Introduction

Given the complexity of the subject-matter of trade in services, as well as the newness of the obligations under the GATS, we believe that claims made under the GATS deserve close attention and serious analysis. We leave [the] interpretation of Article II of the GATS to another case and another day.

WTO Appellate Body[1]

The General Agreement on Trade in Services (GATS) was concluded under the institutional framework of the World Trade Organization (WTO) resulting from the Uruguay Round in 1994. Even though the potential contribution of international trade in services to economic growth and development had long been recognized,[2] GATS was the first and only multilateral agreement aimed at the liberalization of international trade in services. In comparison to the General Agreement on Tariffs and Trade (GATT) from 1947 and other international agreements regulating trade in goods, it is still a relatively new agreement governing an economic sector which has not typically been subject to international trade regulations. The conclusion of GATS had thus been greeted as a new milestone in trade liberalization. Considering the potential of international trade in service and the fact that it is inhibited by many different types of trade obstacles, it is somewhat surprising that to date only five cases involving claims of GATS violations have arisen under WTO dispute settlement procedures.[3] This lack of substantial jurisprudence

[1] Appellate Body Report, *Canada – Autos*, para. 184.

[2] According to UNCTAD, 'services account for some 40% of employment in developing countries and up to 70% in the developed world. The liberalization of trade in services holds great potential for increasing global welfare', available at www.unctad.org/Templates/Page.asp?intItemID=3886&lang=1; see also e.g. Hoekman and Mattoo, 'Services Trade and Growth', p. 53; Sauvant, 'Tradability of Services', pp. 116 ff; Mattoo and Wunsch-Vincent, 'GATS and Outsourcing', 766 ff.

[3] Not including *Canada – Periodicals* where GATS was raised by the defendant, but not applied by the WTO adjudicating bodies, see Appellate Body Report, p. 20; for an overview

considerably contributes to the prevailing uncertainty among Members and trade practitioners with regard to the exact meaning of many obligations embodied in GATS.

It was in the year 2000 when the Appellate Body announced in *Canada – Autos* that it would leave the interpretation of Article II GATS 'to another case and another day', but this 'other case and other day' has yet to come. Following *EC – Bananas III* (1997), *Canada – Autos* was only the second time that the WTO adjudicating bodies were called upon to examine a claim under GATS. In both cases, the main issues were related to trade in goods and GATT. The GATS claims were mainly secondary and only concerned the distribution of the goods in question.[4] Since then, only three other major GATS cases arose under the WTO, namely *Mexico – Telecoms* (2004), *US – Gambling* (2005) and, most recently, *China – Publications and Audiovisual Products* (2009). While these decisions shed some additional light on certain obligations of the GATS framework, many provisions, in particular the non-discrimination obligations in Articles II and XVII, remain largely unexplored. Until currently pending and future GATS cases may bring further and much needed clarification to certain aspects of GATS,[5] this study seeks to make a contribution to the interpretation of the GATS obligations on non-discrimination embodied in Articles II and XVII, focusing in particular on the question of 'likeness'.[6]

I The quest for an appropriate standard of 'likeness' in GATS

A 'Likeness' linking trade liberalization and regulatory autonomy

Whenever the WTO adjudicating bodies are called upon to examine a claim of discriminatory treatment, they need to assess whether the trade obstacle under scrutiny differentiates between 'like products' or between 'like services and service suppliers'. This mechanism of the 'likeness

of GATS disputes which did not lead to the establishment of a panel see Davey, 'Services Cases', pp. 280–86.

[4] Matsushita, 'Jurisprudence on GATS and TRIPS', p. 461.

[5] The dispute *China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers* (DS372, DS373, DS378) was resolved by a mutually agreed solution on 4 December 2008; an appeal was pending in *China – Publications and Audiovisual Products* by the time this book was completed.

[6] Case law and scholarly writing is considered up to August 2009; all internet addresses have been last accessed in August 2009.

concept' in international economic law can be best illustrated with an example from WTO dispute settlement practice:

> In the case *Japan – Alcoholic Beverages II*, the US and the EU complained against Japan, arguing that the higher tax imposed on imported whisky as compared to domestically produced 'shochu' infringes with the principle of non-discrimination embodied in GATT. In order to find a violation of the non-discrimination principle, the Appellate Body was held to determine whether whisky is 'like' shochu for purposes of the GATT national treatment obligation.

