

1 ARTICLE I.....	1
1.1 Text of Article I	1
1.2 Article I:1	2
1.2.1 "measures affecting trade in services"	2
1.3 Article I:2(a).....	5
1.3.1 Means of delivery covered.....	5
1.3.2 Relevance of where the supplier operates, or is present.....	6
1.3.3 Relevance of ownership and control of the infrastructure used to supply the service.....	6
1.3.4 Relevance of degree of interaction between different operators	7
1.3.5 Relevance of supply by means of "linking" to another operator	7
1.4 Article I:2(c).....	8
1.4.1 Supply by a firm commercially present in one Member into the territory of another Member	8
1.5 Article I:3(b).....	9
1.6 Relationship with the GATT 1994	9

1 ARTICLE I

1.1 Text of Article I

Article I

Scope and Definition

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

In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;

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

- (c) "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

1.2 Article I:1

1.2.1 "measures affecting trade in services"

1. The Panel in *EC – Bananas III* defined the scope of application of the GATS in the following terms:

"[N]o 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."¹

2. Based on its interpretation of the scope of the GATS set out above, the Panel in *EC – Bananas III* concluded that there was "no legal basis for an *a priori* exclusion of measures within the EC banana import licensing regime from the scope of the GATS".² The Appellate Body upheld this finding and held that no provision of the Agreement "suggest[s] a limited scope of application for the GATS":

"In addressing this issue, we note that Article I:1 of the GATS provides that '[t]his Agreement applies to measures by Members affecting trade in services'. In our view, the use of the term 'affecting' reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word 'affecting' implies a measure that has 'an effect on', which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term 'affecting' in the context of Article III of the GATT is wider in scope than such terms as 'regulating' or 'governing'. ... We also note that Article I:3(b) of the GATS provides that 'services' includes *any service in any sector* except services supplied in the exercise of governmental authority' (emphasis added), and that Article XXVIII(b) of the GATS provides that the 'supply of a service' includes the production, distribution, marketing, sale and delivery of a service'. There is nothing at all in these provisions to suggest a limited scope of application for the GATS. ... For these reasons, we uphold the Panel's finding that there is no legal basis for an *a priori* exclusion of measures within the EC banana import licensing regime from the scope of the GATS."³

3. The Appellate Body in *Canada – Autos* stated that whether a measure is "affecting" trade in services must be assessed before any further consistency of this measure with other GATS provisions is considered:

"[T]he fundamental structure and logic of Article I:1, in relation to the rest of the GATS, require that determination of whether a measure is, in fact, covered by the GATS must be made before the consistency of that measure with any substantive obligation of the GATS can be assessed.

Article II:1 of the GATS states expressly that it applies only to 'any measure covered by this Agreement'. This explicit reference to the scope of the GATS confirms that the measure at issue must be found to be a measure 'affecting trade in services' within the meaning of Article I:1, and thus covered by the GATS, *before* any further examination of consistency with Article II can logically be made. We find, therefore, that the Panel should have inquired, as a threshold question, into whether the measure is within the scope of the GATS by examining whether the import duty exemption is a measure 'affecting trade in services' within the meaning of Article I. In failing to do so, the Panel erred in its interpretative approach.

¹ Panel Report, *EC – Bananas III*, para. 7.285.

² Panel Report, *EC – Bananas III*, para. 7.286.

³ Appellate Body Report, *EC – Bananas III*, para. 220; applied by the Panel in *US – Gambling*, para. 6.251. See also Panel Report, *EU – Energy Package*, paras. 7.408-7.410.

...

[W]e believe that at least two key legal issues must be examined to determine whether a measure is one 'affecting trade in services': first, whether there is 'trade in services' in the sense of Article I:2; and, second, whether the measure in issue 'affects' such trade in services within the meaning of Article I:1."⁴

4. Rejecting the notion that a panel could directly determine whether a measure was "affecting" trade in services under Article I:1 simply by examining whether the measure violated Article II or Article XVII of GATS, the Appellate Body in *Canada – Autos* stated that a panel needed instead to examine the effect of the measure on the relevant services *as services*, or upon the service suppliers *in their capacity as service suppliers*. It criticized the Panel's approach in the following terms:

"[T]he Panel ... never examined whether or how the import duty exemption affects *wholesale trade service suppliers in their capacity as service suppliers*. Rather, the Panel simply stated:

