> trade services and service suppliers of motor vehicles of different Members commercially present in Canada. Finally, the Panel should have applied its interpretation of Article II:1 to the facts as it found them." [1]

2. The Appellate Body in Canada – Autos subsequently disapproved of the Panel's applica tion of Article II of the GATS to the facts in the case before it. Specifically, the Appellat e Body objected to what it considered to be the Panel's assumption that the application of an import duty exemption to manufacturers automatically affected "competition among wholesale rs in their capacity as service suppliers":

> "Clearly, here the Panel is confusing the application of the import duty exemption to manufacturers with its possible effect on wholesalers. In our view, the Panel has conducted a 'goods' analysis of this measure, and has simply extrapolated its analysis of how the import duty exemp tion affects manufacturers to wholesale trade service suppliers of motor vehicles. The Panel surmised, without analyzing the effect of the measure on wholesalers as service suppliers, that the import duty exemption, granted to a limited number of manufactu rers, ipso facto affects t3 0 Td [(r)-4.7 (e)-5 (r)-el

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> "Articles II:1 and XVII:1 of the GATS refer to ' like services and service suppliers '. In contrast, Articles I:1, III:2, and III:4 of the GATT 1994, for instance, refer to 'like products ', but they do not include a reference to ' like producers '. The term 'service supplier' is defined in Article XXVIII(g) of the GATS as 'any person that suppl ies a service '. With respect to the ' supply of a service ', Article XXVIII(b) stipulates that it ' includes the production, distribution, marketing, sale and delive ry of a service '. Acco rdingly, this term covers a broad array of service -related activities. T he word ' service ' is not defined in the GATS itself. [10] "[11]

8. In Argentina – Financial Services, the Appellate Body considered the reference to "services and service su ppliers " in Article s I I:1 and XVII of the GATS . The Appellate Body held:

> "In our view, the ref erence to ' services and service suppliers ' indicates that considerations relating to both the service and the service supplier are relevant for determining 'liken ess' under Articles II:1 and XVII:1 of the GATS. The assessment of likeness of services should not be undertaken in isolation from considerations relating to the service suppliers, and, conversely, the assessment of likeness of service suppliers should not be undertaken in isol ation from considerations relating to the likeness of the services they provide. We see the phrase 'like services and service suppliers ' as an integrated element for the likeness analysis under Articles II:1 and XVII:1, respectively. Accordingly, separate findings with respect to the ' likeness ' of services, on the one hand, an d the 'likeness ' of service suppliers, on the other hand, are not required. Because the 'likeness ' analysis serves to assess the competitive relationship of the ' services and service suppliers ' at issue, the particular features of that competitive relation ship, in the circumstances of any specific case, will determine the relative weight to be accorded in the analysis of ' likeness ' to considerations relating to the service and the servi ce supplier, respectively. In any event, in a holistic analysis of ' like ness ', considerations relating to both the service and the service supplier will be relevant, albeit to varying degrees, depending on the circumstances of each ca se. "[12]

9. With respect to how a panel should proceed in determining " likeness ", the Appellate Bod y, referring to its case law under Article III:4 of the GATT 1994, recalled in particular the four general criteria for analysing 'likeness' in the context of tra de in goods: (i) the properties, nature, and quality of the products; (ii) the end -uses of the products; (iii) consumers' tastes and habits or consumers' perceptions and behaviour in respect of the products; and (iv) the tariff classification of the produc ts.[13] The Appellate Body then made the following observations:

> "With these considerations in mind, we consider how a panel should proceed in assessing the ' likeness ' of services and service suppliers in the particular context of Article II:1 and Article XVI I:1 of the GATS. We re call that the Appellate Body has clarified that the term ' like ' must be interpreted in the light of its context and the object and purpose of the agreement in which the relevant provision appears. As we have set out above, we consider that the analysis of ' likeness ' serves the same purpose in the context of both trade in goods and trade in services, namely, to determine whether the products or services and service suppliers, respectively, are in a competitive relationship with each other. Thus, to the extent that the criteria for assessing 'likeness ' traditionally employed as analytical tools in the context of trade in goods are relevant for assessing the competitive relationship of services and service suppliers, these criteria may be employed also in assessing 'likeness ' in the context of trade in services, provided that they are adapted as appropriate to account for the specific characteristics of trade in services. In particular, we

the party that asserts the affirmative of a particular claim, the complainant bears the burden of making a prima facie case that a measure draws a distinction between services and service suppliers based exclusively on origin". [23] According to the Appellate Body, "[i]f a panel finds that the complainant has failed to make a prima facie case that a measure provides for differential treatment based exclusively on origin, then the panel must engage in an analysis of 'likeness' of services and service suppliers on the basis of the relevant criteria adapted to trade in services, as addressed above, before it may proceed to the analysis of less favourable treatment." [24]

16. The Appellate Body then explained how a panel should proceed when the complainant successfully demonstrates "likeness" based on the presumption approach:

> "In contrast, if a complainant succeeds in making a prima facie case that a measure draws a distinction between services and service suppliers based exclusively on origin, and this is not rebutted by the respondent, the services and service suppliers at issue may be presumed to be 'like', and a panel may proceed with the analysis of less favourable treatment without the need to assess the competitive relationship of the services and service suppliers at issue based on the relevant criteria as adapted to trade in services.
>
> Once a complainant has made a prima facie case that a measure draws a distinction between services and service suppliers based exclusively on origin, the respondent may rebut this by demonstrating that origin is indeed not the exclusive basis for the distinction drawn by the measure between the services and service suppliers at issue. Alternatively, or in addition, a respondent may seek to rebut the prima facie case based on the presumption approach by introducing arguments and evidence relating to the criteria for determining 'likeness' adapted to trade in services, as explained above, demonstrating that a certain factor affects the relevant criteria for establishing 'likeness', and that it therefore has an impact on the competitive relationship between the services and service suppliers. In the event of a successful rebuttal based on either option above, a panel cannot proceed to a finding of 'likeness' on the basis of such a presumption. Rather, it must engage in an analysis of 'likeness' considering the relevant criteria in order to determine whether the services and service suppliers at issue are 'like' before proceeding to an analysis of less favourable treatment." [25]

