Some thoughts on the concept of ‘likeness’
in the GATS

MIREILLE COSSY*

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 cursory manner. Moreover, in WTO services bodies, Members have shown little interest in discussing these issues in abstracto and have expressed a preference for leaving it to the Panels and the Appellate Body to determine likeness on a case-by-case basis, as has been done under the GATT.

There is perhaps one point on which there is general agreement: that the application of the national treatment obligation and the determination of likeness give rise to a wider range of questions – and uncertainties – under the GATS than under the GATT. The intangibility of services, the difficulty of drawing a line between the product and the producer, the existence of four modes of supply, the combined reference to services and service suppliers, the lack of a detailed nomenclature and the customised nature of many transactions are some of the factors that complicate the task of establishing likeness in services trade. In brief, ‘the concept of likeness … is more elusive in services than in goods’.

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1 Subsidies and Trade in Services, Note by the Secretariat, S/WP:9, 6 March 1996 at 3.
However, defining some basic parameters concerning the scope of the national treatment obligation, including the concept of likeness, would be useful given that, under the GATS, the application of national treatment is negotiable. Members should be able to know more precisely the extent of the obligations they contract when undertaking a national treatment commitment, and be better able to assess the potential for de facto discrimination entailed by such a commitment. As under the GATT, the definition 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 chapter will focus on the concept of likeness in the context of the national treatment obligation (GATS Article XVII). It is concerned mainly with situations of de facto national treatment violations as these raise the thorniest questions. After a brief review of the relevant GATS provisions and the existing jurisprudence, we shall examine whether the criteria developed by GATT case law (physical characteristics, classification, end-use and consumer tastes) can be transposed to services trade and to what extent they may contribute to establishing likeness under the GATS. We shall then discuss whether 'something different' should be envisaged under the GATS.

B. Where do we start?

As under the GATT, the GATS national treatment obligation has to be understood in terms of competitive opportunities: 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. 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

2. These are situations in which, although the measure does not formally distinguish services and service suppliers on the basis of national origin (we are talking about 'origin-neutral measures'), it de facto grants less favourable treatment to foreign services and service suppliers because they are less likely to be able to comply with the measure than services and suppliers of national origin. Example: a measure establishes a prior residency requirement for suppliers to be able to supply a service. De jure discrimination refers to measures which explicitly distinguish between services or suppliers on the basis of their origin.

affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.10

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

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.

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’ and that the purpose of that provision was to protect ‘expectations on the competitive relationship between imported and domestic products’.3

There are also several differences between the national treatment obligations in GATT Article III and GATS Article XVII. First, whereas the GATT covers only products, the GATS national treatment obligation includes both products (services), and 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.

Neither the GATS nor the Guidelines for the Scheduling of Specific Commitments under the GATS6 provide guidance as to which criteria

Panel report in US – Section 337, paras. 5.11 and 5.13.

Adopted by the Council for Trade in Services on 23 March 2001, S/L/92 (hereinafter the 'Scheduling Guidelines') and updating the 1993 Explanatory Note (MTN.GNS/W/164 + Add.1) circulated during the Uruguay Round. As stated in paragraph 1, the Scheduling Guidelines aim at explaining how specific commitments should be set out in schedules in order to achieve precision and clarity; however, they ‘should not be considered as a legal
should be taken into account to determine likeness. One should note, though, that the Scheduling Guidelines address the scope of national treatment in a way which might be indirectly relevant for likeness. Paragraph 15, in the section dealing with national treatment, stipulates that

there 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'. The potential legal implications of this statement are unclear. For instance, does this imply 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?

Discussions in WTO services bodies, such as the Services Council and the Working Party on GATS Rules, showed that most Members had little enthusiasm for discussing these issues in abstracto, but tend to share the view that it must be left to Panels and the Appellate Body to determine likeness on a case-by-case basis. One can also detect certain doubts about a mechanical transposition of the GATT approach to services trade.

The limited case law on the GATS has not provided much clarification 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 service suppliers interpretation of the GATS. 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.

