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## **1 PREAMBLE**

### **1.1 Text of the Preamble**

*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:

### **1.2 "transparency"**

1. In *US – Gambling*, the Panel found that the scope of the United States' commitment in its GATS Schedule on "Other recreational services, except sporting" extends to gambling and betting services. The Panel considered that its conclusion was consistent with the principle of "transparency" expressed in the preamble of the GATS:

"The object and purpose of the GATS lends support to the conclusion that the ordinary meaning of the terms used in the US Schedule, when read in their context, is that the United States has undertaken specific commitments on gambling and betting services in sub-sector 10.D of its Schedule. Our conclusion derives from the need to provide clarity and precision in respect of the US entry under sub-sector 10.D (Other recreational services, except sporting) and the fact that, unless otherwise indicated in the schedule, Members were assumed to have relied on W/120 and the corresponding CPC references.

The need for clarity and precision in Members' schedules referred to in the 1993 Scheduling Guidelines is consistent with the preamble to the GATS which stipulates,

inter alia, that, in establishing the GATS, Members sought the expansion of trade in services 'under conditions of transparency'. This requirement of transparency is undoubtedly an object and purpose of the GATS – and the WTO in general – and applies equally to GATS schedules of specific commitments. Indeed, schedules of specific commitments determine, inter alia, the scope of market access and national treatment obligations that Members undertake under the GATS. It is, therefore, important that schedules be readily understandable by all other WTO Members, as well as by services suppliers and consumers.

The Appellate Body found that 'the security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the WTO Agreement, generally, as well as of GATT 1994.' This confirms the importance of the security and predictability of Members' specific commitments, which is equally an object and purpose of the GATS."<sup>1</sup>

2. The Appellate Body in *US – Gambling* approved the Panel's finding of a need for precision and clarity in scheduling in the following terms:

"The Panel referred to the requirement of 'transparency' found in the preamble to the GATS, as supporting the need for precision and clarity in scheduling, and underlining the importance of having Schedules that are 'readily understandable by all other WTO Members, as well as by services suppliers and consumers'.<sup>2</sup> The Panel also referred to the Appellate Body Report in *EC – Computer Equipment* as follows:

'The Appellate Body found that 'the security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the WTO Agreement, generally, as well as of GATT 1994.' This confirms the importance of the security and predictability of Members' specific commitments, which is equally an object and purpose of the GATS'. (original footnote omitted)

We agree with the Panel's characterization of these objectives, along with its suggestion that they reinforce the importance of Members' making clear commitments."<sup>3</sup>

3. The Panel in *China – Electronic Payment Services* referred to the principle of transparency expressed in the preamble of the GATS to confirm its interpretation of China's Schedule of specific commitments:

"We find that our interpretation of the scope of China's commitment under subsector (d) is consistent with the objective of transparency because it classifies under a single subsector services which, when combined together, result in a new and distinct service, the integrated service. This integrated service is supplied and consumed as such. Furthermore, by reconciling the classification of EPS with the commercial reality of those services, our interpretation reinforces the predictability, security and clarity of GATS specific commitments. For those same reasons, our interpretation is also consistent with the objective of progressive liberalization contained in the Preamble to the GATS."<sup>4</sup>

### **1.3 "progressive liberalization"**

4. In *China – Publications and Audiovisual Products*, the Panel found that the scope of China's commitment in its GATS Schedule on "Sound recording distribution services" extends to sound recordings distributed in non-physical form, through technologies such as the Internet. The Panel considered that its interpretation was consistent with the object and purpose of the GATS:

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<sup>1</sup> Panel Report, *US – Gambling*, paras. 6.106-6.108.

<sup>2</sup> Panel Report, *US – Gambling*, para. 6.107.

<sup>3</sup> Appellate Body Report, *US – Gambling*, paras. 188-189.

<sup>4</sup> Panel Report, *China – Electronic Payment Services*, para. 7.198.

"We now verify whether our interpretation of China's commitment on 'Sound recording distribution services' is consistent with the object and purpose of the GATS. We note that the Preamble of the GATS indicates that the Agreement is aimed, *inter alia*, at establishing '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'. In light of this general object and purpose, the Preamble also provides that commitments negotiated under the Agreement should aim at 'securing an overall balance of rights and obligations' between the Members. We find that our interpretation of China's commitment on 'Sound recording distribution services' is consistent with this object and purpose."<sup>5</sup>

5. In *China – Publications and Audiovisual Products*, China argued on appeal that the Panel's interpretation of "Sound recording distribution services" is inconsistent with the object and purpose of the GATS and, in particular, with the principle of "progressive liberalization". More specifically, China argued that the Panel interpreted the entry "Sound recording distribution services" according to the contemporary meaning of the words it contains, but that the principle of "progressive liberalization" does not allow for the expansion of the scope of the commitments of a WTO Member by interpreting the terms used in the Schedule based on the meaning of those terms at the time of interpretation. The Appellate Body saw no error in the Panel's consideration of the object and purpose of the GATS in general, and considered that the principle of "progressive liberalization" does not lend support to an interpretation that would constrain the scope and coverage of specific commitments that have already been undertaken by Members and by which they are bound:

"We observe that the GATS preamble lists various objectives, including the 'establish[ment] of 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 the 'early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations'. The Panel found that its interpretation of 'Sound recording distribution services' is consistent with the objectives listed in the GATS preamble.

