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1 ARTICLE II

1.1 Text of Article II

Article II

Most Favoured-Nation Treatment

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.
2. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.
3. The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.

1.2 Application

1. In *Canada – Autos*, the Appellate Body explained how a Panel should proceed when examining the consistency of a measure with Article II:1 of the GATS: after determining whether the measure under examination affects trade in services, the examiner should make "factual findings as to treatment of wholesale trade services and service suppliers of motor vehicles of different Members commercially present" and, as the last step, apply Article II:1 to these facts:

"The wording of this provision suggests that analysis of the consistency of a measure with Article II:1 should proceed in several steps. First, as we have seen, a threshold determination must be made under Article I:1 that the measure is covered by the GATS. This determination requires that there be 'trade in services' in one of the four modes of supply, and that there be also a measure which 'affects' this trade in services. We have already held that the Panel failed to undertake this analysis.

If the threshold determination is that the measure is covered by the GATS, appraisal of the consistency of the measure with the requirements of Article II:1 is the next step. The text of Article II:1 requires, in essence, that treatment by one Member of 'like' services and service suppliers' of any other Member be compared with treatment of 'like' services and service suppliers of 'any other country'. Based on these core legal elements, the Panel should first have rendered its interpretation of Article II:1. It should then have made factual findings as to treatment of wholesale

trade services and service suppliers of motor vehicles of different Members commercially present in Canada. Finally, the Panel should have applied its interpretation of Article II:1 to the facts as it found them."¹

2. The Appellate Body in *Canada – Autos* subsequently disapproved of the Panel's application of Article II of the GATS to the facts in the case before it. Specifically, the Appellate Body objected to what it considered to be the Panel's assumption that the application of an import duty exemption to manufacturers automatically affected "competition among wholesalers in their capacity as service suppliers":

"Clearly, here the Panel is confusing the application of the import duty exemption to manufacturers with its possible effect on wholesalers. In our view, the Panel has conducted a 'goods' analysis of this measure, and has simply extrapolated its analysis of how the import duty exemption affects manufacturers to wholesale trade service suppliers of motor vehicles. The Panel surmised, without analyzing the effect of the measure on wholesalers as service suppliers, that the import duty exemption, granted to a limited number of manufacturers, ipso facto affects conditions of competition among wholesalers in their capacity as service suppliers. As we stated earlier in respect of whether the measure at issue 'affects trade in services', the Panel failed to demonstrate how the import duty exemption granted to certain manufacturers, but not to other manufacturers, affects the supply of wholesale trade services and the suppliers of wholesale trade services of motor vehicles. In reaching its conclusions under Article II:1 of the GATS, the Panel has neither assessed the relevant facts – we see no analysis of any evidence relating to the supply of wholesale trade services of motor vehicles – nor has it interpreted Article II of the GATS and applied that interpretation to the facts it found."²

1.3 Article II:1

1.3.1 "like services and like service suppliers"

1.3.1.1 Approach to determining "likeness"

3. The Panel in *EC – Bananas III*, in a finding subsequently not reviewed by the Appellate Body, addressed the issue of likeness under Article II:

"[I]n our view, the nature and the characteristics of wholesale transactions as such, as well as of each of the different subordinated services mentioned in the headnote to section 6 of the CPC, are 'like' when supplied in connection with wholesale services, irrespective of whether these services are supplied with respect to bananas of EC and traditional ACP origin, on the one hand, or with respect to bananas of third-country or non-traditional ACP origin, on the other. Indeed, it seems that each of the different service activities taken individually is virtually the same and can only be distinguished by referring to the origin of the bananas in respect of which the service activity is being performed. Similarly, in our view, to the extent that entities provide these like services, they are like service suppliers."³

4. The Panel in *Canada – Autos* reiterated this approach, stating that "[w]e agree that to the extent that the service suppliers concerned supply the same services, they should be considered 'like' for the purpose of this case."

5. In *Argentina – Financial Services*, the Appellate Body set out its understanding of the phrase "like services and service suppliers" in Articles II:1 and XVII:1 of the GATS. The Appellate Body started by recalling that "the word 'like' refers to something sharing a number of identical or similar characteristics or qualities" and that "the term 'similar' as a synonym of 'like' echoes the

¹ Appellate Body Report, *Canada – Autos*, paras. 170-171. See also Panel Report, *EU – Energy Package*, paras. 7.227 and 7.404.