The correlation between 'like services and service suppliers' and the possible implications of this combined reference in national treatment claims will be discussed in another publication.

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/WFPR/6/26 -27). See also the arguments of the parties and third parties in the panel report in EC – Bananas II.

Panel report in EC – Bananas III, paras. 7.322. This finding was made in the context of a MSN claim and was not reviewed by the Appellate Body. It is true that the issue of likeness of service suppliers was not really addressed by the parties.

Panel report in Canada – Autos, para. 10.307. The issue of 'likeness across modes' will be discussed in another publication.

Panel report in US – Gambling, Sections III and IV.

Panel report in US – Gambling, para. 3.69.

were like without justifying its decision in detail. Reference was made to the 'nature' and 'characteristics' of the services at stake, but the Panel did not explain what these were. Also, the restraint exercised by the Panel when looking at the likeness of service suppliers (to the extent that entities provide these like services, they are like service suppliers) has been criticised by various commentators. This finding was repeated in the Canada – Autos dispute, with the useful clarification that it was applied for the purpose of the case, thus leaving the door open for a different approach in future cases. Moreover, in the Canada – Autos dispute, the Panel introduced the questionable concept of 'likeness across modes'. In the latest disputes, US – Gambling, the Panel exercised judicial economy by respect to the complaint of national treatment violation made by Antigua and Barbuda (hereafter 'Antigua') under Article XVII. The arguments of the parties and third parties, reflected in the descriptive part of the Panel report, offer nevertheless a good idea of the issues arising in a mode 1 national treatment claim.

Another important step in the GATS national treatment case law is the rejection of the so-called 'aims and effects' test by the Appellate Body in the EC – Bananas III dispute (see below for a discussion on aims and effects). However, although the Appellate Body categorically condemned aims and effects, it did not indicate which criteria should be used instead to guide an assessment of national treatment claims under the GATS. We can only presume that the Appellate Body intends to use an approach based on the four-pronged GATT test (see next section).

Does the paucity of the discussion on likeness mean that, as argued by Antigua in the US – Gambling dispute, this concept 'will often be less important in disputes concerning trade in services than in disputes on trade in goods'? There is no reason why this should be the case. In fact, we would be tempted to argue that the difficulty of appraoching likeness in services trade may be a more convincing explanation of why Panels and the Appellate Body have so far avoided engaging in the exercise.
C. Applying the GATT approach to assess likeness under the GATS

1. The four criteria used under the GATT

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'. Putting aside the brief and frustrated attempt to introduce the so-called aims and effects test, these criteria have been used consistently by GATT and WTO Panels and the Appellate Body. In the EC - Asbestos case, the Appellate Body summarised 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 analysing '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. 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.

Concerning the delicate task of assessing likeness, the Appellate Body admitted that, in applying these criteria to the facts of a particular case, 'Panels can only apply their best judgement' and that '[i]t is will always

13 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 had identified were the last word for the purpose of determining likeness.

16 It should be noted that both the SSCCL and the CPC prov. are fifteen years old and are outdated in a number of sectors. Work has been under way for the past eight years in the Committee on Specific Commitments to try to update the SSCCL but no concrete results have been achieved so far. Beyond the technical difficulties, there are 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/SC/M/).
telecom model schedule. Members have a broad margin of discretion to define the services they are ready to commit on; they are encouraged, but not obliged to use these instruments. This flexibility might have the potential for reducing the comparability of schedules and diminishing the usefulness of the CPC and SSCL as a basis for comparing the likeness of services transactions. In practice, however, the vast 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.

Despite their widespread use, the SSCL and the CPC may be less reliable than the Harmonised System ('HS'), used with respect to tariff schedules, for identifying and defining service activities. Compared to the HS and its 8,000 entries, the SSCL is characterised by a high level of aggregation (11 sectors and some 160 sub-sectors). Although the CPC is more detailed than the SSCL, its definitions remain broad, even at a five-digit level. To take one example, should services provided by cardiologists and dermatologists be considered 'like' because they fall under the same CPC category of 'specialised medical services' (CPC 93122)? In some sectors, nevertheless, the CPC breakdown may be considered to refer to clearly-defined activities: 'taxi services' (CPC 71221) is one possible example. Also, in financial services, the nature of the activities listed in the Annex seems clear.

