

Legal Review of the General Agreement on Trade in Services (GATS) from a Health Policy Perspective



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PREPARED BY THE GATS LEGAL REVIEW TEAM
FOR THE WORLD HEALTH ORGANIZATION¹

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¹ Nothing in this document represents the official position of the World Health Organization or any of its staff members. The views expressed in this document represent only those of the members of the GATS Legal Review Team.

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P R E F A C E A N D A C K N O W L E D G M E N T S



Preface
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Acknowledgments

Work on this *Legal Review of the General Agreement on Trade in Services (GATS) from a Health Policy Perspective* began in the summer of 2002 when the World Health Organization (WHO) appointed me, Carlos Correa, and Obijiofor Aginam to form the GATS Legal Review Team. From the beginning, the effort has been helped enormously by many people who have taken the time to provide the project with advice and guidance and to review drafts of the Legal Review as it developed. I thank particularly Carlos Correa and Obijiofor Aginam for serving as members of the GATS Legal Review Team and for all the time and attention they paid to this project from conception to completion. I also thank Rudolf Adlung and Peter Morrison at the World Trade Organization, the members of the WHO Scientific Resource Group on Globalization, Trade, and Health, and many WHO staff members in Geneva and regional offices for reviewing drafts of the Legal Review and providing helpful input on the relationship between health policy and trade in health services. I am also grateful to the participants of the Workshop on Trade in Health Services and GATS Current Evidence and Best Practices in Ongoing GATS Negotiations that took place in July 2003 and which was co-sponsored by WHO, IDRC, CIDA and Health Canada. A special thanks to John Wynn Owen and the Nuffield Trust for their support and co-sponsorship. Finally, I thank Nick Drager, the WHO project leader for this effort, for guiding this complex endeavor with skill, patience, and determination.

The *Legal Review* was substantively completed in November 2004 and took into account the panel decision in the *US—Gambling* case but not the Appellate Body decision issued in April 2005. Annex 2 was, thus, added to the *Legal Review*, and it contains analysis of the Appellated Body decision in *US—Gambling* from a health policy perspective.

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Introduction

1. The General Agreement on Trade in Services (GATS) is one of the most important multilateral trade agreements to emerge from the Uruguay Round negotiations that created the World Trade Organization (WTO). GATS constitutes the multilateral legal framework through which WTO members will approach the progressive liberalization of trade in services, including health-related services. Health policy is an important social endeavor that faces both opportunities and challenges from GATS. Many factors, including the complexity of GATS, the lack of empirical data on international trade in health-related services and on the health effects of liberalized trade in services, and inequalities in resources and power between developed and developing countries create a difficult environment for people in public health and health care who want to understand the actual and potential impact of GATS on their activities.

2. The World Health Organization (WHO) commissioned this Legal Review of GATS from a health policy perspective as part of its efforts to bring the relationship between GATS and health into better focus. Controversies about the impact of GATS on public services, such as health and education, have arisen; and a debate has developed on GATS and health that further complicates discerning how health policy communities should view this WTO agreement. This debate centers on the impact of GATS on the policy flexibility of WTO members in the realm of health.

3. States have long used international law in ways that affect health policy. Two examples discussed in the Legal Review are the International Health Regulations (IHR)² and international human rights law. More significant international legal disciplines on health policy have, however, developed in international trade law, most prominently through the General Agreement on Tariffs and Trade (GATT) and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). GATS is also an international trade agreement that may affect health policy more than the IHR and international law on human rights.³

² All references in the Legal Review to the International Health Regulations (IHR) refer to the IHR originally adopted in 1969 and last amended in 1981. The process of revising the IHR had not been completed by the date of the Legal Review's completion in November 2004.

³ Chapter 2 on "Health Policy and International Law" explores these issues.



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The “GATS and health” debate

4. A considerable body of literature has raised concerns about how GATS might affect the ability of a WTO member to pursue public policies, such as health. This literature expresses fears that GATS restricts the policy space of WTO members *procedurally*, *structurally*, and *substantively*. Procedurally, concerns exist that GATS’ rules create a new and difficult process through which WTO members will have to pursue health policy. Structurally, the worry is that the duty to liberalize trade in services progressively under GATS will force WTO members to privatize public health and health care services currently provided by governments and “lock in” policy experiments with privatization, preventing returns to publicly operated and funded services. Substantively, critics argue that GATS erodes a WTO member’s ability to regulate health-related services adequately because of limitations the treaty places on health policy. According to this view, the interdependence of the procedural, structural, and substantive effects of GATS would constrain health policy’s space for WTO members and bring about a revolution in how states use international law to regulate the provision of public services such as health.

5. Pro-GATS counterarguments often stress the flexibility of GATS, which allows WTO members to determine whether and how to liberalize international trade in services. From the flexibility perspective, GATS supports rather than undermines health policy. The inclusion of health-related services in the scope of GATS means that GATS may affect certain aspects of health policy; but, contrary to the claims of GATS opponents, proponents of GATS emphasize that how GATS may affect health policy remains largely a sovereign decision not imposed by the WTO.

6. As the two previous paragraphs suggest, the GATS and health debate often reads like a “tale of two treaties”—it is the best of treaties; it is the worst of treaties. This context makes it difficult for people working in the public health and health care sectors to understand how GATS may or may not affect their work. In commissioning this Legal Review, WHO sensed that the GATS and health debate had reached a point at which the “tale of two treaties” was proving unhelpful to WHO members attempting to evaluate how GATS relates to health policy. WHO believed an interpretation of GATS from a health policy perspective was required. The Legal Review is designed to provide WHO with a detailed legal reading of GATS for purposes of informing health policy about the liberalization of trade in health-related services.⁴

⁴ Chapter 3 analyzes the “GATS and Health Debate.”

The Legal Review's methodology

7. The Legal Review applies principles of treaty interpretation found in general international law to GATS. This methodology is not novel because both pro- and anti-GATS experts have used these principles. The conflicting interpretations given by the two sides of the debate cannot, however, often be reconciled. This reality forces analysis back to first principles—in this case, principles of treaty interpretation codified in the Vienna Convention on the Law of Treaties (1969). Also important to treaty interpretation is reference to cases decided by dispute settlement bodies under the old GATT system and the existing WTO. The dispute settlement bodies deciding cases apply the principles of treaty interpretation found in the Vienna Convention on the Law of Treaties, and the decisions in these cases may constitute precedents that affect how treaties will be interpreted in future disputes. The Legal Review refers extensively, therefore, to GATT and WTO cases wherever relevant for interpreting provisions in GATS.

8. In addition to interpreting GATS under rules of international law on treaty interpretation, the Legal Review identifies specific legal strategies that health policy experts and organizations could utilize in strengthening the health policy perspective on GATS. Identifying potential legal strategies to strengthen the voice of health policy in interpretation of GATS is important because health policy communities will have to work within the GATS framework and relevant rules of international law. Treaty interpretation, even with a health policy perspective in mind, may not always produce the desired health policy outcome. Understanding when this may or may not be the case with respect to GATS is important in thinking about the relationship between GATS and health policy.⁵

The scope of GATS

9. The Legal Review's substantive analysis of GATS begins with an attempt to understand how the scope of GATS overlaps with the scope of health policy. Because the respective scopes of both GATS and health policy are broad, the overlap is significant, making GATS an important treaty in terms of its potential effect on health policy.⁶



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⁵ The methodology of the Legal Review is explained in Chapter 4 on "Methodology of the Legal Review and Overview of the Structure of GATS."

⁶ Chapter 5 on "Scope of GATS and Health Policy" examines these issues.



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10. GATS' scope is very broad. Article I:1 of GATS provides that "[t]his Agreement applies to measures by Members affecting trade in services." Each of the key terms in this provision—"trade in services," "measures by Members," "affecting"—have broad application under GATS. The extensive coverage of GATS becomes important from a health policy perspective when the scope of health policy is factored into the analysis. The exercise of governmental powers to protect and promote human health extends across a vast range of activities, economic sectors, and social objectives. Threats to human health arise in a multitude of contexts in which governments exercise public authority. Health-related services appear in many service sectors that fall within GATS, further underscoring the significant overlap between GATS and health policy.

11. The key controversy in the overlapping scopes of GATS and health policy is the provision of GATS that excludes "services supplied in the exercise of governmental authority" (GATS, Article I:3(b)). GATS defines such services as "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers" (GATS, Article I:3(c)). Some experts claim that this exclusion is very narrow, bringing government-supplied health-related services inside GATS. Others argue that this provision of the treaty excludes government services, which puts government-supplied health-related services outside of GATS entirely. The debate is, therefore, one about the breadth of this exclusion.

12. The meaning of the exclusion for services supplied in the exercise of governmental authority is still not clear, but the Legal Review undertakes a detailed analysis of this provision to identify possible legal strategies for the public health and health care sectors. The analysis indicates that this provision is sufficiently complex that governments should view simplistic assertions about it with skepticism. In addition, this provision raises issues about whether the complaining or defending WTO member has the burden of proof that a government-supplied service is within or outside the exclusion.

13. The authors argue that the burden of proof rightly falls on the WTO member claiming that a government-supplied service is not covered by the exclusion. In other words, a WTO member complaining about a possible GATS violation has the initial burden of establishing that a government-supplied service does not meet the criteria found in Article I:1(c) of GATS. Thus, government-provided services are presumed to be outside GATS unless a WTO member establishes that such services do not meet the tests provided in Article

1:1(c). The frequent arguments of the WTO Secretariat that government-provided services are excluded from GATS supports this interpretive approach.



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14. Even when a government-provided service falls within GATS because it does not satisfy the Article 1:1(c) tests, WTO members should keep in mind that the importance of this outcome for health policy depends on two further aspects of GATS: (1) the impact of the general obligations, such as the most-favored-nation principle; and (2) the extent of market access and national treatment commitments made by the relevant WTO member. In other words, the determination that a service is within the scope of GATS begins rather than ends analysis of how GATS affects government-provided health-related services.

Structure of GATS

15. As the previous paragraph indicates, when a health-related service falls within GATS, the next analytical step involves examining the rules GATS applies to measures that affect trade in services. GATS contains four sets of rules that form the obligations of WTO members with respect to trade in services.⁷ The first set of rules involves the general obligations that apply to all measures affecting trade in services. GATS literature often refers to these obligations as “horizontal” or “top-down” disciplines because they apply to all service sectors and measures affecting trade in services.

16. The second set of rules governs the making of specific market access and national treatment commitments by WTO members. In contrast to the mandatory general obligations, the specific commitments on market access and national treatment (1) arise from voluntary undertakings by WTO members; and (2) apply only to the service sectors specified in the commitments. WTO members bind themselves to their specific commitments by detailing them on schedules that become part of the binding treaty. The rules on specific commitments are often called “bottom up” rules because the commitments originate with WTO members rather than GATS itself.

17. The third set of rules obliges WTO members to engage in successive rounds of negotiations with a view to achieving progressively a higher level of liberalization in trade in services. These rules envision GATS as a dynamic process that continually involves negotiations to liberalize trade in services further.

⁷ Chapter 4 contains an overview of the structure of GATS.



18 The fourth set of rules establishes the institutional framework for GATS. Most important are the application of the WTO's dispute settlement machinery to GATS disputes and the creation of the Council for Trade in Services to oversee the implementation and progressive development of the Agreement.

General obligations

19. Part of the GATS and health debate centers on whether the general obligations and disciplines of GATS reduce the policy flexibility of WTO members in the area of health. The Legal Review divides the general obligations into substantive and procedural duties and focuses mainly on the substantive duties because these have been the source of controversy.⁸ Substantive disciplines potentially affect the content of measures WTO members may take to regulate trade in services. Procedural duties require WTO members to participate in certain processes deemed important to the functioning of the Agreement but do not touch the substantive content of domestic regulation.

20. One of the most important substantive general obligations is the most-favored-nation (MFN) principle, under which each WTO member has to accord immediately and unconditionally to service and service suppliers of any other WTO member treatment no less favorable than it accords to like services and service suppliers of any other country (GATS, Article II:1). Analysis of the MFN principle revealed that Article II:1 of GATS is a serious substantive discipline for WTO members. Although the MFN principle may have problematic implications in some cases, the ability of a WTO member to discriminate between foreign services or service suppliers does not seem to be important to the protection and promotion of health.

21. A second category of general obligations involves rules affecting domestic regulatory powers. A significant aspect of the GATS and health debate revolves around whether and how GATS interferes with the ability of a WTO member to regulate services domestically. Because many experts have noted that governments must be able to regulate health-related services, the differing positions on the general obligations affecting domestic regulatory powers create a critical area of GATS interpretation.

22. Many of the general obligations on domestic regulatory power only affect domestic regulations in sectors covered by specific commitments. The potential effect of these provisions on health policy depends

⁸ Chapter 7 on "General Obligations and Disciplines" covers this material.

on the level and nature of specific commitments made by WTO members in health-related sectors. The most controversial of these provisions in the GATS and health debate have been Article VI:5(a) on domestic regulations and Article VIII on monopoly service suppliers.



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23. Article VI:5(a) of GATS regulates licensing and qualification requirements and technical standards implemented in sectors subject to specific commitments. This provision obliges a WTO member to apply such requirements and standards in a manner that is transparent and no more burdensome than necessary to ensure the service's quality. The WTO member additionally must show that such requirements and standards could not reasonably have been expected at the time the WTO member made specific commitments in the relevant sector (GATS, Article VI:5(a)). Analysis of Article VI:5(a) indicates that it is a weak provision on the domestic regulation of trade in services because, among other reasons, the burden of proof a complaining WTO member would have to bear to prevail in an Article VI:5(a) claim is significant. Nevertheless, Article VI:5 should be monitored in case it is used in ways that might adversely affect health policy.

24. Article VIII addresses the domestic regulation of monopoly service suppliers. Criticism of Article VIII has focused most significantly on Article VIII:4, which imposes rules that apply when a WTO member grants monopoly or exclusive rights regarding the supply of a service covered by specific commitments after the date of entry into force of the WTO Agreement (GATS, Article VIII:4). These rules require the WTO member granting such rights to provide affected WTO members with compensation or face trade sanctions. Concerns have been raised that this compensation requirement restricts a WTO member's ability to expand monopoly or exclusive service supply rights for public interest purposes. Article VIII:4 does impose a constraint on health policy because it increases the political, economic, and diplomatic costs of using monopoly and exclusive service rights as a health policy tool. Other international legal agreements, such as bilateral investment agreements, may pose even greater constraints in this regard than Article VIII:4 of GATS.

25. In terms of general substantive obligations not linked to specific commitments, controversy has centered on Article VI:4 on domestic regulations. Article VI:4 is not really a substantive obligation, nor does it contain any substantive duties. Rather, it is a provision that obliges WTO members to engage in negotiations in the Council for Trade in Services to develop disciplines on licensing, qualification, and technical standard regulations. At present, Article VI:4 poses no direct threat to health policy because no discussions on adopting



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such disciplines for a health-related service have occurred. The Legal Review's analysis demonstrates, however, that health ministries of WTO members should be vigilant about the Article VI:4 process because health-related services could be affected by the development of disciplines under this provision.

26. The generally applicable procedural duties in GATS concern providing information, establishing governmental procedures, negotiating, consulting, and cooperating in specified circumstances. The most important of these procedural duties for health policy are the duties to engage in multilateral negotiations on disciplines for domestic regulations (Article VI:4), emergency safeguards (Article X:1), government procurement of services (Article XIII:2), and subsidies for service suppliers (Article XV). Health ministries need to monitor the development of these negotiations for their potential impact on health policy.

27. Overall, in terms of the general obligations and disciplines of GATS, their present impact on health policy does not seem particularly troubling. The general obligations that are universally binding are not large in number or particularly worrying for health policy. The low level of specific commitments made in health-related sectors to date mitigates the effect of the general obligations linked to specific commitments. More concerns may arise, however, in the future if the level of specific commitments in health-related sectors increases and if WTO members negotiate additional multilateral disciplines on trade in services.

Rules on specific commitments

28. The second critical piece of GATS' architecture contains the rules governing the making of specific commitments on market access and national treatment.⁹ For many experts, the rules on specific commitments reflect the flexibility and discretion GATS allows WTO members to retain in calibrating where and how much to liberalize trade in services. This perspective obscures, however, the fact that the freedom and flexibility WTO members have to make specific commitments becomes more limited once specific commitments are made, perhaps keeping WTO members in liberalization commitments that may turn out to be bad policy moves.

29. Further, the "flexibility" of the specific commitment provisions cannot be isolated from the duty to participate in successive negotiating rounds to liberalize progressively trade in services. Although the legal duty to enter into successive negotiating rounds contains nothing directly threatening to health policy, this duty will

⁹ The GATS rules on specific commitments on market access and national treatment are analyzed in Chapter 8.

feed into the politics of progressive liberalization efforts. The political dynamic created by the duty to negotiate progressive liberalization may, over time, be detrimental to a government's ability to provide and regulate public-interest services such as health.



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30. Health ministries have not historically been influential actors in the process of making trade policy in developed or developing countries. The danger that trade ministries might underestimate the complexities of health policy and might make specific commitments in health-related services is significant. The apparent low level of specific commitments on health-related services presently experienced, and the apparent lack of sustained interest in the liberalization of trade in such services to date by WTO members, provide no guarantee that successive negotiating rounds will not increase political pressure on WTO members to make more specific commitments on health-related services.

31. For these reasons, understanding the rules on the making of specific market access and national treatment commitments found in Articles XVI and XVII of GATS is important from a health policy perspective. The Legal Review analyzes these rules in detail, focusing on the tensions these rules create between the freedom to make specific commitments accorded by the treaty and the disciplines applied to specific commitments made. For example, if a WTO member makes a market access commitment in a service sector pursuant to GATS Article XVI:1, the entire sector is opened to foreign participation except with regard to specific market access restrictions the WTO member lists in its schedule of specific commitments (GATS, Article XVI:2). The same dynamic exists in connection with the rules on making national treatment commitments (GATS, Article XVII). These GATS rules require that WTO members exercise care and foresight in listing the types of market access restrictions or national-treatment restrictions they want to maintain or adopt in the future. The broad scopes of GATS and health policy combine to create a challenge for WTO members seeking to calibrate appropriately moves to increase market access and/or national treatment in health-related services while retaining needed regulatory tools and flexibility.

32. The Legal Review also covers the complex process of scheduling market access and national treatment commitments. Dangers for health policy appear in this complexity because the schedules form part of the binding rules of the treaty. GATS offers little flexibility to modify schedules of specific commitments, increasing the pressure on WTO members to undertake a complex and difficult process with little margin for



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error. Although the heart of the scheduling process involves substantive decisions about what liberalization commitments to make, the scheduling process poses its own difficulties about which health ministries must be aware and vigilant if specific commitments in health-related services are made. Key to such awareness and vigilance will be formulating, in advance, for health-related services potentially subject to specific commitments a clear understanding of the (1) regulatory “footprint” for such services; (2) demographic, economic, and technological trends affecting such services; and (3) the potential social and equity implications of making specific commitments.

33. WTO members can liberalize trade in health-related services unilaterally, if they so wish, without accepting binding commitments in their GATS schedules of specific commitments. Such unilateral liberalization would allow WTO members to experiment with such policies in a way that permits them to reverse course on market access or national treatment if the experiment produces unsatisfactory results. The reversal of a unilateral liberalization of trade in health-related services would not be subject to GATS rules on providing compensation to WTO members affected by the change in market access or national treatment. For WTO members also bound by bilateral or regional treaties affecting trade in services, unilateral liberalization policies may have greater legal significance than under GATS.

34. GATS provides general and specific exceptions to the general obligations and specific commitments.¹⁰ Analysis of these exceptions focuses on Article XIV(b), the general exception for measures related to the protection of human health. The authors argue that the burdens imposed by the necessity test of Article XIV(b) and the *chapeau* of Article XIV are substantial and difficult. The strict scrutiny doctrine developed by the Appellate Body in the *EC—Asbestos* case for analyzing the potential effectiveness of less trade-restrictive measures under the necessity test in GATT provides a basis for defending non-compliant measures that seek to protect human health. The strict scrutiny doctrine and potential effectiveness test may not, however, be sufficient to protect non-compliant health measures in all circumstances.

35. Concerns about the GATS scheduling process raise questions about the extent to which WTO members have made specific commitments in health-related services.¹¹ Published literature on this issue indicates that the level of specific market access and national treatment commitments in health-related services has been quite low. WTO and WHO jointly concluded, for example, that “all information to date suggests that

¹⁰ Chapter 8 analyzes the exceptions that are available to WTO members under GATS.

¹¹ Chapter 9 contains “Analysis of Health-Related Commitments in GATS Schedules.”

current patterns and levels of health services trade are occurring irrespective of GATS. . . . The overall effect of GATS on trade in health services is thus likely to have remained negligible to date” (WHO/WTO 2002: 117-18).



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36. The Legal Review presents data on aggregate levels of specific commitments in key health-related services that demonstrate the level of commitments has, to date, been low. The authors caution, however, about the use of aggregate data on specific commitments in connection with health-related services. First, such aggregate data do not reflect how any given WTO member has shaped its commitments in a service sector. Second, the absence of specific commitments under GATS tells one nothing about whether a WTO member is or is not open to foreign services and service suppliers. Many countries that have made no specific commitments in health-related services already engage in extensive international trade in such services; they simply have not bound themselves under GATS in connection with such trade. These observations about the limitations of aggregate analysis of specific commitments in health-related services reveal again the complexity created by the structure and dynamics of the process of scheduling specific commitments. Focused and detailed analysis of a WTO member’s specific commitments in health-related service sectors would be required to make informed judgments about whether and how such commitments affect that WTO member’s health policy.

Dispute settlement

37. The Legal Review then examines the institutional framework GATS creates and focuses most of its attention on how the WTO dispute settlement mechanism plays into the GATS and health debate.¹² The Legal Review makes use of GATT and WTO jurisprudence on the meaning of treaty provisions, illustrating how critical the WTO dispute settlement mechanism will be for the future interpretation and implementation of GATS. The WTO dispute settlement mechanism enhances the importance of WTO rules in every field of policy they touch, including health. The actual impact of the WTO dispute settlement process on health policy depends, however, on many factors, including the facts of the case, what GATS principles are under review, and how the parties to the dispute argue their legal positions.

38. GATT and WTO rulings concerning other agreements, such as GATT, demonstrate that the WTO dispute settlement mechanism will not adopt a deferential attitude toward WTO members arguing that their behavior protects human health. At the same time, these rulings suggest that the WTO dispute settlement

¹² See Chapter 10 on “GATS Dispute Settlement and Institutions.”



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process is capable of producing rulings that recognize the importance of protecting human health within a system designed to liberalize international trade. Health policy is subject to WTO disciplines across many different agreements. The WTO dispute settlement mechanism, and its application to GATS, heightens the importance of GATS from the perspective of health policy, making familiarity with WTO jurisprudence on GATS critical to the exercise of health policy in the future.

GATS 2000 negotiations

39. Part of WHO's motivation in commissioning the Legal Review involved helping health policy experts more effectively participate in the "GATS 2000" round of negotiations on further liberalization of trade in services, which now form part of the Doha Development Agenda multilateral trade talks. At the date of this writing, WTO members were formulating their negotiating positions with respect to the GATS 2000 negotiations, which are anticipated to accelerate in the coming months. The Legal Review contains, therefore, analysis of the Council for Trade in Services' guidelines for the GATS 2000 negotiations.¹³ The Legal Review argues that understanding these guidelines is important because the GATS 2000 negotiations, and parallel negotiations on disciplines for domestic regulation, emergency safeguards, government procurement, and subsidies, may perhaps more significantly shape the relationship between GATS and health policy than the existing GATS general obligations and specific commitments made to date.

Lessons from other WTO agreements

40. The GATS 2000 negotiations will be important for the future relationship of GATS and health policy because these negotiations challenge WTO members to balance liberalization of trade in services with the need for sufficient policy flexibility. To begin to answer such questions, the Legal Review analyzes lessons for health policy learned from the health policy experience with other WTO agreements, especially TRIPS.¹⁴

41. Experience in other WTO contexts demonstrates that raising the profile of health policy in international trade law has not been an easy or harmonious project. Cases establishing the health-related jurisprudence of the WTO dispute settlement process were hard-fought disputes in which panels and the Appellate Body confronted difficult interpretive issues. The battle over TRIPS between and among state and

¹³ See Chapter 11 on "GATS 2000: Health-Related Services and the On-Going GATS Liberalization Talks."

¹⁴ See Chapter 12 "Lessons for Health Policy from Other WTO Agreements: Making the Public Health Message Heard in International Trade Law."

non-state actors was bitterly contested and centered on the circumstances under which the safeguards of compulsory licensing and parallel importing could be used.



Executive
Summary

42. The extent to which health policy has been recognized as important in WTO agreements relates to the level of legal, health policy, and political mobilization that occurred in these cases and diplomatic debates. Those interested in preserving adequate policy space and flexibility for health in the face of globalization and trade liberalization face the challenge of mobilizing their efforts in a sophisticated manner on a sustained basis within multiple WTO contexts. The story of the TRIPS controversy involves the mobilization of legal, health policy, and political resources, arguments, and personnel by governments and NGOs to advance positions concerning the public-health safeguards of compulsory licensing and parallel importing. It could be argued that similar mobilization in the context of GATS may be required for health policy to have and maintain a sustainable, influential voice in the process of liberalization of trade in health-related services.

Health policy beyond GATS

43. The Legal Review concludes its substantive analysis by briefly considering the impact on health policy of other international trade and investment agreements.¹⁵ Although GATS has been the subject of much attention and controversy, as the GATS and health debate illustrates, in many respects regional, sub-regional, and bilateral trade and investment agreements that cover services contain more aggressive liberalization provisions than GATS. GATS does not, from this perspective, seem to be at the cutting edge of developments in the liberalization of trade in services either substantively or in dispute-settlement procedures. The Legal Review argues that more attention should be paid to the impact on health policy of these regional, sub-regional, and bilateral trade and investment agreements that liberalize trade in services.


Concluding thoughts

44. The concluding chapter of the Legal Review provides a brief overview of the legal analysis of GATS it contains, reviews the specific legal strategies it identifies to heighten the importance of health in the GATS process, and encourages further health policy work on GATS to ensure that the voice of health policy is heard as the GATS process moves forward.

¹⁵ See Chapter 13 "Implications for Health Policy of Other International Agreements: Bilateral and Regional Agreements on Trade and Investment."

Chapter 1

INTRODUCTION TO THE LEGAL REVIEW



Chap 1
Introduction
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Review

1. The General Agreement on Trade in Services (GATS) is one of the most important multilateral trade agreements to emerge from the Uruguay Round negotiations that created the World Trade Organization (WTO). GATS represents the multilateral legal framework through which WTO members will approach the progressive liberalization of trade in services. GATS takes the liberalization agenda developed in the context of trade in goods under the General Agreement on Trade and Tariffs into the area of services, one of the most important and fastest growing economic sectors. For international trade law, GATS constitutes a landmark agreement that will help shape the global trading system in the 21st century.

2. The scope, structure, and substance of GATS create complex and controversial issues for many economic sectors. Health policy is an important social endeavor that faces both opportunities and challenges from GATS. Recognizing the importance of GATS to health policy, the World Health Organization (WHO) has engaged in various activities to help WHO members understand the implications of GATS for governmental efforts to protect public health and provide health-care services (UNCTAD/WHO 1997; WHO/WTO 2002: 47-52; WHO 2002; PAHO/WHO 2002). The controversy that has developed, especially in connection with the potential health impacts of GATS, indicates that WHO correctly identified an important trade-health intersection that deserves the attention of WHO members.

3. The broad scope and complexity of GATS, combined with the lack of common ground between GATS commentators, create difficulties for people in the public health and health-care sectors. The lack of empirical data on the volume, intensity, and country-level impact of international trade in health services (WHO 2002), and on the implications of liberalization of trade in such services, exacerbates the controversy swirling around GATS. With the next round of GATS liberalization negotiations underway, the opportunity for extended reflection and analysis of GATS' implications for health policy has narrowed without the GATS-related controversy being clarified or mitigated.

4. This Legal Review of GATS from a health policy perspective forms part of WHO's efforts to bring the relationship between GATS and health policy into focus. The Legal Review is designed to provide interested parties with an international legal analysis of GATS that may be useful in GATS-related activities. Specifically, the Legal Review identifies those provisions of GATS that create legal difficulties and questions for health policy. In addition, the Legal Review provides, where relevant, specific legal strategies that could be used to strengthen the voice of health policy in the GATS process.



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5. The Legal Review focuses on legal analysis of GATS from a health policy perspective. Aspects of the controversy about GATS' impact on health policy cannot be captured adequately in a document focused on legal analysis. Arguments that the liberalization of trade in services is the "wrong model" for developing countries generally and health policy specifically (Gould and Joy 2000: 8; Hilary 2001) illustrate the broader scope of the GATS controversy.

6. In addition, developing countries face difficult challenges from GATS that flow from their arguably weaker position in trade negotiations and their more limited economic and governance capacities to implement GATS successfully (Gould and Joy 2000; Raghavan 2002; Woodruff and Joy 2002; Joy and Hardstaff 2003; Joint Submission to the World Health Assembly 2003). Such concerns about inequalities in trade negotiations are important and remain relevant regardless what GATS requires from WTO members.

7. Similarly, the effects liberalization of trade in services have on sustainable economic development (Center for International Environmental Law 2002) and the promotion of human rights (UNHCHR 2002) remain contentious. In addition, Raghavan has argued that the GATS process has gone forward without good data on trade in services, creating for developing countries the diplomatic equivalent of "a blindfolded person in a dark room chasing a black cat" (Raghavan 2002: 26).

8. The analysis undertaken in the Legal Review often touches upon the larger political, economic, and social issues raised by GATS but does not attempt to examine them comprehensively. The premise behind the Legal Review is that a clearer understanding of the legal impact of GATS on health policy can contribute to the on-going political, economic, and social debates about GATS' relationship to the protection and promotion of health.



9. An example may help illustrate why this Legal Review, albeit limited in its focus, may be useful in the larger debates about GATS. As mentioned above, many commentators on GATS worry about the political pressure developing countries face in negotiations to liberalize trade in services. A legal analysis of the text of GATS may not capture the inequalities that confront developing countries in GATS negotiations. A clear and sophisticated understanding of the rights and duties contained in GATS may help, however, developing countries better manage the challenges they might face.

10. The Legal Review begins by discussing health policy and how historically states have used international law to discipline its exercise (Chapter 2). This analysis is important because it connects the GATS controversy to the basic dynamic of international law—the regulation of sovereignty through agreed rules of behavior. In addition, this perspective illustrates how different GATS’ disciplines on health policy are from previous international legal regimes. GATS takes health policy into new and uncharted international legal waters.

11. The Legal Review then looks at the debate on the extent to which GATS affects the health policy of WTO members (Chapter 3). The literature informing the GATS and health debate is substantial and complex; but, essentially, the debate divides generally into two camps—those who believe that GATS undermines health policy and those who argue that GATS leaves WTO members with more than adequate policy space in the health area. The GATS and health debate involves legal questions created by different interpretations of key GATS provisions and political controversies about the wisdom of liberalizing trade in health-related services. The Legal Review focuses on the legal issues generated by conflicting interpretations of GATS rules and does not specifically address the broader and important question about the effects of liberalization of trade in services for health policy.

12. Using principles of treaty interpretation found in general international law (and explained in Chapter 4), the Legal Review analyzes GATS’ general architecture (Chapter 4), scope (Chapter 5), general obligations and disciplines (Chapter 6), specific commitments on market access and national treatment (Chapter 7), exceptions to general obligations and specific commitments (Chapter 8), health-related commitments in WTO member schedules (Chapter 9), dispute-settlement process and decision-making and institutional arrangements (Chapter 10), and on-going liberalization negotiations as they relate to health-related services (Chapter 11).

13. The Legal Review also identifies lessons for health policy learned by the health policy community through controversies and activities related to other WTO agreements (Chapter 12). Finally, the Legal Review seeks to put the GATS and health debate into a wider frame of reference by looking briefly at how other international legal agreements and arrangements affect health policy in connection with services (Chapter 13). The focus in this chapter will be on bilateral and regional regimes that facilitate and liberalize international trade and investment in services, such as bilateral investment treaties.

14. The Legal Review concludes with a brief overview of its legal analysis of GATS, summary of the specific legal strategies it identifies to heighten the importance of health in the GATS process, and encouragement that further health policy work on GATS proceed to ensure that the voice of health policy is heard as the GATS process moves forward.



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Chapter 2

HEALTH POLICY AND INTERNATIONAL LAW



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2.1 The Concept of Health Policy

15. One of the questions raised about globalization is its impact on the state's formulation and implementation of policies across the range of political, economic, and social activities. While some scholars believe that globalization strengthens some states, other experts argue that globalization undermines state sovereignty (Hurrell and Woods 1999: 1-2; Scholte 2001: 21-22). Typically, these arguments stress that a state can no longer control what happens in its territory because of global processes such as trade, investment, and technological developments. Literature on the globalization of public health often emphasizes how the processes of globalization erode a state's ability to implement policies effectively for public health purposes (Fidler 1997; Walt 1998; Buse *et al* 2002; Lee 2003).

16. In international law, sovereignty remains a critical legal concept (Kingsbury 1999: 66). The modern international legal system is still based on the concept of sovereignty. Generally speaking, sovereignty refers to the exclusive power a government possesses over its people and territory (Brownlie 1998: 289). Sovereignty is central to many areas of international law, including jurisdiction, principles of non-intervention, and treaty law. Whatever the impact of globalization on sovereignty, the concept remains at the heart of international law.

17. As used in this Legal Review, "health policy" involves the exercise of a state's sovereign powers for purposes of (1) protecting human health from risks; and (2) providing health services.¹⁶ How a state shapes its health policy is a function of (1) the state's constitutional structure; (2) the substantive content of domestic law affecting health; and (3) the international legal rules binding on the state that affect the pursuit of health objectives.

18. Substantively, whether the state recognizes the human right to health in constitutional and international law affects how the state constructs health policy. The state may also be bound to rules of

¹⁶ This definition of health policy covers the two areas experts often raise in connection with GATS. For example, the American Medical Association Board of Trustees' Report on GATS lists public health and professional medical services as the two areas of concern for physicians (American Medical Association 2004).

international law, such as international trade law, that regulate how it protects and promotes health. The next section focuses on international legal disciplines on health policy because this topic is most pertinent to the debate concerning the impact of GATS on the health-related sectors of WTO members.



19. The Legal Review's concept of health policy is not meant to endorse the unfettered exercise of sovereignty in the health context or call into question rules of international trade law that affect health. Many health advocates do not support absolute sovereignty in health policy contexts because they believe that the human right to health in international law should affect how states pursue, construct, and implement health objectives. At the same time, health experts are concerned that rules of international economic law may reduce the policy space and options governments have in the health area. The health policy concept provides a simple but useful way to evaluate the legal impact of GATS on the policy environment in which WTO members pursue health protection and promotion.

20. Health policy as a concept is also broad enough to capture the expansive terrain of health because it encompasses all aspects of government policy that affect the protection and promotion of health. Thus, health policy includes traditional public health activities designed to protect community health, the provision and regulation of health care services to individuals, the financing of health services, and efforts to improve social determinants of health. To manage health adequately given the enormous range of issues involved, governments require sufficient policy space and flexibility.

2.2 International Legal Disciplines on Health Policy

21. International legal disciplines on health policy can appear in two basic forms: (1) customary international law; and (2) treaty law. Rules of customary international law are principles of international law that develop through state practice and are generally applicable throughout the international system (Brownlie 1998: 4-10). An example of a rule of customary international law that affects health policy is the customary rules on extra-jurisdictional application of domestic law. A state's attempt to apply its health laws beyond its jurisdiction has to satisfy certain tests under customary international law before such application is legitimate (Restatement 1987: 237-54). Generally, rules of customary international law do not contain principles that directly regulate health policy (Fidler 2000: 50-51). For such principles, we must turn to treaty law.



22. Many areas of international law directly and indirectly relate to the protection and promotion of health. The International Health Regulations (IHR), for example, oblige WHO members (1) to notify the Organization of outbreaks of cholera, plague, and yellow fever (Article 3); and (2) not to take unwarranted measures against trade and travelers originating in WHO members experiencing disease outbreaks (Article 23).¹⁷ Thus, the IHR affect a WHO member's health policy in the context of cross-border transmission of cholera, plague, and yellow fever.

23. Another body of international law that affects health policy is human rights. International law on civil and political rights requires governments to satisfy specific criteria before limiting the enjoyment of such rights for public health purposes (Fidler 1999: 170-79). The "human right to health" found in human rights treaties imposes on governments the duty to realize progressively specific health goals, such as greater access to primary health care services (Toebes 1999; Committee on Economic, Social, and Cultural Rights 2000). For states that have accepted treaties containing the right to health, such as the International Covenant on Economic, Social, and Cultural Rights (ICESCR), this right creates obligations that touch upon health policy.

24. The regulatory effect of the IHR and the human right to health on health policy should not, however, be exaggerated. The IHR's notification obligations apply to only three infectious diseases (IHR, Article 1). This limited scope means that the IHR do not affect many health problems that infectious diseases cause among states. Further, the IHR impose no duties on WHO members regulating how such members formulate health policy in contexts not involving cross-border spread of infectious diseases. The inapplicability of the IHR in the outbreak of Severe Acute Respiratory Syndrome (SARS) in 2003 (Fidler 2003) illustrates the limited impact of the IHR on health policy.¹⁸

25. Similarly, the impact of the right to health on health policy should be kept in perspective. The Special Rapporteur on the Right to Health noted in 2003 that "the legal content of the right [to health] is not yet well established . . . [which] is unsurprising given the historic neglect of the right to health" (Hunt 2003: 10). Further, under the principle of progressive realization (ICESCR, Article 2.1), the human right to health leaves states parties a great deal of policy discretion on how to achieve this objective.

¹⁷ All references in the Legal Review to the International Health Regulations (IHR) refer to the IHR originally adopted in 1969 and last amended in 1981. The process of revising the IHR had not been completed by the date of the Legal Review's completion.

¹⁸ The revision of the IHR is intended to expand the scope and applicability of the IHR in the future. See Draft Revised International Health Regulations, in WHO Doc. A/IHR/IGWG/3, Sept. 30, 2004 for the latest version of the draft revised IHR as of this writing.

26. The duties imposed by the WHO Constitution on WHO members similarly do not significantly discipline health policy because WHO members' substantive duties under the Constitution only involve paying assessed financial contributions and reporting certain health-related developments to the Organization (WHO Constitution, Articles 7, 56, 61-65).

27. This brief overview of international legal regimes affecting health illustrates that such regimes do not significantly direct the formulation or implementation of health policy. States subject to these regimes can generally organize their health systems and regulate health activities relatively unfettered by international law.

28. A more significant set of international legal disciplines on health policy comes from international trade law. Multilateral and regional efforts to liberalize trade in goods have created rules of international trade law that affect health policy. Most prominent among the international trade regimes is the General Agreement on Tariffs and Trade (GATT), which has been the major multilateral legal framework regulating trade in goods since 1947. GATT disciplines, such as the most-favored-nation and national treatment principles (GATT, Articles I and III) and the prohibition on the use of quantitative restrictions (GATT, Article XI), can affect the health policies of GATT states parties.

29. Two GATT cases—*Thailand—Cigarettes* (1990) and *EC—Asbestos* (2001)—illustrate GATT's relationship to health policy.¹⁹ In *Thailand—Cigarettes*, Thailand banned the importation of foreign-made cigarettes as part of its public health effort to decrease the consumption of tobacco products. The United States challenged this ban as a violation of the prohibition on quantitative restrictions solely on imports found in Article XI of GATT. Thailand admitted that the ban solely on imports and not on domestically produced cigarettes violated Article XI but claimed that the ban was necessary to protect human health under Article XX(b) of GATT. The GATT panel held that Thailand's ban solely on foreign cigarettes was inconsistent with GATT because it was not necessary to exclude domestically produced cigarettes from the ban in order to achieve the public health objective of reducing smoking. Other less trade restrictive measures—including a ban on both imported and domestic cigarettes—were reasonably available to the Thai government. In this way, the application of the GATT rules on trade in goods obliged Thailand to alter the way in which it implemented its national policy for reducing tobacco consumption.²⁰



¹⁹ This Legal Review will use the abbreviated names of GATT and WTO cases. Full citations to all cases can be found in the Table of Cases.

²⁰ The decision in *Thailand—Cigarettes* did not, however, prevent the government of Thailand from engaging in vigorous efforts to reduce the consumption of tobacco. After this case, Thailand passed legislation, for example, banning all cigarette advertising within its territory—a non-discriminatory health measure permitted under the GATT panel's ruling in the case.



30. In *EC—Asbestos*, France banned the sale or use of products containing asbestos in order to prevent such products from causing asbestos-related diseases. Canada challenged this prohibition as a violation of the national treatment principle in Article III of GATT, arguing that France allowed the sale and use of domestic products that competed directly with asbestos-containing products. The WTO panel held that the Canadian asbestos products and French non-asbestos products were “like products” for purposes of Article III:4 of GATT but that the French ban was justified under Article XX(b) because it was deemed necessary to protect human health. The WTO Appellate Body reversed the panel’s ruling on “like products,” holding that the Canadian and French products were not alike because the Canadian products were dangerous to human health. In addition, the Appellate Body agreed that, if France had violated Article III, Article XX(b) justified the prohibition on asbestos products. The application of the GATT rules on trade in goods upheld French health policy in this case.

31. In addition to the substantive rules in the trade treaties, international trade law under GATT generally has had a more advanced mechanism for securing compliance of states parties. With radical changes made to the GATT dispute settlement system in the Uruguay Round, the WTO dispute settlement mechanism represents the most advanced and powerful system of its kind in contemporary international law (see Chapter 10). Not only the substantive rules but also the compliance mechanism of international trade law significantly affects the health policies of WTO members.

32. This Legal Review does not focus on the impact of GATT on health policy except to the extent that jurisprudence on GATT principles informs how GATS may be interpreted. The brief descriptions of the *Thailand—Cigarettes* and *EC—Asbestos* above merely illustrate that rules of international law on trade in goods affect health policy more significantly than principles found in international law on health (e.g., IHR and treaties on the human right to health).

33. The analysis of the international trade law disciplines on health policy could continue with examination of other important agreements within the WTO involving trade in goods, especially the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), Agreement on Technical Barriers to Trade (TBT Agreement), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). WHO and WTO have indicated that each of these agreements deserves health policy attention (WHO/WTO 2002), and TRIPS has been the subject of global controversy concerning its impact on health policies generally and access to essential drugs and medicines specifically.

34. With the coming of the WTO, health policy at national and international levels has faced shifting from the exercise of relatively unfettered sovereignty to a policy environment in which international legal disciplines have heightened effect. Whether this shift is good or bad for the protection of health from risks and the provision of health services at the national level has been the subject of intense debate. The controversy over GATS' impact on health policy at the national level forms part of the larger discourse about how international trade law affects the promotion and protection of health, and the analysis now turns specifically to the GATS and health debate.



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Chapter 3

THE GATS AND HEALTH DEBATE



Chap 3

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35. During the Uruguay Round negotiations, GATS did not receive much, if any, attention from health policy communities nationally or internationally. Services had not been part of the GATT system during its evolution since 1947, so GATS was unprecedented in the context of multilateral trade negotiations under GATT auspices. Only after GATS was incorporated into the final package of WTO agreements did governmental and non-governmental experts in many economic sectors, including health, begin to focus on it and sort out its possible implications. One result of this evaluation process in the health area has been a controversy about the impact of GATS on national public health and health-care policies.

36. A number of scholars and non-governmental organizations (NGOs), including the Canadian Centre for Policy Alternatives, Save the Children, Public Citizen, World Development Movement, GATSwatch.org, and the Center for Policy Analysis on Trade and Health (CPATH) have criticized GATS for the way in which the Agreement threatens to compromise various areas of public policy, such as health, education, and other public services. In an unusual move, the WTO Secretariat responded in various ways to these NGO attacks on GATS (WTO 2001). The NGOs took up the challenge again by responding to the WTO Secretariat's defense of GATS (GATSwatch.org 2001; World Development Movement 2001; Sinclair and Grieshaber-Otto 2002).

37. The GATS literature is detailed and complex; and this Legal Review does not attempt a comprehensive analysis of the GATS controversy. This section introduces the basic positions of the two sides in this debate as they relate to health policy. The analysis combines arguments on the GATS controversy generally and on the health context specifically. Summarizing the various arguments in this manner does not do full justice to such arguments, but the objective is not to repeat what the two sides have already said in publicly available documents. This chapter seeks to convey the essence of the GATS and health debate as a prelude to the detailed analysis of GATS this Legal Review undertakes.

3.1 GATS Undermines Health Policy

38. The literature criticizing GATS is united by a concern about how GATS affects the ability of a WTO member to pursue public policies, such as health. In basic terms, these analyses express fears that GATS will undermine the health policy flexibility of WTO members *procedurally*, *structurally*, and *substantively*.

39. Procedurally, critics express concerns that GATS disciplines on trade in services create a fundamentally new and difficult process through which WTO members will have to craft health policy. Foremost among these concerns is that the broad scope of GATS, combined with the wide-ranging nature of health policies, means that attempting to achieve GATS compliance will burden the policy-making process on health-related services in the future. Sinclair argued, for example, that “no governmental measure, whatever its aim—environmental protection, consumer protection, enforcing labour standards, promoting fair competition, ensuring universal service, or any other end—is, in principle, safe from GATS challenge” (Sinclair 2000: 40). Regulators of health-related services may constantly have to determine whether GATS affects what they want to do for purposes of protecting human health. The concept that GATS will “chill” regulatory reform for health improvement and other social purposes features frequently in critical literature (Gould and Joy 2000: 9; Sanger 2001: 69-72; Sinclair and Grieshaber-Otto 2002: xii). The existence of the WTO dispute settlement system enhances the degree of GATS’ regulatory chill effect (CPATH 2004a: 5).

40. Structurally, GATS critics worry that the duty to liberalize trade in services progressively under GATS (see Sections 4.4.3 and 7.1.2) will force WTO members to privatize public health and health care services currently provided by governments (Price, Pollack, and Shaol 1999; Education International and Public Services International 1999: 12-13; Price and Pollock 2000; Sexton 2001; Joy and Hardstaff 2003: 29). For countries in which the private sector plays little or no role in the provision of public health and health care services, GATS-induced privatization of public services would constitute a radical structural transformation in how such countries pursue health policy. GATS might “lock in” such structural changes by preventing WTO members from reversing policy experiments with privatization in the health sector (Gould and Joy 2000: 8-9; Howse and Tuerk 2002: 5; Sinclair and Grieshaber-Otto 2002: 75-76; Joy and Hardstaff 2003: 30; Joint Submission to the World Health





Assembly 2003). The WTO dispute settlement system also affects the structure of the provision of health-related services because it effectively allows foreign corporations (through their home governments) to challenge domestic regulation of health-related services.

41. Substantively, analyses of GATS often argue that the Agreement undermines a WTO member's ability to regulate health-related services adequately because of disciplines the treaty places on health policies. Criteria against which domestic regulation of services will be measured under GATS, such as the "necessity test" borrowed from the GATT context, may prevent WTO members from introducing new substantive regulations on health-related services (World Development Movement 2001). Further, it is argued that such criteria force regulators of health-related services to give trade liberalization objectives equal or greater weight than the protection and promotion of human health (GATSwatch.org 2001). From the perspective of health policy, GATS brings about a radical change in the possible substantive content of regulation of health-related services. The WTO dispute settlement mechanism deepens such substantive concerns because it is feared that the impact of GATS criteria on health policy will be determined by unelected members of WTO panels and the Appellate Body rather than democratically accountable legislatures (CPATH 2004a: 5).

42. The procedural, structural, and substantive concerns raised about GATS should be viewed as interdependent concerns. The basic critique of GATS in the literature is not comprised of distinct concerns that can be separately addressed. For critics, the interdependence of the procedural, structural, and substantive effects of GATS make the Agreement a formidable antagonist for the health policies of WTO members.

43. For example, the application of the "necessity test" in the GATS context represents for WTO members not only a procedural challenge but also a substantive one. This test requires both a new process for evaluating regulation of health-related services (i.e., health regulators might have to evaluate new regulations under this test) and the application of a new substantive regulatory criterion linked to liberalized trade in services (i.e., protecting health has to be balanced substantively against minimizing restrictions on trade in services).

44. Progressive liberalization of trade in health-related services as a structural matter (i.e., the balance between public and private provisions of health-related services) also affects substantive regulation because regulating private service providers requires different rules from regulating government-provided services.

As the WHO and WTO observed, “[t]he need to regulate the private sector typically increases as competing suppliers enter the market. . . . Greater, not less, regulation has accompanied more open markets in financial services and telecommunications, and this will be essential for health services as well” (WHO/WTO 2002: 121). Structural shifts from public to private provision of health-related services also create an entirely new procedural environment for regulation of health-related services.

45. With regard to the flexibility in GATS (see Section 3.2), Howse and Tuerk warn that “[f]lexibility and diversity in domestic regulation are at risk from future liberalization of trade in services” (Howse and Tuerk 2002: 3). Joy and Hardstaff argue, for example, that GATS’ flexibility is a theoretical myth rather than a practical reality because of the unequal positions between developed and developing countries in on-going trade liberalization negotiations, the lack of good information about the likely impact of GATS and the liberalization of trade in services, and the uncertainty lurking in the text of the treaty (Joy and Hardstaff 2003: 32-34).

46. From this critical perspective, GATS constitutes a disturbing change in how states use international law in connection with public services such as health. This change has prompted calls from NGOs that a moratorium on GATS negotiations be put into effect (Barlow 2001; AFL-CIO 2002) and that essential public services, including health, be exempted from GATS (AFL-CIO 2002).