² Appellate Body Report, *Canada – Autos*, para. 181.

³ Panel Report, *EC – Bananas III*, para. 7.322.

language of the French version of these provisions, '*produits similaires*', and the Spanish version, '*productos similares*'.⁴ Thus, according to the Appellate Body:

"These terms imply some kind of comparison. While what is being compared is different in the context of trade in goods and trade in services, we consider that, in the context of both trade in goods and trade in services, 'likeness' refers to something that is similar."⁵

6. The Appellate Body in *Argentina – Financial Services* then addressed the question "of what degree or extent of similarity is required for services and service suppliers to be considered 'like'." Turning to the context in which the word "like" appears, the Appellate Body noted that "both Article II:1 and Article XVII:1 further refer to 'treatment no less favourable' of like services and service suppliers, and that Article XVII:3 provides that 'treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of [one] Member compared to like services or service suppliers of any other Member.'"⁶ According to the Appellate Body, "[t]his demonstrates that Article XVII is concerned with competitive opportunities for like services and service suppliers of another Member."⁷ The Appellate Body further observed that the word "advantage" in Article II:1 "suggests that, also in the context of Article II of the GATS, the determination of 'likeness' of services and service suppliers must focus on the competitive relationship of the services and service suppliers at issue". The Appellate Body also recalled that, with regard to Articles I:1 and III:4 of the GATT 1994, it had held that "notwithstanding their textual differences, both of these provisions are concerned with 'prohibiting discriminatory measures' and ensuring 'equality of competitive opportunities' between products that are in a competitive relationship".⁸ In light of the foregoing, the Appellate Body concluded as follows:

"Thus, we consider that the concept of 'likeness' of services and service suppliers under Articles II:1 and XVII:1 of the GATS is concerned with the competitive relationship of services and service suppliers. This is consonant with the Appellate Body's understanding of 'likeness' in the ambit of trade in goods. In *EC – Asbestos*, the Appellate Body held that the word 'like' in Article III:4 of the GATT 1994 is to be interpreted as applying to products that are in a competitive relationship, and that therefore a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products. As the Appellate Body noted, '[i]f there is – or could be – no competitive relationship between products, a Member cannot intervene, through internal taxation or regulation, to protect domestic production.'

Further, in the context of trade in goods, the Appellate Body noted that there is a spectrum of degrees of 'competitiveness' or 'substitutability' of products in the marketplace. The assessment of such a competitive relationship requires a market-based analysis. The Appellate Body also stated that not all products that are in some competitive relationship are 'like products', and that it is difficult, if not impossible, in the abstract, to indicate precisely where on this spectrum the word 'like' falls. In our view, the same is true with respect to 'like services and service suppliers', and, thus, the likeness of services and service suppliers can only be determined on a case-by-case basis, taking into account the specific circumstances of the particular case."⁹

7. In *Argentina – Financial Services*, the Appellate Body explained that what is being compared for 'likeness' is different in the context of trade in goods and trade in services. The Appellate Body stated:

⁴ Appellate Body Report, *Argentina – Financial Services*, para. 6.21.
⁵ Appellate Body Report, *Argentina – Financial Services*, para. 6.21.
⁶ Appellate Body Report, *Argentina – Financial Services*, para. 6.22.
⁷ Appellate Body Report, *Argentina – Financial Services*, para. 6.22. See also Panel Report, *EU – Energy Package*, para. 7.419.
⁸ Appellate Body Report, *Argentina – Financial Services*, para. 6.24.
⁹ Appellate Body Report, *Argentina – Financial Services*, paras. 6.25-6.26.