Overall, services classification instruments appear to be less reliable than the HS for determining likeness of services, but cannot be considered totally irrelevant. On the one hand, the fact that two services fall under the same CPC category will generally be insufficient to establish likeness; at best, it will create a presumption thereof. On the other hand, there will be a strong presumption that two services falling under different categories are unlike.

(b) Likeness of suppliers

The CPC defines service activities and does not consider the quality or characteristics of the supplier. Hence, it can at best be indirectly relevant to compare service suppliers. In the Canada – Autos case, the

Panel assessed summarily the likeness of Canadian vis-à-vis Japanese companies against the relevant definition contained in the CPC. It found that, contrary to the claim made 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. More generally, using the definition of services activities to deduce the likeness of suppliers would lead to the conclusion reached by the EC – Bananas III Panel, which was much debated by commentators, that entities providing like services are like service suppliers.

3. Characteristics of services and service suppliers

(a) Likeness of services

A criterion focusing on the 'physical' characteristics of products, 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 that could distinguish one service from another. In EC – Bananas 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.

In the US – Gambling dispute, the parties developed detailed arguments regarding the characteristics of the types of games found in the gambling industry, coming very close to a physical test. For instance, the nature of the different types of games was discussed in detail and a comparison

17 See Scheduling Guidelines, Part II, Section A.
18 In the same sense, see A. Mattoo, 'National Treatment in the GATS – Corner-Stone or Pandora's Box?', Journal of World Trade 31(1) (1997), 107–135, at p. 128.
19 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'.
20 Panel report in Canada – Autos, paras. 10.283–10.289. These finding were not reviewed by the Appellate Body.
21 Panel report in EC – Bananas III, para. 7.322.
was made between betting on software algorithms, as is the case for Internet gambling, and using physical gambling paraphernalia as in a casino. Quoting the EC – Asbestos Appellate Body report,23 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 transactions are undoubtedly more elusive than those of tangible goods, and even more so in sectors where services transactions are customised. This being said, could a criterion relating to the 'intrinsic' characteristics of services play a useful role? Such characteristics could relate, for instance, not only 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 contribute to the identification of such intrinsic characteristics (for example, in the case of hair-dressing services, the intrinsic characteristics of the service would involve cutting, dressing and styling the hair). Perhaps the main difficulty is 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.24 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 characteristics of the supplier 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.25

23 '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, paras. 113.

24 In US – Gambling, the parties argued at length over the characteristics of gambling paraphernalia: type of technology, sound and visual effects, surroundings, etc. See Panel report, paras. 3.152 ff.


26 Panel report in EC – Bananas III, para. 4.677.


29 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 their size. See, for instance, Communication from Canada, Initial Proposal on Small- and Medium-Sized Enterprises, S/CSS/W/69, as well as the reports contained in S/CSS/M/8 to S/CSS/ M/13. The debate also shows the difficulty of defining what a small- and medium-sized enterprise (SME) is, since definitions seem to vary widely among Members.

30 Nothing in the GATS appears to allow for a differentiation between state-owned and privately owned companies. On the contrary, various provisions suggest that the GATS is neutral with respect to ownership. Article XXVIII(b), defines a monopoly supplier as 'any person, public or private ...', Article XXVIII(b) defines a juridical person as 'any
Taking into account such supplier-related criteria may make sense in an aims and effects type of test, where they would be assessed against the policy objective of a measure. However, in the four-pronged test currently used under the GATT, these criteria would 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’.

This might lead to an arbitrary reduction in the scope of the national treatment obligation.