3.2 GATS Respects Health Policy

47. Largely in response to critical analyses of GATS by NGOs, the WTO Secretariat argues that GATS respects health policy. The term pro-GATS analyses often use is “flexibility” in describing how GATS relates to health policy. The WTO Secretariat noted GATS’ “remarkable flexibility, which allows Governments, to a very great extent, to determine the level of obligations they will assume” (WTO 2001: 8). GATS is a multilateral legal framework to support member-driven liberalization of international trade in services. Under GATS, the scope and depth of liberalization commitments for all sectors, including health, remain in the hands of the WTO members (WTO 2001: 8-9). All decisions a WTO member makes to liberalize trade in health-related services represent, thus, sovereign acts in the realm of health. While GATS creates a legal framework conducive for national strategies utilizing liberalized trade in services, whether and how to use the framework remain prerogatives of WTO members. From this viewpoint, GATS respects rather than wrecks how WTO members formulate and implement health policy.





48. This flexibility argument constitutes a response to the procedural, structural, and substantive concerns of critical NGOs. The WTO member largely determines the extent to which GATS creates procedural hurdles for regulators of health-related services through the level of liberalization commitment that member makes. Each WTO member determines the structural mix of public and private participation in health-related services according to its own policies and objectives. The WTO Secretariat observed that “Governments are free to choose those services on which they will make commitments guaranteeing access to foreign suppliers” (WTO 2001: 11). The nature of GATS’ effect on substantive regulation depends largely on the scope and depth of the liberalization commitments made by a WTO member. Other aspects of GATS’ potential impact on substantive regulation remain subject to negotiations among all WTO members on the principle of consensus.

49. Pro-GATS arguments have no conceptual problem with the interdependency of procedural, structural, and substantive aspects of health policy in the context of trade in services because such arguments rest on the premise that WTO members control the destiny of their service sectors. International law, by definition, involves states agreeing to observe certain rules in their relations. These rules represent disciplines states have accepted as in their best interests. The WTO Secretariat argued that “[l]ike all WTO Agreements, GATS is an agreement to abide by a set of multilaterally agreed rules and therefore entails some surrender of sovereignty. So do all other international agreements” (WTO 2001: 19). The inclusion of health-related services in GATS means that GATS will affect certain aspects of health policy; but, contrary to the claims of NGOs, proponents of GATS emphasize that how GATS affects health policy, and what aspects of health policy it will affect, remain sovereign decisions not imposed by the WTO or any of its agreements.

50. Under this perspective, GATS empowers, as well as respects, health policy. Many countries, including a number of developing countries, see liberalized trade in services as a way to increase economic productivity and development in all sectors, including health (WTO 2001: 7). Those countries that want to harness liberalized trade in different service sectors for health or general economic development purposes require a stable multilateral legal framework to pursue these objectives (WTO 2001: 5-6). By providing that legal framework, GATS empowers WTO members that wish to utilize liberalized trade in health-related services. The general flexibility of the GATS regime allows WTO members to tailor their use of liberalized trade for their own purposes.

51. GATS proponents also caution critics against blaming GATS for problems that it neither created nor exacerbates. GATS commitments on health services were not extensive during the Uruguay Round (Adlung and Carzaniga 2001: 353), meaning that, to date, GATS has not had a significant effect on this service sector (WHO/WTO 2002: 118). The “brain drain” of trained medical and health personnel from developing to developed countries is a problem that predates GATS and which GATS is unlikely to influence significantly (Chandra 2002: 161). Developments in the international law on foreign direct investment (FDI), especially the network of nearly 2,000 bilateral investment treaties (UNCTAD 2000), provided catalysts for health-related FDI long before GATS was negotiated.²¹ WHO and WTO observed, for example, that no empirical evidence exists linking increases in FDI flows to GATS (WHO/WTO 2002: 118).

52. Although GATS affects health governance (WHO/WTO 2002: 121), inadequate basic public health services and primary health care in countries often have nothing to do with international trade in goods or services. As WHO noted in the *World Health Report 2000*, “some countries appear to have issued no national health policy statement in the past decade; in others, policy exists in the form of documents which gather dust and are never translated into action” (WHO 2000: xv).

53. Health concerns often seem to have insufficient weight in decisions many governments make in international forums, such as the WTO. GATS forces WTO members to think about health in connection with the growing role of services in modern economies and the impact of globalization trends, particularly on the poor.

3.3 Observations on the GATS and Health Debate

54. As the previous two sections suggest, the GATS and health debate often reads like a Dickensian “tale of two treaties.” It is the best of treaties; it is the worst of treaties. It is the path to progress; it is the path to disaster. In this respect, the debate echoes general discussion about whether globalization is good or bad for health policy. Much of the sound and fury in the GATS and health debate flows from controversy about the wisdom of liberalizing trade in health-related services.

55. The explicit purpose of GATS is to support and promote the liberalization of trade in health-related services, as part of the overall process of liberalization in the services area. As indicated earlier, this Legal



²¹ See Chapter 13 on the importance of bilateral investment treaties to the GATS and health debate.



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Review does not specifically address important questions concerning the effects of liberalization on health policy because this is not, strictly speaking, a legal question. Some experts have argued that GATS conflicts with the mandates found in human rights treaties on the right to health (Hilary 2001),²² making the liberalization strategy supported by GATS a legal question. This question is not, however, whether liberalization is good or bad but rather to what extent does GATS affect health policy and whether the extent of such impact adversely affects a WTO member's commitments to fulfill the right to health.

56. This Legal Review pursues only the first part of this question—to what extent does GATS affect health policy. Examination of GATS' impact on other international legal obligations would have to involve thorough interpretations of the international legal rules in GATS *and* other relevant treaties. Other than general comments made in Section 2.2, the Legal Review does not analyze the right to health in treaties such as the ICESCR. The Legal Review's analysis of GATS will, however, hopefully be relevant to those interested in assessing GATS' impact on WTO members' other international legal obligations in the field of health.

57. The need to engage in an interpretation of GATS from a health policy perspective is apparent. This Legal Review aims to supply interested parties with a detailed legal reading of the treaty for purposes of informing health policy makers and civil society about the possible implications of GATS for health policy. The authors encourage others to supplement this analysis with in-depth studies on the likely impact of liberalization in health-related services on their capacities to provide equitable access to health-related services, particularly to the poor.

²² On GATS and human rights, see also UNHCHR 2002.

Chapter 4

METHODOLOGY OF THE LEGAL REVIEW AND OVERVIEW OF THE STRUCTURE OF GATS



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4.1 Application of Principles of Treaty Interpretation in International Law

58. The primary methodology of the Legal Review is to apply principles of treaty interpretation found in international law. This approach provides a sound basis for understanding the obligations imposed by GATS and exploring the policy room left to WTO members in the health area.

59. The relevant rules of treaty interpretation are widely accepted and not controversial (Oppenheim 1992: 1267-82). These rules are codified in the Vienna Convention on the Law of Treaties (1969) (Vienna Convention) in Articles 31 and 32, the texts of which can be found in Table 4.1. Even states that are not party to the Vienna Convention, such as the United States, recognize its rules on treaty interpretation as authoritative and binding as customary international law.



TABLE 4.1 MAIN PRINCIPLES OF TREATY INTERPRETATION IN THE VIENNA CONVENTION

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Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes.
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken in account, together with the context.
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

- Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31.
- (a) leaves the meaning ambiguous or obscure; or
 - (b) leads to a result which is manifestly absurd or unreasonable.

60. In addition to the treaty interpretation principles in the Vienna Convention, customary international law contains other rules affecting treaty interpretation. For example, in *EC—Hormones* (1998), the Appellate Body applied the customary international legal principle of *in dubio mitius*:



The principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming the obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties. (*EC—Hormones*, pp. 41-42)

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61. The *in dubio mitius* principle should only be applied when the meaning of the treaty provision in question cannot be ascertained by use of the general rule of treaty interpretation (Vienna Convention, Article 31). As a result, the treaty interpretation process seldom needs recourse to the *in dubio mitius* principle. As a leading treatise on international law observed, “[t]he application of the basic rule of interpretation laid down in Article 31 of the Vienna Convention will usually establish a clear and reasonable meaning” (Oppenheim 1992: 1275).

4.2 Treaty Interpretation Principles and WTO Dispute Settlement

62. The consistent use of the treaty interpretation rules in the Vienna Convention by WTO dispute settlement panels and Appellate Body underscore the importance of these rules in connection with interpreting GATS. GATS disputes that have been decided through the WTO dispute settlement process have involved the treaty interpretation rules of the Vienna Convention. For example, in *EC—Bananas III* (1997), the Appellate Body interpreted Article I:1 of GATS according to Article 31 of the Vienna Convention by looking at the plain meaning of the word “affecting” (*EC—Bananas III*, ¶ 220);²³ and in *US—Gambling*, the panel applied Articles 31-33 of the Vienna Convention in deciding this GATS dispute (¶ 6.8-6.10).²⁴

63. This Legal Review is based on the premise that it is prudent to undertake an interpretation of GATS with the same interpretive tools that the WTO dispute settlement bodies have applied and will apply to GATS disputes. The use of these tools is not easy; and the Appellate Body has often overturned panel decisions for faulty legal interpretations of WTO agreements, including in cases involving health issues. The Appellate

²³ See Section 5.1.5 for more on the substantive importance of this interpretation of GATS in *EC—Bananas III*.

²⁴ As of the time of this writing, the panel report in *US—Gambling* had not been adopted by the Dispute Settlement Body; and the United States had indicated that it would appeal the panel’s decision to the Appellate Body. References made to the unadopted panel report in *US—Gambling* in the Legal Review may, therefore, be affected by any Appellate Body decision that modifies the panel’s conclusions. See Annex 2.



Body has reversed panel interpretations of WTO rules affecting health policy in *US—Gasoline* (1996), *EC—Hormones*, and *EC—Asbestos*. The opposed interpretations of the proponents and opponents of GATS further illustrate that treaty interpretation is often a difficult process.

4.3 Identification of Legal Strategies to Strengthen a Health Policy Perspective on GATS

64. In addition to interpreting GATS in accordance with the relevant treaty interpretation rules in international law, the Legal Review seeks to identify specific legal strategies that health policy experts and organizations could utilize in strengthening a health policy perspective on GATS. GATS contains ambiguities that WTO members will have to clarify as the GATS process moves forward. Such clarifications can occur through a variety of mechanisms that will be identified at relevant points in the Legal Review. Article 31.3(b) of the Vienna Convention contains one such mechanism—subsequent practice of the states parties to a treaty that establishes the agreement of the parties regarding its interpretation.

65. Identifying potential legal strategies to strengthen the voice of health policy in interpretation of GATS is important because health policy communities will have to work within the framework of GATS and relevant rules of international law. Although some NGO literature critical of GATS recommends the termination of the treaty or removal of public services, including health, from GATS, the Legal Review proceeds on the premise that WTO members will not abandon GATS or agree to carve health out of the application of GATS rules because of concerns about its effect on health policy. Prudence dictates that health policy experts and organizations formulate legal strategies to work within the international legal framework that GATS and related rules of international law create, without disregarding possible changes to the Agreement to respond to public interests or development needs.

66. As discussed more in Chapter 12, one of the lessons from the controversy over TRIPS is the importance of interpreting WTO treaties from a health policy perspective. Health policy experts and organizations were able to promote the protection of the safeguards in TRIPS for parallel importing and compulsory licensing by stressing that the treaty's text accorded WTO members these rights. In addition, health policy activism helped stimulate subsequent state practice in the form of the Doha Declaration on the

TRIPS Agreement and Public Health (WTO Doc. WT/MIN(01)/DEC/2), which reinforced WTO members' rights to use TRIPS flexibilities and safeguards for public health purposes. Treaty interpretation from a health policy perspective remains important in other areas of TRIPS as well (Correa 2002a).



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67. Treaty interpretation from a health policy perspective will not always produce the desired health outcome. In the TRIPS context, for example, controversy has arisen concerning the right of a WTO member to issue compulsory licenses as a strategy to increase access to essential drugs and medicines. Although WTO members have a right under TRIPS to issue compulsory licenses under certain conditions (TRIPS, Article 31), WTO members that lack or have insufficient domestic manufacturing capabilities confront a *de facto* limitation on the ability to use compulsory licenses. The text of TRIPS is not clear as to how WTO members can address this problem. In the Doha Declaration on the TRIPS Agreement and Public Health (WTO Doc. WT/MIN(01)/DEC/2), WTO members instructed the TRIPS Council to find a resolution to this problem, but controversy and disagreement on how to resolve the issue frustrated the TRIPS Council's progress until the August 2003 adoption of the Agreement on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health. The question arises whether the provisions of GATS may also provide insufficient flexibility for health policy makers, transferring the issue from the realm of treaty interpretation into treaty implementation or revision.

4.4 Overview of the Structure of GATS

68. The tools of treaty interpretation will be applied to a treaty that has a distinct structure, and this section provides a brief overview of the structure of GATS as a preliminary introduction to the subsequent detailed legal analysis. The first issue analyzed is the scope of GATS (Section 4.4.1) because the scope determines whether a health-related service falls within or outside GATS. Secondly, GATS' general obligations and disciplines are considered (Section 4.4.2). These are provisions of GATS that apply to all measures that affect trade in services, and GATS literature often refers to them as the "horizontal" or "top-down" disciplines because they apply across all service sectors.

69. Section 4.4.3 analyzes a third issue, the GATS provisions on specific commitments on market access and national treatment. GATS analysis often refers to these provisions as the "vertical" or "bottom-



up” disciplines because specific commitments apply to specific service sectors as set out in schedules to the Agreement.

70. Finally, the duty under GATS to engage in progressive liberalization of trade in services and the institutional features of the Agreement are outlined in Section 4.4.4. Subsequent parts of the Legal Review then look in detail at each of these structural pillars of GATS.

4.4.1 SCOPE OF GATS

71. A threshold GATS question for health policy is whether trade in any given health-related service is subject to the rules of GATS. The question of the breadth of GATS’ scope has become one of the most controversial issues in the GATS and health debate. The controversy mainly involves the provision in GATS that excludes from the treaty’s application “services supplied in the exercise of governmental authority” (GATS Article I:3(b)). Interpreting this provision of GATS, as well as other provisions that define the applicability of GATS, is crucial for health policy. Chapter 5 analyzes in detail these scope questions.

4.4.2 GENERAL OBLIGATIONS AND DISCIPLINES

72. Part II of GATS contains the first pillar of the architecture of GATS—the “general obligations and disciplines” that apply to all measures of WTO members that affect trade in services. The general obligations and disciplines will apply to all measures affecting all services to which GATS applies. Part II of GATS contains two basic sets of general obligations: substantive and procedural duties.

73. The substantive duties involve obligations that directly regulate the substance of measures that affect trade in services. The most important substantive duties are the most-favored-nation principle (GATS, Article II) and the provisions affecting the exercise of domestic regulatory powers (GATS, Article VI). Part II also contains a number of exceptions to the substantive duties. These exceptions are both specific to certain substantive duties (e.g., the most-favored-nation principle) and general in nature. Section 6.1 analyzes the substantive duties, and Section 8.1 examines exceptions to the general obligations and disciplines.

74. The procedural duties require WTO members to provide various forms of information, to consult with other WTO members on specific issues, and to participate in negotiations to develop certain rules for trade in services. These duties do not directly affect the substantive content of regulatory measures but rather require WTO members to engage in specific processes deemed important to the functioning of the treaty. Section 6.3 looks at the procedural duties in Part II of GATS.



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4.4.3 SPECIFIC COMMITMENTS ON NATIONAL TREATMENT AND MARKET ACCESS

75. The second pillar of GATS' architecture is found in Part III, which contains the rules governing the making of specific market access and national treatment commitments by WTO members. In contrast to the mandatory general obligations and disciplines that apply to all measures affecting trade in services, the specific commitments on market access and national treatment (1) arise from voluntary undertakings by WTO members; and (2) apply only to the service sectors specified in the commitments. WTO members bind themselves to their specific commitments by detailing them on schedules that become part of the binding rules of the treaty.

76. GATS differs significantly from GATT because in the latter, national treatment is a mandatory obligation (GATT, Article III) rather than one based on voluntary commitments. GATS differs from GATT in another respect. While GATT covers only discriminatory quantitative restrictions (which GATT Article XI prohibits outright), GATS covers both discriminatory and non-discriminatory restrictions, which are prohibited only if voluntary market access commitments are made. Chapter 7 analyzes rules in Part III of GATS on making market access and national treatment commitments, and Section 8.2 describes the exceptions available that justify violations of specific commitments.

4.4.4 PROGRESSIVE LIBERALIZATION AND INSTITUTIONAL PROVISIONS

77. The third major pillar of GATS' architecture is found in Part IV, which sets out the duty of WTO members to engage in successive rounds of negotiations with a view to achieving progressively a higher level of liberalization in trade in services. Although GATT involved negotiating rounds through which trade in goods was gradually liberalized, GATT itself contains no provision mandating states parties' participation in such negotiating rounds. GATS has such a duty. Section 7.1.2 analyzes this duty in more detail. Part V of GATS



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contains the provisions that establish the institutional framework for GATS. The most important provisions in this part of GATS' architecture are the application of the WTO's Dispute Settlement Understanding to disputes under GATS and the creation of the Council for Trade in Services to oversee the implementation and progressive development of the Agreement, both of which are discussed in Chapter 10.

Chapter 5

SCOPE OF GATS AND HEALTH POLICY



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78. The initial starting point for interpreting GATS' impact on health policy is understanding how the scope of GATS overlaps with the scope of health policy. As Section 5.1 analyzes, GATS' scope is remarkably broad. Central for purposes of this Legal Review is the extent of the exclusion in Article I of "services supplied in the exercise of governmental authority."

79. Section 5.2 then looks at the scope of health policy, arguing that contemporary understandings of it are very broad. The wide-ranging nature of health policy can be seen in the numerous health-related services affected by GATS. In addition to the specific "health related and other social services sector," health-related services appear in sectors for, among others, business services, financial services, and environmental services.

80. The scopes of both GATS and health policy combine to create a significant overlap. Section 5.3 explores this overlap and argues that health experts and organizations need to see GATS as an important treaty in terms of its potential effect on health policy.

5.1 Scope of GATS

81. GATS' scope is very broad. Article I:1 of GATS sets out the scope of GATS: "This Agreement applies to measures by Members affecting trade in services." The key terms in this provision are "services," "trade in services," "measures by Members," and "affecting." Each of these key terms has broad application under GATS.



5.1.1 “SERVICE”

82. GATS does not directly define what a “service” is for purposes of the Agreement. The lack of a specific definition for “service” in GATS probably does not create significant interpretive problems. Cases before the WTO Dispute Settlement Body have addressed whether certain economic activities constitute “trade in services” within the meaning of GATS.

83. In *EC—Bananas III*, the European Communities (EC) argued that buyers and importers of bananas within the EC were not engaged in “wholesale trade services” within the meaning of GATS. Both the panel and Appellate Body held that the banana importers were engaged in “wholesale trade services” according to the definition of this concept provided by the Services Sectoral Classification system used under GATS.

84. The Appellate Body took a similar approach in *Canada—Autos* (2000), first determining that the economic activity in question fell within one of the modes of service supply listed in Article I:2 (on Article I:2, see Section 5.1.3) and then relying on definitions of “wholesale trade services of motor vehicles” provided in the Services Sectoral Classification system.

85. These cases suggest that whether an activity constitutes a “service” and involves a “trade in services” should be answered fairly easily by reference to Article I:2 of GATS and specific definitions provided in the Services Sectoral Classification system.

5.1.2 EXCLUSION FOR “SERVICES SUPPLIED IN THE EXERCISE OF GOVERNMENTAL AUTHORITY”

86. For the purposes of GATS, “services” includes “any service in any sector except services supplied in the exercise of governmental authority” (GATS, Article I:3(b)). GATS does not exclude any service or service sector from its rules, which makes the Agreement comprehensive in its scope over the service economy. The only services excluded from GATS’ scope are those “services supplied in the exercise of government authority.”²⁵ GATS defines such services as “any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers” (GATS, Article I:3(c)). Government services that satisfy the

²⁵ Air traffic rights and all services directly related to the exercise of such rights are also excluded from GATS (GATS Annex on Air Transport Services, ¶ 2).

criteria set out in Article I:3(c) are excluded from all GATS disciplines, including the duty to participate in further liberalization of trade in services.



87. In the GATS and health debate, this provision is one of the most controversial. Some argue that the actual text of Article I:3(c) makes the exception potentially very narrow (Sanger 2001: 15; World Development Movement 2001: 11-14; Sinclair and Grieshaber-Otto 2002: 17-25), placing government-supplied health-related services under GATS. Others argue that this provision of the treaty excludes government services from its scope, which puts government-supplied health-related services outside GATS entirely. The debate is, therefore, one about the breadth of the exclusion. Krajewski argued that “[a] look at recent WTO documents shows that there is a great amount of uncertainty about the exact scope of this provision. Neither the Secretariat nor WTO Members have a clear and coherent understanding of the meaning of Article I:3(b),(c)” (Krajewski 2001: 6). The impact of GATS on health policy seems to depend significantly on the interpretation of Article I:3(c).

88. For a service to benefit from the exclusion provided by Article I:3(c), three conditions must be satisfied. The service must be supplied (1) in the exercise of governmental authority; (2) not on a commercial basis; and (3) not in competition with one or more service providers. All three conditions must be fulfilled before Article I:3(c) excludes a service from GATS. The exclusion from GATS provided by Article I:3(c) does not apply to a service merely because the government provides it. Article I:3(c) involves more demanding tests than whether the government provides a service.

In the exercise of governmental authority

89. The WTO Secretariat has frequently argued that GATS explicitly excludes government services. An example of this position came in a June 28, 2002 Press Release in which the Chairman of the GATS negotiations process stated that “GATS explicitly excludes government services from its scope” (WTO 2002a). The Chairman of the GATS negotiation further stated that “[g]overnment services supplied on a non-commercial basis . . . are explicitly excluded from the scope of negotiations” (WTO 2002a).

90. As NGOs critical of GATS have pointed out, such statements from the WTO Secretariat do not accord with the plain language of Article I:3(c) (World Development Movement 2001: 12; Sinclair and



Grieshaber-Otto 2002: 19). GATS does not explicitly exclude government services from its scope. The term “government services” appears nowhere in the text of GATS, let alone in Article I:3(c). Further, the text of GATS does not, as argued by the Chairman of the GATS negotiations, “explicitly exclude . . . government services provided on a non-commercial basis” (WTO 2002a). The non-commercial basis requirement is only one criterion applied by Article I:3(c). As noted above, Article I:3(c) contains *three tests* that a service must meet before the provision excludes the service from GATS. The following paragraphs look at each of these tests.

91. The ordinary meaning of the phrase “in the exercise of governmental authority” includes services supplied by the government pursuant to its exercise of constitutional or legal authority. Health-related services supplied directly by the government, such as health services or water distribution, would satisfy this condition. Less clear is whether services supplied “in the exercise of governmental authority” include public services provided by a private enterprise under contract with a government. Such indirectly supplied governmental services would not, however, satisfy the second condition that the service not be supplied on a commercial basis because the private enterprise under contract would presumably be supplying the service to make a profit (unless the enterprise was not-for-profit). Public services privatized by governments would fall outside the Article I:3(c) exclusion and within the scope of GATS.

Not on a commercial basis

92. The meaning of “on a commercial basis” has been the subject of interpretive controversy in the GATS and health debate. The WTO Secretariat admitted, for example, in a note on environmental services that “it is not completely clear what the term ‘commercial basis’ means” (WTO Doc. S/C/W/46, ¶ 53). The ordinary meaning of supplying a service “on a commercial basis” is supplying a service in order to make a profit, defined typically as a return on investment that exceeds the cost of producing the service (New Shorter Oxford English Dictionary 1993: 2369). The fact that a service is directly provided by a government does not automatically mean a service is not supplied on a commercial basis because governmental services can be provided on commercial terms (e.g., United States’ government-authorized Overseas Private Investment Corporation).

93. The point at which a government moves from providing a service from a non-commercial to a commercial basis is, however, unclear (e.g., when a government charges users’ fees or engages in limited

reimbursement policies for health-care services). The analysis of the meaning of “on a commercial basis” in Article I:3(c) would pose challenges for dispute settlement by requiring the WTO Dispute Settlement Body to evaluate whether the cost structure of a government provided health-related service reflected a commercial or non-commercial approach. Services, such as health care and sanitation, that are provided at or below cost by a government might satisfy the condition that the service not be supplied on a commercial basis.

94. Even this interpretation of “on a commercial basis” may not, however, carry the day. In a note on health and social services, the WTO Secretariat argued that “the provision of medical and hospital treatment directly through the government, free of charge” would be covered by Article I:3(c) (WTO Doc. S/C/W/50, ¶ 37) but that this provision would not apply to a health system in which public and private health care providers existed (WTO Doc. S/C/W/50, ¶ 39).

95. Although the ambiguity of “not on a commercial basis” is troubling, it provides an opportunity to influence the interpretation of this key phrase. First, the treaty-interpretation principle of *in dubio mitius* can be utilized (see paragraphs 60-61) to argue that “not on a commercial basis” should be interpreted in the manner least onerous on WTO members and in a way that minimizes interference with the exercise of sovereignty. Using *in dubio mitius* in this fashion would produce an interpretation of “not on a commercial basis” that only caught true, market-based pursuit of profit by governmental authorities providing services. Thus, governmental policies involving users’ fees and similar cost-control strategies would satisfy the “not on a commercial basis” criterion.

96. Second, WTO members concerned about the ambiguity apparent in “not on a commercial basis” can create subsequent state practice under which “commercial basis” is narrowed to the point that most government-provided services will be considered provided “not on a commercial basis.” The phrase “not on a commercial basis” cannot, under treaty interpretation rules, be conflated with the test of provision by governmental authority; but the “not on a commercial basis” criterion could be narrowed so that most government-provided services pass the test.





Not in competition with one or more service providers

97. The third criteria for application of Article I:3(c)'s exclusion is that the service provided in the exercise of governmental authority and not on a commercial basis also must not be supplied in competition with one or more service suppliers. Competition is defined as "striving for custom between rival traders in the same commodity" (New Shorter Oxford English Dictionary 1993: 459). In the ordinary meaning of the term, "competition" in the services context, then, involves (1) like or directly substitutable services; (2) diversity in supply of a service (i.e., at least two or more suppliers); and (3) freedom on the part of consumers to select from the range of suppliers.

98. This third criterion is perhaps where many government-provided, non-commercial services will fail to benefit from the exclusion in Article I:3(c). Many, if not most, health systems of WTO members involve similar government-sponsored and private health care services from which citizens can theoretically choose. Such competition between similar public and private health services suggests that government-provided health-related services are not "services supplied in the exercise of government authority" within the meaning of Article I:3(c) of GATS.

99. At the same time, the mere presence of both publicly and privately provided services in a health sector of a WTO member does not mean that such services compete. As indicated in paragraph 97, competition requires like or directly substitutable services. The provision of basic, preventive health care services, such as childhood immunization, does not compete with the provision of expensive, high-tech tertiary medical treatments, such as neurosurgery, because they are not like or directly substitutable services.

100. The concept of "like products" has been the subject of adjudication under GATT because this concept is central to the operation of the most-favored-nation and national treatment principles of GATT. (The "like product" concept is also important in other WTO agreements, such as the Agreement on Anti-Dumping Duties.) GATS borrows this concept by using a "like services and service suppliers" test in its most-favored-nation and national treatment provisions (see Sections 6.1.2 and 7.3). Determining whether a service is supplied in the exercise of governmental authority under Article I:3(c) will require devising a "like services and service suppliers" test.

101. Such a test under Article I:3(c) of GATS will, in all likelihood, involve determining whether the services or service suppliers are identical descriptively and/or directly substitutable in the eyes of service consumers. As an initial matter, “like services or service providers” will likely exist mainly within services sectors listed in the Services Sectoral Classification List used by GATS. Thus, medical and dental services (CPC 9312)—listed under Business Services—are not “like services” with sewage services (CPC 9401)—listed under Environmental Services.



102. More difficult questions may arise in determining whether medical and dental services (CPC 9312) are “like services” with certain hospital services (CPC 9311) and other human health services (CPC 9319) even though they appear in different service sectors under the Services Sectoral Classification List used in GATS. Based on GATT jurisprudence on “like product” analysis, such close cases will likely be determined on a case-by-case basis according to relevant criteria developed to help assess the likeness of services and service providers.

103. In addition to descriptive comparisons, whether two services are in competition may also involve determining whether the services are substitutable—consumers behave as if one service is a substitute for a different service. Economists analyze substitutability by looking at the “elasticity of substitution”—how prices affect consumer behavior in selecting between different products or services. For example, if higher prices do not shift consumers from buying Product X instead of Product Y, then economists argue that Product X exhibits inelasticity of demand, suggesting that Product X and Product Y are not directly competitive products. If price shifts move consumers from Product X to Product Y, then the market signals elasticity of demand, indicating that the two products compete directly for consumers.

104. In *Japan—Alcoholic Beverages II*, the Appellate Body noted the following:

The concept of “likeness” is a relative one that evokes the image of an accordion. The accordion of “likeness” stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term “like” is encountered as well as by the context and the circumstances that prevail in any given case to which the provision may apply. (*Japan—Alcoholic Beverages II*, p. 19)



105. In the context of Article I:3(c) of GATS, is the “likeness” accordion to be squeezed narrowly or stretched broadly? The ordinary meaning of “competition” indicates that “like services” under Article I:3(c) will include both identical and directly substitutable services. The “likeness” accordion, then, will, in all likelihood, be stretched broadly under this provision of GATS.

106. The discussion in the previous paragraphs about the importance of the concept of like or directly competitive services or service suppliers was largely speculative, drawing on lessons from GATT, because to date no WTO case has involved the question whether a service falls within the exception provided by Article I:3(c) of GATS. The above analysis sends the message, however, that the determination of whether a service is provided in the exercise of governmental authority within the meaning of Article I:3(c) of GATS will likely involve analytical concepts familiar from the GATT context but nevertheless complex in their application to any specific case.

107. One lesson WTO members may take away from this analysis is to examine which government-provided health-related services could survive the three-part test applied by Article I:3(c) of GATS. The analysis required by this test is sufficiently complex that experts should view simplistic assertions about the effect of Article I:3(c) on health policy with skepticism. Undertaking this analysis could serve a number of important purposes, including identifying (1) to which government-provided services GATS applies; and (2) which health-related services are excluded from on-going GATS negotiations on liberalization of trade in services.

Burden of proof under Article I:3(c)

108. A different, but still important, question raised by Article I:3(c) of GATS is which WTO member in a dispute bears the initial burden of proof regarding this provision. Given the tripartite test found in Article I:3(c), the question of which WTO member has the burden of proof concerning this test is important. One view is that Article I:3(c) should be seen as a general exception to the otherwise comprehensive scope of GATS and that the WTO member claiming the application of the exception has the burden of proving that each test is satisfied.

109. In *US—FSC* (2000), the United States unsuccessfully bore the burden of proof as defendant that footnote 59 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) provided an

exception to the general definition of “subsidy” in Article 1.1 of the SCM Agreement. In other words, the general definition of “subsidy” applied to the U.S. action, forcing the United States to justify its behavior under an exception to the general rule. Using this case’s analysis, one could argue that (1) Article I:3(c) of GATS is an exception to the comprehensive scope of GATS defined by the rest of Article I; and (2) because Article I:3(c) is an exception, the defendant WTO member bears the burden of proof that the conditions of Article I:3(c) have been met.



110. The opposite view is that Article I:3(c) is an exclusion not an exception. Under this view, Article I:3(c) excludes government-provided health services from GATS. Such an exclusion means that the WTO member bringing a complaint should have to establish that the service in question falls within the scope of GATS. An interpretive case could be made that the burden of proof falls on the WTO member claiming that a government-provided service falls within the scope of GATS and outside the category of services excluded by Article I:3(c). Placing the burden of proof on a WTO member claiming that its actions are justified usually occurs only when the WTO member in question has been found in violation of some other binding obligation, which is not the situation when interpreting the effect of Article I:3(c).

111. For example, a WTO member banning the importation of a product violates the general prohibition on quantitative restrictions in Article XI of GATT. The WTO member complaining about this import ban has the burden of establishing that Article XI has been violated. Once that burden is satisfied, the WTO member imposing the import ban can justify the Article XI violation by claiming that such ban is necessary to protect human health under Article XX(b) of GATT. The WTO member appealing to Article XX(b) has the burden of establishing that it has satisfied all the conditions found in this article.

112. Health policy critics of GATT have complained about this allocation of the burden of proof, arguing that such allocation gives trade-related concerns more weight than health concerns. The WTO member complaining about a trade-restricting measure does not, in other words, have to establish that the product banned poses no threat or risk to human health. Rather, the WTO member defending its action on health-related grounds is forced to demonstrate that the product is a threat to human health. Critics argue that this allocation of the burden of proof in GATT poses a constraint on health policy because GATT and WTO panels interpret



“general exceptions” narrowly and strictly, making it even more difficult for WTO members to utilize Article XX(b) for protecting human health (Sinclair and Greishaber-Otto 2002: 37).

113. In GATS, the definition of “service provided in the exercise of governmental authority” does not appear in Article XIV on “General Exceptions.” A WTO member that justifies violations of GATS by reference to Article XIV will bear the burden of proof that its actions satisfy all elements of the relevant provision of Article XIV because the complaining party will have satisfied its burden of establishing the violation of some applicable principle of GATS. In addition, WTO panels and the Appellate Body will probably follow GATT practice and interpret the exceptions in Article XIV narrowly and strictly.²⁶

114. The placement of this exclusion in Article I rather than Article XIV might be significant for purposes of interpreting where the burden of proof lies. The exclusion of services supplied in the exercise of governmental authority from the scope of GATS could be interpreted as different from the exceptions in Article XIV of GATS. The applicability of Article I:3(c) would thus be a threshold issue not a question approached after a violation of another GATS principle has been established, as is the case with exceptions found in Article XIV.

115. Pursuant to this interpretation, the WTO member bringing a complaint that involves a government-provided service should bear the burden of proving that the service in question falls within the scope of GATS—that is, the service does not satisfy all three tests found in Article I:3(c). In other words, government-provided services would be presumed to be outside GATS unless a WTO member establishes that such services do not meet the tests provided in Article I:3(c).

116. The frequent arguments of the WTO Secretariat that government-provided services are excluded from GATS supports the interpretive approach toward the burden of proof on Article I:3(c) outlined above. Although these arguments from the WTO Secretariat may be wrong in terms of the actual language of Article I:3(c), they indicate that GATS should only apply to government-provided services if such services are provided on a commercial basis or in competition with one or more service providers. The burden of establishing such applicability should rest with the WTO member bringing a case claiming that GATS applies to a government-provided service.

117. *EC—Asbestos* illustrates the importance of shifting the burden of proof to the complaining WTO member. In this GATT case, the WTO panel held that Canada successfully argued that (1) asbestos and non-

²⁶ See Chapter 8 on Article XIV.

asbestos products were “like products” for purposes of the national treatment principle in Article III; and (2) France violated the national treatment principle in prohibiting the domestic sale of asbestos products. Then the panel held that the European Communities, on behalf of France, successfully justified the violation of Article III by satisfying all the criteria in Article XX(b) on the protection of human health.

118. The Appellate Body in the *EC—Asbestos* reversed the panel’s ruling that France violated GATT Article III and held that asbestos and non-asbestos products were not “like products” because the former were dangerous to human health while the latter were not. In effect, the Appellate Body held that Canada did not satisfy its initial burden of proof to establish that asbestos and non-asbestos products were “like products” for purposes of Article III of GATT. Rather than the EC bearing the burden of showing that asbestos products were dangerous, Canada was required to demonstrate that asbestos products were not dangerous—a burden that it could not fulfill.

119. Including the health-related impacts of products in the “like product” analysis of Article III of GATT shifts the burden to the WTO member bringing a complaint about a trade-restricting health measure. This outcome resonates more with those who want WTO jurisprudence to be more sensitive to the needs of health policy.

120. This analysis creates a potential legal strategy for WTO members concerned about GATS’ potential impact on their government-provided health services. Such WTO members could assert in the GATS Council and in other diplomatic forums that the burden of proof under Article I:3(c) rests with WTO members that bring complaints involving government-provided services in order to develop a body of subsequent state practice that establishes their position on that Article.

121. Even when a government-provided service falls within the scope of GATS because it does not satisfy all three tests of Article I:3(c), WTO members should keep in mind that the relevance of this outcome for health policy depends on two further aspects of GATS: (1) the impact of the so-called “horizontal” disciplines, such as the most-favored-nation principle (see Chapter 6), that apply to all services within the scope of GATS; and (2) the extent of market access and national treatment commitments made by the relevant WTO member (see Chapter 7). In other words, the determination that a service is within the scope of GATS is only the beginning rather than the end of analysis of how GATS affects government-provided health-related services.





122. Some examples help illustrate this point. First, if a government-provided health service falls within the scope of GATS, then the “horizontal disciplines” of GATS, such as the most-favored-nation (Article II) and transparency (Article III) principles, apply. No horizontal discipline in GATS requires that a WTO member privatize government-provided services. If a WTO member allows foreign suppliers to operate in a service sector, then it has to accord to the service suppliers of any other WTO member treatment no less favorable under the most-favored-nation principle. If no foreign suppliers operate, then the most-favored-nation principle does not apply and has no effect on health policy.

123. Second, if a government-provided health service falls within the scope of GATS, such service may be affected by market access and national treatment commitments made by a WTO member in the relevant service sector. WTO members have, however, discretion under GATS whether to make such commitments and to tailor them for national purposes.²⁷

124. The previous paragraphs demonstrate the level of the complexity of Article I:3(c) and the interpretive controversy surrounding it. Whether Article I:3(c) provides much protection for health policy remains doubtful. The only services obviously protected by Article I:3(c) are services provided free of charge only by the government. The provision of health-related services in most, if not all, WTO members involves mixtures of public and private service providers, which means that some level of competition and commercial activity will likely be present in the relevant sector. Most services traditionally viewed as “public services” may not, as a result, benefit from Article I:3(c).

125. Attempts to broaden the scope of Article I:3(b)-(c) exclusion could include efforts to narrow the meaning of “on a commercial basis” and to place the burden of proof on the complaining WTO member to demonstrate the inapplicability of the exclusion to government-provided services. Even if successful, these attempts will not make Article I:3(b)-(c) a broadly protective provision for government-provided services. As one scholar concluded after extensive analysis, these provisions are likely to be interpreted narrowly, meaning that most government-provided services will be included within the scope of GATS (Krajewski 2003). In that case, the general obligations of GATS will apply to all services caught by the broad scope of Article I:3; but WTO members can tailor their specific commitments on market access and national treatment to protect “public services” from foreign competition.

²⁷ See Sections 7.2 and 7.3 for more on the market access and national treatment commitments.

5.1.3 “TRADE IN SERVICES”



126. GATS defines “trade in services” as the supply of a service in one of four modes of supply (GATS, Article I:2) summarized in Table 5.1. As *Canada—Autos* illustrates (see paragraph 84), Article I:2 will be central to determining whether a situation involves “trade in services” within the meaning of Article I:1.

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127. What is important to grasp about GATS’ definition of “trade in services” is that the four identified modes of service supply encompass all possible ways in which enterprises provide services. Significantly, Article I:2(c) includes foreign direct investment—commercial presence—in the modes of service supply, representing an important step for the WTO into an area historically handled by states outside the context of international trade law.

TABLE 5.1 THE MODES OF SERVICE SUPPLY COVERED BY GATS

Mode	Supply of a Service	Health-Related Example
1	From the territory of one Member into the territory of any other Member (Article I:2(a))	Telemedicine; cross-border supply of health insurance
2	In the territory of one Member to the service consumer of any other Member (Article I:2(b))	Consumption of medical services by a patient from one WTO member in the territory of another WTO member
3	By a service supplier of one Member, through commercial presence in the territory of any other Member (Article I:2(c))	Foreign direct investment in another WTO member by, for example, health insurance, hospital, water, and/or waste disposal companies
4	By a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member (Article I:2(d))	Nurses or doctors supplying medical services while present in another WTO member state



128. Further, GATS expansively defines “supply of a service” as including the production, distribution, marketing, sale, and delivery of a service (GATS, Article XXVII(b)). GATS covers, thus, each stage in the supply of a service in all four modes of service supply.

129. The broad definitions of “trade in services” and “supply of a service” mean that GATS potentially has significant implications for health policy because each facet of supplying services in every possible method of service supply falls within the definitions. As analyses of health services under GATS suggest, Modes 1 and 3 are likely to be more important for health policy than Modes 2 and 4 (Adlung and Carzaniga 2001: 357). The most complex and intrusive mode of service supply for health policy is Mode 3 because it involves the commercial presence of a foreign-service supplier. As Chapter 13 discusses, GATS forms only part of the international legal arrangements that deal with foreign direct investment and commercial presence. Concerns about the implications of Mode 3 for health policy also need to take into account other potentially more significant international legal agreements on foreign direct investment.

5.1.4 “MEASURES BY MEMBERS”

130. Article I:1 of GATS states that the Agreement applies to “measures by Members” affecting trade in services. GATS comprehensively defines “measure” as “any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form” (GATS, Article XXVIII(a)). GATS defines “measures by Members” broadly to include measures taken by all levels of government (i.e., central, regional, and local) and non-governmental bodies exercising regulatory powers delegated by any level of government (GATS, Article I:3(a)). GATS’ disciplines apply, therefore, to every level of government exercising regulatory power over trade in services.²⁸

131. “Measures by Members” includes measures in respect of (1) the purchase, payment, or use of a service; (2) the access to and use of, in connection with the supply of a service, services which are required by the WTO member in question to be offered to the public generally; and (3) the presence, including commercial presence, of persons of a WTO member for the supply of a service in the territory of another WTO member (GATS, Article XXVIII(c)). These provisions constitute a very broad and comprehensive definition of the term “measures by Members.”

²⁸ For example, Antigua’s claims against the United States in *US—Gambling* included both federal and state laws on gambling and betting services (¶ 6.249).

132. Such an extensive definition of “measures by Members” is, of course, consistent with the broad scope of GATS constructed in Article I. It would make little sense to define services and trade in services broadly but to define “measures by Members” restrictively because such a restrictive definition would create a legal loophole that WTO members could exploit to undermine liberalization of trade in services, the *raison d’être* of GATS.

133. Concerns have been raised about the breadth of the definition of “measures by Members,” with experts arguing that GATS reaches deeply into a WTO member to regulate even local regulation of the supply of services (Sinclair and Greishaber-Otto 2002: 13-14). The vertical reach of the definition of “measures by Members” reflects the similar approach taken in GATT, indicating that international legal strategies on trade liberalization have to take into account multiple levels of regulatory authority to be effective in their objectives.

134. The treaty’s application to local as well as central governmental measures is not unusual in international legal terms. When a government agrees to be bound by rules of a treaty, the commitment applies throughout its territory to all levels of government. Local governments cannot, for example, violate principles found in treaties providing diplomats from other countries with immunity from civil and criminal prosecution. The need for stability and enforceability seen in the GATT and GATS contexts of trade liberalization exists in other international legal regimes as well.

135. For example, advocates of the human right to health in international law hold that regional and local governments are not exempt from treaty obligations under human rights agreements containing this particular right. Such an exemption would make the central government’s ratification of such treaties hollow as a practical matter.

136. The Vienna Convention itself provides that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty” (Vienna Convention, Article 27). The only exception to this rule is when the consent of a state to a treaty was a violation of a rule of the state’s internal law of fundamental importance (e.g., constitutional law) and where such violation would be objectively evident to any state conducting itself in accordance with normal practice and in good faith (Vienna Convention, Article 46).





137. Although the principle that treaty obligations apply whatever the level of government involved is not controversial from the perspective of international law, worries exist about the application of this principle because of the broad substantive scope of GATS. GATS will have more impact on local governments than rules on diplomatic immunity, for example, because local governments constantly regulate services while they rarely deal with diplomatic immunity. While local governments often provide health services, the treaty obligation of the right to health leaves governments at all levels within a state party a great deal of discretion about progressively fulfilling this right. GATS' vertical impact on health policy within a WTO member is, therefore, potentially more serious than other kinds of international legal obligations because of the subject matter and substantive disciplines of the Agreement.

138. The vertical impact on health policy from the broad definition of “measures of Members” depends on the substantive nature of the GATS disciplines that apply to such measures. In other words, the definition of “measures of Members” tells us little about the potential vertical impact on the regulation of the supply of services unless we also know what substantive GATS disciplines apply to such regulation.

5.1.5 “AFFECTING”

139. GATS applies to measures of Members “affecting” trade in services. The WTO Dispute Settlement Body has interpreted this key term in Article I:1 of GATS. In *EC—Bananas III*, the Appellate Body held that: “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” (¶ 220). As the panel in *EC—Bananas III* stated, the broad interpretation of “affecting” means that measures “could be of any type or relate to any domain of regulation” (¶ 7.280). The panel in *US—Gambling* cited with approval the approach to “affecting” set out in *EC—Bananas III* (¶ 6.251).

140. The broad reading of “affecting” means that regulations designed to regulate something other than services may nevertheless have an effect on services and fall within Article I:1 of GATS. Article I:1 catches, thus, a measure designed to regulate trade in goods but that also has an effect on trade in services. At issue in both *EC—Bananas III* and *Canada—Periodicals* (1997) was whether measures could fall within the scope of both GATT (trade in goods) and GATS (trade in services). In both cases, the WTO Dispute Settlement Body held

that a measure could fall within the scope of both agreements, which is further evidence of the broad scope of GATS.



141. The term “affecting” was also an issue in *Canada—Autos*. In this case, the panel held that the Canadian measure in question affected trade in wholesale trade services. The Appellate Body criticized the panel’s handling of this aspect of the case because the panel (1) never made adequate factual findings about the service sector in question; (2) did not articulate what it understood Article I:1 to require by the use of the term “affecting”; and (3) did not apply its interpretation of “affecting trade in services” to the facts it should have found (¶ 165).

142. The panel in *Canada—Autos* did state that whether a measure affects trade in services within the meaning of Article I:1 requires determining whether the measure bears upon conditions of competition in the supply of services (¶ 10.239). The panel in this case also indicated that the complaining WTO members did not have to show that the measure in question had any actual adverse impact on trade flows in services but merely that the measure might produce an economic disadvantage (¶ 10.246). The Appellate Body did not challenge this reading of “affecting” and reiterated its own broad interpretation of this term from *EC—Bananas III* (¶ 158). While the WTO cases addressing the term “affecting” do not provide unambiguous guidance as to what it means, they do make clear that satisfying this element of Article I:1 is not very demanding for a WTO member making a GATS complaint.

143. The broad interpretation of “affecting” already promulgated by the WTO Dispute Settlement Body has potentially significant implications for health policy. This interpretation, combined with the broad definitions of “measures by Members” and “trade in services,” means that GATS applies to a potentially huge range of regulatory policies at all levels of government, many of which were not previously connected in any way to international trade. Establishing that a measure by a WTO member affects trade in services does not mean that the measure violates GATS; but the broad and comprehensive definitions of “measures by Members,” “trade in services,” and “affecting” place an enormous range of regulatory activity undertaken in health policy within potential GATS scrutiny.



5.2 Scope of Health Policy

144. Section 5.1 demonstrates that the scope of GATS under Article I is very broad. In thinking about GATS' impact on health policy, it is also important to consider the scope of health policy itself. The exercise of sovereign powers to protect and promote human health extends across a vast range of governmental activities, economic sectors, and social objectives. Threats to human health arise in a multitude of contexts in which governments must formulate health policy.

145. Contemporary conceptions of health policy illustrate this extensive sovereign responsibility. WHO defines health, for example, as the complete state of physical and mental well-being, which goes beyond seeing health merely as the absence of disease (WHO Constitution, preamble). Achieving this conception of health within a country requires extensive governmental leadership, policy, and intervention across many different aspects of national life. The diverse health topics addressed by national and international law (e.g., disease control, environmental degradation, health system regulation, occupational safety and health, injury mitigation, etc.) also signal the extent of the challenges faced by health policy today.

146. The scope of health policy can also be illustrated directly in the context of GATS. Table 5.2 contains a non-exclusive list of health-related services taken from the Services Sectoral Classification List used to categorize services under GATS. This table provides a glimpse of the extent to which the broad scope of health policy overlaps with the broad scope of GATS. Although some categories contained in the Services Sectoral Classification List have obvious connections to health policy, the relevance of some sectors (e.g., communication services and distribution services) may not be as transparent. Communications services are relevant to health policy given the anticipated growth in importance of telehealth and e-health services, which depend on the underlying infrastructure for communications. Distribution services connect to health policy because such services serve as a conduit for the sale and consumption of products with harmful side effects, such as alcohol and tobacco.

TABLE 5.2 HEALTH-RELATED SERVICES IN THE GATS SERVICES SECTORAL CLASSIFICATION LIST



SECTORS AND SUB-SECTORS	
1.	BUSINESS SERVICES
	A. Professional Services
	...
	h. Medical and dental services
	...
	j. Services provided by midwives, nurses, physiotherapists and para-medical personnel
	C. Research and Development Services
	a. R&D services on natural sciences
2.	COMMUNICATION SERVICES
	C. Telecommunications Services
4.	DISTRIBUTION SERVICES
	...
	B. Wholesale trade services
	C. Retailing services
5.	EDUCATIONAL SERVICES
	...
	C. Higher education services
	D. Adult education
	E. Other education services
6.	ENVIRONMENTAL SERVICES
	A. Sewage services
	B. Refuse disposal services
	C. Sanitation and similar services
7.	FINANCIAL SERVICES
	A. All insurance and insurance-related services
	a. Life, accident and health insurance services
8.	HEALTH RELATED AND SOCIAL SERVICES
	A. Hospital services
	B. Other Human Health Services

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5.3 GATS as an Important Treaty for Health Policy

147. The overlap between GATS and the extensive nature of governmental responsibilities in the health area make GATS a relevant treaty for health policies on which health ministries in WTO members should focus. GATS has too many implications for health policy for this treaty to be left only to trade ministers. This Legal Review will continue to analyze the relevance of GATS for health policy, but we emphasize this point at an early stage in the analysis to make clear that sound knowledge of GATS will assist health ministries protect and promote human health.

