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## **1 ARTICLE XVII**

### **1.1 Text of Article XVII**

#### ***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.<sup>10</sup>

*(footnote original)*<sup>10</sup> 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.

### **1.2 Scope of Article XVII**

1. The Panel in *China – Electronic Payment Services* noted that, while the scope of the market access obligation under Article XVI:2 of the GATS "applies to six carefully defined categories of measures of a mainly quantitative nature", the scope of the national treatment obligation under Article XVII extends generally to "all measures affecting the supply of services".<sup>1</sup>

### **1.3 Elements of a claim under Article XVII**

2. In *China – Publications and Audiovisual Products*, the Panel provided an overview of the elements of a claim under Article XVII:

"The wording of Article XVII indicates that we need to determine: whether the services at issue, i.e. the wholesale services supplied through commercial presence, are inscribed in China's Schedule; the extent of China's national treatment commitments, including any conditions or qualifications, with respect to these services entered in its Schedule; whether the measures at issue affect the supply of these

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<sup>1</sup> Panel Report, *China – Electronic Payment Services*, para. 7.652.

services; and whether these measures accord less favourable treatment to service suppliers of other Members, in comparison with like domestic suppliers."<sup>2</sup>

#### **1.4 "subject to any conditions and qualifications set out therein"**

3. In *China – Publications and Audiovisual Products*, the Panel stated:

"As noted above, a Member may limit the extent to which it grants market access or national treatment for the services listed in its Schedule, by inscribing the 'conditions and qualifications' (which we refer to more simply as 'limitations') mentioned in Article XVII either under 'limitations on market access' or under 'limitations on national treatment'. A Member's obligations on market access and/or national treatment are determined with reference to any such limitations inscribed in its schedule. Therefore, to determine the extent of China's national treatment commitments with respect to the services at issue, we need to examine China's Schedule to see whether, with respect to supply through commercial presence, there are any limitations inscribed (a) beside 'Wholesale Trade Services', in the national treatment column or (b) in the national treatment column of the horizontal section of China's Schedule, as those limitations inscribed in the horizontal section apply to *all* the sectors in the Schedule unless otherwise specified."<sup>3</sup>

4. For the use of the words "None" and "Unbound" in the "Limitations on National Treatment" column of GATS Schedules, see the Section on Article XX:1 of the GATS.

#### **1.5 "like services and service suppliers"**

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

"[T]he nature and the characteristics of wholesale transactions as such, as well as of each of the different subordinated services mentioned in the headnote to section 6 of the CPC, are 'like' when supplied in connection with wholesale services, irrespective of whether these services are supplied with respect to bananas of EC and traditional ACP origin, on the one hand, or with respect to bananas of third-country or non-traditional ACP origin, on the other. Indeed, it seems that each of the different service activities taken individually is virtually the same and can only be distinguished by referring to the origin of the bananas in respect of which the service activity is being performed. Similarly, in our view, to the extent that entities provide these like services, they are like service suppliers."<sup>4</sup>

6. In *China – Publications and Audiovisual Products*, the Panel concluded that when origin is the only factor on which a measure bases a difference in treatment between domestic service suppliers and foreign suppliers, the "like service suppliers" requirement is met, provided there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects except for origin:

"When origin is the only factor on which a measure bases a difference of treatment between domestic service suppliers and foreign suppliers, the 'like service suppliers' requirement is met, provided there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects except for origin. We note that similar conclusions have been reached by previous panels. We observe that in cases where a difference of treatment is not exclusively linked to the origin of service suppliers, but to other factors, a more detailed analysis would probably be required to determine whether service suppliers on either side of the dividing line are, or are not, 'like'.

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<sup>2</sup> Panel Report, *China – Publications and Audiovisual Products*, para. 7.944. See also Panel Report, *EU – Energy Package*, para. 7.235.

<sup>3</sup> Panel Report, *China – Publications and Audiovisual Products*, para. 7.950.

<sup>4</sup> Panel Report, *EC – Bananas III*, para. 7.322.

