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Highway XVI re-visited: the road from non-discrimination to market access in GATS

Petros C. Mavroidis*
Edwin B. Parker professor of law at Columbia Law School, New York, professor at the Law Faculty of the Un. of Neuchatel and CEPR

Abstract: The GATS (General Agreement on Trade in Services) is a highly complicated legal instrument and prone to various interpretations because of the embedded ambiguity. It should not come as a surprise that in the context of all disputes concerning services, WTO panels and the Appellate Body reached diametrically opposite conclusions on the same issues. Un-appealed panel reports, on the other hand, have not been welcome either. One of the major, if not the major, issue is the legal relationship between Arts. XVI and XVII GATS, which regulate market access. The manner in which this relationship has been interpreted inescapably leads to constructing the GATS as a move beyond negative integration. This is at odds with the intent of the founding fathers, the letter and the spirit of the GATS itself. Subjecting Art. XVI to Art. XVII GATS guarantees respect of the negative integration character of GATS. It thus avoids internationalizing issues that WTO Members want to keep in their domaine réservé. Counter-intuitively probably, it allows for more trade liberalization. Using the unfortunate US–Gambling report as an example, this report suggests an approach to understanding Art. XVI as a sub-set of Art. XVII GATS.

1. The weight of the non-discrimination obligation in scheduling GATS commitments

This paper deals with an issue which, at first glance, might seem quite narrow to the wider public but which has very important repercussions for the understanding and the functioning of the WTO General Agreement on Trade in Services

* Numerous discussions with Bernard Hoekman, Henrik Horn, Patrick Low, Aaditya Mattoo, Alan Sykes, Bob Staiger have helped me shape my thinking on this score. I am also thankful to anonymous referees for their useful comments. Juan-Alberto Marchetti has very generously spent time and effort discussing all issues reflected in this paper. His very valuable comments helped me address many of the shortcomings in previous drafts and develop my understanding of and about GATS in general. He is in many ways the virtual co-author of this paper, our disagreements on some of the issues discussed notwithstanding.
what is – and what should be – the relationship between Art. XVI and Art. XVII GATS? The first provision identifies six types of measures, which, absent contrary explicit indication to this effect in a Member’s schedule of commitments, cannot be enforced; the second is the GATS re-incarnation of the national treatment-obligation. The question is whether the former reflects measures that apply to both foreign and domestic suppliers. The legal response to this question is judge-made law, and is affirmative. It is submitted that the current approach is wrong, and, for good policy but also legal reasons, the response should be negative: market access restrictions coming under the purview of Art. XVI GATS, to the extent included in a schedule of concessions, should be interpreted as concerning foreign suppliers only.

The paper starts with a description of the two provisions and the manner in which their relationship has been understood in wider WTO practice, and in caselaw, more specifically (Section 2). With the positive understanding of this relationship established, I move to explain the reasons for my disagreement with current practice (Section 3). I then test my preferred approach on imaginary transactions (Section 4). Section 5 concludes.

2. The current understanding

2.1 What did negotiators have in mind?

Even a brief perusal of negotiating documents suggests that there is a lot of disagreement among WTO Members as to the exact nature of Art. XVI GATS, and its relationship with Art. XVII GATS. So much is evidenced in the discussions held by WTO Members in the context of a technical review of the GATS carried out between 2000 and 2004, which focused primarily on Art. XX.2 GATS, and during which a substantial part of the negotiating history of the provisions re-emerged.

Suffice to say that such discussions reveal that the negotiators were not on the same page even after they had agreed on the definitive legal texts of Arts. XVI and XVII GATS.

2.2 The relevant legal texts

The schedule of concessions circumscribes the contractual promise given by each WTO Member to the rest of the WTO Membership, as far as the opening of its services market is concerned. WTO Members wishing to liberalize their market

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2 The GATS of course concerns both services and services suppliers. When using the latter term only, we mean to cover the former as well.
3 We are of course not unaware of the limited legal significance of travaux préparatoires (Art. 32 of the Vienna Convention on the Law of Treaties, VCLT).
4 See ‘Consideration of issues relating to Article XX.2 of the GATS’, Report by the Chairman of the Committee on Specific Commitments, WTO document S/C/W/237, dated 24 March 2004.
will first indicate the sector where they will enter their commitments, and then will enter their commitments. Commitments can be entered under three different provisions:

(a) Arts. XVI GATS (Market Access);
(b) Art. XVII GATS (National Treatment);
(c) and Art. XVIII GATS (Additional Commitments).

Art. XVI.1 GATS reads:

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.

Art. XVI.2 GATS prohibits, in principle, recourse to six types of measures:

(a) limitations on the number of suppliers;
(b) limitations on the total value of service transactions or assets;
(c) limitations on the total number of service operations or on the total quantity of service output;
(d) limitations on the total number of natural persons that may be employed;
(e) measures which restrict or require specific types of legal entity or joint venture;
(f) limitations on the participation of foreign capital.

The wording of Art. XVI.1 GATS on its face suggests that Art. XVI GATS as a whole, and the list of measures included in the second paragraph, concern foreign suppliers only, and the wording of Art. XVI.2 GATS leaves no doubt that the prohibition of recourse to one of the measures included in its body is only in principle:

the measures which a Members shall not maintain or adopt … unless otherwise specified in its Schedule.

Consequently, WTO Members wishing to impose any of the six measures embedded in Art. XVI.2 GATS will have to indicate their wish in their schedule of commitments. Absent such indication, recourse to such measures is impermissible.

5 Although there is not a mandatory sectoral classification, in most cases WTO Members have resorted to a classification prepared during the Uruguay Round by the then GATT Secretariat, and known as the ‘Services Sectoral Classification List’ (document MTN.GNS/W/120). This classification uses as a cross-reference a product classification developed by the UN, and known as the ‘Provisional Central Product Classification’ (Provisional CPC).
6 For the purposes of our discussion in this paper, this provision is immaterial.
7 See the excellent analysis of Art. XVI GATS in Ortino (2006).
8 At this stage, we do not want to prejudge the issue whether indication of both discriminatory as well as non-discriminatory measures is the condition for opposing such measures to foreign suppliers. This is
Limitations and restrictions mentioned in Art. XVI.2 GATS can be entered with respect to one or more mode(s) of supply of the service concerned.\(^9\) Table 1, drawn from the *Scheduling Guidelines*\(^10\) provides an illustration of limitations on market access.