"Articles II:1 and XVII:1 of the GATS refer to 'like services and service suppliers'. In contrast, Articles I:1, III:2, and III:4 of the GATT 1994, for instance, refer to 'like products', but they do not include a reference to 'like producers'. The term 'service supplier' is defined in Article XXVIII(g) of the GATS as 'any person that supplies a service'. With respect to the 'supply of a service', Article XXVIII(b) stipulates that it 'includes the production, distribution, marketing, sale and delivery of a service'. Accordingly, this term covers a broad array of service-related activities. The word 'service' is not defined in the GATS itself.¹⁰¹¹

8. In *Argentina – Financial Services*, the Appellate Body considered the reference to "services and service suppliers" in Articles II:1 and XVII of the GATS. The Appellate Body held:

"In our view, the reference to 'services and service suppliers' indicates that considerations relating to both the service and the service supplier are relevant for determining 'likeness' under Articles II:1 and XVII:1 of the GATS. The assessment of likeness of services should not be undertaken in isolation from considerations relating to the service suppliers, and, conversely, the assessment of likeness of service suppliers should not be undertaken in isolation from considerations relating to the likeness of the services they provide. We see the phrase 'like services *and* service suppliers' as an integrated element for the likeness analysis under Articles II:1 and XVII:1, respectively. Accordingly, separate findings with respect to the 'likeness' of services, on the one hand, and the 'likeness' of service suppliers, on the other hand, are not required. Because the 'likeness' analysis serves to assess the competitive relationship of the 'services *and* service suppliers' at issue, the particular features of that competitive relationship, in the circumstances of any specific case, will determine the relative weight to be accorded in the analysis of 'likeness' to considerations relating to the service and the service supplier, respectively. In any event, in a holistic analysis of 'likeness', considerations relating to both the service and the service supplier will be relevant, albeit to varying degrees, depending on the circumstances of each case."¹²

9. With respect to how a panel should proceed in determining "likeness", the Appellate Body, referring to its case law under Article III:4 of the GATT 1994, recalled in particular the four general criteria for analysing 'likeness' in the context of trade in goods: (i) the properties, nature, and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits or consumers' perceptions and behaviour in respect of the products; and (iv) the tariff classification of the products.¹³ The Appellate Body then made the following observations:

"With these considerations in mind, we consider how a panel should proceed in assessing the 'likeness' of services and service suppliers in the particular context of Article II:1 and Article XVII:1 of the GATS. We recall that the Appellate Body has clarified that the term 'like' must be interpreted in the light of its context and the object and purpose of the agreement in which the relevant provision appears. As we have set out above, we consider that the analysis of 'likeness' serves the same purpose in the context of both trade in goods and trade in services, namely, to determine whether the products or services and service suppliers, respectively, are in a competitive relationship with each other. Thus, to the extent that the criteria for assessing 'likeness' traditionally employed as analytical tools in the context of trade in goods are relevant for assessing the competitive relationship of services and service suppliers, these criteria may be employed also in assessing 'likeness' in the context of trade in services, provided that they are adapted as appropriate to account for the specific characteristics of trade in services. In particular, we

¹⁰ (*footnote original*) We note that, with regard to the national treatment obligation, Members' Schedules of Commitments define the scope of service transactions and sectors that are subject to the obligation. We further note that, in trade in services, the classification and description of services is based mainly on two instruments: (i) the Services Sectoral Classification List, established by the WTO Secretariat in 1991; and (ii) the UN Central Product Classification (CPC). The Services Sectoral Classification List was based on the 1991 provisional UN CPC. The most recent UN CPC (Ver.2.1) was released on 11 August 2015, and is available at: <<http://unstats.un.org/unsd/cr/registry/cpc-21.asp>>.

¹¹ Appellate Body Report, *Argentina – Financial Services*, paras. 6.25-6.26.

¹² Appellate Body Report, *Argentina – Financial Services*, para. 6.29.

¹³ Appellate Body Report, *Argentina – Financial Services*, para. 6.30.

note that Articles II:1 and XVII:1 of the GATS refer to likeness of 'services and service suppliers', and, accordingly, these criteria may be applied both in regard to the service and in regard to the service supplier in a holistic analysis as indicated above.

For example, the characteristics of services and service suppliers or consumers' preferences in respect of services and service suppliers may be relevant for determining 'likeness' under the GATS. We note that, in this vein, the panel in *EC – Bananas III* considered the 'nature and the characteristics' of the service transactions at issue, which may be seen as an adaptation of the original criterion in *Border Tax Adjustments* – namely, properties, nature and quality. Furthermore, with respect to the criterion of tariff classification, the classification and description of services under, for instance, the UN Central Product Classification (CPC) could be relevant.¹⁴ The panel in *China – Electronic Payment Services* undertook another such adaptation in considering evidence that the service suppliers at issue 'describe[d] their business scope in very similar terms', and that this suggested that 'these suppliers compete[d] with each other in the same business sector'. This may be seen as adaptations of the criteria of 'properties, nature and quality', 'end-use', and/or 'consumer preferences'. As in the context of trade in goods, however, we equally consider that the criteria for analysing 'likeness' of services and service suppliers are simply analytical tools to assist in the task of examining the relevant evidence, and that they are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of services and service suppliers as 'like'.¹⁵

