements is incorrect, so too is Canada's more specific argument that Part V.1 of the Excise Tax Act cannot be subject to the GATT 1994 because it applies to advertising services. Measures affecting imported products are not excluded from the purview of the GATT 1994 simply because they take the form of a tax or other measure applied to "services". According to the United States, Canada's view that measures affecting imported goods are exempt from scrutiny under Article III of the GATT 1994 whenever they take the form of taxation or regulation of services would give WTO Members licence to impose a wide range of discriminatory tax and regulatory measures on imported goods. Should Canada's view prevail, a Member could, consistently with the GATT 1994, impose an exclusive tax on the rental of foreign cars,

[6]Done at Marrakesh, Morocco, 15 April 1994.

place a prohibitive surcharge on telephone services carried out using imported telecommunications equipment or tax medical services using foreign diagnostic machinery.

The United States asserts that for the purposes of Article III of the GATT 1994, it is irrelevant whether Canada's excise tax could be characterized as a measure affecting trade in advertising services within the terms of the GATS. The tax measure alters the terms of competition for imported split-run periodicals *vis-à-vis* like domestic magazines for the placement of advertisements -- as indeed it is intended to do -- and thus falls squarely within the purview of Article III:2, first sentence, of the GATT 1994.

The United States also submits that Canada's excise tax applies "directly or indirectly" to split-run periodicals. The sweeping language of Article III:2, first sentence, ensures coverage of taxes (such as taxes imposed on goods or services) that have the potential to affect the competitive position of imported and domestic goods. Thus, the Panel was correct to find that the terms "directly or indirectly" specifically encompass Canada's excise tax on split-run periodicals. The United States points out that the tax is assessed on a "per issue" basis, which plainly links the tax to the physical good, a particular issue of a magazine. The United States also stresses that Part V.1 of the Excise Tax Act is entitled "Tax on Split-Run Periodicals", and the terms of the Excise Tax Act provide that the tax is imposed "in respect of" split-run editions of periodicals.

The United States submits that advertisements, together with editorial content, constitute fundamental, physical components of many, if not most, magazines. It is inconsistent to argue, as Canada does, that a tax concerning inputs is a tax directly or indirectly on a product, but a tax concerning a major component of that product is not. Furthermore, the United States asserts that advertisements affect a magazine's price, cost and competitive position as much as any input used in the production of a product.

The United States also maintains that, by its terms, the first sentence of Article III:2 applies only when imported products are "subject" to internal taxes. Since the language of that sentence includes both direct and indirect taxes on products, it is plain that the first sentence applies even when the immediate object of the taxation is not an imported product. Even if Canada's assertion that the tax applies to "advertising services" is correct, that would hardly be the end of the inquiry; the question would then be whether the tax nevertheless applies at least "indirectly" to split-run periodicals. The answer to that question is plainly "yes", as the language of the Excise Tax Act makes clear.. The notion that restricting a major use of a product -- in this case, the carrying of certain types of advertising -- cannot affect competitive conditions is untenable. By applying a confiscatory tax based on advertisements placed in split-run periodicals, Canada virtually ensures the elimination of such periodicals from the Canadian marketplace -- which indeed is the whole point of the tax.

(…)

IV. Applicability of the GATT 1994

Canada's primary argument with respect to Part V.1 of the Excise Tax Act is that it is a measure regulating trade in services "in their own right" and, therefore, is subject to the GATS. Canada argues that the Panel's conclusion that Part V.1 of the Excise Tax Act is a measure affecting trade in goods, and, therefore, is subject to Article III:2 of the GATT 1994, is an error of law.[7]

We are unable to agree with Canada's proposition that the GATT 1994 is not applicable to Part V.1 of the Excise Tax Act. First of all, the measure is an excise tax imposed on split-run editions of periodicals. We note that the title to Part V.1 of the Excise Tax Act reads, "TAX ON SPLIT-RUN PERIODICALS", not "tax on advertising". Furthermore, the "Summary" of An Act to Amend the Excise Tax Act and the Income Tax Act[8], reads: "The Excise Tax Act is amended to impose an excise tax in respect of split-run editions of periodicals". Secondly, a periodical is a good comprised of two components: editorial content and advertising content.[9] Both components can be viewed as having services attributes, but they combine to form a physical product -- the periodical itself.