Art. XVII GATS is a classic reproduction of the national treatment principle, which WTO Members *can*, but *are not obliged to* give to their trading partners, even if they have undertaken specific commitments in a given sector.

The relationship between Art. XVI and Art. XVII GATS is not explicitly clarified in the GATS except for an oblique reference in Art. XX.2 GATS which reads:

Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.

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### Table 1. Article XVI: limitations on market access

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<tr>
<th>Market access limitations</th>
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<tr>
<td>(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</td>
<td>Licences for new restaurants subject to economic needs test based on population density</td>
</tr>
<tr>
<td>(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</td>
<td>Foreign bank subsidiaries limited to (x%)\ of total domestic assets of all banks</td>
</tr>
<tr>
<td>(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(^1)</td>
<td>Restrictions on the broadcasting time available for foreign films</td>
</tr>
<tr>
<td>(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</td>
<td>Foreign labour should not exceed (x%)\ of the work force and/or not account for more than (y%)\ of total wages</td>
</tr>
<tr>
<td>(e) Measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service</td>
<td>Commercial presence excludes representative offices</td>
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| (f) Limitations on the participation of foreign capital in terms of maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment | Foreign equity participation in domestic insurance companies should not exceed \(x\)\%

*Note: \(^1\) Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.*

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\(^9\) According to the *Scheduling Guidelines* (document S/L/92).

\(^10\) Their legal import is discussed *infra.*
This issue has been discussed in a series of documents surrounding the GATS negotiations as well as in subsequent case law. We turn to a study of negotiated documents in what immediately follows (Section 2.3), before we move to examine the relevant case law (Section 2.4).

2.3 The Scheduling Guidelines

The *Scheduling Guidelines* is a document aimed at assisting Uruguay Round participants to schedule their commitments in a GATS-consistent manner. Critical issues for understanding both the schedules and the relationship between Art. XVI GATS and Art. XVII GATS are spelled out in the *Scheduling Guidelines*: absent understanding of expressions such as ‘none’, ‘unbound’, it is quite hard to understand what exactly has been committed. These terms have been used for the first time and interpreted in the *Scheduling Guidelines*.\(^{11}\) The original document (the *1993 Scheduling Guidelines*) – a WTO Secretariat Note that had been circulated to the negotiators, its purpose being to facilitate the ongoing negotiations – was used for scheduling commitments during the Uruguay round negotiations.\(^{12}\) On 23 March 2001, the WTO Members adopted formally in the context of the CTS (Council for Trade in Services) a new, revised document (*2001 Scheduling Guidelines*).\(^{13}\) This document also reflects guidelines for the scheduling of specific commitments to be used for the purposes of scheduling commitments as of the date of its adoption. The 2001 *Scheduling Guidelines* contains no substantive change or deviation from the 1993 *Scheduling Guidelines*; it re-states the 1993 *Scheduling Guidelines* and adds a few Annexes and an illustrative list of limitations to National Treatment. Its main thrust is described in its first paragraph in the following terms:

*This note is intended to assist in the preparation of offers, requests and national schedules of specific commitments. Its objective is to explain, in a concise manner, how specific commitments should be set out in schedules in order to achieve precision and clarity. It is based on the view that a common format for schedules as well as standardization of the terms used in schedules are necessary to ensure comparable and unambiguous commitments. The note cannot answer every question that might occur to persons responsible for scheduling specific commitments; it does attempt to answer those questions which are most likely to arise. The answers should not be considered as a legal interpretation of the GATS. (emphasis added).*\(^{14}\)

\(^{11}\) This is not to assert anything on the legal significance of the *Scheduling Guidelines*, an issue to which we return in what follows.

\(^{12}\) See WTO Doc. (MTN.GNS/W/164 and Add. 1). Note that whereas the corresponding instrument to the CPC GATT-legal instrument is the HS, there is no corresponding (in the GATT-context) instrument to the *Scheduling Guidelines*.

\(^{13}\) WTO Doc. S/L/92.

\(^{14}\) As the AB put it in a nutshell in its *US–Gambling* report (§173), the *1993 Scheduling Guidelines* address two questions: *what* items should be included, and *how* should included items be scheduled.
The relationship between Art. XVI and Art. XVII GATS in the Scheduling Guidelines

When discussing the list of measures that are reflected in Art. XVI GATS as well as the addressees of the measures, the document states that

The list is exhaustive and includes measures which may also be discriminatory according to the national treatment standard (Article XVII). In other words, all measures falling under any of the categories listed in Article XVI:2 must be scheduled, whether or not such measures are discriminatory according to the national treatment standard of Article XVII.15

Hence, this document takes the view that even measures which apply on a non-discriminatory basis should be scheduled under Art. XVI GATS. This paragraph at the very least adds to the content of Art. XX.2 GATS: whereas the GATS provision refers to measures which are inconsistent with both Art. XVII and XVI GATS (hence, discriminatory), this paragraph requests from WTO Members to schedule in their Art. XVI GATS column non-discriminatory measures as well. Before, however, we pronounce on the well-foundedness of this approach, we should first delve into the legal significance of the Scheduling Guidelines.

The legal significance of the Scheduling Guidelines

The legal relevance of the (1993 and 2001) Scheduling Guidelines has already been addressed in case law. Before moving to that discussion, however, let us first see how this issue is addressed in the text of the Scheduling Guidelines. The already quoted first paragraph of the 2001 Scheduling Guidelines reads in pertinent part:

The note cannot answer every question that might occur to persons responsible for scheduling commitments; it does attempt to answer those questions which are most likely to arise. The answers should not be considered as an authoritative legal interpretation of the GATS.

By the same token, the decision (WTO Doc. S/L/91) adopting the 2001 Scheduling Guidelines reads

1. To adopt the Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services contained in document S/CSC/W/30 as a non-binding set of guidelines.
2. Members are invited to follow these guidelines on a voluntary basis in the future scheduling of their specific commitments, in order to promote their precision and clarity.
3. These guidelines shall not modify any rights or obligations of the Members under the GATS.

