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NOTE

The Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of forty modules.

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WHAT YOU WILL LEARN

This module on the Settlement of GATS Disputes in the WTO will provide, first, an overview of all of the key rights, obligations, commitments and exemptions/exceptions in the GATS. It is difficult to even begin to discuss dispute settlement in the context of the GATS without first providing a general knowledge of the general obligations and specific commitments that comprise the Agreement. The first Section covers the scope of application of the Agreement and definition of certain key terms, which have been interpreted in the sparse WTO jurisprudence to date.

The next Section gives an overview of the general obligations and disciplines that apply to all measures affecting trade in services. These rules of general application include MFN treatment, transparency, increasing participation of developing countries, economic integration, domestic regulation, recognition of standards, and general exceptions and security exceptions. It examines the articles of the GATS relating to specific commitments which Members could choose to undertake for certain services sectors and sub-sectors. These subjects include market access, national treatment and additional commitments (for example, on standards and licensing and certification procedures).

The unique consultations and dispute settlement rules and procedures in GATS are examined. Although the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the “DSU”) applies to dispute settlement arising under the GATS, there are some important special and additional provisions in Articles XXII and XXIII of the GATS relating to consultations and setting forth specific causes of action for trade in services disputes. Finally, the module concludes with a number of problems designed to test overall knowledge and a list of suggested readings for further reference.

INTRODUCTION

The services sector is the largest and fastest-growing sector of the world economy, providing more than 60 per cent of global output and, in many countries, an even larger share of employment. Although it is difficult to obtain accurate statistics on the value of trade in services, much of which takes place through the establishment of foreign enterprises within countries, it is estimated that the value of cross-border trade in services alone, in 1999, amounted to US \$1350 billion, or about 20 per cent of global trade, in balance-of-payment-terms.

The *General Agreement on Trade in Services* (the “GATS”), negotiated and concluded as a result of the Uruguay Round of multilateral trade negotiations, when it came into effect in 1995 was the first multilateral agreement covering this important and growing area of services trade. The GATS is a product of complex, protracted and difficult negotiations among a large number of countries, both developing and developed. As such, it is a complex and intricate agreement. It has a potentially broad scope of application, in the sense that most measures imposed by governments – national, regional and local – affecting trade in services are covered, with the important exception of services supplied in the exercise of governmental authority and certain specific sectors, such as air transport services. However, the general obligations that apply to all measures affecting trade in services are few, most notably the most-favoured-nation (“MFN”) and transparency obligations. Many other key obligations, such as market access and national treatment, apply only when and if a WTO Member has decided to make specific commitments relating to a particular service sector in its Schedule.

The GATS is a complex web of rights, obligations, exemptions/exceptions and specific commitments. Its obligations cannot be understood without reference to all of the relevant legal documents: the text of the GATS itself; the MFN exemptions taken pursuant to the Annex on Article II Exemptions and listed in WTO Members’ Schedules; the specific commitments on market access, national treatment, and additional commitments inscribed in Members’ Schedules; the Annexes to the GATS, which deal with certain sectors and subjects such as Air Transport Services, Financial Services, Maritime Transport Services, Telecommunications and Movement of Natural Persons, Ministerial Decisions and Declarations and, subsequent Protocols that have been entered into with respect to certain services sectors. Depending upon the subject matter of a particular dispute, the applicable legal provisions may be contained in a number of these different documents.

Despite its obvious detail and complexity, the GATS remains a “work in progress”. Although there are many important obligations contained in the text of the GATS, most of the real obligations and commitments are contained in Members’ Schedules. The GATS called for negotiations on basic telecommunications and financial services. Sectoral agreements were reached

on these subjects among groups of countries, and their results were implemented as specific commitments in those Members' Schedules. Several important subjects proved too difficult for negotiators in the Uruguay Round, and they are currently the subject of ongoing negotiations on trade in services in the Doha Round. These topics include: subsidies, emergency safeguard measures, domestic regulation, government procurement, movement of natural persons, and a number of sector-specific negotiations. There are also negotiations among Members aimed at further liberalization in market access, national treatment and other areas covered by specific commitments.

Given the obvious importance of the rights and obligations in the GATS for this extensive and growing sector of the world economy, it is perhaps surprising that so few disputes have been brought relating to this Agreement in the WTO to date. Of the approximately 280 complaints that have been brought in the WTO since 1995, only approximately 10 have included claims under the GATS.¹ Most of these 10 cases have also included claims arising under other agreements, such as the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). Thus, claims under the GATS have only been submitted in approximately 3.5 per cent of all complaints brought under the WTO, a very small percentage of the total dispute settlement complaints. Complex and detailed as the rights and obligations and specific commitments and sectoral deals under the GATS may be, these provisions have not as yet benefited from interpretation and clarification by WTO panels and the Appellate Body. Therefore, unlike the situation with the GATT 1994 or many of the other WTO agreements, the GATS remains largely uninterpreted and is not well understood.

¹ Information extracted from the Update of WTO Dispute Settlement Cases, WT/DS/OV/10, 22 January 2003. Completed Panel and Appellate Body Review: Report of the Panel, Canada – Certain Measures Affecting the Automotive Industry, WT/DS139/R, WT/DS142/R, as modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R, adopted on 19 June 2000; Reports of the Panel, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R/GTM, WT/DS27/HND, WT/DS27/R/ECU, WT/DS27/R/USA, WT/DS27/R/MEX, as modified by the Appellate Body Report, WT/DS27/AB/R, adopted on 25 September 1997; Report of the Panel, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador, WT/DS27/RW/ECU, adopted on 6 May 1999. Pending consultations: Nicaragua – Measures Affecting Imports from Honduras and Colombia (II), WT/DS201; Canada – Measures Affecting Film Distribution Services, WT/DS117; Belgium – Measures Affecting Commercial Telephone Directory Services, WT/DS80; Japan – Measures Affecting Distribution Services, WT/DS45. Settled or Inactive Cases: Turkey – Certain Import Procedures for Fresh Fruit, WT/DS237; United States – The Cuban Liberty and Democratic Solidarity Act. The first major GATS dispute is pending before a panel: Mexico – Measures Affecting Telecommunications Services, WT/DS204.

1. SCOPE AND DEFINITION

Objectives

On completion of this section, the reader will be able:

- to evaluate whether a particular measure is covered by the GATS;
- to assess whether, in a particular situation, there is “trade in services”;
- to identify each of the four modes of supply of services;
- to prepare a claim or a defence on the fundamental question of whether or not the GATS applies in a particular dispute settlement case.

This section of the Module examines discuss the scope of application of the GATS. Article II:1 of the GATS expressly provides that it applies to “any measure covered by this Agreement”. The Appellate Body, in *Canada – Certain Measures Affecting the Automotive Industry* (“*Canada – Autos*”)², stated that a threshold question, for a panel in any case involving claims under the GATS, is whether the measure is within the scope of the GATS by examining whether it is a measure “affecting trade in services” within the meaning of Article I of the GATS.³ The relevant part of Article I reads as follows:

Article I Scope and Definition

1. This Agreement applies to measures by Members affecting trade in services.

To understand fully the meaning of Article I:1 each element of the phrase “measures by Members affecting trade in services” must be examined separately. To do so, it is necessary to understand certain definitions contained in Articles I and XXVIII of the GATS.

1.1 Measures by Members Affecting Trade in Services

The phrase “measures by Members affecting trade in services” is defined in Article XXVIII of the GATS. The definition states as follows:

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