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Determining "likeness" under the GATS: Squaring the circle?

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ABSTRACT

The concept of "like services and service suppliers" used in the General Agreement on Trade in Services (GATS) is still very much uncharted territory. The few dispute cases involving national treatment and most-favoured-nation treatment claims under the GATS are vague concerning the criteria which should be used to establish "likeness". Discussions among WTO Members on this subject have remained limited and inconclusive. Perhaps the only point on which everybody agrees is that a determination of "likeness" under the GATS gives rise to a wider range of questions – and uncertainties – than under the GATT. The intangibility of services, the difficulty to draw a line between product and production, the existence of four modes of supply, the combined reference to like services and like service suppliers, and the lack of a detailed nomenclature are some of the factors which complicate the task of establishing "likeness" in services trade.

This contribution focuses on the concept of "likeness" in the context of the national treatment obligation (Article XVII of the GATS). It discusses the possible implications of the combined reference to "like services and service suppliers", as well as the relevance and role of the modes of supply in determining "likeness". It also examines whether the criteria developed by GATT case-law (physical properties, classification, end-use and consumer tastes) can be mechanically transposed to services trade and how far they may contribute to establishing "likeness" under the GATS. It then discusses whether other parameters, such as the regulatory context or an "aim and effect" type approach could be relevant

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Determining "likeness" under the GATS: Squaring the circle?

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A. INTRODUCTION

The concept of "like services and service suppliers" under the General Agreement on Trade in Services (GATS) is still very much uncharted territory. One explanation may be the limited jurisprudence – only five disputes – existing so far under the GATS. In two disputes, the panels and the Appellate Body made findings with respect to national treatment, but likeness was addressed in a very cursive manner. Moreover, in WTO services bodies, Members have shown limited interest for discussing such issues *in abstracto* and have expressed a preference to leave it to case-law to determine likeness on a case-by-case basis, as has been done under the GATT.

There is perhaps only one point on which everybody agrees: the application of the national treatment obligation and the determination of likeness gives rise to a wider range of questions – and uncertainties – under the GATS than under the GATT. The intangibility of services, the difficulty to draw a line between product and production, the existence of four modes of supply, the combined reference to services and service suppliers, but also the lack of a detailed nomenclature and the "customized" nature of many transactions are some of the factors which complicate the task of establishing likeness in services trade. In brief, "... the concept of likeness of products ... is more elusive in services than in goods."[1]

On the other hand, some basic parameters concerning the scope of the national treatment obligation, including the concept of likeness, would be useful, especially when, as under the GATS, national treatment is negotiable. Members should be able to assess more

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[1] *Subsidies and Trade in Services*, Note by the Secretariat, S/WPGR/9, 6 March 1996.

precisely the extent of the obligations they contract when they undertake a national treatment commitment, especially the potential for *de facto* discrimination. As under the GATT, the definition of the concept of likeness and the scope of the national treatment obligation will have a direct impact on regulatory sovereignty. This is even more so in services which are generally more regulated than goods.

This contribution will focus on the concept of likeness in the context of the national treatment obligation (GATS Article XVII), with some considerations to the most-favoured-nation treatment obligation (GATS Article II). It is concerned mainly with situations of *de facto* national treatment violations, or origin-neutral measures, since this type of scenario raises the thorniest questions. After a brief review of the relevant GATS provisions and existing jurisprudence, we shall discuss the possible implications of the combined reference to "like services and like service suppliers", as well as the relevance and role of the modes of supply in determining likeness. We shall also examine whether the criteria developed by GATT case-law (physical characteristics, classification, end use and consumer tastes) can be transposed to services trade and how far they may contribute to establishing likeness under the GATS. Looking at GATT/WTO and NAFTA case-law, and GATS negotiating history, we shall then discuss whether "something different" could be envisaged under the GATS.

B. LIKENESS IN THE GATS: WHERE DO WE START FROM?

GATS Article XVII reads as follows:

> 1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.[10]
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> 2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

> 3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.
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> [10] Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

There are several differences between the national treatment obligations in, respectively, GATT Article III and GATS Article XVII. First, while the GATT covers only products, the GATS' national treatment obligation, as the MFN obligation, extends to products (services), but also to producers, i.e. service suppliers. Second, GATS Article XVII does not distinguish between tax and other regulatory measures. Third, GATS Article XVII does not contain a reference to "directly competitive products", but only to "like" services and service suppliers.

GATS Article XVII aims at ensuring that foreign services and service suppliers benefit from conditions of competition no less favourable than those benefiting like national services and service suppliers. References, in paragraphs 2 and 3 of Article XVII, to formally identical or different treatment and to the modification of the conditions of competition are directly borrowed from GATT jurisprudence on Article III. The concept "modify the conditions of competition" was first established in the *Italian Agricultural Machinery* case. It was subsequently endorsed by the *US – Section 337* panel, which found that "[t]he words 'treatment no less favourable' in paragraph 4 [of GATT Article III] call for effective equality of opportunities for imported products..." an that the purpose of that provision was to protect "expectations on the competitive relationship between imported and domestic products".[2]

The text of the GATS does not provide guidance as to which criteria should be taken into account to determine likeness. Discussions in WTO services bodies, such as the Services Council and the Working Party on GATS Rules, showed that most Members had little

[2] Panel report in *US – Section 337*, paras. 5.11 and 5.13.

appetite for discussing these issues *in abstracto*, but believe it must be left to case-law to determine the concept on a case-by-case basis.[3]

The *Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services (GATS)*[4] do not provide useful guidance in this respect. They address the scope of national treatment in a way which might be only indirectly relevant for likeness. Paragraph 15 of the Guidelines stipulates that

> "[t]here is no obligation in the GATS which requires a Member to take measures outside its territorial jurisdiction. It therefore follows that the national treatment obligation in Article XVII does not require a Member to extend such treatment to a service supplier located in the territory of another Member."

The last sentence of paragraph 16 adds that "... a binding under Article XVII with respect to the granting of a subsidy does not require a Member to offer such subsidy to a services supplier located in the territory of another Member." These "clarifications" raise several questions which will be discussed below. Does this imply, for instance, that, as far as modes 1 and 2 are concerned, the national treatment obligation applies only to the service, and that likeness of the supplier becomes irrelevant?

The limited GATS case-law does not provide much clarification either on the interpretation of likeness. As under the GATT, the burden of proof remains on the party asserting that services are like. Beyond that, very little information can be gathered, either from panel or Appellate Body reports, as to which criteria should come into play. In *EC – Bananas III*, the panel accepted that foreign and domestic services and services suppliers were like without justifying its decision in great details. Reference was made to the "nature" and "characteristics" of the services at stake, without explaining what these were. The restraint exercised by the panel when looking at the likeness of service suppliers ("... to the

[3] See, for instance, reports of the Council for Trade in Services (S/C/M/56; -59; 60) and reports of the Working Party on GATS Rules (S/WPGR/M/26; -27).

[4] Adopted by the Council for Trade in Services on 23 March 2001, S/L/92 (hereinafter the "Scheduling Guidelines"). The 2001 Guidelines updated a 1993 version, circulated during the Uruguay Round. In the dispute on *US – Gambling*, the Appellate Body considered that the 1993 Guidelines constituted "supplementary means of interpretation", within the meaning of Article 32 of the Vienna Convention, for the interpretation of Uruguay Round schedules of specific commitments.

extent that entities provide these like services, they are like service suppliers") has become famous.[5]

The finding in the *EC – Bananas III* panel report was "recycled" in the *Canada – Autos* dispute, with the clarification that it was applied "for the purpose of the case", then leaving the door open for a different approach in future cases. Moreover, in this latter dispute, the panel introduced the concept of "likeness across modes".[6] In the latest services dispute, *US – Gambling*, the panel exercised judicial economy with respect to the complaint of national treatment violation made by Antigua & Barbuda (hereinafter "Antigua") under Article XVII.

Does the paucity of the discussion mean that, as argued by Antigua in the *US – Gambling*, dispute, "... the concept of likeness will often be less important in disputes concerning trade in services than in dispute on trade in goods"?[7] We would be tempted to argue that the difficulty of apprehending likeness in services trade may be a more convincing explanation of why panels have tried to avoid to engage in the exercise so far.

C. LIKENESS OF SERVICES AND SERVICE PROVIDERS

A significant difference between GATT and GATS is that the national treatment obligation under the latter explicitly applies to both products and producers. The inclusion of "service suppliers" may stem from the recognition that, in services as opposed to goods, it is often difficult to separate the service from the supplier and, hence, regulation is often directed at the latter. It is easier for regulators to ensure that suppliers meet some prerequisites (qualifications, for instance), rather than prescribing quality criteria for intangible activities. At an early stage in the Uruguay Round negotiations, negotiators acknowledged that "the national treatment concept should recognize the inseparability between the service provider and the service itself".[8]

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[5] Panel report in *EC – Bananas III*, para. 7.322. This finding was made in the context of a MFN claim and was not reviewed by the Appellate Body. To be fair, the issue of likeness of service suppliers was not really addressed by the parties. This finding was criticised by various commentators (see below).

[6] Panel report in *Canada –Autos*, para. 10.307.

[7] Panel report in *US – Gambling*, para. 3.149.

[8] Negotiating Group on Services, Note on the Meeting of 15-17 September 1987, MTN.GNS/10, 15 October 1987.

What consequence does the joint reference to both the product and the producer have on the scope of the national treatment obligation and on the determination of likeness? On one hand, it could be argued that the addition of suppliers expands the scope of the national treatment obligation and, hence, the liberalizing effect of specific commitments; it would also impinge more on Members' regulatory capacity. On the other hand, requiring a complaining party to demonstrate likeness (and less favourable treatment) for both the service and the supplier may make the burden of proof more difficult. Also, depending on how the requirement to examine the likeness of services and service suppliers is applied, it may provide ground for further differentiation, and, hence, scope for increased discrimination.[9] Thus, the correlation between likeness of services and service suppliers appears to be a threshold question in the application of GATS Article XVII. Is it necessary to establish likeness for both the service and the supplier, or for either one? Does one "prevail" over the other?

The jurisprudence does not provide much guidance on this issue. In *EC – Bananas III*, the panel circumvented the difficulty to determine likeness of service suppliers by finding that "to the extent that entities provide these like services, they are like service suppliers"[10]. This lapidary reasoning was criticized by various commentators[11] and raises several questions. For instance, is it always the case that suppliers are *ipso facto* "like" because they supply "like" services? Can *a priori* "unlike" suppliers provide "like" services?[12] Conversely, can it be assumed that like suppliers provide like services?

The panel in *Canada – Autos* applied the same reasoning as the *EC – Bananas III* panel for its findings under GATS Article II. With respect to national treatment, the panel focused on service suppliers, but did not address the likeness of services (although the title of the section is "[w]ether services are 'like'"). It found that, contrary to what was claimed by Japan, there were no "like" Japanese and Canadian wholesaler service suppliers; hence, "in

[9] In the same sense, see Krajewski, p. 97.

[10] Panel report in *EC – Bananas III*, para. 7.322. The Panel in *Canada – Autos* reaffirmed this finding, with the clarification, not found in *Bananas III*, that it was "for the purpose of this case" (para. 10.248).

[11] Zdouc (1999, p. 332; 2004, p. 399) notes that, although the panel may have adopted this approach in an attempt to narrow down the group of potential like suppliers, this finding may have the opposite effect because it "could also entail an exceedingly *broad* notion of which service suppliers could be considered 'like'". See also Verhoosel, p. 61, and Davey & Pauwelyn, p. 36. On the other hand, Mattoo (p. 133) is of the view that "the logic of the national treatment discipline would suggest beginning with the presumption that suppliers of like services are like suppliers".

the absence of "like" domestic service suppliers, a measure by a Member cannot be found to be inconsistent with the national treatment obligation in Article XVII of the GATS".[13] The panel seemed to assume that the absence of like suppliers implied the absence of like services.

