

## GENERAL AGREEMENT ON TRADE IN SERVICES: A CRITICAL ANALYSIS

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### **Abstract**

The most significant change in the International trade is the inclusion of services. The global economy witnessed significant changes in the service sector. Five years of studies, discussions, explorations and negotiations at Uruguay Round resulted in GATS and were enforced on 1 January, 1995. The present paper attempts to study, the GATS, which is more about rules regulating the conditions under which foreign service suppliers are allowed to operate in domestic markets and kinds of discrimination they are encountering. The present paper intends to examine the regulations included in the GATS.

**Key words:** Most favoured Nation, National treatment, Progressive Liberalization, Specific commitments.

It is a well-established fact that the contemporary world has entered a globalized age in almost all spheres of social life. Globalization has influenced and transformed culture, politics, trade, economy and social relations.<sup>1</sup> There has been a major shift with the inclusion of services in the overall ambit of international trade under General Agreement on Trade in Services (GATS) framework which was essentially an International trade agreement on goods in its earlier Avatar General Agreement on Trade and Tariff (GATT).

The genesis of current International Trade regulations can be traced back to Brettenwoods, New Wampshire Economics Conference in 1944.

With the advent of United Nations in 1945, its multilateral trade negotiations were conducted with the framework of United Nation Economic and Social Council (UNESCO) in 1946, adopted a resolution in favour of International Trade Organization.

Whilst International Monetary Fund (IMF) and International Bank for Reconstruction & Development (IBRD) were proposed and created, the International Trade Organization (ITO) could not see the light of the day. The idea of founding an international organization to develop and to coordinate the international trade was put forward but details were left for later.

The very first initiative to draft ITO charter was initiated with preparatory committee in London from Oct 15 to Nov 26, 1946 followed by the drafting committee, held at lake success, New York from Jan 20, 1947 to Feb 25, 1947, third was held in Geneva from April 10, 1947 to October 30, 1947, which was pivotal and had three objectives:

1) To draft ITO charter.

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<sup>1</sup> Vaisa Massimiliano "Globalization and higher education organizational change: A framework for analysis". Higher education 48(2004) : 483.

- 2) To prepare multilateral treaty containing general principles of trade.
- 3) To prepare schedules of tariff reduction.

This conference had dual purpose one was to prepare the draft and other to negotiate amongst 21 countries for the reduction of the tariff. The final work to complete the charter was put on hold until 1948, till the Havana conference. The governments of the countries engaged in negotiation were discussing about tariff cuts and enforcement of GATT without waiting for the final round of negotiations to form the ITO. The answer lied in adopting a protocol of provisional application to apply the GATT and its tariff schedule could immediately enter into force, later the GATT could be revised to be constituent with the charter and GATT and the charter could finally be adopted.

This charter could never see the light of the day because to implement this charter, the support of United States was critical but when President Truman submitted ITO charter to the congress, republicans won the control in congress and ITO failed to come into existence. However, the persons dealing with GATT were often those who had drafted ITO charter and their attitude towards GATT was undoubtedly coloured by experiences in the ITO organization. Thereby, GATT came into effect on 1 January, 1948 with 23 founding members to manage international trade through multilateral trade agreement. There were eight rounds of negotiation among member countries between 1948 and 1984 which culminated in the Uruguay Round; the biggest negotiating mandate on trade, which was ever agreed. The agenda included the strengthening the rules of the trading system, improving ways to address non-tariff measures, bringing agricultural products, textiles and clothing under multilateral trade rules, addressing trade in services and protecting Intellectual Property Rights (IPR). The result was ultimately 60 agreements and decisions on more than 500 pages. It was also substantial in economic terms, the world was estimated to gain about \$96 billion from the results of the round. Yet the developed countries and regions such as United States, Japan and European Union were expected to benefit the most<sup>2</sup>. With 108 states ratifying the agreements of Uruguay Round and establishing the World Trade Organization (WTO) as a new trade organization for the concluded agreements.

### **World Trade Organization**

The establishment of WTO in January 1995 was culmination of International efforts over the five decades to establish a truly international trade organization which should not only cater to the growing needs of international community which had witnessed substantial enormous multifaceted phenomenon especially protectionism, regionalization and interdependence as also to substitute aborted ITO of Havana Charter with new international organization plugging the weakness of General Agreement of Trade and Tariff (GATT) which had served the international trade on loose footed way. The WTO, therefore, can be characterized as completing the unfinished agenda of ITO and further strengthening GATT 1947 which was established by way of accident by GATT 1994. The new WTO was package consisting of multilateral trade agreements annexed to single document, namely, the Marrakesh agreement.