10. With respect to the differences between trade in goods and trade in services, and in particular the existence of modes of supply under the GATS, the Appellate Body observed:

"We further note that different modes of supply as defined in Article I:2 exist only in trade in services under the GATS, and not in trade in goods under the GATT 1994, and, accordingly, the analysis of 'likeness' of services and service suppliers may require additional considerations of whether or how this analysis is affected by the mode(s) of service supply. Having said that, we also note that we are not called upon to pronounce in this appeal on the relevance and weight of specific criteria for determining whether service suppliers and the services provided are 'like'.

While the criteria for analysing 'likeness' must be adapted to the particular context of Articles II:1 and XVII:1 of the GATS in accordance with the above considerations, this does not change the fundamental purpose of the comparison to be undertaken in order to determine 'likeness' in the context of trade in services, namely, to assess whether and to what extent the services and service suppliers at issue are in a competitive relationship. The existence of a competitive relationship is a precondition for the subsequent analysis under the requirement of 'treatment no less favourable' of whether the conditions of competition have been modified."¹⁶

1.3.1.2 Presumption of "likeness"

11. In *Argentina – Financial Services*, the Appellate Body discussed whether a complainant may establish "likeness" by demonstrating that the measure at issue makes a distinction between services and service suppliers based exclusively on origin (which the Appellate Body referred to as the "presumption approach").¹⁷ The Appellate Body recalled that the presumption approach was used in the context of trade in goods and noted that "[i]n this respect, measures allowing the

¹⁴ (footnote original) The Panel in *EC – Bananas III (Ecuador)* referred to the CPC and relevant headnotes in addressing the nature and characteristics of wholesale service transactions, as well as different subordinated services mentioned in the headnote to section 6 of the CPC. (Panel Report, *EC – Bananas III (Ecuador)*, paras. 7.322 and 7.346)

¹⁵ Appellate Body Report, *Argentina – Financial Services*, paras. 6.31-6.32.

¹⁶ Appellate Body Report, *Argentina – Financial Services*, paras. 6.33-6.34.

¹⁷ Appellate Body Report, *Argentina – Financial Services*, para. 6.35.

application of a presumption of 'likeness' will typically be measures involving a *de jure* distinction between products of different origin".¹⁸

12. With respect to the use of the presumption approach for determining "likeness" under the GATS, the Appellate Body stated:

"In our view, where a measure provides for a distinction based exclusively on origin, there will or can be services and service suppliers that are the same in all respects except for origin and, accordingly, 'likeness' can be presumed and the complainant is not required to establish 'likeness' on the basis of the relevant criteria set out above. Accordingly, we consider that, under Articles II:1 and XVII:1 of the GATS, a complainant is not required in all cases to establish 'likeness' of services and service suppliers on the basis of the relevant criteria for establishing 'likeness'. Rather, in principle, a complainant may establish 'likeness' by demonstrating that the measure at issue makes a distinction between services and service suppliers based exclusively on origin."¹⁹

13. The Appellate Body considered, however, that "compared to trade in goods, the scope for such a presumption under the GATS would be more limited, and establishing 'likeness' based on the presumption may often involve greater complexity in trade in services".²⁰ According to the Appellate Body:

"First, we have found above that the determination of 'likeness' under Articles II:1 and XVII:1 involves consideration of both the service and the service supplier. Accordingly, depending on the circumstances of the particular case, an origin-based distinction in the measure at issue would have to be assessed not only with respect to the services at issue, but also with regard to the service suppliers involved. Such consideration of both the services and the service suppliers may render more complex the analysis of whether or not a distinction is based exclusively on origin, in particular, due to the role that domestic regulation may play in shaping, for example, the characteristics of services and service suppliers and consumers' preferences.