To further blur the picture, one should also recall the discussion which took place on this issue in the dispute on *US – Gambling*, after the Panel asked the parties whether there was "always a need to assess likeness for both 'services' and 'service suppliers'".[14] Parties and third parties expressed very different views. Antigua argued, in essence, that a cumulative requirement would have the effect of limiting the scope of Article XVII since "less favourable treatment of like services would only be caught by Article XVII to the extent that the services are supplied by like service suppliers".[15] Invoking the *Canada – Autos* panel report, the United States argued that likeness had to be established for both services and service suppliers.[16] The EC considered that establishing a discrimination between services only would be sufficient and Mexico replied that the assessment would "depend on the specific claims of violation in any given dispute and the facts and circumstances of each case".[17]

Different views can also be found among commentators. Writing about the GATS MFN obligation, Abu-Akeel argues that the reference to services and service providers is of little practical significance because "any treatment of services is also, in effect, a treatment of the suppliers thereof and vice-versa". Hence, the reference to services and suppliers does not do any harm, "except for the confusion it may cause as it implies that the distinction has a practical significance".[18] On the other hand, Nicolaïdis & Trachtman attach importance to the fact that Article XVII refers to both services and suppliers. These authors argue in favour of a "disjunctive" test, whereby both services and service providers would have to be

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[12] An interesting example in this regard is that of postal offices supplying financial services.

[13] Panel report in *Canada – Autos*, paras. 10.283-10-289.

[14] Panel report in *US – Gambling*, page C-44.

[15] Panel report in *US - Gambling*, p. C-44.

[16] Panel report in *US – Gambling*, p. C-45. This interpretation seems to stretch the *Canada –Autos* panel report a bit far, since that panel did not really address the issue of whether likeness had to be proved for both services and service supplier.

[17] Panel report in *US – Gambling*, p. C-45.

[18] Abu-Akeel, pp. 109-110. According to this author, "... when seen from the standpoint of service regulators or the public at large, a particular measure or a piece of regulation would be considered as a part of the regulatory regime for the services themselves or for the service sector in which they are included."

evaluated, but separately.[19] This "disjunctive test" is supported by Krajewski who is concerned that a "cumulative" test would not allow Members to discriminate among like services because a measure "which treats service suppliers – for valid regulatory reasons – differently could be invalidated it if (also) affected the supply of like services".[20]

The distinction proposed by Nicolaïdis & Trachtman between "regulation of services and regulation of service providers" may not be easy to implement in practice, however. Drawing a line between the service and the supplier for the purpose of establishing likeness and less favourable treatment may prove artificial and is at odds with the idea of "inseparability" of the service and the supplier.[21] These commentators seem to build their interpretation with a specific objective in mind, i.e. that of allowing a focus on suppliers' characteristics, which should, in turn, allow to take into consideration the regulatory context of suppliers. However, whether the regulatory context should be one of the parameters to be taken into account under GATS Article XVII – and how it should be assessed – is a separate and still open question; it will be further discussed below.

The cacophony concerning the correlation between the likeness of services and service suppliers is not really surprising as the value which should be attributed to the conjunction "and" is unclear. The interpretation proposed by Nicolaïdis & Trachtman would imply an obligation to demonstrate likeness (and "less favourable treatment") for both services and suppliers in any one case. On the other hand, one might also argue that the

[19] "One would simply evaluate regulation of services, as services, by determining whether the regulation treats "like" services alike, full stop. If this were the case, regulation of service providers would be evaluated to determine only whether like service providers, as service providers, are treated alike. ... there would be no violation of national treatment if like services were treated differently where the reason for the difference in treatment is the regulation of the service provider, as service provider. ... *such an approach would replicate a kind of product/process distinction as a service/service provider distinction*." Nicolaïdis & Trachtman, p. 254 (emphasis in the original). The product/process distinction was discussed in the goods context, in particular in the so-called *Tuna/Dolphin* disputes. However, the difference is that under GATT, a product/process distinction would always end up with a finding of likeness – or unlikeness – of the product, because there is no specific reference to the producer.

[20] According to Krajewski (pp. 105-107), a "cumulative" test means "two tests which are applied cumulatively. Accordingly, a regulation would first be tested as to whether it discriminates between like services and then additionally whether it discriminates between like service suppliers. Consequently, a national regulatory measure could be regarded as a violation of national treatment if it treated two like services less favourably, even if the service providers would be unlike." Although Krajewski supports the disjunctive approach proposed by Nicholaïdis & Trachtman, his own disjunctive test seems to be different because he proposes that it should first be determined whether the measure at stake concerns the service or the supplier; based on this determination, the measure would "either be tested for less favourable treatment of like service *or* for less favourable treatment of like service suppliers".

[21] The same doubt seems to be shared by Verhoosel, p. 62.

inclusion of a reference to both the service and the supplier could be a recognition of the fact that a regulation can affect a service and/or a supplier of that service. Whether likeness should be examined for the service and/or for the supplier would then depend on whether the challenged measure affects the service, the supplier, or both.[22]

The context of Article XVII, in particular the definition of the modes of supply contained in Article I:2, could provide some guidance in this regard. It might serve as a basis for distinguishing cases where suppliers are present in the territory of the Member from cases where they are situated outside this territory. The relevant definitions for modes 1 and 2 refer only to the service. As to modes 3 and 4, the definition entails not only the service, but an explicit reference to the service supplier was added. This addition may be explained by the fact that the very presence of the supplier in the market can give raise to "risks" of discrimination based on the identity of the supplier, in addition to, or independently from, the service actually supplied. Based on the respective definitions of the modes, one could establish a distinction between, on the one hand, modes 3 and 4 where both the service and the supplier would be taken into consideration and, on the other hand, modes 1 and 2 where the focus would be on the service.

The *Scheduling Guidelines* could also be read to support a distinction based on the territorial presence of the supplier. Paragraph 15 stipulates, *inter alia*, that " ... the national treatment obligation in Article XVII does not require a Member to extend such treatment to a service supplier located in the territory of another Member." This paragraph could be read as mandating a national treatment obligation only for services, as far as modes 1 and 2 are concerned. Consequently, only the service should be considered in the context of modes 1 and 2, while the service and/or the supplier would relevant for modes 3 and 4.

Some commentators appear to share this view. Marconini indicates that the inclusion of service providers in the national treatment provision would "in effect creat[e] the possibility of treatment no less favourable being granted to foreign established companies as

[22] For instance, a tax is levied on foreign suppliers established under mode 3 and not on domestic suppliers, in spite of a full national treatment commitment. In this case, the examination of the panel would concentrate on the likeness of the supplier. On the other hand, one could argue that a measure whereby health treatment provided abroad is not reimbursed would call for a comparison of the service.

well as to foreign labor and professionals".[23] Weiss suggests that the comparison of suppliers is relevant only for modes 3 and 4: "[t]he primary objective of national treatment is to prevent discrimination against foreign service providers as compared with their domestic counterparts. National treatment, therefore, means treating all services providers – in a given sector and mode of supply – located within the territory of a Member in non-discriminatory manner, irrespective of nationality or ownership".[24]

This approach would obviate the difficulty of comparing two suppliers situated in two different jurisdictions. However, it could again be difficult to enforce as a strict rule in practice, as it may not always be feasible to draw a clear line between the service and the supplier. For instance, a measure applying to services provided cross-border may be drafted in such a way that it targets the supplier, rather than the service. A survey of GATS schedules shows that modes 1 and 2 are typically bound as "None" or "Unbound"; as compared to mode 3, limitations are uncommon and few types are used. Nevertheless, some of the national treatment limitations currently scheduled under modes 1 and 2 concern the supplier rather than the service (nationality, residency and commercial presence requirements).

It is interesting to note that the correlation between services and suppliers does not seem to be such an issue in other trade agreements, such as NAFTA. Chapter 12, dealing with cross-border trade in services, refers exclusively to "service providers" and not to services, which implies that the comparison is possible. On the other hand, the national treatment clause in NAFTA Chapter 11 addresses the "investors of another Party" and the "investments of investors of another Party" in two different paragraphs, which would indicate that a claim can be brought independently with respect to an investment or an investor. Also, the concept of "like circumstances" does not encourage a separate treatment of services and suppliers, but would tend on the contrary to invite a more comprehensive approach.

At the end of the day, the correlation between the service and the supplier will be determined by the test chosen to determine likeness. An interpretation is needed which does not encourage an artificial distinction between the service and the supplier (distinction which

[23] Marconini, p. 23 (emphasis added).
[24] Weiss, p. 1206 (emphasis added).

may not be possible to draw in practice, anyway). For instance, the traditional likeness test used under the GATT may favour a focus on the service as it is ill-suited to compare suppliers. A test allowing to take into account a broader regulatory context (see below) could allow to deal with the service and the service supplier as a global "entity", thus avoiding an artificial separation between the two. These issues will be further discussed below.

D. THE SO-CALLED "LIKENESS ACROSS MODES"

The question that is meant to be raised by the concept of "likeness across modes" is whether the modes of supply should play a role in the determination of likeness. Should services be presumed to be like irrespective of the mode of supply, or should different modes mean different services? The concept of "likeness across modes" appears in a Note dealing with service subsidies, where the Secretariat raised the question whether the national treatment obligation should extend "across modes of supply".[25] It then found its consecration in the *Canada – Autos* case, where the panel stated:

> "We note that the CVA requirements in the MVTO 1998 and SROs do not discriminate between domestic and foreign services and service suppliers operating in Canada under modes 3 and 4. This observation, however, does not suffice to conclude that the requirements of Article XVII are met. In our view, it is reasonable to consider for the purposes of this case that services supplied in Canada through modes 3 and 4 and those supplied from the territory of other Members through modes 1 and 2 are 'like' services. In turn, this leads to the conclusion that the CVA requirements provide an incentive for the beneficiaries of the import duty exemption to use services supplied within the Canadian territory over 'like' services supplied in or from the territory of other Members through modes 1 and 2, thus modifying the conditions of competition in favour of services supplied within Canada. Although this requirement does not distinguish between services supplied by service suppliers of Canada and those supplied by service suppliers of other Members present in Canada, it is bound to have a discriminatory effect against

[25] "There remains a crucial question: does the national treatment obligation extend across modes of supply, or do Members retain the freedom to discriminate between identical services supplied in their territory through different modes?" *Subsidies and Trade in Services*, Note by the Secretariat, para. 28.

services supplied through modes 1 and 2, which are services of other Members."[26]

Since then, "likeness across modes" has surfaced in WTO bodies, such as the Council for Trade in Services or the Working Party on GATS Rules, and in the *US – Gambling* case. Pursuant to this concept, services and service suppliers would be like by virtue of the nature of the activity in question, regardless of the mode of supply. Hence, all services and suppliers in a given sector would be presumed to be like, or, to put it differently, "different modes of supply could be used to provide a 'like' service".[27] The main argument in favour of "likeness across modes" is that the text of GATS Article XVII does not suggest that the mode of supply is relevant for defining likeness.[28] On the face of it, the concept looks straightforward and, hence, appealing. However, it raises several questions.