4. The criteria of ‘consumer 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 for comparing two services in the context of the GATS. Both criteria contribute to a determination as to 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 determination of the ‘extent to which products are capable of performing the same, or similar, functions (end-uses)’. The criterion of ‘consumer 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’, or, in other words, whether consumers regard two services as substitutable in a given market. The application of these criteria would have to rely on a significant quantity of factual evidence (will it always be available?) and will typically require a case-by-case determination.

(b) Likeness of service suppliers

Again, the criteria of end-uses and consumer tastes would be primarily relevant for comparing services and indirectly for service suppliers. A 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 enterprises coexist with private suppliers (telecommunication, postal services, energy, etc).

5. Is there a need for ‘something different’ under the GATS?

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 services. It is possible that Panels and the Appellate Body will be able to improve these criteria over time, to take better account of the specificities of services trade. Nevertheless, the concept of the like supplier is likely to remain largely empty since, by their very nature, all four criteria tend to focus on the service. The use of the GATT test also means that any other justification for regulatory distinction would have to be addressed under GATS Article XIV.

However, both Members and commentators are uneasy about simply transplanting the GATT approach into the GATS. The intangibility of services activities, the existence of the four modes of supply, the difficulty in separating the service from the supplier, and the fact that regulation for services is generally more complex than for goods would seem to call determination of whether suppliers compete for a given market will inevitably entail an assessment of whether their services can have similar end-uses and are treated as substitutable by consumers. Nevertheless, in some sectors, 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 so because, if tastes and perceptions bear directly on the service, the characteristics and qualities of the suppliers are likely to have an important influence on 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.

Although they tend to be recognised as the most pertinent criteria for determining a competitive likeness under the GATS, 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 contains 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.

for a more subtle approach. Legal definitions and jurisprudence show that the GATS bites deep\textsuperscript{34} and GATS Article XIV offers even less scope than GATT Article XX for justifying exceptions.\textsuperscript{35} Against this background, a likeness test based exclusively on the four criteria used in GATT jurisprudence may have liberalising effects beyond those anticipated by the drafters of the GATS (and by Members when they undertake national treatment commitments).\textsuperscript{36}

A look at the approach chosen in other trade and investment instruments may also be informative. NAFTA, for instance, has a different standard of likeness for national treatment in goods and in services. Also, the concept of 'like circumstances', found in the national treatment provisions related to investment (chapter 11) and cross-border trade in services (chapter 12), appears to be broader than a simple competitive test as it may allow a panel to take into account regulatory distinctions and weigh them in the light of a 'legitimate objective'. NAFTA parties and case law seem to prefer to define likeness in services on the basis of broader concepts than those used in the WTO jurisprudence in goods.\textsuperscript{37}

The OECD Declaration on International Investment and Multinational Enterprises seems to be based on a similar idea.\textsuperscript{38}

\textsuperscript{34} 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 relevant. A measure affecting trade in services is '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 '[a]ny measures are excluded 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. 7.385.

\textsuperscript{35} For instance, Article XIV does not contain an exception relating to the protection of natural resources equivalent to GATT Article XX(g).

\textsuperscript{36} In the same sense, see Zdouc (1999), at p. 342: 'overly 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'. Other commentators share the same view.


\textsuperscript{38} The Declaration defines national treatment as treatment "no less favourable than that accorded in like situations to domestic enterprises"; according to the Investment Committee, the expression 'like situations' implies that the comparison must be made 'between firms operating in the same sector' and that 'the key to determining whether a discriminatory measure applied to foreign-controlled enterprises constitutes an exception to National Treatment is to ascertain whether the discrimination is motivated, at least in part, by the fact that the enterprises concerned are under foreign control'. Declaration on International Investment and Multinational Enterprises and Clarifications of the National Treatment Instrument, 27 June 2000, National Treatment for Foreign-Controlled Enterprises, OECD 2005, Annex A and C.

\textsuperscript{39} 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), at p. 342.