Chapter 6

GENERAL OBLIGATIONS AND DISCIPLINES



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148. As indicated in Chapter 4, the general obligations and disciplines in Part II of GATS apply to all measures of WTO members affecting trade in services across all service sectors. In short, these obligations and disciplines have universal application for measures within the scope of GATS except in cases for which GATS provides exceptions. The mandatory nature of these duties gives rise to their description in GATS literature as “top-down” disciplines. These obligations are also described as “horizontal” requirements applied across all service sectors.

149. Part of the GATS and health debate centers on the impact of the general obligations and disciplines on health policy. Proponents of GATS typically emphasize the positive features of these general obligations, such as the most-favored-nation principle (Adlung and Carzaniga 2001: 355; WTO 2001: 9). Others argue that these general obligations pose serious concerns for health policy, especially in connection with the duties that affect domestic regulations (Sanger 2001: 72; World Development Movement 2001: 14-16; Sinclair and Greishaber-Otto 2002: 45-48, 63-70). As with the scope of GATS, this difference of opinion on the impact of GATS’ general obligations on health policy makes this an important issue for this Legal Review to explore.

150. A close reading of Part II of GATS indicates that it contains two distinct types of duties—substantive and procedural. The substantive disciplines are those that potentially affect the substantive content of measures of WTO members affecting trade in services. The procedural disciplines require WTO members to participate in certain processes deemed important to the functioning of the Agreement. Both substantive and procedural duties can have an impact on health policy, but the two kinds of duties will typically have different effects. The substantive obligations are likely to have a greater impact because they affect the substance of domestic regulation of services. Procedural obligations typically do not touch the substantive content of domestic regulation.



151. Classifying duties in Part II of GATS as substantive or procedural is, thus, important analytically, particularly because some GATS literature appears to confuse procedural duties for substantive ones, especially in connection with the provisions on domestic regulation. The classification of duties in Part II into substantive and procedural helps focus legal interpretation on how the duties in question affect health policy. Section 6.1 deals with the substantive duties, and Section 6.2 addresses the procedural obligations.

6.1 Substantive Duties

6.1.1 MOST-FAVORED-NATION PRINCIPLE

152. Article II:1 of GATS provides:

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 favorable than it accords to like services and service suppliers of any other country.

153. This provision enshrines in GATS the most-favored-nation (MFN) principle, which has been a cornerstone of international law on trade in goods (GATT, Article I). The MFN principle is a principle of non-discrimination because it requires that a WTO member not discriminate against a service or service supplier of another WTO member in favor of a service or service supplier from any other country. The intent of the MFN principle is to level the playing field in a WTO member as between foreign services and service suppliers of different foreign origins. The MFN principle does not prohibit a WTO member from discriminating against services or service suppliers from a country that is not a WTO member.

154. Note that the MFN principle in Article II:1 extends the best treatment services or service suppliers from any country, not just WTO members, receive to the like services and service suppliers of WTO members. Advantages accorded to foreign services and service suppliers from non-WTO countries must, therefore, be accorded to the like services and service suppliers of WTO members, which makes the MFN principle comprehensive in targeting discrimination.

155. The MFN principle in Article II:1 does not come into play if the WTO member in question does not allow foreign services or service suppliers to participate in the relevant economic sector. Thus, where foreign participation in health-related services is prohibited, the MFN principle will have no effect on health policy. In such a context, the MFN principle cannot be used to gain access to the services market of a WTO member.

156. Of course, most WTO members already allow foreign services and service suppliers to participate in most national markets, meaning that the MFN principle will likely almost always be applicable. It is important to emphasize that, when foreign services are provided, WTO members cannot use the MFN principle to gain market access in all circumstances. The MFN principle applies when two or more services or service providers of different foreign origins wish to operate in the WTO member in question. If a WTO member allows one foreign-service supplier from a foreign country to provide telemedicine services, then another WTO member cannot use the MFN principle to demand that its telemedicine suppliers be granted market access if the other WTO member uses quantitative limitations to restrict market access. In such circumstances, Article XVI of GATS not Article II:1 governs. The MFN principle requires, however, that the WTO member imposing the quantitative restrictions on market access under Article XVI apply such restrictions against foreign services from WTO members in a non-discriminatory fashion.

157. In addition to the presence of two or more services or service providers of different foreign origins, the MFN principle in Article II:1 requires: (1) a measure covered by the Agreement; (2) like services or service suppliers; and (3) less favorable treatment of a foreign service or service provider from another WTO member. The broad definition of “measures by Members affecting trade in services” analyzed in Chapter 5 suggests that this requirement of the MFN principle will not pose significant barriers to WTO members making MFN complaints.

158. The requirement that the foreign services or service suppliers from a different WTO member be “like” services or service suppliers raises important interpretive issues. The MFN principle in GATT similarly relies on a concept of “like products,” and panels under both GATT and the WTO have developed jurisprudence on the meaning of “like products” for purposes of Article I of GATT (GATT 1994: 35-40).





159. The cases in which panels and the Appellate Body addressed Article II:1 of GATS did not have to grapple with whether two foreign services or service suppliers were alike. In *Canada—Autos*, for example, the WTO panel did not have to make a ruling on “like services” under Article II:1 of GATS because Canada did not contest that the foreign service suppliers in question were “like” (*Canada—Autos*, ¶ 10.247). The jurisprudence on “like product” in GATT Article I might, thus, be important to interpreting what “like services and service suppliers” means under Article II:1 of GATS.

160. Jurisprudence on Article I of GATT indicates that the determination of whether products are “like products” can only be done through case-by-case analysis. The diversity of potential scenarios in the context of trade in goods means that no bright-line rules can be drawn in advance that will work authoritatively in every case. The same dynamic is likely to prevail in the context of Article II:1 of GATS.

161. Analytically, determining whether two products are alike under Article I of GATT has involved the application of a number of tests, none of which is definitive on its own, that cumulatively produce information on the likeness of two products. Again, the same dynamic is likely to be applied in the context of GATS.

162. The tests applied in the GATT “like product” context include: (1) the physical properties of the products; (2) the end uses of the products; (3) the tariff classifications of the products; (4) consumer attitudes toward the products; and (5) comparative analysis of how different countries treat the products in question. GATT cases interpreting Article I make clear that these tests are not exclusive and that others may be applied if the factual circumstances warrant.

163. In terms of the “likeness accordion” described in *Japan—Alcoholic Beverages II*, the “like product” concept in GATT Article I:1 is narrower than the “like services” concept implicit in GATS Article II:1 because it does not cover directly competitive or substitutable products. In *EEC—Animal Feed Proteins (1978)*, the GATT panel noted that Article I of GATT “did not mention ‘directly competitive or substitutable products’” and held that animal, marine, and synthetic proteins and vegetable proteins were not “like products” (¶ 4.20).

164. Non-exclusive tests will in all likelihood be developed and applied to the question whether two services or service suppliers are “like services” or “like service suppliers” under Article II:1 of GATS. Such tests

might potentially include: (1) the mode of the delivery of the service (e.g., are both services supplied within Mode 1 of Article I:2 of GATS?); (2) how the service is classified in the Service Sectoral Classification List (e.g., are the services both classified as business services or health services?); (3) the substantive content of the service (e.g., are the services both distributing goods to retail consumers?); (4) the end uses of the services (e.g., are the services both used for preventive care or tertiary treatment?); and (5) consumer attitudes toward the services (e.g., do consumers of the services see them as like services?).



165. As with “like product” analysis under GATT Article I, determining whether two foreign services or service suppliers provide “like services” or are “like service suppliers” will not depend on only one of the above listed potential tests. For example, WTO jurisprudence on GATS Article II:1 indicates that services supplied through different modes (e.g., cross-border supply (Mode 1) v. commercial presence (Mode 3)) can be “like services” (*Canada—Autos*, ¶ 10.247). “Like services” analysis in Article II:1 of GATS will be, thus, modally neutral.

166. The final requirement of the MFN principle in Article II:1 of GATS is that the measure in question has to treat the foreign service or service supplier of a WTO member no less favorably than the like service or service supplier from any other country. Treatment no less favorable can result from formally identical or formally different treatment; what must be examined are the conditions of competition that result from the measure.

167. Whether different treatment accords an advantage to one foreign service or service supplier over another requires looking at how the different treatment affects the conditions of competition between the two in the market. *Any* alteration, no matter how small, in the conditions of competition by the different treatment qualifies as less favorable treatment within the meaning of Article II:1.

168. WTO case law supports this interpretation of Article II:1. In *EC—Bananas III*, the European Communities argued that Article II:1 prohibited only *de jure* rather than *de facto* less favorable treatment. The Appellate Body did not agree with this limited interpretation of the MFN principle in GATS:

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. (¶ 233)

169. The Appellate Body in *Canada—Autos* held that a finding of less favorable treatment cannot be based on speculation about possible adverse effects on the conditions of competition. It faulted the panel's analysis of the less favorable treatment requirement because the panel “did not examine, *in concreto*, the structure of competition in the wholesale trade services market for motor vehicles in Canada” (¶ 174). The Appellate Body argued that the panel should have conducted an analysis of (1) whether and how the measure in question affected service providers that benefited from the measure; and (2) compared this treatment with the treatment of the service providers that did not benefit from the measure (¶ 174).

170. As in the GATT context, the WTO member bringing a claim that another WTO member has violated Article II:1 of GATS bears the initial burden of proof in establishing the elements required by Article II:1 are satisfied. The Appellate Body's ruling in *Canada—Autos* mentioned in the previous paragraph applies equally to WTO members that wish to claim a violation of GATS Article II:1—mere speculation about discrimination will not satisfy the burden of proof.

171. The interpretation of the MFN principle, supported by the existing WTO case law, demonstrates that Article II:1 of GATS is a significant substantive obligation for WTO members. This principle's application is extensive because of Article I:1's broad definition of measures affecting trade in services. It strictly requires equal treatment for foreign services and service suppliers from WTO members. It prohibits any discriminatory treatment found *de jure* or *de facto* in the substantive measures of WTO members affecting trade in services. The seriousness of the MFN discipline is revealed by the unease some critics of GATS express about the interpretation of Article II:1 in *EC—Bananas III* and *Canada—Autos* (Sinclair 2000: 40-47; Sinclair and Greishaber-Otto 2002: 45-48).

172. The interpretations of the MFN principle in GATS in WTO dispute settlement should come as no surprise, however, to those familiar with the GATT context, where panels and the Appellate Body have similarly applied the MFN principle. Claims that the manner in which panels and the Appellate Body interpreted Article II:1 was somehow radical and disturbing are not persuasive.

173. The impact of the MFN principle on health policy depends on the extent of *de jure* and *de facto* discrimination as between foreign services and service suppliers that exists in WTO members and the policy reasons behind such discrimination. The broad scope of GATS suggests that many WTO members may not be aware of all the contexts in which *de jure* or *de facto* discrimination actually exists in their jurisdictions. One NGO argued that the EC in *EC—Bananas III* and Canada in *Canada—Autos* were “caught unawares” and “flatfooted” when their respective measures were challenged for violating Article II:1 of GATS (Sinclair and Greishaber-Otto 2002: 45). If affluent WTO members such as the EC and Canada were not aware of discrimination lurking in their measures affecting trade in services, then less affluent countries may similarly be caught off-guard by MFN challenges under GATS.

174. Critics of GATS do not challenge the goal of non-discrimination at the heart of the MFN principle, indicating that the substantive objective of the principle is not the problem. Concerns about the MFN principle appear to cluster, firstly, around worries that WTO members are not aware of the full extent of the impact of the MFN principle on their measures affecting trade in services. Second, NGOs have expressed concern that the MFN principle will create a “lock in” effect by granting to all foreign services and service suppliers from WTO members non-discriminatory treatment and market access (Sinclair and Greishaber-Otto 2002: 46, 48). A government would find it harder, the argument goes, to reverse course on foreign participation in service markets because more foreign-service providers would object and fight the new policy direction.

175. As indicated above, the MFN principle applies when two or more services or service suppliers of different foreign origins wish to operate in the domestic market. The MFN principle does not necessarily increase the number of foreign services or service suppliers in a given service sector. Thus, policies aimed at reducing foreign participation in a service market do not face more obstacles by virtue of the MFN principle. Such policies do increase the likelihood of foreign pressure to get market access on the same conditions as competitors from other WTO members.

176. More importantly, policies aimed at decreasing foreign participation in services markets under Mode 3 would face formidable international legal obstacles in the form of treaties protecting foreign direct investment. Most bilateral investment treaties define “investment” broadly enough to cover investments in the services sector (Dolzer and Stevens 1995: 25-31), which means that the protections and rights granted under such treaties





apply to service-sector investments and investors. In United States and EC practice, bilateral investment treaties require each state party to treat the establishment and operation of an investment from the other state party no less favorably than it treats like investments of its own nationals or companies or of nationals and companies of any third country (Dolzer and Stevens 1995: 56). These national treatment and MFN principles would limit the ability of a state party to such a treaty to restrict or reduce the establishment or operation of service-sector investments from the other state party.

177. Health policy might be adversely affected by the MFN principle if the policies behind discriminatory treatment of foreign services or service suppliers had justifiable health policy or other social objectives. The authors are hard pressed to think of many health policy reasons for explicitly treating one foreign service or service provider less favorably than a like foreign service or service provider in any health-related service sector. As Johnson argued in relation to Canada, the MFN “obligation has minimum effect on Canada’s public health care system, as the measures essential to its continuance do not depend on according more favourable treatment to services and service suppliers of one country as compared to suppliers of other countries” (Johnson 2002: 19).

178. Cases may arise, however, where discrimination among foreign providers incompatible with the MFN principle in GATS could serve a legitimate health policy purpose. For example, outward migration of health workers may adversely affect the health systems of some developing countries by creating shortages of health personnel. The MFN principle might complicate attempts by countries importing health personnel to prevent migration of health personnel from countries that would seriously suffer from the loss of such personnel. For the MFN principle to block such policies by the importing country, the country losing health personnel by outward migration would have to challenge the importing country’s policy under Article II:1 of GATS, an unlikely event if the country suffering the loss of health personnel wants to retain such personnel.

179. Under the MFN principle, a WTO member may establish criteria all foreign services or service suppliers must meet to provide services in its jurisdiction (e.g., proficiency in the local language). The MFN principle requires the non-discriminatory application of such criteria. Providing more favorable treatment to services or service suppliers from developing countries might constitute a policy justification for discriminatory treatment, but this rationale connects more with the economic development objectives for the developing countries than with health policy inside the WTO member granting more favorable treatment.

180. Although few policy reasons justify treating one foreign service or service provider less favorably than another such provider from a WTO member, exceptions are provided in GATS that would justify a violation of the MFN principle, and these are examined in Chapter 8; so GATS itself does not make the MFN principle sacrosanct.

181. Claims of MFN violations under GATS are, however, more likely to involve claims of *de facto* as opposed to *de jure* discrimination. WTO members may have health measures in place that adversely affect service providers from some WTO members more than others. The service providers more adversely affected may claim that such measures violate the MFN principle in GATS. Thus, the broad scope of the MFN principle—covering both *de jure* and *de facto* discrimination—may result in the MFN principle having some impact on health policy. Whether preserving such *de facto* discrimination is important for health reasons will depend on the facts of the specific case, but GATS provides for a health exception to the MFN principle in Article XIV(b).²⁹



Chap 6
General
Obligations
and
Disciplines

6.1.2 DUTIES AFFECTING DOMESTIC REGULATORY POWERS

Overview

182. The second category of substantive duties contained in Part II of GATS involves obligations on domestic regulation found in various articles. The GATS controversy has focused on whether and how GATS interferes with the ability of a WTO member to regulate services. Some argue that the provisions on domestic regulation undermine a WTO member's ability to regulate services and service suppliers (Sanger 2001: 69-72; World Development Movement 2001: 5-7; World Development Movement 2002: 9-13; Sinclair and Grieshaber-Otto 2002: 63-70; Joint Submission to the World Health Assembly 2003: 3-4). Others claim that GATS preserves a WTO member's sovereignty to regulate services (WTO 2001).

183. Many experts have noted the importance for a government to be able to regulate health-related services (WHO/WTO 2002: 121), so the differing positions on whether and how GATS affects a WTO member's ability to regulate health-related services create a critical area of GATS interpretation. This area is also the one in which the two sides in the GATS and health debate seem the farthest apart, suggesting that GATS' provisions on domestic regulation are not unambiguous.

²⁹ See Section 8.1.2 for analysis of the exceptions in Article XIV.



184. Substantive disciplines on domestic regulation appear in Articles VI, VII, VIII, and XI of GATS. The most controversial disciplines in the GATS and health debate are Articles VI:4 and VI:5, so the Legal Review will spend most its time on those. Table 6.1 provides an overview of the substantive disciplines on domestic regulation in GATS

TABLE 6.1 OVERVIEW OF SUBSTANTIVE DISCIPLINES ON DOMESTIC REGULATION IN GATS

Article	Content
VI:2	<p>(a) Each Member shall maintain or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.</p> <p>(b) The provisions of subparagraph (a) shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.</p>
VI:4	<p>With a view to ensuring that measures relating to qualification requirements and procedures technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, <i>inter alia</i>:</p> <p>(a) based on objective and transparent criteria, such as competence and the ability to supply the service;</p> <p>(b) not more burdensome than necessary to ensure the quality of the service;</p> <p>(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.</p>
VI:5	<p>(a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:</p> <p>(i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and</p> <p>(ii) could not reasonably have been expected of that Member at the time the specific</p>



	<p>commitments in those sectors were made.</p> <p>(b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations³ applied by that Member.</p> <p>³ The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.</p>
VI:6	In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.
VII:3	A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.
VIII:1	Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments.
VIII:2	Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.
VIII:4	If, after the date of entry into force of the WTO Agreement, a Member grants monopoly rights regarding the supply of a service covered by its specific commitments, that Member shall notify the Council for Trade in Services no later than three months before the intended implementation of the grant of monopoly rights and the provisions of paragraphs 2, 3 and 4 of Article XXI shall apply.
VIII:5	The provisions of this Article shall also apply to cases of exclusive service suppliers, where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory.
XI:1	Except under the circumstances envisaged in Article XII, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.



185. Before focusing specifically on Articles VI:4 and VI:5, some observations on Table 6.1 are in order. The substantive obligations listed in Table 6.1 can be divided into obligations that are generally applicable (Articles VI:2, VI:4, VII:3, VIII:1, and VIII:5) and those that apply only to specific commitments made on market access and national treatment (Articles VI:5, VI:6, VIII:2, VIII:4, and XI:1).

186. The obligations that apply only in the context of specific commitments do not, by definition, have any effect on health policy if a WTO member has made no specific commitments on health-related services. These substantive obligations are, therefore, contingent on WTO members making specific commitments. The relatively few specific commitments that have been made in connection with health-related services³⁰ indicate that these substantive disciplines on domestic regulation may not yet significantly affect health policy in most WTO members.

Substantive obligations linked to specific commitments

187. Of the substantive obligations on domestic regulation linked to specific commitments, the broadest in application are VI:5 and XI:1. Article XI:1 prohibits WTO members from applying restrictions on international transfers and payments for current transactions relating to services and service suppliers covered by specific commitments.³¹ A specific exception to this prohibition is available through Article XII of GATS. This substantive obligation on domestic regulation does not appear to threaten health policy.

188. Article VI:5, which is further discussed below, prohibits WTO members from applying licensing and qualification requirements and technical standards that nullify or impair specific commitments in a manner which does not comply with specified criteria and which other WTO members could not have reasonably expected at the time the commitments were made. Article VI:5's prohibition only applies as long as the Council for Trade in Services has not developed relevant disciplines pursuant to Article VI:4. The key to understanding this substantive obligation lies in the requirement that any such requirements and standards comply with certain criteria, which are analyzed in paragraphs 259-284.

³⁰ See Chapter 9 for analysis of commitments in health-related services in GATS schedules.

³¹ In *US—Gambling*, Antigua claimed that the United States had violated Article XI of GATS; but the panel determined that it did not have sufficient material on the record to enable it to undertake a meaningful analysis of Article XI and its application to this dispute (¶ 6.441). The panel stressed, however, “that Article XI plays a crucial role in securing the value of specific commitments undertaken by Members under the GATS” (¶ 6.442).

189. Of the substantive obligations on domestic regulation linked to specific commitments, the narrowest are found in Articles VIII:2, VIII:4, VIII:5, and VI:6. Articles VIII:2 and VIII:5 require that WTO members ensure that monopoly and exclusive service suppliers do not abuse their privileged market positions by supplying a service outside the scope of their monopoly or exclusive rights in a manner inconsistent with specific commitments. Three conditions must be satisfied before these rules come into effect: (1) monopoly or exclusive service suppliers (2) supplying services outside the scope of their monopoly or exclusive rights (3) within a sector subject to specific commitments.



190. Article VIII:4 lays down obligations for when a WTO member grants monopoly rights regarding the supply of a service covered by its specific commitments. (Article VIII:5 makes these obligations applicable when a WTO member grants exclusive service rights regarding the supply of a service covered by specific commitments.) Article VIII:4 requires two things from a WTO member granting monopoly or exclusive rights in such a context: (1) notification of the Council for Trade in Services no later than three months before the intended implementation of the rights; and (2) negotiation of compensation for WTO members affected by the granting of such rights pursuant to Articles XXI:2-XXI:4. Paragraphs 198-220 discuss the GATS rules on monopoly and exclusive suppliers in detail.

191. Article VI:6 applies in sectors where WTO members have undertaken specific commitments regarding professional services and requires that WTO members provide adequate procedures for verifying the competence of professional service providers of other WTO members. The professional services sector includes health-related services (e.g., medical and dental services), so this rule directly affects health policy. The nature of the rule is, however, not likely to cause concern because health policy principles support a WTO member's right to verify the competence of persons from other WTO members seeking to supply health-related professional services.

Substantive obligations not linked to specific commitments

192. The obligations not tied to specific commitments also have characteristics that need to be highlighted. Three of these obligations (Articles VII:3, VIII:1, and VIII:5) are contingent obligations and are not, thus, applicable to all measures of domestic regulation. Article VII:3 prohibits discrimination between countries



in according recognition to the education, experience, or certifications granted to service suppliers in other countries. Recognition is not, however, mandatory. Article VII:1 gives WTO members discretion whether to accord recognition—“a Member *may* recognize the education or experience obtained, requirements met, of licenses or certifications granted in a particular country” (emphasis added). The substantive non-discrimination duty in Article VII:3 only affects those WTO members that voluntarily choose to recognize foreign qualifications of service suppliers. In addition, the principle of non-discrimination in Article VII:3 does not seem objectionable from a health policy standpoint.

193. Article VIII:1 is also a contingent obligation. This article requires any WTO member that has a monopoly supplier of a service in its territory to ensure that such supplier does not act in manner inconsistent with the MFN principle in Article II:1 and any specific commitments. This obligation does not come into effect if no monopoly supplier exists. The MFN principle already applies comprehensively pursuant to Article II:1 of GATS with respect to measures affecting trade in services; as far as the MFN principle is concerned, Article VIII:1 makes the same principle applicable to any governmental or non-governmental entity that enjoys a supply monopoly. In any case, Article VIII:1 is a substantive duty contingent upon the existence of a monopoly supplier and specific commitments.

194. Article VIII:5 applies the rules in Article VIII on monopoly suppliers to cases of exclusive service suppliers, where the WTO member, formally or in effect, authorizes or establishes a small number of service suppliers and substantially prevents competition among them in its territory. This obligation is contingent on the existence of the particular arrangement of exclusive service suppliers described in the article.

195. Article VI:4, which is discussed more in paragraphs 230-258, does not really constitute a substantive obligation on domestic regulations at all. This article provides that the Council for Trade in Services shall establish any necessary disciplines relating to qualification requirements and procedures, technical standards, and licensing requirements. The article does not impose any specific substantive obligation on WTO members except the indirect obligation to participate in good faith in the efforts of the Council for Trade in Services to establish such disciplines.

196. The only substantive obligation on domestic regulation in GATS that is not contingent, connected to specific commitments, or a duty to negotiate further rules is Article VI:2, which requires WTO members to maintain or institute judicial, arbitral, or administrative tribunals or procedures that provide for the prompt review

of administrative decisions affecting trade in services and appropriate remedies where justified. The objective of this general obligation—due process and fair treatment for services suppliers affected by domestic regulation—does not seem objectionable from a health policy perspective.



197. Substantive obligations on domestic regulation connected to specific commitments or contingent upon the existence of a particular set of facts may or may not significantly affect health policy. The effect depends on either the scope and depth of specific commitments or the extent to which a WTO member operates monopoly or exclusive service suppliers—both of which GATS leaves entirely in the hands of WTO members.

Monopoly and exclusive service suppliers

198. Concerns have been raised about the disciplines GATS imposes on monopoly and exclusive service providers in Article VIII. Monopoly and exclusive service suppliers still provide basic services in many WTO countries, including some directly relevant to health policy, such as water distribution, sanitation services, health insurance, and health care (Sinclair and Grieshaber-Otto 2002: 60; Center for International Environmental Law 2003). Thus, the disciplines in Article VIII are directly of concern to health policy.

199. A government-operated or -controlled monopoly service would fall outside GATS as long as it operated on a non-commercial basis because a monopoly service, by definition, involves no competition. Such a monopoly satisfies all the criteria found in GATS Article I:3(c) and would be excluded from all GATS rules.

200. The text of GATS makes clear that WTO members may retain and establish monopoly and exclusive rights for the supply of a service. The right to continue the operation of existing monopoly and exclusive service suppliers is clear from Article VIII (on monopolies and exclusive service suppliers) and Articles XVI and XVII (on market access and national treatment commitments). The right to grant new monopoly or exclusive service supply rights is clear from Article III:4. Paragraphs 211-217 explore in more detail whether the procedure outlined in Article VIII:4 compromises the ability of a WTO member to create new monopoly or exclusive supply rights, as argued by some commentators (Sanger 2001: 106; Sinclair and Grieshaber-Otto 2002: 62-63).

201. GATS defines a “monopoly supplier of a service” as “any person, public or private, who in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as



the sole supplier of that service” (GATS, Article XXVIII(h)). Exclusive service suppliers exist “where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory” (GATS, Article VIII:5). As noted above, the only obligation in Article VIII that is not linked with the existence of specific commitments is Article VIII:1, which prohibits a monopoly and (through Article VIII:5) exclusive service supplier from acting in a manner inconsistent with the MFN principle.

202. Article VIII:1 raises fears that it will adversely alter the way monopoly and exclusive service suppliers of basic public services engage in their activities. The key question for purposes of this Legal Review is whether the ability of such a monopoly or exclusive service supplier to discriminate between foreign services or service suppliers in its market is important for health policy. If such an ability to discriminate is important for health policy reasons, then both Article II:1 and Article VIII:1 would be of concern.

203. Monopoly or exclusive service providers are likely to discriminate in two contexts: (1) through preferential sales of their services to certain service consumers; or (2) through preferential purchases of services from other service providers. Article VIII:1 only applies the MFN principle to a monopoly or exclusive supplier’s “supply of the service in the relevant market” and not preferential purchases of services from other service providers. This latter context of discrimination would be caught by the general MFN principle in Article II:1, so both contexts of preferential behavior are analyzed below. The mere presence of discrimination in the terms of sales or purchases is not, however, sufficient to trigger the application of the MFN principle.

204. For the MFN principle to apply to preferential sales by monopoly or exclusive service suppliers, the service consumers receiving less favorable treatment would have to be services or service suppliers of WTO members. The service consumers receiving preferential treatment would have to be like services or service suppliers from any other country. For the MFN principle to apply to preferential purchases by monopoly or exclusive service providers, the service suppliers receiving less favorable treatment would have to be service suppliers of WTO members. The service suppliers receiving preferential treatment would have to be like service suppliers from any other country.

205. An example might clarify the specific context in which the MFN principle applies. State A, which is a WTO member, has a monopoly supplier (MonoSupp) of Service X. MonoSupp charges Buyer 1 less than

Buyer 2 for the purchase of the same amount and quality of Service X. In other words, MonoSupp discriminates against Buyer 2 rather than engaging in legitimate differential pricing based on the quantity or quality of the service purchased. For the MFN principle to apply to MonoSupp's preferential pricing, the following conditions must exist: (1) Buyer 1 and Buyer 2 have to be like services or service suppliers themselves not just consumers of services; (2) Buyer 2 has to be from a WTO member engaging in trade in services within the meaning of Article I:1 of GATS; and (3) Buyer 1 has to be a service or service supplier of any other country.



206. In the specific factual context protected by the MFN principle, does the protection and promotion of human health require that monopoly or exclusive suppliers of health-related services be allowed to discriminate against services or service suppliers from WTO members? The authors could not think of examples where such discrimination was either central or even convenient from a health policy perspective. The authors' inability to think of relevant examples does not mean that such examples do not exist, but this exercise at least indicates that Article VIII:1's application of the MFN principle to monopoly and exclusive service providers does not seem to raise obvious threats to health policy.

207. Articles VIII:1 and VIII:2 require WTO members that have made market access or national treatment commitments ensure that monopoly and exclusive service suppliers do not act in ways inconsistent with such commitments. Article VIII:1 applies this obligation when the monopoly or exclusive service supplier is operating within its relevant market. If a WTO member makes a market access commitment in a sector in which it wishes to have a monopoly or exclusive service supplier, then it must specify such limitation on the number of service suppliers (GATS, Article XVI:2(a)). The operation of a monopoly or exclusive service supplier in a sector in which market access commitments have been made is, thus, not prohibited by GATS. Similarly, WTO members can exempt monopoly or exclusive service suppliers from national treatment commitments made in service sectors by specifying such qualifications in the relevant schedules (GATS, Article XVII:1).

208. Article VIII:2 applies the duty not to act inconsistently with market access and/or national treatment commitments when the monopoly and exclusive service suppliers provide services outside the scope of their monopoly or exclusive rights. This provision would catch behavior in two contexts: (1) the monopoly or exclusive service supplier supplying its normal service beyond the territorial or other boundaries established by the monopoly or exclusive rights; and (2) the monopoly or exclusive service supplier supplying a different service to the one it normally supplies under its privileged rights. In either case, the service being provided by



the monopoly or exclusive supplier must be subject to market access or national treatment commitments before Article VIII:2 applies.

209. As with Article VIII:1's application of the MFN principle, identifying how the rules in Article VIII:2 might adversely affect health policy proves difficult. First, a monopoly or exclusive service supplier providing a basic health-related service, such as sanitation, only needs to be concerned with Articles VIII:1 and VIII:2 if the WTO member has made market access or national treatment commitments in the sanitation sector. Second, why a monopoly or exclusive service supplier would need to violate market access or national treatment commitments to serve its health policy function is not clear. This analysis does highlight the critical importance of making sure that market access and national treatment commitments are compatible with the operation of existing monopoly and exclusive service suppliers important for health policy. This issue is further discussed in Sections 7.2 and 7.3.

210. Also unclear are the health policy implications of when a monopoly or exclusive supplier of an important health-related service supplies the same service or a different service beyond the scope of its privileged rights. Whether the monopoly supplier of sanitation services desires to supply sanitation services beyond the remit of its monopoly rights might be a question of *extending* the reach of the monopoly rights, and this issue is discussed in paragraphs 211-217. Health policy experts might be concerned that the monopoly supplier of sanitation services wants to supply a different service, but the health policy concerns are not likely to hinge on the disciplines applied by Article VIII:2.

211. More significant from the perspective of health policy are the disciplines in Article VIII:4, which establishes the rules that apply if a WTO member grants monopoly or exclusive rights regarding the supply of a service after the date of entry into force of the WTO. As noted earlier, Article VIII:4 only applies if a WTO member grants new monopoly or exclusive rights regarding the supply of a service *covered by specific market access or national treatment commitments*. Thus, a WTO member is free to grant new monopoly and exclusive service supply rights for all sectors that are not covered by specific commitments.

212. If a WTO member wants to grant new monopoly or exclusive service supply rights in a sector covered by market access or national treatment commitments, then Article VIII:4 sets out the procedure that must be followed. This provision's requirement for the WTO member seeking to grant new monopoly or

exclusive rights to provide compensation to WTO members whose service suppliers are adversely affected by such grant has been criticized (Sanger 2001: 106; Sinclair and Grieshaber-Otto 2002: 62-63). The justification for the compensation procedure is to keep the overall level of trade liberalization in services the same—that is, new monopoly or exclusive rights may restrict trade in services, triggering the need for the WTO member in question to liberalize trade in services elsewhere to compensate for the restrictive effect of the new privileges. The compensation procedure establishes a process of *quid pro quo* for governments granting new monopoly or exclusive service rights in service sectors covered by specific commitments.



213. The compensation discipline establishes a process that begins when the WTO member notifies the Council for Trade in Services of its intent to grant new monopoly or exclusive service supply rights in a sector covered by specific commitments (GATS, Article VIII:4). Any WTO member affected by the proposal to grant such rights can request that the WTO member proposing such rights negotiate with a view to reaching an agreement on any necessary compensatory adjustment (GATS, Article XXI:2(a)). Any compensation arrangement is then made available to all WTO members through the MFN principle (GATS, Article XXI:2(b)).

214. If the negotiations do not produce a compensatory agreement, the affected WTO member may refer the matter to binding arbitration (GATS, Article XXI:3(a)). If the WTO member implements the new monopoly or exclusive service rights without complying with an arbitration ruling, then the affected WTO member can implement trade sanctions substantially equivalent to the benefits it lost in the implementation of the new rights (GATS, Article XXI:4(b)).

215. Sinclair and Grieshaber-Otto have argued that this compensation discipline is an illegitimate restriction on a WTO member's ability to expand monopoly or exclusive service supply rights for public purposes: "[t]he GATS requirement that governments that designate a monopoly must negotiate compensation with other member governments or face retaliation is . . . a formidable hurdle. . . . Only a government determined enough to negotiate GATS compensation and to face potential retaliation would proceed. . . . [T]he very prospect of paying compensation might be enough to chill such an initiative" (Sinclair and Grieshaber-Otto 2002: 62-63). The goal of trade liberalization trumps the need that governments may have to use monopoly or exclusive rights to achieve social objectives, such as greater access to health technologies and health care, and basic services, such as water (Joint Submission to the World Health Assembly 2003: 3).



216. Although the compensation discipline only applies to new monopoly or exclusive rights granted in sectors covered by specific commitments, the flexibility in this process may be illusory. A WTO member may make a specific commitment concerning a health-related service, such as health insurance, only to decide later that new monopoly or exclusive rights might create a more equitable and just policy. Governments cannot predict the future development of social policy with such precision that market access and national treatment commitments will be forever accommodating to future policy initiatives and reversals. The compensation discipline mandated by Article VIII:4 deters governments from utilizing new monopoly and exclusive service supply rights for purposes of social justice and equity in areas covered by specific commitments.

217. These arguments have merit because Article VIII:4 imposes an obligation on WTO members that potentially affects health policy in connection with sectors covered by specific commitments. WTO members have not made many commitments in the health sector, so the constraining effect of Article VIII:4 might not be large currently. In the future, if WTO members make more commitments through successive negotiating rounds of trade liberalization, the effect of Article VIII:4 may weigh more heavily on health policy.

218. In a situation in which a WTO member has made a specific commitment that later deters the granting of monopoly or exclusive service rights, the WTO member may consider modifying or withdrawing the specific commitment in question. Options for modifying or withdrawing specific commitments are discussed in Section 7.6; but the only option not connected to the compensation procedure outline above is Article X:2 of GATS, which allows WTO members to withdraw or modify specific commitments without a requirement to provide compensation. Although the Article X:2 option technically expired three years after the WTO Agreement entered into force, the GATS Council has extended the availability of this option until the multilateral negotiations on emergency safeguard measures have been completed (WTO Doc. S/L/102, ¶ 3).

219. The existence of other international legal obligations, such as appear in bilateral and regional investment agreements, should also be kept in mind when considering the impact of Article VIII:4 on health policy. Most treaties protecting foreign direct investment require, among other things, compensation for expropriation of foreign-owned investments to be paid to the investor (Dolzer and Stevens 1995: 97-98). A WTO member that seeks to utilize Article VIII:4 of GATS would likely trigger the obligation in investment treaties it has signed to compensate the service investors removed from the market by the creation of new monopoly or exclusive rights.

220. A legal assessment of the impact of international trade obligations on Canadian health policy singled out, for example, the protections for direct foreign investment contained in NAFTA as possessing the most negative potential impact on Canadian health policy because of provisions on compensation for expropriations. Johnson argued that NAFTA's rules on expropriation and compensation (NAFTA, Article 1110) make: (1) expansion of the public component of the Canadian health system impractical; and (2) reduction of the public component of the system a one-way street because, once private firms acquire economic interests through deregulation, returning to public ownership and control is only possible upon payment of compensation (Johnson 2002: 29). The Center for International Environmental Law reported on the use of a bilateral investment treaty by a multinational company to recover losses that resulted from the Bolivian government reversing its privatization of a municipal water system (Center for International Environmental Law 2002: 2). Thus, the requirements found in bilateral or regional investment treaties may represent more significant limitations on health policy than Article VIII:4 of GATS.



The controversy over Articles VI:4 and VI:5

221. Articles VI:4 and VI:5 of GATS have drawn strong criticism. Sinclair observed, for example, that “Article VI, and the further negotiations called for under it, clearly pose one of the more dangerous GATS threats to democratic decision-making” (Sinclair 2000: 81). These two provisions would represent an unprecedented attempt to constrain a government’s powers of domestic regulation all in the name of trade liberalization. Sinclair and Grieshaber-Otto argue, for example, that “[t]he provisions envisaged under Article VI:4 are among the most excessive restrictions ever contemplated in a binding international commercial treaty” (Sinclair and Grieshaber-Otto 2002: 69). A group of NGOs jointly complained “that these GATS rules will threaten key public health regulations in WTO member countries. The GATS requirement that regulations must be ‘necessary’ in WTO terms could expose any domestic health policy to challenge at the WTO” (Joint Submission to the World Health Assembly 2003: 3).

222. The phrase in these two articles that draws the greatest concern is the requirement that domestic regulations on services not be more burdensome than necessary to ensure the quality of the service. Criticism of this requirement results from (1) past experience with a similar test in GATT Article XX(b); and (2) the new way in which GATS employs the “necessary” discipline. The fact that “quality” is the only criterion to be applied



is also a source of concern. Equity in access to health services should also be an important component in any health policy.

223. The so-called “necessity test” is familiar from the GATT context, especially Article XX(b), which allows states parties to violate GATT if the measure in question is necessary for the protection of human, animal, or plant life of health. Under GATT and WTO jurisprudence, the necessity test under Article XX(b) has been interpreted to require that trade-restricting health measures be the least trade-restrictive measures reasonably available.

224. This interpretation of Article XX(b) arose in a case directly involving health policy: *Thailand—Cigarettes*. In this case, Thailand banned the importation of foreign-made cigarettes as part of its effort to reduce smoking in the Thai population. The United States challenged this ban under GATT as a violation of Article XI:1’s prohibition on quantitative measures. Thailand admitted that the ban violated Article XI:1 but argued that Article XX(b) justified the violation because the ban was necessary to protect human health. The GATT panel held that the ban was not necessary within the meaning of Article XX(b) because other measures consistent, or less inconsistent, with GATT were reasonably available for Thailand to achieve its public health objective.

225. Prior to *EC—Asbestos*, no measure evaluated under GATT Article XX(b) survived the necessity test, giving an indication how strictly it was applied in dispute settlement. This interpretation of the necessity test in Article XX(b) has long troubled experts concerned about GATT’s impact on health policy. The appearance of the necessity test in GATS, not surprisingly, raises similar concerns (Joint Submission to the World Health Assembly 2003: 3).

226. GATS utilizes the necessity test in a new way, which creates more cause for concern. The necessity test appears in the general exceptions to GATS in Article XIV;³² and, in this regard, GATS mirrors how GATT uses the necessity test. But the inclusion of the necessity test in Article VI on domestic regulation has heightened concerns about this test’s possible effect on health policy.

227. In addition to being used in cases in which a WTO member justifies a violation of a GATS rule in order to protect human health, Article VI applies the necessity test to a wide range of domestic regulatory issues without any prior violation of GATS being required. In other words, rather than just being applied in contexts

³² For more on Article XIV, see Section 8.1.2.

in which a measure violates a treaty principle, the necessity test is applied to an extensive set of regulatory measures that are neither discriminatory nor in violation of a fundamental principle of the Agreement.



228. Although the preamble of GATS states that WTO members recognize “the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives,” GATS obligations affect both *how* a WTO member exercises this right (i.e., the procedural obligations (see Section 6.2)) and *what* domestic regulations can contain (e.g., no discrimination as between foreign services or service suppliers under the MFN principle).

229. The interpretive question that this Legal Review must address is the extent to which Articles VI:4 and VI:5 affect the right of a WTO member to regulate services within its jurisdiction.

Article VI:4

230. As noted earlier, Article VI:4 empowers the Council for Trade in Services to develop any necessary disciplines on measures relating to qualification requirements and procedures, technical standards, and licensing arrangements in order to prevent such measures from constituting unnecessary barriers to trade in services. Article VI:4 does not contain any disciplines on the right to regulate services and cannot, by itself, be the basis for a challenge against a WTO member’s domestic regulation of services. It merely authorizes the Council for Trade in Services to develop disciplines through negotiations among WTO members. In this regard, Article VI:4 has no current effect on the health policies of WTO members because the Council for Trade in Services has not developed any disciplines for health-related service sectors.

231. The potential scope of disciplines developed under Article VI:4 is, however, significant. First, Article VI:4 does not limit the Council for Trade in Services to developing disciplines for only a few service sectors. The scope of Article VI:4 is as broad as GATS’ application itself. Second, the undefined terms “qualification requirements and procedures,” “technical standards,” and “licensing requirements” have potentially broad application in any given service sector. This breadth is particularly an issue with regard to technical standards, which can regulate not only the substantive content of a service but also rules governing how the service supplier must provide the service.



232. Article VI:4 instructs the Council for Trade in Services to develop disciplines that aim to ensure that measures on qualifications, technical standards, and licensing “are, *inter alia*: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing, not in themselves a restriction on the supply of the service.” As indicated above, the “not more burdensome than necessary” requirement—the so-called necessity test—appears to create the most issues for health policy.

233. Article VI:4 raises some important interpretive questions. To begin, do the disciplines developed pursuant to Article VI:4 apply to all WTO members or only to members that have made specific commitments in the service sector for which the Council for Trade in Services develops disciplines? The text of Article VI:4 does not contain language that would limit such disciplines only to those WTO members with specific commitments in the relevant sectors. Other provisions in Article VI specifically state that their rules apply to domestic regulation in sectors in which specific commitments are undertaken (see Articles VI:1, VI:5, and VI:6), making the textual absence of such limitation in Article VI:4 potentially significant for purposes of interpretation. Thus, one textual reading of Article VI:4 is that disciplines developed under it shall apply to all WTO members, like the MFN principle.

234. State practice under GATS supports a different interpretation of Article VI:4’s scope. To date, the only disciplines developed by the Council for Trade in Services involve accountancy services; and WTO members agreed that these disciplines only apply to WTO members that make commitments on accountancy services (WTO 2001: 14). Further, the accountancy disciplines do not apply to measures WTO members have scheduled as exceptions to market access and national treatment under Articles XVI and XVII respectively (WTO Doc. S/L/64, ¶ 1). According to this state practice, WTO members can, on a case-by-case, limit disciplines developed under Article VI:4 to (1) WTO members that have made specific commitments in a relevant sector; and (2) measures not scheduled as market access or national treatment exceptions. Equally, WTO members could decide to apply Article VI:4 disciplines as a general obligation.

235. As indicated above, Article VI:4 currently poses no direct threat to health policy because the Council for Trade in Services has not adopted any disciplines for any health-related sector. In addition, state practice on the application of Article VI:4 disciplines only to those WTO members with specific commitments in the

relevant sector means that the impact of such disciplines on health policy will depend on the level and nature of commitments a WTO member makes in health-related service sectors. It remains to be seen whether WTO members agree to apply any Article VI:4 disciplines negotiated as general obligations.



236. A second interpretive issue arising from Article VI:4 is whether the three requirements listed in the provision constitute the exclusive tests to be used in developing disciplines. The text of Article VI:4 is clear that the three tests listed, including the necessity test, are mandatory in the development of disciplines by the Council for Trade in Services.

237. The text is equally clear, however, that these three tests are not exclusive. The phrase “*inter alia*” means “among other things,” indicating that the Council for Trade in Services may employ other tests in given service sectors to ensure that domestic measures on qualifications, technical standards, and licensing do not constitute unnecessary barriers to trade in services.

238. A third interpretive question is whether the necessity test in Article VI:4 will be interpreted the same as it has been interpreted under GATT. Article XX(b) of GATT provides a justification for a measure that violates a GATT principle if the measure is necessary to protect human, animal, or plant life or health. In GATT jurisprudence, “necessary” has been defined as requiring that the measure be the least trade-restrictive measure reasonably available in the circumstances to meet the objective of protecting health. Article VI:4 states that the Council for Trade in Services shall aim to ensure that disciplines it develops require that applicable measures of WTO members are “not more burdensome than necessary to ensure the quality of the service.” Does the phrase “not more burdensome than necessary” mean that the measure has to be the least trade-restrictive measure reasonably available?

239. The adoption of disciplines on domestic regulation in the accountancy sector in December 1998 indicates that WTO members interpret the necessity test in GATS Article VI:4 similarly to the necessity test in GATT Article XX(b). These disciplines state that “Members shall ensure that such [accountancy] measures are not more trade-restrictive than necessary to fulfil a legitimate objective” (WTO Doc. S/L/64, ¶ 2). A Note on Article VI:4 from the WTO Secretariat in 1999 suggested that the necessity test in Article VI:4 should be interpreted the way the test has been in the context of GATT Article XX(b) (WTO Doc. S/C/W/96, ¶¶ 9, 12).



Arguments that the necessity test in Article XX(b) has been a problem for health policy in the context of GATT will obviously have resonance in GATS discourse if the necessity test in Article VI:4 has the same “not more trade-restrictive than necessary” substance.

240. State practice on the necessity test after the adoption of the accountancy disciplines suggests, however, some discomfort with interpreting the necessity test in Article VI:4 as requiring the least-trade restrictive measure reasonably available. Submissions from WTO members to the Working Party on Domestic Regulation indicate that perhaps not all WTO members wish to see Article VI:4’s necessity test interpreted in the manner panels interpreted the necessity test in Article XX(b) cases (WTO Doc. S/WPDR/W/9 (submission of the Republic of Korea)); WTO Doc. S/WPDR/W/14, (communication from the EC)).

241. Important to keep in mind when thinking about the possible impact of Article VI:4 on health policy is that disciplines have to be adopted by consensus in the Council for Trade in Services. Article IX:1 of the WTO Agreement states that “[t]he WTO shall continue the practice of decision-making by consensus followed under GATT 1947.” A footnote to Article IX:1 provides that “[t]he body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.” Because WTO members have to negotiate the disciplines contemplated under Article VI:4, those members concerned about health policy in connection with the necessity test in Article VI:4(b) have leverage to influence and even to block the development of rules with which they strongly disagree.

242. For example, a WTO member may have made specific market access or national treatment commitments in a health-related sector before negotiations on disciplines for that sector began under Article VI:4. The potential application of the contemplated disciplines might adversely affect such WTO member because it did not make its specific commitments with such disciplines in mind. This WTO member could negotiate for the disciplines to be revised in light of the nature of its specific commitments vis-à-vis the proposed disciplines or formally object to the content of such disciplines, thus preventing their adoption.

243. This negotiating power is not something that WTO members have in connection with the interpretation and application of the necessity test in Article XX(b) of GATT or Article XIV of GATS.³³

³³ On Article XIV, see Section 8.1.2.

244. Under GATT Article XX(b) jurisprudence, a measure did not survive the necessity test unless it satisfied two conditions: the measure (1) related to the protection of human, animal, or plant life or health; and (2) was the least trade-restrictive measure reasonably available to the government in the circumstances. This dynamic raises another interpretative question for the necessity test in Article VI:4. What does relating to “the quality of the service” mean? This phrase has been subjected to criticism in GATS literature because of its vagueness (Nicolaïdis and Trachtman 2000: 260).



245. The vagueness is particularly acute in terms of what is the scope of the objective of the “quality of the service.” As GATS literature has argued, the quality of a service can be interpreted narrowly or broadly. In the health context, for example, would a domestic regulation to increase equitable access to a health-related service be necessary to ensure the quality of the service? (The following argument assumes that such an equitable-access regulation is considered a measure relating to qualification requirements, technical standards, or licensing requirements.) Applying Article 31 of the Vienna Convention, the WTO Dispute Settlement Body could opt for a narrow interpretation of “quality of service” and exclude equity considerations by focusing on the ordinary meaning of the word “quality”—“degree of excellence” (New Shorter Oxford English Dictionary 1993: 2438).

246. If “quality of the service” is read narrowly as relating only to the technical nature of service, then a regulation to increase equitable access would not fall within the scope of Article VI:4(b). Then, one could argue that the equitable-access regulation constitutes an unnecessary barrier to trade in services because it does not relate to ensuring the quality of the service. Such an outcome would have an impact from a health policy perspective.

247. Again, it is important to stress that Article VI:4 provides no basis for any WTO member to challenge any domestic regulation of another WTO member because the provision merely authorizes the Council for Trade in Services to negotiate disciplines. Following the state practice in adopting the accountancy disciplines, three conditions would have to be satisfied before the hypothetical equitable-access regulation could be challenged under Article VI:4: (1) the WTO member in question would have previously made either market access or national treatment commitments in the service sector affected; (2) the WTO member’s equitable-access regulation could not fall within any exceptions scheduled pursuant to its specific commitments; and



(3) the Council for Trade in Services would have to have adopted disciplines defining (a) such equitable-access regulations as relating to qualification requirements and procedures, technical standards, or licensing requirements, and (b) “quality of service” to exclude regulations on equitable access.