The potential consequences of likeness across modes are unclear. In its most extreme form, it would mean that, in a given sector, a Member would not be able to undertake different levels of national treatment commitments for the different modes; or that, by virtue of a commitment under a certain mode (mode 3, for instance), suppliers under other modes could claim national treatment, irrespective of whether there is a relevant commitment. This approach would be hard to reconcile with Members' agreed practice to schedule commitments mode by mode. The structure of GATS schedules, which was established in the 1993 Explanatory Note and followed by all Members,[29] indicates that Members' commitments are mode-specific, i.e. that, in a given sector, a Member retains the right to bind national treatment for a specific mode and not for another. Moreover, there is not necessarily a contradiction between Article XVII and modal commitments since paragraph 1 of that provision provides that national treatment is granted "[i]n sectors inscribed in Schedules, and subject to any conditions and qualifications set out therein ...". Arguably, the fact of undertaking specific commitments mode by mode can be considered as a "condition" or

[26] Panel report on *Canada – Autos*, para. 10.307, emphasis added. The panel only asserts that services supplied through modes 3 and 4 are similar to services supplied through modes 1 and 2, but does not substantiate this finding.

[27] *Subsidies and Trade in Services*, Note by the Secretariat, para. 28.

[28] *Ibid*. See also Mattoo, p. 119.

[29] 1993 Scheduling Guidelines, page 12. The Explanatory Note also stated that "[w]here a service transaction requires in practical terms the use of more than one mode of supply, coverage of the transaction is only ensured when there are commitments in each relevant mode of supply" (p. 9). The same principles are found in the Scheduling Guidelines adopted in 2001, which have replaced the 1993 Guidelines.

"qualification" and, consequently, different levels of national treatment commitment for different modes within a given sector would be compatible with Article XVII of the GATS.

An alternative application of the concept of likeness across modes would imply that, when a Member has undertaken a national treatment commitment across several modes (modes 1 to 3, say), it would have to apply the same standard of treatment across all these modes and ensure equal conditions of competition. Under this approach, services and suppliers operating under these different modes would be presumed to be like and no discrimination could be made between them to the extent that a commitment exists for the modes concerned. This is the situation which seems to be contemplated in the *Canada – Autos* dispute.

First, it must be noted that, in either form, likeness across modes would have significant liberalizing effects and might go beyond what is expected from Article XVII.[30] It would limit the possibility for regulatory distinctions between modes, or more generally, between services provided through different "means"[31]: services supplied through the Internet for instance, whether cross-border or within the same territory, would have to be subject to the same regulation as services provided by commercial establishment or physical persons having a direct contact with the consumer ("face to face"). In a number of sectors, this may be in contradiction with "real life" regulatory needs.

Moreover, from a conceptual point of view, the standard of comparison called for by the concept of "likeness across modes" is inadequate. Comparing mode 1 and mode 3, for instance, implies a comparison between two different foreign services and service suppliers, i.e., to quote the relevant parts of GATS Article I:2, between services supplied "from the territory of one Member into the territory of any other Member" with those supplied "by a service supplier of one Member, through commercial presence in the territory of any other Member". Imagine a complainant arguing, in support of a national treatment claim, that its mode 1 suppliers are like its mode 3 suppliers. The next question one is tempted to ask is "and so what?", because this argument does not amount to a demonstration that the services

[30] In the same sense, see Zdouc (2004), p. 402.

[31] "Means" of supply is used here to describe how a service is supplied, independently from the legal definitions of "modes" contained in GATS Article I.

and service suppliers under mode 1 – and mode 3, by the way – are like national services and service suppliers.[32]

"Likeness across modes" also seems to imply that a national treatment commitment has to be undertaken for at least two modes of supply, for a comparison to be established. But imagine, for instance, a sector where there is a national treatment commitment only under mode 1:[33] what would then be the basis for determining likeness with respect to this commitment? Would national treatment on mode 1 depend on a similar commitment for mode 3? Should the parameters for determining likeness under mode 1 vary depending on whether there is a mode 3 national treatment commitment? These questions illustrate the possible absurd consequences of the concept of "likeness across modes".

The concept of "likeness across modes" seems to rest on a confusion between "modes" and "means" of supply. There is no "mode" of supply for national products and producers. In fact, the real question is whether the means of supply (electronic transaction vs. "face-to-face", for example) should, as such, play a role in the determination of likeness.[34] The answer will involve a series of questions closely related to the supplier of the service. A proper standard for comparison remains to be established between foreign and national services and suppliers, based on a series of criteria which most likely will have to factor in the means through which a service is supplied. The national treatment obligation must be given a meaning for – and within – each modes of supply, independently from the other modes.

[32] In fact, the reasoning underlying likeness across modes sounds somehow like a syllogism: "national suppliers are like mode 3 suppliers, foreign suppliers operating under mode 1 are like foreign suppliers operating under mode 3, hence mode 1 suppliers should be treated like mode 3 suppliers".

[33] Consciously or not, the argument of "likeness across modes" may have been triggered by the complexity to determine the scope of national treatment with respect to modes 1 or 2 (as illustrated by the *Canada – Autos* panel report). In the case of these two modes, difficult questions remain, in particular with respect to the supplier. Should we compare suppliers who are situated abroad with national suppliers, in addition to the service itself? Which criteria should be taken into account?

[34] For instance, in *US – Gambling*, the parties discussed extensively whether services supplied via Internet could be compared with casino gambling (or "brick-and-mortar" suppliers), or only with domestic suppliers using remote means.

E. POSSIBLE CRITERIA FOR DETERMINING LIKENESS OF SERVICES AND SERVICE SUPPLIERS

1. Is the test developed under the GATT appropriate for services?

The basic criteria for determining likeness under the GATT were laid down in the Report of the Working Party on *Border Tax Adjustments*. They included "the product's end-uses in a given market, consumers' tastes and habits, which change from country to country; the product's properties, nature and quality".[35] Putting aside the brief – and frustrated – attempt to introduce the so-called "aim and effects" test, these criteria and parameters have been used consistently by GATT and WTO panels and the Appellate Body. In the *EC – Asbestos* case, the Appellate Body summarized as follows the now well-established approach for determining likeness under the GATT:

> "This approach has, in the main, consisted of employing four general criteria in analyzing "likeness": (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products. [footnote omitted] We note that these four criteria comprise four categories of "characteristics" that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes."[36]

The Appellate Body also clarified that, in WTO jurisprudence, the determination of likeness is "fundamentally, a determination about the nature and extent of a competitive relationship between and among products".[37] The question arises then whether the approach developed

[35] *Border Tax Adjustments*, Report of the Working Party adopted 2 December 1970, BISD/18 (97-109).

[36] Appellate Body report in *EC – Asbestos*, WT/DS135/AB/R, para. 101. The Appellate Body noted that the fourth criterion, tariff classification, was not mentioned by the 1970 Working Party on *Border Tax Adjustments*, but was included by subsequent panels. It should also be remembered that the Working Party added that "the term '... like or similar products...' causes some uncertainty and .. it would be desirable to improve on it; however, no improved term was arrived at". Thus, the Working Party itself was not convinced that the criteria it identified were the last word for the purpose of determining likeness.

[37] Appellate Body report in *EC – Asbestos*, para. 99.

under the GATT to assess likeness of goods can be transposed under the GATS to assess the likeness of intangible services transactions. We shall discuss each of these four parameters in turn.

2. Classification instruments

(a) Likeness of services

Two main instruments have been used by Members to describe the sectors/sub-sectors covered in their specific commitments: the *Services Sectoral Classification List*, established by the Secretariat in 1991 (the "SSCL"), and the 1991 UN Provisional Central Product Classification (the "CPC prov."). The SSCL, which is based on, and cross-refers to, the CPC, categorises services in twelve sectors and about 160 sub-sectors.[38] These two instruments are complemented by *ad hoc* sectoral classifications, such as the list contained in the Annex on Financial Services or the telecom model schedule. Members have a broad margin of manoeuvre to define the services they are ready to commit on; they are encouraged, but not obliged to use these instruments.[39] This flexibility might have the potential for reducing the comparability of schedules and diminishing the interest of the CPC and SSCL as a basis for comparing the likeness of services transactions. In practice, however, the huge majority of existing GATS schedules are based on the SSCL, which means that they follow its structure, headings and codes. Moreover, most Members have chosen to refer to CPC numbers to define the scope of their commitments.

In spite of their widespread use, the SSCL and the CPC may be less reliable than the Harmonized System ("HS"), used for tariff schedules, for identifying and defining service activities. The SSCL is generally characterized by a high level of aggregation; as to the CPC, its definitions remain often broad even at a five digit level. To take just one example, should services provided by cardiologists and dermatologists be considered "like" because they fall under the same CPC category of "specialized medical services" (CPC 93122)? In

[38] It should be noted that both the SSCL and the CPC prov. are fifteen years old and are outdated in a number of sectors. Work has been underway during these last eight years in the Committee on Specific Commitments to try and update the SSCL, but no concrete results have been achieved so far. Beyond sheer technical difficulties, there is also legal uncertainties relating to the consequences that new definitions – or breakdowns – could have on existing commitments (see reports of the Committee on Specific Commitments, S/CSC/M/--).

[39] See *Scheduling Guidelines*, Part II, Section A.

some sectors, nevertheless, the CPC breakdown may be considered to refer to clearly-defined activities: "taxi services" (CPC 71221) could be one of these examples. Also, in financial services, the nature of the activities listed in the Annex seems to be rather clear.

Overall, services classification instruments appear to be less reliable than the HS to determine likeness of services, but cannot be considered totally irrelevant. In many instances, the fact that two services fall under the same CPC category will not be sufficient to establish likeness; at best, it will create of presumption thereof. On the other hand, there will be a strong presumption that two services falling in different categories are unlike.[40]

(b) Likeness of suppliers

The CPC defines service activities and is indifferent to the quality or characteristics of the supplier.[41] Hence, it can at best be indirectly relevant to compare service suppliers. In the *Canada – Autos* case, the panel assessed – very summarily – the likeness of Canadian *vis-à-vis* Japanese companies against the relevant definition contained in the CPC. It found that, contrary to what was claimed by Japan, the Canadian companies cited by Japan did not "seem to be supplying 'wholesale trade services of motor vehicles' as defined in CPC 6111". Hence, in the absence of domestic "like" suppliers, discrimination could not occur.[42] More generally, using the definition of services activities to deduce the likeness of suppliers will lead to the much criticised panel's conclusion in *Bananas III* that "to the extent that entities provide these like services, they are like service suppliers".

3. Characteristics of services and service suppliers

(a) Likeness of services

A criterion focusing on products' "physical" characteristics, as used in the GATT context, is a contradiction in terms for intangible and non-storable services transactions. However, leaving aside "physical" characteristics, one could explore whether there is a role for "intrinsic" characteristics which could distinguish a service from another. In *EC – Bananas*

[40] In the same sense, see Mattoo, p. 128.

[41] The only exception is "Postal and courier services" (CPC 751) which defines postal services as those rendered by "national postal administration", while "courier services" are rendered "other than by the national postal administration".

III, the panel referred in general terms to the "nature" and "characteristics" of the transactions at issue, but did not elaborate further on these two criteria.

> "[t]he nature and the characteristics of wholesale transactions as such, as well as of each of the different subordinated services mentioned in the headnote to section 6 of the CPC, are 'like' when supplied in connection with wholesale services, irrespective of whether these services are supplied with respect to bananas of EC and traditional ACP origin, on the one hand, or with respect to bananas of third-country or non-traditional ACP origin, on the other. Indeed, it seems that each of the different service activities taken individually is virtually the same and can only be distinguished by referring to the origin of the bananas in respect of which the service activity is being performed."[43]

In the *US – Gambling* dispute, the parties developed detailed arguments around the characteristics of the types of games found in the gambling industry, getting very close to a physical test.[44] For instance, the nature of the different types of games was discussed in detail and a comparison was made between betting on software algorithms, as is the case for internet gambling, *vs.* using physical gambling paraphernalia as found in casino. Quoting the *EC – Asbestos* Appellate Body report,[45] the United States also looked at the differential risks of games to support its view that online gambling is not like other forms of gambling, in particular casino gambling.