\textsuperscript{40} 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 is considered to be relevant'. See Appellate Body report in Japan - Alcoholic Beverages II, at 15-16.
domestic production'. At issue was Article III.2 of the GATT, dealing with discriminatory taxes, and whose second sentence makes an explicit reference to paragraph 1 of Article III. The 'aims and effects' test is intended for use in cases where the measure does not distinguish between products on the basis of 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 non-protectionist government policies requiring regulatory distinctions which would be based on other criteria to be taken into account.41 Pursuant to aims and effects, a panel considers whether a regulatory distinction between products has a bona fide aim and whether it is a protectionist effect in favour of domestic products.42 A regulator is allowed to treat two products differently if the regulation which distinguishes between them has neither the aim nor the effect of affording protection to domestic products. In other words, there is a determination of likeness if and when the regulation at issue has 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. As explained by the Panel in Malt Beverages, such an approach is meant to give more deference to the regulator. Taking into account that the 'limited purpose of Article III' had to be considered in the interpretation of likeness, that Panel stated:

[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.]

According to Hudec, the aims and effects 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'.44

The aims and effects 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.2.45 The first argument invoked against aims and effects 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.46 The second concern, expressed by the panel, was the possible overlap with GATT Article XX.47 The main problem associated with aims and effects, 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.48 In Japan — Alcoholic Beverages II, the Panel and the Appellate Body applied a strict

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41 Panel report in US — Tariffs on Automobiles, para. 5.8.
42 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.
43 Panel report in US — Malt Beverages, para. 5.25.
46 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 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 in Japan — Alcoholic Beverages II, at para. 19.
47 The Panel further noted that the list of exceptions contained in Article XX of GATT 1994 could become redundant or useless because the aims-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 'aims and effects' test would circumvent the burden of proof established in Article XX, and might even shift this burden of proof on the complaining. Panel report in Japan — Alcoholic Beverages II, para. 6.17.
48 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 aims-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
reading of likeness, based on the test elaborated in the 1970s by the Working Party on Border Tax Adjustment. This approach, which is seen as resting on 'objective' criteria, has prevailed until now.

Shortly thereafter, the aims and effects approach 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 panel report dealing with Article III of the GATT 1947, United States – Taxes on Automobiles, as authority for its proposition, despite our recent ruling.49

Is EC – Bananas III the requiem for any approach taking into account the regulatory context in the GATS? In fact, there are signs in more recent GATT jurisprudence that 'aims and effects' is making a discreet return, but linked to the determination of less favourable treatment rather than of likeness.50

In Japan – Alcoholic Beverages II, the Appellate Body interpreted the 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'.51 Some commentators, such as Hudec, consider that this statement is no different from aims and effects

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.

Appellate Body report in EC – Bananas III, para. 241, footnotes omitted.


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, at p. 18.

52 Hudec, at p. 631.
54 Panel report in US – Taxes on Automobiles, para. 5.12 (emphasis added).
55 Appellate Body report in EC – Asbestos, para. 100. This is a 180 degree 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.
56 R. Howse and B. Türk, 'The WTO Impact on Internal Regulation – A Case Study of the Canada – EC Asbestos Dispute', in Gráinne de Búrca and Joanne Scott (eds.), The EU and the WTO: Legal and Constitutional Aspects (London: Hart Publishing, 2001), at p. 299. However, other commentators do not necessarily share this view (see L. Eehing, 'De Facto Discrimination in World Trade Law – National and Most-Favoured-Nation Treatment or Equal Treatment?', Journal of World Trade 36(5) (2002), pp. 921-977). 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.
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.' This finding, in particular, the concept of 'detrimental effect' merits clarification - does it amount to discriminatory treatment? How 'detrimental' must the effect be for a finding of less favourable treatment to be made? However, allowing 'factors or circumstances unrelated to the foreign origin of the product' to be taken into account could arguably open the door to an aims and effects test. 

2. What scope is there for regulatory distinctions in GATS

Article XVII?

Distinguishing services and service suppliers based on the 'regulatory context' may bring us back to an aims and effects type approach. Two main questions would then merit further consideration. The first is whether aims and effects can be read in GATS Article XVII. The second is whether this test can be improved in order to ensure that only bona fide regulatory distinctions would be accepted, and that the effect on foreign services and suppliers is not disproportionate. In other words, the rationale underlying aims and effects should be kept, while correcting the weaknesses that affected its application. 

