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1 ARTICLE I

1.1 Text of Article I

- (c) "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

1.2 Article I:1

1.2.1 "measures affecting trade in services"

1. The Panel in

...

[W]e believe that at least two key legal issues must be examined to determine whether a measure is one 'affecting trade in services': first, whether there is 'trade in services' in the sense of Article I:2; and, second, whether the measure in issue 'affects' such trade in services within the meaning of Article I:1."⁴

4. Rejecting the notion that a panel could directly determine whether a measure was "affecting" trade in services under Article I:1 simply by examining whether the measure violated Article II or Article XVII of GATS, the Appellate Body in *US – Gambling* stated that a panel needed instead to examine the effect of the measure on the relevant services or upon the service suppliers. It criticized the Panel's approach in the following terms:

"[T]he Panel ... never examined whether or how the import duty exemption affects *US – Gambling*. Rather, the Panel simply stated:

'Like the measures at issue in the *US – Gambling* case, the import duty exemption granted onmp3 (a)5.1 (c (grpt (e11.3 .58717.253 0 Td()Tj/TT3 1 Tf-

complainant had proved that "(i) there is 'trade in services' in the sense of Article I:1 of the GATS, and (ii) whether the measure at issue 'affect[s]' such trade in services within the meaning of Article I:1 of the GATS."⁸

7. With respect to the requirement to demonstrate that "there is 'trade in services' in the sense of Article I:1 of the GATS", the Panel in _____ disagreed with Argentina's view that the complainant must demonstrate that there is effective trade in services. The Panel found, _____, that "[t]he wording of Article I:1 ... does not refer to measures that specifically affect actual services and service suppliers of the complaining Member or of any other Member".⁹ The Panel also reasoned that:

"Argentina's argument would lead to an absurd situation in which the GATS would apply to measures provided that there is actual trade in services but would not apply to the most trade-restrictive measures, that is, bans on supplying services, which, by their very nature, prevent actual flows of services. We believe that such an outcome would serve to weaken the GATS and would clearly be contrary to the object and purpose of the Agreement, whose preamble states, _____, that Members wish '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 ...'.¹⁰

8. According to the Panel, the Appellate Body in _____ "did not establish a general rule that the existence of specific transactions between the complainant and the respondent has to be proved but ruled on the factual situation in the market in question".¹¹ The Panel found that, having identified the relevant services and modes of supply, Panama had demonstrated that the measures at issue "apply to services supplied pursuant to Article I:2 of the GATS and that Panama has therefore demonstrated that there is trade in services within the meaning of Article I:2 of the GATS".¹²

9. The Panel in _____ found that a measure that applies to service suppliers withdrawing a commercial presence is a measure that "affects" trade in services within the meaning of Article I:1 of the GATS. The Panel explained:

"The Panel also recalls that, pursuant to Article XXVIII(c) of the GATS, 'measures by Members affecting trade in services include measures in respect of ... (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member'. In Spanish, the term ' _____ ' ('in respect of') is defined as _____ [referring or expressing a relationship to something]. We thus consider that the concept of 'measures ... affecting trade in services' covers measures related to the 'constitution' or 'acquisition' of a legal person within the territory of a Member for the purpose of supplying a service. In our view, this is the case for the foreign exchange authorization requirement.

The fact that this requirement does not apply at the time of establishing a commercial presence in Argentina but rather at the time of withdrawing the investment from the Argentine market does not prevent this requirement from being related to the supply of services through commercial presence, in accordance with the definition of this mode in Article I:2 of the GATS. Indeed, such a measure may have an impact on a service supplier's decision to invest in the market or, in the terms of the GATS, to establish a commercial presence. In our view, a measure which, for example, totally prohibits repatriation of invested capital at the time of withdrawal from the market would most likely influence the supplier's decision as to whether or not to establish a commercial presence in that market. It is our view that a determination which implies leaving outside the scope of the GATS those measures which apply at the time when a legal person withdraws from a market could open up a breach in the Agreement, as it would mean that measures which influence the decision to set up in the territory of a

⁸ Panel Report, _____, para. 7.84.
⁹ Panel Report, _____, para. 7.88.
¹⁰ Panel Report, _____, para. 7.94.
¹¹ Panel Report, _____, para. 7.95.
¹² Panel Report, _____, paras. 7.97-7.98.

Member would not be covered by the Agreement. For the foregoing reasons, we consider that measure 8 affects trade in services in the sense of Article I:1 and is thus covered by the GATS."¹³

1.3 Article I:2(a)

1.3.1 Means of delivery covered

10. The Panel in _____ stated that the supply of a service through mode 1 includes all means of delivery:

"Therefore, a market access commitment for mode 1 implies the right for other Members' suppliers to supply a service through all means of delivery, whether by mail, telex, facsimile, or other electronic means."

performed. No eleme

telecommunications services – the 'transmission of customer supplied information' – must include supply by means which involve or require linking to another operator to complete the service."²²

1.4 Article I:2(c)

1.4.1 Supply by a firm commercially present in one Member into the territory of another Member

18. The Panel in _____ examined whether international services supplied by a firm in Mexico fell within the definition of services supplied through commercial presence. It found that there was no territorial requirement contained in paragraph 2(c) other than a commercial presence in the territory of any other Member:

"The definition of services supplied through a commercial presence makes explicit the location of the service supplier. It provides that a service supplier has a commercial presence – any type of business or professional establishment – in the territory of any other Member. The definition is silent with respect to any other territorial requirement (as in cross-border supply under mode 1) or nationality of the service consumer (as in consumption abroad under mode 2). Supply of a service through commercial presence would therefore not exclude a service that originates in the territory in which a commercial presence is established (such as Mexico), but is delivered into the territory of any other Member (such as the United States)."²³

19. The Panel in _____ stated that what is essential under mode 3 is the relationship between the commercial presence in the importing Member and the natural or juridical person in the exporting Member:

"In our view, this position has no basis in the text of the GATS and we therefore cannot agree with Russia. In line with the position taken by prior panels, we believe that the appropriate focus under mode 3 is the relationship between the commercial presence in the importing Member and the natural or juridical person in the exporting Member, which supplies services through the commercial presence. We do not believe that it is relevant to consider any potential relationshe.4 (tio)1te br tit b R-1 (a)7 (t)13.uural o(ti)

1.5 Article I:3(b)

21. The Appellate Body in _____ examined the context provided by the structure of the GATS in interpreting the specific commitments made by the US in its GATS Schedule. The Appellate Body stated that from the definition of 'services' and 'sector'²⁶ found in GATS, it follows that, firstly, a Member may schedule commitments in respect of _____ service and secondly, that a particular service cannot fall within two different sectors or sub sectors of a Member's Schedule:

the ordinary meaning to be given to the terms of the treaty in their context and in the

conclude that Article III of GATT 1994 is applicable to Part V.1 of the Excise Tax Act."³²

0 1) V b (25. 7) On appeal, the Appellate Body (in 5 0 2 1 T 1 d (V67 0T)80) Tc. 0 (o0060Td -0.00dw(0()T
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