The characteristics of intangible services are more elusive than those of tangible goods, and even more so in sectors where services transactions are very customized. This being said, would it be possible to usefully identify some "intrinsic" characteristics? Such characteristics could relate, for instance, to the result of the service being supplied, but also to how the service is actually being supplied (operational characteristics), among others. The ordinary meaning of the activities concerned might also contribute to the identification of intrinsic characteristics of services (for example, in the case of hair-dressing services, the intrinsic characteristics of the service would involve cutting, dressing and styling the hair).

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[42] Panel report in *Canada – Autos*, paras. 10.283-10.289. Finding not reviewed by the Appellate Body.
[43] Panel report in *EC – Bananas III*, para. 7.322.
[44] Panel report in *US – Gambling*, section III.B.5(a).
[45] "... evidence relating to the health risks associated with a product may be pertinent in an examination of "likeness" under Article III:4 of the GATT 1994". Appellate Body report in *EC – Asbestos*, para. 113.

The main difficulty may be perhaps to determine how detailed an examination of intrinsic characteristics should be. The discussion which took place between the parties in the *US – Gambling* dispute offers a good illustration of this problem. Moreover, the criterion relating to intrinsic characteristics may complement, but also overlap to some extent with other criteria used in the determination of likeness, in particular CPC definitions and end-uses.

(b) Likeness of service suppliers

Which suppliers' characteristics could be usefully taken into account in a determination of likeness? Some commentators have suggested that criteria such as skills, size of the company, number of employees, type of assets, technological equipment, traditional fields of business, experience and know-how could be relevant.[46]

So far, panels have not relied on this type of criteria to assess the likeness of services suppliers, although parties invoked them to support claims of likeness or "unlikeness". For instance, in *EC – Bananas III*, the United States argued that EC/ACP distribution suppliers were "like" Latin American suppliers because "[t]heir respective activities, equipment, types of personnel employed and marketing stages were either identical or virtually so and the extent to which they had competed directly with each other in the EC market had been limited only by the restrictive regulatory regimes established by certain member States ... and by traditional marketing relationships built up over time".[47] In *Canada – Autos*, Canada argued that the "size, sales volumes and the products it [the Canadian company at stake] manufactures are vastly different from those of any of the establishments identified by Japan as suppliers of wholesale trade services of motor vehicles".[48] In *US – Gambling*, the United States proposed a distinction based on the ownership and structure of suppliers, by arguing that state monopolies of gambling services are not like non-state private suppliers.[49]

At first glance, supplier-related criteria are attractive because they may provide panels and the Appellate Body with seemingly straightforward and objective criteria, which could help to distinguish among a range of possible like suppliers. However, these criteria raise a number of questions as, in the real world, it is impossible to find two wholly similar

[46] See, for instance, Zdouc (1999), p. 333 and Krajewski, p. 105.
[47] Panel report in *EC – Bananas III*, para. 4.677.
[48] Panel report in *Canada – Autos*, paras. 10.284-10.285.

suppliers. For instance, it is not clear why the size of a company, the number of employees or the technological equipment should matter when the services they supply compete on a given market. And where to draw the line between a "small" and a "big" firm?[50] Why should the ownership justify different treatment if both state- and privately-owned companies behave in a commercial way and supply competitive services?[51]

Taking into account such supplier-related criteria, such as their respective size, may make sense in an "aim and effect" type of test, where they would be assessed against the policy objective of a measure. However, in a "competitive test", as the one used under the GATT, such criteria will result in an artificial selection of suppliers which may provide like – and perfectly competitive – services. As argued by Zdouc, "the existence of *like* suppliers would become a theoretical construct which could hardly be found in the real world".[52] This might reduce arbitrarily the scope of the national treatment obligation.

4. The criteria of "consumers' tastes and habits" and "end-uses"

(a) Likeness of services

Of the various criteria used in the context of the GATT, services' "end-uses", and, to a lesser extent, "consumer tastes and habits" may be the most useful ones for determining likeness in the context of the GATS. Both criteria contribute to determining whether two products are substitutable in a given market and, hence, are good indicators of a competitive relationship, the protection of which is the very purpose of GATS Article XVII.

The analysis made by the Appellate Body in the *EC – Asbestos* dispute can arguably be transposed to the services context. The concept of "end-uses" would entail a

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[49] Panel report in *US – Gambling*, para. 3.154.

[50] In fact, debates in the Special Session of the Council for Trade in Services show that Members are careful to avoid discrimination among enterprises based on the size. See, for instance, Communication from Canada, *Initial Proposal on Small- and Medium-Sized Enterprises*, S/CSS/W/49, as well as the reports contained in S/CSS/M/8 to S/CSS/M/13. The debate also shows the difficulty to define what an SME is, since definitions seem to vary widely among Members.

[51] Nothing in the GATS seems to allow for a differentiation between state-owned and privately-owned companies. To the contrary, various provisions suggest that the GATS is neutral with respect to ownership. Article XXVIII(h), defines a monopoly supplier as "any person, public or private..."; Article XXVIII(l) defines a juridical person as "any legal entity ... whether privately-owned or governmentally owned. ...". Allowing for an *a priori* distinction based on ownership would greatly reduce the value of specific commitments in sectors where public monopolies or enterprise coexist with private suppliers (telecom, postal, energy, etc).

[52] Zdouc, 1999, p. 333.

determination of the "extent to which products are capable of performing the same, or similar, functions (end-uses)". The criterion of "consumers' tastes" would refer to "the extent to which consumers are – or would be – willing to choose one product instead of another to perform those end-uses",[53] or, in other words, whether consumers regard two services as substitutable in a given market. The application of these criteria will have to rely on a significant amount of factual evidence (will it always be available?) and typically requires a case-by-case determination.

(b) Likeness of service suppliers

Again, the criteria of end-uses and consumer's tastes would be primarily relevant for comparing services and indirectly for service suppliers. A determination of whether suppliers compete for a given market will inevitably entail an assessment of whether their services are capable of similar end-uses or are treated as substitutable by consumers. However, it may be difficult to establish a clear distinction between the service and the supplier, especially when it comes to assessing the taste and perceptions of the consumers. This is because, if tastes and perceptions bear directly on the service, the characteristics and qualities of the suppliers are likely to be an important element in shaping these tastes and perceptions. For example, the particular qualifications of certain suppliers may make them like or unlike from a consumer's point of view.

Interestingly perhaps, although they tend to be recognized as the most pertinent criteria for determining a competitive likeness under the GATS,[54] end-uses and consumers' tastes have not been used so far by panels in their assessment of likeness in services disputes. Neither *Canada – Autos*, nor *EC – Bananas III* contain a discussion of end-uses or consumers' perceptions. In *US – Gambling*, the parties had presented detailed arguments on these two criteria, but the panel exercised judicial economy with respect to the claim of national treatment violation.

[53] Appellate Body report in *EC – Asbestos*, para. 117.
[54] In the same sense, see Mattoo, p. 128 and Zdouc (2004), p. 395.

5. Conclusion

The approach developed in the context of the GATT to establish likeness of goods can be used to a certain extent under the GATS to establish likeness of service, the most useful criteria being end-uses and consumers' tastes, which focus on substitutability of services. However, all four criteria bring the analysis back to the service and, thus, leave the concept of like supplier largely empty. Overall, these criteria are likely to leave a taste of "incompleteness". This is because the nature of trade in services is more complex than trade in goods: more parameters come into play, including different modes of supply, the difficulty to separate the service from the supplier, and more complex regulations. Moreover, legal definitions and jurisprudence show that the GATS bites deep.[55] So, one is tempted to ask the question: is there a need for "something different" in the equation of likeness under the GATS? Members' discussions, arguments exchanged in the *US – Gambling* dispute seem point to a positive answer, even if no clear solution has emerged. The concern also seems to be shared by most commentators who wrote on the subject.

A key issue is whether the "regulatory context" of the service and/or of the supplier should play a role. A look at the solution used in other trade and investment agreements (such as NAFTA) may also give some food for thought. We are aware that an approach involving the regulatory context, especially if it is called "aim and effect", is currently in the Appellate Body's bad books.[56] However, we believe that this issue has to be revisited. And in fact, in recent jurisprudence, the Appellate Body itself gave hints that regulatory considerations, including governments' intent, are relevant in a determination of national treatment violation.

[55] Keeping in mind the definition of "the supply of a service", any regulation touching upon "the production, distribution, marketing, sale and delivery of a service" (GATS Article XXVIII(b)) could arguably be concerned. Moreover, "measure" is defined in an equally broad manner as "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form" (Art. XXVIII(a)). Moreover, in *EC – Bananas III*, the Panel found that "[n] 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." Panel report, para. 7.285.

[56] We share Zdouc's doubts as to "whether it was an act of judicial wisdom for the Appellate Body to engage in such merciless condemnation of 'aims and effects' once and forever in the context of the GATS non-discrimination clauses". Zdouc (1999), p. 342.

In the next section, we shall look at possible parameters which could form the basis for a different approach under the GATS national treatment provision. We shall briefly recall the "aim and effect" test developed in GATT jurisprudence. We shall also recall the drafting history of the GATS, and consider the concept of "like circumstances" used in other treaties, such as NAFTA. We shall then discuss whether and how these concepts could play a role in the context of GATS Article XVII.

F. OTHER POSSIBLE APPROACHES FOR DETERMINING "LIKENESS"

1. "Aim and Effect"

The "aim and effect" approach was used in two GATT panel reports as an alternative to the traditional approach first enunciated by the Working Party on Border Tax Adjustments. It first appeared in the *US – Malt Beverages* case and was further elaborated in the *US – Taxes on Automobiles* dispute, the latter report remaining unadopted[57].

This approach was based on GATT Article III:1, which provides that internal measures "should not be applied ... so as to afford protection to domestic production". At stake was Article III:2 of the GATT, dealing with discriminatory taxes, and whose second sentence makes an explicit reference to para. 1 of Article III. "Aim and effect" is used in cases where the measure does not distinguish products based on their origin (i.e. cases of possible *de facto* discrimination). The underlying idea is that the four-criteria likeness test is too narrow because it does not allow to take into account non-protectionist government policies requiring regulatory distinctions which would be based on other criteria.[58] Pursuant to "aim and effect", a panel considers whether a regulatory distinction between products has a *bona fide* aim and whether it creates a protectionist effect in favour of domestic products.[59] A regulator is allowed to treat two products differently if the regulation which distinguishes between

[57] According to the Appellate Body, "unadopted panel reports have no legal status in the GATT or WTO system ... a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant". See Appellate Body report in *Japan – Alcoholic Beverages II*, p. 15-16.

[58] Panel report in *US – Taxes on Automobiles*, para. 5.8.

