CHAPTER IV

WORLD TRADE ORGANIZATION
AND INDIAN SERVICE SECTOR
Unlike goods, trade liberalization in services through multilateral negotiations is a relatively new phenomenon. The Uruguay Round (UR) of trade negotiations (1986-94), which culminated into the establishment of the World Trade Organization (WTO) with effect from 1 January 1995, was instrumental in bringing this 'new' area within the ambit of the Multilateral Trade Negotiations (MTNs) for the first time. Notwithstanding the opposition posed by a number of developing countries, the UR did succeed in setting in place a sort of a framework Agreement, called the General Agreement on Trade in Services (GATS).

The GATS brought into its purview the entire gamut of the services trade, as classified into 161 service activities under 12 broad sector heads in the GATS Sectoral Classification List (W/120). However, this breadth of coverage was achieved at the cost of certain flexibilities, which aimed at taking on board some of the concerns of developing countries regarding the implications of bringing the services trade under the purview of the multilateral negotiations. These flexibilities made the GATS one of the more development friendly agreements under the WTO. One of the key flexibilities embedded in
the GATS is the discretion that a Member country of the WTO enjoys in deciding which of the services sectors it wants to Schedule for undertaking liberalization commitments under the GATS rules. This is often termed a 'positive list' approach or a 'bottom-up' approach.

BACKGROUND OF THE AGREEMENT

Historically trade agreements involved reducing tariffs, eliminating trade barriers like quotas on imports on goods produced in a country and sold elsewhere. However, this has changed drastically in recent years in the North as manufacturing has ceased to be profitable because of global competition. Presently, the services sectors have expanded and are growing in importance to the North. According to the EC 'the service sectors accounts for two thirds of the Union's economy and jobs, almost an Article of the EU's total exports and a half of all foreign investment flowing from the Union to other Articles of the world.'

In the US, more than a third of economic growth over the past five years has been because of service exports. In the words of Charlene Barshefsky, the importance of the services trade to the US in 1998 was '$265 billion in services exports supporting four million jobs...an indicator of how much we can achieve in an open market. The World Bank estimates that in less developed countries alone, infrastructure development involving some private backing rose from US$15.6 billion in 1990 to $120.0 billion in 1997. Some 15 per cent were direct foreign investment in public schemes.

Until the last years of twentieth century, the exchange of services across national boundaries did not figure promptly in international trade

---

relations. Services were not mentioned in the GATT negotiated in the years following the end of World War II. Although broader Havana Charter noted as one of its purposes to encourage the demand of services and as well as goods, it did not provide substantive provision for exchange of services. The Treaty of Rome, 1956 which established the EEC was the first International Agreement dealing with liberalization of trade in goods and services. During the Tokyo Round, the effort to include services was not intensively perceived.

Actually, economists generally viewed services as not tradable or—even worse—as non-productive economic activities unworthy of policy focus. Academic experts concentrated on employment patterns in services or on services as supports to manufacturing, ignoring the direct contributions services industries made to domestic production and foreign exchange earnings. Government export development planners tended to target goods, so Government agencies were largely unfamiliar with the activities of their own services exporters. National statistical agencies did not collect detailed trade statistics on services.

Services especially transportation, travel and international finance — have been an important Article of the trade environment for a long time. But most trade policy-makers assumed either that the services trade flows were too small to be of importance, that virtually all traded services originated in developed countries, or that focusing on liberalizing the trade of goods would automatically result in expanded trade in services.

With no trade agreements to provide clarity about ground rules, services enterprises were left to expand internationally by being adaptable and learning to manage despite unpredictable and often blatantly discriminatory regulatory environments.

Most services have traditionally been classed as domestic activities difficult to trade across borders. Some service categories have been viewed
as domains for Government ownership and control, given their infrastructural importance and susceptibility to national monopolies. A third important group of sectors, including health, education and water services are considered in many countries as governmental responsibilities to be tightly regulated and not left to the vagaries of markets.

Nevertheless, some service sectors like international finance and maritime transport have been largely open for centuries, as necessary components of merchandise trade. Other large sectors have undergone fundamental technical and regulatory changes in recent decades, opening them to private commercial article and reducing barriers to entry. Development of information technologies and the internet have helped introduction of a range of internationally tradable service products including 'e-banking', 'telemedicine', 'distance learning' and such blights as international gambling, 'spam' and 'pornography'. Governments are increasingly being influenced to expose former monopoly services to international competition. At the same time, powerful countervailing arguments and civil-society movements have been pressing for fuller accountability and legislative restriction of potentially unethical market and corporate behaviours.