248. In the disciplines adopted for the accountancy sector, WTO members did not restrict the necessity test’s application only to the objective of ensuring the “quality of service.” The accountancy disciplines provide that WTO members “shall ensure that such [accountancy] measures are not more trade-restrictive than necessary to fulfil a legitimate objective” (WTO Doc. S/L/64, ¶ 2). The disciplines went on to state that “[l]egitimate 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” (WTO Doc. S/L/64, ¶ 2). In other words, the accountancy disciplines broadened the number of legitimate objectives against which the necessity test applies and allowed the potential (through the use of the words *inter alia*) for other policy objectives to fall within the necessity test’s range.

249. This outcome is consistent with the preamble’s recognition that WTO members have the right to regulate the supply of services within their territories in order to meet their national policy objectives. Article VI:4 should not be read to restrict WTO members to regulations that only relate to a narrowly defined “quality of service” criterion. Although free to set its own policy objectives, a WTO member may have regulations on health-related services affected by the Article VI:4 process generally and the necessity test specifically.

250. Broadening the range of legitimate objectives under the necessity test does not necessarily provide comfort for those concerned about health policy because such broadening may simply mean that *any* legitimate policy objective pursued by a WTO member in connection with health-related services could be subject to the necessity test under Article VI:4. Recall that the potential scope of the qualification requirements and procedures, technical standards, and licensing requirements is very wide, catching a great deal of domestic regulatory activity in service sectors. This wide scope means that Article VI:4 applies to a great deal of domestic regulation, and a broad application of the necessity test to any legitimate policy objective means that most domestic regulation within the scope of Article VI:4 potentially faces scrutiny whether it is the least-trade restrictive regulation reasonably available.

251. One of the sources of controversy about the necessity test has been the criteria used to determine whether a WTO member has a less trade-restrictive measure available to it, and Article VI:4 makes this controversy relevant for purposes of looking at GATS and health policy. Analytically, an alternative measure has to be (1) less trade-restrictive than the measure under scrutiny; (2) as effective at achieving the applicable policy objective as the challenged measure; and (3) reasonably available to the WTO member in question.

252. GATT jurisprudence suggests that identifying a reasonably available measure that is less trade-restrictive than the measure in question is not difficult for a complaining party. GATT jurisprudence also indicates that panels and the Appellate Body closely scrutinize arguments from WTO members that less trade-restrictive measures are not reasonably available. WTO panels have, in two cases, held that more difficult or expensive implementation of less trade-restrictive measures does not make an alternative measure unreasonable to adopt (*EC—Asbestos*, ¶ 8.207; *US—Gasoline*, ¶¶ 6.26-6.28). The first and third criteria used in determining whether a WTO member should have applied an alternative measure are not difficult criteria for a complaining WTO member to establish.

253. The second criterion—that the alternative measure must be as effective at achieving the applicable policy objective as the measure in question—perhaps offers more room for health policy. In *EC—Asbestos*, Canada argued that the French ban on asbestos products was not necessary because less trade-restrictive measures were reasonably available to the French government (e.g., controls on the use of asbestos products in the market place rather than an outright ban). The panel in the case rejected the Canadian argument and held that the French ban was necessary to protect human health.

254. In upholding the panel's ruling on this issue, the Appellate Body argued that the review of the effectiveness of an alternative, less trade-restrictive measure must be as severe as the policy objective pursued is important. Because the Appellate Body considered the protection of human health to be of vital importance, its review of the effectiveness of alternative measures was strict (*EC—Asbestos*, ¶¶ 172-174).

255. The *EC—Asbestos* ruling does not provide WTO members with an argument that automatically trumps any challenge that a measure relating to health is unnecessary, but it establishes that challenges to health-related measures face strict scrutiny as to their effectiveness vis-à-vis the measure adopted. The same dynamic is likely to prevail in the context of the necessity test in Article VI:4.





256. In sum, the effect of Article VI:4 on health policy is, at present, arguably non-existent because the Council for Trade in Services has developed no disciplines for any health-related service. For Article VI:4 to have an effect on health policy, the Council for Trade in Service has to begin negotiations on disciplines for a health-related service sector. The authors could find no indication that any such negotiations had been proposed by any WTO member. If such negotiations commenced, only domestic regulations relating to qualification requirements and procedures, technical standards, and licensing requirements would be affected; but, because these categories are potentially broad, any negotiations would likely affect a great deal of domestic regulation of the service sector under consideration.

257. The Council for Trade in Services would have to adopt disciplines by consensus, providing WTO members with negotiating leverage to protect health policy. The outcome of such negotiations may be affected by the significant differences in negotiating power and technical capacity between developed and developing countries, and by a potentially low participation and influence of health ministries in the process. Following the state practice on the accountancy disciplines, disciplines adopted under Article VI:4 might only affect WTO members with specific commitments in the relevant sector but not apply to measures exempted from such commitments on the relevant market access/national treatment schedules. But there is no guarantee that this approach will be accepted. Any challenges that health-related measures falling within Article VI:4 disciplines were not necessary would be subject to strict scrutiny in terms of the alleged effectiveness of alternative, less-trade restrictive measures.

258. Even though the potential impact of Article VI:4 on health policy is speculative and subject to sector-by-sector negotiations, health ministries of WTO members should be vigilant about the Article VI:4 process because health-related services could be affected by it.

Article VI:5

259. Unlike Article VI:4, which sets up a process for negotiating disciplines on domestic regulation, Article VI:5(a) temporarily applies disciplines directly to domestic regulations in sectors in which WTO members have undertaken specific commitments. The Article VI:5(a) disciplines only apply until the Council for Trade in Services adopts disciplines under Article VI:4 for the relevant service sector. Thus, Article VI:5(a) applies to domestic regulations in all sectors in which WTO members have made specific commitments.

260. Like Article VI:4, measures subject to exemption on market access and national treatment schedules are not subject to the Article VI:5(a) disciplines. Article VI:5(a) is not a general obligation like the MFN principle, but its application to all service sectors in which WTO members have made specific commitments gives Article VI:5(a) broad scope and importance. Because a number of WTO members have made commitments in health-related services, Article VI:5(a) is of more immediate concern to health policy than Article VI:4.

261. For Article VI:5(a) to be applicable to a domestic regulation, three conditions must be satisfied: (1) the WTO member must have made specific commitments in the relevant service sector; (2) the WTO member must not have included the measure in question in exemptions to its market access or national treatment schedules; and (3) the measure in question has to relate to licensing requirements, qualification requirements, or technical standards. As with Article VI:4, licensing and qualification requirements and technical standards are not defined, leaving Article VI:5(a) with the same potential broad scope on this issue analyzed above in connection with Article VI:4.

262. For measures that fall within the scope of Article VI:5(a), WTO members cannot apply such measures so as to nullify or impair their specific commitments in a manner which does not comply with the criteria outlined in Article VI:4(a)-(c) and could not reasonably have been expected by other WTO members at the time the specific commitments in the relevant sector were made. Thus, Article VI:5(a) regulates the application of new or existing measures in a manner that (1) nullifies or impairs specific commitments; (2) violates any of the disciplines in Article VI:4(a)-(c); and (3) could not reasonably have been expected by other WTO members at the time the specific commitments were made. Article VI:5(a) does not prohibit a measure unless the measure triggers all three of the conditions listed above.

263. Nullification and impairment is a concept taken from the GATT context, where it is used in Article XXIII, which is the dispute settlement provision of GATT. Under Article XXIII, a WTO member can begin the dispute settlement process if it believes that another member is nullifying or impairing a benefit accruing to it directly or indirectly under the treaty. Nullification or impairment occurs when a WTO member violates a GATT principle (GATT, Article XXIII:1(a)). But nullification or impairment can also happen if a WTO member applies a measure in a way that does not violate a GATT rule but that does nullify or impair benefits that another WTO member reasonably expected to receive under the agreement (GATT, Article XIII:1(b)). GATT jurisprudence refers to the latter claim as a “non-violation nullification and impairment”—a WTO member can nullify or impair negotiated benefits without actually violating a specific provision of the treaty.





264. The wording of Article VI:5(a) indicates that it incorporates the “non-violation nullification and impairment” concept into GATS. A WTO member that directly violates a specific commitment will be challenged for violating Articles XVI or XVII, so Article VI:5(a) does not duplicate a cause of action for nullification or impairment of a specific commitment by reason of a WTO member failing to carry out its obligations under such commitment. Thus, the concept of nullification or impairment in Article VI:5(a) is different from that in Article XXIII of GATT, which provides that a violation of a GATT obligation constitutes nullification or impairment. Further, the inclusion of the “could not reasonably have been expected” test means that Article VI:5(a) cannot be a basis for challenging domestic regulatory measures and practices that existed at the time the WTO member made the specific commitments.

265. WTO members can, therefore, make challenges to domestic regulations of services subject to specific commitments under Article VI:5(a) in two contexts: (1) the application of a new regulatory measure relating to licensing, qualifications, or technical standards; and (2) the adoption of new practices in applying regulatory measures that existed at the time specific commitments were made. In short, application of Article VI:5(a) will arise when WTO members adopt new regulatory policies in connection with service sectors subject to specific commitments.

266. Article VI:5(a) appears to be a GATS discipline that directly affects whether and how WTO members can change regulatory policy and practices in service sectors committed under Articles XVI and XVII. Article VI:5(a) could be interpreted as a severe limitation on health policy in the future. A new regulatory measure applied in committed service sectors will violate Article VI:5(a) if it nullifies or impairs specific commitments, does not pass the necessity test found in Article VI:4(b), and could not have reasonably been expected by other WTO members at the time specific commitments were made. The idea that a new regulatory measure to benefit human health can be struck down by Article VI:5(a) because other WTO members could not have reasonably expected such a measure earlier is anathema to those concerned with health policy.

267. As with other potential concerns about GATS’ threat to health policy, it is important to look closely at the impact Article VI:5(a) is likely to have on such policy. To begin, a regulatory measure is only suspect under Article VI:5(a) if three conditions are met. The application of a measure relating to licensing requirements, qualification requirements, or technical standards must (1) nullify or impair specific commitments; (2) violate

one of the disciplines in Article VI:4(a)-(c); and (3) not reasonably have been expected by other WTO members at the time the specific commitments were made. Article VI:5(a) contains, thus, more conditions than the “non-violation nullification and impairment” provision in GATT, which only requires nullification or impairment as the result of “the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement” (GATT, Article XXIII:1(b)).

268. Article VI:5(a) is interesting in how it builds “nullification or impairment” into its structure. Under the WTO Dispute Settlement Understanding (DSU), a violation of a provision of a WTO agreement results in a presumption of nullification or impairment, which the respondent state can rebut (DSU, Article 3.8). With Article VI:5(a), a WTO member cannot succeed on a claim that another member violated it without showing that such member nullified or impaired a specific commitment.

269. GATT jurisprudence on “non-violation nullification and impairments” suggests that the burden on a complaining party to establish nullification or impairment is difficult to meet. Prior to the establishment of the WTO, GATT panels decided only eight cases that involved substantive “non-violation nullification and impairment” claims (*Japan—Film*, ¶ 10.36). All but one dealt with claims that GATT-consistent measures nullified or impaired market-access benefits negotiated under tariff concessions (*Japan—Film*, ¶ 10.61), and most dealt with whether product subsidies nullified or impaired such benefits (*Japan—Film*, ¶ 10.38). In only one case did a complaining GATT contracting party prevail on an Article XXIII:1(b) claim (*EEC—Oilseeds I*).

270. WTO jurisprudence on Article XXIII:1(b) also demonstrates that succeeding on a non-violation nullification and impairment claim is difficult. In the *Japan—Film*, the panel stressed that Article XXIII:1(b) is an unusual remedy under which the complaining WTO member bears a significant burden of proof under Article 26.1(a) of the WTO Dispute Settlement Understanding. In this case, the panel held that the United States had not demonstrated that the alleged Japanese measures nullified or impaired benefits accruing to the United States under GATT (*Japan—Film*, ¶ 10.402).

271. Article VI:5(a) is not a general dispute settlement provision like GATT Article XXIII:1(b), so interpreting Article VI:5(a) identically to Article XXIII would not be appropriate. In addition, GATS itself contains the “non-violation nullification and impairment” concept in its dispute settlement provision (GATS, Article XXIII:3),





which makes Article XXIII of GATT perhaps more relevant to that provision than Article VI:5(a). Nevertheless, the context and purpose of Article VI:5(a) draws from Article XXIII:1(b), so that interpretive guidance can be drawn from jurisprudence on Article XXIII:1(b).

272. The language of Article VI:5(a) suggests that it will also be an unusual remedy in the context of specific market access and national treatment commitments. The usual remedy would be for a WTO member to argue that the application of a measure directly or indirectly violated obligations made under specific commitments. Article VI:5(a) contemplates that situations might arise when GATS-consistent measures are applied in a way that effectively nullifies or impairs benefits accruing from market access or national treatment commitments. As Article XXIII:1(b) jurisprudence indicates, remedies against measures consistent with a treaty should be approached with caution.

273. The burden of proof on a WTO member seeking to use Article VI:5(a) will be significant. A complaining WTO member would bear the initial burden to show: (1) the application of a measure related to licensing, qualification, or technical standards; (2) that such measure applies in a service sector in which the other WTO member has made specific commitments; (3) that the application of the measure causes the nullification or impairment of specific commitments; (4) that the application of the measure violates the criteria in Article VI:4(a)-(c); and (5) that the application of the measure could not reasonably have been expected by the complaining WTO member at the time the specific commitments were made.

274. Satisfying the requirement that the application of a measure causes nullification or impairment of specific commitments requires the complaining WTO member to establish two things: (1) nullification or impairment of specific commitments; and (2) a causal link between the application of the measure in question and the nullification or impairment. In GATT Article XXIII:1(b) jurisprudence, the complaining WTO member has to show clearly that the application of a measure upsets the competitive relationship between an imported and domestic product established by a benefit accruing under the treaty (e.g., a tariff concession). In the context of Article VI:5(a), a complaining WTO member would, thus, have to demonstrate clearly that the application of a licensing requirement, qualification requirement, or technical standard adversely affected the conditions of competition between a foreign and domestic service or service supplier established by specific commitments on market access or national treatment.

275. Article VI:5(a) requires the complaining WTO member to show that the application of the measure violates one of the criteria contained in Article VI:4(a)-(c). So, the complaining WTO member bears the burden of establishing that the measure in question is (1) not based on objective or transparent criteria; (2) not the least trade-restrictive measure reasonably available to achieve the regulatory objective; or (3) in the case of licensing procedures, not in themselves a restriction on the supply of the service. As with Article VI:4, the most important of these is the necessity test. The analysis contained in paragraphs 238-255 on the necessity test apply with equal force in the context of Article VI:5(a), especially the strict scrutiny complaining WTO members face if they challenge a measure related to the protection of health.

276. Article VI:5(a) requires the complaining WTO member to demonstrate that it would not reasonably have expected the application of such measure when the respondent WTO member made its specific commitments. As indicated earlier, Article VI:5(a) will only apply in contexts in which a WTO member applies a new measure or changes the manner in which an old measure is implemented. Measures existing at the time WTO members make specific commitments are, thus, largely immunized from challenge. Under Article XXIII:1(b) jurisprudence, measures shown by a complaining WTO member to have been introduced subsequent to the conclusion of the tariff negotiations raise a presumption that the complaining WTO member should not be held to have anticipated these measures (*Japan—Film*, ¶¶ 10.79). The respondent WTO member then can rebut such presumption. Such a rebuttal might be made, for example, by establishing that the measure at issue is so clearly contemplated in an earlier measure that the complaining WTO member should be held to have reasonably anticipated it (*Japan—Film*, ¶¶ 10.79).

277. The burden would be similar under the wording of Article VI:5(a)—the complaining WTO member bears the burden of showing that the measure in question was introduced after the respondent WTO member made specific commitments for the relevant service sector. Such a showing creates a presumption that the complaining WTO member could not reasonably have expected such application at the time the respondent WTO member made specific commitments. The respondent WTO member could then rebut this presumption by showing a clear connection between the measure in question and measures adopted before it made specific commitments.





278. The burden on a complaining WTO member may be greater if the respondent WTO member bases the measure in question on international standards developed by international organizations. Article VI:5(b) states: “In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations applied by that Member.” A footnote defines “relevant international organizations” as international bodies open to the relevant bodies of at least all WTO members.

279. Article VI:5(b) does not create a presumption of conformity for measures based on relevant international standards because the language merely requires that such standards be taken into account when determining whether a WTO member complies with Article VI:5(a). Article VI:5(b) does not resemble, therefore, the safe harbour provided in the SPS Agreement for measures conforming to relevant international standards (SPS Agreement, Article 3.2). Furthermore, Article VI:5(b) does not create a presumption of compliance similar to the one in the TBT Agreement for measures in accordance with international standards (TBT Agreement, Article 2.5). Nor does Article VI:5(b) require or encourage WTO members to base their measures on licensing, qualifications, and technical standards on relevant international standards as the SPS Agreement and TBT Agreement do in their respective areas (SPS Agreement, Article 3.1; TBT Agreement, Article 2.4).

280. The phrase “take into account” in Article VI:5(b) means that WTO members and dispute settlement panels should consider, along with other relevant evidence, whether a measure under Article VI:5(a) scrutiny (1) is related to international standards applied by the WTO member in question; (2) is based on such international standards; or (3) conforms to such international standards. The obligation to “take into account” does not require WTO members or dispute settlement panels to accord particular weight to any kind of connection with international standards in analysis under Article VI:5(a).

281. Analytically, a finding that a measure under Article VI:5(a) scrutiny conforms to an international standard established by a competent international organization and applied by the WTO member in question should be accorded more weight than if the measure is merely based on or related to such a standard. Similarly, if the measure is based on an international standard applied by the WTO member, then such evidence should provide a stronger basis for defending the measure’s validity than if the measure is merely related to an international standard applied by the WTO member.

282. For purposes of health policy, Article VI:5(b) provides some encouragement for WTO members to base or conform new measures applied to health-related services subject to specific commitments on relevant international standards developed by competent international organizations, such as WHO. Basing such measures on, or conforming them with, international standards would strengthen defense of such measures against Article VI:5(a) attack in two ways: by (1) defending the necessity of such measures for purposes of protecting health; and (2) asserting that such measures could reasonably have been expected by other WTO members (assuming that the relevant international standards had been adopted prior to the making of the specific commitments at issue).

283. In summary, Article VI:5(a) affects health policy because it applies to measures relating to licensing requirements, qualification requirements, and technical standards applied to health-related service sectors covered by specific commitments. Article VI:5(a) affects the adoption and implementation of new measures by a WTO member that differ significantly from those in place at the time such member made specific commitments. Unlike Article VI:4, Article VI:5(a) allows WTO members to challenge new domestic regulations relating to licensing requirements, qualification requirements, and technical standards adopted to protect or promote human health. The potential exists for WTO members to utilize Article VI:5(a) to deter or reverse domestic regulatory reforms in health-related sectors in other members.

284. The impact of Article VI:5(a) on health policy should not, however, be exaggerated because the provision's structure and substance indicate that it might not be a powerful weapon for restricting the flexibility of health policy. Commentators have noted that the requirements of Article VI:5(a) make it difficult for domestic regulation of services to be addressed through this provision (Nicolaidis and Trachtman 2000: 258-59). The provision's importation of the "non-violation nullification and impairment" concept from GATT suggests that WTO members and dispute settlement panels might view it as an unusual remedy under which the complaining party bears a significant burden of proof. WTO members are more likely to challenge significant changes in regulatory policy in health-related sectors covered by specific commitments as direct violations of market access and national treatment commitments made under Articles XVI and XVII.





6.2 Procedural Duties

285. In addition to the general substantive obligations reviewed in Section 6.1, GATS contains generally applicable procedural duties that require WTO members to provide information, participate in negotiations, and consult with other WTO members. Procedural duties have, by their very nature, less impact on health policy than substantive duties. These obligations formally pose little threat to the substance of health policy, although inequalities in bargaining power and technical capacities may lead to concessions that produce adverse policy effects. The discussion of the procedural duties in GATS will not be as extensive as Section 6.1's analysis of the general substantive duties.

286. Although not at the forefront of the GATS and health debate, the procedural duties in GATS are important to the successful functioning of the regime. These duties are a central architectural element of the Agreement. For example, a key procedural duty in GATS seeks to increase the transparency of the regulation of trade in services. Transparency is a key objective of many WTO agreements and connects to notions of fundamental fairness and due process. In addition, procedural duties in treaties are generally intended to increase the participation and confidence of states parties in the regime's operations.

6.2.1 DUTIES TO PROVIDE INFORMATION AND ON GOVERNMENTAL PROCEDURES

287. GATS contains many provisions that require WTO members to supply various kinds of information to either the Council for Trade in Services or other WTO members. GATS also contains some duties that require WTO members to establish certain governmental procedures deemed important to the operation of the Agreement. Table 6.2.1 summarizes these provisions to provide information and establish governmental procedures. The table focuses on the basic content of the provisions rather than specific requirements involving, for example, deadlines for supplying information.

TABLE 6.2.1 GATS PROVISIONS ON INFORMATION AND GOVERNMENTAL PROCEDURES



Article	Content
III:1	Requires WTO members to (1) publish promptly and (except in emergency situations) at the latest by the time of their entry into force all relevant measures of general application that pertain to or affect GATS; and (2) publish promptly international agreements pertaining to or affecting trade in service to which they are a signatory.
III:2	Requires WTO members to make the information covered by Article III:1 otherwise publicly available if publication is not practical.
III:3	Requires WTO members to promptly and at least annually inform the Council of Trade in Services of the introduction of any new, or any changes to existing laws, regulations or administrative guidelines that significantly affect trade in services covered by specific commitments.
III:4	Requires WTO members to (1) respond promptly to all requests from other WTO members for specific information on measures of general application or international agreements that pertain to or affect trade in services; and (2) establish national points of enquiry to provide specific information to other WTO members upon request related to information covered by Articles III:1 and III:3.
III:5	Allows any WTO member to notify the Council for Trade in Services of any measure taken by another WTO member that affects the operation of GATS.
III <i>bis</i>	Provides that nothing in GATS requires any WTO member to provide confidential information, the disclosure of which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of public or private enterprises.
IV:2	Requires developed-country WTO members, and the extent possible other WTO members, to establish contact points to facilitate the access of developing-country WTO members' service suppliers to information related to relevant markets.
VI:1	In sectors where specific commitments have been made, requires Members to ensure that all measures of general application affecting trade in services are administered in a reasonable, objective, and impartial manner.

Chap 6
General
Obligations
and
Disciplines

TABLE 6.2.1 GATS PROVISIONS ON INFORMATION AND GOVERNMENTAL PROCEDURES



Chap 6
General
Obligations
and
Disciplines

Article	Content
VI:3	Requires that, where authorization is required for the supply of a service on which a specific commitment has been made, a WTO member inform an applicant of the decision concerning the application within a reasonable period of time.
VI:6	Requires WTO members to provide for adequate procedures to verify the competence of professionals of any other WTO member in sectors where specific commitments have been undertaken.
VII:4	Requires WTO members to promptly inform the Council for Trade in Services of (1) recognition measures existing at the time of entry into force of the WTO Agreement; (2) the opening of negotiations on a recognition agreement or arrangement; and (3) the adoption of new recognition measures or significant modifications of existing ones.
VIII:3 +	Allows the Council for Trade in Services to request a WTO member provide specific information concerning the operation of a monopoly or exclusive service supplier; such request is made on behalf of another WTO member that has reason to believe that such monopoly or exclusive service supplier is acting in a manner inconsistent with Articles VIII:1 or VIII:2.
VIII:4 +	Requires WTO members to notify the Council for Trade in Services when they grant monopoly or exclusive service rights regarding the supply of a service covered by specific commitments.
VIII:5	
X:2	Provides a process through which a WTO member can notify the Council for Trade in Services of its intention to modify or withdraw a specific commitment.
XXV	Requires (1) WTO members to make the contact points established under Article IV:2 available to service suppliers of WTO members in need of assistance; and (2) the WTO Secretariat, in collaboration with the Council for Trade in Services, to provide technical assistance to developing-country WTO members.

Generally applicable provisions

288. Table 6.2.1 reveals that only some of GATS' procedural provisions on information and government procedures are generally applicable to all WTO members across all service sectors (see Articles III:1, III:2, III:4, III *bis*, IV:2, VII:4, and XXV). All but one generally applicable procedural provisions seeks to enhance transparency by requiring (1) the publication/notification of information important to the operation of GATS (Articles III:1, III:2, and VII:4); or (2) responses to requests for information by other WTO members or foreign-service suppliers (Articles III:4, IV:2, and XXV). The remaining generally applicable provision, Article III *bis*, does not contain a duty but states that a WTO member does not have to provide confidential information under its duties to provide information under GATS.

289. The objective of enhancing transparency in trade in services is arguably not objectionable from a health policy perspective, even though such transparency requirements may add administrative responsibilities to health-related ministries (e.g., ensuring prompt publication of measures affecting trade in services, establishing contact points for enquiries). Gould and Joy argued, however, that the transparency requirements of GATS create a bureaucratic burden for developing states that "can be considered a form of assistance that countries have to provide to corporations in identifying potential challenges under the GATS" (Gould and Joy 2000: 16-17).

Provisions related to specific commitments

290. A second category of procedural provisions found in Table 6.2.1 involves rules related to specific commitments (Articles III:3, VI:1, VI:3, VI:6, VIII:4, and X:2). Such provisions only apply to WTO members that have made market access or national treatment commitments under Articles XVI and XVII of GATS. All but one of the procedural provisions on information and government procedures linked to specific commitments directly seek to enhance transparency (Articles III:3, VI:1, VI:3, VIII:4, and X:2), which is the same policy objective of most of the generally applicable procedural provisions reviewed in paragraphs 288-289.³⁴ Article VI:6 deals less with transparency than efficiency and competence because it requires WTO members with specific commitments in professional services to establish adequate procedures to verify the competence of professionals from other WTO members.



³⁴ The panel in *US—Gambling* considered Articles VI:1 and VI:3 and held that: "Article VI:1 does not apply to measures of general applications themselves but, rather, to the *administration* of these measures. Article VI:3 imposes transparency and due process obligations with respect to processing of applications for authorization to supply in a sector where specific commitments have been undertaken. Therefore, Articles VI:1 and VI:3 contain disciplines of a procedural nature" (¶ 6.432).



291. Again, enhancing transparency and administrative efficiency and competence are arguably not objectives that threaten health policy. Requirements to notify the Council for Trade in Services at least annually of changes to regulations that significantly affect trade in health-related services covered by specific commitments may add new administrative responsibilities to existing health-related bureaucracies, but such transparency-guided responsibilities seem neither objectionable nor particularly onerous. The protection of confidential information in Article III *bis* ensures that WTO members do not have to disclose health-related information protected by privacy principles. The requirement in Article VI:6 for WTO members to have adequate procedures to verify the competence of foreign suppliers of professional services does not seem threatening because health policy principles also emphasize the importance of the government vetting the competence of professionals supplying health-related services.

6.2.2 DUTIES TO NEGOTIATE AND/OR CONSULT

292. GATS also contains procedural provisions that require WTO members to engage in different kinds of negotiations or consultations. Table 6.2.2 summarizes these procedural provisions. Again, the table contains only the basic content of the relevant articles not full details. The duties to negotiate specific commitments through successive rounds of liberalization negotiations are dealt with later in Section 7.1.2.

TABLE 6.2.2 GATS PROVISIONS ON NEGOTIATIONS AND CONSULTATIONS

Article	Content
VI:4	Requires WTO members to negotiate through the Council for Trade in Services disciplines on domestic regulation of trade in services.
VII:2	Requires (1) a WTO member party to a recognition agreement or arrangement to afford other WTO members to negotiate their accession to such agreement or arrangement or to negotiate a comparable one; and (2) when a WTO member autonomously accords recognition, the such member accord adequate opportunity to any other WTO member to demonstrate that its service providers meet the recognition requirements.
VII:5	Requires WTO members, in appropriate cases, to work in cooperation with relevant intergovernmental and non-governmental organizations toward the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.



Article	Content
IX:2	Requires a WTO member, at the request of another WTO member, to enter into consultations with a view to eliminating business practices that restrain competition and thereby trade in services.
X:1	Requires WTO members to engage in multilateral negotiations on the question of emergency safeguards based on the principle of non-discrimination.
XIII:2	Requires WTO members to engage in multilateral negotiations on government procurement in services.
XV	Requires WTO members to engage in negotiations with a view to developing the necessary multilateral disciplines to avoid the trade-distorting effects of subsidies.

General negotiation duties on development of additional multilateral disciplines on trade in services

293. Table 6.2.2 reveals that four of the duties to negotiate are applicable to all WTO members and aim at the establishment of additional multilateral disciplines on trade in services (Articles VI:4, X:1, XIII:2, and XV). This Legal Review already extensively analyzed Article VI:4 (see Section 6.1.3), but Article VI:4 is technically a duty to engage in negotiations on the development of disciplines on domestic regulation. The other three articles that require WTO members to engage in negotiations to develop additional multilateral disciplines deal with issues left unresolved by the Uruguay Round—emergency safeguards (Article X:1), government procurement of services (Article XIII:2), and trade-distorting subsidies provided by governments to service suppliers (Article XV).

294. Each of these areas of negotiation is potentially important to the exercise of health policy. The Legal Review has already analyzed the importance of negotiations under Article VI:4 concerning disciplines on domestic regulation of trade in services. Depending on how the negotiations define “emergency safeguards,” negotiations on such safeguards could be important to health policy as well. The emergency safeguard concept appears in Article XIX of GATT, which allows WTO members to restrict trade in violation of GATT obligations temporarily where any product is being imported in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products. The basic rule in Article XIX of GATT is further elaborated in the Agreement on Safeguards. The idea behind the emergency safeguard procedure is to provide temporary protection to a domestic industry in order to give it time to prepare to meet foreign competition more effectively.



295. Central to the emergency safeguard concept in GATT is that the increased imports causing or threatening damage to the like or directly competitive industry have to result from (1) unforeseen developments; and (2) the effect of obligations incurred by a WTO member under GATT (e.g., a tariff concession) (GATT, Article XIX:1(a)). The requirement for the causal link between a GATT obligation and the increase in imports seeks to prevent the emergency safeguard concept from being used any time domestic industries simply fall on hard times. The Agreement on Safeguards also contains elaborate procedural requirements (e.g., on conducting investigations) that further affect the ability to use emergency safeguards.

296. An equivalent procedure for GATS would be to allow a WTO member to violate GATS obligations temporarily in situations in which any service supplied by a service provider of another WTO member increases to the point it causes or threatens to cause serious injury to domestic providers of the like or directly competitive service. Following GATT, the actual or threatened injury would have to be related to obligations made under GATS, most likely specific commitments on market access.

297. Such an emergency safeguards concept in the GATS context is, however, more complex because of the four modes of service supply covered by the treaty. In essence, WTO members might have to negotiate four different kinds of emergency safeguard measures in order to calibrate this remedy to the unique circumstances of each mode of supply. Trying to contemplate what an emergency safeguard measure would look like, for example, is easier for Mode 1 (cross-border supply (e.g., telemedicine)) and Mode 4 (presence of natural persons (e.g., foreign doctors)) than Mode 3 (commercial presence (e.g., foreign direct investment)) because Modes 1 and 4 fit more readily into the GATT-inspired focus on increased “imports.”

298. Emergency safeguards in connection with Mode 2 (supply of services to foreign consumers in one’s own territory (e.g., medical tourism)) could not be focused on the threat that increased imports of foreign patients might pose to like or directly competitive domestic services because all services in this context are within one WTO member. In other words, increased imports of foreign consumers threaten domestic consumers’ access to services (e.g., foreign patients displacing domestic patients for access to domestic health services).

299. The emergency safeguards provisions in GATT remain controversial among WTO members, as illustrated by the consternation among WTO members concerning use of Article XIX by the United States

against steel imports in 2001. Such controversy means that developing emergency safeguard measures under GATS will, in all likelihood, not prove easy. In fact, despite Article X:1 of GATS stating that the results of negotiations on emergency safeguard measures shall enter into effect not later than three years after the WTO Agreement entered into force, WTO negotiations on emergency safeguard measures still have not been completed.

300. Emergency “safeguards” do, however, have a different meaning and context in TRIPS. In this agreement, WTO members may engage in compulsory licensing of patents under specified conditions, including situations of public health emergencies (TRIPS, Article 31). The ability to use compulsory licensing is a flexibility that allows WTO members to deal with public health problems. This type of measure and its context are, however, different from the emergency safeguards contemplated by Article X:1 of GATS, which has in mind emergency measures to address the adverse impact of imported services.

301. The question for the multilateral negotiations on emergency safeguards is whether such negotiations should include procedures for temporarily suspending GATS obligations to allow WTO members to deal with health problems. Many WTO members would oppose this idea because they might view it as a “Pandora’s box,” with other public interest sectors lining up for their own special emergency safeguard measures.³⁵

302. Negotiations on government procurement of services and subsidies to service providers are also important concerns for health policy. GATT has long-standing disciplines on the trade-distorting effects of subsidies on trade in goods (see GATT Article XVI and the Agreement on Subsidies and Countervailing Measures). GATT law on subsidies is complex and cannot be explored here, but the GATT experience on regulating the distorting effect of subsidies on trade in goods is likely to influence the substantive negotiations on service subsidies.

303. GATT contracting parties also negotiated during the Uruguay Round a revised version of the Agreement on Government Procurement (first adopted after the 1979 Toyko Round), which does apply to services; but this treaty is not a mandatory WTO agreement, and not many WTO members have joined this regime.



³⁵ On the general problems facing the negotiations on emergency safeguards, see ICTSD and IISD 2003: 3.



304. Governments procure many kinds of services in fulfilling their health policy mandates, so WTO members should be concerned about what kinds of disciplines GATS negotiations on government procurement might produce. Similarly, government subsidies to suppliers of health-related services might be affected by the results of the negotiations on the trade-distorting effects of subsidies to service providers.

305. In sum, the so-called “built-in” agenda of GATS to foster negotiations on development of multilateral disciplines on domestic regulations, emergency safeguards, government procurement, and subsidies is important to monitor because of the potential for these negotiations to produce rules that affect health policy.

Limited duties on consultation and cooperation

306. Three GATS provisions on negotiations and consultations are more limited in scope because they affect a small subset of WTO members. Article VII:2 requires a WTO member that is party to a recognition agreement or arrangement to afford other WTO members the opportunity to negotiate accession or a comparable recognition regime. In addition, the provision requires that, where a WTO member autonomously accords recognition to service suppliers of another WTO member, such member afford adequate opportunity for any other WTO member to demonstrate that its service suppliers also meet the recognition criteria. This provision does not contemplate full multilateral negotiations on recognition standards but more limited negotiations between interested WTO members.

307. Article VII:5 requires WTO members to work in cooperation with relevant intergovernmental and non-governmental organizations toward the establishment and adoption of common international standards for recognition and the practice of services trades and professions. This requirement is less than a duty to negotiate but more than a simple duty to consult.

308. Article IX:2 is only triggered when a WTO member requests consultations with another WTO member on the elimination of business practices that restrain competition and trade in services. The requested WTO member has to do no more than accord sympathetic consideration to the requesting member and cooperate through the supply of publicly available information relevant to the request.

309. None of these more limited procedural duties on consultation and cooperation affect health policy significantly because, under each, the WTO member retains full powers to make decisions that it deems proper for its national policy objectives.



6.3 Summary of Analysis of General Obligations and Disciplines from a Health Policy Perspective

310. As indicated earlier, part of the GATS and health debate centers on whether the general obligations and disciplines of GATS adversely affect health policy. The Legal Review divided the general obligations into substantive and procedural duties and focused mainly on the substantive duties because these have been the source of controversy.

311. Analysis of the MFN principle revealed that Article II:1 of GATS is a serious substantive discipline for WTO members. The ability of a WTO member to discriminate *de jure* and *de facto* as between foreign services or service suppliers does not seem generally to be important to the protection and promotion of health, but circumstances may arise where the MFN principle complicates health policy.

312. In terms of duties affecting domestic regulatory powers, many of them only affect domestic regulations in sectors covered by specific commitments. The potential effect of these provisions on health policy depends on the level and nature of specific commitments made by WTO members in health-related sectors. The most controversial of these provisions in the GATS and health debate have been Article VI:5(a) on domestic regulations and Article VIII on monopoly service suppliers.

313. Analysis of Article VI:5(a) suggests that it is a provision of problematic application to the domestic regulation of trade in services, a conclusion supported by other analyses of this provision (Nicolaidis and Trachtman 2000: 257-261). Health policy makers may wish to keep this in mind when considering any alleged threat to health policy from Article VI:5(a).

314. Criticism of Article VIII has focused most significantly on Article VIII:4, which imposes rules that apply if a WTO member grants monopoly or exclusive rights regarding the supply of a service covered by specific



commitments after the date of entry into force of the WTO Agreement. These rules require the WTO member granting such rights to provide affected WTO members with compensation or face trade sanctions.

315. For some, this compensation requirement illegitimately restricts a WTO member's ability to expand monopoly or exclusive service supply rights for public interest purposes. Article VIII:4 does seem to impose a constraint on health policy in that it increases the political, economic, and diplomatic costs of using monopoly and exclusive service rights as a policy tool. However, other international legal agreements, such as bilateral investment agreements, perhaps represent greater constraints in the context of Mode 3 services than Article VIII:4 of GATS.

316. In terms of general substantive obligations not linked to specific commitments, controversy has centered on Article VI:4 on domestic regulations. Article VI:4 is not really a substantive obligation, nor does it contain any substantive duties; rather it is a provision that obliges WTO members to engage in negotiations in the Council for Trade in Services to develop disciplines on licensing, qualification, and technical standard regulations. At present, Article VI:4 seems to pose no direct threat to health policy. The analysis in the Legal Review argues, however, that health ministries of WTO members should be vigilant about the Article VI:4 process because health-related services could be affected by the development of disciplines under this provision.

317. The generally applicable procedural duties in GATS concerned providing information, establishing governmental procedures, negotiating, consulting, and cooperating in specified circumstances. The most important of these procedural duties for health policy are the duties to engage in multilateral negotiations on disciplines for domestic regulations (Article VI:4), emergency safeguards (Article X:1), government procurement of services (Article XIII:2), and subsidies for service suppliers (Article XV). Health ministries need to monitor the development of these negotiations for their potential impact on health policy.

318. The low level of specific commitments made in health-related sectors to date mitigates the effect of the general obligations linked to specific commitments. More concerns might arise, however, in the future if the level and nature of specific commitments in health-related sectors increases and if WTO members negotiate additional multilateral disciplines on trade in services.

Chapter 7

SPECIFIC COMMITMENTS ON MARKET ACCESS AND NATIONAL TREATMENT



Chap 7
Specific
Commitments
on Market
Access and
National
Treatment

319. Part III of GATS contains the rules that govern the making of specific market access and national treatment commitments by WTO members. Commentators agree that Part III is the most important part of GATS because this section of the treaty deals directly with liberalization in trade in services. Although general obligations such as the MFN principle could have a liberalizing effect, the main purpose of the general obligations in Part II was to establish norms (e.g., non-discrimination and transparency) that did not directly liberalize trade in services.

320. Substantial disagreement exists, however, in the literature about the implications of Part III for health policy. Some do not see Part III's rules representing a grave threat to health policy because the rules impose no obligations but instead provide WTO members with the opportunity to (1) make market access and national treatment commitments according to their own policy goals; and (2) to tailor any commitments to their national policy and regulatory systems (WTO 2001: 10-11). In short, Part III contains no obligation to make any specific liberalization commitment unless the WTO member decides to make such a commitment in the full exercise of its sovereignty.

321. Others note that the freedom and flexibility that Part III of GATS provides WTO members may be illusory (GATSwatch.org 2001). The freedom not to make specific commitments ignores the political dynamic GATS sets in motion—to liberalize progressively trade in services in all economic sectors. As discussed more in Section 7.1.2, WTO members will ask each other to make specific commitments under Part III. Some argue that the flexibility of GATS may be even more illusory for developing countries facing political and economic pressure (Joint Submission to the World Health Assembly 2003: 1).

322. From this perspective, sovereign freedom and flexibility disappear once a WTO member makes specific commitments because GATS makes it difficult to change scheduled commitments. Unsuccessful



experiments with liberalization in trade in services become effectively non-reversible, burdening democratic societies with such specific commitments for years to come (Gould and Joy 2000: 8-9).

323. Because of these divergent readings, the rules on specific commitments are important to analyze in detail for purposes of this Legal Review.

7.1 “Bottom-Up” Dynamic of the Specific Commitments Section of GATS

7.1.1 OVERVIEW

324. The dynamic created by GATS’ provisions on specific commitments differs from the one found in Part II on general obligations. Part II utilized a “top down” approach—the Agreement imposes on every WTO member certain general obligations and disciplines. These obligations apply to all WTO members; they do not get to pick and choose which general obligations apply to their measures on trade in services. Flexibility in this “top down” approach comes largely from the substantive content of the rules or exceptions made available to WTO members.

325. Part III of GATS uses a “bottom-up” approach to treaty obligations. This approach allows WTO members to choose what duties become binding on them under the treaty in connection with market access and national treatment commitments. A comparison of how GATT and GATS deal with the national treatment principle illustrates the difference between a “top down” and “bottom-up” approach. GATT imposes the national treatment principle in a “top down” fashion, meaning that all WTO members are subject to this principle in connection with trade in goods (GATT, Article III). GATS takes a “bottom-up” approach to the national treatment principle by allowing WTO members to determine in what service sectors and under what conditions they will grant national treatment to services and service suppliers of other WTO members. WTO members may not, however, be completely free to make such determinations because they may be subject to requests from other WTO members to make concessions as part of the negotiations for the progressive liberalization of trade in services.

326. Both GATT and GATS use a “bottom-up” approach on market access. Under GATT, WTO members negotiate and agree to tariff concessions, which become binding when scheduled pursuant to GATT Article II.³⁶ Through periodic negotiating rounds, GATT contracting parties successfully reduced average tariff rates, increasing market access in the process. This approach proved so successful that GATT contracting parties began to employ non-tariff barriers more frequently as a way to restrict market access, which forced GATT negotiations to devise additional disciplines on non-tariff barriers. Under GATT, these additional disciplines, such as the Agreement on Technical Barriers to Trade, only bound GATT contracting parties that accepted them. Under the WTO, these additional disciplines are “top down” because all WTO members are subject to them without exception.

327. In GATS, tariffs are not an issue; so WTO members negotiate and agree to binding commitments that reduce quantitative limitations on services or service suppliers under GATS Article XVI. The objective under GATS is to engage in periodic negotiating rounds that will progressively reduce quantitative limitations on market access in trade in services.

328. As this process proceeds and quantitative limitations decrease, the expectation is that attention will shift to domestic regulations as a barrier to market access, which explains the attention given to domestic regulation in Part II of GATS and the importance of the negotiations for additional disciplines in Article VI:4. As noted earlier, additional disciplines developed under Article VI:4 have the potential for being applicable to WTO members with specific commitments in a given sector (e.g., the accountancy disciplines), which would be a “bottom-up” approach, or to all WTO members in a targeted sector, which would be a “top down” approach.

329. Part III of GATS itself contains no obligations to make commitments on market access or national treatment. The language of the treaty is clear that a WTO member is not bound by specific commitments unless it affirmatively makes such commitments. In addition, the language of the treaty is also clear that a WTO member can tailor its specific commitments according to its own policy needs. The concerns about the “bottom-up” approach in Part III center on two worries: (1) the legal and political dynamics of progressive liberalization; and (2) the effect of making specific commitments on the future health policy. The first of these concerns is dealt with in this section and the second is addressed in Section 7.6.



³⁶ GATT also involves a “top down” approach to market access in the form of the general prohibition on the use of quantitative restrictions in Article XI.



7.1.2 PROGRESSIVE LIBERALIZATION

330. The “bottom-up” approach found in Part III cannot be isolated from the obligation in Part IV that WTO members must “enter into successive rounds of negotiations . . . with a view to achieving a progressively higher level of liberalization” (GATS, Article XIX:1).³⁷ Although periodic rounds of trade negotiations occurred under GATT, GATT itself contains no legal duty to participate in such negotiations.

331. GATS makes participation in such successive rounds of trade liberalization mandatory for WTO members. Failure to enter into such negotiations would constitute a violation of Article XIX:1. Partaking in such negotiations without any intention of progressively liberalizing could also be construed as a violation of the requirement of *pacta sunt servanda* to fulfill treaty duties in good faith (Vienna Convention, Article 26), but proving a lack of good faith in this context would be extremely difficult.

332. Although GATS takes a different legal approach to successive negotiating rounds than GATT, the legal impact of the duty to enter into periodic negotiations to liberalize trade in services needs close consideration. According to the language of Article XIX:1, the duty on WTO members is to enter successive rounds of negotiations “with a view to achieving a progressively higher level of liberalization.” Article XIX:4 also states that “the process of progressive liberalization shall be advanced in each such round through bilateral, plurilateral, or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement.”

333. These duties do not require that any WTO member or the overall negotiations actually achieve a higher level of liberalization in any given negotiating round. A WTO member is not in violation of Article XIX:1 if it enters such negotiations in good faith but concludes that in all or in selected sectors it is not prepared to make specific commitments. Negotiating in good faith does not mean that a WTO member has to make commitments it does not believe are in its best interests.

334. This reading of Articles XIX:1 and XIX:4 is supported by the language of Article XIX:2, which provides that “[t]he process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors.” This provision recognizes

³⁷ The first such negotiating round is now underway, having started in 2000 (see Chapter 11).

that, in negotiations on liberalization, WTO members have to accord respect to each other's national policy objectives overall and in individual sectors.



335. Language in the GATS preamble reinforces this interpretation because the preamble states that the successive rounds of multilateral negotiations should aim “at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives” (GATS, preamble). Article XIX:2 clearly recognizes that national policy objectives on liberalization in trade in services will vary among countries and within any given country among its service sectors. Thus, a given WTO member may want to liberalize trade in telecommunication services rapidly but be much more cautious about making specific commitments in health-related sectors.

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336. Article XIX:2 is stronger in these regards for developing-country WTO members because it provides that the negotiations shall accord such members “appropriate flexibility . . . for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situations, and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV.” The Article IV objectives referred to are (1) strengthening of domestic services capacity, efficiency, and competitiveness, *inter alia* through access to technology on a commercial basis; (2) improvement of their access to distribution channels and information networks; and (3) liberalization of market access in sectors and modes of supply of export interest (GATS, Article IV:1).

337. Although the legal duty to enter into successive negotiating rounds contains nothing directly threatening to health policy, this duty will feed into the political dynamic that progressive liberalization efforts create. GATT contained no duty to negotiate progressive reductions of tariff rates, yet GATT negotiating rounds achieved dramatic reductions over the course of GATT's existence. Clearly, a political dynamic operated that drove down tariff rates in GATT contracting parties. The progressive liberalization agenda of GATS might create a similar dynamic in the context of trade in services, which could affect a government's ability to provide and regulate public-interest services such as health.



338. These concerns seem justified in the context of health policy. Health ministries are not influential actors in the process of making trade policy in developed or developing countries. The danger that trade ministries with insufficient awareness of the complexities of health policy could make specific commitments in health-related sectors is significant. As a group of NGOs pointed out, “[v]ery few government departments other than trade and finance were involved in the [original GATS] negotiations, and several countries committed all or part of their health services to GATS liberalization without the knowledge of their health ministries” (Joint Submission to the World Health Assembly 2003: 1). The low-level of specific commitments on health-related services by WTO members provides no guarantee that successive negotiating rounds will not increase political pressure on WTO members to make specific commitments on such services.

339. The complex political and economic interests of WTO members increase the potential for the political dynamic of progressive liberalization to produce pressure to liberalize health-related services. Many developing-country WTO members have serious interest in negotiating market access in developed-country members for their service exports. Developed-country WTO members may negotiate for market access commitments from developing-country members in return.

340. Given the interest that many developed-country WTO members have in exporting health-related services, and the problems developing-country WTO members have with their health systems and infrastructure, health-related services may increase in prominence in GATS negotiating rounds. In addition, developing countries may be asked to make concessions in the area of health-related services in exchange for advantages in other areas of vital interest to those countries, such as market access for agricultural or textile products.

341. Political incentives to make specific commitments on health-related services may also increase as other sectors are progressively liberalized more rapidly. From the entry into force of the WTO Agreement in 1995, financial and telecommunication services have received the lion’s share of attention. As liberalization of these lucrative commercial service sectors stabilizes, WTO members may start turning their attention to service sectors that have received less attention, including health-related services. Some evidence suggests that WTO members are developing negotiating proposals for the current round of talks that seek commitments from other members on basic health-related services, such as water distribution and sanitation services (Public Citizen 2002; Joy and Hardstaff 2003: 22-23).

342. The scope of GATS combined with the scope of health policy underscore the political challenges health ministries in WTO members face as GATS progressive liberalization proceeds. The authors do not believe that it is prudent to believe that this process will stop. The primary concern from the health policy perspective is to construct ways to manage the progressive liberalization process in a way that maximizes health-related interests in a government and population. Fundamental to such management will be to understand exactly how the process of making market access and national treatment commitments works under GATS. Sections 7.2 and 7.3 address this issue.



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7.2 Making Market Access Commitments

7.2.1 OVERVIEW OF MARKET ACCESS COMMITMENTS

343. In the context of trade in goods, the barriers to market access come in two forms—tariff and non-tariff barriers. GATT is designed to (1) move countries to use tariff rather than non-tariff barriers (e.g., the prohibition on the use of quantitative restrictions in GATT Article XI:1); and (2) provide disciplines on the use of certain non-tariff barriers, such as discriminatory treatment of foreign products in the application of laws and regulations (GATT, Articles I and III). In addition to lowering tariff rates bound under GATT Article II, GATT negotiating rounds developed additional disciplines to deal with certain non-tariff barriers, particularly the application of technical standards for products and, later, sanitary and phytosanitary measures.

