

⑩ Review of administrative decisions



KEY INSIGHTS

- The right to review administrative decisions affecting trade in services is key to making authorization systems predictable, impartial and correctable in practice.
- The GATS establishes the right for affected service suppliers to request prompt review of administrative decisions and, where justified, appropriate remedies, through judicial, arbitral, or administrative tribunals or procedures that provide objective and impartial review.
- The SDR Disciplines complement the GATS and require publication of available review procedures. Some recent PTAs go further by guaranteeing suppliers a reasonable opportunity to support their respective claims during the proceedings, as well as guaranteeing the independence of the review bodies.
- At the domestic level, while differing in their structure, review systems are significantly widespread – with 97 per cent of the economies covered in the WTO-World Bank STPD formally providing for the right to review across services sectors, 96.5 per cent having established an independent authority handling the review, and 92.5 per cent making the review procedures publicly available.

Key features

Sector-specific laws and authorization frameworks empower competent authorities to take administrative decisions with legal effect. These decisions apply general measures to specific individual cases with binding legal consequences, such as assessing an authorization application or determining instances of non-compliance. They are based on laws and regulations that set out conditions and criteria for obtaining authorization and requirements for conducting any permitted business activity.¹ They also encompass monitoring of compliance, as well as enforcement of breaches, including through sanctions or punitive costs.²

The possibility for individuals adversely affected by administrative decisions to request review is a key tenet of due process. Regulatory frameworks which provide the right to challenge decisions are critical to prevent abuse of discretionary authority and discriminatory treatment, as well as to preserve the validity, integrity and fairness of the regulatory system.³ In brief, the purpose of the review is to strike a balance between ensuring administrative efficiency and the protection of individuals' interests.

Challenging the validity of administrative decisions may take various forms, often involving multiple levels of review, beginning with an internal appeal within the competent authority itself to address, if necessary, external bodies entrusted with this task, such as administrative tribunals, or the courts. Alternatively, the administrative and judicial procedures could run in parallel. The structure of such review systems depends on the procedures generally prevalent in the legal system to protect individual rights, including the following:

- **Constitutional protection for individual rights:** Constitutions bestow individual rights, including rights to due process, fairness, equality and protections against arbitrary governmental action. For instance, the Charter of Fundamental Rights of the European Union states that every person is entitled to "the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, officers and agencies of the Union".⁴ In certain instances, constitutions reserve such rights exclusively for citizens, thereby excluding foreign persons.
- **Horizontal legislation and sector-specific regulations:** Horizontal statutes, such as civil

procedure codes, may provide broad rights to individuals to bring a cause of action before a civil court. Similarly, certain jurisdictions have administrative procedural frameworks to ensure efficiency, timeliness and fairness in administrative decision-making. Sector-specific measures, which discipline the actions and responsibilities of regulatory authorities may also guarantee recourse, including to foreigners.

- **Implementing measures:** Rules framed to implement sectoral legislations often prescribe procedures for application for licences, including requirements and conditions to be fulfilled, grounds for rejection and possible recourse against the regulatory authority.

Providing a review mechanism to challenge administrative decisions is an internationally recognized GRP. It is instrumental to increase regulatory quality and legitimacy of the institutional framework. For this GRP, the OECD recommends that its member countries⁵:

Ensure the effectiveness of systems for the review of the legality and procedural fairness of regulations, and of decisions made by bodies empowered to issue regulatory sanctions. Ensure that citizens and businesses have access to these systems of review at reasonable cost and receive decisions in a timely manner.