15 See §8 of the Scheduling Guidelines. It is not our purpose to address in a comprehensive manner the question whether the six measures mentioned in Art. XVI.2 GATS are the only measures a WTO Members can introduce in its schedule of concessions. We believe, however, that this should not be the case. Both the text of Art. XVI GATS (referring to limitations, conditions etc.) as well as the text of Art. XX.1 GATS posit the opposite conclusion.
A WTO Secretariat Note underscores that the 2001 Scheduling Guidelines were not enacted with the aim to affect the balance of rights and obligations as struck by the founding fathers of the GATS.\(^{16}\)

Two WTO panels have dealt with the issue of the legal value of the (1993 and 2001) Scheduling Guidelines. Both panels held for the proposition that the Scheduling Guidelines have important ramifications in the interpretation of the GATS. While doing that however, the two panels have reached irreconcilable conclusions on this issue. First, the report on Mexico–Telecoms reflects the view that the Scheduling Guidelines are an integral part of the Travaux Préparatoires (§§7.66–7.67). Then, the panel report on US–Gambling held for the proposition that the Scheduling Guidelines form an integral part of the context in the sense of Art. 31 VCLT (§6.82).

The different attitudes can have important legal repercussions: if the former view were to be correct, the relevance of the Scheduling Guidelines becomes a second-order concern since WTO adjudicating bodies will have recourse to them only under the conditions laid down in Art. 32 VCLT. Conversely, if the latter panel’s view prevails, WTO adjudicating bodies will have to have recourse to Scheduling Guidelines any time a scheduling issue is brought before them. The AB settled the score in its report on US–Gambling. Stating first that the Scheduling Guidelines constitute no agreement between the parties, it rejected the panel’s view that they should be considered as context in the VCLT-sense of the term (§§174–175). It then went on to express its agreement with the view of the parties to the dispute that the Scheduling Guidelines should be understood as a supplementary means of interpretation, in the sense of Art. 32 VCLT.\(^{17}\) From a functional perspective, the consequence of this taxonomy is that recourse to the Scheduling Guidelines is a matter of discretion of the WTO judge.\(^{18}\)

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17 As noted, however, the Scheduling Guidelines for trade in goods (the Harmonized system) and the Scheduling Guidelines for trade in services have different legal value.
18 The explicit rejection of the panel’s thesis that the Scheduling Guidelines should be considered in context, coupled with its affirmative statement that the Scheduling Guidelines should be viewed as supplementary means of interpretation, makes it clear that the only appropriate legal conclusion is that recourse to the Scheduling Guidelines from now on should be a matter of discretion for the WTO judge. This does not mean that recourse will not happen in future cases. It only means that there is no legal compulsion for the judge to do that. The opposite would have been true had the AB confirmed the panel’s approach. Krajewski (2005) believes that recourse might be necessary more often than not. I suppose it all depends on the clarity of the terms used in any given schedule. The twin question is of course, assuming recourse, is the WTO judge bound to follow the Scheduling Guidelines in a given matter? Once again, it is odd that this should be the case across transactions. There are instances where indeed the Scheduling Guidelines are of decisive help: for example, the meaning of the terms NONE and UNBOUND featuring in schedules. Such are cases where the Scheduling Guidelines were intended to be used as a gap-filling instrument (the terms NONE, UNBOUND being nowhere else defined in GATS). This is not necessarily the case with respect to other issues, such as the one treated in this paper where the Scheduling Guidelines reflect an opinion which (at the very least) could be contradicting the letter of the law. In such cases, were one to prefer the interpretation provided in the Scheduling Guidelines over that included in the GATS, it would be privileging the use of a negotiating document over that of the law itself. This cannot be the case.
2.4 The case law (along came US–Gambling)

The panel in its report on US–Gambling\(^{19}\) dealt with a series of US state laws which prohibited the supply of internet gambling in a non-discriminatory manner: neither US nor foreign services suppliers were allowed to supply such services.\(^{20}\)

At the same time, however, the United States had not imposed in their schedule of commitments any limits on cross-border consumption (Mode 1) of internet gambling services. The question before the panel was to what extent the fact that the United States imposed no restrictions on consumption abroad of internet services, outweighed the fact that, under US laws, the supply of internet gambling was prohibited anyway for all suppliers, irrespective of their origin. To put it bluntly, should non-discriminatory restrictions be scheduled anyway?

The panel without formally pronouncing on the relationship between Art. XVI and XVII GATS, accepted the argument advanced by Antigua and Barbuda that, in the absence of explicit statements to this effect in its schedule of concessions, the United States was effectively in violation of their GATS commitments. The panel found that a series of US federal and state measures, which regulate the supply of services by foreign and domestic suppliers alike, violated Art. XVI GATS:

(a) in §6.36five, the Panel outlaws the Federal Wire Act, which reads in pertinent part:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets and wagers or information assisting in the placing of bets or wagers or any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers shall be fined under this title or imprisoned not more than two years, or both.

(b) in §6.373, the Panel finds that the Federal Travel Act is WTO inconsistent: this legislation reads in a quasi-identical manner with the Wire Act, and punishes, inter alia, those who use the mail with intent to distribute the proceeds of, or promote, establish, carry on, facilitate unlawful activities;

(c) in §6.380, the Panel reaches the conclusion that the Illegal Gambling Act (IGBA) is WTO-inconsistent. The IGBA reads in pertinent part:

> Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.

for the only hierarchy established in public international law (with the exception of jus cogens which is irrelevant here) is that of lex posterior (subsequent law). The Scheduling Guidelines are neither lex, nor posterior.

19 See United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WTO doc. WT/DS 285.

20 With the exception of the Inter-state Horse Act (IHA).
The Appellate Body (AB), explicitly, condoned these findings, by holding the view that with respect to the three statutes mentioned above, the United States had violated Art. XVI GATS (§265).

2.5 Intermediary conclusion on the status of positive law

There is a discrepancy between some negotiating documents and the explicit wording of Art. XVI GATS: whereas the former (Scheduling Guidelines) accept the view that non-discriminatory measures can come under the purview of Art. XVI GATS, the wording of Art. XVI.1 GATS suggests the opposite. In the AB’s view, a non-discriminatory statute can be found to be in violation of Art. XVI GATS. For this to be the case, however, a necessary condition is that the AB must have (at least implicitly) accepted that Art. XVI GATS covers market access for domestic services and services suppliers as well. This is what I find fault with.

3. The suggested approach: XVI is a list of in principle impermissible exceptions to Art. XVII GATS

3.1 The approach in a nutshell

The approach could be summarized as follows: Art. XVI GATS covers only foreign suppliers and is nothing but a list of violations of Art. XVII GATS. It is probably the case that the measures included therein are the most frequent violations of national treatment. Consequently, the negotiators, by including these measures in Art. XVI GATS, wanted to signal their desire to, in principle, abolish them.