344. The GATT approach to reducing barriers to market access does not readily transfer to the trade-in-services context because WTO members do not apply tariffs to service imports. Most analogous for services trade are the “non-tariff” barriers, such as quantitative restrictions, discriminatory treatment of foreign products in the application of laws and regulations, and technical standards. As analyzed earlier, GATS deals with the potential trade-restrictive nature of measures on licensing, qualifications, and technical standards through negotiations to develop disciplines on domestic regulation (GATS, Article VI:4).

345. GATS deals with discriminatory treatment of foreign services and service suppliers in the application of laws and regulations through (1) the MFN principle (GATS, Article II:1); and (2) the rules on making national treatment commitments (GATS, Article XVII discussed in Section 7.3). The MFN principle in GATS does not,



however, have the same market access implications as it does in GATT. Under GATT, the MFN principle can be used to gain improved market access through its application to various kinds of measures imposed by a WTO member at its border.³⁸ The GATT MFN principle also can improve market access beyond the border if a WTO member treats one foreign product more favorably than another like foreign product (e.g., by applying a higher sales tax to one but not the other).

346. The MFN principle in GATS is awkward to apply in the “at the border” context in which WTO members use the principle in GATT. To restrict market access of a service “at the border” means not allowing the foreign service or service supplier access to the domestic market, for example through some form of quantitative limitation. Article XVI not Article II:1 specifically addresses quantitative limitations on trade in services. To allow a WTO member to use the MFN principle to override a quantitative limitation on the number of service providers in its territory would read Article XVI out of GATS, a result that treaty interpretation rules prohibit.³⁹ The MFN principle would, however, apply to the application of a quantitative restriction allowed under Article XVI.

347. Article XVI allows WTO members to make market access commitments and, if made, requires them to accord services and service suppliers of any other WTO member treatment no less favorable than that provided for under the terms, limitations, and conditions agreed and specified in their specific commitments schedules (GATS, Article XVI:1). A WTO member has to indicate on its schedule both the service sector and mode of supply for which it makes a market-access commitment (e.g., hospital services; commercial presence (Mode 3)). This approach is “bottom-up” because all decisions remain in the hands of the WTO member; it selects what sectors and for what modes of supply it is willing to make market-access commitments. The approach of listing the sectors and modes of supply is sometimes also referred to as a “positive list” methodology where the WTO member lists only those areas in which it is making a commitment. Market-access commitments do not cover sectors or modes of supply not positively listed.

348. Article XVI:2 then requires that, in sectors where a WTO member makes market-access commitments, it must specify in its schedule certain restrictions on market access that it wishes to maintain or

³⁸ For example, State A, a WTO member, charges a 1% tariff duty on product X coming from State C, which is not a WTO member. State A charges a 10% tariff duty on product X coming from State B, which is a WTO member. State B can use the MFN principle to improve market access for its product X by claiming that State A must accord to State B's product the tariff advantage accorded to State C's product X. This result occurs even if State A has not included product X on its binding schedule under Article II of GATT.

³⁹ A WTO member could use the MFN principle to gain market access in the following situation. State D, a WTO member, allows a service provider from State F, which is not a WTO member, to provide services in its territory. State D prohibits a like service provider from State E, a WTO member, from providing services in its territory. State D has no quantitative restrictions or other rules that justify its ban on the service provider from State E. In this context, State D is treating the service provider from State F more favorably than it treats the like service provider from State E in violation of the MFN principle.

adopt. This provision means that a market-access commitment completely opens scheduled sectors and modes of supply for foreign participation, subject only to the restrictions listed in the schedule by the WTO member in question.



349. Article XVI:2 resembles a “top down” rather than “bottom-up” approach by establishing that scheduled sectors and modes of supply are open for business, except with regard to access-restrictive measures contained in the schedule. The approach in Article XVI:2 is also referred to as a “negative list” approach—the WTO member is allowed to restrict market access to foreign participation in a scheduled sector only when restrictions are specifically scheduled. In other words, Article XVI:2 contains a general prohibition against the use of certain access-restrictive measures, with an exception allowing the application of such measures only when the WTO member lists them on its schedule.

350. The access-restrictive measures that a WTO member must list if it wants to continue to apply them are:

- (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;⁴⁰
- (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;⁴¹
- (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
- (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
- (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

351. The list in Article XVI:2 is an exhaustive list, meaning that the list contains the only restrictions on market access covered by Article XVI (*US—Gambling*, ¶ 6.298). Four of these six types of access-restrictive

⁴⁰ The elements of Article XVI:2(a) were interpreted and applied in the panel report on *US—Gambling* (¶¶ 6.319-6.338)

⁴¹ The elements of Article XVI:2(c) were interpreted and applied in the panel report on *US—Gambling* (¶¶ 6.339-6.355).



measures (Article XVI:2(a)-(d)) address aggregate quantitative limitations that apply to an entire sector— limitations on the total number of service suppliers, total value of service transactions or assets, total number of service operations, total quantity of service output, and the total number of natural persons employed. The other two (Article XVI:2 (e)-(f)) apply at the level of an individual service supplier because they deal with measures controlling the types of legal entity a service supplier can utilize and limitations on the participation of foreign capital in a service enterprise.

7.2.2 CONCERNS RAISED ABOUT ARTICLE XVI

Scope of Article XVI and its effect on the right to regulate

352. Article XVI has been criticized (Gould and Joy 2000: 11-12; Sanger 2001: 55; GATSwatch.org 2001; Sinclair and Grieshaber-Otto 2002: 52-58). Critics often point out that Article XVI:2 prohibits use of non-discriminatory measures (i.e., measures that apply to all service suppliers, domestic and foreign) against foreign service suppliers when a market-access commitment is made unless the WTO member reserves use of such measures by scheduling them. *US—Gambling* involved just such a non-discriminatory regulation: a prohibition on the supply of remote gambling services, whether foreign or domestic.⁴² Article XVI potentially provides a greater level of market access than the application of a national treatment principle because it pushes beyond the objective of non-discrimination.

353. A domestic service supplier would still be subject to the access-restrictive measures listed in Article XVI:2 even when a WTO member could not apply them to a like foreign service supplier because it failed to list such measures in its schedule of commitments. In this situation, the foreign service supplier would be treated more favorably than the like domestic service supplier, creating the potential for discrimination against domestic enterprises.⁴³ Politically, a WTO member could not sustain discrimination against its domestic enterprises, meaning that the access-restrictive measure in question might have to be abandoned unless the WTO member can justify its violation of Article XVI:2 under an exception.

⁴² In addition, the panel in *US—Gambling* interpreted Articles XVI:2(a) and XVI:2(c) to include measures that had the *effect* of a quantitative restriction, perhaps further widening the scope of Article XVI and its potential impact on the right to regulate. The United States was expected to appeal these rulings.

⁴³ Pauwelyn argued, for example, that the panel ruling in *US—Gambling* that the United States had made a specific commitment on gambling and other betting services under GATS “essentially forces the U.S. to favor foreign suppliers of internet gambling services over domestic ones” (Pauwelyn 2004).

Concerns about the process of making market access commitments

354. Critics also argue that Article XVI provides WTO members with reduced policy flexibility in the future. Although Article XVI:2 allows a WTO member to list access-restrictive measures that it may want to adopt in the future, the question is whether any government has the foresight necessary to reserve such measures for future policy problems that may arise (GATSwatch.org 2001; Woodruffe and Joy 2002: 14). WTO members face, therefore, a “list it or lose it” scenario in connection with the types of measures found in Article XVI:2.

355. Two contexts may develop in which Article XVI could tie the hands of governments bound by GATS. The first involves technological, economic, or demographic shifts that change the underlying nature of a given service sector. Such shifts may require, as a matter of public policy, the implementation of measures prohibited under Article XVI:2. A WTO government that did not list in its schedule of market-access commitments the measures it now needs would not be able to use such measures without violating GATS.

356. The second context involves the development of a new service within a sector subject to specific market-access commitments. Rapid technological changes, particularly in the field of biotechnology, make the evolution of novel health-related services likely. Yet, such new service areas may be slotted into existing service sectors perhaps subject to market-access commitments. A WTO member would not be able to use the access-restrictive measures listed in Article XVI:2 without violating GATS unless it had by foresight or mere fortune reserved the right to use such measures in that sector.

357. A WTO member that faces either of the two contexts described above would have to find a way to justify a violation of market-access commitments, either by appeal to the general exceptions in Article XIV, by modifying its schedule of market access commitments pursuant to Article XXI, or by seeking a waiver from such commitments from other WTO members under Article IX:3 of the WTO Agreement. The rules under Articles XIV and IX:3 are explored in Chapter 8, and that analysis will argue that both options would be difficult to utilize successfully. Article XXI is likewise unattractive for the reasons explored in Section 7.6.

358. The negotiators of GATS could have adopted approaches to market access less worrying from the point of view of public-interest regulation of trade in services. One alternative would have been to enhance





the transparency of non-discriminatory market-access restrictions by requiring governments to list them in an annex to the Agreement (see, e.g., NAFTA, Article 1207). A second alternative would have been to prohibit the application of quantitative restrictions on market access through which a WTO member treated foreign services or service suppliers less favorably than like domestic services or service suppliers (e.g., a national treatment principle tailored to market access). A third approach would be to combine the first two approaches—adopt a national treatment principle on market access combined with transparency obligations to publicize non-discriminatory market-access restrictions.

7.2.3 SUMMARY OF HEALTH POLICY AND ARTICLE XVI

359. Article XVI presents health policy with a double-edged sword. On the one hand, Article XVI:1 gives WTO members complete legal freedom to make market-access commitments in health-related sectors. On the other hand, Article XVI:2 requires that WTO members exercise great care and foresight in listing the types of access-restriction measures they want to maintain or adopt in the future. *US—Gambling* illustrates the problems a WTO member can face when it has inadvertently made market access commitments without properly retaining regulatory authority it still wants to use. The broad scope of both GATS and health policy combine to create an enormous challenge for WTO members seeking to calibrate appropriately moves to increase market access under Article XVI:1 in health-related services while retaining needed regulatory tools implicated by Article XVI:2.

360. Any desire to err on the side of caution and avoid making binding market-access commitments to preserve as much freedom as possible with regard to health-related services might be in tension with the dynamic of progressive liberalization negotiations. In all likelihood, health ministries will have to be involved in wielding the double-edged sword of Article XVI in connection with health-related services. This reality places a premium on health ministries understanding the environment in which health-related sectors are regulated, including the regulatory “footprint” in relevant sectors and demographic, economic, and technological trends in health-related service sectors.⁴⁴

361. The regulatory “footprint” for any given service sector is important to assess in order to determine whether any of the access-restricting measures listed in Article XVI:2 have had or currently have any relevance for governance of that sector. Analysis of the regulatory “footprint” should also include assessment of whether

⁴⁴ “The net results [from liberalization of services under GATS] will depend on the structure of each nation’s health system, the regulatory environment in which it operates, and other health-related national government policies” (Sapsin et al. 2003: 552).

the access-restricting measures in Article XVI:2 have any conceptual application in a health-related service sector under liberalization consideration (i.e., would health policy principles ever point to the use of access-restricting measures listed in Article XVI:2?).



362. Input gathered by the authors from WHO staff and regional offices indicates that governments utilize the measures listed in at least Article XVI:2(a)-(e) in regulating public health and health-care systems. These indications underscore the importance of health ministries understanding the regulatory “footprint” in health-related services. Such an understanding will guide WTO members in making a market access commitment in a health-related service, should it decide to do so.

363. Analysis of relevant demographic, economic, and technological trends in the applicable service sectors would enhance examination of the regulatory “footprint,” particularly as it relates to possible future developments. The past or current use of access-restricting measures listed in Article XVI:2 to regulate a health-related service combined with (1) clear health policy rationale for the use of such measures; and (2) trends that indicate the potential continuing importance of utilizing such measures would converge to produce the need to protect the ability to maintain or adopt such measures on the WTO member’s market-access schedule.

364. The scope of health policy, illustrated by the large number of health-related services covered by GATS, indicates that conducting analysis of the regulatory “footprints” and trends in all health-related services would be a daunting task, especially for health ministries in developing countries. Nor does the conduct of such analysis ensure that the views of health ministries will be accorded proper weight in the progressive liberalization negotiations.

365. The double-edged nature of Article XVI on market access suggests, at the very least, that WTO members need to construct and sustain interagency processes to manage carefully the implications for health policy of progressive liberalization of market-access commitments. Most WTO members have not made market-access commitments in health-related service sectors to date, which means that most of them face the prospect of “risk management” rather than “consequence management” of previously made specific commitments. The effect of Article XVI on health policy for most WTO members depends, therefore, on how well WTO members manage the risks inherent in making market-access commitments in progressive liberalization negotiations.



7.3 Making National Treatment Commitments

366. In GATT, the national treatment principle requires that a WTO member not treat foreign products less favorably than like domestic products in the application of domestic laws and regulations (GATT, Article III). The national treatment principle joins the MFN principle to form GATT's regime against discrimination in trade policy on goods. Unlike the MFN principle, which largely applies to border measures, such as tariffs, the national treatment principle in GATT reaches laws and regulations that apply "beyond the border," after a product has cleared customs and entered the WTO member's domestic market. In GATT, national treatment is mandatory, unless a WTO member can justify behavior that violates this principle through an exception, such as the ones available under GATT Article XX.

367. In GATS, the national treatment principle is not a mandatory obligation. Under GATS Article XVII, WTO members are allowed to make commitments to apply national treatment to service sectors they select and to tailor such national-treatment commitments to conditions and qualifications. Here again is the "bottom-up," positive-list approach in GATS, in which the WTO member has complete legal freedom whether to accord national treatment and on what terms. WTO members must make national-treatment commitments and any conditions thereto on their specific commitment schedules, which schedules are binding parts of the treaty.

368. As with market-access commitment rules, WTO members must declare exceptions to the national treatment principle in their schedules or they lose the ability to deviate from national treatment in the relevant service sector (i.e., another "list it or lose it" scenario). Once a national-treatment commitment is made, the WTO member must accord national treatment in all cases not explicitly listed in its schedule (i.e., a negative list approach).

369. We now turn our attention to the specific details of Article XVII, which provides:

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers.¹⁰

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.

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 favorable if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

370. To make a successful claim that a WTO member violated a national treatment commitment under Article XVII, the complaining WTO member would have to establish the following elements: (1) the application of a measure affecting the supply of services; (2) the application of such a measure in a sector covered by a national-treatment commitment; (3) the absence of any conditions or qualifications in the national-treatment commitment relevant to the applied measure; (4) the existence of like foreign and domestic services or service suppliers; and (5) less favorable treatment accorded to the foreign service or service supplier.

371. Article XVII:1 makes clear that “all measures affecting the supply of services” come under the national treatment principle when a WTO member makes national-treatment commitments. As analyzed earlier, the definition of “measure” in Article XXVIII of GATS is broad, meaning that Article XVII:1 applies to any kind of law, regulation, rule, procedure, decision, or administrative action that affects trade in services. Application of the national treatment principle in GATT also broadly interprets laws and regulations to include both formal laws and administrative practices. As with the wording of the MFN principle in Article II:1, WTO members and dispute settlement bodies will interpret the term “affecting trade in services” broadly.⁴⁵ Given these broad definitions, WTO members making national treatment claims should have little difficulty establishing that a measure affecting trade in services exists.

372. Satisfying the next two requirements—that the sector in question is covered by a national treatment commitment and that no conditions and qualifications affect the measure in question—requires analysis of the respondent WTO member’s schedule of specific commitments.

373. The next step is for the complaining WTO member to establish that the domestic and foreign services or service suppliers are alike. The approach to like product analysis here will be similar to that analyzed in connection with the MFN principle.⁴⁶



⁴⁵ See Section 5.1.5 for detailed analysis of meaning of “affecting.”

⁴⁶ See Section 6.1.2 for detailed analysis of the likeness analysis.



374. The panel in *Canada—Autos* made rulings involving “like services” analysis under Article XVII of GATS that are worth mentioning briefly. In one part of the case, the panel held that Japan had not satisfied its burden of proof as complainant that the Japanese and Canadian service suppliers in question were like suppliers (¶¶ 10.283-10.290). The panel concluded that Japan failed to demonstrate that the Canadian companies in question provided wholesale trade services of motor vehicles as defined in the Services Sectoral Classification List.

375. With respect to a different complaint under Article XVII, the panel ruled that “like services” existed. At issue in this part of the case was whether services supplied under Modes 1 and 2 could be considered “like services” with services supplied through Modes 3 and 4. The panel held that “it is reasonable to consider for purposes of this case that services supplied in Canada through modes 3 and 4 and those supplied from the territory of other Members through modes 1 and 2 are ‘like’ services” (¶ 10.307). Thus, services provided through different modes of supply are not, for that reason alone, unlike services for purposes of Article XVII of GATS.

376. The final step is for the complaining WTO member to establish that the foreign service or service supplier is treated less favorably than the like domestic service or service supplier. Articles XVII:2 and XVII:3 address what constitutes “no less favorable treatment” in Article XVII:1. Article XVII:2 provides that “[a] Member may meet the requirements 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.” Article XVII:3 provides that “[f]ormally identical or formally different treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to like services or service suppliers of any other Member.”

377. As in the case of the MFN principle, “no less favorable treatment” implies two things: (1) different treatment that (2) accords one service or service supplier a competitive advantage. Article XVII:2 means that the key variable in the analysis is not whether a WTO member applies the identical measure to the domestic and foreign like service or service supplier. Such application would constitute “formally identical treatment” within the meaning of Article XVII:2. In addition, the language in Article XVII:2 that states that the national treatment obligation may be met through “formally different treatment” means that a WTO member could apply different

measures to the like service or service supplier but still be in compliance with Article XVII:1. The key variable in “no less favorable treatment” analysis is the *competitive effect* rather than the *form* of the measures applied.



378. In addition, Article XVII:1 does not require that the WTO member in question intended to treat a foreign service or service supplier less favorably than a like domestic service or service supplier. In *EC—Bananas III*, the Appellate Body rejected the argument of the EC that the measures in question were not discriminatory within the meaning of Article XVII:1 of GATS because the EC did not have the aim or intent to discriminate (¶ 241).

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379. Article XVII:3 confirms this analysis because it provides that less favorable treatment, in whatever form and whatever the intent, occurs when a WTO member modifies the conditions of competition in favor of domestic services or service suppliers vis-à-vis like foreign services or service suppliers. As with the MFN principle, *any* alteration, however small, in the conditions of competition by the WTO member applying measures affecting trade in services qualifies as less favorable treatment.

380. To establish that a WTO member has accorded less favorable treatment to a foreign service or service supplier, the complaining WTO member cannot rely on mere speculation about possible adverse effects on the conditions of competition. This observation follows the Appellate Body holding in *Canada—Autos* in connection with the less favorable treatment standard in Article II:1 of GATS. Rather, the complaining WTO member has to demonstrate that the measure in question modified the conditions of competition to the detriment of its services or service providers and to the advantage of the like services or service suppliers of the other WTO member. Modification might not mean that the foreign services or service suppliers suffered adversely (e.g., actual loss market share) but that such adverse effects are likely to occur because of the measure in question.

381. The concerns raised about this kind of approach used in connection with market-access commitments (see Section 7.2) apply in the national-treatment context but perhaps with less force from a health policy perspective. Article XVI:2 on market access covers measures that can be non-discriminatory, which means the market-access provisions go beyond the objective of mitigating discriminatory trade restrictions. By definition, Article XVII addresses only those measures that *de jure* or *de facto* discriminate against foreign



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services or service suppliers. Article XVII does not apply to non-discriminatory domestic regulations that apply to sectors covered by specific commitments, which regulations might fall under either Article XVI (if the regulations are among the quantitative limitations listed in Article XVI:2) or Article VI:5 (if the regulations relate to licensing, qualifications, or technical standards).

382. The ability to discriminate in favor of national services or service providers may serve many different public policy purposes, such as increasing the number of enterprises operated by domestic racial or ethnic minorities. The central question for health policy is whether the ability to discriminate in favor of domestic services or service suppliers over like foreign services and service suppliers is important to protect and promote health. In connection with the MFN principle, the Legal Review argued that the ability to discriminate between like foreign services and service suppliers was not important to health policy. Does the same argument prevail with regard to the national treatment principle?

383. The WTO's *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services* (WTO Doc. S/L/92) (*Scheduling Guidelines*) list examples of frequently occurring national treatment restrictions that appear in WTO members' schedules of specific commitments. These examples give some indication of what kind of discriminatory measures WTO members think are important to protect from the national treatment principle. Table 7.3 provides these examples and illustrations of their application.

TABLE 7.3 FREQUENTLY OCCURRING NATIONAL TREATMENT RESTRICTIONS IN WTO MEMBERS' SCHEDULES OF SPECIFIC COMMITMENTS



National Treatment Restriction	Example
Subsidy measures	Only nationals can receive government subsidies
Tax measures	Taxes applied to premium payments made to non-resident insurance companies
Other financial measures	Higher license fees are charged for non-residents
Nationality requirements	Services may only be provided by nationals
Residency requirements	Services may only be provided by individuals resident for a specified period of time
Licensing and qualification requirements	Licenses or qualification exams limited to residents or nationals
Registration requirements	Foreign service suppliers have to have registered office in the country
Authorization requirements	Foreign service suppliers face extra authorization requirements
Technology transfer/training requirements	Foreign service suppliers are required to transfer technology or train local workers
Local content requirements	Priority shall be given to local service providers
Ownership of property/land	Foreign nationals may not purchase real estate or face additional requirements to purchase

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384. To what extent any of these categories of discriminatory exercise of government power is necessary or even convenient for good governance of health-related sectors is difficult to answer given the scope of health policy. A WTO member does not need to justify including a discriminatory measure on its schedule of specific commitments, so it does not need to demonstrate a rational relationship between the discrimination and any specific policy objective. To probe the potential threat of Article XVII to health policy, we need to try to understand whether the approach in this provision undermines a tool—discrimination against foreign services and service suppliers—that is important for health policy.



385. Input gathered by the authors from WHO staff and regional offices indicates that the commonly used national treatment restrictions described in Table 7.3 are not, by and large, important regulatory tools for health policy. Experience under other international trade agreements involving liberalization of trade in services indicates, however, that countries have explicitly excluded health services from the national treatment principle (e.g., Canada's exclusion of health services from NAFTA's national treatment principle). Thus, WTO members should arguably be careful about making any national treatment commitments because such commitments may be relevant from a broader development perspective, in terms of capacity building, training of human resources, employment, and balance of payments considerations. Development and public health cannot be seen in isolation of each other.

386. WTO members again face, as they do in connection with Article XVI:2, the challenge to understand the regulatory "footprint" and demographic, economic, and technological trends of health-related sectors in which they are contemplating national-treatment commitments. Without rigorous assessment of the health policy importance of the ability to discriminate in favor of domestic services and service suppliers, national treatment commitments may be made to the detriment of health policy in the future. The making of national treatment commitments requires the same kind of careful management process as the scheduling of market access commitments. The construction of this management process also faces the same dangers in the context of health policy.

7.4 Making Additional Specific Commitments Beyond Market Access and National Treatment

387. The final provision of Part III of GATS allows WTO members to negotiate and make commitments with respect to measures affecting trade in services that are not subject to scheduling under Articles XVI and XVII, including those regarding qualification requirements, licensing matters, and technical standards (GATS, Article XVIII). Such additional commitments must also be included in the schedule of specific commitments. WTO members can, at their discretion, make commitments on measures affecting trade in services that do not fall within the list of quantitative measures found in Article XVI:2 and that are non-discriminatory and thus outside Article XVII. Such measures may include the kinds of measures within Articles VI:4 and VI:5 on licensing, qualifications, and technical standards. WTO members are free to make additional commitments for individual sectors and specific modes of service supply.

388. According to the WTO's *Scheduling Guidelines*, additional commitments under Article XVIII should be "expressed in the form of undertakings, not limitations" (WTO Doc. S/L/92, ¶ 19). In other words, the additional commitments column of the schedule of specific commitments should be a "positive list" of affirmative undertakings and not a "negative list" of retained measures. Article XVIII is, therefore, purely a "bottom-up" approach to progressive liberalization, so commitments made under it do not face the "list it or lose it" dynamic seen in Articles XVI and XVII. Additional commitments face, however, the same process for modification as commitments made under Articles XVI and XVII, which is explored in Section 7.6.



389. Article XVIII may not play a significant role in the progressive liberalization of health-related services because the major action will center on market access and national treatment commitments. Lack of progress on developing multilateral disciplines on licensing, qualifications, and technical standards under Article VI:4 may in the future raise the profile of Article XVIII in progressive liberalization negotiations.

7.5 The Schedule of Specific Commitments

390. Article XX:1 of GATS requires each WTO member making market access, national treatment, and additional commitments to set out these commitments in a schedule. Such schedules are annexed to GATS and "shall form an integral part thereof" (GATS, Article XX:3). In short, the schedules become part of the binding treaty. The same is true in the context of GATT for schedules of tariff bindings made under GATT Article II. Schedules of specific commitments are, however, more complex than tariff schedules under GATT, which heightens the legal importance of scheduling specific commitments carefully and properly. This section examines the legal requirements of the schedule of specific commitments.

7.5.1 THE SCHEDULE OF SPECIFIC COMMITMENTS AND ACTUAL STATE POLICIES ON TRADE IN SERVICES

391. A preliminary point involves noting that the contents of a schedule of specific commitments do not necessarily reflect how a WTO member actually treats trade in services in any given sector or mode of supply. A WTO member may make no specific commitments in a specific sector; yet, in practice, it accords full market access and national treatment. The extent of a WTO member's liberalization of trade in services cannot necessarily be gleaned from its schedule of specific commitments.



392. Many WTO members have not, for example, made commitments for Mode 3 (commercial presence) in hospital services but allow foreign direct investment for hospital construction and operation. In situations where a WTO member's actual policies on trade in services are more liberal than its schedule of specific commitments, other WTO members cannot use the schedule to challenge the disparity between the level of commitments and actual policy. The MFN principle would, however, apply and require that the liberal policies be applied in a non-discriminatory manner as between foreign services and service suppliers.

393. A WTO member that makes market access, national treatment, and additional commitments is bound under Articles XVI, XVII, and XVIII to accord the treatment contained in the schedule of specific commitments to all WTO members. Treatment that is less liberal than the bindings in the schedule of specific commitments would constitute a violation of GATS and require a justification under, for example, Article XIV (General Exceptions) or Article XIV *bis* (Security). Treatment that is more liberal than the commitments in the schedule of specific commitments has to be accorded immediately and unconditionally to all WTO members under the MFN principle in Article II:1. The only occasions in which a WTO member would be able to discriminate between foreign services or service suppliers are when: (1) the WTO member has listed such discrimination on its schedule of MFN exemptions under Article II:2; and (2) the WTO member can justify such discrimination under generally available exceptions (e.g., Articles XIV and XIV *bis*).

7.5.2 WHAT MUST BE SCHEDULED

394. Article XX:1 provides that each schedule of specific commitments shall specify: "(a) terms, limitations and conditions on market access; (b) conditions and qualifications on national treatment; (c) undertakings relating to additional commitments; (d) where appropriate the time-frame for implementation of such commitments; and (e) the date of entry into force of such commitments." The substance of Articles XVI, XVII, and XVIII analyzed in Sections 7.1 through 7.4 drives the first three items in this list. The last two items require disclosure of temporal limitations that a WTO member wishes to apply to its specific commitments, and this requirement seeks to increase the transparency of the member's schedule. In addition, these provisions on temporal limitations demonstrate that a WTO member has the freedom to make specific commitments that are implemented gradually or come into effect at a later date.

395. The WTO's *Scheduling Guidelines* also state that a schedule of specific commitments should describe the geographical scope of measures when specific commitments do not cover the entire national territory (WTO Doc. S/L/92, ¶ 4). Disclosure of such geographical limitations is important for transparency purposes because, without them, GATS defines "measures by Members" to include measures taken by all levels of government (GATS, Article I:3(a)(i)).

396. Identifying measures to schedule under market access is easier than under national treatment because Article XVI:2 contains an exclusive list of measures that should be scheduled while Article XVII does not provide an exclusive or even representative list of the kinds of measures that should be scheduled in connection with national treatment commitments. The WTO Secretariat compiled a list of frequently occurring national treatment restrictions found in WTO members' schedules of specific commitments, and these examples appeared in Table 7.3. The substantive nature of the national treatment principle precludes developing an exclusive list of measures because the principle focuses on prohibiting *de jure* and *de facto* discrimination in favor of nationals. Such discrimination can occur in many different ways.

397. In the past, WTO members have scheduled measures that should not be scheduled under Article XX:1. The only measures that should be listed as limitations on market access are those listed in Article XVI:2. Non-discriminatory measures that do not fall within the list of measures in Article XVI:2 should not be scheduled; instead, Article VI:5 on domestic regulation applies to such measures. Measures that are *de facto* or *de jure* discriminatory should not be scheduled under market access (with one exception discussed below) but under the schedule of measures exempted from the MFN principle (GATS, Article II:2) or the schedule of specific commitments on national treatment (GATS, Article XVII:1). By definition, measures that are not discriminatory within the meaning of the national treatment principle should not be listed on the schedule of specific commitments on national treatment but instead fall under Article VI:5 on domestic regulations.

398. The only time a discriminatory measure should be scheduled under the market access portion of a schedule of specific commitments occurs when (1) a WTO member makes both market access and national treatment commitments in a sector; and (2) a measure it wishes to retain (a) falls within the list of measures contained in Article XVI:2, and (b) violates the national treatment principle in Article XVII:1. Article XX:2 of GATS provides that measures that are inconsistent with both Articles XVI and XVII shall be inscribed in the column





relating to market access. The WTO's *Scheduling Guidelines* recommend that such notations in the market access column should indicate that the measure also limits national treatment to increase the transparency of the Article XX:2 rule (WTO Doc. S/L/92, ¶ 18).

399. WTO members should also not schedule measures covered by other provisions in GATS. For example, Article XII (Restrictions to Safeguard the Balance of Payments) governs exceptions to Article XI (Payments and Transfers), and such exceptions should not be listed in the schedule of specific commitments (WTO Doc. S/L/92, ¶ 6). Also, “[a]ll measures falling under Article XIV (General Exceptions) are excepted from all obligations and commitments under the Agreement, and therefore should not be scheduled” (WTO Doc. S/L/92, ¶ 19). The same applies for measures excepted under Article XIV *bis* (Security).

400. Although GATS contains a provision specifically on subsidies (see Article XV), subsidies that discriminate in violation of the national treatment principle must be scheduled under Article XVII:1. Article XV merely calls for multilateral negotiations to develop rules to mitigate the distorting effects of subsidies on trade in services.

7.5.3 HOW MEASURES SHOULD BE SCHEDULED

The importance of the scheduling process

401. As noted earlier, the schedules of specific commitments are more complex than the schedules of tariff bindings made under Article II of GATT. Such complexity heightens the importance of understanding how WTO members should schedule specific commitments. Because the schedules of specific commitments are part of the legally binding Agreement, WTO members need to ensure they undertake the scheduling process carefully and competently. Mistakes could be legally costly and difficult to change.⁴⁷

402. The panel decision in *Canada—Autos* reinforced the legal importance of scheduling specific commitments. In this case, the panel had to determine whether Canada had undertaken national treatment commitments under Article XVII of GATS for wholesale trade services of motor vehicles. In connection with a complaint from Japan, the panel ruled that Canada had made a national treatment commitment for “sale of

⁴⁷ See Section 7.6 on modifying schedules of specific commitments.

motor vehicles including automobiles and other road vehicles” under CPC entry 6111 (¶ 10.280). The panel rejected Canada’s claim that its commitment under CPC entry 6111 was made under the heading “C. Retail Services” and thus was a commitment limited to retail not wholesale services (¶ 10.280). The panel argued that “if Canada had meant to limit this commitment only to retail services it should have inscribed entry 61112 (Retail sales of motor vehicles) in its schedule rather than 6111 (Sale of motor vehicles)” (¶ 10.280).

403. With respect to another complaint, the panel in *Canada—Autos* had to determine whether Canada’s specific commitments covered the services in question. Canada argued that limitations on national treatment it scheduled pursuant to Article XVII applied to the services at issue, which would mean Canada could not be in violation of Article XVII (¶ 10.295). The panel held, however, that Canada’s scheduled limitations on national treatment commitments in the relevant sectors did not cover the measure that the complainants alleged violated Article XVII (¶ 10.296).

404. These panel decisions in *Canada—Autos* illustrate the legal importance of accurately scheduling market access and national treatment commitments and scheduling any limitations to such commitments. WTO panels and the Appellate Body will be called upon to interpret specific commitment schedules; and, as the panel demonstrated in *Canada—Autos*, the approach to schedule interpretation will not be deferential to the WTO member that made the schedule, but will apply the rules of treaty interpretation, as set out in Articles 31 and 32 of the Vienna Convention. The panel report in *US—Gambling* confirms this observation because the panel applied treaty interpretation rules in finding that the United States had made a specific commitment in its GATS Schedule covering gambling services, rejecting the U.S. argument that it had made no, and never intended to make an, express specific commitment on gambling or other betting services (¶¶ 6.41-6.138).⁴⁸

Basic structure of the schedule

405. GATS does not contain specific rules on the form of the schedule, but the substantive provisions in Part III determine the basic structure of the schedule. Part III requires that WTO members make market access, national treatment, and additional commitments on a schedule. Thus, Part III mandates that a schedule for specific commitments have at least three substantive columns providing space for scheduling limitations on market access, limitations on national treatment, and additional commitments.



⁴⁸ The panel indicated that it had “some sympathy” for the U.S. position that it never intended to make a specific commitment on gambling and betting services (¶ 6.136) and noted “that the United States may well have inadvertently undertaken specific commitments on gambling and betting services (¶ 7.3); but it nevertheless held that the United States had made such a specific commitment according to international law on treaty interpretation.



406. The provisions in Part III also make clear that a fourth column is required that allows the WTO member to identify the service sector or sub-sector in which it wants to make a specific commitment. Article I:2's definition of "trade in services" as encompassing four different modes of service supply requires that the columns for listing limitations on market access and national treatment include the opportunity to schedule limitations for each mode of supply. Annex 3 to this Legal Review contains a basic model schedule of specific commitments containing the structural elements just outlined and others described below.

The process of completing the schedule

407. Although the substantive rules of GATS build the basic structure for the schedule of specific commitments, the treaty does not contain more detailed rules on how WTO member states should complete a schedule. For specific commitments made during the Uruguay Round, non-binding guidelines developed by negotiators assisted governments in drafting their specific commitment schedules (MTN.GNS/W/120; MTN.GNS/W/164; and MTN.GNS/W/164.Add.1). For commitments to be made during the GATS 2000 negotiating round, the WTO Secretariat produced the *Scheduling Guidelines* to provide similar assistance to WTO members formulating negotiating proposals and translating them into binding commitments on schedules.

408. The Uruguay Round guidelines and the *Scheduling Guidelines* are not legally binding on WTO members. The WTO Secretariat makes clear, for example, that the *Scheduling Guidelines* "should not be considered a legal interpretation of the GATS" (WTO Doc. S/L/92, ¶ 1). As part of the treaty, WTO members and dispute settlement panels should interpret schedules of specific commitments using the general principles of treaty interpretation found in the Vienna Convention and customary international law and discussed in Chapter 4. The application of these principles of treaty interpretation can, however, make the non-binding guidelines on scheduling important for determining the meaning of GATS schedules. In *US—Gambling*, the panel held that the scheduling guidelines developed during the Uruguay Round negotiations formed part of the context of GATS schedules within the meaning of Article 31 of the Vienna Convention on the Law of Treaties (¶ 6.82).⁴⁹

409. The process of making a specific commitment on a schedule breaks down into five sequential steps. The first step requires the WTO member to determine whether the commitment it wants to make applies

⁴⁹ This holding of the panel was expected to be the subject of appeal by the United States.

to a single service sector or to multiple sectors. In other words, the WTO member must classify the scope of its commitment as either a *horizontal commitment* applying to more than one service sector or a *vertical commitment* binding in only one service sector. This classification process involves describing the service sectors affected by a commitment. Most schedules contain two structural rows—one for horizontal commitments and one for sector-specific commitments (see Annex 3).

410. The *Scheduling Guidelines* recommend that WTO members use the classification of sectors and sub-sectors found in the Service Sectoral Classification List, which is based on the United Nations Central Product Classification (CPC) system (WTO Doc. S/L/92, ¶ 23). The Service Sectoral Classification List provides a harmonized description of sectors and sub-sectors linked to a corresponding CPC number. Use of the same classification system by WTO members in scheduling horizontal or vertical commitments increases the transparency and efficiency of the process. Further, like the scheduling guidelines, the CPC Service Sectoral Classification List can form part of the context of interpreting the meaning of a GATS schedule and thus has legal significance. The panel in *US—Gambling* applied the CPC Service Sectoral Classification List in interpreting whether the United States had made a specific commitment on gambling and betting services (¶ 6.83-6.96).

411. The second step is for the WTO member to determine whether the commitment it wants to make falls within the market access, national treatment, or additional commitments category. The substance of Articles XVI, XVII, and XVIII drives analysis in this step. As indicated earlier, commitments may involve measures that affect both market access and national treatment, which underscores the importance of properly classifying the commitment under the market access, national treatment, and additional commitment columns. This classification step also involves determining whether a measure should not be included in a schedule because it is covered by another provision of GATS.

412. The third step requires the WTO member to determine under which modes of supply its commitment falls. The commitment may or may not affect more than one mode of supply and determining the scope of the commitment in this regard is important. For some commitments, certain modes of supply may not at present be technically feasible (e.g., cross-border supply (Mode 1) of surgical procedures). This process of identifying the relevant modes of supply is necessary for making both horizontal and vertical commitments.





413. The fourth step requires the WTO member to determine the level of its commitment. Both Part III of GATS and the *Scheduling Guidelines* (WTO Doc. S/L/92, ¶¶ 42-47) indicate that WTO members have four levels of commitment from which to choose: (1) full commitment; (2) partial commitment; (3) no commitment; and (4) no commitment technically feasible. Full commitment means that a WTO member has decided to retain no measures that limit market access or national treatment. Partial commitment means that a WTO member wants to retain measures through which it limits market access and national treatment. No commitment means that the WTO member wishes to retain full authority to restrict market access and discriminate in favor of its nationals. Commitments that are not technically feasible mean that a WTO member cannot make a commitment.

414. The process of determining the level of commitment can be complicated because it has to be done in connection with each mode of supply affected by the commitment. For example, a WTO member may want to make a vertical commitment in a single sub-sector in which it schedules full commitment for Mode 1 (cross-border supply), partial commitment for Mode 2 (consumption abroad), no commitment for Mode 3 (commercial presence), and no commitment for lack of technical feasibility for Mode 4 (presence of natural persons).

415. The fifth step requires the WTO member to inscribe its commitment clearly, concisely, and accurately on its schedule. This step essentially presents a drafting challenge for the WTO member to inscribe its schedule with exactly the commitment it wants to make in a way that is transparent for other WTO members. Utilization of common descriptors (e.g., Services Sectoral Classification List) assists a WTO member's drafting responsibilities. If a WTO member wishes to deviate in its schedule from the meanings provided by such commonly used descriptors, then it needs to make such deviation clear and obvious.⁵⁰ The *Scheduling Guidelines* also recommend common terminology for drafting commitments. For example, the *Scheduling Guidelines* advise that full commitments should be expressed as "None" in a schedule; partial commitments as "Unbound, except for measures affecting . . ."; no commitments as "Unbound;" and technically impossible commitments as "Unbound due to lack of technical feasibility."

416. For transparency purposes, the *Scheduling Guidelines* advise that, if a WTO member makes a full or partial commitment in only one mode of supply in a sector, then it should inscribe "Unbound" in the other three modes of supply for that sector. No entries should appear for a sector in which a WTO member makes no commitments.

⁵⁰ The panel in *US—Gambling* observed that the United States did not provide for its own definitions of services within the service sub-sector in question, which meant the panel should apply CPC definitions as part of the context for interpreting the U.S. schedule of specific commitments (¶ 6.91).

417. In addition to utilizing common descriptors and terminology, WTO members should draft commitments clearly, concisely, and accurately. WTO members should draft partial commitments under market access to provide a concise description of the limitations under Article XVI:2 being retained. WTO members should draft partial commitments under national treatment to describe the discriminatory measures retained in order to disclose exactly how such measures violate the national treatment principle. Similarly, additional commitments require careful drafting to inscribe only the precise undertaking the WTO member wants to make.



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7.5.4 THE SCHEDULING PROCESS AND HEALTH POLICY

418. The complexity of the scheduling process deepens concerns about the treaty's effect on a WTO member's ability to govern for the public interest (Gould and Joy 2000: 15-16; GATSwatch.org 2001; Sinclair and Grieshaber-Otto 2002: 31-33). Such complexity imposes significant burdens on often under-funded, under-staffed ministries asked to formulate specific commitments for service sectors under their jurisdiction. The complex task of scheduling commitments might be mitigated if GATS afforded WTO members the ability to change and modify their commitments easily, but GATS does not make modifying schedules of specific commitments easy (see Section 7.6). The lack of flexibility to modify, and the legally binding nature of inscribed schedules, combine to create demands on WTO members to undertake a complex and difficult process with little margin for error.

419. Literature on the GATS scheduling process includes references to poorly drafted schedules resulting from negotiators in the Uruguay Round not being sufficiently familiar with the novel substance and procedures of GATS (Sinclair and Grieshaber-Otto 2002: 32). As time passes and state practice on scheduling commitments grows, threats to sovereignty because of complex demands will probably diminish. Feketekuty observed, for example, that "schedules of new [WTO] entrants have received a great deal more scrutiny than the schedules of existing members and therefore come closer to providing the kind of information that is desirable" (Feketekuty 2000: 99).

420. The significant challenges of the scheduling process to health policy are substantive and have been addressed earlier in this Legal Review. Drafting schedules of specific commitments that assist rather than restrict health policy depends fundamentally on the quality of the "risk management" process WTO members



have to undertake to determine whether to make specific commitments on market access and national treatment. The scheduling process itself merely represents the procedure through which sovereign decisions are conveyed clearly and accurately within the framework of the treaty.

7.6 Modifying a Schedule of Specific Commitments

421. The procedure set out in GATS Article XXI for the modification of schedules of specific commitments has also drawn critical attention (World Development Movement 2001: 17; GATSwatch.org 2001; Sinclair and Grieshaber-Otto 2002: 33-35). Concerns have been raised that Article XXI's rules restrict the legitimate right of governments to revise policy and regulations after specific commitments have been made. The modification principles combine with the disciplines of Articles XVI and XVII to freeze, the argument goes, a WTO member's policy and regulations in the condition found in schedules of specific commitments. This regulatory freeze may harm the exercise of sovereignty for public interest purposes, including the protection of health.

422. This section focuses on the rules in Article XXI of GATS, which governs how WTO members may modify their schedules of specific commitments, and on any threat such rules pose to health policy.

423. GATS disciplines on the modification of schedules of specific commitments appear in Articles X:2 and XXI. Article X:2 provides that, in the period before the entry into force of disciplines on emergency safeguard measures to be negotiated under Article X:1, a WTO member may notify the Council for Trade in Services that it intends to modify or withdraw a specific commitment after a period of one year from the date the commitment entered into force. The WTO member providing such notification has to show cause to the Council for Trade in Services why it cannot wait for the lapse of the three-year waiting period prescribed in Article XXI:1 of GATS.

424. In essence, Article X:2 functions as a temporary emergency safeguard measure pending the adoption of multilateral disciplines on emergency safeguards in Article X:1 and overrides the general provision on the modification of specific commitments found in Article XXI. Article X:3 provides that Article X:2 "shall cease to apply three years after the date of entry into force of the WTO Agreement." The Council for Trade in Services has, however, extended the availability of the option in Article X:2 until the entry into effect of the results of the

negotiations under Article X:1 (WTO Doc. S/L/102, ¶ 3), which means that WTO members may still modify or withdraw specific commitments under Article X:2.⁵¹



425. Article XXI:1(a) provides that any WTO member “may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.” The first observation to make about Article XXI:1(a) is that it mandates a three-year “standstill” period during which a WTO member may not modify or withdraw a specific commitment.

426. Second, Article XXI:1(a) allows WTO members to modify or withdraw a specific commitment after the three-year standstill period only if the members follow the rules set out in the rest of the article. These rules initially involve (1) a requirement to notify the Council for Trade in Services of the intent to modify or withdraw a specific commitment no later than three months before the intended implementation date (GATS, Article XXI:1(b)); and (2) mandatory consultations with any WTO member affected by such proposed modification or withdrawal with a view to reaching agreement on any necessary compensatory adjustment (GATS, Article XXI:2(a)).

427. The duty to consult presumes that the proposed modification or withdrawal will adversely affect trade in services with some other WTO member. In other words, the modification or withdrawal will restrict trade in services concerning the services or service suppliers of another WTO member. The compensation negotiations are supposed to reach a result that maintains generally the level of liberalization in trade in services achieved before modification or withdrawal of the specific commitment (GATS, Article XXI:2(a)). The WTO member seeking to modify a specific commitment will have to liberalize trade in services in some other sector or sub-sector of interest to the affected WTO member to compensate it and keep the level of liberalization generally constant. If a modifying WTO member makes compensatory adjustment, it has to make such adjustment available to all WTO members on a MFN basis (GATS, Article XXI:2(b)).

428. If the modifying and affected WTO members do not reach agreement on compensation, the affected member may refer the dispute to arbitration (GATS, Article XXI:3(a)). Every affected WTO member that wishes to enforce its right to compensation must participate in the arbitration (GATS, Article XXI:3(a)). If no affected

⁵¹ With negotiations on emergency safeguards currently stalemated (Pruzin 2003b: 499), the Article X:2 option may remain available for longer than expected, unless the Council for Trade in Services terminates the extension.



member requests arbitration, the WTO member is free to implement the proposed modification or withdrawal (GATS, Article XXI:3(b)).

429. The arbitration proceeding will, in all likelihood, have to deal with basic issues of contention, such as (1) whether a proposed modification or withdrawal will likely have an adverse effect on another WTO member; and (2) the level of compensation that a modifying WTO member must provide when an adverse effect is likely to be present. The arbitration decision is final and binding on the parties; Article XXI:4(a) provides that the modifying WTO member may not proceed with its change in specific commitments until it has made compensatory adjustments in conformity with the arbitration's findings.

430. Should a modifying WTO member implement its modification or withdrawal without complying with the arbitration ruling, then any affected WTO member that participated in the arbitration may modify or withdraw substantially equivalent benefits in conformity with the arbitration findings (GATS, Article XXI:4(b)).

431. As GATS critics argue, a WTO member's ability to change policy and law in sectors covered by specific commitments is restricted under GATS. Although Article X:2 is still available as a modification option, eventually it will lapse when the multilateral disciplines on safeguard measures are adopted. Article XXI is the only permanent modification provision, and it confronts WTO members with two obstacles. First, no changes can be proposed until the three-year "standstill period" has passed, eliminating regulatory flexibility during that period. Second, any changes proposed under Article XXI trigger a duty to compensate any WTO member potentially adversely affected by such changes. Depending on the sector affected by a proposed specific commitment change, a modifying WTO member could face dozens of claims for compensatory adjustment.

432. The compensation would have to take the form of new market access, national treatment, or additional commitments that liberalize trade in proportion to the proposed changes' restrictions on such trade. The compensation procedure may arguably chill WTO members from modifying specific commitments for public interest purposes (World Development Movement 2001: 17; Sinclair and Grieshaber-Otto 2002: 34-35). From this perspective, the treaty sacrifices regulatory flexibility for the public interest to the objective of trade liberalization because the Agreement makes modifications of specific commitments difficult.

433. An example of the potential effect of the GATS rules on modifying schedules of specific commitments comes in the area of water distribution systems. A consortium of NGOs observed that “several developing countries which experimented with liberalisation in their water services have taken the service back into public hands. Yet once a sector is committed under GATS, punitive rules on the modification of national commitments make it effectively impossible for a country to reverse liberalisation in this way” (Joint Submission to the World Health Assembly 2003: 3). This scenario helps explain why many critics of GATS want to see the modification rules in Article XXI radically changed to facilitate modifications of scheduled commitments.



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434. The disciplines GATS applies to proposed modifications of specific commitments will make such modifications difficult but not impossible to achieve. This reality heightens the importance for health policy of carefully managing the process of making specific commitments. The danger of the Article XXI rules to health policy depends on how WTO members handle the “risk management” of scheduling specific commitments.

435. One mitigating perspective on the restrictiveness of the rules in Article XXI of GATS may be to emphasize the broad scope of GATS. With virtually every conceivable service covered by the treaty, a WTO member desiring for health policy reasons to modify or withdraw a specific commitment in a health-related service may have a pool of other service sectors from which to offer compensatory arrangements to WTO members potentially affected by its proposed change. This pool would shrink depending on the nature of the trade in services undertaken by affected WTO members with the modifying member. Other treaty commitments made by a WTO member, such as bilateral investment treaties, may also reduce the size of the pool of service sectors available for compensation purposes. Also, this mitigating perspective does not ameliorate the complexity of trying to deal with multiple affected WTO members all seeking different levels and forms of compensation.

436. GATS critics are probably correct that Article XXI will seldom be used by WTO members seeking to change specific commitments for reasons related to public interest regulation. The arguably restrictive Article XXI is, thus, of concern for health policy. More likely than utilization of Article XXI for health policy purposes is the justification of violations of specific commitments under exceptions under GATS, which the next chapter addresses.

