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General Agreement on Trade in Services: Part I

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- For an overview of services classifications, see categories 5-9 in UN Central Product Classification (updated 2013):
<http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=25>

Overview

This week:

1. The rise of global services
2. History and economics of GATS
3. Overview of GATS
4. What is a 'service' in GATS?
5. GATT and GATS
6. MFN and GATS



Next time on GATS

Market Access

National Treatment and GATS

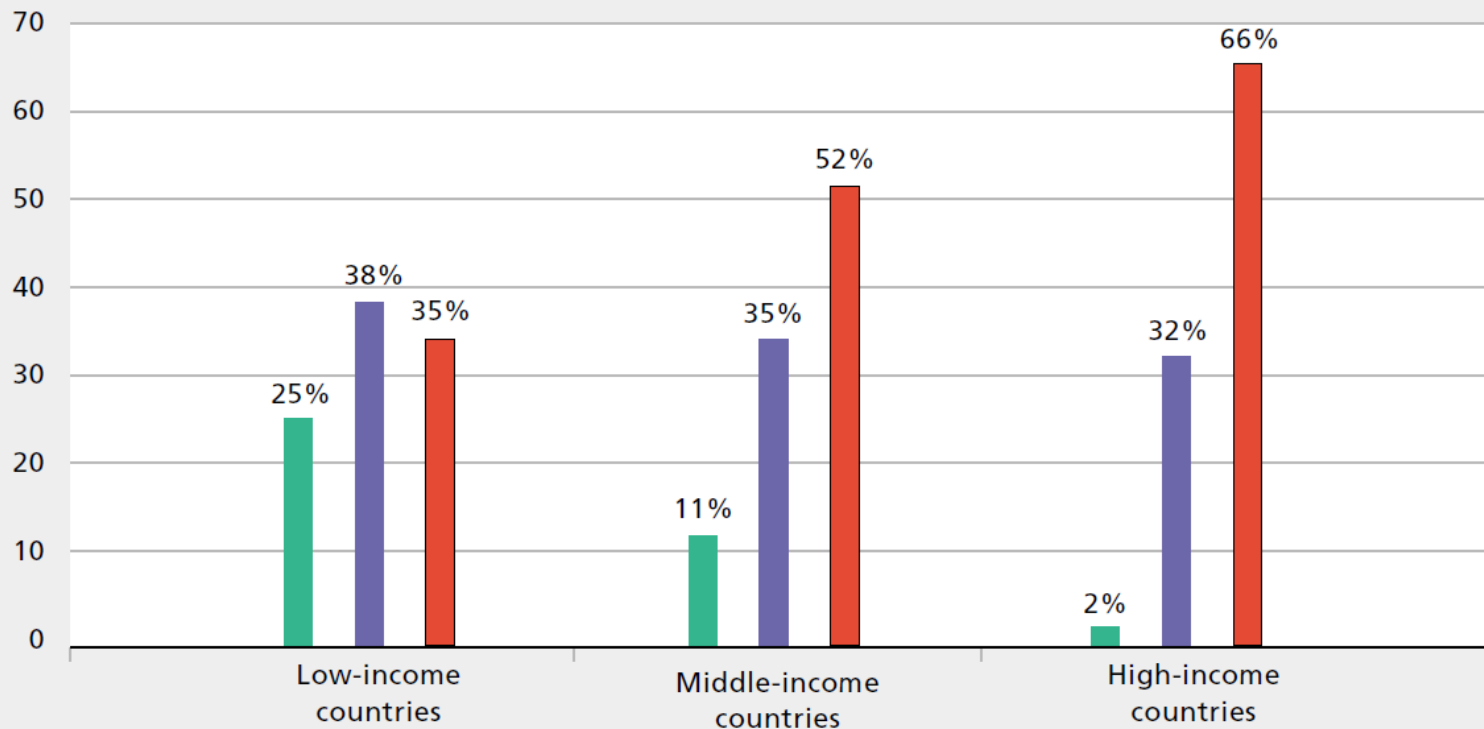
Other barriers to services

1. The rise of global services

Figure 9.1

Sectoral structure of world economies, 1995

Percentage of GDP



Agriculture

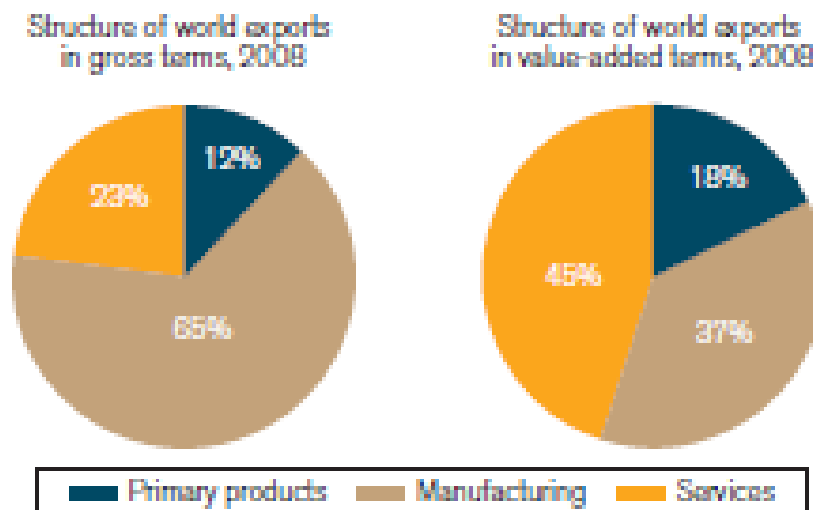


Industry



Services

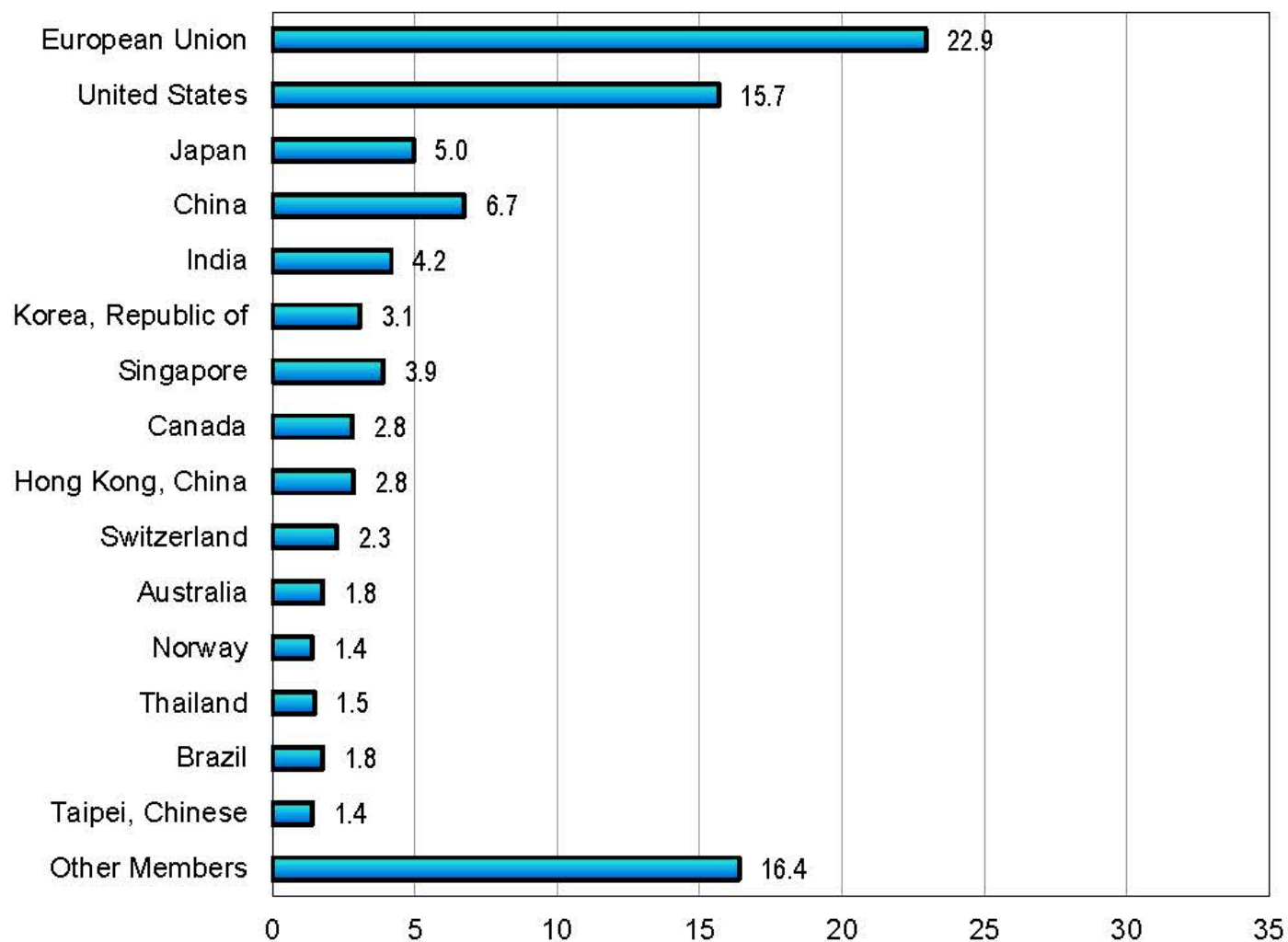
Figure B.19: Sectoral contribution to total trade, gross and value-added measures, 2008 (percentage)



Source: WTO Secretariat estimates based on OECD-WTO 2008 data.