In addition, we note the principles for determining origin set out in Article XXVIII of the GATS. The definitions of the various terms set out in Article XXVIII(f), (g), and (k) through (n) of the GATS provide an indication of the possible complexities of determining origin and whether a distinction is based exclusively on origin in the context of trade in services. An additional layer of complexity stems from the existence of different modes of supply and their implications for the determination of the origin of services and service suppliers."²¹

14. These considerations led the Appellate Body to the following conclusions with respect to the applicability of the presumption approach in the context of trade in services:

"While these complexities do not, as a matter of principle, render the presumption approach inapplicable in the context of trade in services, the scope of this presumption is more limited than in trade in goods. Whether and to what extent such complexities have an impact on the determination of whether a distinction is based exclusively on origin in a particular case will depend on the nature, configuration, and operation of the measure at issue and the particular claims raised."²²

15. In *Argentina – Financial Services*, the Appellate Body also addressed the question of the burden of proof in establishing "likeness" when relying on the presumption approach. The Appellate Body stated that "in keeping with the general rule that the burden of proof rests upon

¹⁸ Appellate Body Report, *Argentina – Financial Services*, para. 6.36.

¹⁹ Appellate Body Report, *Argentina – Financial Services*, para. 6.38. See also Panel Report, *EU – Energy Package*, para. 7.741.

²⁰ Appellate Body Report, *Argentina – Financial Services*, para. 6.38.

²¹ Appellate Body Report, *Argentina – Financial Services*, paras. 6.39-6.40.

²² Appellate Body Report, *Argentina – Financial Services*, para. 6.40. See also *ibid.* 6.52.

the party that asserts the affirmative of a particular claim, the complainant bears the burden of making a *prima facie* case that a measure draws a distinction between services and service suppliers based exclusively on origin".²³ According to the Appellate Body, "[i]f a panel finds that the complainant has failed to make a *prima facie* case that a measure provides for differential treatment based exclusively on origin, then the panel must engage in an analysis of 'likeness' of services and service suppliers on the basis of the relevant criteria adapted to trade in services, as addressed above, before it may proceed to the analysis of less favourable treatment."²⁴

16. The Appellate Body then explained how a panel should proceed when the complainant successfully demonstrates "likeness" based on the presumption approach:

"In contrast, if a complainant succeeds in making a *prima facie* case that a measure draws a distinction between services and service suppliers based exclusively on origin, and this is not rebutted by the respondent, the services and service suppliers at issue may be presumed to be 'like', and a panel may proceed with the analysis of less favourable treatment without the need to assess the competitive relationship of the services and service suppliers at issue based on the relevant criteria as adapted to trade in services.

Once a complainant has made a *prima facie* case that a measure draws a distinction between services and service suppliers based exclusively on origin, the respondent may rebut this by demonstrating that origin is indeed not the exclusive basis for the distinction drawn by the measure between the services and service suppliers at issue. Alternatively, or in addition, a respondent may seek to rebut the *prima facie* case based on the presumption approach by introducing arguments and evidence relating to the criteria for determining 'likeness' adapted to trade in services, as explained above, demonstrating that a certain factor affects the relevant criteria for establishing 'likeness', and that it therefore has an impact on the competitive relationship between the services and service suppliers. In the event of a successful rebuttal based on either option above, a panel cannot proceed to a finding of 'likeness' on the basis of such a presumption. Rather, it must engage in an analysis of 'likeness' considering the relevant criteria in order to determine whether the services and service suppliers at issue are 'like' before proceeding to an analysis of less favourable treatment."²⁵

1.3.2 "no less favourable treatment"

1.3.2.1 *de facto* discrimination under Article II:1 of the GATS

17. In *EC – Bananas III*, the European Communities argued that Article II of the GATS did not cover *de facto* discrimination; the European Communities claimed that if the drafters of the GATS had wished to make the "modification of competitive conditions" requirement an integral part of the "no less favourable treatment" test under the most-favoured-nation clause, they would have done so explicitly. The Panel rejected this argument, noting that Article XVII "is meant to provide for no less favourable conditions of competition regardless of whether that is achieved through the application of formally identical or formally different measures ... The absence of similar language in Article II is not, in our view, a justification for giving a different ordinary meaning in terms of Article 31(1) of the Vienna Convention to the words 'treatment no less favourable', which are identical in both Articles II:1 and XVII:1."²⁶ The Panel also opined that "if the standard of 'no less favourable treatment' in Article II were to be interpreted narrowly to require only formally identical treatment, that could lead in many situations to the frustration of the objective behind Article II which is to prohibit discrimination between like services and service suppliers of other Members".²⁷ The Appellate Body did not agree with this reasoning of the Panel, but reached the same conclusion as regards the applicability of Article II of GATS to *de facto* discrimination:

²³ Appellate Body Report, *Argentina – Financial Services*, para. 6.42.