'Like the measures at issue in the *EC – Bananas III* case, the import duty exemption granted only to *manufacturer beneficiaries* bears upon conditions of competition in the supply of distribution services, regardless of whether it directly governs or indirectly affects the supply of such services. (emphasis added)'

We do not consider this statement of the Panel to be a sufficient basis for a legal finding that the import duty exemption 'affects' wholesale trade services of motor vehicles *as services*, or wholesale trade service suppliers *in their capacity as service suppliers*. The Panel failed to analyze the evidence on the record relating to the provision of wholesale trade services of motor vehicles in the Canadian market. It also failed to articulate what it understood Article I:1 to require by the use of the term 'affecting'. Having interpreted Article I:1, the Panel should then have examined all the relevant facts, including *who* supplies wholesale trade services of motor vehicles through commercial presence in Canada, and *how* such services are supplied. It is not enough to make assumptions. Finally, the Panel should have applied its interpretation of 'affecting trade in services' to the facts it should have found.

The European Communities and Japan may well be correct in their assertions that the availability of the import duty exemption to certain manufacturer beneficiaries of the United States established in Canada, and the corresponding unavailability of this exemption to manufacturer beneficiaries of Europe and of Japan established in Canada, has an effect on the operations in Canada of wholesale trade service suppliers of motor vehicles and, therefore, 'affects' those wholesale trade service suppliers in their capacity as service suppliers. However, the Panel did not examine this issue. The Panel merely asserted its conclusion, without explaining how or why it came to its conclusion. This is not good enough."⁵

5. In *China – Publications and Audiovisual Products*, the Panel found that various measures at issue were measures "affecting" the supply of services. The Panel noted that it was not in dispute that the measures at issue "regulate or govern" certain matters, and stated that "[s]ince the term "affecting" is wider in scope than "regulating" or "governing", we therefore consider that these measures are "affecting" the supply of [services]".⁶

6. In *Argentina – Financial Services*, the Panel examined "as a preliminary matter ... the question of the applicability of the GATS to the measures at issue before evaluating their consistency with the substantive obligations invoked by Panama".⁷ Following the guidance established by the Appellate Body in *Canada – Autos*, the Panel examined whether the

⁴ Appellate Body Report, *Canada – Autos*, paras. 151-152 and 155; applied by the Panel in *US – Gambling*, paras. 6.250 and 6.254.

⁵ Appellate Body Report, *Canada – Autos*, paras. 164-166.

⁶ Panel Report, *China – Publications and Audiovisual Products*, para. 7.971.

⁷ Panel Report, *Argentina – Financial Services*, para. 7.80.

complainant had proved that "(i) there is 'trade in services' in the sense of Article I:1 of the GATS, and (ii) whether the measure at issue 'affect[s]' such trade in services within the meaning of Article I:1 of the GATS."⁸

7. With respect to the requirement to demonstrate that "there is 'trade in services' in the sense of Article I:1 of the GATS", the Panel in *Argentina – Financial Services* disagreed with Argentina's view that the complainant must demonstrate that there is effective trade in services. The Panel found, *inter alia*, that "[t]he wording of Article I:1 ... does not refer to measures that specifically affect actual services and service suppliers of the complaining Member or of any other Member".⁹ The Panel also reasoned that:

"Argentina's argument would lead to an absurd situation in which the GATS would apply to measures provided that there is actual trade in services but would not apply to the most trade-restrictive measures, that is, bans on supplying services, which, by their very nature, prevent actual flows of services. We believe that such an outcome would serve to weaken the GATS and would clearly be contrary to the object and purpose of the Agreement, whose preamble states, *inter alia*, that Members wish 'to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization ...'."¹⁰

8. According to the Panel, the Appellate Body in *Canada – Autos* "did not establish a general rule that the existence of specific transactions between the complainant and the respondent has to be proved but ruled on the factual situation in the market in question".¹¹ The Panel found that, having identified the relevant services and modes of supply, Panama had demonstrated that the measures at issue "apply to services supplied pursuant to Article I:2 of the GATS and that Panama has therefore demonstrated that there is trade in services within the meaning of Article I:2 of the GATS".¹²

9. The Panel in *Argentina – Financial Services* found that a measure that applies to service suppliers withdrawing a commercial presence is a measure that "affects" trade in services within the meaning of Article I:1 of the GATS. The Panel explained:

"The Panel also recalls that, pursuant to Article XXVIII(c) of the GATS, 'measures by Members affecting trade in services include measures in respect of ... (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member'. In Spanish, the term '*referente a*' ('in respect of') is defined as '*[q]ue refiere o que expresa relación a algo*' [referring or expressing a relationship to something]. We thus consider that the concept of 'measures ... affecting trade in services' covers measures related to the 'constitution' or 'acquisition' of a legal person within the territory of a Member for the purpose of supplying a service. In our view, this is the case for the foreign exchange authorization requirement.