Therefore, to the extent that, under the measure at issue, a difference of treatment between foreign-invested enterprises that would, if not prohibited, engage in the wholesale of imported reading materials and wholly Chinese-owned enterprises that are permitted to supply this service is based exclusively on the origin of service suppliers, the 'like' service suppliers requirement in Article XVII is met, as long as there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects except for origin. In our view, there is no doubt that under the measure at issue, there will, or can, be foreign-invested enterprises prohibited from engaging in the wholesale of imported reading materials that are the same in all material respects as wholly Chinese-owned enterprises permitted to supply this service, except for their origin. We also note that the parties do not dispute the likeness of the service suppliers under the measures at issue. We thus consider that, for the measure at issue, the 'like' service suppliers requirement in Article XVII is met."<sup>5</sup>

7. In *China – Electronic Payment Services*, the Panel found that the difference of treatment was "not exclusively linked to the origin of service suppliers, but to other factors". Hence, the Panel decided to undertake "a more detailed analysis of the likeness issue".<sup>6</sup> The Panel started by noting that:

"In approaching this matter, we do not assume that without further analysis we may simply transpose to trade in services the criteria or analytical framework used to determine 'likeness' in the context of the multilateral agreements on trade in goods. We recognize important dissimilarities between the two areas of trade – notably the intangible nature of services, their supply through four different modes, and possible differences in how trade in services is conducted and regulated."<sup>7</sup>

8. The Panel in *China – Electronic Payment Services* then considered the ordinary meaning of the term "like" and the context of the phrase "like services". The Panel deduced from the wording of Articles XVII:1 and XVII:3 that "Article XVII seeks to ensure equal competitive opportunities for like services of other Members" and that "like services are services that are in a competitive relationship with each other (or would be if they were allowed to be supplied in a particular market)".<sup>8</sup> The Panel further stated:

"Furthermore, we note that Article XVII is applicable to all services<sup>9</sup>, in any sector, and that services – which are intangible – may be provided through any of the four modes of supply. As well, Article XVII refers to 'like services and service suppliers'. In the light of this complexity, 'like services and service suppliers' analyses should in our view take into account the particular circumstances of each case. In other words, we consider that determinations of 'like services', and 'like service suppliers', should be made on a case-by-case basis."<sup>10</sup>

In the light of the above, we consider that a likeness determination should be based on arguments and evidence that pertain to the competitive relationship of the services being compared. As in goods cases where a panel assesses whether a particular product is a 'like product', the determination must be made on the basis of the evidence as a whole. If it is determined that the services in question in a particular case are essentially or generally the same in competitive terms, those services would, in our view, be 'like' for purposes of Article XVII.<sup>11"12</sup>

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<sup>5</sup> Panel Report, *China – Publications and Audiovisual Products*, paras. 7.975-7.976.

<sup>6</sup> Panel Report, *China – Electronic Payment Services*, para. 7.697.

<sup>7</sup> Panel Report, *China – Electronic Payment Services*, para. 7.698.

<sup>8</sup> Panel Report, *China – Electronic Payment Services*, para. 7.700.

<sup>9</sup> (footnote original) Except for services supplied in the exercise of governmental authority. See Article I:3(b) of the GATS.

<sup>10</sup> (footnote original) For a similar view with regard to 'like products' determinations in the context of Article III of the GATT 1994, see Appellate Body Reports, *EC – Asbestos*, para. 101; and *Japan – Alcoholic Beverages II*, DSR 1996:I, 97, at p. 113.

<sup>11</sup> (footnote original) It is important to note that even if relevant services are determined to be 'like' and a measure of a Member is found to result in less favourable treatment of 'like' services of another Member, it

9. Referring to the Panel in *EC – Bananas III (Ecuador)* which had found that "to the extent that entities provide [] like services, they are like service suppliers" (see above, paragraph 5), the Panel in *China – Electronic Payment Services* stated:

"We agree that the fact that service suppliers provide like services may in some cases raise a presumption that they are 'like' service suppliers. However, we consider that, in the specific circumstances of other cases, a separate inquiry into the 'likeness' of the suppliers may be called for. For this reason, we consider that 'like service suppliers' determinations should be made on a case-by-case basis."<sup>13</sup>

10. In *Argentina – Financial Services*, the Appellate Body set out its understanding of the phrase "like services and service suppliers" in Articles II:1 and XVII:1 of the GATS. See the Section on Article II:1 of the GATS.

#### **1.6 "treatment no less favourable"**

11. As regards the "no less favourable" treatment element of Article XVII, the Panel in *China – Publications and Audiovisual Products* stated that:

"We must now examine whether the formal prohibition on the supply of certain services by a foreign service supplier that a like domestic supplier may undertake, constitutes 'no less favourable' treatment in terms of Article XVII.

This treatment is to be assessed in terms of the 'conditions of competition' between like services and services suppliers, as specified in Article XVII:3 of the GATS:

Formally identical or formally different treatment shall be considered to be less favourable if it modified 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.