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<sup>2</sup> Harrison, G.W., Rutherford T.F. & Tarr, D.G. "Quantifying the Uruguay Round". The Economic Journal, 107, (444), (1997) : 1405-1430.

Through the indigenous device all agreements awaked to WTO agreement became binding on all members as single body of law.<sup>3</sup>

The most significant change in the WTO in relation to GATT is the Dispute Settlement Mechanism (DSM). Under GATT, countries were allowed to lodge complaints against other countries for violating the rules. Then an expert report was issued deciding upon the matter of complaint. If the report was approved by the members of GATT unanimously, the offending member was required to either change its stand or was made subject to sanction. This mechanism in fact gave every country a veto over the decision. Under WTO dispute settlement the procedure mechanism is different. A unanimous decision is required in order to block an expert report. Therefore, the DSM became much more effective and made even large countries such as United States of America to go to the WTO panel with its most important complaints.<sup>4</sup>

**WTO agreement consists of:**

Annexure 1A – consists of GATT 1994 and other agreements. Annexure 1A includes general interpretative note that provides, if there is conflict between the provisions of 1994 and another Annexure 1A agreement, the provisions of the later controls.<sup>5</sup>

Annexure 1B consists of the General Agreement on Trade in Services (GATS) and the its Annexes.

Annexure 1C consists of agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPs).

Annexure 2 consists of the understanding on rules and procedures governing the settlement of disputes (Dispute Settlement Understanding, DSU) which establishes the procedures for resolving trade disputes among WTO members.

Annexure 3 consists of the trade policy review mechanism which establishes a periodic review of each WTO members compliances with WTO agreement and commitments.

Annexure-4 consists of plurilateral agreements and are binding only on the parties that have accepted them.

Preamble recognizes less advantageous position of less developing and least developed countries in international trade and economic welfare and recommends positive efforts for their upgradation objectives to be achieved by entering into reciprocal and mutually advantageous agreement, which are directed to the substantial reduction of tariff and non-tariff barrier and the elimination of discriminatory treatment in international trade relations.

The WTO has two governing bodies Governing Council & Ministerial Conference. Ministerial Conference is the nucleus which is composed of representative of all WTO members and meets at least once every two years. The ministerial conferences – the most visible WTO events – have been very closely monitored by the media and the public.

<sup>3</sup> World Trade Organizations Agreement, Article 11 : 2.

<sup>4</sup> A.V. Deardoff & R.M. Stern, “What you should known about globalization and the World Trade Organization” Review of International Economics, 10(3) 404-423.

<sup>5</sup> General Interpretive note to Annexure IA, Multilateral Agreements on Trade in Goods of the WTO Agreement, reprinted in WTO, The Legal Texts: The result of the Uruguay round of Multilateral Trade Negotiations, 16(1999)

### **Singapore Ministerial**

The first Ministerial Conference took place in Singapore from 9-13 December 1996. The issues of trade and investment, trade and competition policy, trade facilitation and transparency in government procurement were main issues. These four issues were called Singapore issues.

### **Geneva Ministerial**

The second Ministerial Conference held in Geneva from 18-20 May, which coincided with the 50<sup>th</sup> anniversary of GATT, was relatively a non-controversial event. The conference saw successful negotiations in the area of basic telecommunications and financial services. India was not very active in Geneva Ministerial Conference as was the case in Singapore Ministerial Conference.

### **Seattle Ministerial**

The Third Ministerial Conference was held in Seattle from 30 November – 3 December 1999. The agenda included negotiations in areas such as agriculture, E-commerce, antidumping laws, fisheries, antidumping laws, intellectual property laws, dispute resolution, labour and environmental standards. However, dissatisfaction among the developing countries was increasing due to the non-realization of Uruguay Round commitments instead of addressing the market, access issues of the UR, the developed countries hampered the agenda by including Singapore issues, labour and environmental standards and so on. As a result conference ended in failure and protest against the Ministerial Conference were called “Battle of Seattle”. Doubts were raised about the WTO as an institution with any respect for individual freedom and advances of democracy.<sup>6</sup>

### **Cancun Ministerial**

The Fifth Ministerial Conference of WTO was held in Cancun from 13-18 December 2005. It was supposed to be a mid-term stock taking affair as the Doha Development Agenda (DDA) was already being implemented. Four unresolved issues were expected to be discussed at the meetings namely, ensuring agricultural liberalization, treatment of SI, addressing public health concerns under TRIPS and finally ensuring Special and Differential Treatment (SDT) to developing countries. Unfortunately agriculture alone over shadowed the meeting to a greater extent. Most of the developing countries opposed the agenda. The group of leading industrialized and developed economies strongly influenced the agenda and for the first time put significant pressure on opening of market to the developed countries.