The suggested approach requires sequencing Art. XVI GATS to Art. XVII GATS: assuming a WTO Member has not granted national treatment to foreign suppliers, it cannot impose on them any of the measures featured in Art. XVI GATS, unless it has indicated so in its schedule of concessions.

21 Whereas the panel dealt with both state and federal laws, the AB report concerns federal laws only.

22 Note, however, that the AB did not reach this conclusion by deferring to the Scheduling Guidelines.

23 Other commentators as well have expressed their views on US–Gambling see Krajweski (2005), Ortino (2006), Pauwelyn (2005), and Delimatsis (2006). None of them however, advances an understanding of Art. XVI GATS along the lines that we do in this paper. To them, as is the case with Mattoo (2000), Art. XVI GATS concerns not only foreign but domestic suppliers as well. There are differences in their analysis, however. While Pauwelyn (2005) and Delimatsis (2006) seem to privilege a narrow understanding of Art. XVI GATS, Mattoo (2000) and Krajewski (2005) seem to sequence Art. XVII to Art. XVI GATS in the sense that once a measure is covered by the latter, it is saved from a test of legality under Art. XVII. Ortino (2006) is the closest to the suggested approach. Even he, however, sees an overlap between Arts. XVI and XVII GATS: in his view, non-discriminatory measures can come under the purview of Art. XVI GATS. For the reasons explained in Sub-section 3.2, the approach suggested in this paper takes distance from all these writings.

24 Of course, we suppose that a WTO Member has made specific commitments. Otherwise, recourse to Art. XVII GATS is not an issue; that is, sequencing Art. XVI to Art. XVII GATS means that (a) a country has made specific commitments in a given sector, and (b) it has decided not to make a full national treatment commitment. In this case, the scheduling of commitments under Art. XVI GATS will respond to
3.2 Justifying the suggested approach

There are good, both purely legal and policy, arguments justifying our approach. First, for pure textual reasons our interpretation is robust. Art. XVI.1 GATS reads:

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).

Art. XVI.1 GATS is the chapeau governing all measures reflected in the second paragraph of this provision. Consequently, all these measures are measures to be applied to services suppliers of other Members. By the same token, it is clear that not all national treatment limitations are meant to be addressed by Art. XVII GATS, and that some of the so-called market access limitations listed in Art. XVI:2 GATS can only concern foreigners. Otherwise, how would one explain the inclusion of measures such as foreign equity limitations or the requirement of constituting a joint-venture within the so-called market access limitations?

Besides, a closer look at the measures included in paragraph 2 of Art. XVI GATS raises doubts – at least in the eyes of the author – as to whether any of those measures was thought of as restricting access from national suppliers. For instance, what would be the regulatory rationale for limiting the total value of transactions, operations, or assets that can be performed or held by national suppliers? By the same token, what would be the regulatory rationale for limiting the total number of natural persons that might be employed by a national supplier?

Certainly, those kinds of limitations seem to be intended to actually limit the scale of the supplier, and it would be odd to think that a regulator would like to limit the growth of national companies.

Second, to conceive Art. XVI GATS as an instrument to regulate market access for domestic services and services suppliers goes against the very nature of the GATS. The GATS is the agreement to liberalize trade in services. Through its many provisions, foreign services and services suppliers will be granted market access to markets that they could not, in principle, access before the entry into force of the

the question how much less favourably will foreign service suppliers be treated (than domestic service suppliers)?

25 WTO courts that have a tendency to over-emphasize the importance of the textual element should be persuaded only by this observation that Art. XVI GATS covers only measures regulating market access for foreign services suppliers.

26 Assuming it is concentration of power that the regulator is after, this objective is typically achieved through domestic antitrust statutes.

27 It is typically developed nations with (relatively speaking) high unemployment rates that have made the most of the commitments.

28 Incidentally, note that the examples of market access limitations falling under paragraphs 2(b), (c), (d), and (e) given in paragraph 12 of the Scheduling Guidelines always refer to limitations applicable only to foreign service and service suppliers.
GATS. Art. XVI GATS is one of the provisions regulating liberalization commitments. Domestic services and services suppliers will access their national market under the conditions specified in domestic legal instruments, such as, for example, the national constitution, state laws, Bar regulations etc. The very title of Part III (covering Arts. XVI, XVII, and XVIII GATS) is Specific Commitments. Commitments are made to foreign nations and not to domestic suppliers. It is logically unthinkable to talk of trade liberalization – that is, an international transaction par excellence – and, at the same time, understand this term to cover market access for nationals as well.29

This conclusion is further supported by a quick look into the counter-factual. Assume that by introducing the number 5 into its commitments on financial services (banks), Argentina has been limiting the number of bankers, domestic and foreign alike. As a result, Argentines will be in a position to access their domestic banking market under the conditions mentioned in GATS and not, for example, in a domestic statute. That is, Argentina, by signing the GATS, accepted a change at the level of regulation for its domestic citizens as well: it cannot unilaterally decide the number of Argentine bankers, their total value of transactions, their number of operations, the total number of natural persons they may employ, the legal entity under which they will operate; it cannot unilaterally decide any of the measures listed in Art. XVI GATS as far as Argentine suppliers are concerned. And if, in the future, it wants to modify its schedule (and reduce the number of Argentine bankers as well), it will, by virtue of Art. XXI GATS, have to pay compensation to its trading partners for damage inflicted (at least in part) on its own suppliers. One of the few issues where public international law is crystal-clear is in the area of transfer of sovereignty: absent clear and unambiguous transfer, a regulatory exercise is presumed to rest with the sovereign state. This is what the maxim in dubio mitius accepted across international jurisdictions (and in the WTO as well) amounts to. The GATS founding fathers did not intend to transfer sovereignty in this matter. In fact, a look in the context (the rest of the GATS) clearly supports this conclusion. Take Art. VI GATS, for example: this provision pre-supposes that each WTO Member can unilaterally decide on the conditions for acceding into a particular service market. Regulatory diversity is the working hypothesis of this provision and, whenever gains from cooperation exist, regulatory cooperation will indeed take place under the conditions established in Art. VI GATS. This reading of the GATS is very much in line with the function of international trade agreements: they are there to internalize externalities stemming from the unilateral definition of trade and trade-related policies.30 The GATS is a negative integration contract: policies will be unilaterally defined and trade liberalization will take place against the background of a pre-existing regulatory diversity. Positive integration will occur under the

29 Matsushita et al. (2006) tangentially touch upon this issue.
30 An elegant account of the ‘received theory’ is offered in Bagwell and Staiger (2002).
limited conditions established in Art. VI GATS. This reading is consonant with the construction of the GATS as an agreement leading to the elimination of discrimination in international trade, and not as an agreement to de-regulate.\textsuperscript{31} The latter might occur when work undertaken under Art. VI GATS is proved successful. Until that day, the maximum promise to trading partners is national treatment (non-discrimination). National treatment pre-supposes unilateral definition of policies.