WTO Members share in world commercial services trade (excluding intra-EU(27)), 2011

(Percentage)



2. History and economics of GATS

- GATT 1948
 - No mention
- EEC Treaty of Rome 1950
 - Mention but no substantive provision
- US legislation 1974
 - Services included in definition of trade
- Tokyo Round 1982
 - US/EU pushed; developing countries opposed

- Uruguay Round 1986:
 - Created separate group on Negotiation on Services
 - GATS was finalised and entered into force January 1995
 - However, does not include a full principle of non-discrimination
 - Followed by negotiated annexes to GATS:
 - Agreement on Telecommunications 1996
 - Agreement on Financial Services 1997

Obstacles to including services in trade agreements

- The economics of comparative advantage is similar for trade in goods as services
- But multiple challenges:
 1. Global trade in services was limited due to technological and migration barriers
 2. Trade in services rarely discussed and conceived by economists, lawyers and trade officials
 3. Barriers to trade in services more difficult to identify
 - Usually regulation of services that focus on *providers* not *products*. e.g., US banking/security rules

- Challenges (cont.):
 4. Trade in services often involves investment, presence and/or migration to another country.
 - Permitting such market access can be controversial
 5. Difficult to engage in cross-sectoral multi-item negotiations
 - Lack of knowledge of value of lowering trade barriers to potential services
 - Hard to calculate benefits to negotiating parties let alone third parties through MFN



Legal solutions achieved through long negotiations

- Agree on some general principles
- BUT
- Create space for exemptions for MFN based on current regulations
- Limited national treatment - market access only permitted for sectors 'positively' listed

3. Overview of GATS

- Article 1: Scope and Definitions
- Article II: MFN
- Article III: Transparency
- Article IV: DC participation
- Article V: Economic Integration
- Article VI: Domestic Regulation
- Article VII: Recognition
- Article X: Emergency safeguard measures
- Article XI: Payments and transfers
- Article XII: Restrictions to safeguard balance of payments
- Article XIII: Government procurement
- Articles XIX-XXI: Negotiations and schedules of commitments
- Articles XXII-III: Dispute Settlement
- Articles XXIV-VI: Institutional Issues
- Annexes (e.g., exemptions, natural persons, financial services)
- Schedules of Commitment on market access commitment and national treatment

4. What is a 'Service' in GATS?



See **Article I, GATS**

- A service includes any service in any sector except services supplied in the exercise of governmental authority.
- Does not include government services supplied on a commercial basis.
- Covers production, marketing, sale and delivery.
- Article I(2) defines a «trade in services»: see table below.

Modes

Article I(2)	Criteria	Supplier Presence
a) Mode 1: Cross-border supply	Service delivered within the territory of the Member, from the territory of another Member	Service supplier not present within the territory of the member
b) Mode 2: Consumption abroad	Service delivered outside the territory of the Member, in the territory of another Member, to a service consumer of the Member	
c) Mode 3: Commercial presence	Service delivered within the territory of the Member, through the commercial presence of the supplier	Service supplier present within the territory of the Member
d) Mode 4: Presence of a natural person	Service delivered within the territory of the Member, with supplier present as a natural person	

Modes

Article I(2)	Criteria	Example
a) Mode 1: Cross-border supply	Service delivered within the territory of the Member, from the territory of another Member	App on your Smartphone from Silicon Valley, USA
b) Mode 2: Consumption abroad	Service delivered outside the territory of the Member, in the territory of another Member, to a service consumer of the Member	Norwegian getting dental treatment in Hungary
c) Mode 3: Commercial presence	Service delivered within the territory of the Member, through the commercial presence of the supplier	Travel insurance sold in Malawi by a Norwegian company with an office/subsidiary in Malawi
d) Mode 4: Presence of a natural person	Service delivered within the territory of the Member, with supplier present as a natural person	French engineer sent by a French company to help with an oil rig in Norway

Defining “cross-border” supply

- *Mexico – Telecoms:*
 - Facts: telecommunications services offered in Mexico from a US service provider with no operations or presence in Mexico.
- Mexico argument:
 - “supplier must *itself transmit* the customer data within the territory of that other Member”. It implies “in effect that cross-border supply within the meaning of Article I:2(a) can only occur if the supplier operates, or is present”

- Panel:
 - Begins with ‘ordinary meaning’ from Art. 31 Vienna Convention on the Law of Treaties
 - Article I(2)(a) is “silent as regards the *supplier* of the service”.
 - Does not require any presence in the territory

Defining “commercial presence” supply

- *Mexico – Telecoms:*
 - Panel: Article I(2)(c) only requires presence in the territory of the state.
 - It does not require any other form of territorial-like requirement such as cross-border trade or different nationality (as in the other tests).