The fact that this requirement does not apply at the time of establishing a commercial presence in Argentina but rather at the time of withdrawing the investment from the Argentine market does not prevent this requirement from being related to the supply of services through commercial presence, in accordance with the definition of this mode in Article I:2 of the GATS. Indeed, such a measure may have an impact on a service supplier's decision to invest in the market or, in the terms of the GATS, to establish a commercial presence. In our view, a measure which, for example, totally prohibits repatriation of invested capital at the time of withdrawal from the market would most likely influence the supplier's decision as to whether or not to establish a commercial presence in that market. It is our view that a determination which implies leaving outside the scope of the GATS those measures which apply at the time when a legal person withdraws from a market could open up a breach in the Agreement, as it would mean that measures which influence the decision to set up in the territory of a

⁸ Panel Report, *Argentina – Financial Services*, para. 7.84.

⁹ Panel Report, *Argentina – Financial Services*, para. 7.88.

¹⁰ Panel Report, *Argentina – Financial Services*, para. 7.94.

¹¹ Panel Report, *Argentina – Financial Services*, para. 7.95.

¹² Panel Report, *Argentina – Financial Services*, paras. 7.97-7.98.

Member would not be covered by the Agreement. For the foregoing reasons, we consider that measure 8 affects trade in services in the sense of Article I:1 and is thus covered by the GATS."¹³

1.3 Article I:2(a)

1.3.1 Means of delivery covered

10. The Panel in *US – Gambling* stated that the supply of a service through mode 1 includes all means of delivery:

"Therefore, a market access commitment for mode 1 implies the right for other Members' suppliers to supply a service through all means of delivery, whether by mail, telephone, Internet etc., unless otherwise specified in a Member's Schedule. We note that this is in line with the principle of 'technological neutrality', which seems to be largely shared among WTO Members."

...

To sum up, we conclude that mode 1 includes all means of delivery. We are of the view that when a Member inscribes the word 'None' in the market access column of its schedule for mode 1, it commits itself not to maintain measures which prohibit the use of one, several or all means of delivery under mode 1 in a committed sector or sub-sector. This is especially so in sectors and sub-sectors where cross-border supply is effected essentially if not exclusively through the Internet.¹⁴

11. In *China – Publications and Audiovisual Products*, the Panel considered that the principle of "technological neutrality" "might have come into play" had it found that there was doubt about whether it also covered the distribution of content on non-physical media, but that this was not the case in that dispute:

"In light of our interpretation of China's commitment, we now examine the US argument on 'technological neutrality'. This principle, according to the United States, establishes that any differences between the supply of the sound recording distribution services on physical, as compared to non-physical, media are merely 'technological', and thus should not, unless specified in China's Schedule, serve to narrow the scope of China's commitment. The United States derives this principle from a statement in a Progress Report on a 'Work Programme on Electronic Commerce', dated 19 July 1999, prepared by the Council for Trade in Services for the General Council. The statement says:

It was also the general view that the GATS is technologically neutral in the sense that it does not contain any provisions that distinguish between the different technological means through which a service may be supplied.

We note that this statement has been referred to by the panel in *US – Gambling*. That panel, in examining the range of possible means of delivery included in a full market access commitment on cross-border supply, concluded that such a commitment includes 'all means of delivery, whether by mail, telephone, Internet etc., unless otherwise specified in a Member's Schedule.' The panel in that case added that this was 'in line' with the principle of technological neutrality that 'seems to be largely shared among WTO Members' as evidenced by the statement in the Progress Report.

We note, however, that in interpreting China's commitment on 'sound recording distribution services', we have no need to invoke a principle of technological neutrality. We have already found that the core meaning of China's commitment on these services includes the distribution of audio content on non-physical media. The principle of technological neutrality might have come into play had we found that China's commitment covered distribution on physical media and that there was doubt

¹³ Panel Report, *Argentina – Financial Services*, paras. 7.111-7.112.

