

General Agreement on Trade in Services: Part II

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Overview

Last week:

1. The Rise of Global Services
2. GATS
3. What are services?
4. MFN and GATS

This week:

5. Market Access
6. National Treatment and GATS
7. Other barriers to services

Revision: 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	

5. Market Access

Article XVI.1, GATS

With respect to market access through the modes of supply identified in Article I, each Member 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)

Article XVI.2

In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

- (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
- (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
- (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
- (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment. _____

- Market access barriers can be:
 - discriminatory (e.g. broadcasting time for films) &
 - non-discriminatory (e.g. economic needs test for a food franchise)
- This list of market access barriers is exclusive. The criteria do not relate to:
 - Quality of the service supplier
 - The ability of the supplier to provide the service.
 - Thus language or professional requirements are not “market access” barriers even if they impede trade.
- A prohibition can count as a numerical quota: *US-Gambling*

Schedule Commitments

- Whether a market access barrier (as listed in Article XVI.2) amounts to “treatment less favourable” (Article XVI.1) depends on the extent to which a state binds itself in the Schedule.
- E.g., US said “none” for “other recreational services” which was interpreted to include gambling: *US-Gambling*
- Commitments can be horizontal or sectoral
- Commitments can be full (‘none’), limited or absent (‘unbound’).

Modification/Withdrawal

- Commitments can be modified or withdrawn subject to compensatory adjustment: what happened after the *US-Gambling* decision?
- <http://www.ictsd.org/bridges-news/bridges/news/wto-authorises-antigua-to-move-forward-on-retaliation-in-us-gambling>



6. National Treatment

Article XVII: National Treatment

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, **treatment no less favourable** than that it accords to its **own like services and service suppliers**.

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either **formally identical treatment** or **formally different treatment** to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to **be less favourable if it modifies the conditions of competition** in **favour of** services or service suppliers of the **Member** compared to like services or service suppliers of any other Member.

Example

- See Norwegian Commitments
- EU Commitments also in Fronter
- See WTO website for schedules (and MFN exemptions):

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?
- This test follows the same principles as the MFN standard as GATS
 - However, note that national treatment provision is explicit on de facto discrimination (measures affecting “conditions of competition”) *but* also permits different treatment if no effect on competition.
 - Recall also that it only applies to scheduled commitments.

7. Other Barriers

- Lack of transparency
- Unfair or arbitrary application of measures
- Domestic regulation
- Lack of recognition of education/professional qualifications
- Other measures and actions

- Fair and non-arbitrary application: Article VI.1
- Transparency: Article III
 - Publish existing
 - Enquiry points in developed countries
 - Notify new
- Domestic regulations: Article VI.5/6
 - must be objective
 - transparent,
 - not unnecessarily burdensome in relation to ensuring a quality service
 - in the case of licensing not a restriction on supply
 - reasonably expected at time of commitment

- Lack of recognition: Article VII.1
 - Encourages recognition by allowing deviation from the basic MFN standard
 - Can recognise education or experience from a particular country if based on objective criteria
 - If accorded autonomously (not under a bilateral agreement), other states have right to demonstrate they meet the standard