[59] "A measure could be said to have the *aim* of affording protection if an analysis of the circumstances in which it was adopted, in particular an analysis of the instruments available to the contracting party to achieve the declared domestic policy goal, demonstrated that a change in competitive opportunities in favour of domestic products was a desired outcome and not merely an incidental consequence of the pursuit of a legitimate policy goal". As to "effect", the panel stated that "a measure could be said to have the *effect* of affording protection to domestic production if it accorded greater competitive opportunities to domestic products than to imported products." *Ibid.*, para. 5.10, emphasis in the original.

them does not have the aim nor the effect of affording protection to domestic products. In other words, there would be a determination of likeness if and when the regulation at stake had the aim and the effect of affording protection. Thus, the purpose and the market effect of a measure become an integral part of the likeness test. Such an approach is meant to give more deference to the regulator, as stated by the *Malt Beverages* panel, which considered that the "limited purpose of Article III" had to be taken into account in the interpretation of likeness:

> The purpose of Article III is thus not to prevent contracting parties from using their fiscal and regulatory powers for purposes other than to afford protection to domestic production. Specifically, the purpose of Article III is not to prevent contracting parties from differentiating between different product categories for policy purposes unrelated to the protection of domestic production.[60]

According to Hudec, the "aim and effect" approach had two advantages over the traditional analysis of likeness. First, it "made the question of violation depend primarily on the two most important issues that separate bona fide regulation from trade protection – the trade effects of the measure and the bona fides of the alleged regulatory purpose behind it." Second, it avoided "both the premature dismissal of valid complaints on grounds of "un-likeness" alone and excessively rigorous treatment given to claims of regulatory justification under article XX ...".[61]

The "aim and effect" test was rejected by both the panel and the Appellate Body in one of the first WTO cases, the so-called *Japan – Alcoholic Beverages II*, which involved a claim of violation of GATT Article III:2.[62] The first argument invoked against "aim and effect" was based on textual grounds: the first sentence of GATT Article III:2, which contains the concept of "like" product, does not refer to the general policy statement of "... so as to afford protection to domestic production" contained in the first paragraph of the same provision.[63]

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[60] Panel report in *US – Malt Beverages*, para. 5.25.

[61] Hudec, p. 628.

[62] Appellate Body report in *Japan – Alcoholic Beverages II*, p. 25 and panel report, paras. 6.15-6.19.

[63] "Article III:2, first sentence does not refer specifically to Article III:1. There is no specific invocation in this first sentence of the general principle in Article III:1 that admonishes Members of the WTO not to apply measures "so as to afford protection". This omission must have some meaning. We believe that the meaning is simply that the presence of a protective application need not be established separately from the

The second concern, expressed by the panel, was the possible overlap with GATT Article XX.[64] The main concern associated with "aim and effect", although not expressed directly by the Appellate Body in this dispute, seems to be the fear of having to second-guess the motivation of a regulator and the possible high level of subjectivity that this may entail.[65] In *Japan – Alcoholic Beverages II*, the Appellate Body applied a strict reading of likeness, based on the traditional test elaborated in the seventies by the Working Party on Border Tax Adjustment. This approach, which is seen resting on "objective" criteria, has prevailed until now, although, as we shall see, the Appellate Body has itself departed from this traditional approach.

Shortly thereafter, aim and effect was rejected in the context of the GATS. In the *EC – Bananas III* case, in response to EC arguments, the Appellate Body stated categorically that:

> 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, 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

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specific requirements that are included in the first sentence in order to show that a tax measure is inconsistent with the general principle set out in the first sentence." Appellate Body report, p. 19.

[64] "The Panel further noted that the list of exceptions contained in Article XX of GATT 1994 could become redundant or useless because the aim-and-effect test does not contain a definitive list of grounds justifying departure from the obligations that are otherwise incorporated in Article III." According to the Panel the "aim and effects" test would circumvent the burden of proof established in Article XX, and might even shift this burden of proof on the complainant. Panel report in *Japan – Alcoholic Beverages II*, para. 6.17.

[65] The Panel did discuss these issues, though: "The Panel also noted that very often there is a multiplicity of aims that are sought through enactment of legislation and it would be a difficult exercise to determine which aim or aims should be determinative for applying the aim-and-effect test. Moreover, access to the complete legislative history, ..., could be difficult or even impossible for a complaining party to obtain. Even if the complete legislative history is available, it would be difficult to assess which kinds of legislative history (statements in legislation, in official legislative reports, by individual legislators, or in hearings by interested parties) should be primarily determinative of the aims of the legislation." Panel report in *Japan – Alcoholic Beverages II*, para. 6.16, footnotes omitted.

> panel report dealing with Article III of the GATT 1947, United States - Taxes on Automobiles, as authority for its proposition, despite our recent ruling.[66]

Is *Bananas III* the requiem song for any approach taking into account the regulatory context in the GATS? In fact, there are signs in more recent jurisprudence indicating that "aim and effect" might be making a discreet return, but linked to the determination of "less favourable treatment" rather than of likeness.[67]

In *Japan – Alcoholic Beverages II*, the Appellate Body interpreted the policy statement of "so as to afford protection" in Article III:1 as calling for an investigation of the "protective application" of a measure, which "can most often be discerned from the design, the architecture and the revealing structure of a measure".[68] Some commentators, such as Hudec, consider that this statement is no different from "aim and effect" or "at least some understanding of the 'aim and effects' approach".[69] According to Verhoosel, "[t]he concept of 'protective application' is nothing but a painfully far-fetched attempt to define objective parameters which may be revealing of subjective intent".[70] And in fact, one can draw a parallel with the statement made by the panel in the *US – Taxes on Automobiles* that "... an assessment of the aim of the legislation could not be based solely on ... statements or on other preparatory work. The aim of the legislation had also to be determined through the interpretation of the wording of the legislation as a whole".[71]

Furthermore, in *EC – Asbestos*, the Appellate Body adopted a less formalistic approach in the context of GATT Article III and considered effects despite the absence of a reference to "so as to afford protection" in Article III:4 when it found that

> the term "less favourable treatment" expresses the general principle, in Article III:1, that internal regulations "should not be applied ... so as to afford protection to domestic production. ... a Member may draw distinction between

[66] Appellate Body report in *EC – Bananas III*, para. 241, footnotes omitted.
[67] See Porges & Trachtman.
[68] The full quote reads: "Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture and the revealing structure of a measure." Appellate Body report in *Japan – Alcoholic Beverages II*, p. 18.
[69] Hudec, p. 631.
[70] Verhoosel, pp. 55-56.
[71] Panel report in *US – Taxes on Automobiles*, para. 5.12.

products which have been found to be "like", without, for this reason alone, according to the group of "like" *imported* products "less favourable treatment" than that accorded to the group of "like" *domestic* products".[72]

This statement has been interpreted by some commentators as supporting the "aim and effect" approach.[73] More recently, the Appellate Body may have gone one step further in *Dominican Republic – Cigarettes*, where it found that "... the existence of a *detrimental effect* on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances *unrelated to the foreign origin of the product*, such as the market share of the importer in this case".[74] This finding, in particular the concept of "detrimental effect" would deserve to be clarified (does it amount to discriminatory treatment? How much "detrimental" should the effect be for a finding of a finding of less favourable treatment to be made?). However, by allowing to take into account "factors or circumstances unrelated to the foreign origin of the product", it could arguably open the door to an "aim and effect" test.

2. The concept of "like circumstances"

(a) The concept of "like circumstances" in NAFTA jurisprudence

The North American Free Trade Agreement (NAFTA) and other FTAs concluded by the United States, include the concept of "like circumstances", but do not make reference to the likeness of services or service suppliers. In NAFTA, for instance, the national treatment provisions related to investment (Chapter 11) and cross-border trade in services (Chapter 12) stipulate that each Party shall accord to investors/service providers of another Party treatment no less favourable than that it accords, "in like circumstances" to its own investors/service providers.[75]

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[72] Appellate Body report in *EC – Asbestos*, para. 100. This is a 180° turn compared to the *EC – Bananas III* jurisprudence where the Appellate Body said that a determination of whether there has been a violation of Article III:4 "does not require a separate consideration of whether a measure 'afford[s] protection to domestic production' because Article III:4 does not refer specifically to Article III:1". Appellate Body report in *EC – Bananas III*, para. 216.

[73] Howse & Türk, p. 299. However, other commentators do not necessarily share this view (see Ehring). In fact, this finding could be a restatement of the principle that a foreign product can be treated differently, as long as this does not result in less favourable treatment. See Appellate Body report in *Korea – Beef*, para. 132.

[74] *Dominican Republic – Import and Sale of Cigarettes*, para. 96.

[75] Articles 1102 and 1202 of the NAFTA.

As such, "like circumstances" is a fluid concept which does not offer clearer guidance than "like services and service suppliers" with respect to the extent of the comparison between foreigners and nationals. As noted by a NAFTA panel, "the phrase 'like circumstances' is open to a wide variety of interpretations in the abstract and in the context of a particular dispute".[76] Dolzer echoes this statement when he writes that the concept is fact-specific and "resists abstract definitions".[77] And not surprisingly, NAFTA jurisprudence varies when it comes to applying it.

Under a narrow approach, the concept of "like circumstances" refers to the scope of the activities concerned: a panel is led to enquire whether two suppliers are operating in the same business or sector.[78] Transposing this test to the GATS would amount, *grosso modo*, to determining whether two activities fall under the same CPC definition.

However, as put by a NAFTA tribunal, the comparison of business or economic sector should be only "a first step".[79] NAFTA parties and case-law seem to favour a broader interpretation, allowing to take into consideration other parameters, such as policy concerns and objectives. The basic principle is expressed in *Myers V. Canada*: "[t]he assessment of 'like circumstances' must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest".[80] Hence, as a matter of principle, differential treatment may be appropriate and not necessarily in contradiction with the national treatment obligation, subject to certain conditions.

Now, how do we tell when a different treatment is justified? The *Pope & Talbot Inc.* panel required that the differences in treatment have a "reasonable nexus to rational

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[76] *Myers v. Canada*, Partial award, 13 November 2000, para. 243.

[77] Dolzer, p. 1.

[78] This narrow reading is found, for instance, in *Marvin Feldman v. Mexico*, ICSID case no. ARB(AF)/99/1, award of 16 December 2002, where the Tribunal considered that "the 'universe' of firms in like circumstances are those foreign-owned and domestic-owned firms that are in the business of reselling/exporting cigarettes. Other Mexican firms that may also export cigarettes, such as Mexican cigarettes producers, are not in like circumstances". In *Methanex Corporation v. United States of America*, the Tribunal also adopted a tight reading, when it found that "the proper comparator" were "the entities that were in the most 'like circumstances' and not comparators that were less in 'like circumstances'". Hence, it compared Methanex, a producer of methanol, with other methanol producers, but refused to compare it with producers of ethanol, a product which could arguably compete with methanol. See Final Award of the Tribunal on Jurisdiction and Merits, 7 August 2005, paras. 11-38.

[79] *Pope & Talbot Inc.*, Award on the Merits of Phase 2, 10 April 2001.

government policies". In particular, those policies should not "distinguish, on their face or *de facto*, between foreign-owned and domestic companies" and should not "otherwise undermine the investment liberalizing objectives of NAFTA". In a dispute under Chapter 12 of NAFTA, dealing with cross-border trucking services, the panel went even further, in the sense that it referred to "like circumstances" as an exception, which should be interpreted narrowly, and made an explicit reference to GATT Article XX. The panel applied a full necessity test when it found that

> "... the proper interpretation of Article 1202 [national treatment obligation] required that differential treatment should be no greater than necessary for legitimate regulatory reasons such as safety, and that such different treatment be equivalent to the treatment accorded to domestic providers. With regard to objectives, it seems unlikely to the Panel that 'in like circumstances' language ... could be expected to permit maintenance of a very significant barrier to NAFTA trade, namely a prohibition on cross-border trucking services".[81]

In this dispute, there was a clear attempt by the panel to strike a balance between, on the one hand, a narrow interpretation, which would be limited to some kind of "physical" or "definitional" test ("are the two suppliers working in the same sector?"), and, on the other hand, an open test, which would empty the national treatment obligation from its meaning by permitting virtually any kind of regulatory distinction.[82]

Another interesting question is the relationship between NAFTA language of "like circumstances" and the GATT/GATS language of "like products" and "like services and service suppliers", or, other words, whether these different wordings should mean different tests. The views expressed by the parties may appear to be contradictory at first glance and the case-law is limited, which makes it difficult to identify a clear trend.