¹⁴ Panel Report, *US – Gambling*, paras. 6.285 and 6.287.

about whether it also covered the distribution of content on non-physical media. But this was not the case here."¹⁵

1.3.2 Relevance of where the supplier operates, or is present

12. The Panel in *Mexico – Telecoms* found that "the services at issue, in which United States suppliers link their networks at the border with those of Mexican suppliers for termination within Mexico, without United States' suppliers operating, or being present in some way, in Mexico, are services which are supplied cross-border within the meaning of Article I:2(a) of the GATS."¹⁶ In examining Article I:2(a), the Panel found that this provision does not require that the service supplier must itself operate, or be present, in the territory into which the service is supplied:

"Subparagraph (a) describes what is referred to as 'cross-border', or 'mode 1', supply of trade in services. The ordinary meaning of the words of this provision indicate that the *service* is supplied from the territory of one Member into the territory of another Member. Subparagraph (a) is silent as regards the *supplier* of the service. The words of this provision do not address the service supplier or specify where the service supplier must operate, or be present in some way, much less imply any degree of presence of the supplier in the territory into which the service is supplied.

If we look at the wording of the other modes of supply, we note that the silence in subparagraph (a) as regards the presence of the supplier of the service is in marked contrast to the modes of supply described in subparagraphs (c) ('commercial presence') and (d) ('presence of natural persons'). In both cases, the presence of the service supplier within the territory where the service is supplied is specifically mentioned. The context provided by subparagraphs (c) and (d) therefore suggests that, where the presence of the service supplier was required to define a particular mode of supply, the drafters of the GATS expressed this clearly."¹⁷

1.3.3 Relevance of ownership and control of the infrastructure used to supply the service

13. The Panel in *Mexico – Telecoms*, in examining the definition of basic telecommunications services contained in the GATS, found that the definition does not imply that the supplier of such services must itself own or control the entire network infrastructure over which the cross-border service is supplied:

"According to the definition, basic telecommunications services are services supplied 'between two or more points'. The definition nowhere indicates that a *single* supplier must undertake the transmission between the 'points'. The words 'between two or more points' suggest, in fact, the contrary. Transmission to the various 'points' requested by a customer requires ownership of or access to an expansive transmission infrastructure. It would be unreasonable to assume that the definition of telecommunications services applies only where a telecommunications supplier itself owns or controls a complete global infrastructure allowing it to reach every potential 'point' requested by its customers. Had WTO Members intended this to be the case, they surely would have made it explicit in the definition."¹⁸

14. The Panel in *Mexico – Telecoms* found further support for this view by examining the meaning of "public long-distance voice telephone services", contained in the UN 1991 Provisional Central Product Classification, and referenced in the GATS Sectoral List (W/120) used by Mexico and many other Members in scheduling their telecommunications commitments:

"This definition makes clear that the service of long-distance telephony consists of giving a customer access to both 'the supplier's and connecting operator's entire telephone network' (emphasis added). The definition of voice telephony services thus anticipates interworking of both operating networks in order for the service to be

¹⁵ Panel Report, *China – Publications and Audiovisual Products*, paras. 7.1256-7.1258.

¹⁶ Panel Report, *Mexico – Telecoms*, para. 7.45.

¹⁷ Panel Report, *Mexico – Telecoms*, paras. 7.30-7.31.

¹⁸ Panel Report, *Mexico – Telecoms*, para. 7.34.

performed. No element of the definition implies or requires 'end-to-end' service by one and the same operator. Moreover, when more than one operator is involved, the service supplied to customers includes access to the 'entire networks' of both operators. The service supplied is not therefore the simple transmission of a voice message 'up to' a connecting operator's network; rather, the service is defined as spanning both operators' networks. It therefore follows that supply of the service involves call completion spanning both operators' networks."¹⁹

15. The Panel in *Mexico – Telecoms* specified that the cross-border supply of telecommunications services could take place even if elements of the service were subcontracted or carried out with assets owned by another firm:

