

# TRADE ISSUES IN SUSTAINABLE TOURISM CERTIFICATION: AN EXAMINATION OF THE CONSTRAINTS IMPOSED BY INTERNATIONAL TRADE RULES AND ORGANIZATIONS' (NAFTA, WTO, ETC.), BARRIERS TO TRADE

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## Trade Issues in Sustainable Tourism

### Introduction

This report examines whether efforts to establish standards or certification programs for sustainable tourism might violate international trade agreements. In a number of high profile cases in the 1990s, international trade panels held that various United States and European laws setting environmental standards for foreign products violated the General Agreement on Tariffs and Trade (GATT). Although GATT governs barriers to trade in *goods* and thus seldom would be relevant to tourism restrictions, the General Agreement on Trade in Services (GATS) applies to restrictions on tourism and other services and contains many provisions that loosely parallel GATT proscriptions. A growing number of regional and bilateral agreements, such as NAFTA, also promote liberal international trade in services such as tourism. The question therefore arises whether these service-focused provisions might pose obstacles to either mandatory standards or certification programs for sustainable tourism.

Service agreements such as GATS currently do not pose a significant barrier to sustainable tourism standards or certification. As explained in more detail in this report, the few mandatory restrictions in GATS and in parallel regional and bilateral agreements do not appear to threaten current sustainable tourism proposals in any significant fashion. The potentially most troublesome provisions in GATS and similar agreements are all voluntary. Countries decide for themselves how much to limit their discretion, and to date, no countries have restricted their authority over tourism in a manner that is likely to significantly undermine efforts to promote sustainable tourism.

This does not mean that nations need not worry about international trade restrictions in mandating sustainable tourism standards or certification. As explained below, governmental provisions that encourage tourism groups to purchase local rather than foreign products might pose problems under GATT. Although most of the current GATS provisions are unlikely to constrain sustainable tourism efforts in any significant fashion, moreover, negotiations continue under GATS to further liberalize trade in tourism and other services. Member nations must be careful in the commitments that they make not to limit their ability to promote sustainable tourism through direct standards or voluntary certification programs.

### Trade and the Environment: An Introduction to Key Issues

Measures that seek to protect or enhance environmental or other social goals can undercut international trade. In the late 1980s, for example, many states in the U.S. adopted laws requiring newspapers to use recycled content in their newsprint. These laws almost certainly benefited the environment, but U.S. pulp and paper producers were the major advocates for these laws because U.S. producers could more easily increase the recycled content of their newsprint than Canadian producers could. Indeed, as a result of these laws, the market share of U.S. producers rose from 42% to 49% at the complete expense of Canadian producers. Examples such as this have raised the concern in international trade circles that domestic interests might use environmental protection or other social goals as a cover for protectionism. Even if protectionism is not the principal motivation, moreover, such examples pose the question of whether the goal of liberalizing international trade should trump environmental and other social goals – or vice-versa.

Given these concerns, conflicts between environmental laws and international trade agreements were probably inevitable. In the 1990s, a number of countries used the General Agreement on Tariffs and Trade (GATT) to challenge efforts by the United States to exclude foreign goods that did not meet U.S. environmental standards. In the first dispute (*Tuna-Dolphin I*), Mexico successfully challenged a U.S. ban on any tuna that was caught by encircling dolphins.<sup>1</sup> In a subsequent trade case (*Tuna-Dolphin II*), the European Union successfully challenged a similar ban that was imposed on countries that canned such tuna.<sup>2</sup> In yet another case (the *Shrimp-Turtle Decision*), several developing countries successfully used GATT to challenge a U.S. ban on imports of shrimp harvested with gear that traps and suffocates endangered sea turtles.<sup>3</sup>

These cases raised two sets of overarching issues. First, to what degree does GATT permit nations to discriminate among goods based on how the good was produced or processed rather than based on the intrinsic character of the good. Article I of GATT (the “Most Favored Nation,” or MFN, provision) prohibits a nation from discriminating among “like products” from different foreign countries. Article III of GATT (the “National Treatment” obligation) prevents nations from discriminating between a domestic good and a “like product” of a foreign nation. The United States argued that its bans on various tuna and shrimp did not violate either Article I or Article III because tuna and shrimp caught in an environmentally cautious fashion is not “like” tuna and shrimp that are caught in an environmentally destructive manner. The trade panels, however, uniformly and unhesitatingly rejected this argument, holding that differences in processes or production measures (“PPMs”) are generally not a legitimate basis for discrimination in foreign trade. A nation can discriminate between two tunas that are different products (e.g., yellow-fin and blue-fin tunas), but typically not between tunas that are identical except in the way that they are caught.

Underlying the rejection of PPM distinctions was, in part again, a fear of protectionism. In the view of the challenging nations, the bans at issue in the tuna and shrimp cases were merely a form of eco-imperialism in which the United States sought to favor its own industries through domestic environmental laws. The challenging nations argued that, if such bans were permitted, the United States could readily erect multiple barriers to trade in the name of environmental protection. Other nations would have to adopt all of the United States environmental rules (assuming even that they could do so) or lose the ability to import their products to the United States.