In its commentary, the OECD emphasizes that appeals should be heard by a separate authority other than the body responsible for making the original decision.⁶ The right to review should also set out the grounds on which it can be initiated, including procedural fairness and due process, review of facts, and review of law. Other GRP principles play an important role in this area, notably (i) establishing standard time periods within which individuals or businesses can expect a decision to be made when asking for a decision's review⁷; (ii) identifying time frames within which reviews can be requested; (iii) guaranteeing the right to review free of charge; as well as (iv) providing the right to present relevant documentation and arguments for the defence. Additionally, (v) the precise legal effect of the review decisions should be specified,⁸ together with the different types of remedies available, and (vi) safeguards to ensure the independence and impartiality of review decisions should be upheld. Box 1 provides for an account of the implementation of the right to challenge decisions in OECD member countries and Figure 1 summarizes the types of review and their legal bases, as well as relevant GRP elements.

Box 1: The right to challenge decisions among OECD member countries

Mechanisms to challenge decisions made in individual cases exist in all OECD member countries. Citizens and businesses can have administrative decisions reviewed by a court (in 38 jurisdictions), and in a majority of them (34 jurisdictions), such decisions can also be reviewed by the body in charge of enforcing the regulation that was the basis for the decision. Some jurisdictions make other mechanisms available to challenge such decisions. For instance, it is possible to appeal an individual decision before an independent body (in 26 jurisdictions), have a ministry review the decision (in 25 jurisdictions) or have the decision reviewed by a specialized administrative body (in 22 jurisdictions). In addition, 24 OECD member countries reported that businesses and citizens may petition the decision-making agency to reconsider its decision.

Source: OECD (2021).

GATS, SDR Disciplines and other relevant trade agreements

In international trade law, the right to request review is enshrined across a range of WTO agreements: Article X:3(b) of the GATT provides for the prompt review and correction of administrative actions related to customs matters by independent tribunals or procedures.⁹

The latter action has effectively served as a basis for other WTO agreements, including Article 41.4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (opportunity for review of administrative decisions related to the

enforcement of intellectual property rights);¹⁰ Article 4 of the TFA (appeal or review of customs and trade-related administrative decisions);¹¹ Article 13 of the Anti-Dumping Agreement (judicial, arbitral, or administrative review of anti-dumping decisions);¹² and Article 23 of the Subsidies and Countervailing Measures Agreement (SCM Agreement) (judicial, arbitral, or administrative review of countervailing decisions).¹³

In the area of trade in services, GATS Article VI:2(a) provides for the principle of review of administrative decisions for all measures affecting trade in services across all sectors¹⁴:

Figure 1: Review of administrative decisions

Type of review	Legal basis
▪ Judicial, arbitral, administrative tribunals or procedures ▪ Review authority separate to the body responsible for making the original regulatory decision	▪ Constitution ▪ Horizontal legislation ▪ Sector-specific regulation ▪ Implementing measures
Relevant GRP elements	
▪ Publication of review procedures ▪ Time periods for review decisions ("prompt review") ▪ Safeguards to ensure the independence, impartiality, and objectivity of review decisions ▪ Time frames within which review can be initiated ▪ Review procedures free of charge ▪ Right to present relevant documentation and arguments during review ▪ Specification of legal effect of review ▪ Identification of types of remedies available (such as reversal or modification of decisions, reprocessing of requests, compensation, or instructions which the initial deciding authority should comply with)	

Source: WTO/World Bank.

Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.

Notably, in accordance with Article VI:2(a), administrative decisions are to be reviewed at the request of the affected service supplier, establishing an individual right for both domestic and foreign service suppliers to seek remedy. This provision implies that accessible and effective channels for submitting such requests must be made available.

Article VI:2 does not prescribe the institutional structure of the review process. It allows WTO members to choose between “judicial, arbitral or administrative tribunals or procedures”. These terms, in the context of GATT Article X:3(b), have been interpreted to not prescribe a particular type of review or correction of administrative action relating to customs matters.¹⁵ This suggests there may be “a variety of ways in which a WTO member may comply with the obligation of maintaining tribunals or procedures for prompt review and correction”.¹⁶ Nonetheless, Article VI:2 of the GATS demands that whatever system is chosen, it must provide “for the prompt review of, and where justified, appropriate remedies” and that the related procedures provide for an “objective and impartial review”.