As a general rule, it can be said that the broader the WTO adjudicating bodies construe the concept of 'likeness', the more intrusive the non-discrimination obligation becomes, which in turn intensifies the obligation's liberalizing effect. Under GATT 1947 and WTO jurisprudence, the element of 'like products' grew to be the decisive element in the legal analysis of non-discrimination cases. Respondents would generally try to defend a claim of non-discrimination violation with the argument that the measure under scrutiny legitimately differentiates between 'different products'. During GATT 1947 practice, 'like products' were primarily assessed on the basis of objective criteria, such as physical characteristics and tariff classifications of the concerned products. A later theory introduced a subjective element to the analysis of 'like products', allowing the regulatory purpose for differential treatment to be taken into account. The prevailing and most recent theory, finally, defines 'likeness' on the basis of economic considerations designed to assess the competitive relationship between the products under scrutiny. Considering this key function of 'like products' in GATT rules on non-discrimination, it is not surprising that the issue is receiving considerable attention in trade literature. An ongoing debate emerged among trade scholars and practitioners on various aspects of the 'like product' concept. However, while the specific problems have been identified and the different positions have been made clear, the WTO adjudicating bodies have yet to adopt a definite solution for many issues of 'likeness' and the law continues to evolve.

The concept of 'like products' has been matched by the GATS rules on non-discrimination which apply to the treatment of imported services. GATS non-discrimination obligations employ a concept of 'like services and service suppliers' which to date has only received very little attention in WTO jurisprudence. The Panels in *EC – Bananas III*, *Canada – Autos* and *China – Publications and Audiovisual Products* only marginally touched upon the issue of 'likeness' in GATS. By the same token, even

though many scholars have recognized the importance and ambiguities of the GATS 'like services and service suppliers' concept,[7] it largely lacks a doctrinal analysis that is comparable to the one related to GATT 'like products'.[8]

The nature of services transactions as well as the particularities of the GATS framework considerably complicate the 'like services and service suppliers' concept in comparison to its 'like product' counterpart from GATT. Service transactions are intangible and thus cannot be compared on the basis of physical characteristics. Moreover, in contrast to trade in goods and tariffs, no detailed and internationally recognized nomenclature exists for service transactions. In addition, some services are highly individualized, while others are largely standardized. Many services are subject to different methods of supply, such as distance learning and class room teaching. Finally, given the intangible nature of service transactions, cross-border trade may require the supplier or the consumer to relocate. For all these reasons, the Working Party on GATS Rules recognized that 'the concept of likeness … is more elusive in services than in goods'.[9]

In light of these considerations, the purpose of this study is to identify the interpretative problems that arise with regard to the concept of 'like services and services suppliers' under GATS and to develop possible methodologies for the 'likeness' analysis. The interpretation of 'likeness' in GATS has potentially far reaching consequences for the Members' autonomy to regulate the supply of services within their territory, which in turn may result in conflicts between domestic objectives of political, social and economic nature and the liberalization of international trade in services. Such conflicts are particularly sensitive in the context of

[7] See e.g. Abu-Akeel, 'MFN as it Applies to Service Trade', 110–14; Cottier and Oesch, *International Trade Regulation*, pp. 407–11; Davey and Pauwelyn, 'MFN Unconditionality', p. 36; Krajewski, 'Public Services and Trade Liberalization', 360–61; Drake and Nicolaidïs, 'Electronic Commerce and GATS', pp. 420–21; Krajewski, *National Regulation*, pp. 97–107; Krajewski and Engelke, 'Art. XVII GATS', pp. 406–9; Leroux, 'GATS Case Law', 779–80; Morrison, 'WTO Dispute Settlement in Services', p. 387; Mattoo, 'National Treatment in GATS', 122–33; Mattoo, 'MFN and GATS', pp. 73–80; Nicolaïdis and Trachtman, 'Policed Regulation', pp. 252–55; Wolfrum, 'Art. II GATS', pp. 82–85; Wunsch-Vincent, 'Lessons from US-Gambling', 329–35; Zdouc, '(1999) Dispute Settlement Practice', 331–34; Zdouc, *Comparative Analysis of GATS and GATT*, pp. 157–71; Zdouc, '(2004) Dispute Settlement Practice', pp. 397–403.

[8] As a notable exception Cossy, 'Thoughts on "Likeness" in GATS'; Cossy, 'Determining Likeness under GATS'.