1.3.2 "no less favourable treatment"

1.3.2.1 de facto discrimination under Article II:1 of the GATS

17. In EC – Bananas III, the European Communities argued that Article II of the GATS did not cover de facto discrimination; the European Communities claimed that if the drafters of the GATS had wished to make the "modification of competitive conditions" requirement an integral part of the "no less favourable treatment" test under the most-favoured-nation clause, they would have done so explicitly. The Panel rejected this argument, noting that Article XVII "is meant to provide for no less favourable conditions of competition regardless of whether that is achieved through the application of formally identical or formally different measures … The absence of similar language in Article II is not, in our view, a justification for giving a different ordinary meaning in terms of Article 31(1) of the Vienna Convention to the words 'treatment no less favourable', which are identical in both Articles II:1 and XVII:1." [26] The Panel also opined that "if the standard of 'no less favourable treatment' in Article II were to be interpreted narrowly to require only formally identical treatment, that could lead in many situations to the frustration of the objective behind Article II which is to prohibit discrimination between like services and service suppliers of other Members". [27] The Appellate Body did not agree with this reasoning of the Panel, but reached the same conclusion as regards the applicability of Article II of GATS to de facto discrimination:

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[23]

"We find the Panel's reasoning on this issue to be less than fully satisfactory. The Panel interpreted Article II of the GATS in the light of panel reports interpreting the national treatment obligation of Article III of the GATT. The Panel also referred to Article XVII of the GATS, which is also a national treatment obligation. But Article II of the GATS relates to MFN treatment, not to national treatment. Therefore, provisions elsewhere in the GATS relating to national treatment obligations, and previous GATT practice relating to the interpretation of the national treatment obligation of Article III of the GATT 1994 are not necessarily relevant to the interpretation of Article II of the GATS. The Panel would have been on safer ground had it compared the MFN obligation in Article II of the GATS with the MFN and MFN-type obligations in the GATT 1994.

Articles I and II of the GATT 1994 have been applied, in past practice, to measures involving de facto discrimination. …

The GATS negotiators chose to use different language in Article II and Article XVII of the GATS in expressing the obligation to provide 'treatment no less favourable'. The question naturally arises: if the GATS negotiators intended that 'treatment no less favourable' should have exactly the same meaning in Articles II and XVII of the GATS, why did they not repeat paragraphs 2 and 3 of Article XVII in Article II? But that is not the question here. The question here is the meaning of 'treatment no less favourable' with respect to the MFN obligation in Article II of the GATS. There is more than one way of writing a de facto non-discrimination provision. Article XVII of the GATS is merely one of many provisions in the WTO Agreement that require the obligation of providing 'treatment no less favourable'. The possibility that the two Articles may not have exactly the same meaning does not imply that the intention of the drafters of the GATS was that a de jure, or formal, standard should apply in Article II of the GATS. If that were the intention, why does Article II not say as much? The obligation imposed by Article II is unqualified. The ordinary meaning of this provision does not exclude de facto discrimination. Moreover, if Article II was not applicable to de facto discrimination, it would not be difficult -– and, indeed, it would be a good deal easier in the case of trade in services, than in the case of trade in goods – to devise

discrimination provisions, and cover both de jure and de facto discrimination. [29] Thus, the elaboration on the meaning of the term 'treatment no less fav ourable ' contained in Art icle XVII, and in particular in Article XVII:3, should also be pertin ent context to the meaning of the same term in Article II:1.

We note that, in EC – Bananas III , the Appellate Body upheld the panel's finding that the EC licensi ng procedures in that d ispute conferred less favourable treatment under both Article II and Ar ticle XVII of the GATS. In so doing, the Appellate Body based its findings under both provisions on the same notion of ' less favourable treatment '. Specifically, the Appellate Body agr eed with the panel that various aspects of the EC licensing procedures a t issue created less favourable conditions of competition for service suppliers of the complainants' origin. [30] The Appellate Body's findings indicate that, on subs tance, the concept of ' tr eatment no less favourable ' under both the most -favoured -nation and n ational treatment provisions of the GATS is focused on a measure's modification of the conditions of competition. This legal standard does not contemplate a separate and additional inq uir y into the regulatory objective of, or the regulatory concerns underlying, the contested measure. Indeed, in prior disputes, the fact that a measure modified the conditions of competition to the detriment of services or service suppliers of any other Me mber was, in itself, sufficient for a finding of less favourable treatme nt under Articles II:1 and XVII of the GATS. "

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> Specifically, as further discussed below, this legal standard does not contemplate a separate step of analysis regarding whether the 'regulatory aspects' relating to service suppliers could 'convert[]' the measure's detrimental impact on the conditions of competition into 'treatment no less favourable'."[36]

21. In Argentina – Financial Services, the Appellate Body explained that its interpretation of the legal standard of "treatment no less favourable" was also supported by the structure of the GATS. According to the Appellate Body, "[u]nder this structure, Members can utilize certain flexibilities, available to them uniquely under the GATS, when undertaking their GATS commitments, and their obligations are qualified by exceptions or other derogations contained in the GATS and its Annexes."[37]

> "Through these 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. A Member's right to pursue national

and the GATS, an interpretation of the term 'tre atment no less favourable ' that does not contemplate a separate inquiry into the regulatory objectives of a measure sits well within the general structure of the respective Agreement. "[40]

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