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[80] *Myers v. Canada*, Partial award, 13 November 2000.

[81] See *Cross-Border Trucking Services*, Final Report, 6 February 2001.

[82] The panel noted, in this regard, that: "Similarly, the Panel is mindful that a broad interpretation of the 'in like circumstances' language could render Articles 1202 [NT] and 1203 [MFN] meaningless. If, for example, the regulatory systems in two NAFTA countries must be substantially identical before national treatment is granted, relatively few service industry providers could ultimately qualify." See *Cross-Border Trucking Services*, Final Report, 6 February 2001.

In a 1128 submission made in the dispute *International Thunderbird Gaming Corporation v. Mexico*, Canada notes that "[a]lthough arguably similar expressions can be found both in GATT Article III and in the [GATS] at Article XVII ..., the criteria are different in the three agreements [i.e. NAFTA, GATT and GATS] as is evident from the different wording" and argues that the "like product" analysis developed under GATT Article III is not relevant for the interpretation of "like circumstances". Canada's concern seems to be that the WTO jurisprudence under GATT Article III would expand the national treatment obligation under Article 1102 "in manifestly unreasonable ways and conflict with the ordinary meaning of the provision".[83] On the other hand, the United States considers that the two concepts have a similar meaning. In *Cross-Border Trucking*, it argued that, according to NAFTA negotiating history, the "in like circumstances" had been adopted "on the understanding that it had similar meaning to 'like services and services providers, as preferred originally by Canada and Mexico".[84] As noted above, the United States made a similar statement in the Council for Trade in Services (see below). Hence, according to the United States, a country would be allowed in both instances "to accord differential, and even less favourable, treatment where appropriate to meet legitimate regulatory objectives".[85] The US and Canadian position may not necessarily be contradictory. Canada stresses the different language to reject the "product analysis" found in the WTO jurisprudence. The United States ignores the different language and argues that the test is the same, i.e. something similar to "like circumstances". But in the end, both seem reluctant to transpose the GATT approach to likeness into NAFTA services obligations.

NAFTA jurisprudence has quoted approvingly WTO jurisprudence on likeness when it referred to the need for a case-by-case approach or for reading "like" in its overall context, as stated by the Appellate Body in *Japan-Alcoholic Beverages II*.[86] However, in *Methanex*, the Tribunal refused to use the four-criteria test used under GATT Article III to determine likeness on the ground that Chapter 11 refers to "like circumstances" and not to "like, directly

[83] Submission of the Government of Canada pursuant to NAFTA Article 1128 in *International Thunderbird Gaming Corporation v. Mexico*, 21 May 2004, paras. 7-16. See also Fourth Submission of the Government of Canada Pursuant to NAFTA Article 1128 in *Methanex Corporation v. The United States of America*, 30 January 2004.

[84] See *Cross-Border Trucking Services*, Final Report, 6 February 2001, para. 167. This statement appears to contradict the Canadian position referred to above.

[85] *Ibidem*, para. 165.

[86] *Myers v. Canada*, Partial Award, 13 November 2000, para. 244.

competitive or substitutable goods", which "show[ed] that trade provisions were not to be transposed to investment provisions".[87]

We can draw only limited conclusions from available jurisprudence on "like circumstances". The concept still lacks a clear definition as the case-law is limited and not always consistent. However, there is still a clear feeling that the GATT approach is rejected by NAFTA parties for their services obligations and that "like circumstances" is broader than a mere competitive test as it may allow a panel to take into account regulatory distinctions and weigh them in the light of a "legitimate objective". In this sense, it is somewhere between "aim and effect" and a necessity test. Several questions remain open, however, in particular as to what kind of policy objectives may justify differential treatment. Also, (and this is not necessarily linked to the interpretation of "like circumstances" as such), the NAFTA jurisprudence gives contradictory signals as to the role which should be attributed to a government's intentions. Some judgements indicate that there is no requirement to demonstrate an intention to discriminate,[88] while in another case at least, this type of evidence was required.[89]

(b) "Like circumstances" in the GATS

(i) Drafting history

Delegations' proposals and drafts of the GATS show that Uruguay Round negotiators discussed various options as possible standards for comparison between national and foreign

[87] *Methanex Corporation v. The United States of America*, Final Award on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter B, paras. 30-37.

[88] In *Myers v. Canada*, the Panel noted that "[i]ntent is important, but protectionist intent is not necessarily decisive on its own". The existence of an intent to favour nationals over non-nationals would not give rise to a breach of Chapter 1102 ... if the measure in question were to produced [sic] no adverse effect on non-national complainant. The word "treatment suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11" (Partial Award, 13 November 2000, para. 254). See also *Feldman v. Mexico*: "... it is not self-evident ... that any departure from national treatment must be *explicitly* shown to be a result of the investor's nationality. ... requiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden ..., as that information may only be available to the government. It would be virtually impossible for any claimant to meet the burden of demonstrating that a government's motivation for discrimination is nationality rather than some other reason." (ICSID Award, 16 December 2002, paras. 181-183).

[89] See for instance *Methanex v. United States*, where the panel required the complainant to demonstrate that "California intended to favour domestic investors by discriminating against foreign investors". Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter B, para. 12.

services and service suppliers. The possible inclusion of "like circumstances" was one of them.

A reference to "like circumstances" was contained in the draft services agreement presented by the United States, which defined national treatment as "... treatment no less favorable than that accorded in like circumstances to a Party's own service providers, to service providers owned or controlled by persons of that Party, or to like services provided by such service providers."[90] Similarly, a communication from Mexico stated that: " ... national treatment must be understood as the treatment of foreign services that is no less-favourable than that given in similar circumstances to the local services of the signatory party".[91] These proposals were certainly influenced by the US – Canada Free Trade Agreement and the North American Free Trade Agreements (NAFTA), entered into force respectively in 1989 and 1994, and which contain similar language.

In July 1990, the Chairman of the GNS tabled a draft services text containing both the concepts of "like circumstances" and of "like service and service supplier".[92] In the December 1990 Draft Final Act which was sent to the Brussels Ministerial Conference, the reference to "like circumstances" had been dropped. The national treatment provision focused on the likeness of services by stipulating the obligation to accord "to services and service providers of other Parties, ..., treatment no less favourable than that accorded to like

[90] *Agreement on Trade in Services*, Communication from the United States, MTN.GNS/W/75, 17 October 1989. See also *Concepts for a Framework Agreement in Services*, Communication from the United States, MTN.GNS/W/24, 27 October 1987: "National treatment should generally require that foreign service providers receive treatment no less favorable in like circumstances than that accorded to domestic service providers with respect to government measures affecting the service sector in question. ... In most cases, national treatment for foreign service providers would be treatment identical to that provided to domestic service providers in the service sector in question. Occasionally, differences in institutional structures and regulatory systems may require a modified approach to national treatment, which should be allowed under the framework such as in the case of national security considerations and fiduciary responsibilities. However, such treatment would have to be at least equivalent in effect. Parties would be obligated to substantiate such equivalency both in terms of establishing the necessity for non-identical treatment and ensuring that there is no disguised violation of the national treatment principle." (emphasis added). The inclusion of a necessity test in the national treatment provision will be discussed below.

[91] *Elements for a Framework Agreement With Special References to the Participation of Developing Countries*, Communication from Mexico, MTN.GNS/W/85, 20 November 1989.

[92] The draft national treatment provision stipulated that foreign services and service providers should be granted treatment no less favourable "than that accorded to like domestic service or service providers in like circumstances" (emphasis added). The draft MFN provision referred to treatment no less favourable than the Member accords "in like circumstances to services and service providers of any other party", but did not refer to like services or like service suppliers. Introductory Note by the Chairman on the GNS Negotiations on a Framework Agreement, *Draft Multilateral Framework For Trade in Services*, MTN.GNS/35, 23 July 1990.

domestic services or providers of like services".[93] One year later, in the Draft Final Act of December 1991, the language of Articles II:1 and XVII:1 corresponded to the current text of the GATS.[94]

These texts give the impression that drafters felt that there should be "something more" than in goods as a benchmark for comparison, and that a mere reference to "like services" was not sufficient. In the absence of a negotiating history, one is compelled to second-guess what led drafters to the current text. It may be that the possibility to negotiate national treatment on a sectoral and modal basis, and to take MFN exemptions, as well as the inclusion of Article XIV convinced drafters that they would benefit from sufficient flexibility, thus rendering additional conditions unnecessary. However, as pointed out by Zdouc, this might have been short-sighted because the MFN exemptions lists are not to exceed ten years (in principle) and the limitations inscribed in commitments are subject to periodic rounds of negotiations.[95] According to some sources who followed the drafting of the GATS, some drafters were of the view that a combined reference to "like services and service suppliers" called for the same type of considerations as the concept of "like circumstances". Finally, a more prosaic reason may be that drafters, who had mainly a GATT background, were reluctant to "import" into the GATS an unfamiliar concept.

(ii) Recent developments on the relevance of "like circumstances" under the GATS

The concern that, somehow, elements "surrounding" the supply of the service should be taken into account is still present, as shown by the discussion which took place in the Services Council a few years back, and also by the arguments put forward by the parties and third parties in the *US –Gambling* dispute.

The scope of the national treatment provision under the GATS and the possible usefulness of a reference to "like circumstances" – or an understanding that such a reference

[93] *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.GNS/W/35/Rev.1, 3 December 1990. The same reference to "like services and providers of like services" was included in the draft MFN provision, which contained, in square brackets, two additional conditions against which the non-discriminatory benchmark should be assessed, i.e. those of "in like circumstances" and "with respect to the same mode of delivery".

[94] *Draft Final Act Embodying The Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/FA, 20 December 1991 (also called "Dunkel Draft").

[95] Zdouc (2004), p. 403.

could be read in Article XVII – was raised again a few years ago in the Council for Trade in Services. In the context of the so-called "technical review of the GATS", Brazil launched a discussion on the scope of the MFN and national treatment provisions, focusing on the concept of "like services and service suppliers" in relation to the four modes of supply. The main suggestion contained in the proposal was that likeness should be defined within each mode of supply, based on a comparison of services suppliers that operate in "like circumstances".[96] Brazil's main concern seemed to be to counter the so-called "likeness across modes" which had been endorsed by the *Canada – Autos* panel report; according to Brazil, "like circumstances" would be "solely for the purpose of illustrating that the basic disciplines should be understood to apply within each mode of supply, and not across modes".[97] Brazil explicitly linked "like circumstances" to "aim and effects" and explained that its proposed interpretation

> drew on another approach to likeness identified in the jurisprudence on trade in goods, which was to define it on the basis of the "aims and effects" or of the regulatory objective being pursued by a certain measure affecting the product or its producers. In this connection, services and/or service suppliers would be considered "like" only if they were subject to the same regulatory framework, which did not mean that they necessarily had to be in compliance with the same regulatory framework. [...] This approach was in keeping with the "principle of equality"... according to which the same treatment must be accorded to persons under the same conditions or similarly situated".[98]

Very few Members commented on this proposal, mainly because most of them considered that this type of issue was not appropriate for a "technical" review of the GATS. However, it is interesting to note a comment by the United States, which "did not see a difference"

[96] Council for Trade in Services, Report of the Meeting Held on 3 December 2001, Note by the Secretariat, S/C/M/56, para. 28. The informal communication from Brazil is contained on JOB(01)/165, *MFN, National Treatment and Like Circumstances*, 30 November 2001.

