CHAPTER FIVE

THE PRINCIPLE OF NON-DISCRIMINATION AND ITS EXCEPTIONS IN GATS: SELECTED LEGAL ISSUES

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Introduction

The General Agreement on Trade in Services (GATS) represents one of the innovative features of the World Trade Organization (WTO) stemming out of the Uruguay Round as it provides for the first multilateral disciplines covering international trade in services. As the 10th anniversary of the entry into force of the GATS is just behind us, it is difficult to assess the impact of such disciplines to the ‘expansion of trade in services’ and the ‘promotion of economic growth of all trading partners’.1 This is perhaps principally due to the fact that (a) the liberalizing provisions of GATS (in particular the Market Access and National Treatment obligations) are only binding in sectors and at the conditions specified in Members’ schedules of specific commitments and (b) the GATS negotiating round, officially started in 2000, has still to bear any substantial fruit. However, it should be stressed that the (perhaps frustrating) state of being of the service liberalization agenda is also the result of a certain level of uncertainty of the precise meaning and scope of GATS disciplines. If one positions this legal uncertainty within the relevant context of trade in services (potentially touching upon very sensitive issues such as foreign direct investment, movement of workers, financial services, etc), it is perhaps easier to understand the very slow pace with which Members have been able to pursue GATS’ objectives.2

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1 See Preamble to the GATS.

2 See A. Mattoo, “National Treatment in the GATS: Corner-Stone or Pandora’s Box?”, in 31 JWT (1997) 107 at 108 (“Uncertainty about the precise meaning of the national treatment obligation may undermine the key GATS objective of creating a secure, predictable trading environment”) and 133.

The present chapter aims to highlight a few fundamental issues of the GATS focusing in particular on its two non-discrimination principles—Most-Favoured-Nation (MFN) Treatment of Article II and National Treatment (NT) of Article XVII—and the two main exceptions to these principles—Economic Integration of Article V and the General Exceptions of Article XIV. Given the dearth of WTO dispute settlement reports that have dealt with these GATS provisions (compared to any of the other major WTO Agreements), the analysis will also rely on the interpretation of comparable provisions in other WTO Agreements.

In order to limit the ambit of the subject, the chapter will only address a few selected issues within each provision. In particular, Part I will examine the National Treatment provision focusing in particular on the ‘less favourable treatment’ standard (section I) and on the General Exceptions provision focusing in particular on the ‘necessity’ test (section II). Part II will review the compatibility of bilateral investment treaties (BITs) with the MFN provision of Article II GATS (section III) and the applicability of the Economic Integration exception in Article V GATS to these treaties (section IV).

PART I  NATIONAL TREATMENT AND GENERAL EXCEPTION

I. Article XVII GATS (National Treatment): ‘less favourable treatment’

Article XVII GATS encapsulates the second type of non-discrimination norm: the National Treatment principle. Article XVII requires each Member to ‘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.’

Contrary to the MFN obligation in Article II GATS, the National Treatment obligation of Article XVII GATS does not apply generally to all measures affecting trade in services, but only comes into play if Members choose to commit service sectors or sub-sectors in their Schedules of Specific Commitments. GATS follows the so called ‘positive list’ approach, whereby national treatment obligations extends only to those service sectors that Members have actually (i.e., positively) inscribed in their individual schedules. In order to determine the actual level of GATS ‘national treatment’ commitments, it is therefore necessary to examine each Member’s schedule of specific commitments which will indicate the range of activities covered in each service sector and sub-sector and the limitations on national treatment entered by Members pertaining to the different modes of supply.3

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3 Article XX:1 GATS provides that ‘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; […] (d) where appropriate the time-frame for implementation of such