"More generally, a supplier of services under the GATS is no less a supplier solely because elements of the service are subcontracted to another firm, or are carried out with assets owned by another firm. What counts is the service that the supplier offers and has agreed to supply to a customer. In the case of a basic telecommunications service, whether domestic or international, or supplied cross-border or through commercial presence, the supplier offers its customer the service of completing the customer's communications. Having done so, the supplier is responsible for making any necessary subsidiary arrangements to ensure that the communications are in fact completed. The customer typically pays its supplier the price of the end-to-end service, regardless of whether the supplier contracts with, or uses the assets of, another firm to supply the service."²⁰

1.3.4 Relevance of degree of interaction between different operators

16. Referring again to the definition of "public long-distance voice telephone services" in the UN 1991 Provision Central Product Classification, the Panel in *Mexico – Telecoms* stated that the reference in this definition to services "necessary to establish and maintain communications" suggested a high degree of interaction between operators in the cross-border supply of a telecommunications service:

"We observe that basic telecommunications services supplied between Members do require, during the delivery of the service, a high degree of interaction between each other's networks, since the service typically involves a continuous, rapid and often two-way flow of intangible customer and operator data. The interaction results in a seamless service between the originating and terminating segments, which suggests that the service be considered as a single, cross-border service."²¹

1.3.5 Relevance of supply by means of "linking" to another operator

17. In arriving at the conclusion discussed in paragraph 12 above, the Panel in *Mexico – Telecoms* considered that Mexico's claim that the supplier itself must transmit the customer data from one Member to another Member:

"If linking with another operator implied that the originating operator were no longer 'supplying' the service, an absurd consequence would result. Not only would telecommunications services delivered in this manner not be 'supplied' cross-border in the sense of Article I:2(a), they would also not be 'supplied' under any of the other modes of supply under the GATS. Nearly all telecommunications services currently supplied across borders would then fall outside the scope of the GATS. Present and future liberalization of this form of international telecommunications trade would not be possible within the WTO, without a new or amended treaty. Such an interpretation would be inconsistent with the fact that the GATS 'applies to ... trade in services' (Article I:1), and that 'trade in services' is defined comprehensively as the supply of services through four modes of supply. The GATS creates a wide-ranging agreement covering all services and modes of supply, in order to allow progressive liberalization of trade in services between Members. This suggests that the supply of basic

¹⁹ Panel Report, *Mexico – Telecoms*, para. 7.36.

²⁰ Panel Report, *Mexico – Telecoms*, para. 7.42.

²¹ Panel Report, *Mexico – Telecoms*, para. 7.38.

telecommunications services – the 'transmission of customer supplied information' – must include supply by means which involve or require linking to another operator to complete the service."²²

1.4 Article I:2(c)

1.4.1 Supply by a firm commercially present in one Member into the territory of another Member

18. The Panel in *Mexico – Telecoms* examined whether international services supplied by a firm in Mexico fell within the definition of services supplied through commercial presence. It found that there was no territorial requirement contained in paragraph 2(c) other than a commercial presence in the territory of any other Member:

"The definition of services supplied through a commercial presence makes explicit the location of the service supplier. It provides that a service supplier has a commercial presence – any type of business or professional establishment – in the territory of any other Member. The definition is silent with respect to any other territorial requirement (as in cross-border supply under mode 1) or nationality of the service consumer (as in consumption abroad under mode 2). Supply of a service through commercial presence would therefore not exclude a service that originates in the territory in which a commercial presence is established (such as Mexico), but is delivered into the territory of any other Member (such as the United States)."²³

19. The Panel in *EU – Energy Package* stated that what is essential under mode 3 is the relationship between the commercial presence in the importing Member and the natural or juridical person in the exporting Member:

"In our view, this position has no basis in the text of the GATS and we therefore cannot agree with Russia. In line with the position taken by prior panels, we believe that the appropriate focus under mode 3 is the relationship between the commercial presence in the importing Member and the natural or juridical person in the exporting Member, which supplies services through the commercial presence. We do not believe that it is relevant to consider any potential relationship between the natural or juridical person in the exporting Member, supplying services through the commercial presence in the importing Member by owning or controlling it, and natural or juridical persons that may, in turn, own or control the former of these two."²⁴

20. In *China – Electronic Payment Services*, the Panel examined whether the supply of services through commercial presence includes the supply of services to all recipients, whether located within or outside China. The Panel found:

"Nothing in the GATS suggests that the supply of a service through commercial presence in the territory of a Member does not extend to the 'export' of services from that Member's territory to a recipient in the territory of another Member or to a foreign recipient located in the 'exporting' Member's territory. A foreign service supplier may therefore, subject to any limitations set out in the Member's schedule, supply a committed service to a foreign recipient wherever located, and of whatever nationality or origin."²⁵

²² Panel Report, *Mexico – Telecoms*, para. 7.41.