The right of WTO members to choose the most convenient review method is limited insofar as any procedures that are “not independent of the agency entrusted with the administrative decision concerned” shall nonetheless ensure that the “procedures in fact provide for an objective and impartial review”. This means that even where the reviewer of the decision is part of the same regulatory authority, it must maintain an unbiased approach to the review of facts and law. This could be ensured through protecting the tenure of the reviewers or judges and insulating them from any retaliatory action from the regulatory authority.

Under the GATS, the terms “prompt review”, “objective” and “impartial” are not specifically defined. In this context, regulatory authorities may be guided by the interpretation of similar terms in Article X of the

GATT to identify best practices regarding the review of administrative decisions. In the context of GATT Article X:3(b) which deals with the “prompt review and correction of administrative action relating to customs matters,” the term “prompt” has been interpreted to mean “in a quick and effective manner and without delay”.¹⁷ Whether a review is conducted without delay “depends on the context and particular circumstances, including the nature of the specific type of action to be reviewed and corrected”.¹⁸

The requirement for an “objective” review implies that authorities must not treat suppliers in an arbitrary manner, and that similar situations must be treated in the same way.¹⁹ The impartiality of the reviewing authority and process is also a critical feature; it requires that a review is conducted without giving special consideration or privileges or interest to other equally affected parties.²⁰ It can also be interpreted to mean that the reviewing authority shall not have any substantial interest in the outcome of the matter. WTO panels have not presumed that regulatory authorities that are part of the government, would *per se* act partially towards state-owned enterprises or domestic traders. In such situations, authorities will have to establish guardrails that ensure the independence and impartiality of authorities with links to the government and domestic traders, including with respect to the publication of the reasons for the decision, conflict of interest rules, as well as other accountability mechanisms.

Importantly, GATS Article VI:2 requires that a review process must be initiated, upon request of the applicant, if the challenged decision has been found to be flawed. Based on the overarching objective to restore fairness and rectify any harm done, authorities have discretion to determine what “appropriate remedies” would be in any given case. This could involve, *inter alia*, the reversal or annulment of the original decision, or its modification and replacement with another decision, the referral to the original authority for a new decision while considering the outcome of the review process. Appropriate remedies could also comprise compensation for damages and losses.

Article VI:2 of the GATS does not specify procedural details of the review. WTO members may therefore identify certain requirements for the review, e.g. that requests are made within specific time frames, in writing, that they clearly identify the administrative decision challenged and the grounds for challenge.

The obligation is generally understood to imply that the parties involved in the proceedings have a fair opportunity to present or defend their claims.

It should also be highlighted that Article VI:2(b) provides for a safeguard from the obligation in sub-paragraph (a). It states that sub-paragraph (a) must not be construed to oblige a WTO member to “institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system”. In practice, most WTO members are able to establish some form of administrative, judicial, or arbitral review, consistent with GATS requirements, given the substantive flexibility in the range of options. However, Article VI:2(b) acknowledges that, for some jurisdictions, structural, constitutional, or practical incompatibilities could prevent implementing any of these options. The safeguard clause ensures that these WTO members are not forced into obligations that would require substantial upheaval of their regulatory frameworks.²¹

The SDR Disciplines do not elaborate on the obligations contained in GATS Article VI:2. However, they require the publication of procedures for appeal and review of administrative decisions on authorization applications.²² They provide that WTO members promptly publish:

... the information necessary for service suppliers or persons seeking to supply a service to comply with the requirements and procedures for obtaining, maintaining, amending and renewing such authorization. Such information shall include, *inter alia*, where it exists: (...) (e) procedures for appeal or review of decisions concerning applications;

PTA practice

Many PTAs guarantee the review of administrative decisions in a similar way to that set out in the GATS. This is the case, for example, of the 2018 EFTA-Philippines FTA,²³ the 2018 China-Georgia FTA²⁴, and the 2020 PACER Plus Agreement.²⁵ These agreements contain obligations reproducing the content of GATS Article VI:2.