The measure in this appeal, Part V.1 of the Excise Tax Act, is a companion to Tariff Code 9958, which is a prohibition on imports of special edition periodicals, including split-run or regional editions that contain advertisements primarily directed to a market in Canada and that do not appear in identical form in all editions of an issue distributed in that periodical's country of origin. Canada agrees that Tariff Code 9958 is a measure affecting trade in goods, even though it applies to split-run editions of periodicals as does Part V.1 of the Excise Tax Act. As Canada stated in the oral hearing during this appeal:

> Tariff Code 9958 is basically an import prohibition of a physical good, i.e., the magazine itself. In that sense the entire debate was as to whether or not there was a possible defence against the application of Article XI of the GATT. In that case, therefore, there were direct effects and Canada recognized that there were effects on the physical good -- the magazine as it crossed the border.[10]

The Panel found that Tariff Code 9958 is an import prohibition, although it applies to split-run editions of periodicals which are distinguished by their advertising content directed at the Canadian market. Canada did not appeal this finding of the Panel. It is clear that Part V.1 of the Excise Tax Act is intended to complement and render effective the import ban of Tariff Code 9958.[11] As a companion to the import ban, Part V.1 of the Excise Tax Act has the same objective and purpose as Tariff Code 9958 and, therefore, should be analyzed in the same manner.

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[7]Canada's Appellant's Submission, 12 May 1997, pp. 2-3, paras. 6, 9, 13 and 15.
[8]S.C. 1995, c. 46.
[9]Panel Report, para. 3.33.
[10]Canada's Statement at the oral hearing, 2 June 1997.
[11]Panel Report, paras. 3.25 and 3.26.

An examination of Part V.1 of the Excise Tax Act demonstrates that it is an excise tax which is applied on a good, a split-run edition of a periodical, on a "per issue" basis. By its very structure and design, it is a tax on a periodical. It is the publisher, or in the absence of a publisher resident in Canada, the distributor, the printer or the wholesaler, who is liable to pay the tax, not the advertiser.[12]

Based on the above analysis of the measure, which is essentially an excise tax imposed on split-run editions of periodicals, we cannot agree with Canada's argument that this internal tax does not "indirectly" affect imported products. It is a well-established principle that the trade effects of a difference in tax treatment between imported and domestic products do not have to be demonstrated for a measure to be found to be inconsistent with Article III.[13] The fundamental purpose of Article III of the GATT 1994 is to ensure equality of competitive conditions between imported and like domestic products.[14] We do not find it necessary to look to Article III:1 or Article III:4 of the GATT 1994 to give meaning to Article III:2, first sentence, in this respect. In *Japan - Alcoholic Beverages*, the Appellate Body stated that "Article III:1 articulates a general principle" which "informs the rest of Article III".[15] However, we also said that it informs the different sentences in Article III:2 in different ways. With respect to Article III:2, second sentence, we held that "Article III:1 informs Article III:2, second sentence, through specific reference".[16]

Article III:2, first sentence, uses the words "directly or indirectly" in two different contexts: one in relation to the application of a tax to imported products and the other in relation to the application of a tax to like domestic products. Any measure that indirectly affects the conditions of competition between imported and like domestic products would come within the provisions of Article III:2, first sentence, or by implication, second sentence, given the broader application of the latter.

The entry into force of the GATS, as Annex 1B of the *WTO Agreement*, does not diminish the scope of application of the GATT 1994. Indeed, Canada concedes that its

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[12]An Act to Amend the Excise Tax Act and the Income Tax Act, S.C. 1995, c. 46, s. 35(1).

[13]Appellate Body Report, *Japan - Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 16.

[14]Panel Report, *United States - Tobacco*, DS44/R, adopted 4 October 1994, para. 99; Panel Report, *United States - Malt Beverages*, adopted 19 June 1992, BISD 39S/206, para. 5.6; Panel Report, *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, adopted 18 February 1992, BISD 39S/27, para. 5.6; Panel Report, *United States - Section 337 of the Tariff Act of 1930*, ("*United States - Section 337*"), adopted 7 November 1989, BISD 36S/345, para. 5.13; Panel Report, *United States - Taxes on Petroleum and Certain Imported Substances*, adopted 17 June 1987, BISD 34S/136, para. 5.1.9; Panel Report, *Brazilian Internal Taxes*, adopted 30 June 1949, BISD IIS/181, para. 15.