### **Hongkong Ministerial**

The Sixth Ministerial Conference was hosted by Hongkong from 13 to 18 December 2005. Though the final declaration was approved by 149 member states, still it cannot be referred as a success. Agriculture has been a major area of negotiation at Hong Kong. Regarding services, members were encouraged to participate in the negotiations.

### **Geneva Ministerial II**

The WTO General Council was held and seventh WTO Ministerial Conference session in Geneva from 30 November to 20 December 2009. The general theme for the discussion was

<sup>6</sup> S. Kirchhoff, WTO, ‘After 5 year, Still Getting its Balance’. CQ Weekly, p. 2834, November 1999.

“The WTO, the Multilateral Trading System and Current Global Economic Environment. According to WTO Director General Pascal Lamy it would be “a platform for ministers to review the functioning of house”, including Doha Round and an occasion “to send a number of strong signals to the world with respect to the entire WTO waterfront of issues from monitoring and surveillance to disputes, accessions, aid for trade, technical assistance and international governance”.<sup>7</sup>

### Geneva Ministerial III

The Eighth Ministerial Conference was held in Geneva, Switzerland from 15 to 17 December. In parallel to the plenary session, three working sessions took place with following themes: “Importance of Multilateral Trading System and WTO”, “Trade and Trade Development” and “Doha Development Agenda”. Number of decisions on intellectual property, e-commerce, small economies, least developed countries accession, a service waiver for least developed countries and trade policy reviews.

### Bali Ministerial

Bali Ministerial was held in Bali, Indonesia from 3-7 December 2013. The Bali Ministerial declaration and accompanying decisions were informally called ‘Bali Package’ which comprised of series of decisions aimed at streamlining trade, allowing developing countries more options for providing food security, boosting least developed countries trade and helping development more generally.

### Nairobi Ministerial

The Tenth Ministerial Conference of WTO was hosted by Nairobi Kenya from 15 to 19 December 2015. It also marked the 20<sup>th</sup> anniversary of WTO. The Nairobi package consists of six ministerial decisions on agriculture, cotton and issues related to the least developed countries, which includes abolishing of farm related export subsidies and extending the waiver period regarding preferential treatment for additional four years or until 31<sup>st</sup> December 2030. The waiver, adopted in December 2011 and runs for 15 years.

**Table-I Ministerial Conferences of WTO**

Uruguay Round	1986-1994
WTO	1 <sup>st</sup> January, 1995
Ist WTO Ministerial Conference, Singapore	9-13 December, 1996
IInd WTO Ministerial Conference, Geneva	18-20 May, 1998
IIIRD WTO Ministerial Conference, Seattle	30 Nov – 3 December, 1999
IV WTO Ministerial Conference, Doha	9-13 November, 2001
V WTO Ministerial Conference, Cancun	10-14 September, 2003
VI WTO Ministerial Conference, Hongkong	13-18 December, 2005
VII WTO Ministerial Conference, Geneva	30 Nov – 2 December, 2009
VIII WTO Ministerial Conference, Geneva	15-17 December, 2011
IX WTO Ministerial Conference, Bali	3-6 December, 2013
X WTO Ministerial Conference, Nairobi	15-19 December, 2015

<sup>7</sup> [www.choike.org](http://www.choike.org) visited on 25 December, 2015.

Since its establishment, the WTO has been a source of controversy. The policies of WTO impact all aspects of society and planet but it is not a democratic and transparent institution. It is alleged that WTO is not an impartial organization but it has a systematic bias towards the Multinational Corporation and developed countries. The opponents of WTO are of the view that the main agenda behind the organization is to take away powers from the ordinary citizens and law makers and vest it with the non-elected bureaucracy.

### **Trade in Services**

Before GATS came into existence, GATT was an international trade treaty that worked to remove or reduce barriers from international trades in goods. Prior to Uruguay round, services were considered to have less scope for trade expansion than goods, due to existence of technical, institutional and regulatory barriers.