We do not disagree with the Panel that nothing in the GATS preamble appears to contradict an interpretation of 'Sound recording distribution services' as extending to electronic distribution of sound recordings. At the same time, we observe that none of the objectives listed in the GATS preamble provides specific guidance as to the correct interpretation to be given to China's GATS Schedule entry 'Sound recording distribution services'.

The principle of progressive liberalization is reflected in the structure of the GATS, which contemplates that WTO Members undertake specific commitments through successive rounds of multilateral negotiations with a view to liberalizing their services markets incrementally, rather than immediately and completely at the time of the acceptance of the GATS. The scheduling of specific commitments by service sectors and modes of supply represents another manifestation of progressive liberalization. In making specific commitments, Members are not required to liberalize fully the chosen sector, but may limit the coverage to particular subsectors and modes of supply and maintain limitations, conditions, or qualifications on market access and national treatment, provided that they are inscribed in their Schedules. We do not consider, however, that the principle of progressive liberalization lends support to an interpretation that would constrain the scope and coverage of specific commitments that have already been undertaken by Members and by which they are bound."<sup>6</sup>

6. The Panel in *China – Electronic Payment Services* referred to the principle of progressive liberalization expressed in the preamble of the GATS to confirm its interpretation of China's Schedule of specific commitments (see above, paragraph 3).

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<sup>5</sup> Panel Report, *China – Publications and Audiovisual Products*, para. 7.1219.

<sup>6</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 392-394.

#### 1.4 "national policy objectives"

7. In *Argentina – Financial Services*, the Appellate Body explained that, through various flexibilities and exceptions, "the GATS seeks to strike a balance between a Member's obligations assumed under the Agreement and that Member's right to pursue national policy objectives". The Appellate Body further observed:

"A Member's right to pursue national policy objectives is recognized in the preamble of the GATS, including the third and fourth recitals. The term 'national policy objectives' in the preamble, which is general and undefined, may cover a wide array of objectives, and Members retain various means to pursue these objectives. To begin with, measures pursuing national policy objectives may be taken outside the sectors or supply modes covered by GATS Schedules. Furthermore, a Member may pursue a wide range of policy objectives while acting consistently with its obligations or commitments assumed under the GATS. Indeed, a Member's commitments under the GATS could in some cases serve to further its national policy objectives. Where measures are found to be *inconsistent* with a Member's obligations or commitments under the GATS, the GATS provides for various mechanisms, such as Article XIV, which take account of policy objectives underlying such measures."<sup>7</sup>

8. The Appellate Body also disagreed with the Panel's view that the relevance of the "regulatory aspects concerning service suppliers" for the purpose of assessing whether there is "treatment no less favourable" is confirmed by the object and purpose of the GATS as expressed in its preamble:

"[W]e agree that the scope of the 'national policy objectives' referred to in the preamble is broader than the objectives listed in the exceptions. As long as Members comply with their GATS obligations and commitments, they are free to pursue national policy objectives that they consider appropriate. In this regard, Panama is correct in stating that 'Members, on a daily basis, regulate services sectors and pursue a wide range of national policy objectives without violating their obligations under the GATS', and that they only act inconsistently with their non-discrimination obligations when they pursue policy objectives pursuant to regulations that discriminate between like services or service suppliers. The exceptions contained in the GATS recognize a limited number of policy objectives that, under certain conditions, may be pursued by measures that are otherwise *inconsistent* with the GATS. In other words, the pursuit of a Member's national policy objectives is not equivalent to violation of a Member's GATS obligations, and can be accommodated without the need to invoke exceptions. Only when a Member, in pursuing its objectives, imposes measures that are inconsistent with its GATS obligations – e.g. by modifying the conditions of competition to the detriment of like services or service suppliers of any other Member – would the need to invoke exceptions arise.

Therefore, an interpretation of the term 'treatment no less favourable' that is based on a measure's detrimental impact on the conditions of competition does *not* prevent a Member from pursuing a wide range of national policy objectives beyond those identified in the exceptions. Moreover, a Member's right to pursue national policy objectives does not, as the Panel seemed to suggest, confirm 'the relevance of the regulatory framework established to meet these objectives' for the purpose of analysing 'treatment no less favourable'. For these reasons, we also disagree with the Panel that the relevance of the 'regulatory aspects concerning service suppliers' is 'confirmed by the object and purpose of the GATS'.<sup>8</sup>

9. In *Argentina – Financial Services*, the Appellate Body also referred to Members' "national policy objectives" in the third and fourth recitals of the preamble of the GATS when assessing the scope of paragraph 2(a) of the Annex on Financial Services. The Appellate Body found that "[a]n interpretation limiting the types of measures that could potentially fall under paragraph 2(a)

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<sup>7</sup> Appellate Body Report, *Argentina – Financial Services*, para. 6.114.

<sup>8</sup> Appellate Body Report, *Argentina – Financial Services*, paras. 6.117-6.118.

would not be in consonance with the balance of rights and obligations that is expressly recognized in the preamble of the GATS."<sup>9</sup>

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<sup>9</sup> Appellate Body Report, *Argentina – Financial Services*, para. 6.260.