[15]WT/DS8/AB/R, WT/DS10/AB/R,WT/DS11/AB/R, adopted 1 November 1996, p. 18.

[16]*Ibid.*, p. 23. In this respect, we draw attention to paragraphs 4.8, 5.37 and 5.38 of the Panel Report, and we note that a Panel finding that has not been specifically appealed in a particular case should not be considered to have been endorsed by the Appellate Body. Such a finding may be examined by the Appellate Body when the issue is raised properly in a subsequent appeal.

position "with respect to the inapplicability of the GATT would have been exactly the same under the GATT 1947, before the GATS had ever been conceived".[17]

We agree with the Panel's statement:

> The ordinary meaning of the texts of GATT 1994 and GATS as well as Article II:2 of the WTO Agreement, taken together, indicates that obligations under GATT 1994 and GATS can co-exist and that one does not override the other.[18]

We do not find it necessary to pronounce on the issue of whether there can be potential overlaps between the GATT 1994 and the GATS, as both participants agreed that it is not relevant in this appeal.[19] Canada stated that its

> ... principal argument is not based ... on the need to avoid overlaps and potential conflicts. On the contrary it is based on a textual interpretation of the provision, on the plain meaning of the words in Article III:2 -- more precisely the word 'indirectly' interpreted in its legal context and in light of the object and purpose of the provision.[20]

We conclude, therefore, that it is not necessary and, indeed, would not be appropriate, in this appeal to consider Canada's rights and obligations under the GATS. The measure at issue in this appeal, Part V.1 of the Excise Tax Act, is a measure which clearly applies to goods -- it is an excise tax on split-run editions of periodicals. We will now proceed to analyze this measure in light of Canada's points of appeal under Article III:2 of the GATT 1994.

(…)

VIII. Findings and Conclusions

For the reasons set out in this Report, the Appellate Body:

(a) upholds the Panel's findings and conclusions on the applicability of the GATT 1994 to Part V.1 of the Excise Tax Act; (…)

The Appellate Body *recommends* that the Dispute Settlement Body request Canada to bring the measures found in this Report and in the Panel Report, as modified

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[17]Canada's Appellant's Submission, 12 May 1997, p. 3, para. 14.
[18]Panel Report, para. 5.17.
[19]Canada's Appellant's Submission, 12 May 1997, p. 3, para. 14; United States' Appellee's Submission, 26 May 1997, p. 13, para. 29.
[20]Canada's Statement at the oral hearing, 2 June 1997.

by this Report, to be inconsistent with the GATT 1994 into conformity with Canada's obligations thereunder.
(…)

3-2-2. Bananas III

"Bananas III" is the unofficial name of the first Banana dispute under the WTO Agreement which followed two disputes under the (old) GATT 1947. Unlike in the case of those previous disputes the European Communities were no longer able to block the adoption of the dispute settlement reports, but were confined to exercising their rights under the Dispute Settlement Understanding (see the previous unit) and to delaying the implementation of the violation findings. Substantively, the GATS was important because the United States, one of the complainants, does not produce bananas. Rather, U.S. multinationals are heavily involved in the distribution (transportation, wholesale, marketing) of bananas. The United States therefore could assert its standing more easily under the GATS than under the GATT (although the interest of the U.S.A. was ultimately deemed sufficient also for the complaint under the GATT 1994). In this relation the question arose whether the GATS applies to the distribution (a service in the economic sense) of goods. Like in the Periodicals case, this was mainly a question of cumulative versus alternative application. In addition, Bananas III gave a first opportunity to interpret and apply the substantive disciplines of the GATS, namely the most-favored-nation and the national treatment obligations.