Turning to the first question, we note that the concept of 'like services and service suppliers' is fluid: the ordinary meaning of 'like' is not directly applicable and requires a broader theoretical construct to establish the parameters by which likeness can be established. 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 no 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 aims and effects test. But a possible textual link for reading aims and effects into 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'. Arguably, a disadvantage which is 'inherent' is not due to an intent to discriminate and cannot be assimilated with 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, whose role has remained unclear so far. 

Hudec is of the view that paragraph 3 of Article XVII explicitly invites an aims and effects enquiry because a 'one-dimensional analysis of competitive impact', which some could be tempted to read in the text, might lead to invalidation of a measure on the basis of 'fortuitous market circumstances'. Moreover, the preamble of the GATS, which provides the context for interpreting its 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. And, as discussed above, applying the criteria used in GATT jurisprudence makes little sense for determining likeness of suppliers, thus leaving this concept largely without substance; this is paradoxical considering that services 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 and end-uses - and pursue non-protectionist policy objectives. Under this approach, aims and effects would replace rather than complement the GATT likeness test. 

Alternatively, aims and effects could be linked to the concept of 'less favourable' in Article XVII, which would presuppose a 'traditional'

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57 Appellate Body report in Dominican Republic – Import and Sale of Cigarettes, para. 96.
58 The definition 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; analogue.'
59 In the same sense, see Zdune (2004) and Verhoosel. Note that the use of the word 'compensate' raises several interpretative questions.
60 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.'
61 The Panel in Canada – Airbus 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.
determination of likeness, probably based on a GATT-type test; however, this approach would probably diminish the importance of likeness in national treatment claims. Linking aims and effects with the determination of less favourable treatment would have the advantage of fitting with the trend in the Appellate Body's jurisprudence described above. Ultimately, whether aims and effects are considered under likeness or under 'less favourable' should not make a practical difference in terms of the final result.

The second issue: how to strengthen aims and effects raises two questions. First, there is a need to ensure that a truly objective assessment of governments' regulatory intent can be made. The Appellate Body apparently considered 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'.

It might also be useful to 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 demonstrated actual protective effect of the measure' that the 'design and structure' of the tax in question was to afford protection; and in Chile – Taxes on Alcoholic Beverages, the Appellate Body 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 an objective expression in the statute itself'.

Second, the main problem with the aims and effects approach as applied by the panel in US – Taxes on Automobiles, is not 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 which allowed claims that imported products bore a heavier burden of tax to be easily dismissed. These weaknesses in the application of the aims and effects test no doubt contributed to its being discredited. Hence, should an aims and effects type approach be used under the GATS, it would have to be strengthened so as to ensure that a reasonable nexus exists between the measure and the policy objective in question. 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 aims and effects' approach would almost inevitably entail the introduction of some kind of proportionality or necessity test in Article XVII. Matteo seems to suggest that such a test could be inferred in relation to the supplier, but would prefer that its explicit inclusion be considered by Members in negotiations. Verhoosel is in favour of an 'integrated necessity test' to be read into WTO national treatment provisions and considers that existing jurisprudence has already conditioned de facto an 'in-depth' necessity test under GATT Article III:2. The question is whether and how such a test could be read into GATS Article XVII.

A possible hook for ensuring that a measure has 'least trade-restrictive effects' could be found in the concept of 'inherence' contained in footnote 10 to Article XVII. Paraphrasing the definition quoted above, an inherent competitive disadvantage 'exists as a permanent attribute or quality' in the foreign service or supplier and will thus persist irrespective of the type of 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, determination of whether, in practice, a disadvantage does or does not result from the 'inherent' foreign character of the service or the supplier is fraught with difficulties. A reliable test has yet 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 into footnote 10 'follows inevitably from the concept of 'inherence', which requires a counterfactual