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

services, where governments typically adopt regulations for reasons such as consumer protection, supply of public services, monopoly supply or limiting competition.[10]

B *Linkage between 'likeness' and progressive liberalization*

A key function attributable to the concept of 'likeness' relates to its role in the process of progressive liberalization for international trade in services. Under GATT, the principle of non-discrimination directly applies to *all* products which are traded internationally. Conversely, certain GATS non-discrimination obligations are limited to service sectors for which Members made explicit commitments. At the same time, the GATS framework allows for Members to further negotiate commitments in view of progressively facilitating international trade in more service sectors.[11] Yet, Members have so far been reluctant in making significant commitments for services trade, in particular with regard to the specific mode of service supply allowing the supplier to enter the importing country (mode 4) or with regard to public services.

One of the reasons for this reluctance may be that progressive liberalization can only be achieved to the extent that Members are able to assess the scope of their commitments,[12] which in turn presupposes that the mechanism of the GATS non-discrimination obligation is clear. Yet, due to the remaining open questions and uncertainties concerning the interpretation of GATS rules on non-discrimination – and in particular the concept of 'likeness' – Members are virtually left in the dark when formulating new commitments and limitations. Hence, more clarification is needed in order for Members to properly assess risks and benefits of future commitments.

C *'Likeness' linking trade with other policy and legal disciplines*

Under GATT rules on non-discrimination, the 'like product' concept became the centre of attention with regard to the interaction between

[10] See e.g. Cass and Noam, 'Economics and Politics of Trade in Services', pp. 61 ff; Mattoo and Sauvé, 'Domestic Regulation', p. 2; Krommenacker, 'Multilateral Services Negotiations', p. 459; Francois and Wooton, 'Trade Liberalization and GATS', 392.

[11] Cottier, 'Progressive Liberalization to Progressive Regulation', 780; see also GATS Preamble, second recital: 'Wishing to establish a multilateral framework … a view to the expansion of such trade under conditions of transparency and progressive liberalization'.

[12] Similarly also Cossy, 'Thoughts on "Likeness" in GATS', p. 328; Ortino, 'Principle of Non-Discrimination', p. 173; Tietje, 'Stärken und Schwächen des GATS', p. 19; Howse and Tuerk, 'WTO Negotiations on Services', 3–4.

trade law and other legal disciplines, such as environmental law, labour law, human rights, animal welfare or consumer protection. The question of whether foreign goods or services produced to the detriment of human rights, labour standards or the environment are 'like' domestically produced goods or services of a 'higher standard' is crucial with regard to the regulatory autonomy of WTO Members to adopt regulations restricting the sale of such 'low standard' goods or services in order to protect its own societal values. Within this discussion, it is necessary to clearly distinguish the situation of a Member regulating the import and sale of a product for reasons pertaining to the way it was produced from the situation of a Member regulating the sale of a product for domestic policy reasons:[13]

– Regulations pertaining to the process and production method:

> For instance, in 2007 Canada requested consultations with the EU under WTO dispute settlement procedures for prohibiting the sale of Canadian seal fur which, in the view of the EU, is produced by Canadian hunters who catch and kill baby seals in a cruel way.[14] Similar trade restrictions may be considered by WTO Members to sanction environmentally damaging production methods, exploitation of workers, child labour, human rights violations etc. Such measures restricting trade in goods which are produced in a way that is inconsistent with domestic values could be found discriminatory and thus illegal under GATT to the extent that 'likeness' is affirmed between domestically produced 'high standard' products and imported 'low standard' products.

– Regulations pertaining to the product and domestic policies:

> This situation corresponds to the issue presented under section A above, which concerns the question whether Members retain the autonomy to pursue domestic non-economic policies – such as environment or consumer protection – by setting standards for the sale of goods and services. To the extent that such a regulation is subject to a non-discrimination claim, the question arises whether, for instance, environmentally harmful goods or services are 'like' environmentally friendly goods or services.

While the various legal problems related to these issues have been addressed by different WTO adjudicating bodies and extensively

[13] See e.g. Charnovitz, '*Alcoholic Beverages* Decision', 201; Brown Weiss and Jackson, 'Environment and Trade', pp. 28–9.