Appellate Body Report

http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm Field Code Changed

Division: Bacchus, Beeby and El-Naggar

WORLD TRADE ORGANIZATION

WT/DS27/AB/R
9 September 1997

(97-0000)

EUROPEAN COMMUNITIES - REGIME FOR THE IMPORTATION, SALE AND DISTRIBUTION OF BANANAS

AB-1997-3

Report of the Appellate Body

(…)

IV. Issues Raised in this Appeal

(…)

C. *General Agreement on Trade in Services*

1. Application of the GATS

217. There are two issues to consider in this context. The first is whether the GATS applies to the EC import licensing procedures. The second is whether the GATS overlaps with the GATT 1994, or whether the two agreements are mutually exclusive. With respect to the first issue, the Panel found that:

> ... no measures are excluded *a priori* from the scope of the GATS as defined by its provisions. The scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services.[21]

For these reasons, the Panel concluded:

> We therefore find that there is no legal basis for an *a priori* exclusion of measures within the EC banana import licensing regime from the scope of the GATS.[22]

218. The European Communities argues that the GATS does not apply to the EC import licensing procedures because they are not measures "affecting trade in services" within the meaning of Article I:1 of the GATS. In the view of the European Communities, Regulation 404/93 and the other related regulations deal with the importation, sale and distribution of bananas. As such, the European Communities asserts, these measures are subject to the GATT 1994, and not to the GATS.

219. In contrast, the Complaining Parties argue that the scope of the GATS, by its terms, is sufficiently broad to encompass Regulation 404/93 and the other related regulations as measures affecting the competitive relations between domestic and foreign services and service suppliers. This conclusion, they argue, is not affected by the fact that the same measures are also subject to scrutiny under the GATT 1994, as the two agreements are not mutually exclusive.

220. In addressing this issue, we note that Article I:1 of the GATS provides that "[t]his Agreement applies to measures by Members affecting trade in services". In our view, the

[21]Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX and WT/DS27/R/USA, para. 7.285.
[22]*Ibid.*, para. 7.286.

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".[23] We also note that Article I:3(b) of the GATS provides that "'services' includes *any service* in *any sector* except services supplied in the exercise of governmental authority" (emphasis added), and that Article XXVIII(b) of the GATS provides that the "'supply of a service' includes the production, distribution, marketing, sale and delivery of a service". There is nothing at all in these provisions to suggest a limited scope of application for the GATS. (…) For these reasons, we uphold the Panel's finding that there is no legal basis for an *a priori* exclusion of measures within the EC banana import licensing regime from the scope of the GATS.

221. The second issue is whether the GATS and the GATT 1994 are mutually exclusive agreements. 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. 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 service 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. This was also our conclusion in the Appellate Body Report in *Canada - Periodicals.*[24]

222. For these reasons, we agree with the Panel that the EC banana import licensing procedures are subject to both the GATT 1994 and the GATS, and that the GATT 1994 and the GATS may overlap in application to a particular measure.

2. Whether Operators are Service Suppliers Engaged in Wholesale Trade Services

[23] Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX and WT/DS27/R/USA, para. 7.281. See, for example, the panel report in *Italian Agricultural Machinery*, adopted 23 October 1958, BISD 7S/60, para. 12.

[24] Appellate Body Report, WT/DS31/AB/R, adopted 30 July 1997, p. 19.

223. The European Communities raises two issues concerning the definition of wholesale trade services and the application of that definition. Both these issues relate to the Panel's finding that:

> ... operators in the meaning of Article 19 of Regulation 404/93 and operators performing the activities defined in Article 5 of Regulation 1442/93 are service suppliers in the meaning of Article I:2(c) of GATS provided that they are owned or controlled by natural persons or juridical persons of other Members and supply wholesale services. When operators provide wholesale services with respect to bananas which they have imported or acquired for marketing, cleared in customs or ripened, they are actual wholesale service suppliers. Where operators form part of vertically integrated companies, they have the capability and opportunity to enter the wholesale service market. They could at any time decide to re-sell bananas which they have imported or acquired from EC producers, or cleared in customs, or ripened instead of further transferring or processing bananas within an integrated company. Since Article XVII of GATS is concerned with conditions of competition, it is appropriate for us to consider these vertically integrated companies as service suppliers for the purposes of analysing the claims made in this case.[25]