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63 Appellate Body report in Japan – Alcoholic Beverages, at p. 18.
64 Appellate Body report in Canada – Periodicals, at p. 32.
65 Appellate Body report in Chile – Taxes on Alcoholic Beverages, para. 63 (emphasis in the original).
66 For a detailed critique of the panel's approach in US – Taxes on Automobiles, see Matteo, at p. 131 and Verhoosel, at p. 55.
analysis of whether the regulation at hand constitutes a necessary condition for the same adverse effect to occur, the foreign character remaining the same. The 'counterfactual' analysis would require a Panel to examine various measures for attaining the same regulatory objective; if the adverse effects on foreign services and suppliers persist when applying 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 would lead to similar adverse effects on foreigners? Should it be up to a Panel or to the parties concerned to identify the range of possible measures and their capability to pursue the same regulatory objective? Is it possible to determine in abstract whether different measures present the same 'inherent' competitive disadvantage to foreign services and suppliers?

Zdouc reads a 'de facto discrimination test' into footnote 10 and proposes a three-step test to distinguish the adverse effects caused by the origin-neutral regulation at issue from those due to the foreign character of the service or the service supplier. The first step is to measure the inherent competitive disadvantages 'on the basis of a comparison between foreign and like domestic services and service suppliers'. The second is to assess the restrictive impact of the measure at stake on domestic services and service suppliers, and the third to ascertain the restrictive impact of the same measure on the foreign services and service 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 is susceptible to 'some form of quantification', but he is silent on the parameters which could be used for that purpose. 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. While this author does not refer explicitly to a necessity test, he notes that his proposed approach resembles the one which would normally be used under GATT Article XX or GATS Article XIV.

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

Another possible basis for reading a necessity test into 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 could allow application of this test to origin-neutral measures in order to identify de facto national treatment discrimination. However, there may be several difficulties with this approach. 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, taken 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 of this mandate when they adopted the Disciplines on Domestic Regulation in the Accountancy Sector, which contain an elaborated necessity test inspired by Article 2.2 of the Agreement on Technical Barriers to Trade. Negotiations aiming at agreeing on generally applicable disciplines are still underway.

The main obstacle, however, is that the disciplines contained in paragraphs 4 and 5 of Article VI have so far been understood by Members as applying only to non-discriminatory measures. The fact that Article VI.4

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60 Verhoosel, at pp. 90–91. 61 Zdouc (2004), at p. 412. 62 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 fulfill 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.
and 5, on the one hand, and Article XVII on the other, 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’. Arguably, there is nothing to prevent Members from modifying this understanding and deciding that the criteria contained in Article VI/4, in particular its necessity test, can be used as context for assessing the conformity of measures under Article XVII. However, in the absence of an explicit decision by Members on this issue, resorting to the Article VI necessity test in an analysis made under Article XVII may be a long way for a Panel to go.

It is noteworthy in this regard that the current understanding that Articles VI/4 and 5 apply to non-discriminatory measures means that WTO judiciary organs could be in a position to condemn a particular measure on the ground that it is more burdensome than necessary, even though the possible negative effects are the same for both national and foreign services and suppliers, and even though the measure may be motivated by legitimate policy objectives, such as consumer or environmental protection. Now, in the absence of agreed benchmarks and standards, what would be the basis for ruling that technical standard A is more trade-restrictive than necessary, while technical standard B is acceptable? Should a non-discriminatory environmental regulation, for example, be looked at mainly through the lens of trade considerations? In practice, such a necessity test might mean, in the medium- to long-term, harmonisation of regulation through judiciary organs. Allowing the WTO judiciary system to dictate ‘sound’ regulation is likely to be politically unacceptable for many Members. It would also depart from the historical role of GATT/WTO, which is to ensure access of foreigners to markets and fair conditions of competition between foreigners and nationals in the market, and not to harmonise regulation. This is expressed in the third paragraph of the WTO Agreement, which states that 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’. Hence, we would agree with Marchetti and Mavroidis that a necessity test ‘has its limits’.