A second issue in these trade cases was the degree to which Article XX of GATT, which sets out a series of exceptions to the standard trade provisions, exempts trade restrictions based on environmental considerations. Article XX(b) exempts measures “necessary to protect human, animal or plant life or health.” Article XX(g) exempts measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.” Neither provision saved the U.S. tuna and shrimp restrictions, although the WTO trade panels differed to some degree in their reasoning. *Tuna-Dolphin I*, for example, held that Article XX does not permit a nation to violate trade rules in order to prevent environmental harms occurring *outside* its borders. The United States has a legitimate interest under Article XX in protecting its own environment, but cannot discriminate against foreign goods based on impacts in other nation’s jurisdiction or on the high seas.

*Shrimp-Turtle*, by contrast, suggested that a nation might occasionally be able to act to protect species outside its borders but only if it has made every effort to negotiate a uniform international agreement before taking unilateral action. In reaching this latter conclusion, the *Shrimp-Turtle* decision noted that the preamble (or chapeau) to Article XX emphasizes that even matters that might otherwise fall within one of the subcategories of Article XX are not exempt if “applied in a

manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.” Absent good-faith efforts to resolve an environmental concern through international negotiations and treaties, unilateral impositions of environmental norms through trade rules are arbitrary and unjustified.

Out of these various decisions, one can derive a series of principles that, although not crystalline rules for when an environmental trade measure will or will not violate GATT, indicate how likely trade panels are to invalidate a particular measure restricting imports of products. First, trade measures are less likely to survive a challenge under GATT if they focus on the process by which a product is produced rather than the intrinsic characteristics of the product itself. Second, trade measures are more suspect if the environmental damage of concern is foreign and not local. Finally, trade measures are more suspect if a nation has not tried to negotiate an international agreement embodying the measure but instead has imposed the measure unilaterally without any good faith attempt at international negotiations.

### **Product Agreements: GATT & the TBT Agreement**

Both GATT<sup>4</sup> and the Agreement on Technical Barriers to Trade<sup>5</sup> (the TBT Agreement) pose obstacles to environmental standards imposed on international trade in *physical products*. As discussed below, neither of these provisions is likely to apply to many of the standards or certification programs involving tourism because tourism is a “service” rather than a “product.” A general understanding of GATT and the TBT Agreement is still important, however, both because some tourism standards or certification programs do appear to affect trade in products and in order to have a better understanding of the comparative weakness of agreements dealing specifically with trade in services.

#### GATT

GATT was negotiated in the immediate aftermath of World War II and predated the current World Trade Organization. Because of its decades-long existence, GATT has been interpreted in a number of trade disputes and thus constitutes a far more developed body of law than the other trade agreements discussed in this report. In contrast to GATT, most of the trade agreements and provisions most relevant to sustainable tourism standards and certification programs have never been interpreted.

As discussed in Section I, GATT restricts the ability of a nation to discriminate either (1) against “like products” produced in foreign countries (Article III: National Treatment) or (2) among “like products” produced by different countries (Article I: Most Favored Nation). Trade tribunals have held that products that differ only in the processes by which they are made or obtained are “like products.” Article XI also prohibits quantitative restrictions, such as bans or volume limits, on products imported from abroad or exported to other nations. Challenges to the bans on tuna, shrimp, and other goods produced in an environmentally harmful fashion have cited all three of these GATT provisions in support of the challenges. All of the provisions are mandatory under GATT; a signatory country does not have the discretion to decide whether or not to comply with the provisions.

The major issue under Articles I and III has been what constitutes a “like product.” As discussed in Section I, the panel decisions in both the Tuna-Dolphin and Shrimp-Turtle controversies suggested that nations cannot distinguish among products based on how they are produced – creating a so-called “product/process” distinction. Other WTO decisions, however, have

suggested that process may not always be an illegitimate consideration. A few WTO trade decisions have suggested that trade panels should use an “aims and effects” test to determine what is a “like product.”<sup>6</sup> Under this test, the panel would determine whether the purpose and effect of a particular trade measure is to favor domestic over imported products or instead to respond to perceived differences in products. The test thus is subjective and looks to the perceived intent of the nation imposing the trade measure. Few panels, however, appear to have followed such a test, and a number have explicitly rejected it.<sup>7</sup> There is no basis in the text of GATT to suggest that the “like product” standard is subjective, and the test would require trade panels to make extremely difficult determinations of national intent.

Most trade panels instead appear to follow what some commentators have labeled a “border tax adjustments test.”<sup>8</sup> Under this test, WTO trade panels look at a variety of factors in determining whether two products are “like.” These factors include, but are not necessarily limited to, (1) the properties, nature, and quality of the products, (2) the end-uses of the products, (3) the tariff classification of the products, and (4) consumers’ tastes and habits. The first three factors are the most objective, and trade panels to date have placed the greatest emphasis on them. The final factor, however, potentially brings into play consumer perceptions of the differences between two products, including perceptions based on the methods by which the two products are produced. According to the WTO Appellate Body, determinations of “likeness” based on these criteria must be done on a case-by-case basis.<sup>9</sup> In short, there does not appear to be any set formula for determining “likeness.”

Article XX of GATT sets out a series of “general exceptions” that often play a major role in challenges to environmental measures. All of the exceptions are subject to the general requirement (set out in the “chapeau” of the Article) that the challenged measure must not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.” Article XX lists ten specific exceptions. Two exceptions specific to environmental concerns exempt measures “necessary to protect human, animal or plant life or health” (subsection (b)) and “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption” (subsection (a)). A number of other exceptions, however, also might be relevant in the broader context of sustainable tourism. These include measures “necessary to protect public morals” (subsection (a)) and “imposed for the protection of national treasures of artistic, historic or archaeological value” (subsection (f)).