Furthermore, it should be noted that some recent PTAs build on the obligations contained in GATS Article VI:2. For instance, the 2022 India-Australia ECTA includes commitments that are similar to those found in GATS Article VI:2.²⁶ Moreover, in the chapter dedicated

to horizontal transparency issues (Chapter 10), it contains a provision which requires the parties to put in place judicial, arbitral or administrative tribunals or procedures to ensure the prompt review and, where warranted, correction of administrative actions relating to any matter covered by the agreement, i.e. beyond the services trade chapter.²⁷ The obligation goes further and sets out that:

2. Each Party shall ensure that, in any such tribunals or procedures, the parties to the proceedings are provided with the right to:
 - a. reasonable opportunity to support or defend their respective positions; and
 - b. a decision based on the evidence and submissions of record.

A similar approach is adopted, for instance, by the 2011 Hong Kong, China-New Zealand CEPA,²⁸ and the 2022 RCEP.²⁹ These agreements, in addition to the obligation to review administrative decisions contained in the services chapter, based on GATS Article VI:2, also provide for a horizontal right to administrative review applicable to all matters within their scope of application. Specifically, the relevant provisions in the horizontal chapters also guarantee that those involved in the proceedings have a fair opportunity to present or defend their positions, and that decisions are based on the evidence and submissions on record. Finally, the horizontal provisions typically ensure that, unless further appealed, the decision will be implemented and will guide the enforcing authority's actions on the matter in question. Moreover, these agreements provide that tribunals in charge of the review shall be impartial and independent of the authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.

Another interesting example is the 2020 EU-Viet Nam FTA.³⁰ Besides containing an obligation to guarantee the prompt review and correction of administrative actions both in the services trade as well as in the horizontal transparency chapters, the agreement goes even further specifically with respect to the resolution of telecommunications disputes. Article 8.37 establishes the right to appeal for any user or supplier of telecommunications services affected by the decision of a regulatory authority.³¹ The appeal body is required to (i) be independent from the party involved; (ii) have the appropriate expertise to carry out its functions effectively; (iii) duly take into account the merits of the

case; and (iv) be effective. The provision further sets out that “where the appeal body is not judicial in character, written reasons for its decision shall always be given and its decisions shall also be subject to review by an impartial and independent judicial authority”.

It is worth noting that only a few PTAs contain an explicit obligation to publish procedures relating to review of administrative decisions, as set out in the SDR Disciplines. Among these, the 2020 USMCA,³² in the chapter dedicated to trade in services, where authorization for the supply of a service is required, the party shall provide the necessary information to service suppliers or persons seeking to supply a service, including “any procedure for appeal or review of a decision concerning an application”.³³

Implementation at the domestic level

At the domestic level, the right to seek review of administrative decisions is widely regarded as a fundamental principle of due process and effective remedy – often enshrined in constitutions or core administrative-law statutes – even though its design and functions vary across jurisdictions. The WTO-World Bank STPD shows that, on average, 97 per cent of the economies studied have introduced the right to review across services sectors. Furthermore, 96.5 per cent of them have an independent authority handling the review and 92.5 per cent of them make the review procedures publicly available.

For example, in New Zealand, the right to apply to the High Court for judicial review of decisions exists independently of any statutory appeal rights and is affirmed in the New Zealand Bill of Rights Act 1990 (NZBORA).³⁴ In 2021, New Zealand adopted a set of legislative guidelines including, among others, on the creation of a system of appeal, review and complaint.³⁵ The guidelines note that where a public body makes a decision affecting a person's rights or interests, that person should generally be entitled to have the decision reviewed.

The ability to review or appeal decisions helps to ensure that these are in accordance with the law. Also, the prospect of scrutiny encourages first-instance decision makers to produce decisions of the highest possible quality. The guidelines indicate that there are two main processes for decisions to be reconsidered, depending on the nature of the decision and the decision-maker.