[14] *EC – Certain Measures Prohibiting the Importation and Marketing of Seal Products* (DS369).

discussed among trade scholars,[15] the corresponding problem with regard to trade in services has hardly received any attention. One of the reasons may be that the main GATS cases pertaining to non-discrimination, such as *EC – Bananas III* and *Canada – Autos*, did not concern the regulation of process and production methods or non-economic domestic policies. It is thus not surprising that in both cases the element of 'likeness' remained largely undisputed among the parties. Nonetheless, sooner or later the exact same issue is likely to arise under the GATS rules on non-discrimination, potentially even with much broader implications than under GATT. In fact, while the production of imported goods takes place in a foreign country, trade in services may require the foreign supplier to relocate to the country of the consumer. Consequently, a Member's autonomy to regulate the supply of a service within its own jurisdiction may be considerably restricted if 'likeness' is affirmed between services supplied by different methods or by differently qualified suppliers.

D 'Likeness' linking legal and economic analysis

To the extent that 'likeness' is subject to an economic interpretation and relates to the competitive relationship between the products or services under scrutiny, the question arises to what degree the legal analysis should be guided by economic theories. Other fields of law which have substantial experience in the application of economic theories could serve as a basis for a more refined analysis of 'likeness' in international trade law. In the 1950s, economists and lawyers developed the concept of a 'relevant market', which was designed to serve as a tool for the assessment of market power in US antitrust law. Lower federal courts implemented this concept in their antitrust jurisprudence, and eventually the US Supreme Court endorsed it in the famous *Cellophane* case on illegal monopolization.[16] The relevant market concept was originally based on a test of 'reasonable interchangeability by consumers'. While demand substitutability remains the main pillar of the relevant market analysis, US antitrust authorities

[15] From the many contributions on conflicts between international trade and other policy and legal disciplines see e.g. Bhagwati and Hudec (eds.), *Fair Trade*; Abbott, Breining-Kaufmann and Cottier (eds.), *Trade and Human Rights*; Cottier, Pauwelyn and Bürgi (eds.), *Human Rights and International Trade*; Cameron, Demaret and Geradin (eds.), *Trade & Environment*; Cottier and Oesch, *International Trade Regulation*, pp. 412–66, 513–42.

[16] *US* v. *E. I. du Pont de Nemours & Co. (Cellophane)*, 351 US 377 (1956), p. 395; Werden, 'History of Market Delineation', 130 ff.

and courts have further refined the methodologies, introducing *inter alia* considerations of supply substitutability, ease of entry as well as potential and future competition. The EU and other countries have relied on the relevant market concept from US antitrust law as a model and implemented the same or similar concepts in their own competition policies.

Against this background, it is manifest that the 'likeness' analysis could draw from economic theories developed under the 'relevant market' concept of competition law. A WTO panel soon recognized the overlaps between the two different fields of law, but noted that '[w]hile the specifics of the interaction between trade and competition law are still being developed, we concur that the market definitions need not be the same'.[17] Even though some panels subsequently acknowledged the relevance of price elasticity of demand,[18] – some even explicitly referring to market definitions of national competition authorities[19] – the vast majority of cases pertaining to 'likeness' completely ignore all economic theories under the 'like product' analysis. While a number of commentators from scholarly literature demand such an approach, only few contributions explore the comparative implications in more detail.[20] As the current analytical framework applied for the GATT 'like products' analysis – which in itself is not yet consolidated and continues to evolve – may not be sufficiently refined to resolve the specific issues raised by the 'like services and service suppliers' concept, this study analyses whether market definition in US and EU antitrust law could provide a basis for the 'likeness' test in GATS rules on non-discrimination.

II Methodology, scope and structure

All agreements concluded under the WTO framework constitute public international law[21] and are thus subject to customary international law on the law of treaty interpretation. Article 3.2 DSU even mandates WTO panels and the Appellate Body to construe the provisions of the WTO agreements in accordance with the customary rules of interpretation of

[17] Panel Report, *Korea – Alcoholic Beverages*, Para. 10.81.
[18] *Ibid*., para. 10.44; Appellate Body Report, *Korea – Alcoholic Beverages*, para. 134.
[19] Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.77.
[20] Most notably Emch, 'What are "Like" Products?'; Goco, '"Likeness" and Market Definition'; Choi, '*Like Products*'; Neven, 'How Should "Protection" be Evaluated?'.
[21] Oesch, 'Commercial Treaties', n 1.