Beginning in the late 1970s, private-sector groups in the United Kingdom (British Invisibles) and the United States of America (the Coalition of Service Industries) lobbying their Governments for a more level playing field in accessing foreign markets. Therefore, in the GATT Ministerial Meeting of 1982 the issues of services for the first time placed on the Agenda to consider whether any multilateral action in the shape of services is appropriate and desirable. The developed countries mainly favoured the inclusion of services in the GATT system; on the other hand, the developing countries strongly opposed the inclusion of service sector in the GATT system. However, the pressure from developed countries force them to turn around. When the Uruguay Round was launched in Punta del Este in 1986 a separate group on negotiation on services was created “with a view expansion of such trade under condition of transparency and progressive liberalization subject
however prospects for the policy object of national laws and regulations applying to services. Since the Articles of Uruguay Round were not sure of the outcome of the negotiation on services, the negotiation was Article separately though linked to original system of GATT. The rules and discipline governing trade in services were not in place until the Dankel Draft of December, 1991 and negotiations about commitment did not begin in earliest until 1992. The General Agreement on Trade in Services (GATS), negotiated during the Uruguay Round as Article of a single undertaking is the first set of multilaterally agreed and legally enforceable rules and disciplines relating to international trade in services.

The basic objectives of the GATT given in the Preamble are:

- Expansion of such trade.
- Condition of transparency.
- Progressive liberalization as an objective of promoting growth of all trading Articles.

THE SCOPE OF THE AGREEMENT

The scope of the GATS is determined by Article I of the Agreement. Accordingly, the GATS apply to "measures by Members affecting trade in services". The term 'trade in services" is defined as supplying services in any of the four modes; and the term 'measures of Members' as measures of Governmental and of non-Governmental entities (Article:3(a)). The crucial definition concerning the kind of services covered by the GATS can be found in Article I: 3 GATS. For the purposes of this Agreement:

---

2 Article:1
3 Article:2
services includes any service in any sector except services supplied in the exercise of Governmental authority;

a service supplied in the exercise of Governmental authority means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

The substantive scope of GATS depends on how the notion of services supplied in the exercise of Governmental authority is understood. It must meet two cumulative conditions: It must neither be supplied on a commercial basis nor in competition with one or more service suppliers. If a service is provided on a non-commercial basis but in competition with other suppliers or on a commercial basis but without competition, it is not a service supplied in exercise of Governmental authority. The scope of the GATS therefore depends on an understanding of the notions 'supplied on a commercial basis' and 'supplied in competition with one or two services suppliers'.

It is important to notice the relationship between the scope of the GATS and the scope of Article I: 3(b) and I: 3(c): If a broad definition of 'commercial basis' and 'in competition' is adopted, the notion of Governmental authority is narrow and almost all services would be covered by GATS. If a more narrow interpretation of 'commercial basis' and 'in competition' is adopted, the scope of 'Governmental authority' is larger and more services are not covered by GATS.

For example: Article I: 3(b) states "Services" includes any service in any sector except services supplied in the exercise of governmental authority. It may appear therefore that in countries where health care is mostly provided by Government may be exempted from implementing GATS in the health sector." However the Article I: 3(c) further clarifies that "a service supplied in the exercise of governmental authority," means any service that is supplied neither on a commercial basis nor in competition with one or more service suppliers.

4 Article I: 3(b)
suppliers. In most countries health services are also provided by the private sector and even the Government sector charges for certain services. Therefore, under these sections of the agreement, the health sector is invariably covered by GATS. Unlike many other services, however, the direct impact of liberalization on the priorities of the public health sector makes this kind of trade a critical issue in terms of people's right to health.

For purposes of structuring their commitments, WTO Members have generally used a classification system comprised of 12 core service sectors:

- Business services (including professional services and computer services)
- Communication services
- Construction and related engineering services
- Distribution services
- Educational services
- Environmental services
- Financial services (including insurance and banking)
- Health-related and social services
- Tourism and travel-related services
- Recreational, cultural and sporting services
- Transport services
- Other services not included elsewhere

These sectors are further subdivided into a total of some 160 sub-sectors. Under this classification system, any service sector may be included in a Member's schedule of commitments with specific market access and national treatment obligations. Each WTO Member has submitted such a schedule under the GATS.