Chapter 8

EXCEPTIONS TO GENERAL OBLIGATIONS AND SPECIFIC COMMITMENTS



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8.1 Exceptions to General Obligations

437. GATS provides a number of exceptions to the general substantive and procedural duties analyzed in Chapter 6. These provisions allow WTO members not to comply with substantive duties, such as the MFN principle, under certain conditions spelled out in the treaty. This section analyzes these exceptions and how they relate to health policy.

8.1.1 EXCEPTIONS TO THE MOST-FAVORED-NATION PRINCIPLE

438. GATS contains a number of provisions that allow WTO members not to comply with the MFN obligation in Article II:1 of GATS. Table 8.1.1 summarizes these exceptions. Subsequent paragraphs then look at each exception.

TABLE 8.1.1 EXCEPTIONS TO THE MFN PRINCIPLE

Article	Substantive Content
II:2	Allows WTO members to exempt measures inconsistent with the MFN principle by listing them on a schedule.
II:3	WTO members can confer or accord advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.
V	WTO members can grant countries more favorable treatment through bilateral or regional agreements liberalizing trade in services as long as such agreements meet certain conditions.



Article	Substantive Content
V bis	WTO members can enter bilateral or regional agreements establishing full integration of labor markets as long as such agreements meet certain conditions.
VII:1	WTO members may grant recognition to the education, experience, qualifications awarded in other countries to service suppliers.
XIII:1	Provides that the MFN principle does not apply to measures governing government procurement of services.
XIV(e)	Provides justification for violations of the MFN principle related to agreements on the avoidance of double taxation.

Schedules of MFN-inconsistent measures under Article II:2

439. Article II:2 provides: “A Member may maintain a measure inconsistent with paragraph 1 [the MFN principle] provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.” This provision allowed WTO members to exempt measures inconsistent with the MFN principle on a schedule. The Annex on Article II Exemptions contains the conditions under which a WTO member could have exempted measures from the MFN principle. The schedule containing such MFN-inconsistent measures forms part of the binding treaty.

440. The first thing to point about Article II:2 is that it no longer provides a basis for exempting measures from the MFN principle. This provision provided a one-time opportunity for WTO members to exempt MFN-inconsistent measures for all service sectors. Article II:2 does not, therefore, allow new MFN-inconsistent measures to be exempted from the MFN principle. If a WTO member wants to exempt an MFN-inconsistent measure now and in the future, then it must seek a waiver from the MFN principle under Article IX:3 of the WTO Agreement (Annex on Article II Exemptions, ¶ 2). The Article IX:3 waiver process requires that waivers be approved by consensus or, if consensus is not achievable, a three-fourths majority of WTO members at a Ministerial Conference. The Ministerial Conference also has powers to review and terminate waivers granted (WTO Agreement, Article IX:4).



441. Article II:2 does not, therefore, provide any flexibility for health policy vis-à-vis the MFN principle. As noted earlier, however, the ability to discriminate as between foreign services or service suppliers is of questionable importance from a health policy perspective, except in some particular cases.

442. Examination of the MFN Exemption Schedules reveals that the word “health” appears in only four MFN Exemption Schedules (Austria, Cyprus, Tunisia, and the United States) (WTO 2002b).⁵²

443. The Austrian MFN Exemption Schedule exempts certain measures under “Road Transport (passengers and freight)” from the MFN principle in GATS in order, among other things, “to protect the integrity of road infrastructure, etc., health and environment” (WTO Doc. GATS/EL/7, at 1).

444. Cyprus’ MFN Exemption Schedule creates an MFN exemption under “Human Health Services” to enable “[p]rovision to Cypriot citizens of medical treatment, not available in Cyprus, in selected countries with which bilateral agreements have been signed or will be signed in the future” (WTO Doc. GATS/EL/25, at 3).

445. Tunisia created an MFN exemption for measures extending social security and health benefits to citizens of other countries with which Tunisia has signed bilateral social security agreements (WTO Doc. GATS/EL/87, at 3).

446. The MFN Exemption Schedule of the United States mentions “health” in exempting from the MFN principle sub-federal taxation measures that create differential tax treatment “based on . . . methods (including environmental and health and safety measures) of performance” (WTO Doc. GATS/EL/90, at 9).

447. In addition to the infrequency with which “health” is mentioned in the MFN Exemption Schedules, few WTO members listed a MFN exemption specifically on a health-related service. The Cypriot exemption mentioned in paragraph 444 represents one such health-specific exemption. Other specific health-service exemptions are: (1) the Dominican Republic’s MFN exemption for measures that require reciprocity from other countries in connection with dental, physiotherapy, medical, paramedical, and nursing services (WTO Doc. GATS/EL/28, at 1); (2) Bulgaria’s MFN exemption for measures that require reciprocity from other countries in connection with public payments for medical and dental services for foreign nationals (WTO Doc. GATS/EL/122,

⁵² “MFN exemptions are quite rare in health services” (Adlung and Carzaniga 2003: 12).

at 4); and (3) Jordan's MFN exemption for measures that require reciprocity from other countries in connection with access to foreign pharmacists and licenses to foreigners to operate medical laboratories (WTO Doc. GATS/EL/128, at 3).



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448. The MFN Exemption Schedules contain, however, many exemptions that affect the provision of health-related services. These exemptions are typically broad exemptions that apply either to all service sectors or to all services within a broadly defined sector or sub-sector, such as Professional Services. In 1998, the WTO Secretariat noted eight MFN exemptions on Professional Services that would apply to the health services falling within this sector (WTO Doc. S/C/W/50, ¶ 63). WTO members have also scheduled MFN exemptions that apply to "All Sectors," meaning that these exemptions also apply to all sectors that involve trade in health-related services. The policy justifications for broad sectoral or "All Sectors" exemptions do not rest on the protection of health and typically refer to other policy objectives, such as allowing the WTO member to treat services or service providers from certain foreign countries more favorably under regional or bilateral investment and trade agreements.

449. Many WTO members have also scheduled exemptions in specific sectors in which health-related services fall. For example, MFN Exemption Schedules contain MFN exemptions for measures applied to "Professional Services," "Telecommunications," and "Financial Services." Although exemptions scheduled for such broad sectors and sub-sectors are not directed toward health-related services, the exemptions' scope would affect trade in health-related services that fall within such sectors or sub-sectors.

Exemptions for advantages conferred to adjacent countries to facilitate local service exchanges

450. Article II:3 exempts from the MFN principle and all other provisions of GATS advantages conferred or accorded to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of locally produced and consumed services. As analyzed earlier, the MFN principle requires that a WTO member accord to the services and service suppliers of other WTO members treatment no less favorable than it accords to like services and service suppliers of any other country (GATS, Article II:1). Article II:3 means that a WTO member may accord to services in contiguous frontier zones of geographically adjacent countries treatment more favorable than it accords to other WTO members as long as such services are locally produced and consumed.



However, Article II:3's conditions—geographically adjacent countries, contiguous frontier zones, and locally produced and consumed services—mean that the MFN exemption it provides may be utilized infrequently.

451. This limited MFN exemption may, however, be useful in certain health contexts. Many countries with contiguous borders, such as the United States and Mexico, engage in various kinds of health policy cooperation in border areas. Under Article II:3, Mexico can treat U.S. services and service providers in the border areas more favorably than it treats like service or service suppliers from other WTO members. For such specific geographical and service contexts, Article II:3 provides some flexibility for health policy.

Economic integration agreements

452. Article V allows a WTO member to treat more favorably countries with which it enters a bilateral or regional agreement liberalizing trade in services, provided that such liberalization agreement (1) has substantial sectoral coverage; and (2) provides for national treatment in substantially all cases (GATS, Article V:1). This provision echoes Article XXIV of GATT, which allows WTO members to enter into bilateral or regional free trade agreements or customs unions without being in violation of the MFN principle. In addition, the need for Article V:1 is apparent because of the existence of arrangements, such as the European Union, that pursue liberalization of services more aggressively than GATS.

453. In essence, Article V:1 creates an opportunity for WTO members to accelerate and/or deepen liberalization in trade in services bilaterally or regionally under certain conditions without having to accord such advantages to all WTO members. Because Article V:1 is an enabling principle rather than an obligation, its relationship to health policy depends on the extent to which WTO members take advantage of it. Many are skeptical of the entire project of liberalization of trade in services, particularly as it relates to health-related services; so critics do not welcome the opportunity provided by Article V:1 to accelerate and deepen liberalization in services trade. The requirement that such bilateral or regional agreements involve substantial sectoral coverage means that such agreements might have to include health-related service sectors in their liberalization and non-discrimination efforts.⁵³

⁵³ See discussion of regional, sub-regional, and bilateral agreements affecting liberalization in services trade in Chapter 13.

Labor market integration agreements

454. Article V *bis* contains another exemption from the MFN principle by allowing WTO members to enter into bilateral or regional agreements establishing full integration of labor markets among the states parties, provided that such agreements exempt citizens of states parties from requirements concerning residency and work permits and is notified to the Council for Trade in Services. This exemption specifically addresses the liberalization of trade in services in Mode 4—the supply of a service by a service provider of one country through physical presence of natural persons of another country.

455. Like Article V:1, Article V *bis* contains no obligations but rather allows WTO members to pursue integration of labor markets (i.e., faster and deeper liberalization of Mode 4 services) if they desire without having to accord all WTO members the same benefits. The effect of Article V *bis* on health policy depends on the extent to which WTO members use its exemption. Most international trade agreements do not involve labor market integration, suggesting that WTO members may not be eager to take advantage of the opportunity Article V *bis* provides.

Discretion to recognize the qualifications of service providers from specific countries

456. Article VII:1 provides that a WTO member “may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country” as part of its standards or criteria for the authorization, licensing, or certification of service suppliers. A WTO member can accord such recognition through agreement with other countries or autonomously. Article VII:1 constitutes an exception to the MFN principle because, under its terms, a WTO member can accord recognition to service providers from one WTO member but not other WTO members, which produces more favorable treatment for the service providers recognized. If a WTO member accords recognition pursuant to Article VII:1, then it must not do so “in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services” (GATS, Article VII:3). While Article VII:1 allows substantive discrimination in favor of recognized service providers, it does not allow procedural discrimination in the application of standards or criteria for authorizing, licensing, or certifying service suppliers.





457. Like Articles II:2, V, and V *bis*, Article VII:1 merely provides WTO members with an option to engage in behavior that otherwise would violate the MFN principle. The decision whether and how to recognize the qualifications of foreign service providers remains in the hands of the WTO member, allowing it to shape such recognition to meet its own policy objectives. Article VII:1 does not, as a result, pose any direct or indirect threat to health policy of WTO members.

458. In the longer term, the recognition provisions in Article VII:1, and the mutual recognition arrangements made under it, may encourage more active multilateral efforts at the substantive harmonization of standards and criteria for licensing and certifying service suppliers. This possibility may be worrying from the perspective of health policy. At present, however, efforts to promote multilateral harmonization efforts of substantive criteria for the authorization, licensing, and certification of service suppliers does not seem a pressing concern in any health-related service sector.

Government procurement exception to the MFN principle

459. Article XIII:1 provides that the MFN principle (and specific market access and national treatment commitments) shall not apply to measures governing procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale. The MFN principle does not, therefore, apply to governmental procurement of health-related services for governmental, non-commercial purposes.

460. As discussed in Chapter 5, whether a government supplies a service “on a commercial basis” has been the subject of interpretive controversy with regard to GATS Article I:3(c). The same interpretive issue arises in connection with Article XIII:1 because this provision exempts from the MFN principle government procurement of services for non-commercial purposes. As argued earlier, the ordinary meaning of “commercial” for purposes of GATS refers to profit-seeking behavior. As long as governmental agencies of WTO members procure services for use only in non-commercial activities, Article VIII:1 provides a WTO member full freedom to procure health-related services for governmental purposes without any constraints from the MFN principle. This freedom ends, however, as soon as the government procures services for commercial purposes, as often might be the case.

Justification for violations of the MFN principle in connection with double taxation treaties



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461. Article XIV(e) of GATS allows a WTO member to justify treatment that is inconsistent with the MFN principle provided that it results from an agreement or arrangement on the avoidance of double taxation to which the WTO member is bound. This exception for MFN-inconsistent behavior has no connection to health policy.

8.1.2 GENERAL EXCEPTIONS

462. GATS provides two general exception provisions that can justify violations of the obligations imposed by the Agreement. In addition, the WTO Agreement provides a mechanism that can be used to exempt a WTO member from any obligation imposed by a WTO agreement. Table 8.1.2 summarizes these provisions.

TABLE 8.1.2 GENERAL EXCEPTIONS UNDER GATS AND WTO WAIVER PROCEDURE

Article	Substantive Content
GATS XIV	Provides general exceptions for violations of GATS obligations for measures that, <i>inter alia</i> , relate to the protection of human health
GATS XIV <i>bis</i>	Provides exception for violations of GATS obligations for measures related to a WTO member's national security
WTO Agree. IX:3	Creates a process by which WTO members acting through a Ministerial Conference can waive a requesting WTO member's compliance with a GATS obligation

The general exceptions

463. Article XIV sets out the so-called "general exceptions," which justify the violation of GATS principles if all the conditions are satisfied. This provision is analogous to the general exceptions provision in GATT—Article XX. In fact, GATS Article XIV and GATT Article XX contain identical language in connection with the exception relating to measures to protect human health. GATT Article XX contains an exception for measures relating to the conservation of exhaustible natural resources that does not appear in GATS Article XIV (Sinclair and Grieshaber-Otto 2002: 38). We return to this issue after first setting out the rules in Article XIV that connect to health policy.



464. In order to appeal to the general exceptions in Article XIV, a WTO member in violation of a GATS obligation first has to show that the measure in question falls within one of the categories of exceptions Article XIV provides.⁵⁴ Two of these categories deal exclusively with measures relating to taxation (Articles XIV(d) and (e)) and thus are of no concern for purposes of this Legal Review.

465. Another category provides an exception for measures relating to the protection of public morals or public order (Article XIV(a)); again, WTO members are unlikely to utilize this exception for purposes of health policy because Article XIV provides a specific exemption for health purposes.⁵⁵ Another category provides an exception for measures relating to securing compliance with laws or regulations that are not inconsistent with GATS, including laws on the prevention of fraud, service contract defaults, protection of privacy, and safety (Article XIV(c)).⁵⁶ The measure that violates a GATS principle must, in other words, be linked to securing compliance with another law or regulation that does not violate GATS. Theoretically, a WTO member could use this exception in the context of health-related services; but this exception is not likely to generate much attention in connection with health policy.

466. The center of action for health policy in terms of general exceptions will be Article XIV(b), which provides an exception for non-compliant measures that are “necessary to protect human, animal or plant life or health.” As indicated above, the wording in Article XIV(b) is identical to the language of Article XX(b) of GATT; so GATT jurisprudence on Article XX(b) will be important to interpreting Article XIV(b).⁵⁷ This connection between GATT Article XX(b) and GATS Article XIV(b) may raise concerns because of the way in which dispute panels interpreted Article XX(b), particularly the necessity test built into the provision (GATSwatch.org 2001; Joint Submission to the World Health Assembly 2003: 3).

467. In GATT Article XX jurisprudence, dispute settlement panels have made clear that the WTO member appealing to Article XX to justify a measure that violates a GATT principle bears the burden of proof to establish that it meets all the requirements of Article XX. (The complaining WTO member bears the burden of establishing that a principle of GATT has been violated.) The same burden of proof allocation exists for GATS

⁵⁴ Following the interpretations of Article XX of GATT, the panel in *US—Gambling* held that, for a measure to be justified under Article XIV of GATS, it first has to “fall within the scope of one of the recognized exceptions set out in paragraphs (a) to (e) of Article XIV in order to enjoy provisional justification” (¶ 6.449).

⁵⁵ In *US—Gambling*, the United States included health concerns in its arguments under Article XIV(a) of GATS. The panel accepted the U.S. arguments “that remote gambling presents ‘special health risks’ associated with the isolated and anonymous environment in which such gambling takes place. We do not consider that Antigua’s evidence disproves the existence of this specific concern” (¶ 6.514). The panel’s interpretation of Article XIV(a) in *US—Gambling* can be found in ¶¶ 6.455-6.535 of the Panel Report.

⁵⁶ The panel in *US—Gambling* interpreted Article XIV(c) of GATS (¶¶ 6.536-6.565).

⁵⁷ “Given the textual similarity between Article XX of GATT and Article XIV of the GATS, and the similar purposes that both Articles are designed to serve, we consider that GATT/WTO jurisprudence in relation to the former may be relevant and useful in the interpretation of the latter” (Panel Report, *US—Gambling*, ¶ 6.448).

Article XIV—the WTO member attempting to justify a violation of a GATS obligation would bear the burden of establishing that it satisfies all elements of the applicable exception.⁵⁸



468. To justify a non-compliant measure under GATS Article XIV, the respondent WTO member would have to satisfy the burden of proof at three successive analytical steps. First, the WTO member appealing to Article XIV would have to show that the non-complying measure falls into one of Article XIV exceptions. For example, if a WTO member wanted to justify a non-complying measure under Article XIV(b), then it would have to show that the measure relates to the protection of human, animal, plant life or health.

469. Second, the WTO member would have to demonstrate that it meets all the requirements of the specific exception. Thus, in an appeal to Article XIV(b), the WTO member would have to show that its non-complying measure was “necessary” to protect human, animal, or plant life or health. Under GATT Article XX(b), “necessary” means that the measure has to be the least trade-restrictive measure reasonably available to achieve the stated health objective. Most commentators agree that WTO dispute settlement panels would interpret the necessity test in GATS Article XIV(b) the same way they have interpreted it in cases involving GATT Article XX. In *US—Gambling*, the first GATS case involving an interpretation of Article XIV, the panel’s analysis of the necessary test in Article XIV(a) and Article XIV(c) involved references to case law applying the necessary test in GATT Article XX(b) and XX(d).⁵⁹ As indicated earlier, in only one case in the history of GATT and the WTO has a measure survived scrutiny under Article XX(b)’s necessity test, and this occurred in *EC—Asbestos*. The necessity test applied in the context of trade in services may affect health policy because health-related measures may not survive the test. We return to this issue in a moment.

470. The third analytical step required by GATS Article XIV involves the WTO member in question demonstrating that the non-compliant measure not only relates to a listed exception and satisfies all the requirements of such exception but also meets all the requirements contained in the introductory paragraph of Article XIV (*US—Gambling*, ¶ 6.449). (The identical introductory paragraph in GATT Article XX(b) is known as the *chapeau*.) The *chapeau* of Article XIV requires that measures “are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.”

⁵⁸ In *US—Gambling*, the panel stated that “[i]t is well established under WTO law that it is for the Member invoking the application of a justification provision (such as Article XIV of the GATS) to demonstrate that it has complied with the requirements of such a provision” (¶ 5.26) and “a party seeking to invoke Article XIV of the GATS bears the burden of proof to demonstrate that the various elements comprising a defence under this Article have been fulfilled” (¶ 6.450).

⁵⁹ Specifically, the panel referred to *Korea—Various Measures on Beef* (interpreting GATT Article XX(d)) and *EC—Asbestos* (interpreting GATT Article XX(b)) in determining that the necessary test in Articles XIV(a) and (c) of GATS involves a “weighing and balancing test” comprised of three elements: (1) the importance of interests and values that the challenged measure is intended to protect; (2) the extent to which the challenged measure contributes to the realization of the end pursued by that measure; and (3) the trade impact of the challenged measure (¶ 6.477).



471. In GATT Article XX jurisprudence, the WTO Dispute Settlement Body has applied the *chapeau* to measures falling within an Article XX exception. In only two WTO cases involving application of the *chapeau* have the measures in question survived: *EC—Asbestos* and *US—Shrimp* (2001). Measures failed at the *chapeau* stage of interpretation in *US—Gasoline* and *US—Shrimp* (1998). We return to the disciplines applied by the *chapeau* in GATS Article XIV below.

472. As jurisprudence under GATT Article XX(b) suggests, carrying the burden of proof through all three analytical stages outlined above proves difficult for WTO members seeking to justify non-compliant measures; and there seem to be no reasons to believe that the burden of proof will be less difficult to satisfy under GATS Article XIV.⁶⁰ Non-compliant measures connected to protecting human health are not accorded special consideration under the principles in either GATT Article XX(b) or GATS Article XIV(b).

473. Underscoring these concerns is the fact that GATS Article XIV does not contain a specific exception for the conservation of exhaustible natural resources as GATT Article XX does. Although it may be argued that Article XIV(b) catches environmental measures designed to protect human health, two counterarguments have been suggested, only one of which is directly relevant to this Legal Review.

474. The first argument is that GATS does not provide for a specific exception that justifies non-compliant measures that seek to conserve environmental resources unrelated to the protection of human health (e.g., the protection of endangered animal species in connection with the regulation of eco-tourism) (GATSwatch.org 2001). Protection of endangered animal species would have to be handled under GATS Article XIV(b). Because this argument does not hinge on the protection of human health, it is not pursued here.

475. The second argument is relevant to the purposes of this Legal Review. The failure to include a specific environmental exception in GATS Article XIV forces environmental provisions connected to health policy to pass the necessity test, something similar provisions did not face in the context of GATT Article XX(g). This GATT exception provided a justification for non-compliant measures “relating to the conservation of exhaustible natural resources” but did not contain the necessity test. *US—Gasoline* demonstrated the relevance of GATT Article XX(g) to health policy because the clean air standards adopted by the United States related to the conservation of the exhaustible natural resource of clean air.

⁶⁰ The panel in *US—Gambling* held, for example, that the United States’ non-compliant measures on gambling and other betting services did not survive scrutiny under the necessity test in Articles XIV(a) and (c) or the *chapeau* of Article XIV. The United States was expected to appeal these panel rulings.

476. A non-compliant measure involving the protection of exhaustible natural resources (e.g., air, water) important for health policy purposes thus had two possible justifications under GATT Article XX—Articles XX(b) and XX(g)—one of which did not involve the necessity test (Article XX(g)). As indicated by the category of Environmental Services in the Services Sectoral Classification List, the quality of exhaustible natural resources such as air and water is not outside the context of trade in services. Under GATS Article XIV, only Article XIV(b) would be available; and it applies the necessity test.

477. As analyzed earlier, the necessity test in GATT Article XX(b) requires that the measure in question is the least trade-restrictive measure reasonably available to the WTO member to achieve the relevant health-protecting objective. Article XX(b) jurisprudence makes clear that Article XX(b) does not regulate the ability of WTO members to set their own level of health protection. Article XX(b) regulates *how* a WTO member achieves the level of health protection it selects—the measure chosen to achieve that level has to be the least-trade restrictive measure reasonably available to reach that level of protection. As explored earlier, alternative measures have to be (1) less trade-restrictive than the measure chosen; and (2) potentially as effective in achieving the WTO member’s chosen level of health protection. As the panel report in *US—Gambling* illustrates, WTO members and dispute panels are likely to interpret Article XIV(b) in the same way.

478. Unlike in the context of claims under Article VI:4 disciplines or Article VI:5, the WTO member appealing to Article XIV(b) has the burden of proving that alternative measures are either (1) not less trade-restrictive; or (2) not potentially as effective as the chosen measure at achieving the level of health protection sought. Because identifying less trade-restrictive measures has not proven difficult historically, the focus in disputes is likely to be on whether an alternative measure is potentially as effective at achieving the desired level of health protection as the measure actually used. This issue was, in fact, a central question in the first GATS dispute involving an appeal to Article XIV, *US—Gambling*: whether the United States had exhausted GATS-consistent alternatives to its non-compliant measures on gambling and other betting services (¶¶ 6.526, 6.528).

479. The Appellate Body’s interpretation of GATT Article XX(b) in *EC—Asbestos* may influence how less trade-restrictive measures are vetted for their effectiveness in achieving the level of health protection sought by a WTO member under GATS Article XIV(b). According to the Appellate Body in *EC—Asbestos*, the review of the





effectiveness of an alternative, less trade-restrictive measure must be as severe as the policy objective pursued is important. Because the protection of human health is of vital importance, the Appellate Body reviewed alternative measures to the ban on asbestos very strictly, concluding that none of the suggested alternatives (e.g., regulation of uses of asbestos products) would prove as effective as the ban in eliminating the chances for the contraction of asbestos-related diseases (*EC—Asbestos*, ¶¶ 172-74).⁶¹

480. WTO members appealing to GATS Article XIV(b) could endeavor to strengthen their efforts to establish the necessity of the measure chosen through reference to scientific evidence, public health principles, and international standards developed by relevant international organizations. Scientific evidence about the dangers of asbestos generated by national governments, private research, and international organizations played a significant role in legal reasoning in the *EC—Asbestos*.

481. The use of science, public health principles, and international standards face, however, a different context in the services realm than with trade in products. Asbestos as a product is dangerous to human health. The same direct danger to human health cannot be established in connection with many services.⁶² For example, water distribution is not, by itself, dangerous to human health. Distribution of contaminated water is, however, a threat to public and individual health. GATS Article XIV(b) does not regulate the level of water quality a WTO member chooses for its population because WTO members are free to select the level of health protection they desire.

482. If a WTO member appealing to GATS Article XIV(b) succeeds in showing that the measure in question is necessary to protect human health, then the final requirement for such member is to demonstrate that the measure is not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade. The *chapeau* of Article XIV is identical to the *chapeau* of GATT Article XX; and, as illustrated by the panel decision in *US—Gambling*, Article XX jurisprudence will influence the interpretation of Article XIV's introductory paragraph.⁶³

⁶¹ The panel in *US—Gambling* referred to this aspect of *EC—Asbestos* (¶ 6.477) and held that the U.S. interests and values protected by the non-compliant measures “serve very important societal interests that can be characterized as ‘vital and important in the highest degree’ in a similar way to the characterization of the protection of human life and health against a life-threatening health risk by the Appellate Body in *EC—Asbestos*” (¶ 6.492). Nevertheless, the panel held that the measures were not necessary under Article XIV(a) and (c) because the United States had not exhausted GATS-consistent alternative measures, including bilateral or multilateral consultations or negotiations with Antigua (¶¶ 6.533-6.534; 6.564-5.565). The United States objected to this panel holding at the stage of the Interim Report to the parties (¶ 5.25), and this issue will likely form part of the United States’ appeal in this case.

⁶² As noted earlier, part of the U.S. argument in *US—Gambling* under Article XIV(a) was that remote gambling and other betting services had the potential to cause adverse health effects on users (¶¶ 6.510-6.514); but the United States did not appeal to Article XIV(b) in defending its measures.

⁶³ “The Panel notes that the chapeau of Article XIV is textually similar to the chapeau of Article XX of the GATT 1994. On the basis of the comments made by the Appellate Body . . . regarding the applicability of jurisprudence under the GATT 1994 to the GATS, we will refer to such jurisprudence to the extent to which it is applicable and relevant in interpreting and applying the chapeau to Article XIV in this case” (*US—Gambling*, ¶ 6.571).

483. The *chapeau* of GATT Article XX did not become a serious matter of concern in GATT dispute settlement until *US—Gasoline*. In that case, the Appellate Body held that U.S. clean air standards violated the national treatment principle in Article III:4 of GATT but fell within Article XX(g) on conservation of exhaustible natural resources and satisfied the requirements of that exception (*US—Gasoline*, p. 26). The Appellate Body ruled, however, that the United States applied these clean air standards in a manner that constituted arbitrary and unjustifiable discrimination in violation of the *chapeau* of Article XX (*US—Gasoline*, p. 26). Thus, the United States could not justify its violation of the national treatment principle under Article XX. In addition to *US—Gasoline*, the *chapeau* of Article XX has been applied in *EC—Asbestos* (under Article XX(b)) and *US—Shrimp* (under Article XX(g)).



484. In *US—Gasoline*, the Appellate Body emphasized that the disciplines in the *chapeau* of GATT Article XX(b) focus on the *application* of the measure in question rather than the measure itself. In that case, the U.S. clean air standards violated the national treatment principle in GATT Article III:4. The Appellate Body stressed that the standards could not be held to be unjustifiable discrimination under the *chapeau* of Article XX simply because they violated the national treatment principle; such a result would collapse Article XX into Article III:4 and essentially provide no opportunity to appeal to general exceptions (*US—Gasoline*, p. 20). The analysis in the *chapeau* has to be distinct and focus on the manner in which the non-compliant measure is applied in the circumstances of the case.

485. The same logic applies to the *chapeau* of GATS Article XIV.⁶⁴ A measure found to violate the MFN principle cannot, for example, be held to violate Article XIV's introductory paragraph because the measure discriminates in violation of GATS Article II:1. Analytically, a case never reaches scrutiny under the *chapeau* of Article XIV unless a measure discriminates or restricts trade in violation of some GATS provision. The *chapeau* applies disciplines to the manner in which such discriminatory or trade-restrictive measures are applied by a WTO member.

486. The *chapeaux* of both GATT Article XX and GATS Article XIV prohibit the application of non-compliant measures in a manner that would constitute a (1) means of arbitrary or unjustifiable discrimination between countries where like conditions prevail; or (2) disguised restriction on trade. The purpose of the *chapeau* in both agreements is to prevent abuse of the general exceptions by WTO members.⁶⁵ For this reason,

⁶⁴ *US—Gambling*, ¶ 6.581, applying interpretative principles developed under the *chapeau* of GATT Article XX to GATS Article XIV.

⁶⁵ *US—Gambling*, ¶ 6.581, noting purpose of *chapeau* of GATT Article XX and GATS Article XIV is to ensure that exceptions in these provisions are not abused.



the Appellate Body in *US—Gasoline* did not draw sharp distinctions between the “arbitrary or unjustifiable discrimination” standard and the “disguised restriction on trade” standard (*US—Gasoline*, p. 22).

487. The disciplines in the *chapeaux* of GATT Article XX and GATS Article XIV do not constitute very clear rules in spite of the Appellate Body’s efforts in *US—Gasoline* to clarify their meaning. Pinning down the disciplines proves difficult even for the panels and Appellate Body of the WTO. This situation presents difficulties for the respondent WTO member appealing to GATT Article XX or GATS Article XIV because the parameters of what is required to establish that the *chapeau*’s disciplines have been met remains ambiguous.

488. In *US—Gasoline* and *US—Shrimp* (1998), the Appellate Body’s holdings that the United States failed at the *chapeau* in its efforts to justify non-compliant measures through GATT Article XX(g) focused on the lack of effort the United States made to mitigate either the discrimination (*US—Gasoline*) or the trade restrictiveness (*US—Shrimp* (1998)) created by the application of the environmental measures. In both cases, the Appellate Body discussed other ways in which the United States could have applied the measures that would have lessened their discrimination and the trade restrictiveness. As the Appellate Body said in *US—Gasoline*, the central question the *chapeau* raises is whether non-compliant measures have been “applied reasonably, with due regard to both the legal duties of the party claiming the exception and the legal rights of the other parties concerned” (*US—Gasoline*, p. 20).

489. Another way to think of the *chapeau*’s disciplines is to see them requiring the application of the measures to be necessary in the sense that the application is the least discriminatory or trade-restrictive application reasonably available under the circumstances to implement the measures effectively. This interpretation is consistent with the rulings of the Appellate Body in *US—Gasoline* and *US—Shrimp* (1998) in which the Appellate Body found fault with U.S. application of environmental measures when less discriminatory or trade restrictive methods of application were available. It is also consistent with the panel’s interpretation of the *chapeau* of Article XIV of GATS in *US—Gambling* when it held that the United States failed to demonstrate that the application of its prohibition on the remote supply of gambling services for horse racing did not constitute arbitrary or unjustified discrimination or a disguised restriction on trade because the United States appeared to allow remote supply of gambling services for horse racing in the United States (¶ 6.608).

490. Likewise, the Appellate Body upheld the U.S. application of its non-compliant environmental measure under the *chapeau* of GATT Article XX in *US—Shrimp* (2001) because the United States took steps to apply the ban in a manner that reduced its trade restrictiveness. Further, this interpretation of the *chapeau* does not duplicate the necessity test in specific exceptions, which focuses on whether the substance of the non-compliant measure is the least trade-restrictive reasonably available to achieve the policy objective in question. The *chapeau's* “necessity test” focuses instead on the *application* of the non-compliant measure.



491. This reading of the meaning of the *chapeaux* of GATT Article XX and GATS Article XIV does not provide comfort from the perspective of health policy. One necessity test is bad enough, critics might say, without reading the *chapeaux* of these agreements to embody another necessity test for the application of health-related measures.

492. However, interpreting the *chapeaux* of GATT Article XX and GATS Article XIV to incorporate a necessity test for the application of non-compliant measures at least clarifies what a WTO member seeking to rely on the general exceptions of these two agreements has to establish to satisfy its burden of proof. In the context of the application of measures necessary to protect human health, the Appellate Body's statements about the vital importance of protecting human health should also influence the operation of the *chapeau's* necessity test by requiring strict scrutiny of the potential effectiveness of alternative measure-application options.

493. This interpretation of the *chapeaux* of GATT Article XX and GATS Article XIV does not mean that the burden on a WTO member seeking to justify a non-compliant health-related measure becomes insignificant. The burden remains substantial: (1) that the substance of the measure in question relates to the protection of human health; (2) that the measure is the least trade-restrictive measure reasonably available to meet the desired health objective; and (3) that the application of the measure is the least discriminatory or trade restrictive way to implement the measure effectively to achieve the desired health goal. Any WTO member that finds itself having to justify a measure that violates a GATS principle under Article XIV faces a challenging task.

494. Some critics of GATS have called for Article XIV to be re-negotiated to provide greater protection for public interest regulation, such as health (Sinclair and Grieshaber-Otto 2002: 39); but, as this seems unlikely to happen in the immediate future, the Legal Review's interpretation attempts to clarify the disciplines of the



chapeau of GATS Article XIV to assist WTO members in meeting their burden of proof under it. In addition, the “strict scrutiny” doctrine the Appellate Body enunciated in *EC—Asbestos* could be used in dealing with GATS disputes that turn on the application of Article XIV(b).

National security exception

495. Article XIV *bis* of GATS allows WTO members to justify violations of GATS principles on national security grounds. Article XIV *bis* mirrors GATT’s Article XXI where the same national security exception appears. Unlike the general exceptions in GATT Article XX and GATS Article XIV, the national security exceptions in GATT and GATS are self-executing. A WTO member invoking the national security exception must neither demonstrate that its action relates to national security nor face any challenge or review by any other WTO member.

496. Despite such a powerful exception being available, GATT contracting parties rarely utilized the national security exception in GATT Article XXI. The same pattern is likely to prevail under GATS Article XIV *bis* as well. As a result, there seems little purpose in exploring this exception further in connection with health policy.

Waiver of GATS obligations

497. Article IX:3 of the WTO Agreement establishes a procedure under which a WTO member can request a waiver of any obligation under WTO agreements, including GATS. This procedure constitutes another possible way for a WTO member to be excused from its general obligations and specific commitments under GATS. Waivers of GATT provisions occurred prior to the creation of the WTO (see GATT Article XXV:5), so waiver requests may well appear in the operation of GATS. The requirements of Article IX:3 of the WTO Agreement make getting a waiver difficult because the waiver has to be granted by the Ministerial Conference by consensus or by a three-fourths majority vote when consensus cannot be achieved. In addition, the Ministerial Conference will review any waiver granted and can modify or terminate the waiver. It seems unlikely that WTO members will utilize Article IX:3 of the WTO Agreement much for health policy purposes, but the option is always available.

8.1.3 BALANCE OF PAYMENTS SAFEGUARD EXCEPTION TO SPECIFIC COMMITMENTS

498. Article XII of GATS provides: “In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including payments or transfers for transactions related to such commitments.” GATT has a similar balance-of-payments provision (GATT, Article XII). A WTO member’s use of Article XII of GATS will not be triggered by health policy concerns but economic and financial problems, so this provision is not directly relevant to analyzing GATS’ potential impact on health policy. Restrictions on trade in services applied pursuant to Article XII could, however, affect trade in health-related services; but again the driving forces in this context are not the protection of health.



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8.1.4 DENIAL OF BENEFITS

499. The final category of exceptions to substantive general obligations under GATS is Article XXVII, which allows a WTO member to deny the benefits of GATS to the supply of a service or a service supplier if such member establishes that such service or supplier is (1) not a service or supplier of another WTO member; or (2) a service or supplier from a WTO member to which the denying member does not apply the WTO Agreement. The first aspect of this provision is a straightforward application of the international legal principle that treaty rights only accrue to states that have ratified the treaty in question. A WTO member is under no GATS obligation to accord service or service providers from countries that are not WTO members the benefits under GATS. The second part of this provision refers to a rule in the WTO Agreement that allows a WTO member not to apply WTO agreements between itself and any other WTO member (WTO Agreement, Article XIII:1). The denial-of-rights principle in GATS Article XXVII has little significance for health policy, so this provision is not explored here.



8.2 Exceptions to Specific Commitments

500. A WTO member that violates a specific commitment may attempt to justify such violation by reference to the general exceptions in Article XIV (as the United States attempted in *US—Gambling*) or the national security exception in Article XIV *bis*. The Legal Review examined these exceptions in Section 8.1.2 above, and this analysis applies to using these exceptions to justify the violation of a specific commitment. For health policy purposes, Article XIV(b) seems the most important general exception, and the earlier analysis extensively covered this exception for human health protection.

501. A WTO member seeking to engage in behavior not allowed by a specific commitment may also seek a waiver from the Ministerial Conference pursuant to Article IX:3 of GATS (see also Section 8.1.2). If a WTO member wants to implement restrictions on trade subject to specific commitments in order to deal with a serious balance-of-payments problem or external financial difficulties, then it may do so under the conditions specified in Article XII of GATS (see Section 8.1.3). Finally, Article XXVII provides a procedure through which a WTO member may deny the benefits of GATS, including specific commitments, to a service or service supplier if such service or service supplier (1) does not come from another WTO member; or (2) comes from a WTO member to which the denying member does not apply the WTO Agreement (see Section 8.1.4).

Chapter 9

ANALYSIS OF HEALTH-RELATED COMMITMENTS IN GATS SCHEDULES



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502. In this chapter, we briefly look at the commitments made in health-related service sectors to provide an overview of the specific commitments made to date by WTO members. This Legal Review has already indicated that the level of specific market access and national treatment commitments in health-related service sectors is, to date, not very significant. This situation holds across the broad scope of service sectors related to health identified in Table 5.2. This reality informs the conclusion of WHO and WTO that “all information to date suggests that current patterns and levels of health services trade are occurring irrespective of GATS. . . . The overall effect of GATS on trade in health services is thus likely to have remained negligible to date” (WHO/WTO 2002: 117-18).

503. Previously published literature has demonstrated that the level of market access and national treatment commitments in service areas most often connected with health is not significant compared to other service sectors. Table 9.1 reproduces, for example, the results of calculations Adlung and Carzaniga made on the level of specific commitments for certain health services as of July 2000 (Adlung and Carzaniga 2001: 358). Adlung and Carzaniga concluded that “no service sector other than education has drawn fewer bindings among WTO Members than the health sector” (Adlung and Carzaniga 2001: 356; Adlung and Carzaniga 2003: 8).

TABLE 9.1 SPECIFIC COMMITMENTS OF WTO MEMBERS ON INDIVIDUAL HEALTH SERVICES
(JULY 2000)

Health Service	Number of WTO Members Making Specific Commitments	% of Total Number of WTO Members in July 2000 (138)
Medical and dental services	54	39%
Services provided by midwives, nurses, and physiotherapists	29	21%
Hospital services	44	32%
Other human health services	17	12%



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504. Accessions to the WTO have increased the number of countries making specific commitments in health services but not significantly. As of June 2003, Adlung and Carzaniga counted 62 WTO members making commitments in medical and dental services, 52 in hospital services, 34 in services provided by midwives, nurses, and physiotherapists, and 22 in other human health services (Adlung and Carzaniga 2003: 17).

505. From a health policy perspective, the health services analyzed by Adlung and Carzaniga are important but do not represent the full spectrum of health-related services within the scope of GATS. As of 2000, WHO and the WTO Secretariat noted that 78 WTO members had made specific commitments in the health insurance sector (WHO/WTO 2002: 116). Environmental services, such as sanitation, sewage, and refuse disposal, are important health-related services. Specific commitments on these health-related services are also not significant as a percentage of the total number of WTO members (see Table 9.2).

TABLE 9.2 COMMITMENTS IN ENVIRONMENTAL SERVICES RELEVANT TO HEALTH POLICY (DECEMBER 2002)

Environmental Service	Number of WTO Members Making Specific Commitments	% of Total Number of WTO Members in January 2002 (144)
Sanitation services	46	32%
Sewage services	45	31%
Refuse disposal	44	30%

506. Another important health-related service implicated by GATS is the distribution of water for human consumption. Currently, the GATS Services Sectoral Classification List does not specifically list water distribution for human use, which “is the principle reason why no government has yet made a commitment in water distribution” (Joy and Hardstaff 2003: 22). The European Union is, however, making requests in the GATS 2000 negotiations for specific commitments from other WTO members on water for human use (Joy and Hardstaff 2003: 22-29). By contrast, the initial offer of the United States in the GATS 2000 negotiations expressly excludes water for human use in the specific commitments the United States is initially willing to make (United States 2003), which gives countries seeking to exclude water for human use from their GATS negotiating positions a precedent to follow. Water distribution services might be a controversial issue in the GATS 2000 negotiations (Shrybman 2002; Center for International Environmental Law 2003; Joy and Hardstaff 2003; Polaris Institute 2003).

507. Wholesale and retail distribution services also are important health-related services because products of health policy concern, such as pharmaceutical products, tobacco, alcohol, and firearms, are disseminated in populations through such services. Concerns about GATS' potential impact on health policies on alcohol control have been expressed (Grieshaber-Otto and Schacter 2001). As of 2000, 30 WTO members had made specific commitments on retailing services (WTO 2002b), and 31 WTO members had specific commitments on wholesale trade services (European Commission 2002).



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508. Aggregate figures on the number of WTO members that have made specific commitments in health-related sectors do not, however, provide an accurate account of the nature of the specific commitments undertaken by any given WTO member. If a WTO member makes only one partial commitment in one mode of service supply in a given sector, then it is counted in aggregate analysis even though its level of liberalization in that sector is low. In addition, commitment levels may vary between market access and national treatment and among the four modes of supply.

509. In 1998, the WTO Secretariat noted, for example, that only 12 of the 49 WTO members with commitments in the medical and dental services sector and nine of the 39 WTO members with commitments in hospital services made full commitments for both market access and national treatment with no limitations in sectoral coverage (WTO Doc. S/C/W/50, Table 4). Adlung and Carzaniga noted that WTO members exhibited a high percentage of unbound commitments in Mode 1 (cross-border service supply) in both market access and national treatment for medical and dental services (50%), nursing and similar services (60%), and hospital services (65%) (Adlung and Carzaniga 2001: 358). WTO members made more binding liberalization commitments in Mode 2 (service consumption abroad) (Adlung and Carzaniga 2001: 358). Analyses have also shown a lack of specific commitments in the health services area in Mode 4 (S/C/W/50, ¶¶ 57-60; Adlung and Carzaniga 2001). In terms of health insurance commitments, data indicate that WTO members have made far more partial and unbound commitments in market access and national treatment than full commitments across all four modes of supply (WHO/WTO 2002: 116-17).

510. Further, the fact a WTO member makes few or no specific commitments in a health-related sector does not necessarily mean that it is not open to foreign services or service suppliers (WTO Doc. S/C/W/50, ¶ 49). As the WTO Secretariat observed, "schedules do not necessarily provide an accurate, let alone comprehensive, picture of actual trade and market conditions" (WTO Doc. S/C/W/50, ¶ 49).



511. Aggregate analysis of specific commitments also does not reflect how WTO members may make commitments in a service sector, such as distribution services, but exclude from such commitments products important to health policies, such as firearms, alcohol, and tobacco. A number of WTO members that made specific commitments on distributions services expressly excluded, for example, alcohol, tobacco, and firearms at either the wholesale or retail levels or both (Grieshaber-Otto and Schacter 2001; WTO 2002b). Norway's schedule of specific commitments expressly excludes from its commitments on wholesale trade services and retailing services import and trade in alcohol, arms, and pharmaceuticals but not tobacco (WTO 2002b). Austria excludes, among other things, tobacco, firearms, and pharmaceuticals but not alcohol from its commitments under distribution services (WTO 2002b).

512. These observations about the limitations of aggregate analysis of specific commitments in health-related sectors reveal the complexity created by the structure and dynamics of Part III of GATS. The hybrid "positive list" and "negative list" approaches found in Articles XVI and XVII, combined with the four modes of supply, create a complex matrix for each WTO member across many health-related service sectors. Generalizations about the nature of the impact of specific commitments on health policy generally or for any given WTO member should be viewed with skepticism.

513. Specific and detailed analysis of a WTO member's specific commitments in health-related service sectors would be required to make informed judgments about whether and how such commitments affect that WTO member's health policy. Such analysis is beyond the scope of this Legal Review. This kind of country-specific analysis is, however, important for WTO members both to assess the impact of existing commitments and to prepare for the intensification of GATS 2000 negotiations. As a legal strategy, ministries of health in WTO members could engage in such detailed analysis of their specific commitments from a health policy perspective.

514. One such analysis of country-level specific commitments in the health context has been published by Matthew Sanger of the Canadian Centre for Policy Alternatives (Sanger 2001).⁶⁶ Sanger's report "assesses the implications of the General Agreement on Trade in Services for Canada's health care system" (Sanger 2001: i). Sanger's analysis found "that Canada's health care system is *already* more exposed to GATS rules than Canadians have been led to believe and that the GATS 2000 negotiations threaten to further extend [GATS'] coverage of health care" (Sanger 2001: i). Sanger's analysis utilizes health policy ideas, such as a framework

⁶⁶ The World Development Movement has also produced a guide to the United Kingdom's commitments under GATS, which includes analysis of commitments made in health-related sectors (World Development Movement 2002); and the Center for Policy Analysis on Trade and Health has analyzed U.S. commitments under GATS concerning health-related services (CPATH 2004b). Maskay provided a brief analysis of GATS and health-care systems reform in Nepal (Maskay 2004).

for evaluating population health and the human right to health (Sanger 2001: 3-8, 17-20). Sanger's approach is also relevant because, while the focus is GATS, the importance of NAFTA as a regional trade and investment agreement also is made clear (Sanger 2001: 8-13).

515. WHO could assist this endeavor by developing an analytical template to guide ministries of health through a health policy review of their countries' existing GATS specific commitments. Such a template could help WTO members, especially developing countries, map their existing specific commitments against key health policy concepts, practices, and principles. A mapping exercise could also help ministries of health clarify the "regulatory footprints" that exist in the various service sectors relevant to health policy, which are important in deciding whether to make future market access or national treatment commitments. This effort may also provide WTO members with a tool that assists them in strategically shaping future specific commitments such members think are needed in order to improve the health of their populations (e.g., access to foreign telehealth suppliers).



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Chapter 10

GATS DISPUTE SETTLEMENT AND INSTITUTIONS



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516. The WTO dispute settlement mechanism makes the interpretive controversies surrounding GATS very real as a practical matter. Indeed, as noted in earlier chapters, WTO dispute settlement panels and/or the Appellate Body have already decided cases involving claims under GATS (i.e., *EC—Bananas III*, *Canada—Autos*, and *US—Gambling*). In addition, other cases brought under the WTO dispute settlement mechanism involving GATS are at various stages in the dispute settlement process (see Table 10).

TABLE 10. WTO CASES INVOLVING CLAIMS OF GATS VIOLATIONS AS OF OCTOBER 2004

Dispute Settlement Category	Case Name	GATS Claims
<i>Pending Consultations</i>	Nicaragua—Measures Affecting Imports from Honduras and Columbia (II) (WT/DS201)	Honduras claims a tax on services coming from or originating in Honduras and Columbia violates Articles II and XVI of GATS
	Canada—Measures Affecting Film Distribution Services (WT/DS117)	European Communities claims Canadian measures on film distribution services violate Articles II and III of GATS
	Belgium—Measures Affecting Commercial Telephone Directory Services (WT/DS80)	United States claims Belgian measures on telephone directory services violate Articles II, VI, VIII, and XVII of GATS
	Japan—Measures Affecting Distribution Services (WT/DS45)	United States claims that Japanese measures on distribution services violate Articles III and XVI of GATS
	European Communities—Regime for the Importation, Sale, and Distribution of Bananas (WT/DS16)	Guatemala, Honduras, Mexico, and the United States claim the EC regime on banana importation violates Articles II, XVI, and XVII of GATS
<i>Reports Circulated</i>	United States—Measures Affecting Cross-Border Supply of Gambling and Betting Services (WT/DS285) ⁶⁷	Antigua and Barbuda claim measures affecting the cross-border supply of gambling and betting services violate GATS Articles II, VI, VII, XI, XVI, and XVII

⁶⁸ As of the time of writing, the Dispute Settlement Body had not adopted this panel report, which was issued on November 14, 2004. The United States was expected to appeal the panel's decision. See Annex 2.