#### TBT Agreement

The TBT Agreement, in turn, prevents countries from using technical regulations as disguised protectionist measures to restrict imports of foreign products. Like GATT, the TBT Agreement applies only to “products, including industrial and agricultural products.” The principal purpose of the TBT Agreement is “to ensure that technical regulations and standards, including packaging, marking and labeling requirements, and procedures for assessment of conformity with technical regulations and standards, do not create unnecessary obstacles to international trade.” The preamble to the agreement explicitly notes that countries should be able to protect “human, animal or plant life or health” and “the environment,” so long as it does not apply those protections “in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.”

The TBT Agreement regulates both mandatory “technical regulations” and non-mandatory “standards.” “Technical regulations” are documents that set out “product characteristics or their

related processes and production methods.” Technical regulations include “labeling requirements” and mandates regarding “terminology,” which would seem to encompass eco-labeling or environmental certification programs.<sup>10</sup> Whether eco-labeling and certification programs are subject to the TBT Agreement, however, is still a subject of debate within the WTO community. The TBT Agreement does not explicitly refer to eco-labels or certification, and some non-governmental organizations argue that it therefore should not restrain this developing field.<sup>11</sup> “Standards” include any document “approved by a recognized body, that provides, for common and repeated uses, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory.” Standards again encompass terminology and labeling requirements, raising the possibility that they include voluntary forms of certification or eco-labeling approved by a “recognized body.”

The TBT Agreement subjects mandatory “technical requirements” to slightly greater restriction than voluntary “standards.” Under Article 2 of the TBT Agreement, technical requirements (such as mandatory certification provisions) cannot (1) favor the products of national origin more than “like products” that are imported, (2) favor products of one nation over “like products” of another, or (3) create “unnecessary obstacles” to international trade (by being more restrictive than necessary to meet legitimate environmental or other goals). Under Article 2, a country also must use “relevant international standards” where they exist as a basis for its national regulations (unless they would not be an effective means of meeting legitimate objectives because of unique local conditions). Finally, a nation interested in adopting a new technical requirement of its own must allow other countries an opportunity to comment before adopting its unilateral standard. Although Article 2 applies only to technical requirements imposed by “central governmental bodies,” Article 3 requires nations to “take such reasonable measures as may be available to them to ensure compliance” also by “local government and non-governmental bodies.”

In the case of voluntary standards, Article 4 of the TBT Agreement requires member nations to “ensure that their central government standardizing bodies accept and comply with” a “Code of Good Practices” set out in Annex 3 to the Agreement and to “take such reasonable measures as may be available to them to ensure that local government and non-governmental standardizing bodies within their territories as well as regional standardizing bodies of which they or one or more bodies within their territories are members, accept and comply” with that Code. Like Article 2, the Code of Good Practices provides that standards shall not (1) favor the products of national origin more than “like products” that are imported, (2) favor products of one nation over “like products” of another, or (3) create “unnecessary obstacles to international trade.” Unlike Article 2, however, the Code does not explicitly require that voluntary standards be no more restrictive than necessary to meet legitimate governmental objectives. The Code, like Article 2 again, requires standardizing bodies to use relevant parts of existing “international standards” as a basis for their own standards (unless they would not be an effective means of meeting legitimate objectives because of unique local conditions).

### **Do GATT and the TBT Agreement Ever Apply to Tourism Standards or Certification?**

Sustainable tourism standards and certification programs often will not deal with “products” and thus will not trigger either GATT or the TBT Agreement. The major WTO agreements do not define either “products” or “services.” However, the WTO, as well as GATS and other relevant international trade agreements, uniformly treat tourism as a service rather than a product, even though the service may involve physical facilities or goods such as lodges, furniture, linens, food, or vehicles. The WTO Secretariat’s “Services Sectoral Classification List,” for example, lists “Tourism and Travel Related Services” as one of its eleven principal service categories.

Subcategories on the list include “Hotels and restaurants (incl. catering),” “Travel agencies and tour operators services,” and “Tourist guides services.”<sup>12</sup>

#### Standards that Favor Local Products

This does not mean that GATT and other product-focused trade agreements will never be relevant. “Buy local” standards, in particular, are likely to run afoul of GATT. Imagine, for example, that a country establishes a “sustainable tourism” certification program that requires all local hotels and resorts who wish to be certified to purchase and use only locally grown food and other products. Hotels and resorts that disliked this requirement probably could not launch a challenge under the TBT Agreement. The TBT Agreement covers technical regulation of “product characteristics,” and tourism is a service rather than a product. Foreign producers of food or other products that might be used in the hotels and resorts, however, could reasonably argue that the certification requirement is an indirect means of discriminating against “like products” of foreign nations and thus a violation of Article III of GATT. Article III(4) of GATT provides that imported products “shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal ... *purchase* ... or *use*.”