There is only one sector-specific exception to the agreement's otherwise comprehensive coverage. Under the GATS Annex on Air Transport

---

5 Document MTN.GNS/W/120
Services, only measures affecting aircraft repair and maintenance services, the selling and marketing of air transport services, and Computer Reservation System (CRS) services have been included. Measures affecting Air Traffic Rights and directly-related services are excluded. This exclusion is subject to periodic review.

Another blanket exemption applies to "services supplied in the exercise of Governmental authority" (Article I: 3(b)). The relevant definition specifies that these services are "supplied neither on a commercial basis, nor in competition with one or more service suppliers" (Article I: 3(c)). Typical examples may include police, fire protection, monetary policy operations, mandatory social security and tax and customs administration.

FOUR MODE OF SUPPLY

The GATS is much more than a trade Agreement. It covers every possible way of providing a service internationally, including through foreign direct investment and labour mobility. For the purpose of the agreement a comprehensive definition of trade in services in terms of four different modes have been provided in the GATS. These modes are the basic rules in the area of trade in services and help to better understand the specific problems and regulatory issues arise in international trade in service. In addition, it also helps in understanding the specific commitments that members have undertaken in their schedules. It is also the key to much of the jargon commonly used by negotiations and others at home with GATS.

Mode1: Through this mode the supply of service from the territory of one member to the territory of another. In GATS it is known as Cross Border Supply and Services. It is in many ways, the most state forward form in trade.

---

6 Barmardm. Hoekman: market access through multilateral Agreement from goods to services 15 world economy 707 [1992]
7 Guide to the Uruguay Round Agreement, the WTO Secretariat Cluwer, law international, the house, London, Boston 164 (1999)
8 Article1:2a
in services because it resembles the familiar subject matters of the GATT. This mode abolishes the geographical boundaries between the service provider and the consumer because in this mode neither the service supplier nor the service commander has to move, only the service move across the national frontiers. It covers all services provided through international mail, phone, fax, teleconference, and the Internet. In the case of education, this would apply to distance education provided through the use of telephones or the internet.

**Mode 2:** Mode 2 is the supply of a service “in the territory of one member to the service consumer of any member”. This is known as Consumption Abroad. Under this mode, consumer move to the supplying country per haves for tourism or to attend educational institute, for repairing of attain track or air craft outside its home country. Unlike the Mode 1 it does not require the service supplier to be admitted to the consuming country.

**Mode 3:** This refers to services directly provided by a supplier of one member in the territory of another. This is known as Commercial Presence. This covers all foreign direct investment related to services, such as the establishment of foreign education providers, foreign branch campuses, foreign subsidiaries, or programmes brunch or agencies of banks, legal firms, etc. and courses offered in local markets by foreign providers. This mode is most important in terms of future development, a large number of proportion of service transitions required that the service provider and the consumer be locate at the same place.

**Mode 4:** This mode of service is provided through the temporary entry of people from one Member country to another, such as courses offered in another country by foreign teachers. This is known as Presence of Natural Persons.

---

9Article 1:2 b
10Article 1:2 c
11Article 1:2 d
Under Mode 4, there are commitments that cover four categories of service personnel, including:

- Services salespersons (e.g. insurance salesperson)
- Intra-corporate transferees (e.g. executives, managers and specialists)
- Business visitors (e.g. personnel engaged in establishing a foreign office or subsidiary)
- Independent contract suppliers (e.g. doctor or architect)

**ASPECTS OF MODE 4**

Various aspects relates to Mode 4 are:

- Workers under Mode 4 are not granted access to the local labour market. They must either be employed by a foreign firm with commercial presence where the service is provided or be under a contract for the provision of a service. They cannot be unemployed—visa and right to stay dependent on employment.

- One interpretation of the GATS language on Mode 4 would allow local firms to import foreign workers through contracting with independent Foreign Service providers or subcontracting with foreign firms.

- Temporary currently undefined, but WTO Members have agreed on periods ranging from a few weeks to three to five years.
CURRENT MODE 4 COMMITMENTS

The number of workers, occupations and sectors committed under Mode 4 is up to the individual countries. Developing country Governments complain that, current commitments are limited to highly skilled occupations such as doctors, lawyers, and company executives. Mode 4 currently offers little more than existing wealthy country visas, since these sectors are already favoured by these systems.