224. First, the European Communities questions whether the operators within the meaning of the relevant EC regulations are, in fact, service suppliers in the sense of the GATS, in that what they actually do is buy and import bananas. The European Communities argues that "when buying or importing, a wholesale trade services supplier is a buyer or importer and not covered by the GATS at all, because he is not providing any reselling services".[26] (…)

225. On the first of these two issues, we agree with the Panel that the operators as defined under the relevant regulations of the European Communities are, indeed, suppliers of "wholesale trade services" within the definition set out in the Headnote to Section 6 of the CPC.[27] We note further that the European Communities has made a full commitment for wholesale trade services (CPC 622), with no conditions or qualifications, in its Schedule of Specific Commitments under the GATS.[28] (…)

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[25] Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX and WT/DS27/R/USA, para. 7.320 (footnotes deleted).

[26] EC's appellant's submission, para. 293.

[27] Provisional Central Product Classification, United Nations Statistical Papers, Series M, No. 77, 1991, p. 189.

[28] European Communities and their Member States' Schedule of Specific Commitments, GATS/SC/31, 15 April 1994, p. 52.

226. The Headnote to Section 6 of the CPC defines "distributive trade services" in relevant part as follows:

> ... the *principal services* rendered by wholesalers and retailers may be characterized as *reselling merchandise, accompanied by a variety of related, subordinated services* ... (emphasis added)

We note that the CPC Headnote characterizes the "*principal* services" rendered by wholesalers as "reselling merchandise". This means that "reselling merchandise" is not necessarily the *only* service provided by wholesalers. The CPC Headnote also refers to "a variety of related, subordinated services" that may accompany the "principal service" of "reselling merchandise". (…)

227. The second issue relates to "integrated companies". In our view, even if a company is vertically-integrated, and even if it performs other functions related to the production, importation, distribution and processing of a product, to the extent that it is also engaged in providing "wholesale trade services" and is therefore affected in that capacity by a particular measure of a Member in its supply of those "wholesale trade services", that company is a service supplier within the scope of the GATS.

228. For these reasons, we uphold the Panel's findings on both these issues.[29]

3. Article II of the GATS

229. The European Communities appeals the Panel's finding:

> ... that the obligation contained in Article II:1 of GATS to extend "treatment no less favorable" should be interpreted *in casu* to require providing no less favorable conditions of competition.[30]

The critical issue here is whether Article II:1 of the GATS applies only to *de jure*, or formal, discrimination or whether it applies also to *de facto* discrimination.

230. The Panel's approach to this question was to interpret the words "treatment no less favorable" in Article II:1 of the GATS by reference to paragraphs 2 and 3 of Article XVII of the GATS. The Panel said:

> ... we note that the standard of "no less favorable treatment" in paragraph 1 of Article XVII is meant to provide for no

[29]Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX and WT/DS27/R/USA, para. 7.320.
[30]*Ibid.*, para. 7.304.

> less favorable conditions of competition regardless of whether that is achieved through the application of formally identical or formally different measures. Paragraphs 2 and 3 of Article XVII serve the purpose of codifying this interpretation, and in our view, do not impose new obligations on Members additional to those contained in paragraph 1. In essence, the "treatment no less favorable" standard of Article XVII:1 is clarified and reinforced in the language of paragraphs 2 and 3. The absence of similar language in Article II is not, in our view, a justification for giving a different ordinary meaning in terms of Article 31(1) of the Vienna Convention to the words "treatment no less favorable", which are identical in both Articles II:1 and XVII:1.[31]

231. We find the Panel's reasoning on this issue to be less than fully satisfactory. The Panel interpreted Article II of the GATS in the light of panel reports interpreting the national treatment obligation of Article III of the GATT. The Panel also referred to Article XVII of the GATS, which is also a national treatment obligation. But Article II of the GATS relates to MFN treatment, not to national treatment. Therefore, provisions elsewhere in the GATS relating to national treatment obligations, and previous GATT practice relating to the interpretation of the national treatment obligation of Article III of the GATT 1994 are not necessarily relevant to the interpretation of Article II of the GATS. The Panel would have been on safer ground had it compared the MFN obligation in Article II of the GATS with the MFN and MFN-type obligations in the GATT 1994.[32]

232. Articles I and II of the GATT 1994 have been applied, in past practice, to measures involving *de facto* discrimination.[33] We refer, in particular, to the panel report in *European Economic Community - Imports of Beef from Canada*[34], which examined the consistency of EEC regulations implementing a levy-free tariff quota for high quality grain-fed beef with Article I of the GATT 1947. Those regulations made suspension of the import levy for such beef conditional on production of a certificate of authenticity. The only certifying agency authorized to produce a certificate of authenticity was a United States agency. The panel, therefore, found that the EEC regulations were inconsistent with the MFN principle in Article I of the GATT 1947 as they had the effect of denying access to the EEC market to exports of products of any origin other than that of the United States..