A very similar issue arose in the 1980s in connection with a challenge to a United States challenge to a Canadian law that required foreign investors seeking approval of investment projects to undertake to purchase certain products from domestic sources (so-called “local content requirements”). A trade panel concluded that the local content requirements violated the national treatment obligations of Article III(4) of GATT. In the view of the trade panel, it was irrelevant that the product discrimination took place in the context of foreign investment measures rather than being imposed directly by the Canadian government.<sup>13</sup>

The fact that tourism organizations such as hotels and resorts use products, in short, does not change tourism from a service to a product. Neither GATT nor the TBT Agreement applies to tourism itself. To the degree that any sustainable-tourism standards or certification programs result, directly or indirectly, in discrimination among or against foreign products, however, the standards or programs may be separately challengeable under GATT. The applicability of GATT in these contexts, however, is an untested area and is likely to be very fact specific. In the hypothetical example just given, for example, the certifying nation might argue that GATT should not be read to apply to technical standards when the TBT Agreement, which has primary authority over such standards, is inapplicable.

Assuming that GATT is applicable to a sustainable tourism standard that discriminate in favor local products, a trade panel would need to address a number of other issues in order to determine whether the standard is permissible. An initial issue would be whether the standard is part of a governmental or private program. GATT applies only to governmental action. If the standard were established and implemented purely by private NGOs or other organizations, GATT would not apply. Material governmental support of a sustainable tourism program, however, might convert a private program into a governmental program for purposes of GATT. This issue is discussed in more detail in a later section.

Assuming governmental involvement, a major question is whether locally produced products and similar products from afar are “like” products for purposes of Article III (“National Treatment”). As noted earlier, a trade panel is likely to look at a variety of factors in making this determination. Part of the answer would lie in the objective qualities of the products – e.g., do local food products taste or look different from foreign products? Even if the products were otherwise identical, however, a nation might defend a “buy local” standard on the ground that tourists

staying at hotels or eating at restaurants advertising themselves as “sustainable” would consider local and foreign products to be very different. At the same time, however, the major distinction between local and foreign products would appear to be a matter of “process” rather than “product” – a distinction that was not effective in either the *Tuna-Dolphin* or *Shrimp-Turtle* disputes.

Another question would be the applicability of exceptions under Article XX. A nation seeking to defend a “buy local” standard could make several arguments. First, it could argue that such a standard is designed to support local indigenous economies and thus is “necessary to protect human ... life or health” (art. XX(b)). Although this argument might seem at first glance to stretch the meaning of Article XX(b), the Preamble to GATT explicitly notes that international trade “should be conducted with a view to raising standards of living, ensuring full employment,” and the WTO Appellate Body in the *Shrimp-Turtle* dispute, noting this provision, observed that Article XX should be interpreted with due regard to this “sustainable development” language of the Preamble.<sup>14</sup>

A “buy local” standard also might be defensible under Article XX(g), covering provisions “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.” The argument here would be that a “buy local” standard is “sustainable” because it reduces the energy and other resources needed to transport similar products from more distant locales. In light of the proviso of Article XX(g), this argument would be stronger if the “buy local” standard favors local products over not only foreign products but also products from other regions of the same nation and if the nation can point to other examples of how it is trying to conserve energy and other transportation resources.

The legitimacy under GATT of any “buy local” standard also might depend on whether the standard is a mandatory requirement for all hotels or restaurants in a region or instead a requirement for certification. In the case of voluntary certification or labeling requirements, the question is whether the certification or labeling program itself discriminates between local and foreign products. In *Tuna-Dolphin I*, for example, the trade panel held that, although the United States could not ban tuna caught in a dolphin-unsafe fashion, they could set a standard for tuna that wished to label itself as dolphin safe, because the labeling requirement applied in a neutral fashion to all tuna. Tuna caught in the United States had to meet the same standard as foreign-caught tuna if it wished to label itself as tuna-safe. A “buy local” requirement for an ecotourism label, however, may not meet this neutrality test. By definition, foreign nations cannot meet the “buy local” requirement; the labeling standard therefore automatically appears to discriminate against foreign producers. The issue here has not come up in any trade decision to date and thus remains unresolved.

#### Restrictions on Foreign Investment

GATT therefore casts doubt on the legitimacy of sustainable tourism standards that require tourism organizations to favor local products over foreign products. Does the same logic also apply to sustainable tourism standards that limit local investment in hotels and other tourism facilities? Such facilities are physical goods, and the standards appear to be limiting trade in such facilities and goods.

GATT would not appear to be applicable, however, for two reasons. First, the standard does not actually restrict trade in the product itself. A limit on foreign investment in tourism, by itself, does not restrict the ability of foreigners to purchase or lease the physical structures – the buildings – that make up hotels, resorts, restaurants, and other tourism facilities. The limit merely

restricts the ability of foreigners to then use those facilities for tourism purposes. Unlike the “buy local” standard, therefore, limits on foreign investment are focused on the service of tourism and not on products.

Second, GATT itself regulates international trade and not foreign investment policies. Any foreign investment limitation for sustainable tourism does not restrict trade in any goods. The buildings themselves are geographically fixed and do not move in international trade. The only question involved is the flow of international funds, which is not by itself subject to regulation by GATT.

### Summary

In summary, GATT typically will not regulate the standards that governments can impose either directly on tourism or indirectly through certification or labeling programs. Nations, however, may not be able to use such standards to favor local products over foreign products. Although there are various defenses that a nation could mount in favor of such “buy local” standards, they appear on their face to discriminate against international trade and are likely to be suspect under GATT. Except in this instance, however, sustainable tourism standards appear to deal with trade in services rather than products and not to raise concerns under GATT.