With the beginning of 21<sup>st</sup> century the global economy witnessed significant structural changes in service sector rather than simultaneous growth in primary secondary and tertiary sectors. The reason behind the development of service sector is the development of sophistication in information technology. Since 1980s the share of service sector in the real GDP in India has also surpassed that of agriculture and industry.<sup>8</sup> No doubt, the dynamics of service sector has infused new growth impulses stimulating investment, income, consumption and employment.<sup>9</sup>

The importance of GATS can be judged from the growth witnessed in world trade in commercial services. In the year 2013, the growth in the export of world's total commercial services was 8% (US\$ 4,625 billion) and in the import of commercial services was 4% (US\$ 4,340). India's export of commercial services grew at 5% in 2013 and reached at US\$ 153 billion. India's commercial services imports was US\$ 127 billion in 2013 witnessing a negative growth of (-)1% in 2013. During 2013, India ranked sixth in export of services and 7<sup>th</sup> in import services.<sup>10</sup>

Furthermore world exports of commercial service amounted to US\$ 3300 billion in 2007, after growing on average around 8.5% per year in value terms since 1980. Trade in commercial services grew faster than trade in goods during the period.<sup>11</sup>

The current importance of services can easily be understood as it represent more than two third of World Gross Domestic Product (GDP). The share of services value added in GDP tends to gain significantly.<sup>12</sup>

The growth in the service sector is expected to get multidimensional benefits from development of services due to the access to world class services. Benefits relating to employment also are going to be manifold with the country and overseas for the professionals. Consumer will also reap benefit from trade in services as it widens the choice for them which ultimately leads to lower prices and better quality. In all probabilities, it

<sup>8</sup> GDP

<sup>9</sup> Anil Kumar Thakur & Nageshwar Sharma (eds) WTO and India 224, Deep & Deep Publications Pvt. Ltd., New Delhi, 2007

<sup>10</sup> Commerce.nic.in>trade>faqs\_gats visited on 11.11.201.

<sup>11</sup> Measuring trade in services; World Trade Organization, www.wto.org. visited on 15<sup>th</sup> January.

<sup>12</sup> Ibid

leads to technology transfer and brings in new skills because of Foreign Direct Investments (FDI).

Prior to the Uruguay Round, services were considered to have less scope for trade expansion than goods due to existence of technical, institutional and regulatory barriers with the development of new transmission technological facilitating the supply of services (e.g. satellite communication, e-banking; tele-education), the opening of monopolies in various countries (e.g. telecommunication) and gradual liberalization of sectors which were earlier state regulated like transport, banking and insurance and simultaneous changes in consumer, preferences, enhanced the “tradability” of services. These developments increased international services flows and created a similar need for multilateral disciplines as in the area of goods. Thus there was a need to create a credible and reliable system of international trade rules, which ensured fair and equitable treatment of all countries on the principles of non-discrimination.

Five years of studies, discussions, explorations and negotiations at Uruguay Round resulted in GATS and was enforced on 1 January 1995. The multilateral legal instruments resulting from Uruguay Round were treated as a single agreement. India also signed all the WTO agreement under single rule and GATS is a part of this whole package. The main idea of GATS is based on the assumption that transparency and progressive liberalization service as a means of promoting economic growth and the development of developing countries and the whole economy.<sup>13</sup>

### **GATS**

Although the goal of decreasing the barriers that hinder economic growth applies to both goods and services, the mechanism of dealing with each of them differs; reduction or abolishment of tariff (as is the case of GATT) cannot be applied to the services.<sup>14</sup> Therefore GATS is more about rules regulating the conditions under which foreign services and service suppliers are allowed to operate in domestic markets and about discrimination they have to face there.<sup>15</sup>

The GATS, an agreement that is proclaimed to be disciplinary, rule based, transport, accountable development friendly and even democratic provides a comprehensive, a legally enforceable, multilateral frame work of principles and rules governing international trade in services with a view to expansion of free trade under conditions of transparency and progressive liberalization through multi-lateral negotiations.<sup>16</sup> The scope of GATS is wide, they cover all measures effecting trade in services with two exception GATS excludes “services supplied in exercise of governmental authorities”<sup>17</sup> which means any service which is supplied neither on commercial basis, nor in competition with one or more service suppliers. Further air transport services are exempted from coverage measures affecting air

<sup>13</sup> T.P. Steward (ed) The GATT Uruguay Round. A negotiating history (1986-1994). The Hague Klumer Law International.