The two types are (i) judicial review (which is always available regardless of whether a statutory appeal or other complaint mechanism exists) to check whether a decision was made lawfully; and (ii) when provided by law, an appeal to an appellate court or tribunal to reconsider the case and make new findings of fact or law, or both. Interestingly, the guidelines state that the review or appeal procedure “should contain adequate safeguards to protect an individual's rights and interests and be consistent with the right to natural justice affirmed by section 27(1) NZBORA”.

Some common procedural protections for appeals include the following:

- independent and impartial decision-makers;
- the opportunity to be heard (whether by oral hearing or in writing);
- ensuring parties are aware of issues that affect their case (such as notice of hearings and impending decisions);
- disclosure of relevant material;
- the availability of legal representation;
- a right to call and cross-examine witnesses;
- a requirement that the decision-maker give reasons;
- the provision of interpreters;
- the provision of a further right of appeal.³⁶

Furthermore, the guidelines recommend the inclusion of an internal review process to reassess the merits of a decision, with the goal of identifying and correcting errors (especially those involving factual findings) without the cost or public exposure that an external appeal or judicial review might entail. Internal reviews are regarded as particularly appropriate to ensure quality and consistency of decisions across multiple decision-makers.

Another interesting example is Japan where, in 2014, the government introduced a fundamental revision aimed at simplifying its existing Administrative Complaint Review Act, originally adopted in 1962.³⁷

This important streamlining reform established a system for allowing citizens to file complaints against administrative decisions through simple, prompt and fair procedures. Prior to this revision, there were three different steps of appeal, namely (i) objection against the acting agency or an agency that has failed to act; (ii) request for review against a reviewing agency; and

(iii) request for a second review against a ruling on a request for review.

With the 2014 updated Act, the filing of an objection has been combined with the request for review, with the aim of improving the fairness of procedures conducted internally within administrative agencies. The procedure provides that the hearing officer, who has not been involved in the original administrative decision, hears the argument of the acting or non-acting agency and the applicant, and on that basis, submits the opinion to the reviewing agency. A group of third-party experts also participate as a consultative body to assist the reviewing agency. To ensure the timely completion of procedures, the Act also requires the reviewing agency to endeavour to establish and publicly share standard time frames typically needed for making a determination from the date a review request is submitted (Article 16).³⁸

In conclusion, the right to review is not ancillary to other GRPs for services trade – it is the mechanism that ensures that authorization systems are predictable, impartial and correctable in practice. The right to request review had already been anchored in the GATS: WTO members are mandated to provide for,

at the request of an affected service supplier, the prompt review of (and, where justified, appropriate remedies) administrative decisions affecting trade in services, through judicial, arbitral, or administrative tribunals or other procedures that ensure an objective and impartial review. The GATS, however, does not prescribe a specific institutional model for implementing such right. The SDR Disciplines complement this framework by requiring prompt publication of available review routes. Some recent PTAs go further by spelling out due process guarantees, such as a reasonable opportunity to support their respective positions, as well as the independence of the review decisions. Domestic experience suggests review works best under the following conditions: (i) grounds (i.e. law, facts, procedure) are clearly stated; (ii) routes and time limits are transparent, predictable, and low-cost; (iii) reviewers are structurally independent from the original decision maker; (iv) the legal effect and remedies are specified; and (v) reasoned, published decisions and internal review loops drive consistency and learning. Embedding these GRP elements in domestic regulatory frameworks helps limit authorities' discretion, prevent discriminatory practices and promote continuous improvements in regulatory quality.

ENDNOTES

1 Fn 4 to Article 4.1 of the TFA defines "administrative decisions" as "a decision with a legal effect that affects the rights and obligations of a specific person in an individual case. It shall be understood that an administrative decision in this Article covers an administrative action within the meaning of Article X of the GATT 1994 or failure to take an administrative action or decision as provided for in a Member's domestic law and legal system. For addressing such failure, Members may maintain an alternative administrative mechanism or judicial recourse to direct the customs authority to promptly issue an administrative decision in place of the right to appeal or review under subparagraph 1(a)."