Consequently, the number of Argentine bankers operating in Argentina is not a matter of commitments under the GATS, but simply a matter of domestic laws.

Third, from a policy-perspective, it seems that trade liberalization will indeed be served were one to restrict the applicability of Art. XVI GATS to foreign services and services suppliers only: the limitations indicated in a schedule of concessions will apply to foreign services suppliers only. So in case Argentine limits the number of banks to five, all five will be foreign banks. This approach has a welcome positive externality. Mattoo (2000) in his insightful paper, points to a lacuna in the current GATS: assume that Argentina has limited the number of banks operating in its sovereignty to five. Assume further that they accept a sixth bank. Should this sixth bank be up for grabs for both foreign and domestic suppliers? Assuming the US–Gambling approach is followed, the response should be in the affirmative. In the suggested approach, the sixth bank can be offered to foreign bankers only, and it becomes the benchmark for any additional bank that can request market access making a non-discrimination claim to this effect. Consequently, the suggested approach both at a static and at a dynamic setting, induces more trade liberalization, indeed the very purpose of the WTO edifice.

There are, of course, some legitimate counter-arguments to the advanced thesis. The very existence of Art. XX.2 GATS could be perceived as signaling a potential overlap between Art. XVI and Art. XVII GATS. This argument, it is submitted, is ill-founded. Art. XX.2 GATS reads:

Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.

Art. XX.2 GATS is nothing but a scheduling device. Its rationale is provided by its (proper) counter-factual: absent this provision, any time a WTO Member had recourse to one of the measures embedded in Art. XVI GATS, it would have to include them explicitly both under the Art. XVI, and the Art. XVII GATS columns. Art. XX.2 GATS makes the second inclusion redundant. It does only that.

The other institutional argument against the suggested approach is §8 of the Scheduling Guidelines, a point I briefly discussed supra. Recall that from a pure

\textsuperscript{31} Judging from the work accomplished under Art. VI GATS so far on accountants, this looks a very safe conclusion, see Delimatis (2006). Recall that under Art. VI GATS, one could potentially move towards establishing common qualifications/standards.
formal (legal) perspective, this is not much of an issue: case-law has clarified that such documents are supplementary means of interpretation. Moreover, this particular document itself reflects the view that it is not an authentic interpretation of the GATS. Its main value lies in the fact that it provides some information additional to the GATS without which a serious gap-filling exercise would have become, sooner or later, necessary.

But, even if we were to set aside these arguments, a look into the content of the Scheduling Guidelines does not necessarily lead to the conclusion that what the negotiators had in mind when drafting Art. XVI GATS was measures applied to both domestic and foreign suppliers: one should not be forgetful of the fact that most of the examples that negotiators used while drafting the Scheduling Guidelines are examples of transactions concerning foreign suppliers only. In this regard, we read in §39:

(a) Limitations on the number of service suppliers:
   – Licence for a new restaurant based on an economic needs test.
   – Annually established quotas for foreign medical practitioners.
   – Government or privately owned monopoly for labour exchange agency services.
   – Nationality requirements for suppliers of services (equivalent to zero quota).

(e) Limitations on the total value of transaction or assets:
   – Foreign bank subsidiaries limited to x percent of total domestic assets of all banks.

(c) Limitations on the total number of service operations or quantity of service output:
   – Restrictions on broadcasting time available for foreign films.

(d) Limitations on the total number of natural persons:
   – Foreign labour should not exceed x percent and/or wages xy percent of total.

(e) Restrictions or requirements regarding type of legal entity or joint venture:
   – Commercial presence excludes representative offices.
   – Foreign companies required to establish subsidiaries.
   – In sector x, commercial presence must take the form of a partnership.

(f) Limitations on the participation of foreign capital:
   – Foreign equity ceiling of x percent for a particular form of commercial presence. (emphasis added).

The examples mentioned above show clearly that, what the founding fathers had in mind when drafting Art. XVI GATS, was a class of measures that concerned explicitly foreign service suppliers only. But, even the examples used, which do not fall into this category (that is, which explicitly concern foreign service suppliers), do not necessarily contradict that the working hypothesis of Art. XVI GATT was
to cover measures aimed at regulating market access for foreign service suppliers only. Take the economic needs test, for example: WTO Members could use it to block foreign entry of say a new gas station (or restaurant), arguing that there is already sufficient (domestic) supply in a given region.

All this leads me to conclude, even assuming that the legal relevance of the Scheduling Guidelines is higher than it actually is, that it is a matter of positive law and that, as a result, recourse to it is compulsory, quod non, they do not clearly point to the opposite (of my preferred) direction. They are at best confusing: the examples used are examples that concern foreign service suppliers, whereas at the same time they reflect a statement to the effect that such measures could be non-discriminatory. Crucially, all examples used can be understood as concerning foreign service suppliers only.

One could further advance the argument that Art. XVI.1 GATS, although addressed to foreign service suppliers only, does not also clearly state whether the measures included in Art. XVI.2 GATS are discriminatory or not. The argument is not persuasive:

first, if this were indeed the will of the founding fathers, they could very easily add the term ‘domestic suppliers’ in Art. XVI.1 GATS. They did not;
second, this reading is at odds with the construction of the GATS as a negative integration contract already dismissed (see supra).