[97] Meeting of the Council for Trade in Services on 5 June 2002, Note by the Secretariat, S/C/M/60, para. 24.

[98] Meeting of the Council for Trade in Services on 3 December 2001, Note by the Secretariat, S/C/M/56, paras. 28-29. Brazil further explained that "[t]he concept of "like circumstances" should be understood such that the services and service suppliers must be within the scope of application [of] any given regulation, but needed not necessarily be required to comply with it, as otherwise this would allow extreme discretion on the part of the regulator, thus affecting the very standard of treatment that would be expected." Meeting of the Council for Trade in Services on 19 March 2002, Note by the Secretariat, S/C/M/59, para. 27.

between the two concepts of "like services and services suppliers" vs. "in like circumstances".[99]

The Brazilian proposal aimed at a specific application of "like circumstances", i.e. one which would ensure that the comparison between foreign and national services and service suppliers would be limited to those operating within the same mode of supply. Such an application would be different from NAFTA's, where "like circumstances" is a criteria used within a mode of supply, for instance to compare foreign and domestic investors. Arguably, this latter approach gives a potentially more important reach to the concept (see below).

(c) Arguments in the *US – Gambling* dispute

In *US – Gambling*, the United States argued in favour of a distinction based on "regulatory distinctions" to differentiate between internet gambling and gambling by other means. The United States argued, *inter alia*,

> "Regulatory distinctions are directly relevant under GATS Article XVII, and should be considered in their own right – not solely through the lens of consumer perceptions. The GATS explicitly recognizes in its preamble the "right of Members to regulate" services. The "like services and suppliers" language of Article XVII must therefore be interpreted in light of that object and purpose of the GATS. Thus, one must consider not only the different competitive characteristics of a services or supplier as such, but also the existence of regulatory distinctions between services in interpreting and applying the likeness analysis under Article XVII. Such issues have been addressed in the goods context under the rubric of consumer perception and their impact on competitive relationship, but they merit independent consideration in the context of the GATS. They assume particular importance in this dispute because gambling is so heavily regulated. ..."[100] [emphasis added]

[99] *Ibid*., para. 29.

[100] Panel report on *US - Gambling*, para. 3.188. Note also that, in connection with the signing of the US – Australia Free Trade Agreement, the governments of US and Australia signed a letter of understanding, which is an integral part of the Agreement, concerning the regulation of gambling and betting services. They

In a reply to the panel, the United States clarifies that: "The more relevant likeness factor in this dispute is therefore not differences in regulation *per se*, but differences in the characteristics of services and suppliers that influence the manner in which they are regulated".[101] The United States referred in particular to various risks associated with remote gambling (organized crime, money laundering, health risks, child and youth gambling, etc.) as compared to other "non-remote" forms of gambling. Unsurprisingly, the United States does not directly refer to "aim and effects" or "like circumstances", but the objective sought seems to be similar. The thrust of the US arguments presented in this WTO dispute is comparable to those put forward in the NAFTA *Cross-border* trucking dispute. Also, in support of its arguments that the measure at issue does not afford less favourable treatment, that "... even in a group of like services or like suppliers, nothing in the GATS prevents the maintenance of nationality-neutral regulatory distinctions" and refers to Hudec's article on "aim and effects" to support this statement.[102]

The US arguments find some echoes in the third-party submissions of Japan and, to a lesser extent, the EC. Japan refers to "regulatory circumstances" which may be different for services provided cross-border as compared to services supplied via a commercial presence, thus making these services "unlike". An "importing" Member would have to demonstrate that different regulatory requirements are necessary.[103] The EC stated that "... if differences in the factual circumstances had an impact e.g. on the characteristics of the services themselves, as they are provided in the territory of the WTO Member whose measure is at issue, they could have an impact on the likeness of the domestic and foreign service."[104]

The concepts of "regulatory distinctions", "regulatory circumstances" or "factual circumstances" raise a number of interpretative questions. For instance, it is not clear how they should be articulated with the traditional four GATT criteria: are they meant to be considered within the existing criteria, or as an additional one? Or should they replace these

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agreed that such regulation "will typically fall within the exceptions provided under subparagraphs (a) and (c)(i) of Article XIV of GATS ... In addition, suppliers of gambling and betting services established outside of a jurisdiction are typically not in similar circumstances to suppliers of gambling and betting services within that jurisdiction". "Reciprocal" letter signed on 18 May 2004 by R. Zoellick for the United States and M. Vaile for Australia.

[101] Panel report in *US – Gambling*, p. C-44.
[102] Panel report in *US – Gambling*, para. 3.228.
[103] Panel report in *US – Gambling*, para. 4.45.
[104] Panel report in *US - Gambling*, p. C-83.

criteria? But they indicate the readiness to consider different parameters in the context of national treatment in services. And they are most likely to haunt again the next services dispute dealing with national treatment.

G. WHERE DO WE GO FROM HERE?

A first, "easy", option for determining likeness under the GATS would be to replicate the GATT approach. The likeness of foreign and national services and service suppliers would be based on a test focussing on intrinsic characteristics, classification, end-uses and consumer tastes. It is probable that panels and the Appellate Body will be able to refine these criteria over time, to better take into account the specificities of services trade. Then, any other justification for regulatory distinctions would have to be addressed under Article XIV. This option would have the advantage of being perfectly in line with current Appellate Body jurisprudence.

There is, however, a feeling of uneasiness, which tends to be shared by Members and commentators, about transplanting the traditional GATT approach into the GATS. The intangibility of services activities, the existence of four modes of supply, the difficulty to separate the services from the supplier, and the fact that regulation of services is generally more complex than in goods would seem to call for a more contrasted approach. A likeness test based exclusively on the four criteria used in GATT jurisprudence may have liberalizing effects going beyond what was anticipated by the drafters of the GATS.[105] Moreover, one should keep in mind that Article XIV of the GATS offers even more limited scope than GATT Article XX for justifying possible exceptions.[106] Also, the fact that NAFTA, for instance, has a different likeness standard for national treatment in goods and in services should be noted; as should the fact that NAFTA parties and case-law seem to prefer defining likeness in services on the basis of broader concepts than those used in the WTO jurisprudence in goods. Hence, we would argue that there is a need for "something different" under GATS Article XVII, which could allow to take into account regulatory distinctions not

[105] In the same sense, see Zdouc (1999), p. 342: " ... overtly strict interpretations of the GATS non-discrimination clauses – irrespective of possibly *legitimate policies* pursued by national legislators – could in effect undermine sovereign regulatory powers of WTO Member governments to a larger degree than similarly strict interpretations of corresponding GATT provisions". Mattoo, Verhoosel, and Krajewski, among others, also share this view.

[106] For instance, Article XIV does not contain an exception relating to the protection of natural resources.

necessarily based on the four criteria of the GATT jurisprudence, and would broaden the points of reference which should be used to determine when there is a violation of national treatment.

Let us come back to aim and effect. As explained above, this approach allows to take into account the need for regulators to draw distinctions between *a priori* competitive products. Two main questions deserve careful consideration. The first one is whether aim and effect can be read in GATS Article XVII. The second issue is whether aim and effect can be improved in order to ensure that only *bona fide* regulatory distinctions pass the test, and that the effect on foreign services and suppliers is not disproportionate. In other words, we would keep what is good in aim and effect (essentially the rationale underlying the test), and correct the weaknesses that affected its application.

Turning to the first issue, we would note that the concept of "like services and service suppliers" is fluid: the ordinary meaning of "like" is not directly operational and requires a broader theoretical construct to establish the parameters by which likeness can be established.[107] In this context, it could be argued that looking at the aim and the effect of a measure to distinguish services and service suppliers is *a priori* not more arbitrary or artificial than relying on classification or consumer tastes, for instance. As already noted, the text of Article XVII does not contain a reference to the concept of "so as to afford protection", which was used as a basis for formulating the original aim and effect test. But a possible textual link for reading aim and effect in the GATS could be found in footnote 10 to paragraph 1 of Article XVII, which stipulates that Members are not obliged to "compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers".[108] Arguably, a disadvantage which is "inherent"[109] is not due to a *de facto* discrimination; hence, to paraphrase GATT Article III:1, it is not "so as to afford protection" to domestic services and producers. This interpretation could give meaning to footnote 10,

[107] The definition contained in the Oxford English Dictionary reads: "Having the same characteristics or qualities as some other person or thing; of approximately identical shape, size, colour, character, etc., with something else; similar; resembling; analogous."

[108] In the same sense, see Zdouc (2004) and Verhoosel.

[109] The Oxford English Dictionary (on-line version) defines "inherent" as follows: "Existing in something as a permanent attribute or quality; forming an element, esp. a characteristic or essential element of something; belonging to the intrinsic nature of that which is spoken of; indwelling, intrinsic, essential".

whose role has remained unclear so far.[110] Moreover, the preamble of the GATS, which provides the context for interpreting GATS provisions, could be invoked as a basis for considering regulatory distinctions in their own right, as it explicitly recognises "the right for Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives ..." (4th para.). And, as discussed above, the criteria used in the current jurisprudence make little sense for determining likeness of suppliers, thus leaving this concept largely empty; this is paradoxical considering that regulations are most often directed at the supplier.

Against this background, regulatory distinctions could be taken into consideration to the extent that they are based on objective differences in the services and service suppliers concerned – other than classification, end-uses, etc. – and pursue non-protectionist policy objectives. Under this approach, aim and effect would replace rather than complement the traditional GATT test to determine whether services and service suppliers are like. Alternatively, aim and effect could be linked to the concept of "less favourable" in Article XVII, which would presuppose a "traditional" determination, probably on the basis of the GATT test (this approach would likely lessen the importance of likeness in national treatment claims). Linking aim and effect with the determination of less favourable treatment would have the advantage of keeping with the trend in Appellate Body's jurisprudence described above. At the end of the day, whether aim and effect is considered under likeness or under "less favourable" should not make a practical difference in terms of the final result.

The second issue is how to strengthen aim and effect, which, in turns, raises two questions. First, there is a need to ensure that a truly objective assessment of governments' regulatory intent can be made. But here, the Appellate Body has already given indications that such an assessment was possible when it referred to the "protective application" of a measure which "can most often be discerned from the design, the architecture and the revealing structure of a measure".[111] One could also recall *Canada-Periodicals*, where the Appellate Body concluded, on the basis of, *inter alia*, "the several statements of the Government of Canada's explicit policy objectives in introducing the measure and the

[110] The panel in *Canada – Autos* stated that footnote 10 "does not provide cover for actions which might modify the conditions of competition against services and service suppliers which are already disadvantaged due to their foreign character". The panel does not clarify the meaning of "inherent". See panel report, para. 10.300.

demonstrated actual protective effect of the measure" that the "design and structure" of the tax in question was to afford protection;[112] and in *Chile – Taxes on Alcoholic Beverages*, it considered that it was pertinent to take into consideration "the statutory purposes or objectives – that is, the purpose or objectives of a Member's legislature and government as a whole – to the extent that they are given *objective* expression in the statute itself".[113]

Second, the main problem with aim and effect as applied by the panel on *US – Taxes on Automobiles*, is not the fact that governments should be allowed to define likeness on the basis of certain regulatory objectives of their choice. It is rather that, in this dispute, the panel opened the door to all kinds of market barriers by refusing to examine the efficiency of the measure, and by introducing an "inherency" test allowing to easily dismiss claims that imported products bore a heavier burden of the tax.[114] These weaknesses in the application of aim and effect no doubt contributed to discredit it. Hence, should aim and effect be resurrected, it would have to be strengthened so as to ensure that a reasonable nexus exists between the measure and the policy objective sought. Or, in other words, a solution must be found to prevent situations where a truly *bona fide* regulation would have a disproportionate effect on foreigners.