### **Trade Agreements Related to Services**

A number of international trade agreements deal generally with services and thus with tourism. Of these agreements, the most important in looking at potential trade issues for sustainable tourism standards or certification is the General Agreement on Trade in Services (GATS), which went into effect in 1995.<sup>15</sup> Like GATT and the TBT Agreement, GATS operates under the umbrella of the World Trade Organization and applies to all members of the WTO. In addition to GATS, a number of regional trade agreements also deal with services and thus with rules regulating tourism. These agreements include the North American Free Trade Agreement (NAFTA), the Central American Free Trade Agreement (CAFTA), the Southern Common Market (MERCUSOR), and the Andean Community. If and when completed, the Free Trade Area of the Americas (FTAA) will also impinge on national authority over services such as tourism. Finally, several bilateral agreements between various Central and South American nations deal with services. None of these latter agreements, however, contain provisions that are more restrictive than GATS or other applicable regional agreements.

A number of Central and South American nations also have negotiated treaties dealing specifically with tourism. These agreements include the Agreement for the Promotion of Tourism in South America and the Andean Program for Tourism Development and Integration. These agreements are generally designed to promote tourism within a general region, such as South America as a whole or the Andean Community, and do not contain provisions that are likely to restrict the ability of a nation to adopt standards or certification programs for sustainable tourism.

### The General Agreement on Trade in Services

The WTO adopted GATS in 1995 in order to achieve “progressively higher levels of liberalization of trade in services.” Its preamble makes clear, however, that “due respect” must be given to “national policy objectives” in the process of liberalization. The preamble specifically

recognizes the “right” of Members, and particularly developing countries, “to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives.” The preamble also notes the desire 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.”

#### Types of Trade in Services Covered

GATS applies to four different categories of “trade in services.” The four categories are broad enough to encompass virtually all types of trade challenges that might be brought against standards or certification programs for sustainable tourism. As set out in Article I of GATS, the four covered categories, or “modes” of trade, are:

- (1) The “supply of a service ... from the territory of one Member into the territory of any other Member.” This category would not appear to be relevant to sustainable tourism, but might include certification programs themselves. As discussed below, GATS therefore may require that certification programs be operated in a fashion that is consistent with the requirements of GATS.
- (2) The “supply of a service ... in the territory of one Member to the service consumer of any other Member.” This category would include hotels, resorts, tours, and other tourism services that are provided in one WTO member for tourists from another member.
- (3) The “supply of a service ... by a service supplier of one Member, through commercial presence in the territory of any other Member.” This category would include foreign-run accommodations and other tourism services that are run or owned by a foreign company.
- (4) The “supply of a service ... by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.” This category would include foreign employees of accommodations and other tourism operations.

As explained later, most WTO members have agreed in their GATS schedules not to impose trade restrictions in Mode # 2. This agreement, however, is relatively inconsequential, since the WTO member thereby agrees not to impose restrictions on tourists coming to the nation – something that most nations want to promote not restrict. Few WTO members have agreed to significant restrictions in the various other modes, other than the limited mandatory restrictions found in GATS and discussed below.

#### Governmental Action

The various trade protections included in GATS apply to all “measures by Members.” The definition of this term makes clear that GATS applies to many entities other than the central government. Under Article I(3), GATS applies to actions taken not only by the central government, but also by “regional or local governments and authorities” within the member nations and by non-governmental organizations using powers “delegated” to them by central, regional, or local governments. Member nations thus cannot escape the trade protections in GATS by delegating authority to lower governments or to private organizations (such as a trade organization or an indigenous community).

Given GATS’ extensive reach, standards or certification programs imposed by indigenous organizations might be subject to the protections of GATS. The question in such cases is likely to be whether the indigenous organization has any regulatory authority that has been delegated by the central government over commercial operations in its area or whether the organization is

acting purely as a private, non-regulatory entity. If an indigenous community, for example, merely creates a private organization to promote sustainable tourism or economic development in its region, the organization itself is probably not subject to GATS. If the indigenous community holds authority to determine what businesses operate in its region or in what manner, by contrast, GATS probably applies.

Although GATS does not apply directly to private organizations that adopt standards or certification programs for sustainable tourism without any governmental involvement, governments might have an obligation to prevent private organizations from adopting standards or programs that conflict with GATS' protections. GATS unfortunately is ambiguous on this point. After listing the organizations to which GATS applies, Article I(3) provides that "each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory." Because the reference to non-governmental bodies is not limited to NGOs acting under governmentally delegated powers, GATS might be read as requiring member nations to take "reasonable measures" to prevent all NGOs within their jurisdiction from taking actions that, if the member nation took the action, would violate GATS. This is consistent with Article 2 of the TBT Agreement (see earlier discussion), which also requires member nations to try to bring private organizations within their jurisdiction into conformity with the protections of the TBT Agreement. In GATS, however, the placement of this requirement immediately after the list of organizations to which GATS applies (which speaks of NGOs operating under delegated authority), along with the reference to regional and local governments, may suggest that member nations need worry only about "non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities."

