

respect of the relevant services sector; (2) whether the measure at issue is a *measure by a Member affecting trade in services*; (3) whether the foreign and domestic services or service suppliers are *'like services'* or *'like service suppliers'*; and (4) whether the foreign services or service suppliers are granted *'treatment no less favourable'*.

Generally speaking, internal measures (whether taxation or regulation) are inconsistent with the national treatment obligations under the GATT 1994 and the GATS when they modify the conditions of competition in the relevant market to the detriment of the imported products, foreign services or foreign service suppliers.

### Exercise 5: Beer

Traditionally, Newland is a wine-drinking country. However, recent market research has shown that demand for beer in Newland is steadily growing. RichBrew Inc. of Richland, one of the world's largest beer producers, therefore wants to increase its exports of specialty beers,<sup>348</sup> ordinary beer and non-alcoholic beer to Newland. Before its accession to the WTO, Newland limited the importation of beer of any kind to a meagre 50,000 hectolitres per year. This quantitative restriction was put into place in the late 1950s to protect the many winegrowers in Newland from competition from imported beer. The National Association of Wineries (NAW) was, and still is, a powerful lobby in Newland politics. Beer production in Newland has always been and remains small.

On accession to the WTO, Newland abolished the quantitative restriction on the importation of beer. However, around the same time, it revised its tax regime for alcoholic and non-alcoholic beverages. In addition to a value added tax (VAT) of 21 per cent *ad valorem* applied to all alcoholic beverages, the following excise tax rates currently apply: N\$5 ppl on wine; N\$6 ppl on ordinary beer; and N\$15 ppl on specialty beers.<sup>349</sup>

Non-alcoholic beer is not subject to excise tax. However, non-alcoholic beer is subject to a VAT of 21 per cent *ad valorem* whereas soft drinks are subject to a VAT of 15 per cent *ad valorem*. As stated above, all alcoholic beverages are subject to a 21 per cent VAT but resellers of imported alcoholic beverages are subject to more onerous VAT-related administrative requirements.

At the time of importation, the Newland Customs Service imposes a charge of N\$0.5 per litre on alcoholic beverages that are, after importation, bottled in aluminium cans rather than glass bottles.

348 The specialty beers concerned are primarily blond ales with an alcohol content of 8–9 per cent, almost as high as wine.

349 N\$ stands for Newland dollars, and 'ppl' for 'per proof litre'. Since alcoholic beverages have different alcohol contents (proof), the specific excise tax applicable to a particular alcoholic beverage will vary depending on its alcohol contents per litre. N\$1 equals €1.

In Newland, beer, whether domestic or imported, may only be sold by licensed beer merchants; it may not be sold in supermarkets. No such restrictions exist on the sales of domestic or imported wine.

RichBrew Inc. not only wants to sell its beer in Newland's supermarkets, it also wants to establish a wholesale trade company in Newland as well as a network of retail shops to handle the distribution and sales of its beer. RichBrew has been told it can do neither because it is not a company incorporated in Newland.

Pursuant to the *Fair Competition Act* of 1991, imported as well as domestic beer and wine are subject to a minimum price requirement, annually set by the Ministry of Commerce of Newland. Furthermore, Newland prohibits the use of additives in lager while leaving the use of additives in specialty beers and wine unregulated.

In support of the national wine industry, Newland's National Federation of Restaurateurs, a government-sponsored organisation, has instructed its 10,000 members not to serve beer with traditional Newland dishes. Municipal authorities in Newland's main wine-producing region prohibit serving beer on weekends. Note also that, since the *Armed Forces Reform Act* of 1996, the armed forces of Newland are required by law to buy domestic alcoholic beverages to serve in army mess halls.

As stated above, beer production in Newland has always been and remains small. The Newland beer industry consists primarily of microbreweries, which produce beer in a more environment-friendly manner than RichBrew Inc. As part of its environmental policy, the Government of Newland intends to lower the excise tax on beer produced by microbreweries to N\$5 ppl (instead of the N\$6 ppl (for ordinary beer) and N\$15 ppl (for specialty beer) currently applied). Also, the Government of Newland intends to give financial incentives (i.e. subsidies) to Newland-based beer merchants engaged in the retail selling of beer from microbreweries.

Finally, RichBrew Inc. has recently acquired a moribund brewery in Newland, and, in order to revive this brewery, it wants to employ in Newland brew masters from Richland. However, RichBrew Inc. has been informed that, under Newland's *Regulated Professions Act* of 1997, only brew masters with a degree obtained in Newland are allowed to work in Newland.<sup>350</sup> Newland argues that brewmasters trained in Richland are not 'like' brewmasters trained in Newland.

You are an associate with the Brazilian law firm Nogueira Neto Avogados. Your firm has been hired by RichBrew Inc. to give legal advice on all the issues raised above. You have been instructed to limit your legal brief to the question of whether there are violations of the national treatment obligations under WTO law.<sup>351</sup>

<sup>350</sup> *Ibid.* Brew masters are chemical *engineers* specialised in beer production.

<sup>351</sup> For the purpose of this exercise, assume that the Services Schedule of Newland is identical to the Services Schedule of Brazil. As instructed, you will not address questions relating to the consistency of the measures at issue with other WTO agreements (such as the *TBT Agreement* or the *SCM Agreement*) or questions relating to the possible justification of inconsistencies with the national treatment obligations under the 'general' or other exceptions provided for in the GATT 1994 or the GATS. For a discussion on these questions, see below.