In our view, a measure that prohibits foreign service suppliers from supplying a range of services that may, subject to satisfying certain conditions, be supplied by the like domestic supplier cannot constitute treatment 'no less favourable', since it deprives the foreign service supplier of *any* opportunity to compete with like domestic suppliers. In terms of paragraph 3 of Article XVII, such treatment modifies conditions of competition in the most radical way, by eliminating all competition by the foreign service supplier with respect to the service at issue."<sup>14</sup>

12. The Panel in *China – Publications and Audiovisual Products* also discussed the burden of proof on the issue of "less favourable" treatment, drawing upon jurisprudence developed under the GATT 1994:

"We recall the requirement under Article XVII that a Member accord 'no less favourable treatment' to foreign services or service suppliers than it does to like domestic ones. Under paragraph 2 of Article XVII, the treatment need not be identical. Formally different treatment may be accorded to foreign services or service suppliers, as long as that treatment does not modify conditions of competition in favour of like domestic services or service suppliers. Therefore, China's formally different treatment of foreign-invested wholesalers with respect to operating term does not necessarily indicate an inconsistency with Article XVII. It is for the United States, as the complaining party, to demonstrate that the formal difference in treatment by China has modified the conditions of competition in favour of wholly Chinese-owned wholesalers.

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may still be possible to justify that measure under one of the general exceptions set out in Article XIV of the GATS.

<sup>12</sup> Panel Report, *China – Electronic Payment Services*, paras. 7.701-7.702.

<sup>13</sup> Panel Report, *China – Electronic Payment Services*, para. 7.705.

<sup>14</sup> Panel Report, *China – Publications and Audiovisual Products*, paras. 7.978-7.979.

The demonstration of 'less favourable treatment' of foreign services or service suppliers under Article XVII must proceed through careful analysis of the measure and the market. In examining the national treatment obligation applying to trade in goods, the Appellate Body in *US – FSC (Article 21.5 – EC)* stated:

The examination of whether a measure involves 'less favourable treatment' of imported products within the meaning of Article III:4 of the GATT 1994 must be grounded in close scrutiny of the 'fundamental thrust and effect of the measure itself'. This examination cannot be rest on simple assertion, but must be founded on a careful analysis of the contested measure and of its implications in the marketplace. At the same time, however, the examination need not be based on the actual effects of the contested measure in the marketplace.

We consider that this statement by the Appellate Body is relevant also to an analysis under Article XVII of the GATS, since an examination of 'less favourable treatment' involves, in goods as well as services cases, an analysis of the effects of a measure on conditions of competition."<sup>15</sup>

13. In *China – Electronic Payment Services*, the Panel observed that Article XVII:3 of the GATS provides useful clarification regarding the concept of "less favourable treatment":

"[Article XVII:3] states that formally identical or different treatment is deemed 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'. We deduce from this that, subject to all other Article XVII conditions being fulfilled, formally identical or different treatment of service suppliers of another Member constitutes a breach of Article XVII:1 if and only if such treatment modifies the conditions of competition to their detriment."<sup>16</sup>

14. In *Argentina – Financial Services*, the Appellate Body set out its understanding of the terms "treatment no less favourable" in Articles II:1 and XVII of the GATS. With respect to Article XVII of the GATS, the Appellate Body observed:

"Examining the text of these provisions, we note that the second and third paragraph of Article XVII elaborate on the meaning of a Member's obligation to grant 'treatment no less favourable' pursuant to Article XVII:1. Specifically, Article XVII:2 recognizes that a Member may meet this requirement by according to services and service suppliers 'either formally identical treatment or formally different treatment'. Article XVII:3 stipulates that '[f]ormally 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.' In our view, while Article XVII:3 refers to the modification of conditions of competition *in favour of* domestic services or service suppliers, the legal standard set out in Article XVII:3 calls for an examination of whether a measure modifies the conditions of competition to *the detriment of* services or service suppliers of any other Member. Less favourable treatment of foreign services or service suppliers and more favourable treatment of like domestic services or service suppliers are flip-sides of the same coin.

Footnote 10 to Article XVII:1 provides further insight as to the meaning of the obligation to accord 'treatment no less favourable' under Article XVII:1. Footnote 10 stipulates that specific commitments assumed under Article XVII:1 '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'. As its text indicates, the 'inherent competitive disadvantages' referred to in footnote 10 result from the 'foreign character' of the relevant services or service suppliers, rather than from the contested measure adopted by the importing Member. The 'inherent competitive disadvantages' under footnote 10, therefore, must

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<sup>15</sup> Panel Report, *China – Publications and Audiovisual Products*, paras. 7.1130-7.1132.