<sup>14</sup> Ales Vlk, Higher education and GATS regulatory consequences and stakeholders responses 2006; Centre for Higher Education Policy Studies (CHEPS), Twente University. Printed by UNITISK, Czech Republic Published by CHEPS/UT.

<sup>15</sup> J. Arkell. GATT and services. Economic Affairs, November, 1992 p 24-26.

<sup>16</sup> B.G. Tilak Jandhyala: Trade in Higher Education: The role of general agreement on trade in services (GATS) UNESCO: International Institutes for Educational Planning Pg 32.

<sup>17</sup> General Agreement on Trade in services Art 1(3)

traffic rights and services directly related to exercise of such rights.<sup>18</sup> Services under GATS are defined broadly and are classified under 12 international trading sectors:

1. Business services (including professional and computer services).
2. Communication services.
3. Construction and Engineering Services.
4. Distribution services (e.g. agents, wholesale and retail trade and franchising)
5. Education services.
6. Environment services.
7. Finance (including insurance and banking)
8. Health related and social services.
9. Tourism and travel services.
10. Recreational, cultural and sporting services.
11. Transportation services (including maritime, water ways air, road transport services)
12. Other services not elsewhere classified.

### **The 28 Articles of**

GATS basically consists of three inter-related parts. The first part consists of the agreement which is known as framework agreement. It comprises of the rules which are applicable on all member states. The framework agreement is categorized into six parts:

- i) Scope and definition
- ii) General obligations and disciplines
- iii) Specific commitments.
- iv) Progressive liberalization.
- v) Institutional provisions.
- vi) Final provisions.

The second part consists of sectoral annexes which are unique to specific economic sectors and they are integral part of the agreement. The annexure dealing with specific sectors;

- 1) Exemptions
- 2) Movement of natural person
- 3) Air transport services
- 4) Financial services
- 5) Maritime services
- 6) Telecommunications

The third part of GATS comprises of National Schedules of specific commitments.

### **Part I – Scope & Definition**

- 1.1 Services are defined in Paragraph 3(b) of Article 1 as including any service in any sector. All sectors are covered, including possible future services, but there are certain sectors where not all the major states have to commit specifically e.g. audiovisual services. Services provided to the public in exercise of governmental authority are excluded from the coverage of GATS. This exception is however limited to the extent that where government acts on commercial basis and / or as competitor with other

<sup>18</sup> GATS: Annex on Air Transport Services.



suppliers, its activities are treated like any those of a private player. This also includes state-owned commercial enterprises which are covered try GATS general obligations.<sup>19</sup>

**1.2** Trade in services<sup>20</sup> is defined as supply of a service.

- a) From the territory of one member into the territory of other member.
- b) In the territory of one member to the service consumer of any other member.
- c) By a service supplier of one member, through commercial presence in the territory of any other member.
- d) By a service supplier of one member, through presence of natural persons of a member in the territory of any other member.

These are usually referred to as four modes of delivery. The four modes of supply identified in GATS are essentially based on trade data reflecting the most commonly used ways established in the trade of services in the international market so far.<sup>21</sup> The four modes are however interdependent.

**1.2.1 Cross border supply** – Mode I – cross border supply refers to a situation, where the service crosses the border, with neither the consumer moving nor the supplier establishing himself abroad. For instance, an architect sending his architectural plan through electronic mail or through transmission of computer diskette. In this case, trade in services takes place which is equivalent to cross border movements of goods.

**1.2.2 Consumption abroad** – Mode II – In this particular mode the consumption refers to a situation where the consumer crosses the border of another member country to consume the services. This can be applied to almost any services especially tourism industry.

**1.2.3 Commercial presence** – Mode III – Commercial presence implies the supplier crosses the border to establish a territorial presence (a legal presence) abroad, through which intends to provide a service. Commercial presence is defined as “any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) creation, or maintenance of a branch or representative office”.<sup>22</sup> These, while an explicit “right of establishment was considered by some counties the concept of commercial presence, was retained in equivalent of the concept of establishment. The concept covers matters relating to pre and post establishment. The only restriction: the “commercial presence” is only authorized for supplying a service. Protection will be provided up to the extent of supplying of service or services sector covered by the host country (specific commitments).