²³ Panel Report, *Mexico – Telecoms*, para. 7.375.

²⁴ Panel Report, *EU – Energy Package*, para. 7.446.

²⁵ Panel Report, *China – Electronic Payment Services*, para. 7.618. In a footnote attached to this paragraph, the Panel provided the following clarification:

"This means, for example, that a mode 3 commitment on data processing services would allow a foreign company established in the territory of a Member to supply data processing services to a consumer located in the territory of another Member. Similarly, a mode 3 commitment on 'hotel services' would allow a foreign-owned hotel established in the territory of that Member to supply hotel services to foreign tourists." Ibid. fn 808.

1.5 Article I:3(b)

21. The Appellate Body in *US-Gambling* examined the context provided by the structure of the GATS in interpreting the specific commitments made by the US in its GATS Schedule. The Appellate Body stated that from the definition of 'services' and 'sector'²⁶ found in GATS, it follows that, firstly, a Member may schedule commitments in respect of *any* service and secondly, that a particular service cannot fall within two different sectors or sub sectors of a Member's Schedule:

"To us, the structure of GATS necessarily implies two things. First, because the GATS covers *all* services except those supplied in the exercise of governmental authority, it follows that a Member may schedule a specific commitment in respect of *any* service. Secondly, because a Member's obligations regarding a particular service depend on the specific commitments that it has made with respect to the sector or subsector within which the service falls, a specific service cannot fall within two different sectors or subsectors. In other words, the sectors and subsectors in a Member's Schedule must be mutually exclusive."²⁷²⁸

1.6 Relationship with the GATT 1994

22. The Panel in *EU – Energy Package* highlighted the differences in the focus of assessment under Article II:1 of the GATS and Articles I:1 and III:4 of the GATT 1994 in light of the different scope, subject matter and nature of MFN and national treatment obligations in the two agreements:

"We note that there are important differences between Russia's claims under Article II:1 of the GATS, Article I:1 of the GATT 1994 and Article III:4 of the GATT 1994 due to the distinct scope and subject matter of the GATS and the GATT 1994, respectively, and the different nature of the MFN and national treatment obligations in Articles I:1 and III:4 of the GATT 1994, respectively. Notably, whereas our assessment of Russia's claim under Article II:1 of the GATS will focus on the treatment accorded to pipeline transport services and service suppliers under the different unbundling models, our assessment of Russia's claims under Articles I:1 and III:4 of the GATT 1994 will focus on the treatment accorded to natural gas under the different unbundling models. Furthermore, whereas our assessment of Russia's claim under Article I:1 of the GATT 1994 will involve a comparison of the treatment accorded to imported natural gas from Russia with that accorded to imported natural gas from other non-EU countries, our assessment of Russia's claim under Article III:4 of the GATT 1994 will involve a comparison of the treatment accorded to imported Russian natural gas with that accorded to domestic natural gas."²⁹

23. The Panel in *Canada – Periodicals*, in a finding subsequently not addressed by the Appellate Body, rejected the argument by Canada that Article III of the GATT 1994 does not apply to a measure which is within the purview of the GATS. The Panel observed that, pursuant to Article II:2 of the WTO Agreement, "[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 ... are integral parts of this Agreement, binding on all Members". Recalling the principle of effective treaty interpretation, the Panel then found that "obligations under GATT 1994 and GATS can co-exist and that one does not override the other":

"According to Article 31(1) of the 1969 Vienna Convention on the Law of Treaties ('Vienna Convention'), a treaty must be interpreted in good faith in accordance with

²⁶ Article XXVIII provides that:

"(e) 'sector' of a service means,
(i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule,
(ii) otherwise, the whole of that service sector, including all of its subsectors;"

²⁷ (*footnote original*) If this were not the case, and a Member scheduled the same service in two different sectors, then the scope of the Member's commitments would not be clear where, for example, it made a full commitment in one of those sectors and a limited, or no, commitment in the other. At the oral hearing in this appeal, both the United States and Antigua agreed that the entries in a Member's Schedule must be mutually exclusive. See also Panel Report, paras. 6.63, 6.101, and 6.119.