Assuming that GATS does not require member nations to work to get NGOs to comply with GATS even when the nations have not delegated any relevant authority to the NGOs, what types of governmental actions might trigger the protection of GATS? Under Article I(3), GATS clearly applies if a government (or any of its sub-entities) adopts standards or certification requirements for sustainable tourism or if the government delegates this authority to an NGO that then acts. Although there are no relevant trade cases determining when GATS otherwise applies, GATS also arguably would apply if the government provides any type of material aid or help to standards or certification programs adopted by separate entities to which it has no other association. If an NGO with no connection to or delegated authority from the government developed and ran a certification program, for example, GATS still could be triggered by governmental action:

- providing significant financial support to the certification program (e.g., paying for the development or implementation of the certification program)
- providing specific and unique advertising about the certification program and certified facilities to potential tourists (e.g., through a state-run tourism program)
- awarding special privileges or advantages to accommodations or other tourism services that meet the certification requirements (e.g., tax breaks or relaxed regulations).

In all of these cases, the government is materially supporting and advancing the certification program, which no longer might be said to be purely private. Indeed, if GATS did not apply, GATS would suffer from a sizable loophole because governments could effectively get around GATS merely by enlisting a non-profit organization to officially run a certification program while the government itself provided most of the financing and assistance.

Material governmental involvement, however, would not necessarily lead to the invalidity of the certification program. The question would be whether the certification program could be separated from the governmental support. Assume, for example, that an international NGO adopted a certification program and that a local government provided financial support to local resorts wishing to be certified. Even if the financial support were found to be governmental action in violation of GATS, the private certification program is a separate system that should survive. Although the government would no longer be able to provide financial or other material support, the international NGO should be free to continue to run its certification program – just as it would have been free to run the program if the government had not taken any actions in support.

In other cases, however, a certification program might be sufficiently dependent on and interlocked with governmental action that a trade tribunal would find it impossible to disentangle the two. For example, if the government paid for the actual development of a certification program, barring the government from paying for any future support would not erase the impact of the prior support. In that case, a trade tribunal might conclude that it could not untangle the public and private actions; as a result, the governmental involvement might doom the entire program. At the same time, however, because GATS does not constrain purely private action, an NGO presumably would be free to design and implement an identical certification program. If the NGO can do this, however, it seems hard to understand why initial governmental involvement should block an NGO from continuing to run a program initially financed and developed by the government – at least absent any indication that the NGO is acting purely as the surrogate of the government.

Some forms of governmental involvement also might be sufficiently immaterial to trigger GATS, although there is no relevant precedent in this area and so significant uncertainty over what would or would not trigger GATS. The following are examples of various potential types of governmental involvement that arguably would not convert a private certification program into a governmental program covered by GATS:

- Governmental lobbying of a private NGO regarding the standards in a certification program. Such lobbying arguable does not involve either the exercise of traditional governmental functions or active governmental support of the certification program itself.
- Governmental provision of technical support to a certification program (e.g., the provision of experts on the impact of various types of practices on local ecosystems and communities).
- Governmental financial support of tourism organizations wishing to determine, through pre-certification inspections, whether they qualify for certification, or governmental support of local certification costs themselves. Although such financial support is similar in some ways to financial support of the certification program itself, the government is merely ensuring that local facilities are able to take advantage of a non-governmental program. The government itself is arguably not promoting the certification program.
- Governmental listings of certification in general tourism directories or in advertisements. Assume, for example, that a government maintains a directory of local hotels and resorts or advertises them internationally. Would the government be barred from mentioning in such directories or advertisements that particular resorts or hotels have been certified by a private organization, if the certification itself would otherwise violate GATS? Such listings would not seem to constitute material involvement in the certification system itself.

### Mandatory GATS Provisions

Assuming that a particular standard is subject to GATS, Part II of GATS sets out a limited number of mandatory protections. None is likely in most cases to restrict sustainable tourism standards in any significant fashion. The major provisions are Article II (“Most-Favoured-Nation Treatment”) and Article III (“Transparency”). Article II requires nations to treat “services and service suppliers” of one nation no differently than they treat services and service suppliers of other nations. In adopting certification programs, nations therefore should be careful to ensure that they do not recognize certification in some other nations but not others. A certification program, for example, that was open to tourism organizations in some, but not all, nations could pose a problem under Article II of GATS for a government that actively supported the program. Tourism organizations in nations that were not included could argue that the program discriminated among nations. So long as a program is open to tourism organizations in all nations (or only in the implementing nation), however, Article II should not pose a problem.

Article III, in turn, requires nations to publish on a prompt basis all measures relating to international trade in services. To avoid running afoul of Article III, nations therefore must be careful to publish and make available to everyone measures dealing with sustainable tourism. This, however, should not pose any significant difficulty. Indeed, to provide an incentive for sustainable tourism, nations presumably will want to make their standards public and clear.

### International Certification Recognition

Article VII of GATS deals with the recognition in one nation of “standards or criteria for the authorization, licensing or *certification* of services suppliers” developed and used by other nations (emphasis added). It is unclear whether the term “certification” in Article VII refers only to certifications that, like licenses, are required in order to engage in a particular service or whether the term also encompasses voluntary labeling programs. GATS does not expressly define the term. Because of GATS’ broad purposes and the fact that it uses the terms “license” and “certification” separately, however, Article VII arguably encompasses all forms of certifications.