In the same vein, one could argue that Art. XVI GATS is a legislative response to the awkward de facto discrimination analysis: instead of having to argue whether an origin neutral measure de facto hits foreigners harder, the GATS founding fathers, for reasons of administrative ease, simply inserted a list of measures that should be, in principle, declared illegal anyway, irrespective of who (domestic/foreign supplier) is hit harder. This is definitely an appealing argument, especially so because the WTO case law on de facto discrimination leaves a lot to be desired. This argument runs of course afoul the construction of GATS as an instrument eventually prohibiting discrimination and, for the reasons mentioned above, should be dismissed. And of course, they could have stated that such measures cover both domestic and service foreign suppliers alike. They did not. Moreover, the gains, were such policies to be declared outright illegal, should not be exaggerated. Assume for example, that Argentina requests that banks do not employ more than 200 employees, and it also requests by law that 50% of the banking personnel speaks one of the idioms used in every Argentine region. Such a measure would have an impact on the nationality of employees hired, since de facto it confers an advantage on local hires. Should it be outlawed by Art. XVI GATS? In other words, should measures which, not de jure but de facto, amount to a measure such as those proscribed by Art. XVI GATS, be also prohibited? If the

32 This argument was advanced by an anonymous referee.
33 See on this score, Horn and Mavroidis (2004).
founding fathers cared about administrative ease, they could have been more careful in their expression.

One might finally legitimately ask the question whether there is a downside to the suggested approach? Indeed, one could argue that absence of scheduling of non-discriminatory regulatory interventions under Art. XVI GATS necessarily leads to absence of transparency, and, thus, to increased transaction costs. It would indeed be regrettable to incite opaque protectionism by restricting the list of items that should come under Art. XVI GATS (and, consequently, be scheduled). For scheduling, a measure contains by definition a transparency externality. Such fears are, however, grossly exaggerated: Art. III GATS obliges WTO Members to

publish promptly ... all relevant measures of general application which pertain to or affect the operation of this Agreement.

This provision arguably leaves some discretion to the regulating state to decide whether a measure is of general application (this should be most of the time a mundane exercise) and, among this set of measures, which pertains to or affects the GATS. In the worst case scenario, assuming the WTO Member concerned commits a type II error (false negative), this provision, like any other provision in the WTO agreement is justifiable. Hence, the exercise of discretion is justifiable as well. Moreover, one should not neglect that the possibility for a cross-notification (under Art. III.5 GATS) is embedded in the GATS system. Looking for evidence in this context (cross-notification) should not be that burdensome: it suffices that a request be submitted to the regulatory regime governing market access for a particular service.

3.3 Expressing the suggested approach in four steps

The approach advanced here suggests hence, a different role for Art. XVI GATS, than that envisaged by the AB. It is by now clear that, in our view, it seems plausible to view Art. XVI GATS as a sub-set of Art. XVII GATS. That is, WTO Members:

(a) will decide whether or not to accord national treatment to foreign services and services suppliers by indicating their wish in the schedule;
(b) if yes, then Art. XVI GATS is irrelevant. With respect to measures affecting trade in services for which national treatment has been granted, WTO Members incur anyway the transparency obligation embedded in Art. III GATS;

34 A Type-II error (false negative) in this context would lead to a situation where the agreed law has not been applied (respected). This would be the case if a WTO Member does not notify a GATS-covered law. False positives are not issue here: over-notification is rather welcome by the WTO Membership. More generally, on GATS transparency, see Iida and Nielsen (2003).
(c) if no, they will so indicate in their schedule of concessions under the column ‘Art. XVII GATS’;\(^{35}\)

(d) if no, and assuming they choose an instrument reflected in Art. XVI.2 GATS, then they will have to indicate their concession (which should be termed \textit{limitation} or \textit{restriction}) under the column ‘Art. XVI GATS’ of their schedule, and not under Art. XVII GATS (by virtue of Art. XX.2 GATS).

Points (b) and (c) need some further clarification. Let us start from (b), where a WTO Member has granted national treatment to foreign suppliers (the inscription in the schedule is \textit{none}). In this case, Art. XVI GATS is irrelevant because national treatment has been afforded. However, this does not mean that a WTO Member granting national treatment can never have recourse to one of the measures included in Art. XVI GATS; it only means that the WTO Member cannot apply such a measure against foreign suppliers only. It can of course impose a complete ban on the supply of services (à \textit{la US–Gambling}). In this case, it will have to notify its relevant laws (the ban) in accordance with Art. III GATS, and it will incur no further obligation to also include it in its Art. XVI GATS column.\(^{36}\)

Let us move to point (c) now, irrespective of whether the inscription is \textit{unbound} or \textit{other}, Art. XVI GATS could be relevant. If the inscription is \textit{unbound}, the WTO Member is free to deviate as much as it deems appropriate from national treatment. Importantly, it does not, with the exception of the measures reflected in Art. XVI GATS, prejudice the extent of the deviation \textit{ex ante}. It can of course also deviate from Art. XVI.2 GATS, if it has indicated so in its schedule. If the inscription is \textit{other},\(^{37}\) the WTO Member will indicate whether it wishes to avail itself of the possibilities to refuse market access offered in Art. XVI.2 GATS. This is so since, under \textit{other}, it can reflect measures going beyond the coverage of Art. XVI.2 GATS.

In other words, WTO Members should, through the measures coming under the purview of Art. XVI GATS, be explaining the terms of discriminatory treatment afforded to foreign services and services suppliers. Such measures, however, should not be construed to be as the only permissible discriminatory measures. Hence,

\(^{35}\) In this case as well, WTO Members will have to abide by the transparency requirement embedded in Art. III GATS. However, in this case, knowledge of the regulatory regime in place will be of a mere academic interest, since no market access commitments will have been entered.

\(^{36}\) Indeed, requiring inscription in the Art. XVI GATS column looks like an inappropriate \textit{double emploi}. If WTO Members have not respected their obligations under Art. III GATS, one cannot cure such defect by over-extending the ambit of Art. XVI GATS: the former covers laws irrespective of whether trade commitments have been entered into, and has, consequently, a wider coverage. However, nothing can stop WTO Members from reflecting in their Art. XVI GATS column measures notified under Art. III GATS. What we suggest here is that they should not be \textit{required} to do so.

\(^{37}\) The term here is used as in the \textit{Scheduling Guidelines}. That is, it covers cases where a WTO Member has not granted national treatment to foreign service suppliers, but it has \textit{ex ante} bound its discretion as to the treatment to be provided.
Art. XVI GATS should be understood as a provision that clarifies *some* of the agreed deviations from national treatment.

4. Testing the approach

4.1 Limitations on the number of service suppliers

Let us suppose that Argentina made a commitment to allow only *five* banks into its market. Is this a guarantee that *five* banks will enter the market or just an opportunity given to *five* banks to enter the market? In the absence of a National Treatment commitment (NT *unbound*),\(^{38}\) nothing is in fact guaranteed. Foreign banks can be subject to conditions that may be much more onerous than those imposed on national suppliers. If there is a National Treatment commitment (NT *none*), there is still no guarantee that the quota will be fulfilled since, again, the conditions imposed may be highly restrictive.