<sup>16</sup> Panel Report, *China – Electronic Payment Services*, para. 7.687.

be distinguished from the measure's impact on the conditions of competition in the marketplace. By stating that a Member is not required to 'compensate for' such 'inherent competitive disadvantages', footnote 10 thus makes clear that the national treatment obligation under Article XVII:1 is not about the relative competitive advantages or disadvantages of the services and service suppliers that are *not* caused by the contested measure. Rather, the standard of 'treatment no less favourable' must be based on the impact on the conditions of competition that *results from* the contested measure."<sup>17</sup>

15. For the remainder of the Appellate Body's analysis of the term "no less favourable treatment" under Article XVII of the GATS, see the Section on Article II:1 of the GATS.

### 1.7 The "aims-and-effects" test

16. In *EC – Bananas III*, the Appellate Body rejected the alleged relevance of the so-called "aims-and-effects" test in the context of Article XVII:

"We see no specific authority either in Article II or in Article XVII of the GATS for the proposition that the 'aims and effects' of a measure are in any way relevant in determining whether that measure is inconsistent with those provisions. In the GATT context, the 'aims and effects' theory had its origins in the principle of Article III:1 that internal taxes or charges or other regulations 'should not be applied to imported or domestic products so as to afford protection to domestic production'. There is no comparable provision in the GATS. Furthermore, in our Report in *Japan – Alcoholic Beverages* the Appellate Body rejected the 'aims and effects' theory with respect to Article III:2 of the GATT 1994. The European Communities cites an unadopted panel report dealing with Article III of the GATT 1947, *United States – Taxes on Automobiles* as authority for its proposition, despite our recent ruling."<sup>18</sup>

### 1.8 Footnote 10

17. In *Canada – Autos*, one of the measures at issue was the so-called Canada Value Added (CVA) requirement, according to which a tax duty exemption was granted, *inter alia*, only if the amount of Canadian value added in a manufacturer's local production of motor vehicles exceeded a certain level. One component of this CVA requirement was "maintenance and repair work executed in Canada on buildings, machinery and equipment used for production purposes". Canada argued that there can be no discrimination against these services supplied through modes 1 and 2, as cross-border supply and consumption abroad of these services are not technically feasible. Further, Canada pointed out that "the competitive disadvantage in the foreign provision of many services listed by the complainants as being affected by the CVA requirements is inherent in the foreign character of these services and, as stated in footnote 10 to Article XVII, should not be regarded as a national treatment restriction."<sup>19</sup> The Panel, in a finding not reviewed by the Appellate Body, disagreed with Canada:

"We consider that, although the supply of some repair and maintenance services on machinery and equipment through modes 1 and 2 might not be technically feasible, as they require the physical presence of the supplier, all other services listed by the complainants as being affected by the CVA requirements, including some consulting and advisory services relating to repair and maintenance of machinery, can be supplied through modes 1 and 2. We further consider that treatment less favourable granted to services supplied outside Canada cannot be justified on the basis of inherent disadvantages due to their foreign character. Footnote 10 to Article XVII only exempts Members from having to compensate for disadvantages due to foreign character in the application of the national treatment provision; it does not provide cover for actions which might modify the conditions of competition against services and service suppliers which are already disadvantaged due to their foreign character.

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<sup>17</sup> Appellate Body Report, *Argentina – Financial Services*, paras. 6.103-6.104. See also Panel Report, *EU – Energy Package*, para. 7.744.

<sup>18</sup> Appellate Body Report, *EC – Bananas III*, para. 241.

<sup>19</sup> Panel Report, *Canada – Autos*, para. 10.298.

We therefore find that lack of technical feasibility only excludes the supply of some repair and maintenance services on machinery and equipment through modes 1 and 2 from Canada's national treatment obligation. We also find that any eventual inherent disadvantages due to the foreign character of services supplied through modes 1 and 2 do not exempt Canada from its national treatment obligation with respect to the CVA requirements."<sup>20</sup>

18. On footnote 10 to Article XVII, see also the comments made by the Appellate Body in *Argentina – Financial Services* and reflected in paragraph 14 above.

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<sup>20</sup> Panel Report, *Canada – Autos*, paras. 10.300-10.301.