public international law. The Appellate Body recognized that Article 31 of the Vienna Convention on the Law of Treaties 'has attained the status of a rule of customary or general international law',[22] pursuant to which the provisions of international agreements must be analysed (i) in accordance with the ordinary meaning to be given to the terms (ii) in their context and (iii) in the light of their object and purpose. The WTO adjudicating bodies and other international tribunals called upon to rule on international economic law are thus compelled to justify their interpretations on the basis of the rules codified in Article 31 VCLT. For this reason, the WTO adjudicating bodies have a tendency to closely follow the text of the provisions, even referring to the dictionary definition of a certain term.[23] However, the Appellate Body also recognized that dictionary meanings leave many questions open and are not necessarily capable of resolving complex questions of interpretation.[24] The Appellate Body even adopted interpretations which may go against the mere text of the provisions:

> To state two examples, both of which are relevant for the present study, the terms 'like products' in Articles III:2, first sentence, and III:4 GATT were given different meanings and standards despite the identical text.[25] Similarly, all WTO non-discrimination clauses were found to apply to *de facto* discrimination, even though only Article XVII:2 GATS actually contains explicit text allowing for this conclusion.[26]

These developments in the interpretation of WTO agreements focusing more on context, object and purpose than text are to be welcomed. As the two examples on the interpretation of non-discrimination demonstrate, WTO agreements are frequently incomplete, incoherent and inconsistent from a textual and systemic point of view. Considering that the text of the agreements is a result of negotiations and compromises among governments of different countries – as opposed to a structured and systemic national legislative process – such textual shortcomings are not surprising. It follows that an interpretation of WTO agreements in the light of purpose and context is generally more conclusive – and provides superior

[22] Appellate Body Report, *US – Gasoline*, p. 16; the same is true for Art. 32 VCLT, see Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 9; on treaty interpretation and Art. 31 VCLT see e.g. Brownlie, *Principles of Public International Law*, pp. 630 ff.

[23] See e.g. Appellate Body Report, *US – Gasoline*, p. 17, n 40; Panel Report, *US – Gambling*, paras. 6.20, 6.55 ff.

[24] Appellate Body Reports, *Canada – Aircraft*, para. 153; *US – Softwood Lumber IV*, para. 59; *US – FSC*, para. 129; *EC – Asbestos*, para. 92; *US – Gambling*, para. 164.

[25] See below, 5.I.

[26] See below, 3.I.A.2.

results – than a strict application of the text of the provisions in accordance with dictionary definitions.[27]

In light of these considerations, the aim of this book is not to strictly follow the rules of treaty interpretation in accordance with Article 31 VCLT, which would require mainly focusing on 'text', 'objects and purpose' and 'context'. The methodology applied in this research is predominantly a *comparative analysis*. While the primary aim is to explore the 'likeness' concept as it applies in GATS, the comparative analysis – by identifying different techniques applied to the same problems in related fields – also highlights potential issues for the adoption and modelling of future non-discrimination obligations in international economic law. When identifying the comparators to the 'likeness' concept in GATS rules on non-discrimination, the most obvious approach is to consider other non-discrimination obligations under the WTO framework. The rich jurisprudence and scholarly work pertaining to the 'like product' concept is particularly relevant. Hence, a main objective of this study is to analyse the extent to which the GATT theories can be transposed to the 'like services and service suppliers' concept of GATS. Such an approach requires discerning similarities and differences between GATT and GATS in general and between the applications of the 'likeness' concept in particular. In addition, it is also useful to look beyond GATT and GATS rules on non-discrimination. Such an extended comparative approach can basically be undertaken from two directions. The first and more obvious comparison is to examine the element of 'likeness' in other *non-discrimination clauses*. Many areas of law typically contain non-discrimination obligations, such as constitutional law or human and fundamental rights. Yet, the further away the comparative field is from international trade, the less relevant are the concepts for purposes of GATS. For this reason, this study limits the comparative approach to non-discrimination obligations in international economic law, such as NAFTA, BITs and EU law. A second comparative approach consists of looking beyond the principle of non-discrimination, by identifying other fields of law which require the determination of competitive relationships in legal analysis. Legal reasoning follows a process

[27] Ortino, 'Treaty Interpretation', 147: 'There is no doubt that the textual approach to treaty interpretation unanimously adopted by the Vienna Convention should be maintained … However, and this is the argument advanced in this paper, it must be a textuality which is qualified in a variety of important ways, for example, by giving meaning to the terms of the treaty in their context and in light of its object and purpose.' For an overview of reasons why Art. 31 VCLT is inadequate for the interpretation of WTO agreements see Qureshi, *Interpreting WTO Agreements*, pp. 4 ff.