PROPOSED EXPANSION OF MODE 4

Some developing country Governments want to expand independent contract suppliers and intra-corporate transferees' services covered under Mode 4 to include medium and low-skilled workers, such as domestic or construction workers, thus covering sectors in which they hold a competitive advantage. Because the current framework allows for only temporary movement of workers across borders to provide services, and their visa and right to stay are dependent on employment within the firm or contract under which the worker entered the country, this may amount to a global guest worker program. High-level executives, managers, business visitors and others engaged in business negotiations or overseeing foreign operations are not "guest workers," as they are in positions of authority and are well-compensated.

THE WTO AND PROTECTING HUMAN RIGHTS

To date, labour standard rules remain firmly outside WTO rules—leaving the responsibility to the International Labour Organization (ILO), which lacks meaningful enforcement mechanisms. Given this, expanding the GATS Mode 4 to manage the movement of temporary low and medium-skilled workers must proceed with great caution—especially when civil society and
the migrant communities themselves are excluded from the process. Under GATS negotiations, Government negotiators limit Mode 4 commitments to suit their local labour needs, not to create a general international standard for legal labour migration. The result will likely be a specialized guest worker programme. Between the U.S. and Mexico from 1942-64, are often proposed as a way to reduce irregular labour migration and protect migrant worker rather than a broad improvement in the mobility and rights of workers.

However, the above definition is significantly broader than the Balance of Payments (BOP), concept of services trade. While the BOP focuses on residency rather than nationality i.e., a service is being exported if it is traded between residents and non-residents – certain transactions falling under the GATS, in the case of Mode 3, typically involve only residents of the country concerned.

Commercial linkages may exist among all four modes of supply. For example, a foreign company established under Mode 3 in country A may employ nationals from country B (Mode 4) to export services cross-border into countries B, C, etc. Similarly, business visits into a (Mode 4) may prove necessary to complement cross-border supplies into that country (Mode 1) or to upgrade the capacity of a locally established office (Mode 3).

**GENERAL OBLIGATION AND DISCIPLINE**

The second Article of GATS deals with general obligations and disciplines which are the basic rules apply to all Members and all services. Many provisions of this Article are similar to the provision of GATT.

---

12Article 2
Article II deals with most favoured-nation treatment clause which has direct parallels to the centrally important Article I of the GATT. It requires that Members 'accord immediately and unconditionally to services and services suppliers of any other Member treatment no less favourable than it accords to like services and service suppliers of any other country'\textsuperscript{13} All countries whether they have state owned or privatize infrastructure should allow their market on a nondiscriminatory basis between service providers from different countries to meet the obligation of MFN treatment. The MFN obligation has been the subject matter of both the EC-Bananas\textsuperscript{14} and the Canada automobile industry\textsuperscript{15} disputes. Three issues were raised in these disputes:

a. What is the scope of MFN
b. What constitutes less favourable treatment; and
c. To what extent likeness of service suppliers is affected by the mode of supply

The Panel Report in EC-Bananas conformed that the MFN obligation applies to all services sectors and suppliers regardless of whether specific commitments have been undertaken. The Panel further conformed that this provision prohibits both \textit{de jure} and \textit{de facto} discrimination. The Panel noted that the term 'less favourable treatment' appears in both Article II and XVII of the GATS by a striking a Parallel with GATT Article III, the Panel went on to state that the term must be interpreted in Article II GATS in the manner it is elaborated in GATS Article XVII.2 and .3. On appeal the Appellate Body disagreed. The Appellate Body widen the ambit of the Panel’s ruling by

\textsuperscript{13}Article II.1
\textsuperscript{14}Europe communities, regime for the importation sale and distribution of bananas compliant by the United States, Panel Report WT/DS27 1R/USA USA adopted 25\textsuperscript{th} September 1997 DSR 1997:II as modified by the Appellate Body Report WT/DS27 1AB/R DSR 1997:II
\textsuperscript{15}Canada certain measures affecting the automobile industry Panel Report WT/DS 1391 R, WT/DS142/R adopted 19\textsuperscript{th} June 2000 as modified by the Appellate Body Report WT/139 /AB/R, WT/DS142/AB/R
pointing out that all forms *de facto* discrimination not only the one mentioned in GATS XVII are covered by GATS Article II. The two Panel Report EC-Bananas and Canada-automotive industry addressed the issue of likeness under the GATS. In the EC-Bananas, the Panel concluded that 'likeness' concepts developed in the GATT jurisprudence may carry over to GATS. In Canada-Automotive Industry, Panel confirmed this and added that services may be 'like' even if delivered by different modes of supply. In both cases the Appellate Body reversed the Panel without addressing the issue.