Dispute Settlement Category	Case Name	GATS Claims
<i>Appellate Body and Panel Reports Adopted</i>	European Communities—Regime for the Importation, Sale, and Distribution of Bananas (WT/DS27)	Ecuador, Guatemala, Honduras, Mexico, and the United States claim EC banana importation regime violates Articles II and XVII of GATS
	Canada—Certain Measures Affecting the Automotive Industry (WT/DS139 and WT/DS142)	Japan and the European Communities claim Canadian measures in automotive industry violate Articles II, VI, and XVII of GATS
	Mexico—Measures Affecting Telecommunications Services (WT/DS204)	United States claims various Mexican measures in telecommunication services sectors violate Articles VI, XVI, XVII, and XVIII of GATS
<i>Mutually Agreed Solutions</i>	Turkey—Certain Import Procedures for Fresh Fruit (WT/DS237)	Ecuador claimed certain Turkish import procedures violated Articles VI and XVII of GATS
	China—Value-Added Tax on Integrated Circuits (WT/DS309)	United States claimed China's preferential value-added tax for domestically produced or designed integrated circuits violated Article XVII of GATS
<i>Inactive Cases</i>	United States—The Cuban Liberty and Democratic Solidarity Act (WT/DS38)	European Communities complained that federal statute violated Articles I, III, VI, XVI, and XVII of GATS

Source: Based on WTO, *Update of WTO Dispute Settlement Cases, WT/DS/OV/22, Oct. 14, 2004.*

517. This Legal Review will not examine in detail the WTO dispute settlement process elaborated in the WTO Dispute Settlement Understanding or the controversies this process has created (see, e.g., Esserman and Howse 2003). Instead, the dispute settlement provisions in GATS will briefly be highlighted. Two critical aspects of the WTO dispute settlement process that demonstrate its importance will, however, be mentioned. First, WTO members making complaints under the WTO dispute settlement process will have their “day in court” because the WTO member accused of violating a WTO agreement has no way to stop the WTO Dispute Settlement Body from establishing panels to hear the dispute and adopting panel and Appellate Body reports on the dispute (DSU, Articles 6.1, 16.4, and 17.14).



518. Second, the WTO member that the Dispute Settlement Body finds to be in violation of a WTO agreement must comply with the recommendations in the panel and Appellate Body rulings within a reasonable period of time or face the possibility of trade sanctions from the winning WTO member. The losing WTO member that does not comply has no way to stop the Dispute Settlement Body from authorizing trade sanctions at the request of the winning member (DSU, Article 22.6).

519. The WTO Dispute Settlement Understanding is the most powerful dispute settlement mechanism in contemporary international law because it combines compulsory jurisdiction and effective enforcement procedures (although they are not always sufficient to ensure removal of violating measures). This mechanism applies to GATS by virtue of Article 1 of the Dispute Settlement Understanding. Fears have been expressed that this mechanism will supplant democratic decision-making over crucial public policy issues left ambiguous in GATS, thus representing another potential effect on the health policies of WTO members.

10.1 Consultations

520. The first stage of dispute settlement under GATS involves consultations between WTO members (GATS, Article XXII:1). Such consultations under GATS are subject to the relevant provisions in the Dispute Settlement Understanding (GATS, Article XXII:1; DSU, Article 4). Article XXII:2 provides that a WTO member may request the Council for Trade in Services or the Dispute Settlement Body to consult with any other WTO members in which consultations under Article XXII:1 have not proven successful.

10.2 Formal Dispute Settlement Process

521. If consultations fail to produce a mutually satisfactory result between disputing WTO members, then any WTO member party to the dispute may have recourse to the Dispute Settlement Understanding for settlement of the matter (GATS, Article XXIII:1). Under the Dispute Settlement Understanding, the formal dispute settlement process usually begins with the request to the Dispute Settlement Body for establishment of a panel (DSU, Article 6). The Ministerial Conference adopted a Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services that addressed the question of establishing a roster of qualified panelists for GATS disputes.

522. Article XXIII:3 incorporates the procedure for a WTO member to pursue a “non-violation nullification and impairment” under GATS. The Legal Review discussed this cause of action in Section 6.1.3 in connection with interpreting Article VI:5 of GATS, which also incorporates the “non-violation nullification and impairment” concept; so it will not be analyzed again here except to emphasize again that the “non-violation nullification and impairment” claim is unusual and difficult to use successfully.



10.3 Enforcement of Dispute Settlement Rulings

523. Article XXIII:2 reinforces that the Dispute Settlement Body is empowered under Article 22 of the Dispute Settlement Understanding to authorize sanctions against any WTO member that does not comply with recommendations in adopted panel and Appellate Body reports. Thus, the enforcement provisions of the Dispute Settlement Understanding apply with full force to GATS disputes.

10.4 The Dispute Settlement Mechanism and Health Policy

524. The presence of a dispute settlement mechanism enhances the importance of WTO rules in every field of policy, including health. As past experience demonstrates, WTO members will bring claims against each other under GATS. To date, none of the GATS cases dealt with health-related services; but such cases may happen in the future. Disputes under other WTO agreements, such as GATT (*EC—Asbestos*) and the SPS Agreement (*EC—Hormones*), have directly addressed health measures.

525. The probability of GATS disputes involving health-related services is not, by itself, a threat to health policy. Much depends on the facts of the case, what GATS principles are under scrutiny, and how the parties to the case argue the merits of their positions and their interpretations of the key provisions. Further, a case may involve a health-related service but not involve any principle of GATS central to health policy.

526. For example, a WTO member may be accused of violating the MFN principle in connection with the supply of a health-related service from another WTO member. The accused WTO member may be engaging in the alleged discrimination between like foreign service suppliers for reasons that have nothing to do with the protection of health in its territory. Such a case would involve a health-related service but not be decided on grounds that affect health policy.



527. The effect of the dispute settlement mechanism on health policy also depends on how panels and the Appellate Body interpret the GATS articles at issue. Some indication of how panels and the Appellate Body may deal with health concerns in GATS cases may be gleaned from cases under other WTO agreements where WTO members challenged health policy actions by other members.

528. WTO panels and the Appellate Body have stressed in health-related cases that the WTO agreements in question do not affect a WTO member's ability to select the level of health protection that it thinks appropriate for its population (*EC—Hormones* and *EC—Asbestos*). The Appellate Body also held that the health-effects of products should be considered as a factor in the like product analysis of Article III:4 of GATT, effectively forcing complaining WTO members to establish that a product is not dangerous to human health (*EC—Asbestos*).

529. Provisions in TRIPS were interpreted to allow the early marketing approval of generic drugs for commercialization immediately after expiry of a patent, which assists efforts to distribute cheaper drugs more widely in a health care system (*Canada—Pharmaceutical Patents*). The Appellate Body has also emphasized the principle that WTO members need not rely on majority scientific evidence in assessing the risk of a product to human health (*EC—Hormones* and *EC—Asbestos*), which creates a lower threshold for establishing a health risk.

530. Finally, the Appellate Body has interpreted Article XX(b) to require that the effectiveness of potentially less trade-restrictive alternative measures be strictly scrutinized when the protection of human health is at stake because such protection is of vital importance (*EC—Asbestos*).

531. These rulings do not mean that the WTO dispute settlement mechanism adopts a deferential attitude toward WTO members arguing that their behavior protects human health. Panels and the Appellate Body have scrutinized and will scrutinize whether a challenged measure relates to the protection of health. Once this relationship is established, WTO case law indicates that the WTO dispute settlement mechanism exhibits considerable deference to national health policies. The rulings suggest that the WTO dispute settlement mechanism is capable of producing rulings that recognize the importance of protecting human health within a system designed to liberalize international trade.

532. On the basis of WTO case law, one scholar has argued that “[t]he principle that protection for health merits special regard as a basis for deference to member states’ policies is a common strand running through WTO law . . . [and] has animated the Appellate Body’s approach to national health regulation under the GATT and SPS agreement, as well as the Ministerial Conference’s treatment of TRIPS in the Doha Declaration” (Bloche 2002: 843). This expert further asserted that the “portrayal of the WTO and its associated agreements as implacable threats to the health of people constitutes pessimism bordering on panic . . . [and] ignores recent developments within the WTO system that have underscored and expanded member states’ authority to develop national health policies” (Bloche 2002: 827).⁶⁸



533. Although the analysis in the previous paragraphs indicates that the WTO dispute settlement mechanism demonstrates some level of understanding and consideration of health policy concerns, under existing WTO case law measures designed to protect human health are subject to the rules of international trade law, which take precedence in instances in which a WTO member cannot fit the health measure into the confines of such rules.

534. An alternative approach to GATS and health would involve recognizing the need to differentiate health-related measures from other kinds of trade-restricting actions and accord health-related measures a rebuttable presumption of legitimacy under international trade law. Under this approach, WTO members could still challenge trade-restricting health measures, but the burden would be on the challenging WTO member to prove that the measures were not legitimate health measures.⁶⁹

10.5 GATS Decision-Making and Institutional Framework

535. GATS establishes an institutional framework and decision-making process that the Legal Review has frequently mentioned in earlier sections. This section briefly describes these provisions and their importance for health policy.

⁶⁸ Similarly, Bloche and Jungman argued that “The WTO framers paid little heed to health policy. Over the past several years, however, politics and the AIDS pandemic have pushed health to center stage as a trade issue. The WTO has responded with heightened deference to national authority when member states’ health policies conflict with other values protected by trade agreements” (Bloche and Jungman 2003: 530).

⁶⁹ This approach and the case law approach to trade-restricting health measures may not, in reality, be that far apart, presenting an opportunity to solidify a health-sensitive WTO jurisprudence.



536. Article XXIV:1 establishes the Council for Trade in Services to facilitate the operation of GATS and advance its objectives. As previously noted, the Council for Trade in Services is critical to the development of the multilateral disciplines WTO members have agreed to negotiate under GATS, such as those contemplated under Article VI:4, that are of concern for health policy. To help it discharge its functions, the Council for Trade in Services may create subsidiary bodies it considers appropriate (GATS, Article XXIV:1; see also Ministerial Conference Decision on Institutional Arrangements for the General Agreement on Trade in Services). The Council for Trade in Services and, unless the Council decides otherwise, all subsidiary bodies are open to participation by representatives of all WTO members (GATS, Article XXIV:2). In keeping with Article IX:1 of the WTO Agreement, the Council for Trade in Decisions follows the consensus decision-making model.

537. The General Council of WTO shall make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies as well as with other intergovernmental organizations concerned with services (GATS, Article XXVI). WHO would seem to be an obvious candidate for the General Council to establish consultation and cooperation arrangements on health-related services.

538. Both the text of GATS and treaty interpretation principles point to the importance of the Council for Trade in Services in connection with health policy concerns. The Council for Trade in Services and subsidiary bodies created by it will be critical to the development of multilateral disciplines on domestic regulations (Article VI:4), emergency safeguards (Article X:1), government procurement (Article XIII:2), and subsidies (Article XV)—all of which the Legal Review noted earlier were important processes from a health policy perspective.

539. The GATS institutional framework is also the place where WTO members develop subsequent state practice on the meaning of GATS provisions. Treaty interpretation rules provide that account shall be taken of subsequent state practice in the application of the treaty that establishes the agreement of the parties regarding the meaning of its terms (Vienna Convention, Article 31:3(b)). State practice in the Council for Trade in Services on contentious provisions of GATS (e.g., meaning of Article I:3(c); meaning of necessity test in Article VI:4) is unlikely to reveal consensus on their interpretation, but WTO members with concerns about health policy could utilize the Council for Trade in Services and its subsidiary bodies for making their state policies and practice on GATS provisions clear.

Chapter 11

GATS 2000: HEALTH-RELATED SERVICES AND THE ON-GOING GATS LIBERALIZATION TALKS



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540. Article XIX:1 provides that the first round of progressive liberalization talks under GATS should begin not later than five years from the entry into force of the WTO Agreement. The “GATS 2000” round of negotiations formally began in 2000 and now forms part of the Doha Development Agenda’s multilateral trade talks begun at the Doha WTO ministerial meeting in 2001. The GATS 2000 negotiations have made some progress since their launch in 2000 and their incorporation into the Doha Development Agenda. Article XIX:3 requires the establishment of negotiating guidelines and procedures, and the Council for Trade in Services issued the *Guidelines and Procedures for the Negotiations on Trade in Services (GATS 2000 Guidelines)* in March 2001 (WTO Doc. S/L/93). As of this writing, WTO members were in the process of formulating and issuing their initial offers and requests.

541. NGOs have identified the GATS 2000 process as a particular concern. GATSwatch.org argued, for example, that “[t]hese so called GATS negotiations . . . could have a dramatic and profound effect on a wide range of public services and citizens’ rights all over the world” (GATSwatch.org 2002); and, in its “Stop the GATS Attack Now!” open civil society letter, GATSwatch.org asserted that the GATS 2000 process seeks “to subordinate democratic governance in countries throughout the world to global trade rules established and enforced by the WTO as the supreme body of global economic governance” (GATSwatch.org 2002).

542. This Legal Review has argued at several points that future developments in the GATS regime will determine to what extent this treaty may adversely affect health policies of WTO members. The low level of specific commitments made in health-related sectors to date combined with the unfulfilled mandates on negotiating disciplines for domestic regulation, emergency safeguards, government procurement, and subsidies make the course of future negotiations, especially GATS 2000, critical for the shaping of the relationship between GATS and health policy. This chapter briefly explores some of the key issues for health policy in the GATS 2000 negotiating process.



543. GATS Article XIX:1 provides that the objective to negotiating rounds is the achievement of a progressively higher level of liberalization in trade in services. The *GATS 2000 Guidelines* incorporate this mandate: “The negotiations shall aim to achieve progressively higher levels of liberalization of trade in services through the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access, and with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations” (WTO Doc. S/L/93, ¶ 1).

544. The aim of progressively higher levels of liberalization in trade in services may mean that the low level of specific commitments in health-related sectors may be a target of negotiators in GATS 2000. The *GATS 2000 Guidelines* provide that no service sector or mode of supply shall be *a priori* excluded from the negotiations (WTO Doc. S/L/93, ¶ 5), which means that all health-related sectors are on the table. The extent of the interest of WTO members in negotiating more liberalization in health-related sector will not, of course, be clear until the offers and requests are tabled and analyzed. The European Union (EU) declared in February 2003 that it would not expand EU market access in the GATS 2000 negotiations for public services such as health and education (Kirwin 2003: 308). EU Trade Commissioner Pascal Lamy stated that the EU’s negotiating stance “ensures that services of collective interest in the EU such as education and health are preserved” and that “[t]here can not be and never will be a way of privatizing or totally deregulating public services” (Kirwin 2003: 308). Similarly, the Canadian initial offer contains no offers in the areas of health, public education, and social services (Pruzin and Menyasz 2003: 593). The initial Swiss offer likewise contains no commitments for health services (Pruzin 2003a: 594).

545. As for requests to other WTO members for increased liberalization in trade in services, the EU has stated that its “requests do not seek to dismantle public services, nor to privatise state-owned companies. No requests are being made on health services. . . . If requests are being made on environmental services, they seek to capitalise on the experience and skills European environmental services in tackling environmental problems. EU requests do not touch on the issue of access to (water) resources and in no way undermine or reduce governments’ ability to regulate pricing, availability and affordability of water supplies as they choose” (European Union 2003).

546. NGO analysis of leaked copies of the EU's initial requests to other WTO members argues, however, that the EU seeks specific commitments in health-related service sectors, such as distribution and environmental services from developing countries (Joy and Hardstaff 2003). The EU's initial requests include commitments for liberalization of the water services sector from Honduras, Tunisia, Botswana, Bolivia, Egypt, and Trinidad, each of which manages water systems through government control (Joy and Hardstaff 2003: 28-31).

547. Requests from other WTO members also show a reluctance to target health services specifically. News reports suggest that the initial requests from the United States, Japan, and Australia do not include requests on health services (Pruzin 2002: 1202). India's request includes, however, requests for liberalization of commitments for the cross-border movement of professionals and of medical, dental, and health services (Pruzin 2002: 1202). Most of these requests include requests for commitments in other health-related service sectors that may, depending on the nature of the request, relate to health policy.

548. At the time of this writing, a clear picture of the substance of initial offers and request in health-related services cannot be drawn. Adlung and Carzaniga argued in June 2003 that "[t]here is virtually no evidence . . . to suggest that the scope and content of the current commitments on health services will change significantly as a result of the ongoing negotiations" (Adlung and Carzaniga 2003: 15). What is clear at this stage in the GATS 2000 negotiations is that health ministries need to be prepared to evaluate the development of offers and the tabling of requests with respect to specific commitments in health-related services. The refusal of such WTO members as the EU, Canada, and Switzerland to consider making specific commitments in the health services sector provides other WTO members with strong precedents for also refusing to negotiate any health service commitments. But, as the above-mentioned EU requests for liberalization of public water systems in developing countries illustrates, health-related sectors other than "health services" may be the subject of negotiations in the GATS 2000 talks. Health ministries should, therefore, remain vigilant with respect to the GATS 2000 negotiations.

549. The *GATS 2000 Guidelines* set out a number of principles to guide the negotiators in their quest for a higher level of liberalization. First, the *Guidelines* stress that the negotiations shall recognize the right of WTO members to regulate, and to introduce new regulations, on the supply of services (WTO Doc. S/L/93, ¶ 1). The *Guidelines* also state that the "negotiations shall take place with due respect for national policy objectives" (WTO





Doc. S/L/93, ¶ 3). These principles echo language in the GATS preamble and connect to controversies explored earlier about the effect of GATS on the ability of a WTO member to regulate trade in services for public interest purposes, including health. Reaffirming the importance of recognizing the right of WTO members to regulate the supply of services does not, as explored earlier, advance the underlying interpretive disputes about the impact of GATS disciplines on the right to regulate.

550. Of central importance to the “right to regulate” debate will be the progress of negotiations on multilateral disciplines under Article VI:4 of GATS. The *GATS 2000 Guidelines* state that WTO members shall aim to complete negotiations under Article VI:4 prior to the conclusion of negotiations on specific commitments (WTO Doc. S/L/93, ¶ 7). Negotiations on specific commitments and on Article VI:4 disciplines will, therefore, be proceeding simultaneously, heightening the importance of participation and vigilance by health ministries in the progress of the GATS 2000 process.

551. The “right to regulate” debate will also be affected by the negotiations to develop multilateral disciplines on emergency safeguards (Article X), government procurement (Article XIII), and subsidies (Article XV). The *GATS 2000 Guidelines* provide that WTO members shall complete negotiations on safeguards under Article X by March 15, 2002 (WTO Doc. S/L/93, ¶ 7). In March 2002, the Council for Trade in Services changed the target completion date for these negotiations until March 15, 2004 (WTO Doc. S/L/102, ¶ 1); and, in March 2004, the Council again extended the completion date to not later than the date of entry into force of the results of the current round of services negotiations (WTO Doc. S/C/W/236). This postponement means that negotiations on emergency safeguards will also be underway during the GATS 2000 negotiations on progressive liberalization of specific commitments.⁷⁰

552. Further, the *GATS 2000 Guidelines* provide that negotiations to develop multilateral disciplines on government procurement of services under Article XIII and on the trade-distorting effect of subsidies under Article XV shall aim to be completed prior to the conclusion of the GATS 2000 negotiations on specific commitments (WTO Doc. S/L/93, ¶ 7). As analyzed earlier, these areas of negotiations are potentially important to health policy and bear close watching by health ministries.

⁷⁰ In March 2003, the Chairman of the working party responsible for negotiations on emergency safeguards declared such negotiations in stalemate and indicated that he did not know how negotiations could be finalized by March 15, 2004 (Pruzin 2003b: 499).

553. The agenda of negotiations in and parallel to the GATS 2000 process that potentially affect WTO members' right to regulate the supply of services is broad and complex, especially for health ministries in developing countries. The authors perceive that the negotiations affecting the right to regulate will not produce rules that undermine the basic principle, recognized in WTO jurisprudence, that a WTO member has the right to establish its own level of health protection for its population. The disciplines produced by the negotiations on domestic regulation, emergency safeguards, government procurement, and subsidies are likely to affect *how* a WTO member regulates and organizes policy to achieve the level of health protection it has chosen.

554. A second principle the GATS Guidelines set as a guide for negotiations on progressive liberalization of specific commitments is recognition of the position of developing and least-developed countries in the negotiating process. The perspective of developing countries is very important for two reasons. First, sentiment is strong in some quarters that "the liberalization of trade in services has benefited the industrialized countries and their suppliers but has yielded hardly any gains for the developing countries (Raghavan 2002: 31). Second, the GATS 2000 negotiations form part of the Doha Development Agenda, with its strategic aim of placing the needs and interests of developing countries at the heart of the WTO's work program (WTO Doc. WT/MIN(01)/DEC/1).

555. The *Guidelines* provide that negotiations shall aim to (1) liberalize services trade progressively as a means for the development of developing countries; (2) promote the interests of all participants; (3) increase the participation of developing countries in trade in services; (4) accord appropriate flexibility for individual developing-country members; (5) grant special priority to least-developed country members; (6) respect the level of development of individual members; (7) give the needs of small and medium-sized service suppliers from developing countries due consideration; (8) accord special attention to sectors and modes of supply of export interest to developing countries; (9) provide developing countries appropriate flexibility in negotiations on MFN exemptions; (10) provide developing country members with appropriate flexibility in opening fewer sectors, liberalizing fewer transactions, extending market access in line with their development situation, and attaching conditions to market access found in Article IV (Increasing Participation of Developing Countries); (11) provide technical assistance to developing country members in accordance with Article XXV; (12) review the extent to which Article IV is being implemented and suggest ways to improve its implementation; and (13) take account of the needs of smaller delegations in scheduling GATS 2000 meetings (WTO Doc. S/L/93, ¶¶ 1-3, 5-6, 12, 14-15, 17).⁷¹



⁷¹ A group of developing countries tabled a proposal in October 2002 to establish a mechanism to review the GATS 2000 negotiations in terms of whether they are meeting the objectives of GATS Article IV on increasing participation of developing countries. See WTO Doc. TN/S/W7.



556. Developing-country WTO members could utilize the principle of recognizing the special position of developing and least-developed countries to place heightened scrutiny on requests made of them to liberalize health-related sectors. Developing-country WTO members could reinforce the principle of recognizing the special position of developing and least developed countries through appeal to the principle found in WTO jurisprudence of viewing the protection of health as a vital interest of WTO members.

557. Such a strategy could, however, be textured as many developing countries may affirmatively seek to liberalize their markets in health-related services in order to improve the health conditions of their people.

558. A third principle in the *GATS 2000 Guidelines* is that the negotiations “shall take place within and shall respect the existing structure and principles of the GATS, including the right to specify sectors in which commitments will be undertaken and the four modes of supply” (WTO Doc. S/L/93, ¶ 4). This principle means that the GATS 2000 negotiations will not involve negotiations to revise either the structure or substance of existing GATS provisions.

559. The third principle emphasizes the “the right to specify sectors in which commitments will be undertaken and the four modes of supply” (WTO Doc. S/L/93, ¶ 4). The *GATS 2000 Guidelines* also state that “[t]he starting point for the negotiations of specific commitments shall be the current schedules” and “[t]he main method of negotiation shall be the request-offer approach” (WTO Doc. S/L/93, ¶¶ 10-11). GATS literature has involved discourse about changing the methodology of progressive liberalization negotiations (Low and Mattoo 2000). The approach taken in the Uruguay Round, and which is enshrined in GATS, is for WTO members to make specific commitments on a sector-by-sector basis. Although WTO members can schedule horizontal commitments (i.e., limitations on market access and national treatment that apply in more than one sector), the dominant methodology is commitments in sector-specific contexts. Some experts have argued that, instead of or parallel to the sector-specific negotiating methodology, WTO members should adopt so-called “formula approaches” to the progressive liberalization of specific commitments (Thompson 2000).

560. Formula approaches have two objectives—to increase the efficiency of negotiations and to broaden progressive liberalization commitments. The sector-specific negotiating approach requires the negotiation of many bilateral deals, which is costly and time consuming. A formula approach would seek commitments that cut

across numerous if not all sectors to produce broader liberalization in two senses—sectoral and geographical. An example of a formula-approach principle is the specific commitment to eliminate in all sectors limitations on the consumption of services abroad by a service consumer (Mode 2). In contrast to the largely vertical approach of sector-specific negotiations, formula approaches generally advocate the adoption of horizontal methodologies to progressive liberalization.

561. Those concerned with the implications of GATS on health policy are likely to oppose negotiating strategies, such as formula approaches, designed to achieve “faster, wider, deeper” liberalization of trade in services (Sinclair 2000: 72-75). From a health policy perspective, pursuing liberalization of health-related services through formula methodologies might complicate matters enormously because health ministries would have to assess the impact of horizontal commitments on diverse and complex sectors simultaneously. The sector-specific approach provides more context and focus for those individuals and departments concerned about health policy.

562. The *GATS 2000 Guidelines* clearly indicate that the negotiations will not undermine the right of WTO members to engage in sector- and mode-specific commitments. The authors expect that the sector-specific/bilateral request-offer approach will dominate GATS 2000. The *Guidelines* do not, however, preclude the possibility that more horizontal approaches to liberalization can be adopted. They provide that “[l]iberalization shall be advanced through bilateral, plurilateral or multilateral negotiations” (WTO Doc. S/L/93, ¶ 11).

563. GATS 2000 negotiations shall take place in Special Sessions of the Council for Trade in Services and are open to all WTO members (WTO Doc. S/L/93, ¶¶ 8-9). The Council for Trade in Services may create subsidiary bodies as it deems necessary to advance the negotiations, but the *GATS 2000 Guidelines* require the utilization of existing subsidiary bodies and strongly caution against the proliferation of new subsidiary bodies (WTO Doc. S/L/93, ¶ 16). These provisions of the *Guidelines* again emphasize how important understanding and working within the institutional structure of GATS will be in negotiating health policy through the GATS process.





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564. In sum, the authors stress again that the GATS 2000 negotiations (including the parallel negotiations on domestic regulation, emergency safeguards, government procurement, and subsidies) may perhaps more significantly shape the relationship between GATS and health policy than the existing GATS general obligations and specific commitments reviewed in this document. It is also important to note that WTO members could unilaterally liberalize health-related services without assuming binding commitments under GATS schedules of specific commitments. This unilateral approach would allow WTO members to experiment with liberalization policies and later restrict access or deny national treatment for health policy reasons without being subject to GATS rules on compensation to affected WTO members. In other words, WTO members always have the option to frame their health policies in services outside GATS and may wish to consider this as the main option, unless a careful, comprehensive assessment of the implications of binding commitments under GATS has been undertaken.

Chapter 12

LESSONS FOR HEALTH POLICY FROM OTHER WTO AGREEMENTS: MAKING THE HEALTH POLICY MESSAGE HEARD IN INTERNATIONAL TRADE LAW



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565. The importance of the GATS 2000 negotiations in determining the future relationship of GATS and health policy raises questions on identifying the most effective ways of balancing the GATS project of liberalization of trade in services with the health objectives of WTO members. This chapter looks briefly at some lessons about the place of health policy within international trade law learned in the context of other WTO agreements. The objective of this analysis is to discern strategic options that transfer to the “GATS and health” debate.

566. At a general level, the years since the establishment of the WTO have demonstrated that this international organization and its related agreements is at the center of international governance on a wide range of issues, including health policy. The centrality of the WTO to international governance has caused consternation among many groups and individuals, as evidenced by the prominence of anti-WTO sentiments in anti-globalization protests. Calls for radical transformation or even termination of the WTO underestimate how deeply embedded the international trade regime started by GATT in 1947 has become in international relations. New WTO agreements, especially TRIPS and GATS, which have become lightning rods for opposition to a wide range of policy developments, are also in the process of becoming incorporated into the fabric of international and national governance worldwide.

567. The centrality of the WTO to international governance in the health policy arena has been amply demonstrated in the years since 1995. WTO members and dispute settlement decisions have applied major WTO agreements, including GATT, TRIPS, SPS Agreement, and TBT Agreement, to various health-related measures. This Legal Review has referred to the cases in which health measures were at the center of WTO dispute resolution. Cases alone do not, however, adequately convey the importance of WTO agreements to health policy.



568. Experiences with TRIPS illustrate how the tension between WTO disciplines and health policy may arise and how such tension may be handled within the WTO system. TRIPS obliges all WTO members to recognize patents for pharmaceutical products, which a large number of developing countries considered non-patentable before the Uruguay Round. Patents may have the effect of limiting access to medicines because patent owners usually charge prices higher than those that would prevail in a competitive environment. Developing countries have been keen to defend the right to apply measures, such as parallel imports and compulsory licenses, allowed by TRIPS that may contribute to lowering prices for drugs and medicines. Several efforts, particularly by WHO and UNCTAD (UNCTAD 1996), as well as extensive academic work (WHO 2001) and NGO statements (Medécins Sans Frontières 2001; VSO 2001; Oxfam 2002), highlighted the flexibility permitted by TRIPS.

569. However, the research-based pharmaceutical industry disputed that flexible use of such measures would resolve problems of access to medicines. The legal action brought by foreign pharmaceutical companies against the South African government in relation to compulsory licensing and parallel imports (Bond 1999), and the complaint by the United States against Brazil in the WTO relating to compulsory licenses, reflected conflicting views on the relationship between intellectual property rights and health policy.

570. In this context, developing countries requested that health policy issues be specifically addressed in the TRIPS Council in order to confirm their right to adopt measures necessary to ensure access to medicines. The developing countries sought approval of a ministerial declaration, not only because of disagreements about the scope of provisions in TRIPS but also as a result of the obstacles they had experienced when trying to make use of TRIPS-granted flexibility at the national level. After significant debate, the Declaration on the TRIPS Agreement and Public Health (Doha Declaration) was adopted at the Doha WTO Ministerial Conference in November 2001 (WTO Doc. WT/MIN/(01)/DEC/W/2).

571. The Doha Declaration stresses the importance of public health in international trade law and clarifies when public health concerns have supremacy over efforts to strengthen intellectual property rights (Correa 2002b). According to paragraph 4 of the Doha Declaration, if a conflict between public health and intellectual property rights arises, “the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health.” The Doha Declaration also, in paragraph 6, instructed the TRIPS Council to find an

expeditious solution for cases in which a medicine is needed but WTO members lacking or with insufficient manufacturing capabilities cannot effectively use compulsory licensing. Although the Doha Declaration requested the TRIPS Council find and report on an agreed solution to the WTO General Council by the end of 2002, no agreement was reached until the end of August 2003 because of diverging views on the diseases to be covered by such a solution.

572. These experiences teach the lesson that tensions between WTO rules and health policy may be addressed through either the dispute settlement mechanism or political channels. The divergent views over compulsory licensing and parallel importing that occurred under TRIPS was addressed in the realm of international diplomacy and world public opinion rather than in the WTO Dispute Settlement Body. Those experiences also indicate that protecting health in the WTO context may require both political commitment and careful interpretation of the obligations under the relevant agreements to ensure appropriate respect for, and deference to, the health policies of WTO members and that the exercise of exceptions needed to protect health are duly protected.

573. The TRIPS controversy contains, however, a number of important lessons for health policy communities: (1) the need for a sophisticated understanding of the legal context of WTO agreements; (2) the ability to interpret WTO agreements proactively from a health policy perspective; (3) the need to draw on other areas of international law, such as human rights, in interpreting WTO agreements; (4) the importance of mobilizing political commitment from governments and NGOs on behalf of health policy objectives; and (5) the capability to maintain vigilantly policy space for health in the on-going WTO political and legal processes.

574. GATS may increasingly affect health policy by WTO members. Health issues may feature more and more prominently in the diplomacy surrounding GATS, particularly in the GATS 2000 negotiations. NGO criticism of GATS has already elevated the diplomatic profile of GATS in connection with public interest issues, such as the protection of human health. The WTO Secretariat's decision to respond publicly to NGO views also indicates that the GATS nexus with policy objectives such as health is sensitive diplomatically and subject to political controversy.





575. As we said earlier, GATS cases involving health-related services should also be expected to emerge. Health-centered cases have arisen under GATT, the SPS Agreement, and TBT Agreement. Those interested in health policy in service sectors should anticipate that WTO members will apply the WTO's dispute settlement mechanism to GATS disputes involving health-related sectors.

576. The likelihood of both diplomatic and dispute-settlement controversies involving GATS and health policy places a premium on how the provisions of GATS are interpreted. Previous experience with controversies under other WTO agreements underscores the importance of treaty interpretation in shaping the relationship between an agreement and health policy. Chapter 10 examined some key principles that have emerged from health-related cases under GATT and the SPS Agreement; and this analysis indicated that WTO jurisprudence in this context was not inherently hostile to the restriction of trade for purposes of protecting human health but provided narrow and often difficult means for reconciling health objectives with a trade liberalization strategy.

577. The WTO Dispute Settlement Body has enunciated a set of principles that health policy could use to promote health in the context of trade in goods and services, namely that (1) the protection of health is a national objective of vital importance; (2) WTO members are free to select the level of health protection they believe appropriate for their populations; (3) health effects should be included in the case-by-case analysis of whether products or services are alike; and (4) in cases analyzing measures to protect human health under the necessity test, the potential effectiveness of less trade-restrictive alternatives should receive strict scrutiny.

578. Notwithstanding these principles, WTO agreements, including GATS, sometimes place WTO members in the difficult position of having to justify and defend health measures from claims based on principles designed to liberalize trade. The international trade law of the WTO may not be inherently hostile toward trade-restricting health measures but neither is it inherently accommodating of such measures.

579. Although the set of principles outlined in paragraph 577, and the approach they embody, are insufficient by themselves to protect health policy, these principles provide a foundation for solidifying the protection of health as a value and objective within the international governance dynamics centered on the WTO. The Doha Declaration supplements these principles. Even though these principles provide a foundation for health protection, they may not apply in connection with all WTO agreements when health issues arise. For

example, the Appellate Body's decision in *EC—Asbestos* upheld trade restrictions where the health risks of the product in question were scientifically proven. It is not clear what the WTO Dispute Settlement Body would do in cases in which WTO members attempt to increase rather than restrict the availability of certain goods by, for instance, limiting intellectual property rights and authorizing competition by third parties. In such cases, principles derived largely from Article XX(b) and the SPS Agreement may not provide much guidance because limiting intellectual property rights may increase rather than restrict trade.

580. Similarly, whether the TRIPS controversy provides an adequate precedent for the health policy challenges presented by GATS remains a question. The HIV/AIDS pandemic, and especially its disproportionate impact on developing countries, provided a political, legal, and moral catalyst for health policy activism. The health policy context for GATS and further liberalization of trade in services contains no such catalyzing force. Nor does the GATS context exhibit the stark “North v. South” dynamics seen in the TRIPS controversy because many developing countries view liberalization of trade in services as an opportunity for better economic development prospects. Crafting and sustaining health policy interest and vigilance in the GATS 2000 negotiations may prove more difficult than the mobilization of health activism over TRIPS.

581. The authors do not mean to imply that raising the profile of health in international trade law has been an easy or harmonious project in any context. The cases establishing the health-related jurisprudence of the Dispute Settlement Body were contentious disputes in which panels and the Appellate Body confronted difficult interpretive issues. The controversy over TRIPS between and among state and non-state actors was contested over different interpretations about the scope of the flexibilities of compulsory licensing and parallel importing that could be used for health policy purposes.

582. The extent to which health has been recognized as important in WTO agreements relates to the level of legal and health policy mobilization that occurred in these cases and controversies. Those interested in health policy in the era of globalization, including WHO, face the challenge of mobilizing their efforts on a sustained basis within multiple WTO contexts. The story of the TRIPS controversy involves the successful mobilization of legal and health policy resources, arguments, and personnel by governments and NGOs to protect public-health safeguards. Such mobilization continued in the aftermath of the Doha Declaration.





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583. Health policy communities within and outside government have not begun to focus seriously on GATS even as GATS 2000 reaches the landmark stage of requests-offers being tabled. Some experts in health policy have familiarity with general arguments that GATS presents both opportunities and challenges for health policy. As stated in Chapter 1, this Legal Review seeks to bring the relationship between GATS and health policy into better focus. Whatever focus this Legal Review provides will not be useful unless international organizations and their member states commit serious time and resources to understanding, participating in, and monitoring the substantive rules and processes established by GATS. The lessons learned in the context of other WTO agreements about making the health policy voice heard in international trade law seem to support this conclusion.

Chapter 13

IMPLICATIONS FOR HEALTH POLICY OF OTHER INTERNATIONAL AGREEMENTS: BILATERAL AND REGIONAL AGREEMENTS ON TRADE AND INVESTMENT



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584. Although we believe that understanding, participating in, and monitoring the GATS process is important for health policy purposes, GATS does not represent the only international legal agreement that significantly affects the relationship between trade in services and health policy. Bilateral and regional agreements on trade and investment affect this relationship as well. Article V of GATS provides a MFN exception to regional and bilateral agreements or arrangements involving liberalization of trade in services that meet certain conditions.

585. The WTO Secretariat conducted a survey and identified at least 130 regional trade agreements (not all of which applied to services), of which 60 had been notified to the WTO under GATS Article V (Stephenson 2000: 520). This statistic suggests that liberalization in trade in services is proceeding extensively at the regional and sub-regional level. One expert counted ten bilateral or sub-regional agreements covering trade in services in the Western hemisphere alone (Stephenson 2000: 520). As mentioned earlier, provisions in NAFTA are expected to cause more concern for Canadian health policy than GATS (Johnson 2002: iv). Trade in services among European Union members is far more liberalized than the liberalization contemplated under GATS, including in health-related services as recent European Court of Justice cases on consumption of health services abroad indicate (Wismar 2001).

586. To this activity on liberalizing trade in services at the regional and sub-regional level, the extensive network of bilateral investment treaties that now exist should be added. UNCTAD calculated that approximately 2,000 bilateral investment treaties are currently in force, mainly between developed and developing countries (UNCTAD 2000). Most of these bilateral investment treaties define “investment” very broadly, and the definition catches foreign direct investment in services as well as manufacturing. U.S. bilateral investment treaties define investment to mean “every kind of investment owned or controlled directly or indirectly by that national



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or company,” including shares, contractual rights, tangible property, intellectual property, and rights conferred by law, such as licenses and permits (Treaty between the Government of the United States of America and the Government of the Republic of Azerbaijan Concerning the Encouragement and Reciprocal Protection of Investment, Article I.1(d)).

587. The substantive provisions of these treaties are also very similar and require host governments to accord investors and investments from home governments non-discriminatory treatment in terms of establishment, operation, and divestment. Such requirements essentially open host-government markets to foreign investors and investment in any sector in which domestic or foreign investors or investments are established and operating. These bilateral investment treaties constitute powerful market-access tools for foreign direct investment in service sectors.

588. In some respects, the regional, sub-regional, and bilateral trade and investment agreements that cover services contain more aggressive liberalization provisions than GATS. NAFTA’s investment chapter and virtually all bilateral investment treaties allow *private investors* to challenge host governments in international arbitration in disputes about host government measures. By contrast, WTO agreements only allow governments to bring claims against other governments. In some respects, then, GATS is not at the cutting edge of developments in the liberalization of trade in services either substantively or in dispute-settlement procedures.

589. The authors could not find much analysis of the extent to which regional, sub-regional, and bilateral trade and investment agreements liberalizing trade in services affects health policy. Some discussion of the impact of bilateral and regional investment treaties can be found in an analysis of sustainable development (Center for International Environmental Law 2002: 1-2), of water services (Shrybman 2002: 9-12, 53-64; Center for International Environmental Law 2003: 4-5), and health and water services in the proposed Free Trade Area of the Americas (CPATH 2003: 5-8). Although the “GATS and health debate” is important, the existence of regional, sub-regional, and bilateral trade and investment agreements with liberalization agendas focusing on trade in services suggests that the debate about international legal arrangements on services and health policy deserves a much wider and more urgent focus.

Chapter 14

CONCLUSION



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14.1 General Overview of the Legal Review

590. The length, detail, and complexity of this Legal Review provide some indication of the importance of GATS for health policy communities in international organizations, governments, and non-governmental sectors. The Legal Review's primary focus on the interpretation of the provisions of GATS does not address all aspects of the "GATS and health" debate, such as whether liberalization in trade in services is an appropriate policy to pursue when health is at stake. Nor does the Legal Review delve into important social dimensions of health, such as access, equity, and human rights, and how GATS generally or specifically may affect them. The authors believe, however, that the Legal Review's attention to the law of GATS could assist larger policy debates undertaken in the context of trade in health-related services.

591. The authors' review of GATS through treaty interpretation principles covered the Agreement comprehensively and produced analysis on virtually all the provisions of the treaty. From the detailed legal analysis of the instrument the Legal Review argued that, to date, GATS has not severely restricted the space available for health policy because few WTO members have made specific commitments on health-related services. However, the scope of GATS is comprehensive, catching most public and private health-related services provided by WTO members today. As the Council for Trade in Services negotiates multilateral disciplines on domestic regulation, emergency safeguards, government procurement, and subsidies during the GATS 2000 process, GATS' impact on health policy may increase.

592. In terms of specific commitments on market access and national treatment, arguably the heart of GATS, the Legal Review balanced the freedom GATS provides WTO members in determining whether to improve market access or accord national treatment against the strict disciplines the Agreement applies to the making, interpreting, and modifying of commitments. The low level of specific commitments made by WTO members in health-related sectors points to the fact that the GATS 2000 negotiations may shape the relationship between GATS and health policy more than the provisions of the treaty or the commitments made in the Uruguay Round.



593. The importance of on-going and future negotiations under GATS to health policy indicates that this agreement remains of significant concern from a health policy perspective. Like other WTO agreements, GATS does not privilege the protection of human health within its architecture for trade liberalization. GATS has become the process through which health policy in connection with trade in services will be vetted, and the process sometimes places burdens on WTO members seeking to protect and promote health. Further, the GATS process may adversely affect developing countries more than developed countries.

594. With the future of both general obligations and specific commitments tied to the GATS 2000 negotiations, the authors stressed the importance for WTO members concerned about health policy to mobilize legal and health policy resources in this context and sustain their application within the institutional framework of GATS and GATS 2000. Lessons learned from health policy controversies and cases in other WTO agreements seem to support this advice.

595. Finally, the authors raised a concern that the “GATS and health” debate needs to be broadened to analyze the potential effects on health policy of numerous regional, sub-regional, and bilateral trade and investment treaties that seek to liberalize trade in services, including health-related services.

14.2 Specific Legal Strategies Identified in the Legal Review

596. In addition to the comprehensive legal analysis of GATS, the Legal Review identified possible legal strategies WTO members could adopt in raising the profile of health policy concerns in the process of interpreting, implementing, and negotiating GATS obligations and commitments. The strategies identified in the Legal Review are premised on the need to work within the framework GATS establishes. The identification of these strategies does not mean that such strategies will be successful because many factors determine the success or failure of policies. Further, working within the GATS framework to establish a higher profile for health policy should not be pursued in isolation from political efforts to build support for health protection and promotion in the GATS process.

14.2.1 PUBLICLY PROVIDED HEALTH-RELATED SERVICES AND THE SCOPE OF GATS



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597. As Chapter 5 analyzed, concerns exist that health-related services provided by governmental authorities will fall within the scope of GATS. The meaning of the tests contained in GATS Article I:3(b)-(c) remain ambiguous and a source of interpretive controversy. The Legal Review posited five possible strategies towards Article I:3(b)-(c) to help ensure that its application is as broad as possible with respect to health. First, WTO members could, through state practice, make the case that the burden of proof for excluding a publicly provided service from the protection accorded by Article I:3(b)-(c) should rest on the WTO member alleging that such a service is subject to GATS. In other words, publicly provided services are presumed to be outside GATS' scope unless a WTO member complaining of a violation of GATS successfully rebuts this presumption by arguing the service in question does not meet all the criteria provided in Article I:3(b)-(c).

598. Second, WTO members could, in relation to Article I:3(b)-(c), argue that the ambiguity in these provisions should be interpreted in the manner least burdensome to WTO members. The *in dubio mitius* principle could be used, therefore, to support the interpretation of GATS under which government-provided services are presumed excluded from the scope of the treaty. In addition, the *in dubio mitius* principle could be employed to argue that the thresholds for engaging in commercial behavior and competition be set quite high, increasing the burden of proof the WTO member complaining of a violation would have to sustain.

599. Third, the burden of proof and *in dubio mitius* strategies described above could be strengthened in the context of health-related service by drawing on principles of WTO jurisprudence that recognize health as a vital national interest of WTO members. Thus, these WTO principles would require strict scrutiny of any claim that a government-provided health-related service falls within the scope of GATS.

600. Fourth, some opportunity exists to develop state practice on the meaning of "not on a commercial basis" that excludes policies and practices utilized in health-related services provided by governments, such as user fees or limited cost reimbursement schemes. The objective of developing such state practice would be to establish an interpretation of "not on a commercial basis" that is highly sensitive to the context in which governments provide health-related services.



601. Fifth, in contrast to the previous four approaches, WTO members could seek an authoritative interpretation of Article I:3(b)-(c) under Article IX:2 of the WTO Agreement, which authorizes the Ministerial Conference and General Council to adopt interpretations of WTO agreements by a three-fourths majority of WTO members.

14.2.2 GENERAL OBLIGATIONS AND DISCIPLINES

602. The Legal Review argued that the general obligations and disciplines of most concern from the health policy perspective are (1) the duty to participate in negotiations on rules for domestic regulation, government procurement, subsidies, and emergency safeguards; and (2) the requirement to provide compensation when new monopoly or exclusive service rights are granted in a sector subject to specific commitments.

603. In connection with the negotiation of rules on domestic regulation, government procurement, subsidies, and emergency safeguards, the Legal Review proposed that WTO members utilize the consensus decision-making process to prevent the adoption of rules that would adversely affect health policy. The failure of WTO members to reach consensus on emergency safeguard measures has, for example, blocked progress in this area; and WTO members concerned about health policy may wish to view the consensus decision-making process as an instrument of influence in the negotiations of these rules.

604. Specifically with regard to rules on health-related services negotiated under Article VI:4, the Legal Review argued that WTO members could draw on health-sensitive jurisprudence in GATT and SPS Agreement cases to construct an interpretation of “necessary” in Article VI:4 accommodating health policy flexibility. Of particular value in this regard would be the Appellate Body’s interpretation of the necessary test in Article XX(b) of GATT in *EC—Asbestos*.

605. With regard to Article VIII:4’s compensation requirement for the granting of new monopoly or exclusive service rights in sectors subject to specific commitments, the Legal Review identified three possible strategies. First, WTO members could identify whether monopoly or exclusive service rights constitute an important health policy tool in the various health-related service sectors.

606. Second, WTO members could determine whether they have made specific commitments in health-related sectors in which monopoly or exclusive service rights have policy utility and whether they have adequately protected the power to extend such rights in their schedules of specific commitments. If WTO members have not adequately protected this power, then they could consider using the extended availability of Article X:2 of GATS to modify or withdraw the problematical commitments.

607. Third, WTO members could protect their power to grant monopoly or exclusive service rights in non-scheduled health-related sectors where such rights can play a regulatory function by (1) not making any specific commitments in those sectors; or (2) properly tailoring any specific commitments to preserve the power to grant monopoly or exclusive service rights.

14.2.3 SPECIFIC COMMITMENTS

608. In connection with the relationship between specific commitments and health policy, the Legal Review proposed that WTO members inventory their existing schedules of specific commitments in order to identify any commitments that raise health policy concerns. For any specific commitment that causes such concerns, WTO members could consider making use of the extended availability of Article X:2 to modify or withdraw such commitments. Above all, WTO members may wish to be aware that they could liberalize trade in health-related services, if they desire, without locking themselves into the GATS system and keeping the freedom to abandon liberalization experiments that do not prove successful. In addition, the Legal Review stressed the importance of a WTO member understanding the “regulatory footprint” for health-related service sectors in connection with the process of considering new specific commitments. Generally, the measures targeted by the market access rules are more likely to be relevant to the regulation of health-related services than the rules on national treatment.

14.2.4 EXCEPTIONS TO GENERAL OBLIGATIONS AND SPECIFIC COMMITMENTS

609. The most important exception that would seem to justify a violation of a general obligation or specific commitment on health-related grounds is Article XIV(b) of GATS, which provides a justification for trade-restricting measures necessary to protect human, animal, and plant life or health. For this provision, the Legal





Review proposed the development of state practice interpreting this provision of GATS in the health-sensitive manner Article XX(b) of GATT was interpreted in *EC-Asbestos*.

14.2.5 GATS 2000 NEGOTIATIONS

610. The Legal Review argued a possible strategy for the GATS 2000 process is for WTO members to develop a clear understanding of how offers and requests for specific commitments will affect health policy in health-related service sectors. Such an understanding could guide WTO members in the negotiations in a manner that protects health policy appropriately. This strategy requires not only health policy involvement in the GATS 2000 process but also consultations among government ministries, private industry, and representatives of civil society. Health ministries may wish to be proactive in this legal research, analysis, and consultation to ensure the voice of health policy contributes to the development of national policy.

611. Health ministers should preferably not wait for trade and finance ministers to approach them in the offer/request process. Health ministries may also wish to remember that *nothing* in the GATS 2000 process had been agreed and fixed in stone. All offers and requests tabled to date are merely the start of a negotiating process, in which health ministries could have influence provided they proactively and constructively approach their responsibilities in the GATS 2000 process.

14.3 The Legal Review and Further Health Policy Work on GATS

612. The Legal Review does not provide a comprehensive health policy strategy in connection with GATS. The legal focus of this Review hopefully helps other health policy activities on GATS. WHO has already begun country-level analyses of GATS from a health policy perspective, and the Organization plans to develop other documents and tools to assist its Member States as they deal with GATS and the GATS 2000 process as effectively as possible in terms of the protection and promotion of health.

613. GATS is an important treaty from a health-policy perspective; but, unlike other WTO agreements, this treaty offers opportunities for WTO members generally and health policy communities specifically to shape its impact on health policy. The development of more health-sensitive legal interpretations and political decisions in other areas of the WTO provides a springboard for health policy advocacy on GATS *before* the diplomatic process proceeds beyond the point where damage to health policy might be done.

614. The Legal Review may assist in this overall effort by providing an understanding of the law of GATS from a health policy perspective. As in other contexts, the law is only a tool, the successful use of which depends not only on knowledge of the law but also the political, economic, moral, and cultural contexts in which the law operates. Despite its length, detail, and complexity, the authors hope that this Legal Review will contribute to other efforts governments, WHO, and NGOs are undertaking to craft an approach to GATS that respects the obligations of governments for protecting and promoting human health.





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Annex 1

GENERAL AGREEMENT ON TRADE IN SERVICES

Members,

Recognizing the growing importance of trade in services for the growth and development of the world economy;

Wishing 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 and as a means of promoting the economic growth of all trading partners and the development of developing countries;

Desiring the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives;

Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right;

Desiring to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports including, *inter alia*, through the strengthening of their domestic services capacity and its efficiency and competitiveness;

Taking particular account of the serious difficulty of the least-developed countries in view of their special economic situation and their development, trade and financial needs;

Hereby *agree* as follows.