²⁸ Appellate Body Report, *US – Gambling*, para. 180.

²⁹ Panel Report, *EU – Energy Package*, para. 7.374.

the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Furthermore, as the Appellate Body has repeatedly pointed out, 'one of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.' ... The ordinary meaning of the texts of GATT 1994 and GATS as well as Article II:2 of the WTO Agreement, taken together, indicates that obligations under GATT 1994 and GATS can co-exist and that one does not override the other. If the consequences suggested by Canada were intended, there would have been provisions similar to Article XVI:3 of the WTO Agreement or the General Interpretative Note to Annex 1A in order to establish hierarchical order between GATT 1994 and GATS. The absence of such provisions between the two instruments implies that GATT 1994 and GATS are standing on the same plain in the WTO Agreement, without any hierarchical order between the two."³⁰

24. The Panel in *Canada – Periodicals* finally rejected the notion that overlaps between the subject-matter of the GATT 1994 and GATS should be avoided. Rather, it noted that certain types of services have long been associated with GATT disciplines, as evidenced, *inter alia*, by certain GATT Panel Reports:

"In this connection, Canada also argues that overlaps between GATT 1994 and GATS should be avoided. ... We disagree. Overlaps between the subject matter of disciplines in GATT 1994 and in GATS are inevitable, and will further increase with the progress of technology and the globalization of economic activities. We do not consider that such overlaps will undermine the coherence of the WTO system. In fact, certain types of services such as transportation and distribution are recognized as a subject-matter of disciplines under Article III:4 of GATT 1994. It is also noteworthy in this respect that advertising services have long been associated with the disciplines under GATT Article III. As early as 1970, the Working Party on Border Tax Adjustment made the following observation:

'The Working Party noted that there was a divergence of views with regard to the eligibility for adjustment of certain categories of tax and that these could be sub-divided into

(a) 'Taxes occultes' which the OECD defined as consumption taxes on capital equipment, auxiliary materials and *services* used in the transportation and production of other taxable goods. Taxes on *advertising*, energy, machinery and transport were among the more important taxes which might be involved. ... ;

(b) Certain other taxes, ...!³¹

We also note that there are several adopted panel reports that examined the issue of services in the context of GATT Article III. For instance, the panel on *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* addressed the issues of access to points of sale and restrictions on private delivery of beer. ... The panel on *United States – Measures Affecting Alcoholic and Malt Beverages* also dealt with the issues of distribution of wine and beer. ... More to the point, the panel on *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* specifically addressed the question of advertising ...

In any event, since Canada admits that in the present case there is no conflict between its obligations under GATS and under GATT 1994..., there is no reason why both GATT and GATS obligations should not apply to the Excise Tax Act. Thus, we

³⁰ Panel Report, *Canada – Periodicals*, para. 5.17.

³¹ (*footnote original*) "Border Tax Adjustments", Report of the Working Party adopted on 2 December 1970 (L/3464), BISD 18S/97, para. 15 (emphasis added).

conclude that Article III of GATT 1994 is applicable to Part V.1 of the Excise Tax Act."³²

25. On appeal, the Appellate Body in *Canada – Periodicals* did not find it necessary "to pronounce on the issue of whether there can be potential overlaps between the *GATT 1994* and the *GATS*, as both participants agreed that it is not relevant in this appeal." The Appellate Body then held that the Canadian measure at issue, as an excise tax on certain periodicals, clearly applied to goods. The Appellate Body subsequently examined the measure under Article III:2 of the *GATT 1994*.³³

26. While in *Canada – Periodicals* the Appellate Body did not find it necessary to pronounce on the question whether there could be overlaps between the scope of application of the *GATT 1994* and *GATS*, in *EC – Bananas III* the Appellate Body confirmed the approach of the Panel in *Canada – Periodicals*. The Appellate Body rejected the notion that the *GATT 1994* and *GATS* are "mutually exclusive agreements" and held that there was a "category of measures that could be found to fall within the scope of both the *GATT 1994* and the *GATS*":