Article VII provides that for purposes of fulfilling its own certification standards or criteria, a nation “*may* recognize the . . . requirements met, or licenses or certification granted in a particular country.” Like much of GATS, this provision is not mandatory. If a nation has a sustainable tourism certification program, it can accord recognition to part or all of the certification program of another nation, but it does not have to do so. Where a nation provides recognition to one nation’s certification program, however, Article VII(2) requires the nation to also provide an “adequate opportunity” for other nations to receive comparable recognition. Article VII(3) also explicitly provides that a nation “shall not accord recognition in a manner which would constitute a means of discriminating between countries . . . or a disguised restriction on trade in services.” GATS, in short, prohibits countries from according recognition to certification programs of other nations in a discriminatory fashion. If a nation with a sustainable tourism program recognized sustainable tourism certification in one country but not in other countries with similar programs, Article VII could pose a problem.

Article VII also suggests that nations should work toward the development of an international program for sustainable tourism. Article VII(5) provides that nations “shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.” Although Article VII does not bar nations from adoption their own standards even in the face of an

international program, a nation that goes its own way is likely to find its policies subject to particular scrutiny under other substantive provisions of GATS.

### Specific Commitments

Most of GATS encourages, while not requiring, nations to liberalize trade in services. Article XVI, for example, provides that each member nation “shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions *agreed and specified in its Schedule*” (emphasis added). Where a nation undertakes a market-access commitment in a particular sector, it cannot limit the number of service suppliers, employees, foreign investment, or service operations – “unless otherwise specified in its Schedule.” Article XVII similarly provides that a member nation cannot accord its own services and service suppliers less favorable treatment than it provides “its own like services and service suppliers,” but only for “sectors inscribed in its Schedule” and only “subject to any conditions and qualifications set out therein.” A nation, in short, can agree through its schedule not to restrict trade in a particular service or to accord its own services and service suppliers favorable treatment, but it is not bound to anything to which it does not agree in its schedule.

GATS imposes minimal requirements on the schedules of member nations. Members must enter into at least one commitment in one service sector, but otherwise are largely free to decide for themselves how liberal of service restrictions to adopt. Once a nation has entered into a commitment, it cannot change the commitment for three years. After that point, it can change or eliminate commitments, but it must make “compensatory adjustments” if a nation that has benefited from the commitment objects to the change.

Tourism actually is one of the most liberalized areas under GATS. Approximately 120 different member nations (including the European Community) have made some form of commitment in their schedules to liberalize tourism. Virtually all of these members have made commitments in connection with hotels and restaurants. Fewer have made commitments in connection with travel agencies and tour operations (approximately 100), tourist guide services (less than 60), and “other” tourism services (less than 20 commitments).

Few, if any, of the commitments that have been made, however, would appear to restrict what standards a nation can adopt to promote sustainable tourism. Costa Rica’s tourism schedule is typical. For “hotels and other lodging services” and for “food-serving services,” Costa Rica agrees to impose no limitations on market access or national treatment in Mode # 2. As explained earlier, however, Mode # 2 covers the “supply of a service ... in the territory of one Member to the service consumer of any other Member.” By agreeing not to impose any limitations, Costa Rica agrees merely not to restrict the number of tourists that can come from abroad or to give its own tourists preferential treatment. Costa Rica does not agree to limit its authority with respect to the other modes of international trade in hotels and lodgings.

The only place where Costa Rica effectively gives up any authority of consequence is in connection with its regulation “travel agencies and tour operators services.” Here, Costa Rica agrees that foreign investors “can hold up to 49 percent of the equity of such enterprises.” As a result, Costa Rica could not itself insist that resorts or hotels in particular regions must be owned entirely by local communities (although a non-discriminatory certification program might be able to include an ownership factor).

In all other respects, Costa Rica retains full authority to regulate travel agencies and tour operator services in ways that might constitute a restriction on international trade. In the case of “tourist

guide services,” Costa Rica expressly states that the “right to exercise this activity is reserved to Costa Rican nationals” both as to the owner and employees of such services.

If and where a member nation undertakes a specific commitment in the tourism sector, Article VI of GATS requires the nation to “ensure that all measures of general application ... are administered in a reasonable, objective, and impartial manner.” Article VI also provides that, absent any uniform WTO standard, a nation “shall not apply licensing and qualification requirements and technical standards that nullify or impair” the specific commitments of that nation in a manner that is not “based on objective and transparent criteria” or that is “more burdensome than necessary to ensure the quality of the service.”

#### Progressive Liberalization

The major threat that GATS poses to sustainable tourism programs lies less in the current GATS schedules and restrictions than in the potential restrictions that might arise from future negotiations. Article XIX of GATS provides that member nations “shall enter into successive rounds of negotiations ... with a view to achieving a progressively higher level of liberalization.” The aim of the negotiations, moreover, must be to reduce or eliminate the “adverse effects on trade in services” of protectionist measures and to provide “effective market access.” Pursuant to this provision, both the United States and the European Community have been pressuring other nations to liberalize trade in tourism services.

GATS, however, also provides that liberalization negotiations “shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors.” Individual nations, moreover, remain free to decide whether to liberalize trade in tourism services in a manner that might interfere with sustainable tourism programs. To date, developing nations have resisted proposals that might undermine sustainable tourism.

Indeed, in 1999, a number of Central and South American nations (Bolivia, Dominican Republic, Ecuador, El Salvador, Honduras, Nicaragua, Panama, Peru, and Venezuela) proposed that the WTO add a tourism annex to GATS that would expressly recognize and support sustainable tourism. The annex would have provided for involvement of local communities, implementation of international environmental and quality standards, and the sustainable allocation of tourism revenues. Although the proposal currently is dead in the water, the proposal illustrates developing nations’ understanding of the need to maintain authority over tourism.