**1.2.4 Movement of natural persons** – Mode IV – In this mode service is delivered through persons of a territory temporarily entering the territory of another member country. This mode pertaining to individuals’ entry into the sovereign territory of other state is

<sup>19</sup> www.oecd.org. visited on 1<sup>st</sup> January, 2014

<sup>20</sup> The GATS Article 2

<sup>21</sup> Rohini Sahni and Sumita Kale: GATS and Higher Education – The Journey so far, Occasional Papers Series: 1, Department of Sociology, University of Pune 2004.

<sup>22</sup> GATS: Article 25(d)

a sensitive issue. Natural person are service suppliers (self employed) or foreign service suppliers. There immigration and access to the employment can be regulated by reserving the rights with member countries as per the Annexure of movement of natural persons.

2. The general obligations of GATS which apply to all member states are:

**2.1 Most Favoured Nation Treatment (MFN):** Favour one favour all. MFN means treating one's trading partners equally.<sup>23</sup> Under GATS, if a country allows foreign competition in sector, equal opportunities in that sector should be given to service providers from all other WTO members.<sup>24</sup> It is applied to even those countries which have made no specific commitment to provide access to foreign companies in its own market. MFN applies to all services, but some special temporary exemptions have been allowed. This exemption exists in the form of Article-II exemptions. The member countries were allowed to schedule exemptions at the time of entering into WTO agreement. These exemptions are subject to review and should not last for more than 10 years in principle.

**2.2 Transparency:** GATS requirement is that its member states publish their regulations affecting trade in services, that they notify the council for trade in services of any relevant changes, and that they respond promptly to request for information from other members.<sup>25</sup>

**2.3 Other unconditional obligations:** They include the establishment of administrative review and appeals, procedures and disciplines on the operation of monopolies and exclusive suppliers.

'GATS follows a positive list approach under which each member is expected to undertake specific liberalization commitments through a process called "scheduling". Each member states identifies the service sectors/sub sector and modes of supply in which it is willing to make commitments. Then the member inscribes the condition under which it will allow services and service suppliers access to its market. This is done by indicating limitations it wishes to impose on market access and national treatment while granting the access. Thus, national treatment is not mandatory in GATS but is negotiated on a sector to sector basis.<sup>26</sup>

### 3. Specific Commitments

**3.1 MARKET ACCESS:** GATS requirement that a WTO member state accord to services and service suppliers of other member states treatment not less favourable than that listed in its GATS schedule.<sup>27</sup> Article XVI furthermore enumerates the measures which a member state should not maintain unless otherwise specified in its schedule.

**3.2 NATIONAL TREATMENT:** "GATS requirement that a WTO member state accord to services and service suppliers of other member states treatment no less favourable

<sup>23</sup> India is Business, ITP Division, Ministry of External affairs, Government of India.

<sup>24</sup> Ibid.

<sup>25</sup> August, R (2000) International Business Law. Upper Saddle River, NJ. Prentice Hall pg 418

<sup>26</sup> Supra, 22.

<sup>27</sup> Article XVI – General Agreement on trade in services.

than what the member grants its own like services and service suppliers.<sup>28</sup> It means that if a country is allowed to supply services in one's country, there will be no discrimination between the local and foreign service providers.

This principle will be applied when the country has made specific commitment. It will be applied only in the sectors so specifically committed even though the service is permitted under liberalized regime. GATS does allow limitations on national treatment to be taken fully or partially in the sectors where it has made specific commitment for market access.

#### **4. Progressive Liberalization**

**4.1** In pursuance of the objective of GATS, to open as many service sectors to its members for market access, agreement of progressive liberalization was included in part IV of GATS. "Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into the force of the WTO agreement and periodically thereafter with a view of achieving a progressively higher level of liberalization. Such negotiation shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interest of all participants on mutually advantageous basis and to securing an overall balance of rights and obligations."<sup>29</sup>

#### **4.2 Schedules Of Specific Commitments**

In Uruguay Round, it was decided that each member will table schedule of specific commitments containing horizontal commitment and sector specific commitments with respect to each sectors or subsectors, limitations on market access and on limitation to be stated across the modes of supply.<sup>30</sup> Schedules of specific commitments shall be annexed with the agreement with respect to sectors where such commitments are undertaken, each schedule shall specify.