"The second issue is whether the *GATS* and the *GATT 1994* are mutually exclusive agreements. The *GATS* was not intended to deal with the same subject matter as the *GATT 1994*. The *GATS* was intended to deal with a subject matter not covered by the *GATT 1994*, that is, with trade in services. Thus, the *GATS* applies to the supply of services. It provides, *inter alia*, for both MFN treatment and national treatment for services and service suppliers. Given the respective scope of application of the two agreements, they may or may not overlap, depending on the nature of the measures at issue. Certain measures could be found to fall exclusively within the scope of the *GATT 1994*, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of the *GATS*, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the *GATT 1994* and the *GATS*. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the *GATT 1994* and the *GATS*. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the *GATT 1994*, the focus is on how the measure affects the goods involved. Under the *GATS*, the focus is on how the measure affects the supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the *GATT 1994* or the *GATS*, or both, is a matter that can only be determined on a case-by-case basis. This was also our conclusion in the Appellate Body Report in *Canada – Periodicals*."³⁴

27. In *China – Publications and Audiovisual Products*, the Panel and the Appellate Body found that China had acted inconsistently with the "trading rights commitments" found in China's Protocol of Accession and China's Accession Working Party Report. China argued, *inter alia*, that because one of the measures at issue regulated trade in services, it should be excluded from scrutiny under China's "trading rights commitments", which are applicable only to trade in goods. The Appellate Body saw no error in the Panel's finding that the measure was subject to China's trading rights commitments, in that it necessarily affects who may engage in importing of hard-copy cinematographic films and, therefore, goods. While the argument raised by China did not concern the relationship between the *GATS* and the *GATT 1994*, in the course of its analysis, the Appellate Body found guidance in its prior pronouncements regarding the relationship between the *GATS* and the *GATT 1994*:

"We understand China to argue that, because the *Film Regulation* regulates trade in services, it should be excluded from scrutiny under China's trading rights commitments, which are applicable only to trade in goods. We note, in this regard, that the Appellate Body has found that a measure could be simultaneously subject to obligations relating to trade in goods under the *GATT 1994* and to obligations relating

³² Panel Report, *Canada – Periodicals*, paras. 5.18-5.19.

³³ Appellate Body Report, *Canada – Periodicals*, pp. 21-22.

³⁴ Appellate Body Report, *EC – Bananas III*, para. 221.

to trade in services under the GATS. As the Appellate Body noted in *Canada – Periodicals*, '[t]he entry into force of the GATS, as Annex 1B of the *WTO Agreement*, does not diminish the scope of application of the GATT 1994.' In *EC – Bananas III*, the Appellate Body observed that, although the subject matter of the GATT 1994 and that of the GATS are different, particular measures 'could be found to fall within the scope of both the GATT 1994 and the GATS', and that such measures include those 'that involve a service relating to a particular good or a service supplied in conjunction with a particular good.' These findings specifically concern the relationship between the GATS and the GATT 1994, and thus do not directly address the relationship between China's trading rights commitments and its commitments on trade in services. Yet, these findings provide assistance in analyzing the issue of whether a measure can be simultaneously subject to obligations relating to trade in goods and those relating to trade in services. Given that China's trading rights commitments apply to trade in goods, the Appellate Body findings in these earlier disputes are also relevant to resolving the issue of whether measures regulating services may be subject to China's trading rights commitments.

The Appellate Body's approach in the above two disputes implies that a measure can regulate both goods and services and that, as a result, the same measure can be subject to obligations affecting trade in goods and obligations affecting trade in services.

...

We do not see the clear distinction drawn by China between 'content' and 'goods'. Neither do we consider that content and goods, and the regulation thereof, are mutually exclusive. Content can be embodied in a physical carrier, and the content and carrier together can form a good. For example, in *Canada – Periodicals*, the Appellate Body found that 'a periodical is a good comprised of two components: editorial content and advertising content. Both components can be viewed as having services attributes, but they combine to form a physical product—the periodical itself.' Moreover, the United States points out that China's Schedule of Concessions on goods, which contains the Harmonized System heading 3706, defines as a good 'cinematographic film, exposed and developed, whether or not incorporating sound track or consisting only of sound track'. This confirms that a physical film reel containing content is treated as a good under China's own tariff regime. We therefore share the view that China's arguments 'are premised on an artificial dichotomy between film as mere content (which China contends is not a good) and the physical carrier on which content may be embedded (which China views as a good)'."³⁵

Current as of: December 2020

³⁵ Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 193-195.