233. 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 favorable".

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[31] *Ibid*., para. 7.301.

[32] In addition to Article I (the fundamental MFN provision of the GATT), Articles III:7, IV(b), V:2 and V:5, IX:1 and XIII:1 are also MFN-type obligations in the GATT 1994.

[33] See *European Economic Community - Imports of Beef from Canada*, adopted 10 March 1981, BISD 28S/92; *Spain - Tariff Treatment of Unroasted Coffee*, adopted 11 June 1981, BISD 28S/102; and *Japan - Tariff on Imports of Spruce-Pine-Fir (SPF) Dimension Lumber*, adopted 19 July 1989, BISD 36S/167.

[34] Adopted 10 March 1981, BISD 28S/92, paras. 4.2-4.3.

The question naturally arises: if the GATS negotiators intended that "treatment no less favorable" 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? But that is not the question here. The question here is the meaning of "treatment no less favorable" 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 favorable". The possibility that the two Articles may not have exactly the same meaning does *not* imply that the intention of the drafters of the GATS was that a *de jure*, or formal, standard should apply in Article II of the GATS. If that were the intention, why does Article II not say as much? The obligation imposed by Article II is unqualified. The ordinary meaning of this provision does not exclude *de facto* discrimination. Moreover, if Article II was not applicable to *de facto* discrimination, it would not be difficult -- and, indeed, it would be a good deal easier in the case of trade in services, than in the case of trade in goods -- to devise discriminatory measures aimed at circumventing the basic purpose of that Article.

234. For these reasons, we conclude that "treatment no less favorable" in Article II:1 of the GATS should be interpreted to include *de facto*, as well as *de jure*, discrimination. We should make it clear that we do not limit our conclusion to this case. We have some difficulty in understanding why the Panel stated that its interpretation of Article II of the GATS applied "*in casu*".[35]

(…)

6. Whether the EC Licensing Procedures are Discriminatory Under Articles II and XVII of the GATS

240. The European Communities argues that the EC licensing system for bananas is not discriminatory under Articles II and XVII of the GATS, because the various aspects of the system, including the operator category rules, the activity function rules and the special hurricane licence rules, "pursue entirely legitimate policies" and "are not inherently discriminatory in design or effect".[36]

[35]Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX and WT/DS27/R/USA, para. 7.304.
[36]EC's appellant's submission, para. 301.

241. We see no specific authority either in Article II or in Article XVII of the GATS for the proposition that the "aims and effects" of a measure are in any way relevant in determining whether that measure is inconsistent with those provisions. In the GATT context, the "aims and effects" theory had its origins in the principle of Article III:1 that internal taxes or charges or other regulations "should not be applied to imported or domestic products so as to afford protection to domestic production". There is no comparable provision in the GATS. Furthermore, in our Report in *Japan - Alcoholic Beverages*[37], the Appellate Body rejected the "aims and effects" theory with respect to Article III:2 of the GATT 1994. The European Communities cites an unadopted panel report dealing with Article III of the GATT 1947, *United States - Taxes on Automobiles*[38], as authority for its proposition, despite our recent ruling.

(a) Operator Category Rules

242. The European Communities argues that the aim of the operator category system, in view of the objective of integrating the various national markets, and of the differing situations of banana traders in the various Member States, was not discriminatory but rather was to establish machinery for dividing the tariff quota among the different categories of traders concerned. (…) The effect of the operator category rules, the European Communities argues, is to leave a commercial choice in the hands of the operators.