- a) Terms, limitations and conditions on market access,
- b) Conditions and qualifications on national treatment
- c) Undertaking relating to additional commitments
- d) Where appropriate the time frame for implementation of such commitments.
- e) The date of entry into force of such commitments.<sup>31</sup>

#### **5. Institutional Provisions**

**5.1 Consultations:** Each member shall accord sympathetic consideration to, and shall afford adequate opportunity for, consultations regarding such representations as may be made by any other member with respect to any matter affecting the agreement. The dispute settlement understanding (DSU) shall apply to such consultation.<sup>32</sup>

**5.2 Dispute settlement and enforcement:** If a member fails to carry out its obligations or specific commitment under the agreement, in that case matter may be referred to DSU for mutually satisfactory resolution. If the DSB considers that the circumstances

<sup>28</sup> Article XVII General Agreement on trade in Services

<sup>29</sup> Article XIX(1) GATS

<sup>30</sup> Article XX GATS

<sup>31</sup> Article XX(1) GATS

<sup>32</sup> Art XXII (1) GATS

are serious enough to justify such action, it may authorize a member or members to suspend the application to any other member or members of obligations and specific commitments in accordance with article 22 of the DSU.

**5.3 Council for Trade in Services:** For the effective implementation of this agreement and furthering its objective the provision of council for trade in services was introduced the council may establish such subsidiary bodies as it considers appropriate for effective discharge of its functions.<sup>33</sup>

## VI. Final Provisions

define the terms for the purpose of this agreement and also contains the provisions relating to Denial of Benefits to the supply of service, if it establishes that the service is supplied from or in the territory of a non-member or of a member to which the denying member does not apply the WTO agreement.<sup>34</sup>

GATS allows for progressive liberalization, as it is hoped that, under the GATS, market access for services will eventually reach a state of no barrier between countries. As article XIX of GATS directs the negotiations to reduction and elimination of the adverse effects on trade in services of measures as means of providing effective market access. The general procedure, involving the 'bottom-up'<sup>35</sup> aspect of the GATS begins with countries voluntarily submitting their commitments.<sup>36</sup> It is not mandatory for country to open its markets in all services. The members countries, through bargaining in special sessions of the council for trade in service, modify their offers suitably and when an agreement is by the end of the round of negotiations, the offer becomes commitment that are legally binding on the respective countries<sup>37</sup> unless they are withdrawn before the end of the round. For a period of time, a country can also elect to have exemptions within limits. This voluntary approach to national commitment and flexibility, it offers in setting up of time frame, specifying limitations, and so forth are considered to be most important features of GATS.<sup>38</sup>

### Controversial issues in GATS

The scope of GATS is very broad and covers any measure taken by any govt., at any level, which affects the supply of service. At the first, GATS appears to protect public service system and authority of governments to regulate the systems. There are few general exclusions to the Agreements broad coverage including:<sup>39</sup>

1. An exemption of protect "essential security interest" (Art XIV) which, uniquely, is self-defining and very broad.

<sup>33</sup> Article XXIV (1) GATS

<sup>34</sup> Article XXVII (1) GATS

<sup>35</sup> National treatment and market access rules apply only to sectors or subsectors that governments have listed in their country schedules.

<sup>36</sup> B.G. Tilak Jandhyala: Trade in higher education: The role of the general agreement on trade in service (GATS) UNESCO: International Institute for Educational Planning, Paris 2011.

<sup>37</sup> Ibid

<sup>38</sup> Scott Sinclair (2000) GATS: How the World Trade Organizations New 'Services' Threatens Democracy, can Octawa: Canadian Centre for Policy Alternatives

<sup>39</sup> GATS and Public Service Systems; Ministry of Employment and investment, British Columbia pg. 3

2. Other exemptions, each of which is subject to strict limitations. These include, for example, exemptions to “maintain public order” and to protect human, animal or plant life or health” (Art XIV)
3. An exclusion for services that are supplied “in the exercise of governmental authority” (Art 1 : 3).

Both proponents and critics agree that the scope of GATS is very broad. The GATS applies to all measures affecting “trade in services” broadly defined. It covers measures taken by all levels of government, including central, regional and local governments. In other words no government action, whatever its purpose protecting the environment, safeguarding consumers, enforcing labour standards, promoting fair competition, ensuring universal service or any other end is in principle, beyond GATS scrutiny and potential challenges.

Not limited to cross border trade, it extends to every possible means of providing a service internationally including investment. While the broad application, does not mean all services related measure violate the treaty, it does mean that any regulatory or legislative initiative in any WTO-member country must now be vetted for GATS consistency or risk possible challenge.