2 Administrative decisions may also include internal rulemaking or delegated legislation, such as procedures for submission of applications. However, since rules or their drafts cannot ordinarily be "appealed", this section will only focus on administrative decisions that have some element of adjudicative decision-making, such as accepting or rejecting an application.

3 OECD (2012).

4 EU, Charter of Fundamental Rights of the European Union, OJ C 326/391, 26 October 2012, pp. 391-407, Article 41.

5 OECD (2012), Recommendation 8, p. 18.

6 OECD (2012), Recommendation 8, p. 18.

7 OECD (2012), Recommendation 8, p. 18.

8 Ideally, it should be specified what legal effect a review outcome has and what remedies the reviewer can grant, i.e. whether the review body's decision binds the authority responsible to the original decisions; whether the review body's decision replaces the original decision; whether the original decision is sent back to the authority for reconsideration; whether the review body's decision can be enforced, and by whom.

9 GATT, Article X:3(b).

10 TRIPS Agreement, Article 41.4.

11 TFA, Article 4.

12 Anti-Dumping Agreement, Article 13.

13 SCM Agreement, Article 23.

14 GATS, Article VI:2(a).

15 WTO (2011), para. 205.

16 WTO (2011), para. 205.

17 WTO (2010), para. 7.1074.

18 WTO (2011), para. 203.

19 See WTO (2012), para. 7.876. Note that the related concept of uniform administration of procedures under Article X:3(a) has been construed to mean application of rules that is consistent and predictable, such that persons similarly situated are subject to uniformity of treatment.

20 WTO (2006), paras. 7.123-7.135.

21 Inclusion of the safeguard clause may reflect the multilateral nature of the obligation. Note that the PTAs between a limited number of partners frequently omit this safeguard.

22 SDR Disciplines (WTO, 2021), para. 13.

23 EFTA-Philippines FTA (2018), Article 6.7.2.

24 China-Georgia FTA (2018), Article 8.8.2.

25 PACER Plus (2020), Chapter 7, Article 10.2.

26 India-Australia ECTA (2022), Article 8.14.

27 India-Australia ECTA (2022), Article 10.4. It should be noted that the review obligation is linked in this Article to the issue of impartiality and independence of authorities entrusted with administrative enforcement.

28 Hong Kong, China-New Zealand CEPA (2011), Article 9 of Chapter 13 and Article 4.1 of Chapter 15.

29 RCEP (2022), Article 8.15.2 of Chapter 8 and Article 17.6 of Chapter 17.

30 EU-Viet Nam FTA (2020).

31 EU-Viet Nam FTA (2020), Article 8.37.

32 USMCA (2020).

33 USMCA (2020), Article 15.8.6. Note that the USMCA contains only a horizontal provision on Review and Appeal (Article 29.4), in Chapter 29 on "Publication and Administration", but does not contain provisions specifically set out in the services chapter.

34 Government of New Zealand, Ministry of Justice, "Constitutional Issues & Human Rights", <https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/>.

35 Government of New Zealand, Legislation Design and Advisory Committee (LDAC), "Legislation Guidelines 2021 – Chapter 28: Creating a system of appeal, review, and complaint", <https://www.ldac.org.nz/guidelines/legislation-guidelines-2021-edition/appeal-and-review-2/chapter-28>.

36 Government of New Zealand, Legislation Design and Advisory Committee (LDAC), "Legislation Guidelines 2021 – Chapter 28: Appeal and Review", <https://www.ldac.org.nz/guidelines/legislation-guidelines-2021-edition/appeal-and-review-2/chapter-28>.

37 Hitomi (2014).

38 Government of Japan, Administrative Complaint Review Act No. 68 of 2014, Japanese Law Translation (Ministry of Justice), <https://www.japaneselawtranslation.go.jp/en/laws/view/2984/en>.



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