243. We do not agree with the European Communities that the aims and effects of the operator category system are relevant in determining whether or not that system modifies the conditions of competition between service suppliers of EC origin and service suppliers of third-country origin. Based on the evidence before it[39], the Panel concluded "that most of the suppliers of Complainants' origin are classified in Category A for the vast majority of their past marketing of bananas, and that most of the suppliers of EC (or ACP) origin are classified in Category B for the vast majority of their past marketing of bananas".[40] We see no reason to go behind these factual conclusions of the Panel.

244. We concur, therefore, with the Panel's conclusion that "the allocation to Category B operators of 30 per cent of the licences allowing for the importation of third-country and non-traditional ACP bananas at in-quota tariff rates creates less favorable conditions of competition for like service suppliers of Complainants' origin and is therefore inconsistent with the requirement of Article XVII of GATS".[41] We also concur with the Panel's conclusion that the allocation to Category B operators of 30 per cent of the licences for

[37]Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996.
[38]DS31/R, 11 October 1994, unadopted.
[39]We note that the European Communities contests the Panel's findings in paras. 7.331, 7.333 and 7.334 of the Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, concerning the relative market shares of suppliers of EC (or ACP) origin as compared with suppliers of Complaining Parties' origin. We also note that the Panel indicated that it relied on evidence supplied by the Complaining Parties, and that the European Communities failed to present information that would cast doubt on the evidence presented by the Complaining Parties (see Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, paras. 7.331 and 7.333).
[40]Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, para. 7.334 (footnotes deleted).
[41]Panel Reports, WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, para. 7.341.

importing third-country and non-traditional ACP bananas at in-quota tariff rates is inconsistent with the requirements of Article II of the GATS.[42]

(b) Activity Function Rules

245. The European Communities maintains that the aim of the activity function rules is to protect the banana ripeners against the concentration of economic bargaining power in the hands of the primary importers as a result of the tariff quota. The European Communities contends that the policy objective is to correct the position of all ripeners *vis-à-vis* all suppliers of bananas, without distinction as to nationality. (…)

246. As indicated earlier, we do not accept the argument by the European Communities that the aims or effects of the activity function rules are relevant in determining whether they provide less favorable conditions of competition to services and service suppliers of foreign origin. In this respect, we note the Panel's factual conclusions that:

> ... even the EC statistics suggest that 74 to 80 per cent of ripeners are EC controlled. Thus, we conclude that the vast majority of the ripening capacity in the EC is owned or controlled by natural or juridical persons of the EC and that most of the bananas produced in or imported to the EC are ripened in EC owned or controlled ripening facilities.[43]

(…)
Given these factual findings, we see no reason to reverse the Panel's legal conclusion that the allocation to ripeners of a certain proportion of the Category A and B licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates creates less favorable conditions of competition for like service suppliers of Complainants' origin, and is therefore inconsistent with the requirements of Article XVII of GATS.[44]

(c) Hurricane Licences

247. The European Communities asserts that the purpose of the hurricane licences is to compensate those that suffer damage caused by tropical storms. With respect to Article XVII of the GATS, the European Communities maintains that the hurricane licence provisions do not modify competitive conditions between EC operators and operators of Complaining Parties' origin. With respect to Article II of the GATS, the European Communities argues that there is no *de facto* discrimination since there is no indication in the hurricane licence rules that operators that are not ACP-owned or -controlled cannot own or represent ACP producers on the same basis as ACP or EC-owned or -controlled operators.

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[42] *Ibid*., para. 7.353.
[43] Panel Reports, WT/DS27/R/ECU and WT/DS27/R/USA, para. 7.362 (footnotes deleted).
[44] *Ibid*., para. 7.368.

248. Once again, we do not accept the argument by the European Communities that the aims and effects of a measure are relevant in determining its consistency with Articles II or XVII of the GATS. We note that under the EC hurricane licence rules, only operators who include or directly represent EC or ACP producers or producer organizations affected by a tropical storm are eligible for allocation of hurricane licences.[45] The Panel made a conclusion of fact that "the vast majority of operators who 'include or directly represent' EC or ACP producers are service suppliers of EC (or ACP) origin".[46] Given this factual finding, we do not reverse the Panel's conclusions in paragraphs 7.393 and 7.397 of the Panel Reports.

(…)

[45] *Ibid*., para. 7.392.
[46] *Ibid*.

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