The GATS regime, however, contains a unique provision. Article II: 2 permit WTO Members to "maintain a measure inconsistent with paragraph I provided that such a measure is listed in, and meets the conditions of the Annex on Article II exemptions." There was an obvious reason to include this provision in the Agreement. Prior to the Uruguay Round negotiations, many countries had arranged into special reciprocal rights with other countries which they wish to honour. For this an elaborate pattern of air traffic landing rights was expressly conceded in the Annex on Air Transport Services. A more *ad hoc* instance comprises the arrangements which have been made for co-production of films in the audiovisual services sector.\(^\text{16}\)

Provision for MFN exemptions is, however, to have a more profound impact on the pattern of commitments. Legally speaking, Members are permitted to maintain measures inconsistent with MFN obligation simply by listing them. Again there are, some limits bound up with the decision to make commitments under the Agreement. The MFN exemption is not meant to attract from the commitments which a Member do make in its schedule. The Guide states, "where commitments are entered", therefore, the effect of the an MFN exemption can only be to permit more favourable treatment to be given to the country to which the exemption applies than is given to all other

---

\(^{16}\)See generally Christopher Arup, the new world trade organization Agreement, globalizing law through services and intellectual property Cambridge University 2000
Members. Where there are no commitments, however, an MFN exemption may also permit less favourable treatment to be given.\footnote{Guide legal instrument, volume 28 introduction page IV}

Thus where the entry of some commitments is considered worthwhile, the MFN exemption provides scope to reward another country on the basis of material reciprocity by making further concessions to it. The result can be characterized as a baseline of MFN with the top-up of material reciprocity. Yet, while the MFN obligation is meant to be general one, this approach to exemption allows a Member, by choosing to make no commitments, to continue to operate exclusive on a bilateral or regional basis.

Annex on Article Exemptions of GATS laid down some formal conditions for the taking of exemptions. Measures of the WTO Members which are inconsistent with MFN obligations had to be entered into lists. These lists are attached to the Annex in the treaty copy of the GATS Agreement. The GATS allowed Members to apply for new exemption after the agreement had entered into force. But these exemptions need to attract the support of three-fourths of all the Member countries. The Annex provisions are also covered with the review and termination of the exemption. Each exemption has to be terminated at one point of time. No exemption will run for more than ten years. The Council for trade in Services is charged to review all exemptions that were granted initially for a period of more than five years.

Apart from services specified in individual MFN exemption lists, the only departure from it under the GATS is among the countries that are Members of regional trading arrangements. Article V of GATS is modelled on Article XXIV of GATT, although the absence of services equivalent to import duties means that there is no distinction comparable to that between customs union and free trade areas. Article V—Rules on Economic Integration permits any WTO Members to enter into an agreement to further liberalize trade in services only with other countries that are parties to the Agreement, provided
the Agreement has 'substantial sectoral coverage', eliminates measures that discriminate against service suppliers of other countries in the group and prohibits new or more discriminatory measures. Recognizing that action to open up services market may well form part of a wider process of economic integration; the Article allows the liberalization achieved to be judged in this light. The rules covered under Article V of GATS improves on their GATT equivalents in some spheres e.g., “substantial sectoral coverage” is much more clearly defined since it disqualifies Agreements that exclude any of the four modes of supply. Further, an approved Agreement must be designed to help trade among its Members, in an overall increase in the barriers they face in trading with the group in the service sectors or sub-sectors covered. If the establishment of the Agreement, or its subsequent enlargement, leads to the withdrawal of commitments made to non-Members, there must be negotiations to provide appropriate compensation. No compensation, on the other hand, is due from any non-Members for any trade benefits they gain from the Agreement. Areas exception from the MFN principle as far as the movement of persons is concerned is permitted by Article V bis of the GATT.

Article V bis allows countries to take Article in agreement which establish full-integration of labour markets.