5. Are GATT and GATS mutually exclusive?



Are GATT and GATS mutually exclusive?

- They are mutually exclusive to the extent that GATT only covers goods and GATS only covers services
- If a product contains both, the respective goods and services dimensions are dealt with under the respective and relevant treaties.
- Whether a “certain measure affecting the supply of a good or service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis” *EC-Bananas III*, para 221.
- Trade in bananas would thus fall partly under GATS when a measure affects the supply of services: e.g. wholesale trade services.
- Note the many GATS cases involving the licence allocation.

6. Most-Favoured Nation Treatment

- Article II: “treatment no less favourable than it accords to like services *and* service suppliers of any other country” (emphasis added).
- MFN-like provisions can also be found in Articles VII, VIII, X, XII, XVI, and XXI.
- Does this cover *de facto* discrimination in measures affecting services?

***De facto* discrimination**

- Article II is broad: “any measure”
- *EC Bananas III*
 - Facts:
 - The complainants alleged that the European Communities’ regime for importation, **sale** and **distribution** of bananas is inconsistent with Articles I, II, III, X, XI and XIII of the GATT 1994 as well as provisions of the Import Licensing Agreement, the Agreement on Agriculture, the TRIMs Agreement and the **GATS**.
 - Services aspect concerned allocation of import licences which were origin-neutral but Ecuador claimed they benefited in effect traditional ACP exporters (to the detriment of Latin American and non-traditional ACP exporters).

- Appellate Body in *EC Banannas*:
 - Article II covers *de facto* discrimination
 - Why?
 - Textual reasoning: “The obligation imposed by Article II is unqualified”
 - Purposive reasoning: it is a “good deal easier” to “devise discriminatory measures” aimed at services than goods.

Three-tier test of consistency

- 1. Is the measure covered by GATS?
- 2. Are the services or service supplies “like”?
- 3. Is less favourable treatment accorded?

1. Measures Affecting Trade

- Article I: GATS “applies to measures by Members affecting trade in services”
- Article I(3)(a): Can include measures by sub-national authorities and non-governmental organisations with delegated powers
- “Affecting”
 - It is a “**broad**” definition: Appellate body’s reasoning is based on intent of drafters, ordinary meaning, and choice of wording (“affecting” is wider than “regulating” or “governing” under GATT jurisprudence): para. 220.
 - Also, it is caught if it affects “ the conditions of competition”: Panel report in *EC Bananas*, para. 7.281

- This breadth is clear in the Appellate Body's decision in *Canada-Autos*.
 - In considering whether a selective import duty exemption on car imports was affecting trade in services, the question was **not** whether the exemption concerned a service.
 - Rather it is a two-step definition that begins with a relevant service, i.e.:
 - Is there a trade in services?
 - Does the measure in issue (e.g. import duty exemption) affect that trade in services?

2. Like services or service suppliers



- Arguable that likeness of services and service suppliers should be determined by:
 - Characteristics
 - UN Central Product Classification system
 - Consumer habits and preferences
- Test doesn't require that both services and service suppliers are like: Only one of the two limbs needs to be "like".
 - It is possible for two different service suppliers to supply a like service (and vice-versa),
- However, in *Canada – Autos*:
 - If the two service suppliers supply the same services, they should be considered "like"

3. No less favourable treatment

- No further guidance offered in Article II
- However, under national treatment in Article XVII, it is less favourable if it “modifies the conditions of competition”.
 - In *EC Bananas III*, the Appellate body cautioned against using Article XVII to interpret Article II.
 - But it effectively came to the same conclusion through the *de facto* discrimination test
- Moreover, in *EC Bananas III*, the Panel operated with a relatively low evidentiary threshold.
 - Ecuador had established a “presumption” that the revised allocation system for licences prolonged less favourable treatment
 - Ecuador had shown that its suppliers lacked the same “opportunities” to access import licences as the others benefited from participation in the previous regime.
 - Burden was on the EC to provide counter-evidence and it had not been able to overcome this burden.

Exemptions

- Article II:2 permits exemptions if they are listed before 1 January 1995 and contain:
 - A description of sectors and measures
 - Countries to which it applies
 - Intended duration
 - Conditions creating the need for the exemption
- 400 exemptions granted to 2/3 of WTO states
- They “should not” exceed ten years
- But Member states have continued and the Council for Trade in Services has demurred in its reviews and permitted continuance.