The treaty cover “any service in any sector” with only limited exception no service sector is excluded a priori. This all-inclusive framework binds members governments to certain GATS rules that already apply across all sectors – event those where no specific commitments have been made. It also means that all service sectors are on the table in ongoing, continuous negotiations.<sup>40</sup>

The exclusion of governmental services applies to those governmental services which are provided neither on commercial nor on competitive basis. These critical terms are left undefined. The GATS governmental authority exclusion – which claims to protect public services – is at less, unclear and subject to confiding interpretations. At worst, if narrowly interpreted by dispute panels, the exclusion as of little or no practical effect.

Similarly, the exclusion does not apply to services that are supplied on commercial basis even where these services are supplied in the absence of competition with any other service supplier. Hence, only a small sub-set of services – more that are provided by completely non commercially absolute monopolies appear to be protected by this exclusion.<sup>41</sup>

Secondly, the agreement does not define the phrases “on commercial basis” and “in competition with one or more service suppliers”. However, the ordinary definitions of these terms are broad, making the set of service that they describe very large and the set of services falls outside them, hence outside the scope of agreement quite small. Thus, the public services supplied through complex mixture of public and private suppliers would fall outside the protective exclusion.<sup>42</sup>

GATS Article XIV emits the GATT Article XX references to measures “related to conservation of exhaustible natural resources. This commission is glaring and deliberate. It

<sup>40</sup> Scott Sinclair and Jim Grieshaber – Otto; Facing the facts; A guide to the GATS debate, Canadian Centre for Policy Alternatives 2002 Pg IV

<sup>41</sup> Ibid Pg V

<sup>42</sup> Ibid 38 Pg IV

suggests that the grounds to defend environmental protection and conservation measures are even narrower under GATS than already desultory record of GATT Article XX.<sup>43</sup> This omission could prove highly problematic, especially given the broad interpretation of GATS as covering measures aimed primarily at goods (e.g. natural resources) but affecting services.<sup>44</sup>

The third clause in GATS Article XIV contains new references to measures necessary to prevent deceptive and fraudulent practices, for the protection of personal privacy, confidentiality of data and consumer safety. These are all vital grounds for regulation, especially in the area of services. But this clause refers only to measures “necessary to ensure compliance with laws and regulations that are not consistent with GATS” This extra ordinary qualification neuters the effectiveness of the exceptions that themselves could be challenged under the GATS. In this respect, it hardly qualifies as an exception.

The final clauses under Article XIV shelter differential treatment aimed at ensuring the equitable or effective imposition or collection of direct taxes from GATS national treatment article and differential treatment that result from agreements on the avoidance of double taxation from the GATS MFN article. These attest to the bureaucratic clout of finance ministries in the international trade negotiations. GATS critics can only wish that social service, health and environmental protection advocates wielded similar influence.

In short, the national security exception is the only GATS general exception that can firmly relied upon.

### **Conclusion**

GATS is undoubtedly the most comprehensive and overarching international Agreement regulating the trade in services working under the aegis of WTO, albeit with some concerns from members especially the developing countries. All the signatories of the GATS are subject to the oversight of the WTO and could not have discriminatory policies against the foreign investors and service providers in sync with the principle of ensuring favourable competitive eco system to all. Any discriminatory practice or policy can be challenged.

However, GATS also impinges upon the domestic policies entailing public services and bring these policies under the ambit of WTO. Therefore, in a way, the core social issues like education and health have also been brought under the purview of WTO through GATS.

### **Suggestions**

- While public awareness of the GATS and its policy impact is still modest, it is rising. Citizen concern about the public policy impacts of the GATS will certainly grow as the profound significance of the agreement becomes more widely understood outside business and trade circles.
- GATS bring public service system and their regulations within WTO authority. The GATS brings many aspects of public service systems and governments regulation of these system within the sphere of WTO authority. Indeed most government measures “affecting

<sup>43</sup> Supra 40

<sup>44</sup> GATS Article, note and sinclairs 2000, op. cit. p 58

services” are subjects to GATS rules, even, in some cases, if these measures are non discriminatory and have little or no effect on international trade.

- The narrowness of the “governmental authority” exclusion is not widely recognized. Many governments may not fully appreciate the limited scope of the governmental authority.
- Assessments of GATS coverage on public service systems are warranted. These assessments may be considered important as some existing GATS obligations extend beyond international trade, reaching to the heart of governments domestic regulatory authority.
- Revisiting the “governmental authority exclusion in current negotiations to make it effective and permanent.