Following this understanding – a quota only for foreign banks – foreigners only would be competing for the *five* banks, the host state having no obligation to grant five licences to this effect. In a NT *none*-scenario, the foreign banks will be competing for *five* licences. The licensing requirements will be equivalent to those applied to domestic incumbents. In a NT *unbound*-scenario, the foreign banks will be competing for five licences under conditions not specified *ex ante* in the schedule of concessions. However, the conditions under which the first licence is granted become *ipso facto* the benchmark for any subsequent licence (by virtue of the MFN, most favoured nation-obligation embedded in Art. II GATS). In a NT *other*-scenario, market access for foreign banks will be explained in the schedule. Here we distinguish between two alternatives: if the measure coming under the purview of other is part and parcel of Art. XVI GATS, then the relevant entry will be under Art. XVI GATS (by virtue of Art. XX.2 GATS); if the measure is a measure other than the measures included in Art. XVI GATS, it will figure under Art. XVII GATS.

4.2 Limitations on the total value of service transactions or assets

This type of restrictions does not abound in schedules, and the provision itself (Art. XVI.2b GATS) is not absolutely clear.\(^{39}\) Most examples apply only to foreigners, which reinforces the idea that Art. XVI GATS seems to have been conceived as capturing all restrictions affecting foreign services and services suppliers, and only in a subsidiary manner domestic services and services suppliers.\(^{40}\) In addition,

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\(^{38}\) We use the terminology used in GATS schedules: *unbound* means that the WTO Member making the commitment does not at all limit its sovereignty; *none*, that no restrictions have been placed; and, finally, *other*, that there is specific language in the schedule of concessions specifying the extent of the commitment. NT stands for national treatment.

\(^{39}\) TQ1.

\(^{40}\) The only example provided by the *Scheduling Guidelines* is the following: ‘Foreign bank subsidiaries limited to x percent of total domestic assets of all banks.’ See S/L/92, paragraph 12.
this type of restriction may apply at the market level (e.g. foreign bank subsidiaries limited to \( x \) % of total domestic assets of all banks), or at the individual institution level (e.g. foreign banks are subject to per client foreign currency credit extension limit of 25 % of the net worth of their head office\(^{41}\)). Let us analyze both options.

A limitation on the total value of assets applying at the market level
It is difficult, if not impossible, to think how such a limitation would apply to domestic banks. Clearly, all these limitations found by the authors in real schedules of commitments, as well as the example given by the Scheduling Guidelines, apply only to foreign suppliers. Check the following example:

Foreign bank subsidiaries in Argentina are limited to 25 % of total domestic assets of all banks.

By definition, this is a discriminatory measure, hence it is contrary to National Treatment. Following Art. XX.2 GATS, such a measure should be scheduled under the Market Access (Art. XVI GATS) column, and it would be considered as qualifying both market access and national treatment.

Is this a guarantee or an opportunity to trade? The only thing that is ‘guaranteed’ is that foreign bank subsidiaries would eventually (i.e. assuming that they fulfil all other requirements) be allowed, provided the new addition to the market does not take foreign-banks’ market share beyond 25 %.

A limitation on the total value of assets applying at the individual institution level
Let us suppose that Argentina schedules the following measure:

Banks are subject to a per client foreign currency credit extension limit of 25 % of the net worth of their head office.

We are aware that such a measure might eventually be justified as a ‘measure for prudential reasons’ as per §2 of the GATS Annex on Financial Services, and, therefore, is not subject to scheduling. Following current practice, however, let us suppose that it has been scheduled anyway, as any other market access limitation.

What is guaranteed by this commitment? Very little indeed. The commitment only ‘guarantees’ that banks will not be requested to cap foreign currency credits at a level equivalent to less than 25 % of the head office’s net worth. That’s all. The most important question in this case, however, is whether this measure should be understood as a limitation applying to all banks or only to foreign banks. If the measure is applied as such to all banks, irrespective of whether they are foreign owned, it would not constitute a national treatment restriction,\(^{42}\) and

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\(^{41}\) Example taken from a real schedule of commitments.

\(^{42}\) We leave aside consideration of whether a limitation on foreign currency loans might constitute a \textit{de facto} national treatment violation.
Art. XX.2 GATS would be irrelevant. The measure would, in principle, affect everybody’s conditions of competition in that segment of the market. What if the measure applied only to foreign banks? In that case, the measure – a Market Access limitation – would also constitute a National Treatment qualification since domestic banks would not be subjected to such a limit. If that is the case, Argentina would only need to schedule the measure in the Market Access column, since it would be also understood as a qualification on national treatment.

In conclusion, the guarantee provided by this type of market access limitation is very little indeed. Considered in its entirety, with other limitations and qualifications that may apply, the commitment still provides an opportunity to access that market. Whether the limitation is meant to be applied to all banks or, in the case of dual regimes, to foreign banks only would not change the legal rights and obligations of Argentina because of Art. XX.2 GATS. However, it may change conditions of competition if the limitation is applied only to foreign banks. Besides, the legitimate question may arise: would it be possible to justify a discriminatory application of the measure post scheduling? This is a paradoxical, although logical, consequence of the protection granted by Art. XX.2 GATS.

4.3 Limitations on the total value of service operations

Before proceeding with this example, it is worth noting that, at least in the case of banking, the distinction made in Art. XVI GATS between services operation/assets on the one hand (Art. XVI.2b GATS) and service operations/output on the other (Art. XVI.2c GATS) is far from clear. In practical terms, the distinction might not pose problems to Members, who are not required to provide a taxonomy of their limitations according to Art. XVI GATS. The lack of distinction may pose, however, problems for a hypothetical exercise such as the one undertaken here. With that proviso in mind, let us suppose that Argentina applies the following limitation:

Banks can establish only up to ten off-premise Automated-Teller-Machines (ATMs).

What type of market access guarantee is this? The only thing that is guaranteed is that banks will be told to restrict their off-premise ATMs to less than ten units. That is all. Apart from that, on its own, this measure does not constitute a real market access guarantee, even if no other Art. XVI GATS-type of measure applies, because access would again depend on other terms and conditions that may apply to banks wishing to establish in this country.