PART I SCOPE AND DEFINITION

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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.



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PART II GENERAL OBLIGATIONS AND DISCIPLINES

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.

ARTICLE III TRANSPARENCY

1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.

2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.

3. Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.

4. Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the "WTO Agreement"). Appropriate flexibility with respect to the time-limit within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations.

5. Any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement.



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ARTICLE III *BIS* DISCLOSURE OF CONFIDENTIAL INFORMATION

Nothing in this Agreement shall require any Member to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.



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ARTICLE IV INCREASING PARTICIPATION OF DEVELOPING COUNTRIES

1. The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members pursuant to Parts III and IV of this Agreement, relating to:

- (a) the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia* through access to technology on a commercial basis;
- (b) the improvement of their access to distribution channels and information networks; and
- (c) the liberalization of market access in sectors and modes of supply of export interest to them.

2. Developed country Members, and to the extent possible other Members, shall establish contact points within two years from the date of entry into force of the WTO Agreement to facilitate the access of developing country Members' service suppliers to information, related to their respective markets, concerning:

- (a) commercial and technical aspects of the supply of services;
- (b) registration, recognition and obtaining of professional qualifications; and
- (c) the availability of services technology.

3. Special priority shall be given to the least-developed country Members in the implementation of paragraphs 1 and 2. Particular account shall be taken of the serious difficulty of the least-developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.

ARTICLE V ECONOMIC INTEGRATION



1. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:

(a) has substantial sectoral coverage,¹ and

[¹ This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply.]

(b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:

(i) elimination of existing discriminatory measures, and/or

(ii) prohibition of new or more discriminatory measures,

either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV *bis*.

2. In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.

3. (a) Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.

(b) Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.

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4. Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement.

5. If, in the conclusion, enlargement or any significant modification of any agreement under paragraph 1, a Member intends to withdraw or modify a specific commitment inconsistently with the terms and conditions set out in its Schedule, it shall provide at least 90 days advance notice of such modification or withdrawal and the procedure set forth in paragraphs 2, 3 and 4 of Article XXI shall apply.

6. A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.

7. (a) Members which are parties to any agreement referred to in paragraph 1 shall promptly notify any such agreement and any enlargement or any significant modification of that agreement to the Council for Trade in Services. They shall also make available to the Council such relevant information as may be requested by it. The Council may establish a working party to examine such an agreement or enlargement or modification of that agreement and to report to the Council on its consistency with this Article.

(b) Members which are parties to any agreement referred to in paragraph 1 which is implemented on the basis of a time-frame shall report periodically to the Council for Trade in Services on its implementation. The Council may establish a working party to examine such reports if it deems such a working party necessary.

(c) Based on the reports of the working parties referred to in subparagraphs (a) and (b), the Council may make recommendations to the parties as it deems appropriate.

8. A Member which is a party to any agreement referred to in paragraph 1 may not seek compensation for trade benefits that may accrue to any other Member from such agreement.

ARTICLE V *BIS* LABOUR MARKET INTEGRATION AGREEMENTS

This Agreement shall not prevent any of its Members from being a party to an agreement establishing full integration² of the labour markets between or among the parties to such an agreement, provided that such an agreement:

[²Typically, such integration provides citizens of the parties concerned with a right of free entry to the employment markets of the parties and includes measures concerning conditions of pay, other conditions of employment and social benefits.]

- (a) exempts citizens of parties to the agreement from requirements concerning residency and work permits;
- (b) is notified to the Council for Trade in Services.

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ARTICLE VI DOMESTIC REGULATION

1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

- 2. (a) Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.
- (b) The provisions of subparagraph (a) shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.



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3. Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application.

4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

- (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
- (b) not more burdensome than necessary to ensure the quality of the service;
- (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

- (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and
- (ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

(b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations³ applied by that Member.

[³The term “relevant international organizations” refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.]

6. In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.

ARTICLE VII RECOGNITION



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1. For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

2. A Member that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Member's territory should be recognized.

3. A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.

4. Each Member shall:

- (a) within 12 months from the date on which the WTO Agreement takes effect for it, inform the Council for Trade in Services of its existing recognition measures and state whether such measures are based on agreements or arrangements of the type referred to in paragraph 1;
- (b) promptly inform the Council for Trade in Services as far in advance as possible of the opening of negotiations on an agreement or arrangement of the type referred to in paragraph 1 in order to provide adequate opportunity to any other Member to indicate their interest in participating in the negotiations before they enter a substantive phase;
- (c) promptly inform the Council for Trade in Services when it adopts new recognition measures or significantly modifies existing ones and state whether the measures are based on an agreement or arrangement of the type referred to in paragraph 1.



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5. Wherever appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases, Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.

ARTICLE VIII MONOPOLIES AND EXCLUSIVE SERVICE SUPPLIERS

1. Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments.

2. Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.

3. The Council for Trade in Services may, at the request of a Member which has a reason to believe that a monopoly supplier of a service of any other Member is acting in a manner inconsistent with paragraph 1 or 2, request the Member establishing, maintaining or authorizing such supplier to provide specific information concerning the relevant operations.

4. If, after the date of entry into force of the WTO Agreement, a Member grants monopoly rights regarding the supply of a service covered by its specific commitments, that Member shall notify the Council for Trade in Services no later than three months before the intended implementation of the grant of monopoly rights and the provisions of paragraphs 2, 3 and 4 of Article XXI shall apply.

5. The provisions of this Article shall also apply to cases of exclusive service suppliers, where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory.

ARTICLE IX BUSINESS PRACTICES

1. Members recognize that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services.

2. Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating practices referred to in paragraph 1. The Member addressed shall accord full and sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question. The Member addressed shall also provide other information available to the requesting Member, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Member.



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ARTICLE X EMERGENCY SAFEGUARD MEASURES

1. There shall be multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination. The results of such negotiations shall enter into effect on a date not later than three years from the date of entry into force of the WTO Agreement.

2. In the period before the entry into effect of the results of the negotiations referred to in paragraph 1, any Member may, notwithstanding the provisions of paragraph 1 of Article XXI, notify the Council on Trade in Services of its intention to modify or withdraw a specific commitment after a period of one year from the date on which the commitment enters into force; provided that the Member shows cause to the Council that the modification or withdrawal cannot await the lapse of the three-year period provided for in paragraph 1 of Article XXI.

3. The provisions of paragraph 2 shall cease to apply three years after the date of entry into force of the WTO Agreement.



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ARTICLE XI PAYMENTS AND TRANSFERS

1. Except under the circumstances envisaged in Article XII, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.

2. Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article XII or at the request of the Fund.

ARTICLE XII RESTRICTIONS TO SAFEGUARD THE BALANCE OF PAYMENTS

1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.

2. The restrictions referred to in paragraph 1:

- (a) shall not discriminate among Members;
- (b) shall be consistent with the Articles of Agreement of the International Monetary Fund;
- (c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other Member;
- (d) shall not exceed those necessary to deal with the circumstances described in paragraph 1;
- (e) shall be temporary and be phased out progressively as the situation specified in paragraph 1 improves.

3. In determining the incidence of such restrictions, Members may give priority to the supply of services which are more essential to their economic or development programmes. However, such restrictions shall not be adopted or maintained for the purpose of protecting a particular service sector.



4. Any restrictions adopted or maintained under paragraph 1, or any changes therein, shall be promptly notified to the General Council.

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5. (a) Members applying the provisions of this Article shall consult promptly with the Committee on Balance-of-Payments Restrictions on restrictions adopted under this Article.

(b) The Ministerial Conference shall establish procedures⁴ for periodic consultations with the objective of enabling such recommendations to be made to the Member concerned as it may deem appropriate.

[⁴ It is understood that the procedures under paragraph 5 shall be the same as the GATT 1994 procedures.]

(c) Such consultations shall assess the balance-of-payment situation of the Member concerned and the restrictions adopted or maintained under this Article, taking into account, *inter alia*, such factors as:

- (i) the nature and extent of the balance-of-payments and the external financial difficulties;
- (ii) the external economic and trading environment of the consulting Member;
- (iii) alternative corrective measures which may be available.

(d) The consultations shall address the compliance of any restrictions with paragraph 2, in particular the progressive phaseout of restrictions in accordance with paragraph 2(e).

(e) In such consultations, all findings of statistical and other facts presented by the International Monetary Fund relating to foreign exchange, monetary reserves and balance of payments, shall be accepted and conclusions shall be based on the assessment by the Fund of the balance-of payments and the external financial situation of the consulting Member.

6. If a Member which is not a member of the International Monetary Fund wishes to apply the provisions of this Article, the Ministerial Conference shall establish a review procedure and any other procedures necessary.



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ARTICLE XIII GOVERNMENT PROCUREMENT

1. Articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.

2. There shall be multilateral negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement.

ARTICLE XIV GENERAL EXCEPTIONS

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or to maintain public order;⁵

[⁵ The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.]

(b) necessary to protect human, animal or plant life or health;

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(iii) safety;

(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective⁶ imposition or collection of direct taxes in respect of services or service suppliers of other Members;

[⁶ Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Member under its taxation system which:

- (i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Member's territory; or
- (ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Member's territory; or
- (iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or
- (iv) apply to consumers of services supplied in or from the territory of another Member in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Member's territory; or
- (v) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or
- (vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Member's tax base.

Tax terms or concepts in paragraph (d) of Article XIV and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Member taking the measure.]

(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.



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ARTICLE XIV *BIS* SECURITY EXCEPTIONS

1. Nothing in this Agreement shall be construed:

(a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:

(i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;

(ii) relating to fissionable and fusionable materials or the materials from which they are derived;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.

ARTICLE XV SUBSIDIES

1. Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects.⁷ The negotiations shall also address the appropriateness of countervailing procedures. Such negotiations shall recognize the role of subsidies in relation to the development programmes of developing countries and take into account the needs of Members, particularly developing country Members, for flexibility in this area. For the purpose of such negotiations, Members shall exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers.

[⁷ A future work programme shall determine how, and in what time-frame, negotiations on such multilateral disciplines will be conducted.]

2. Any Member which considers that it is adversely affected by a subsidy of another Member may request consultations with that Member on such matters. Such requests shall be accorded sympathetic consideration.

PART III SPECIFIC COMMITMENTS

ARTICLE XVI MARKET ACCESS

1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.⁸

[⁸ If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(a) of Article I and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital. If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of Article I, it is thereby committed to allow related transfers of capital into its territory.]

2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

- (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;⁹

[⁹ Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.]

- (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
- (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
- (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

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ARTICLE XVII NATIONAL TREATMENT

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.¹⁰

[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.]

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.

ARTICLE XVIII ADDITIONAL COMMITMENTS

Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.

PART IV PROGRESSIVE LIBERALIZATION

ARTICLE XIX NEGOTIATION OF SPECIFIC COMMITMENTS



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1. In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.

2. The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV.

3. For each round, negotiating guidelines and procedures shall be established. For the purposes of establishing such guidelines, the Council for Trade in Services shall carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of this Agreement, including those set out in paragraph 1 of Article IV. Negotiating guidelines shall establish modalities for the treatment of liberalization undertaken autonomously by Members since previous negotiations, as well as for the special treatment for least-developed country Members under the provisions of paragraph 3 of Article IV.

4. The process of progressive liberalization shall be advanced in each such round through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement.



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ARTICLE XX SCHEDULES OF SPECIFIC COMMITMENTS

1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:
 - (a) terms, limitations and conditions on market access;
 - (b) conditions and qualifications on national treatment;
 - (c) undertakings relating to additional commitments;
 - (d) where appropriate the time-frame for implementation of such commitments; and
 - (e) the date of entry into force of such commitments.

2. Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.

3. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof.

ARTICLE XXI MODIFICATION OF SCHEDULES

1.
 - (a) A Member (referred to in this Article as the “modifying Member”) may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.
 - (b) A modifying Member shall notify its intent to modify or withdraw a commitment pursuant to this Article to the Council for Trade in Services no later than three months before the intended date of implementation of the modification or withdrawal.

2.
 - (a) At the request of any Member the benefits of which under this Agreement may be affected (referred to in this Article as an “affected Member”) by a proposed modification or withdrawal notified under subparagraph 1(b), the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the

Members concerned shall endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations.

(b) Compensatory adjustments shall be made on a most-favoured-nation basis.



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3. (a) If agreement is not reached between the modifying Member and any affected Member before the end of the period provided for negotiations, such affected Member may refer the matter to arbitration. Any affected Member that wishes to enforce a right that it may have to compensation must participate in the arbitration.

(b) If no affected Member has requested arbitration, the modifying Member shall be free to implement the proposed modification or withdrawal.

4. (a) The modifying Member may not modify or withdraw its commitment until it has made compensatory adjustments in conformity with the findings of the arbitration.

(b) If the modifying Member implements its proposed modification or withdrawal and does not comply with the findings of the arbitration, any affected Member that participated in the arbitration may modify or withdraw substantially equivalent benefits in conformity with those findings.

Notwithstanding Article II, such a modification or withdrawal may be implemented solely with respect to the modifying Member.

5. The Council for Trade in Services shall establish procedures for rectification or modification of Schedules.

Any Member which has modified or withdrawn scheduled commitments under this Article shall modify its Schedule according to such procedures.



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PART V INSTITUTIONAL PROVISIONS

ARTICLE XXII CONSULTATION

1. Each Member shall accord sympathetic consideration to, and shall afford adequate opportunity for, consultation regarding such representations as may be made by any other Member with respect to any matter affecting the operation of this Agreement. The Dispute Settlement Understanding (DSU) shall apply to such consultations.

2. The Council for Trade in Services or the Dispute Settlement Body (DSB) may, at the request of a Member, consult with any Member or Members in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

3. A Member may not invoke Article XVII, either under this Article or Article XXIII, with respect to a measure of another Member that falls within the scope of an international agreement between them relating to the avoidance of double taxation. In case of disagreement between Members as to whether a measure falls within the scope of such an agreement between them, it shall be open to either Member to bring this matter before the Council for Trade in Services.¹¹ The Council shall refer the matter to arbitration. The decision of the arbitrator shall be final and binding on the Members.

[¹¹ With respect to agreements on the avoidance of double taxation which exist on the date of entry into force of the WTO Agreement, such a matter may be brought before the Council for Trade in Services only with the consent of both parties to such an agreement.]

ARTICLE XXIII DISPUTE SETTLEMENT AND ENFORCEMENT

1. If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU.

2. If the DSB considers that the circumstances are serious enough to justify such action, it may authorize a Member or Members to suspend the application to any other Member or Members of obligations and specific commitments in accordance with Article 22 of the DSU.



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3. If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply.

ARTICLE XXIV COUNCIL FOR TRADE IN SERVICES

1. The Council for Trade in Services shall carry out such functions as may be assigned to it to facilitate the operation of this Agreement and further its objectives. The Council may establish such subsidiary bodies as it considers appropriate for the effective discharge of its functions.

2. The Council and, unless the Council decides otherwise, its subsidiary bodies shall be open to participation by representatives of all Members.

3. The Chairman of the Council shall be elected by the Members.

ARTICLE XXV TECHNICAL COOPERATION

1. Service suppliers of Members which are in need of such assistance shall have access to the services of contact points referred to in paragraph 2 of Article IV.

2. Technical assistance to developing countries shall be provided at the multilateral level by the Secretariat and shall be decided upon by the Council for Trade in Services.



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ARTICLE XXVI RELATIONSHIP WITH OTHER INTERNATIONAL ORGANIZATIONS

The General Council shall make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies as well as with other intergovernmental organizations concerned with services.

PART VI FINAL PROVISIONS

ARTICLE XXVII DENIAL OF BENEFITS

A Member may deny the benefits of this Agreement:

- (a) to the supply of a service, if it establishes that the service is supplied from or in the territory of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement;
- (b) in the case of the supply of a maritime transport service, if it establishes that the service is supplied:
 - (i) by a vessel registered under the laws of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement, and
 - (ii) by a person which operates and/or uses the vessel in whole or in part but which is of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement;
- (c) to a service supplier that is a juridical person, if it establishes that it is not a service supplier of another Member, or that it is a service supplier of a Member to which the denying Member does not apply the WTO Agreement.

ARTICLE XXVIII DEFINITIONS



For the purpose of this Agreement:

(a) “measure” means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;

(b) “supply of a service” includes the production, distribution, marketing, sale and delivery of a service;

(c) “measures by Members affecting trade in services” include measures in respect of

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

(ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally;

(iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member;

(d) “commercial presence” means any type of business or professional establishment, including through

(i) the constitution, acquisition or maintenance of a juridical person, or

(ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service;

(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;

(f) “service of another Member” means a service which is supplied,

(i) from or in the territory of that other Member, or in the case of maritime transport, by a vessel registered under the laws of that other Member, or by a person of that other Member which supplies the service through the operation of a vessel and/or its use in whole or in part; or

(ii) in the case of the supply of a service through commercial presence or through the presence of natural persons, by a service supplier of that other Member;

(g) “service supplier” means any person that supplies a service;¹²

[¹² Where the service is not supplied directly by a juridical person but through other forms of commercial

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presence such as a branch or a representative office, the service supplier (i.e. the juridical person) shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under the Agreement. Such treatment shall be extended to the presence through which the service is supplied and need not be extended to any other parts of the supplier located outside the territory where the service is supplied.]

(h) “monopoly supplier of a service” means any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service;

(i) “service consumer” means any person that receives or uses a service;

(j) “person” means either a natural person or a juridical person;

(k) “natural person of another Member” means a natural person who resides in the territory of that other Member or any other Member, and who under the law of that other Member:

(i) is a national of that other Member; or

(ii) has the right of permanent residence in that other Member, in the case of a Member which:

1. does not have nationals; or

2. accords substantially the same treatment to its permanent residents as it does to its nationals in respect of measures affecting trade in services, as notified in its acceptance of or accession to the WTO Agreement, provided that no Member is obligated to accord to such permanent residents treatment more favourable than would be accorded by that other Member to such permanent residents. Such notification shall include the assurance to assume, with respect to those permanent residents, in accordance with its laws and regulations, the same responsibilities that other Member bears with respect to its nationals;

(l) “juridical person” means any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association;

(m) “juridical person of another Member” means a juridical person which is either:

(i) constituted or otherwise organized under the law of that other Member, and is engaged in substantive business operations in the territory of that Member or any other Member; or

(ii) in the case of the supply of a service through commercial presence, owned or controlled by:

1. natural persons of that Member; or

2. juridical persons of that other Member identified under subparagraph (i);

(n) a juridical person is:

(i) “owned” by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member;

(ii) “controlled” by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions;

(iii) “affiliated” with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person; and

(o) “direct taxes” comprise all taxes on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, and taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.



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ARTICLE XXIX ANNEXES

The Annexes to this Agreement are an integral part of this Agreement.



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THE WTO DECISION IN *US—GAMBLING*: IMPLICATIONS FOR HEALTH POLICY¹

An Important GATS Decision for Health Policy

1. On 7 April 2005, the Appellate Body of the World Trade Organization (WTO) issued its decision in *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US—Gambling)*.² Although *US—Gambling* did not directly involve health policy, the Appellate Body decision in this case contains interpretations of the General Agreement on Trade in Services (GATS) that are important to the relationship between GATS and health policy. Most prominently, the Appellate Body decision in *US—Gambling* addresses the (1) interpretation of schedules of specific commitments; (2) relationship between the rules on specific market access commitments and those on domestic regulation; and (3) general exceptions available to WTO members seeking to justify GATS-inconsistent measures.

2. *US—Gambling* represents an important case in WTO jurisprudence on GATS that may influence how WTO members approach future disputes under GATS and the on-going GATS negotiations. Both the Panel and Appellate Body decisions attracted criticism from trade experts and non-governmental organizations. In light of the importance of and controversy surrounding *US—Gambling*, this Annex describes the facts of *US—Gambling*, outlines the most important rulings of the Panel and Appellate Body, and analyzes the implications of the Appellate Body's decision for health policy makers.

¹ David P. Fidler, Professor, Indiana University School of Law, USA and Carlos Correa, Professor, University of Buenos Aires School of Law, Argentina; Director, Project on Intellectual Property Policy, Innovation and Development, South Centre.

² WT/DS285/AB/R. The Panel report, WT/DS285/R, was issued on 10 November 2004.

Background on *US—Gambling*



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THE CLAIM BY ANTIGUA AGAINST THE UNITED STATES

3. In 2003, Antigua and Barbuda (Antigua) brought GATS claims against the United States to the WTO dispute settlement body. Antigua alleged that the U.S. prohibition on the remote supply (e.g., Internet-based supply) of gambling and betting services violated numerous U.S. obligations under GATS, including obligations concerning (1) specific commitments made for market access and national treatment (Articles XVI and XVII); and (2) domestic regulations (Article VI).³

4. Specifically, Antigua claimed that the United States had made full market access commitments during the Uruguay Round for cross-border (Mode 1) supply of gambling and betting services—commitments violated by the U.S. prohibition on the remote supply of gambling services found in various state and federal laws. The United States denied it had made market access commitments on the cross-border supply of gambling services; but the United States also argued that, should a WTO panel rule it did make such commitments, the U.S. violation of GATS was justified as necessary to protect public morals or to maintain public order under Article XIV(a) of GATS.

THE PANEL AND APPELLATE BODY DECISIONS

5. In its decision issued on 10 November 2004, the Panel held that the United States (1) had made a specific commitment on Mode 1 supply of gambling services, which it violated; and (2) did not demonstrate that its violations of GATS were justified as necessary to protect public morals or to maintain public order (Article XIV(a)). Both Antigua and the United States appealed aspects of the Panel's decision.

6. Although modifying in important ways the legal reasoning used by the Panel, the Appellate Body upheld the findings that the United States had made, and violated, its specific commitments on the Mode 1 supply of gambling services. The Appellate Body overturned the Panel's decision that the prohibition was not

³ Antigua's full set of claims against the United States involved GATS Articles VI:1, VI:3, XI:1, XVI:1, XVII:1, XVII:2, and XVII:3.



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necessary to protect public morals or to maintain public order but concluded that the United States had not demonstrated that its prohibition satisfied all the requirements established by the introductory paragraph of Article XIV of GATS. (See Table 1 for a comparison of the Panel’s and Appellate Body’s major rulings in this case.)

TABLE 1: COMPARISON OF MAJOR RULINGS IN *US—GAMBLING* BY THE PANEL AND APPELLATE BODY

Panel Decision	Appellate Body Decision
The U.S. made a specific commitment for full market access for gambling services.	Affirmed with modified reasoning. The Appellate Body modified the legal reasoning of the panel with respect to how the 1993 GATS <i>Scheduling Guidelines</i> and the Services Sector Classification List are used in treaty interpretation.
The U.S. prohibition on the remote supply of gambling services violated its specific market access commitment because the prohibition had the effect of a numerical or quantitative limitation on the remote supply of gambling services within the meanings of Articles XVI:2(a) and XVI:2(c)	Affirmed. The Appellate Body stressed that a prohibition on the supply of services subject to a full market access commitment is a quantitative limitation within the meanings of Articles XVI:2(a) and XVI:2(c).
The U.S. did not demonstrate that its prohibition on the supply of remote gambling services was necessary to protect public morals within the meaning of Article XIV(a).	Reversed. The Appellate Body held that the U.S. had established that its prohibition was necessary to protect public morals within the meaning of Article XIV(a).
The U.S. did not establish that its application of the prohibition on the supply of remote gambling services satisfied the disciplines in the introductory paragraph of Article XIV because (1) the U.S. failed to demonstrate that it enforced its prohibition consistently with the requirements of the <i>chapeau</i> ; and (2) one federal law appeared to allow the remote supply of gambling services domestically for horse races.	Reversed in part, affirmed in part. The Appellate Body rejected the Panel’s ruling that the U.S. failed to demonstrate that it did not enforce its prohibition in a manner consistent with the <i>chapeau</i> ; but it upheld the Panel’s holding that the U.S. had not shown that its law on horse racing applied consistently to both foreign and domestic service suppliers of remote gambling services.

7. The Appellate Body decision immediately drew critical commentary from trade experts and non-governmental organizations that have been monitoring GATS. One NGO called it an “explosive decision” with broad political and policy implications,⁴ and an expert in international trade law opined that the Appellate Body’s decision threatened “with the stroke of a pen, the validity of scores of domestic services regulations, including those that are non-discriminatory[.]”⁵



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Implications for Health Policy: A Closer Look at *US—Gambling*

8. The importance of *US—Gambling* for health policy can be found in three important features of this case: (1) how WTO members make and interpret schedules of specific commitments; (2) whether the Appellate Body’s interpretation of the scope of Article XVI:2 on market access commitments undermines the right to regulate services domestically; and (3) the requirements a WTO member must satisfy to justify a violation of GATS through Article XIV.

MAKING AND INTERPRETING SCHEDULES OF SPECIFIC COMMITMENTS

9. Under GATS, each WTO member decides for itself whether to make binding market access and national treatment commitments. GATS allows WTO members to make specific market access and national treatment commitments in service sectors in which they wish to liberalize trade. Market access commitments create opportunities for foreign services and service suppliers, and national treatment commitments require that foreign and domestic services be treated the same.

10. In the service sub-sector of “Other Recreational Services (except sporting),” the United States made full market access and national treatment commitments for Mode 1 trade in services during the Uruguay Round. At the heart of *US—Gambling* is the dispute between Antigua and the United States about whether the United States had made specific commitments that applied to gambling services. This dispute forced the Panel and Appellate Body to interpret the U.S. Schedule of Specific Commitments through the applicable rules

⁴ Public Citizen, “Final WTO Panel Upholds Ruling Against U.S. Internet Gambling Ban in Explosive Decision with Broad Political, Policy Implications,” Press Release, 7 April 2005.

⁵ J. Pauwelyn, “WTO Softens Earlier Condemnation of U.S. Ban on Internet Gambling, But Confirms Broad Reach into Sensitive Domestic Regulation,” American Society of International Law Insight, 12 April 2005.



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of treaty interpretation. Although the Panel's and Appellate Body's approaches to treaty interpretation differed,⁶ both reached the same conclusion: The U.S. specific commitments under "Other Recreational Services (except sporting)" included gambling services. Neither the Panel nor the Appellate Body gave any weight to U.S. protests that it never intended to make specific commitments on gambling services. *US—Gambling* illustrates that interpretations of specific commitments by the WTO dispute settlement body will be objective and based on the application of the rules of treaty interpretation found in international law.

11. *US—Gambling* also illustrates the "list it or lose it" dynamic of making and scheduling specific commitments under GATS. In connection with making specific commitments, WTO members must list in their schedules of specific commitments all measures they wish to retain that would otherwise violate the specific commitments being made. If a WTO member does not list such measures, it loses the ability to resort to them in the future, unless it can justify the violation of its specific commitment caused by relying on such measures by appealing to the general exceptions in Article XIV of GATS.

12. The United States made full market access commitments for Mode 1 supply of "Other Recreational Services (except sporting)," which included gambling services; but the United States did not list its prohibition on the remote supply of gambling services in its schedule of specific commitments. Not having listed this market-access restriction, the United States lost the ability to apply it in conformity with GATS and had to resort to Article XIV to justify its violation of its specific commitment.

13. For health policy purposes, *US—Gambling* confirms that WTO members should approach making specific market access and national treatment commitments in health-related services carefully and should thoroughly analyze what kinds of measures they want to retain with respect to the precise service sectors potentially affected by their specific commitments. In addition, *US—Gambling* underscores the importance for WTO members to draft their respective schedules of specific commitments clearly and precisely to ensure their intent is accurately recorded in their schedules and is readily discernable through the application of international law on treaty interpretation.⁷ This process requires that WTO members fully understand the "regulatory footprint" of the service sector in which they wish to make specific commitments. As the United States discovered in *US—Gambling*, the WTO dispute settlement body will treat inadvertent specific commitments the same as intentional commitments in terms of GATS treaty interpretation and implementation.

⁶ The Panel used the 1993 *Scheduling Guidelines* and the Service Sector Classification List as context for GATS interpretation pursuant to Article 31 of the Vienna Convention on the Law of Treaties. By contrast, the Appellate Body used these documents as supplementary means for interpreting GATS under Article 32 of the Vienna Convention on the Law of Treaties.

⁷ *US—Gambling* may also indicate that clarity and precision in drafting schedules of specific commitments may be enhanced by WTO members utilizing (as the United States did not) the standardized Services Sectoral Classification List and Central Product Classification (CPC) numbers.

THE SCOPE OF ARTICLE XVI:2 AND THE RIGHT TO REGULATE SERVICES



14. The second major implication of *US—Gambling* for health policy involves the controversy over the Appellate Body’s interpretation of the scope of Articles XVI:2(a) and XVI:2(c) (see Box 1 for the language of these provisions).

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BOX 1: ARTICLES XVI:1 AND XVI:2(A) AND XVI:2(C)

Article XVI
Market Access

1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.

2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;

* * *

(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;

15. The United States maintained that its prohibition on the supply of remote gambling services did not fall within either Article XVI:2(a) or XVI:2(c) because the prohibition contains no numerical units or explicit quotas. The United States argued for a narrow interpretation of the scope of Articles XVI:2(a) and XVI:2(c). The United States claimed that the prohibition properly fell within Article VI on domestic regulations⁸ or Article XVII on national treatment.⁹ Reading its prohibition on the supply of remote gambling services as a market access limitation would, the United States asserted, improperly expand market access obligations under Article XVI into a WTO member’s right to regulate how services are provided in its territory (*US—Gambling*, Appellate Body Report, ¶126).

⁸ Specifically, the prohibition would fall within Article VI:5(a).

⁹ The United States made a full national treatment commitment for “Other Recreational Services” under Article XVII of GATS, and Antigua claimed that the prohibition on the supply of remote gambling services violated this specific commitment. The Panel did not address this Article XVII claim for reasons of judicial economy, and the Appellate Body did not address the claim either.



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16. The Panel and the Appellate Body ruled against the United States, interpreting Articles XVI:2(a) and XVI:2(c) to catch measures that have the effect of a “zero quota” with respect to service sectors subject to full market access commitments (Panel Report, ¶¶6.338, 6.355; Appellate Body Report, ¶¶239, 250).

17. Although the European Communities and Japan supported this reasoning (Appellate Body Report, ¶¶101, 107), the holdings have raised concerns that *US—Gambling* will serve as a precedent allowing WTO members to challenge any domestic regulation as a market access restriction if such regulation merely has the effect of restricting market access in a service sector subject to a specific market access commitment. Under this approach, a domestic regulation would, unless expressly inscribed in the schedule of specific commitments as required by Article XVI:2, violate the market access commitment in question. Such a dynamic would, critics claim, undermine the balance negotiated in GATS between specific market access commitments subject to Article XVI and the right to regulate trade in services subject to Article VI.

18. Pauwelyn provides a hypothetical of what he perceives to be problematical with the interpretation of Articles XVI:2(a) and XVI:2(c) in *US—Gambling*:

So far, a driving test requirement to obtain a taxi license was presumed to fall under the (to date) very lenient provisions of Article VI of GATS on domestic regulation. Under the Appellate Body’s logic, however, the mere fact that such a substantive driving requirement has the *effect* of lowering the *number* of foreign taxi drivers (i.e., keeps out those that fail the driving test) may transform the requirement into a *per se* prohibited market access restriction.¹⁰

19. If Pauwelyn is correct, the only way to save the driving test requirement would be to try to justify it under an exception provided in Article XIV of GATS.

20. The concern expressed in this hypothetical is that a broad interpretation of Article XVI:2 through an “effect test” expands the rules on market access in Article XVI into the territory previously thought to be governed by the rules on domestic regulation in Article VI. Such an expansion, the argument goes, reduces the WTO member’s right to regulate services domestically and undercuts GATS’ stated objective of preserving the right of WTO members to regulate services in their territories.

¹⁰ Pauwelyn, *supra* note 5.

21. It is not clear, however, that *US—Gambling* expands the market access rules into the area of domestic regulation. First, *US—Gambling* addresses a specific situation that does not necessarily speak to other fact patterns. The Appellate Body held that the United States had made full market access commitments for Mode 1 supply of services in the sector in which gambling services fall. The United States listed no restrictions to these commitments under Article XVI:2 that it wanted to retain. U.S. laws completely prohibited, however, Mode 1 supply of gambling services, thus imposing a clear quantitative limit—zero—on the number and amount of Mode 1 gambling services that could be supplied by WTO members.



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22. The facts of *US—Gambling* are different from a situation in which the application of a qualitative domestic regulation has the effect of reducing market access for foreign suppliers by some unquantifiable amount. Therefore, this ruling does not necessarily set a precedent for qualitative measures that WTO members may currently have or adopt. Arguing that the Appellate Body's opinion has expansive meaning does not assist WTO members willing to exercise their rights under Article VI.

23. Second, *US—Gambling* confirms what WTO members have known from the beginning of GATS: Non-discriminatory measures applied to trade in services would fall under Article XVI:2 if (1) the WTO member had made specific market access commitments in a relevant sector; and (2) the non-discriminatory measures imposed limitations on the number of service suppliers or service operations or on the total quantity of service output.

24. Articles XVI:2 and XX:1(a) require terms, limitations, and conditions on market access to be inscribed in the schedule of specific commitments if a WTO member wants to continue to apply measures that limit market access in the service sector in question. The Appellate Body ruling reminds WTO members how careful, clear, and precise they should be in making specific commitments if they want to retain measures that restrict, for whatever reason, trade in services in sectors subject to commitments.

25. Third, *US—Gambling* may not help a WTO member prevail on an argument that a non-discriminatory, qualitative domestic regulation violates a market access commitment merely because it has some effect on market access. In other words, *US—Gambling* might not support a WTO member's argument that but for the application of a qualitative domestic regulation market access would be greater. *US—Gambling*



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can be read to require evidence that the measure in question restricts, in form or effect, market access to an identifiable numerical or quantitative limit, such as the “zero quota” produced by the U.S. prohibition.

26. From a health policy perspective, *US—Gambling* creates neither a crisis nor grounds for complacency with respect to the relationship between market access commitments and the right to regulate services domestically. How WTO members use the Appellate Body’s rulings in *US—Gambling* bears close scrutiny by health ministries. The Appellate Body has rejected the very narrow interpretation of Article XVI:2 posited by the United States, but it did not endorse the position that any restrictive effect on market access produced by qualitative domestic regulations constitutes a prohibited market access limitation in a service sector subject to specific market access commitments. As the Appellate Body stated in *US—Gambling*, “[i]t is neither necessary nor appropriate for us to draw, in the abstract, the line between quantitative and qualitative measures, and we do not do so here” (¶1250).

27. Between the two extremes of the U.S. position in *US—Gambling* and the “any effect” test posited by critics sits the interpretive area in which the line between quantitative and qualitative measures may be drawn in future cases. As the controversy sparked by *US—Gambling* suggests, how subsequent cases draw this line will be relevant for health policy’s relationship with GATS. The line drawing is particularly important for health-related services because WTO members, rightly, tend to regulate such services in significant ways within their respective territories. Box 2 provides some health-related situations in which *US—Gambling* may arise as part of the legal arguments of the parties.

BOX 2: HEALTH POLICY SITUATIONS AND *US—GAMBLING*

The following scenarios represent health policy situations involving trade in health-related services to illustrate how the Appellate Body ruling in US—Gambling might or might not apply.

Background Facts

State A and State B are WTO members. State A made a full market access commitment for the Mode 1 supply of hospital services. State A inscribed no limitations on its schedule of specific commitments with respect to this market access commitment.



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Situation #1: Domestic Law Banning Telemedicine

At the time it made its market-access commitment, State A had domestic laws that prohibited the remote delivery of medical advice to patients (i.e., a ban on telemedicine, one means of providing cross-border hospital services); but State A did not include these limitations on market access in its schedule of specific commitments as market-access restrictions it wanted to retain with respect to the hospital services sector subject to its Mode 1 market access commitment.

State B challenges the prohibition on telemedicine as a violation of State A's full Mode 1 market access commitment because the prohibition is a clear limitation (a zero-quota) on the number of telemedicine suppliers of Mode 1 hospital services. Under *US—Gambling*, State A would have to argue either that (1) it did not make any market-access commitment on telemedicine because telemedicine does not fall within the hospital service sector subject to its specific commitment; or (2) its violation of its market-access commitment is necessary to protect human health and thus justified under the Article XIV(b) exception of GATS.

Situation #2: Domestic Law Regulating Telemedicine

At the time it made its market-access commitment, State A had domestic laws that permit the provision of remote delivery of medical advice to patients, subject to the approval in advance of a licensing authority; and State A did not inscribe this licensing requirement in its schedule of specific commitments with respect to its market-access commitment on Mode 1 health services.

State B challenges the licensing regulation as a violation of State A's full Mode 1 market access commitment, arguing that it produces, in effect, quantitative limitations on the number of service suppliers that can supply telemedicine services in State A. The decision in *US—Gambling* is not helpful to State B in this situation *unless* State B can demonstrate that State A, in applying the licensing requirement, actually imposed quantitative limitations found in Article XVI:2 (e.g., a quota) on Mode 1 supply of telemedicine services.

State B cannot prevail if all it can show is that the licensing requirement limits the number of suppliers from State B that can provide Mode 1 telemedicine services in State A. Domestic licensing requirements restrict, by definition, the number of people or entities that can supply the service in question to those who meet the licensing standards.

Nor could State B make a successful claim under Article VI:5(a) because the licensing requirement existed when State A made its market-access commitment. State B could not show, therefore, that it could not reasonably have expected State A to apply such domestic regulations in the sector in which State A made its market-access commitment.



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INTERPRETATION OF ARTICLE XIV ON GENERAL EXCEPTIONS

28. *US—Gambling* is the first GATS dispute in which the Panel and Appellate Body interpreted Article XIV of GATS, which contains the general exceptions. The United States attempted to justify its violation of Article XVI by appealing to Article XIV(a), which provides an exception for measures necessary to protect public morals or to maintain public order (see Box 3 for the language of Article XIV(a)).¹¹

BOX 3: ARTICLE XIV(A)

Article XIV General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public moral or to maintain public order;⁵

⁵ The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

29. The Panel held that the United States failed to meet its burden of demonstrating that the prohibition on the supply of remote gambling services was necessary to protect public morals or to maintain public order. The Appellate Body rejected the Panel's holding, ruling instead that the United States had demonstrated the necessity of its prohibition in connection with the protection of public morals or maintenance of public order. The Appellate Body held, however, that the United States had not met its burden of showing that the application of its prohibition satisfied all the requirements of the introductory paragraph of Article XIV, known as the *chapeau*.

30. The Appellate Body's handling of Article XIV(a) and the *chapeau* is important for future cases that involve appeals to Article XIV(b), the exception that justifies measures necessary to protect human, animal, or plant life or health. Both Articles XIV(a) and XIV(b) contain the "necessity test," and the *chapeau* applies to all measures that survive scrutiny under Articles XIV(a) or XIV(b).

¹¹ The United States also appealed to Article XIV(c), but neither the Panel nor the Appellate Body engaged in substantive analysis of this exception.

31. The Appellate Body issued a number of important procedural statements concerning the application of Article XIV generally:

- Decisions under the general exceptions provision of GATT, Article XX, are relevant to the interpretation of Article XIV of GATS (¶291).
- The WTO member appealing to any exception in Article XIV bears the burden of establishing that the GATS-inconsistent measure in question satisfies all the requirements of Article XIV (¶282).
- To benefit from Article XIV, a GATS-inconsistent measure has to fall within the scope of one of the listed exceptions, which requires “that the challenged measure address the particular interest specified in that paragraph and that there be a sufficient nexus between the measure and the interest protected” (¶292).
- If the GATS-inconsistent measure satisfies all the requirements of the specific exception into which it falls, then the measure has to meet all the requirements of the *chapeau* of Article XIV (¶292).

32. Article XIV(a), like Article XIV(b), requires that the GATS-inconsistent measure be “necessary” to achieve the stated objective. In *US—Gambling*, the Appellate Body interpreted what the “necessity test” in Article XIV means and made the following statements in the process:

- The necessity test in Article XIV is an objective test (¶304) that reflects “the shared understanding of [WTO] Members that substantive GATS obligations should not be deviated from lightly” (¶308).
- A panel should determine whether a measure is necessary through a process of weighing and balancing a series of factors to decide whether a more GATS-consistent measure or measures is reasonably available to the WTO member applying a GATS-inconsistent measure (¶305).
- The weighing-and-balancing process begins with assessing the relative importance of the interests or values advanced by the GATS-inconsistent measure (¶306).



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- Once the importance of the interests or values at stake has been determined, the weighing-and-balancing process takes other factors into account, especially the contribution the GATS-inconsistent measure will make to realizing the objectives identified and the trade-restrictive impact of the measure (¶¶306).
- Then, the GATS-inconsistent measure should be compared to possible reasonably alternative measures that are more GATS-consistent (¶¶307) and that are proposed by the complaining WTO member (¶¶311). To be reasonably available, proposed alternative measures must:
 - » Achieve the same level of protection sought by the WTO member in question through the GATS-inconsistent measure;
 - » Not be merely theoretical in nature;
 - » Be a measure the WTO member is capable of taking; and
 - » Not impose an undue burden on the WTO member through such things as prohibitive costs or substantial technical difficulties (¶¶308).
- The WTO member appealing to Article XIV does not bear the burden of showing that there are no reasonably available alternative measures to achieve its objectives (¶¶309).
- The reasonable availability of alternative measures proposed by the complaining WTO member that are more consistent with GATS means that the GATS-inconsistent measure at issue is not necessary. The WTO member appealing to Article XIV bears the burden of demonstrating why proposed alternative GATS-consistent measures are not reasonably available to it (¶¶310-311).

33. The Panel held that the United States prohibition on the supply of remote gambling services was not necessary within the meaning of Article XIV(a) because the United States had not explored and exhausted all reasonably available GATS-consistent alternatives, especially the United States' "obligation to consult with Antigua before and while imposing its prohibition on the cross-border supply of gambling and betting services" (Panel Report, ¶¶6.531).

34. The Appellate Body rejected the Panel's analysis, holding that consultations with Antigua were not a reasonably available alternative measure because "consultations are a process, the results of which are

uncertain and therefore not capable of comparison with the measures at issue in this case” (¶317). Given that Antigua proposed no other alternative measures as more GATS-consistent than the prohibition on the supply of remote gambling services, the United States satisfied its burden under Article XIV(a) of establishing that the prohibition was necessary (¶326).

35. The Appellate Body held, however, that the United States failed to demonstrate under the *chapeau* of Article XIV that its GATS-inconsistent measure was not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services. The Appellate Body confirmed that the *chapeau* of Article XIV focuses on the application of a GATS-inconsistent measure (as opposed to its substance) in order “to ensure that Members’ rights to avail themselves of exceptions are exercised reasonably, so as not to frustrate the rights accorded other Members by the substantive rules of the GATS” (¶339).

36. The Appellate Body ruled that the U.S. Interstate Horseracing Act appeared to exempt domestic suppliers of remote gambling services for horse racing from the prohibition on the supply of remote gambling services, an exemption that made the application of the prohibition inconsistent with the disciplines in the *chapeau* of Article XIV (¶369). To bring its law into compliance with GATS, the United States must either clarify that the Interstate Horseracing Act does not allow the supply of remote gambling services by any service supplier or amend the statute to achieve non-discriminatory application of the prohibition on the supply of remote gambling services.

37. We have described at length the Appellate Body’s interpretation and application of Article XIV because *US—Gambling* will be an important precedent for any GATS case that involves a WTO member appealing to Article XIV(b), the exception for measures necessary to protect health, to justify a GATS-inconsistent measure related to health protection. Whether the Appellate Body decision makes the use of Article XIV(b) easier or harder for health policy purposes remains, however, difficult to determine in the abstract. The decision emphasizes the seriousness of the disciplines Article XIV applies to WTO members attempting to justify violations of GATS; but the ruling also clarifies procedural and substantive aspects of Article XIV, which may facilitate more effective use of Article XIV by WTO members in future disputes.



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Implications of *US—Gambling* for the GATS Negotiations in the Doha Development Agenda

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38. Negotiations on progressive liberalization of trade in services under GATS form part of the larger set of multilateral trade negotiations at the WTO under the rubric of the Doha Development Agenda. *US—Gambling* may affect these negotiations in two ways. First, *US—Gambling* makes clear the problems a WTO member could face by making mistakes in the process of making and scheduling specific commitments. Thus, the case might slow down negotiations because WTO members will want to make sure that, in making specific commitments, they do not create subsequent trouble for themselves. *US—Gambling* could, thus, increase the transactions costs of GATS negotiations.

39. Second, *US—Gambling* could deter WTO members from making significant specific commitments on market access because it creates uncertainty in the relationship between Article XVI on market access and Article VI on domestic regulation. The case could encourage WTO members to inscribe domestic regulations as market access limitations in their schedules of specific commitments (thus reducing the liberalizing impact of the market access commitments) or simply not to make specific market access commitments.

40. Whether *US—Gambling* has these two effects on the GATS negotiations, and whether these effects manifest themselves in the offer/request process involving health-related services, remains to be seen. Given the policy and political sensitivity of GATS negotiations in health-related service sectors, the controversies generated by *US—Gambling* may well contribute to the negotiation dynamics in this area.

TABLE 2: SUMMARY OF KEY HEALTH POLICY QUESTIONS CONCERNING *US--GAMBLING*

Health Policy Question	Response
Does <i>US—Gambling</i> affect how a WTO member should approach making specific commitments for market access and national treatment concerning health-related services?	Yes, <i>US—Gambling</i> underscores the importance for WTO members to be very careful, clear, and precise in defining the committed sector, making specific commitments for market access and national treatment in health-related service sectors, and listing all limitations to such commitments. A comprehensive understanding of the “regulatory footprint” of a service sector can help WTO members ensure all important limitations and restrictions to market access and/or national treatment are inscribed when specific commitments are made.



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<p>Do the legal interpretations in <i>US—Gambling</i> undermine the right to regulate health-related services domestically?</p>	<p>No, <i>US—Gambling</i> means that domestic regulations that are, in effect, quantitative limitations within the meaning of Article XVI:2 should be inscribed in the schedule of specific commitments if the WTO member wants to continue to apply such quantitative limitations. <i>US—Gambling</i> does not affect domestic regulations that are not quantitative limitations under Article XVI:2.</p>
<p>Does <i>US—Gambling</i> affect a WTO member’s ability to justify a trade-restricting measure as necessary to protect human health?</p>	<p>Yes, <i>US—Gambling</i> is the first case that interprets Article XIV of GATS; and the decision clarifies procedural and substantive aspects of Article XIV’s application. Thus, the Appellate Body’s interpretations of Article XIV(a) and the <i>chapeau</i> of Article XIV will influence how WTO members and the Dispute Settlement Body make use of the health exception in Article XIV(b) in the future.</p>
<p>Do the rulings in <i>US—Gambling</i> affect the analysis that appears in <i>Legal Review of the General Agreement on Trade in Services (GATS) from a Health Policy Perspective</i> (Nov. 2004)?</p>	<p>No, <i>US—Gambling</i> alters neither the analysis nor the recommendations in the <i>Legal Review</i>. In fact, <i>US—Gambling</i> highlights the importance of many aspects and conclusions of the <i>Legal Review</i>, particularly its emphasis on the need for WTO members to be careful in making specific commitments in health-related sectors in order to ensure that needed regulatory authority remains protected.</p>

Conclusion

41. GATS constitutes one of the most important trade agreements from the perspective of health. The Appellate Body decision in *US—Gambling* is the most important decision on GATS issued by the WTO to date. The rulings in this case should be of interest, therefore, to health policy communities, even though the case did not turn on the compatibility of health measures with GATS (see Table 2 above). The Appellate Body’s interpretations of the U.S. schedule of specific commitments, Article XVI:2, and Article XIV are all relevant for how WTO members manage the relationship between GATS and their respective interests in trade in health-related services.

Annex 3

MODEL SCHEDULE OF SPECIFIC COMMITMENTS



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Model
Schedule
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Commitments

Modes of Supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatments	Additional commitments
I. HORIZONTAL COMMITMENTS			
II. SECTOR SPECIFIC COMMITMENTS			
SECTOR X	(1) (2) (3) (4)	(1) (2) (3) (4)	
SECTOR Y	(1) (2) (3) (4)	(1) (2) (3) (4)	

TABLE OF TREATIES

Agreement on the Application of Sanitary and Phytosanitary Measures
(SPS Agreement) ••••• ¶¶ 33, 279, 532, 575-76, 579, 604

Agreement on Government Procurement ••••• ¶ 303

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Agreement on Anti-Dumping Duties) ••••• ¶ 100

Agreement on Safeguards ••••• ¶¶ 294-95

Agreement on Subsidies and Countervailing Duties ••••• ¶¶ 109, 302

Agreement on Technical Barriers to Trade (TBT Agreement) ••••• ¶¶ 33, 279, 567, 575

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) ••••• ¶¶ 3 (Ex. Sum.), 40-42 (Ex. Sum.), 33, 66-67, 300, 529, 532, 566-73, 580-82

Constitution of the World Health Organization ••••• ¶¶ 25-26, 32, 145

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AIDS	Acquired Immunodeficiency Syndrome
CPC	Central Product Classification
DSU	Dispute Settlement Understanding
EC	European Communities
EU	European Union
FDI	Foreign direct investment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HIV	Human Immunodeficiency Virus
ICESCR	International Covenant on Economic, Social, and Cultural Rights
IHR	International Health Regulations
MFN	Most favored nation
NGO	Non-governmental organization
NAFTA	North American Free Trade Agreement
SARS	Severe Acute Respiratory Syndrome
SCM	Subsidies and Countervailing Measures
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
TRIPS	Agreement on Trade-Related Intellectual Property Rights
U.S.	United States
WHO	World Health Organization
WTO	World Trade Organization



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