This leads us to argue, as other commentators have done, that an "improved aim and effect" almost inevitably entails introducing some kind of proportionality or necessity test in Article XVII. Mattoo seems to suggest that such a test could be read in relation to the supplier, but would prefer that its explicit inclusion be considered by Members in negotiations.[115] Verhoosel is in favour of an "integrated necessity test" to be read in WTO national treatment provisions and considers that existing jurisprudence has already condoned de facto an "in-depth" necessity test under GATT Article III:2.[116] The question is whether and how such a test could be read in GATS Article XVII.

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[111] Appellate Body report in *Japan – Alcoholic Beverages*, p. 18.

[112] Appellate Body report in *Canada – Periodicals*, p. 32

[113] Appellate Body report on *Chile – Taxes on Alcoholic Beverages*, para. 62 (emphasis in the original).

[114] For a detailed critic of the panel's approach in *US – Taxes on Automobiles*, see Mattoo, p. 131 and Verhoosel, p. 53.

[115] Mattoo, p. 133.

[116] In that dispute, the panel examined "the *relationship* between the stated objective and the measure in question. If a rational relationship between the stated objective and the measure is lacking, this may provide evidence of protective application ..." (Panel report, para. 7.148, original emphasis). The Appellate Body approved this approach: "It appears to us that the Panel did no more than try to relate the observable structural features of the measure with its declared purposes, a task that is unavoidable in appraising the application of the

A possible hook for ensuring that a measure has least trade-restrictive effects could be the concept of "inherence" contained in footnote 10 referred to above. Paraphrasing the definition quoted above, an inherent competitive disadvantage "exists as a permanent attribute or quality" in the foreign service or supplier and will persist irrespective of the type regulatory measure in force. All other conditions being equal, foreign services and suppliers suffer from the very – and only – fact that they are foreign. However, telling whether, in practice, a disadvantage results or not from the "inherent" foreign character of the service or the supplier is fraught with difficulties. A reliable test remains to be developed to give meaning to this concept of "inherence". Two commentators have made suggestions in this regard.

Verhoosel argues that reading a necessity test in footnote 10 "... follows inevitably from the concept of 'inherence', which requires a counterfactual analysis of whether the regulation at hand constitutes a necessary condition for the same adverse effect to occur, the foreign character remaining the same".[117] The "counterfactual" analysis would require a panel to examine various measures pursuing the same regulatory objective; if the adverse effects on foreign services and suppliers persists with these various measures, it would mean that they are "inherent" to the foreign character, and, hence, the measure at stake would not be considered as affording less favourable treatment. This raises several questions, however. In practice, is it feasible for a panel to assess whether different measures pursue the same objective and whether they amount to similar adverse effects on foreigners? Should it be to a panel or the parties to identify the range of possible measures and their aptitude to pursue the same regulatory objective? Is it possible to determine *in abstracto* whether these different measures present the same "inherent" competitive disadvantage to foreign services and suppliers?

Zdouc reads a "*de facto* discrimination test" in footnote 10 and proposes a three-step test to distinguish the adverse effects caused by the origin-neutral regulation at issue from the adverse effects due to the foreign character of the service or the service supplier. First, one

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measure as protective or not of domestic production" (para. 72). Verhoosel (pp. 29-30) argues that, in *Chile – Taxes on Alcoholic Beverages*, both the panel and the Appellate Body held that "the discriminatory character of a domestic regulation is revealed under GATT Article III:2, second sentence, by the lack of a 'necessary' relationship between the measure and the purported policy goal".

would measure the inherent competitive disadvantages "on the basis of a comparison between foreign and like domestic services and service suppliers". Second, one would assess the restrictive impact of the measure at stake on domestic services and service suppliers, and, third, one would ascertain the restrictive impact of the same measure on the foreign services and services suppliers. Then, one would compare the third variable "with the sum of the first and second variables" and "if these sums are equal, no *de facto* discriminatory domestic regulation has been taken". Zdouc acknowledges that this approach presupposes that each of these three elements be susceptible of "some form of quantification", but he is silent on the parameters which could be used for that purpose.[118] And that is certainly the key to implementing this test. The main challenge may well be the quantification of the first variable, which entails the identification of parameters to "measure" an inherent competitive disadvantage.

These two approaches are conceptually innovative and provide an interesting framework for further analysis. They would need to be further elaborated upon in view of a possible implementation.

Another possible basis for reading a necessity test in Article XVII could be found in GATS Article VI dealing with domestic regulation. Article VI:5 stipulates that, in sectors where Members have undertaken specific commitments, they shall not apply "licensing and qualification requirements and technical standards" which are, *inter alia*, "more burdensome than necessary to ensure the quality of the service". Reading Article XVII in the light of Article VI:5 would allow to apply this test to origin-neutral measures in order to identify de facto national treatment discrimination. There may be several difficulties to this approach, however. First, paragraph 5 of Article VI contains the additional condition that the measure in question "could not reasonably have been expected of the Member at the time the specific commitments ... were made". It is generally acknowledged that this condition, borrowed from GATT jurisprudence on non-violation cases, makes Article VI:5 an extremely weak discipline. This weakness might nevertheless disappear in the future as paragraph 4 of Article VI contains a mandate to develop disciplines on domestic regulation, containing, *inter alia*, the "no more burdensome than necessary" criterion. In 1998, Members completed part

[117] Verhoosel, pp. 90-91.

of this mandate when they adopted the *Disciplines on Domestic Regulation in the Accountancy Sector*, which contain an elaborated necessity test inspired from Article 2.2 of the Agreement on Technical Barriers to Trade.[119] Negotiations aiming at agreeing on generally applicable disciplines are still underway.

The main problem, however, is that Article VI has so far been understood by Members as applying only to non-discriminatory measures. The fact that GATS Articles VI and XVII are mutually exclusive is not found in the GATS itself, but is expressed, for instance, in the Accountancy Disciplines, which state that they "do not address measures subject to scheduling under Articles XVI and XVII of the GATS...".[120] Arguably, nothing would prevent Members from modifying this understanding and decide that the criteria contained in Article VI:4, in particular its necessity test, can apply to measures falling under Article XVII.

This would have the advantage of making better sense of GATS Article VI:4. In effect, the current understanding that Article VI applies to non-discriminatory measures leads to the questionable consequence that WTO judiciary organs can rule on the "necessity" of a measure which does not discriminate, whether *de facto* or *de jure*, foreign services and service suppliers, but is seen unsound from an economic point of view and has possible a restrictive effect on trade (this effect being the same for nationals and foreigners). As a consequence, it will allow a WTO judge to rule on societal choices (opening hours of shops, to take just one example), based on consideration of trade and economic efficiency. This is highly undesirable. Allowing the WTO judiciary system to dictate "sound" economic and trade policies would be dangerous for the Organization as it would most likely be politically unacceptable for many Members. It would also depart from the historical role of

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[118] Zdouc (2004), p. 412. Zdouc does not refer directly to a necessity test, but notes that the analysis he proposes resembles that which normally would take place under GATT Article XX or GATS Article XIV.

[119] Adopted by the Council for Trade in Services on 14 December 1998, S/L/64 ("Accountancy Disciplines"). They have not yet entered into force. Paragraph 2 of the Disciplines elaborated the necessity test as follows: "Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS, relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective. Legitimate objectives are, *inter alia*, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession."

[120] *Ibid.*, para. 1. The same idea is found in the *Scheduling Guidelines* (S/L/92), para. 14 and Attachment 4, as well as *US – Gambling*, report by the panel, paras. 6.301-6.313.

GATT/WTO, which is to ensure access to markets and fair conditions of competition once in the market. No more, no less. This is expressed in the third paragraph of the WTO Agreement, which states Members' desire to contribute to the "objectives [expressed in the first paragraph] by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations". However, given the current background, and in the absence of an explicit decision by Members on this issue, applying Article VI necessity test in the context of an analysis made under Article XVII may, however, be a long way to go for a panel.

Reading a necessity test in Article XVII would amount to introducing an exception in the national treatment provision, as was done, for instance, in the NAFTA dispute on *Cross-Border Trucking Services*. Consequently, the role of GATS Article XIV would be trimmed and, in practice, it role might then be limited to cases of *de jure* discrimination. But the Appellate Body may have already provided the answer to the type of concern when it stated that "[t]he scope and meaning of Article III:4 should not be broadened or restricted beyond what is required by the normal customary international law rules of treaty interpretation, simply because Article XX(b) exists and may be available to justify measures inconsistent with Article III:4. The fact that an interpretation of Article III:4, under those rules, implies a less frequent recourse to Article XX(b) does not deprive the exception in Article XX(b) of *effet utile*".[121] This jurisprudence could apply *mutatis mutandis* to the relation between GATS Articles XIV and XVII. A possible diminished role for Article XIV should be weighed against the possibility for Members to make regulatory distinctions beyond the limited list of exceptions contained in that provision (and the fact there would be no need to formally amend Article XIV, a prospect which is close to unrealistic anyway).

Finally, applying an improved aim and effect under the GATS would be without prejudice to the approach taken under the GATT. As made clear by the Appellate Body with the "accordion metaphor", likeness does not need to have the same scope across the different provisions of a given agreement, let alone in different WTO agreements.

[121] Appellate Body report in *EC – Asbestos*, para. 115.

H. CONCLUSION

The main purpose of this contribution is to further the debate on a fundamental question which has so far attracted surprisingly little attention, at least considering its potential importance for the implementation of the GATS. We do not pretend to provide definitive answers or ready-made solutions, but rather contribute to a much-needed brainstorming.

The implementation of the national treatment obligation under the GATS raises unprecedented questions in the WTO legal system. While the "goods model" can offer a useful starting-point for analysis, it also has limits. New concepts – in particular the application of the national treatment to service suppliers in addition to services, the existence of four modes of supply – call for different solutions.

The correlation between services and service suppliers has been dealt with in a cursory manner by panels, with the result that the concept of like suppliers remains largely empty. This is not surprising since the traditional likeness test developed under the GATS is ill-suited to compare service suppliers. An interpretation is needed which does not result in an artificial separation between the service and the supplier, but allows a more global approach. Such an approach would also allow to do without the so-called "likeness across modes", which is an unhelpful way of posing a real question, that of whether and how to take into consideration the manner in which a service is supplied ("means" of supply as opposed to modes) in the determination of likeness. The response seems to hinge in large part on the meaning which shall be given to the concept of like supplier.

There seems to be a shared feeling that the well-established GATT approach to determine likeness of goods cannot be mechanically transposed under the GATS. The four criteria used in GATT jurisprudence offer a narrow base for determining likeness of services and service suppliers, and may have liberalizing effects exceeding what is necessary to protect conditions of competitions for foreign services and service suppliers. Hence, different parameters should enter the equation to allow non-protectionist regulatory objectives (other than those deriving from the GATT likeness test or GATS Article XIV) to be taken into consideration. What is known as the "aim and effect" approach could offer a starting-point for dealing with national treatment claims in services trade. However, while the thrust of this

approach has merits, its application should be strengthened to permit only good faith measures which do not have disproportionate effects on foreign services and service suppliers. We are aware that aim and effect is in the Appellate Body's bad books, but we believe that the issue must be revisited.

So far, national treatment and likeness were addressed in only two disputes where did not feature prominently. It is still time to consider a different focus.

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