²⁴ Appellate Body Report, *Argentina – Financial Services*, para. 6.43.

²⁵ Appellate Body Report, *Argentina – Financial Services*, paras. 6.44-6.45.

²⁶ Panel Report, *EC – Bananas III*, para. 7.301.

²⁷ Panel Report, *EC – Bananas III*, para. 7.303.

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

Articles I and II of the GATT 1994 have been applied, in past practice, to measures involving *de facto* discrimination. ...

The GATS negotiators chose to use different language in Article II and Article XVII of the GATS in expressing the obligation to provide 'treatment no less favourable'. The question naturally arises: if the GATS negotiators intended that 'treatment no less favourable' should have exactly the same meaning in Articles II and XVII of the GATS, why did they not repeat paragraphs 2 and 3 of Article XVII in Article II? But that is not the question here. The question here is the meaning of 'treatment no less favourable' with respect to the MFN obligation in Article II of the GATS. There is more than one way of writing a *de facto* non-discrimination provision. Article XVII of the GATS is merely one of many provisions in the *WTO Agreement* that require the obligation of providing 'treatment no less favourable'. The possibility that the two Articles may not have exactly the same meaning does *not* imply that the intention of the drafters of the GATS was that a *de jure*, or formal, standard should apply in Article II of the GATS. If that were the intention, why does Article II not say as much? The obligation imposed by Article II is unqualified. The ordinary meaning of this provision does not exclude *de facto* discrimination. Moreover, if Article II was not applicable to *de facto* discrimination, it would not be difficult -- and, indeed, it would be a good deal easier in the case of trade in services, than in the case of trade in goods -- to devise discriminatory measures aimed at circumventing the basic purpose of that Article.

For these reasons, we conclude that 'treatment no less favourable' in Article II:1 of the GATS should be interpreted to include *de facto*, as well as *de jure*, discrimination. We should make it clear that we do not limit our conclusion to this case. We have some difficulty in understanding why the Panel stated that its interpretation of Article II of the GATS applied '*in casu*'.²⁸

1.3.2.2 Interpretation of the term "treatment no less favourable"

18. In *Argentina – Financial Services*, the Appellate Body set out its interpretation of the term "treatment no less favourable" in Article II:1 and Article XVII of the GATS. With respect to Article II:1 of the GATS, the Appellate Body observed as follows:

"Turning to Article II:1 of the GATS, we note that this provision does not further define the term 'treatment no less favourable'. Furthermore, we recall that Article XVII:1 contains a national treatment obligation, whereas Article II:1 contains a most-favoured-nation obligation. Nonetheless, the operative parts of these provisions are similarly worded, in that a Member is required to accord 'treatment no less favourable' to 'services and service suppliers of any other Member'. Both provisions serve the function of prohibiting discrimination against foreign services and service suppliers *vis-à-vis* like services and service suppliers. Although the immediate context of this term in Articles II:1 and XVII:1 is not expressed in identical words, and Article II does not contain the elaboration of the 'less favourable treatment' standard found in Articles XVII:2 and 3, the Appellate Body has found that both provisions share the essential nature of anti-

²⁸ Appellate Body Report, *EC – Bananas III*, paras. 231-234.

discrimination provisions, and cover both *de jure* and *de facto* discrimination.²⁹ Thus, the elaboration on the meaning of the term 'treatment no less favourable' contained in Article XVII, and in particular in Article XVII:3, should also be pertinent context to the meaning of the same term in Article II:1.