Let us suppose that the measure only applies to foreign banks’ subsidiaries or branches, as per our preferred understanding of Art. XVI GATS. Since the measure modifies the conditions of competition against foreign entities, the measure is not only inconsistent with market access but also with national treatment. However, by virtue of Art. XX.2 GATS, the measure would only appear in the market access column and would qualify for national treatment as well.
4.4 Limitations on the total number of natural persons that may be employed in a particular services sector or that a service supplier may employ

It is hard to think why domestic banks would be limited in their ability to hire natural persons. Again, most examples one can think of would concern either the ability of foreign service suppliers to employ natural persons in general, or the ability of companies to employ foreign natural persons. Both cases would constitute in fact national treatment restrictions, and, if scheduled, would have to be seen in light of Art. XX.2 GATS.

The conclusions reached in Section 4.2 supra holds also for this example.

4.5 Measures which restrict or require specific types of legal entity or joint venture

These measures abound in schedules. The requirement to form a joint venture could be a national treatment qualification, unless we think of regimes in which domestic investors could only supply services if and only if they are associated with a foreign partner, or even of regimes where a WTO Member imposes heavier requirements on foreign suppliers.\(^\text{43}\) Since requirements imposed on joint ventures (between domestic and foreign suppliers) are by definition both a market access and a national treatment restriction, as per our understanding of Art. XVI GATS, they should be scheduled only in the market access column and the entry would qualify both obligations.

Is this a guarantee or an opportunity to trade? Again, the answer to this question would necessarily depend on the interplay with other limitations that may have been scheduled, or with other conditions that may applied even if not scheduled.

Requirements to constitute a specific type of legal entity might eventually be applicable to both domestic and foreign suppliers. In this case, assuming adherence to NT, Art. XVI GATS is obsolete: foreign like domestic banks will have to choose from a limited selection of company types. The Art. XVI GATS entry is important only if foreign banks are treated, in this respect, different from their domestic counterparts. In the case of banking and other financial services, the provision is particularly relevant for foreign entities, since the most important concern for regulators is whether foreign banks can access the market through a branch or through a subsidiary (i.e. a locally incorporated company). Restrictions to incorporate locally may be accompanied by the requirement to adopt a specific type of juridical person and this restriction may apply to both domestic and foreign

\(^{43}\) It could be, for example, that a WTO Member allows domestic suppliers to supply a service through a simple societal form, whereas imposes heavier requirements (limited responsibility) on foreign suppliers of the same service.
entities. So, let us suppose that Argentina imposes the following requirement in its schedule of commitments:

Only stock-companies can be licensed as banks, cooperatives and mutual companies are not allowed to take deposits.

If the measure applies both to foreign and domestic banks, there is no national treatment violation, and therefore no need to have recourse to Art. XX.2 GATS. If the measure concerns only foreign banks, then it is both a market access restriction and a national treatment violation, because deposit-taking activities might be performed by domestic entities organized as cooperatives. If this is the case, in order to safeguard say Argentina’s rights under the Agreement, the measure would have to be considered as qualifying also National Treatment, by virtue of Art. XX.2 GATS.

Again, the conclusions reached in Section 4.2. supra applies mutatis mutandis to this case.

4.6 Limitations on the participation of foreign capital in terms of maximum percentage limits on foreign share holding or the total value of individual or aggregate foreign investment

Limitations on foreign ownership (e.g. foreign ownership limited to 49%) are by definition national treatment restrictions. Therefore, Art. XX.2 GATS applies almost automatically in interpreting these entries. However, some ownership limitations may apply to both domestic and foreign investors, for example direct or indirect ownership or voting rights in a credit institution of a single shareholder other than credit institution, insurance company or investment firm cannot exceed 25%. If that is the case, the measure is non-discriminatory, but would need to be scheduled anyway because it applies to foreigners as well.

What type of guarantee is this? Well, the only thing that is guaranteed here is that, if allowed to enter, (i) a foreign bank would be required to hold less than 49% of the institution’s equity or (ii) an individual shareholder would not be obliged to hold less than 25% of voting rights. The limitation is per se a qualification on national treatment, and therefore Art. XX.2 GATS would apply automatically to this provision in gauging rights and obligations of Argentina under the Agreement.

5. A coherent interpretation is possible, but leaves much to be desired ...

The suggested interpretation does not require a re-drafting of any of the GATS provisions. It might entail that some commitments are more meaningful than anticipated: a country for example which accepts five new banks and has not specified anything more in its Art. XVI GATS column, will be forced to, in principle, accept that the five new banks must be foreign. Keep in mind, however, that a five
bank commitment is an opportunity to trade and not an obligation to accept five banks anyway.

In defence of this understanding, I will state that the suggested proposal is in line with the very essence of the GATS, which is an overwhelmingly negative integration type of contract: WTO Members remain largely uninhibited to unilaterally define their policies. To the extent that there is international spill-over stemming from the exercise of their regulatory sovereignty, it will be dealt with within the four corners of the existing legislative framework. National treatment is the maximum value of any national promise. If we could \textit{ex ante} foresee the policies that will affect trade, then, in all likelihood, negotiators would have simply spelled out all these policies in the contract: the associated negotiating costs make such an exercise an impossibility. The GATS like the GATT,\textsuperscript{45} is an obligationally incomplete contract whereby national treatment operates as punishment in case unilateral policies deviate from the agreed objective not to provide non-negotiated protection.\textsuperscript{46} In the GATS, the situation is even more favourable to our argument since, national treatment is not even an obligation across the board, but merely a specific commitment. It follows that the negative integration character of the contract is even more prevalent.\textsuperscript{47}

From an operational perspective, the suggested understanding is tantamount to sequencing Art. XVI GATS to Art. XVII GATS: the former is understood to reflect the types of deviations from national treatment that WTO Members should abolish, unless they have clearly indicated their wish \textit{not} to do so. Even in this latter scenario, however, one step forward has been taken since; they become the negotiating material for the next round.

\textbf{References}


\textsuperscript{44} In theory, a WTO Member can treat foreign suppliers better than it treats its own nationals. To my knowledge, there is no national schedule including such concessions.

\textsuperscript{45} See, in this respect, the analysis in Horn and Mavroidis (2004).

\textsuperscript{46} Assuming of course, that a WTO Member has promised to grant national treatment to foreign suppliers.

\textsuperscript{47} Probably much of this discussion would have been taken care of if Art. XVI GATS were to follow Art. XVII GATS and be entitled as \textit{‘Impermissible, in principle, deviations from national treatment.’}