#### General Exceptions

Like GATT, GATS contains a number of “general exceptions” that apply to all restrictions, including both the mandatory restrictions and restrictions adopted on a voluntary basis by individual nations. The list of general exceptions, contained in Article XIV of GATS, appears on its surface to be narrower than the GATT restrictions. The two exceptions of greatest applicability are for restrictions on trade in services that are:

- “necessary to protection public morals or to maintain public order” (art. XIV(a)), or
- “necessary to protect human, animal or plant life or health” (art. XIV(b)).

Unlike GATT, GATS does not contain an explicit exception for measures adopted to conserve natural resources (parallel to Article XX(g) of GATT). The WTO Committee on Trade and the Environment, however, has stated that the health-and-life exception found in Article XIV(b) of GATS was designed to protect environmental measures more generally. Whether GATS ultimately will be held to except measures designed to protect natural resources therefore is open to doubt but not out of the question. Even if one of the GATS exceptions applies, Article XIV

also provides that the trade restriction must not be “applied in a manner which would constitute a means of arbitrary and unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.”

Although the exceptions may be useful if a sustainable tourism standard is challenged at some point in the future, it would be a mistake to rely too much on the exceptions. None of the exceptions specifically speaks to sustainability. To date, moreover, trade disputes under GATT have applied the GATT exceptions relatively narrowly.

### Summary

Current trade law is less restrictive of restrictions on trade in services than in goods. In addition, trade law is generally less restrictive of voluntary labeling or certification programs than of mandatory governmental standards, and most trade provisions apply to governmental rather than private actions. For all of these reasons, a privately-sponsored international effort to develop a certification program for sustainable tourism should not pose significant concerns under GATT, the TBT Agreement, GATS, or regional trade agreements.

This does not mean that there is no cause for concern, nor that efforts should not be made to influence the future course of trade negotiations. As discussed earlier, sustainable tourism standards that encourage the purchase of local versus foreign food and other products poses the greatest current concern. GATT explicitly prohibits discrimination against foreign products through any governmental measure, including arguably standards addressed to tourism services. Even “buy local” standards may be defensible, however, if included as part of a voluntary certification program rather than mandated through regulation or if governments have no material involvement. GATS also might pose a problem for any sustainable tourism certification programs that is open to some but not all nations; the exclusion of some countries from a certification program arguably would violate the most-favored-nation protection of Article II.

Future liberalization of trade in services poses perhaps the greatest risk to sustainable tourism programs. Most nations’ GATS schedules do not currently include restrictions on tourism laws that are likely to pose insurmountable barriers to sustainable tourism certification. Pressure continues, however, in favor of greater liberalization. Any international program for sustainable tourism should work to ensure that future actions reflect the particular needs raised by sustainable tourism.

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## Endnotes

- <sup>1</sup> Panel Report, United States—Restrictions on Imports of Tuna, GATT B.I.S.D. (39<sup>th</sup> Supp.) at 155 (1993), reprinted in 30 I.L.M. 1594 (Aug. 16, 1991) (unadopted).
- <sup>2</sup> Panel Report, United States—Restrictions on Imports of Tuna, GATT Doc. DS29/R, reprinted in 33 I.L.M. 839 (June 16, 1994) (unadopted).
- <sup>3</sup> Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998) (adopted, with modifications, Nov. 6, 1998).
- <sup>4</sup> General Agreement on Tariffs and Trade, 55 U.N.T.S. 187 (entered into force Jan. 1, 1948).
- <sup>5</sup> Agreement on Technical Barriers to Trade, 33 I.L.M. 1125 (1995).
- <sup>6</sup> See United States - Measures affecting Alcoholic and Malt Beverages, BISD 39th Supp. 206, 270-71, at ¶¶ 5.25, 5.71, 1992; United States - Taxes on Automobiles, DS31/R, ¶ 5.8 et seq, 1994 (unadopted).
- <sup>7</sup> See the general discussion of this issue in Won Mog Choi, Overcoming the "Aim and Effect" Theory: Interpretation of the "Like Product" in GATT Article III, 8 U.C. Davis J. Int'l L. & Pol'y 107 (2002).
- <sup>8</sup> See, e.g., Appellate Body Report, European Communities--Measures Affecting Asbestos and Asbestos-Containing Products, Mar. 12, 2001, WT/DS135/AB/R, at ¶ 88.
- <sup>9</sup> Id. at ¶ 102.
- <sup>10</sup> Caldwell, Douglas, Environmental Labeling in The Trade & Environment Context, March 1999.
- <sup>11</sup> Natural Resources Institute, University of Greenwich, The Trade and Environmental Debate at the WTO, Oct. 1999 (<http://www.nri.org/NRET/PWB/et3-1.htm>).
- <sup>12</sup> Services Sectoral Classification List, Document MTN.GNS/W/120, dated 10 July 1991.
- <sup>13</sup> Canada-Administration of the Foreign Investment Review Act (FIRA), BISD 30S/140, 1984.
- <sup>14</sup> *Shrimp-Turtle*, ¶¶ 151-152.
- <sup>15</sup> General Agreement on Trade in Services, 33 I.L.M. 1167 (1994).