We note that, in *EC – Bananas III*, the Appellate Body upheld the panel's finding that the EC licensing procedures in that dispute conferred less favourable treatment under both Article II and Article XVII of the GATS. In so doing, the Appellate Body based its findings under both provisions on the same notion of 'less favourable treatment'. Specifically, the Appellate Body agreed with the panel that various aspects of the EC licensing procedures at issue created less favourable conditions of competition for service suppliers of the complainants' origin.³⁰ The Appellate Body's findings indicate that, on substance, the concept of 'treatment no less favourable' under both the most-favoured-nation and national treatment provisions of the GATS is focused on a measure's modification of the conditions of competition. This legal standard does not contemplate a separate and additional inquiry into the regulatory objective of, or the regulatory concerns underlying, the contested measure. Indeed, in prior disputes, the fact that a measure modified the conditions of competition to the detriment of services or service suppliers of any other Member was, in itself, sufficient for a finding of less favourable treatment under Articles II:1 and XVII of the GATS."³¹

19. The Panel in *Argentina – Financial Services* had found "two aspects in particular" in the text of Article II:1 of the GATS to be relevant to its interpretation of the term "treatment no less favourable", namely (i) the broad scope of the obligation under Article II:1 of the GATS, and (ii) the reference to "services and service suppliers".³² The Appellate Body disagreed with the Panel on both accounts and rejected the Panel's proposition that "regulatory aspects" were relevant to the interpretation of the term "no less favourable treatment". With respect to the first point, the Appellate Body observed that "the fact that a provision has a potentially broad scope of application is not unique to Article II:1 or Article XVII of the GATS" and pointed to Article III:4 of the GATT 1994 as also having an extensive scope of application.³³ The Appellate Body explained:

"[T]he broad scope of Article III:4 of the GATT 1994 has not been perceived as a reason for requiring an analysis as to the 'regulatory aspects' relating to the products. Rather, pursuant to the legal standard for 'treatment no less favourable' under Article III:4 of the GATT 1994, the fact that a measure modifies the conditions of competition to the detriment of imported products is, in itself, sufficient for a finding that the measure confers 'less favourable treatment'."³⁴

20. With respect to the reference to "services and service suppliers", the Appellate Body stated:

"We note that the reference to 'service suppliers' is a particular feature of the GATS. This can be seen from Article I:2, which defines 'trade in services' as 'the supply of a service' by a supplier through four modes of supply. The definition of 'trade in services' makes clear that the supply of a service is inextricably linked with the service suppliers. Nonetheless, we do not see how the mere reference to 'service suppliers' in the GATS could alter the legal standard of 'treatment no less favourable', that is, whether the measure modifies the conditions of competition to the detriment of like services or service suppliers of any other Member."³⁵

²⁹ (footnote original) Appellate Body Report, *EC – Bananas III*, para. 233.

³⁰ (footnote original) Appellate Body Report, *EC – Bananas III*, paras. 240-248. In that dispute, the Appellate Body stated that the relevant findings under the most-favoured-nation obligation in Article I of the GATT 1994 would be of greater pertinence in interpreting the most-favoured-nation obligation in Article II of the GATS. (See *ibid.*, para. 231)

³¹ Appellate Body Report, *Argentina – Financial Services*, paras. 6.105-6.106. See also Panel Report, *EU – Energy Package*, para. 7.489.

³² Panel Report, *Argentina – Financial Services*, para. 7.209.

³³ Appellate Body Report, *Argentina – Financial Services*, para. 6.109.

³⁴ Appellate Body Report, *Argentina – Financial Services*, para. 6.109.

³⁵ (footnote original) Furthermore, as noted above, the fact that Article III:4 of the GATT 1994 covers measures affecting the 'internal sale, offering for sale, purchase, transportation, distribution, or use' of

Specifically, as further discussed below, this legal standard does not contemplate a separate step of analysis regarding whether the 'regulatory aspects' relating to service suppliers could 'convert[]' the measure's detrimental impact on the conditions of competition into 'treatment no less favourable'.³⁶

21. In *Argentina – Financial Services*, the Appellate Body explained that its interpretation of the legal standard of "treatment no less favourable" was also supported by the structure of the GATS. According to the Appellate Body, "[u]nder this structure, Members can utilize certain flexibilities, available to them uniquely under the GATS, when undertaking their GATS commitments, and their obligations are qualified by exceptions or other derogations contained in the GATS and its Annexes."³⁷

"Through these flexibilities and exceptions, the GATS seeks to strike a balance between a Member's obligations assumed under the Agreement and that Member's right to pursue national policy objectives. A Member's right to pursue national policy objectives is recognized in the preamble of the GATS, including the third and fourth recitals. The term 'national policy objectives' in the preamble, which is general and undefined, may cover a wide array of objectives, and Members retain various means to pursue these objectives. To begin with, measures pursuing national policy objectives may be taken outside the sectors or supply modes covered by GATS Schedules. Furthermore, a Member may pursue a wide range of policy objectives while acting consistently with its obligations or commitments assumed under the GATS. Indeed, a Member's commitments under the GATS could in some cases serve to further its national policy objectives. Where measures are found to be *inconsistent* with a Member's obligations or commitments under the GATS, the GATS provides for various mechanisms, such as Article XIV, which take account of policy objectives underlying such measures.