Assessing national treatment claims under Article XVII in the light of a necessity test would be likely to reduce, in practice, the role of the exceptions contained in Article XIV, which might then be resorted to mainly in cases of de jure discrimination. But the Appellate Body may have already provided the answer to this type of concern when it stated that ‘the 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’. This jurisprudence could apply mutatis mutandis to the relationship between GATS Articles XIV and XVII. A diminished role for Article XIV should be weighed against the possibility that Members could make regulatory distinctions beyond the limited list of exceptions contained in this provision (and the fact there would be no need to formally amend Article XIV, which is anyway an unrealistic prospect).

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

**E. Conclusion**

The main purpose of this chapter is to contribute to a much-needed brainstorming on a question which has so far attracted surprisingly little

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71 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.

72 On the one hand, a necessity test may raise interpretative problems in the future, and it is not readily apparent how such a test would be applied in the absence of internationally agreed standards or regulations that could be used as a benchmark against which to judge specific measures. On the other hand, the necessity test does not provide positive guidance for the design of a regulatory regime, since it lacks appropriate details for such an endeavour. Although this may eventually be a drawback in terms of the potential of the GATS to promote efficient regulation, it is also the reasonable outcome for an organization such as the WTO that promotes liberalisation while respecting regulatory diversity’. J. A. Marchetti and P. C. Mavroidis, ‘What are the Main Challenges for the GATS Framework Don’t Talk About Revolution’, *European Business Organization Law Review* 5 (2004), pp. 511–552 at 552.

73 Appellate Body report in EC - Asbestos, para. 115.
attention, considering its potential importance for the application of
GATS. The interpretation of the national treatment obligation in
the context of services trade raises unprecedented questions in the WTO
legal system. The limited GATS case-law has provided little clarification
on the concept of 'like services and service suppliers' and discussions in
WTO services bodies tend to indicate that most Members have little
interest in discussing these issues.

The four-pronged test developed under the GATT to establish likeness
of goods (classification, physical characteristics, end-uses and consumer
tastes) can be used to a certain extent under the GATS, but has limits.
End-uses and consumer tastes are the most useful criteria because they
help to determine whether two services are substitutable in a given
market and, hence, are a good indicator of a competitive relationship.
The aggregated nature of services classification instruments severely
restricts their relevance as possible tools for determining likeness.
'Physical characteristics' is a contradiction in terms for intangible ser-
vice transactions and it is not clear whether a criterion related to the
'intrinsic' characteristics of services could prove useful in practice;
Furthermore, attempting to distinguish among suppliers with criteria
based on 'characteristics' such as size or skills may result in artificial
distinctions. Also, all four criteria bring the analysis back to the service,
thus failing to address the concept of like supplier. Overall, these criteria
appear to offer too narrow a base for determining likeness of services
and service suppliers, and may have liberalising effects exceeding those
necessary to protect conditions of competition for foreign services and
service suppliers.

Hence, we would argue that a mechanical transposition of the four-
pronged GATT test to assess national treatment claims under the GATS
may not do justice to the more complicated nature of services trade
(including different modes of supply, intangibility of transactions, appli-
cation of national treatment to services and service suppliers and more
complex regulations). There seems to be a need to consider something
different, which would broaden the terms of reference used to determine
whether there is a violation of national treatment in international
services trade. Focusing on new criteria would allow different par-
eters to enter the equation in order to allow non-protectionist regu-
ltory objectives (other than those deriving from the GATT likeness test
or GATS Article XIV) to be taken into consideration. What is known as
the aims and effects approach could offer a starting point for dealing
with national treatment claims in services trade. However, while the
thrust of the aims and effects approach has merits, its application should
be strengthened so as to ensure that only good faith measures, having a
reasonable nexus with the regulatory objective sought, would be found
compatible with Article XVII. This, in turn, would mean reading some
kind of necessity test into GATS Article XVII.

We are aware that the aims and effects test has been declared non grata
by the Appellate Body. But there are signs in recent Appellate Body
jurisprudence that some elements of this approach can find their way
into WTO case law. This should offer an opportunity for reopening the
debate.

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