This balance, too, reinforces the established legal standard for 'treatment no less favourable' under the non-discrimination provisions of the GATS, that is, whether a measure modifies the conditions of competition to the detriment of like services or service suppliers of any other Member. Where a measure is inconsistent with the non-discrimination provisions, regulatory aspects or concerns that could potentially justify such a measure are more appropriately addressed in the context of the relevant exceptions. Addressing them in the context of the non-discrimination provisions would upset the existing balance under the GATS."³⁸

22. The Appellate Body also noted that "[its] interpretation of Articles II:1 and XVII of the GATS chimes with the Appellate Body's interpretation of the most-favoured-nation and national treatment obligations in the context of the GATT 1994."³⁹ It further explained that the approach adopted with respect to the relevance of regulatory concerns in determining "treatment no less favourable" under Article 2.1 of the TBT Agreement is not applicable to the same term in the GATS:

"The Appellate Body explained in *EC – Seal Products* its reasons for finding that the two-step analysis developed under Article 2.1 of the TBT Agreement does not form part of the legal standard under Article III:4 of the GATT 1994. One of the reasons identified by the Appellate Body was that, whereas the obligations assumed by Members under Articles I:1 and III:4 of the GATT 1994 are balanced by a Member's right to regulate in a manner consistent with the requirements of the exceptions contained in Article XX, the TBT Agreement does not contain such general exceptions. This observation by the Appellate Body, in our view, has particular resonance in the context of the GATS, where a Member's obligations are not only qualified by the various exceptions listed therein, but also circumscribed by the flexibilities unique to the GATS. Thus, in the context of both the GATT 1994

products indicates that this provision also covers measures affecting producers or suppliers of goods. (See *supra*, para. 6.109)

³⁶ Appellate Body Report, *Argentina – Financial Services*, para. 6.111.

³⁷ Appellate Body Report, *Argentina – Financial Services*, para. 6.112.

³⁸ Appellate Body Report, *Argentina – Financial Services*, paras. 6.114-6.115.

³⁹ Appellate Body Report, *Argentina – Financial Services*, para. 6.119.

and the GATS, an interpretation of the term 'treatment no less favourable' that does not contemplate a separate inquiry into the regulatory objectives of a measure sits well within the general structure of the respective Agreement."⁴⁰

23. In concluding, the Appellate Body pointed out that "[its] analysis does not suggest that any evidence relating to the regulatory aspects must *a priori* be excluded". According to the Appellate Body:

"Consistent with the established approach to assessing 'less favourable treatment' under the GATT 1994, an assessment of whether a measure modifies the conditions of competition to the detriment of like services or service suppliers of any other Member 'must begin with careful scrutiny of the measure, including consideration of the design, structure, and expected operation of the measure at issue'. In such assessment, to the extent that evidence relating to the regulatory aspects has a bearing on the conditions of competition, it might be taken into account, subject to the particular circumstances of a case, and as an integral part of a panel's analysis of whether *the measure at issue* modifies the conditions of competition to the detriment of like services or service suppliers of any other Member."⁴¹

1.3.3 The "aims-and-effects" test

24. In *EC – Bananas III*, the Appellate Body rejected the application of the so-called "aims-and-effects" test which had been previously adopted by several GATT panels in interpreting GATT Article III, to the national treatment requirement contained in Article II or Article VII of the GATS.⁴²

25. With respect to the "aims-and-effects" test under GATT Article III, see the Section on Article III of the GATT 1994.

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⁴⁰ Appellate Body Report, *Argentina – Financial Services*, para. 6.121.

⁴¹ Appellate Body Report, *Argentina – Financial Services*, para. 6.127.

⁴² Appellate Body Report, *EC – Bananas III*, para. 241.