“GENERAL TRANSPARENCY” AND OTHER "GOOD GOVERNANCE" OBLIGATIONS

Sufficient information about potentially relevant rules and regulations is critical to the effective implementation of an Agreement. Article III ensures that Members publish promptly all measures pertaining to or affecting the operation of the GATS.\(^{18}\) Moreover, there is an obligation to notify the Council for Trade in Services at least annually of all legal or regulatory changes that significantly affect trade in sectors where specific commitments have been made.\(^{19}\) Members are also required to establish enquiry points which provide specific information to other Members upon request. Elaborately we can say,
Members also have a general obligation to establish an enquiry point to respond to requests from other Members. Moreover, pursuant to Article IV:2, developed countries (and other Members to the extent possible) are to establish contact points to which developing country service suppliers can turn for relevant information.

However, there is no requirement to disclose confidential information. Transparency is inherently desirable. However, two issues arise in the context of strengthening transparency disciplines. First, while transparency can help to reduce concealed protectionism, transparency alone cannot eliminate it. Second, while it is important to recognize the many benefits of enhanced transparency, it is also important to acknowledge that, its pursuit in greater quantities may also be costly.

For instance, ex ante transparency, in the form of obligations providing for consultations with all interested countries prior to the enactment of a new law or regulation will almost certainly have a higher administrative cost than ex post transparency, whereby new regulations and regulatory decisions are made public once taken. At the same time, prior notification requirements may lead to greater political legitimacy of laws and regulations deriving from broad public consultations, and less scope for protectionist capture and inefficient regulatory design.

Accordingly, any new multilateral disciplines on transparency must be based on a careful assessment of the benefits and costs, both globally and nationally. An empirical investigation could be based on how the choice of optimal levels of transparency is today made at the national level.

---

20 Article III
DOMESTIC REGULATION AND MUTUAL RECOGNITION

Non-tariff barriers to the services sectors are often prohibitive. Article VI and VII of GATS lay the detailed guidelines for WTO Members to identify and negotiate the reduction of specific service sector non-tariff barrier such as requirement for licensing and de-competitive business practices and activities of monopoly providers. The Members to the basic telecommunications negotiation set out guidelines in these areas.

Pursuant to Article VI: 1, measures of general application are to be administered "in a reasonable, objective and impartial manner". If the supply of a Scheduled service is subject to authorization, Members are required to decide on applications within a reasonable period of time.

Article VI: 5 seeks to ensure that specific commitments are not nullified or impaired through regulatory requirements (licensing and qualification requirements and technical standards) that are not based on objective and transparent criteria or are more burdensome than necessary to ensure quality. The scope of these provisions is limited, however, to the protection of reasonable expectations at the time of the commitment. Article VI: 4 mandate negotiations to be conducted on any necessary disciplines that, taking account the above considerations, would prevent domestic regulations from constituting unnecessary barriers to trade.

Article VI: 6 requires Members that have undertaken commitments on professional services to establish procedures to verify the competence of professionals of other Members.

22Article VI: 3
Henceforth the only work has been undertaken in the context of professional services and more on a priority basis in the accountancy sector.\textsuperscript{23} A working Article has been established to prepare guidelines for mutual recognition of accountancy qualifications. These guidelines are not legally binding as they have not been integrated into the GATS. The GATS Council has also adopted disciplines on domestic regulations in the account sector.\textsuperscript{24}

Article VII of GATS addresses licensing criteria as technical barriers to trade. This GATS Article distinguishes between the substance of the criteria and the procedure by which the criteria are being implemented. The Article is silent on the issue that what the specific criteria or standards of operation must be. So it is less strict than the technical barriers to trade limits under the GATT. The Article addresses the issue of the recognition by a host Member of education or experience obtained, requirement made or licencees or certification granted in another Member. Such recognition is permitted and may result from unilateral recognition by the host Member or from the other country concerned. The Member recognizing licences and certification obtained in another Member must give other interested Members the opportunity to negotiate their accession to the agreement on recognition or to demonstrate that the licences or certification obtained in their territory also be recognized.\textsuperscript{25} Further Member shall not discriminate between countries in the application of its standard or criteria from the authorization, licensing or certification of service suppliers or disguised restriction on trade in services. Recognition should be based on mutually agreed criteria.\textsuperscript{26}

\textsuperscript{23}WTO working Article on professional services S/WPPS/W/1, 12, 12/REV.1, 14 and 4/REV.1
\textsuperscript{24}WTO discipline on accounts regulation in the accountancy sector S/L 84 17 December 1988
\textsuperscript{25}GATS Article VII Paragraph 3 and 5
\textsuperscript{26}GATS Article VII Paragraph 3 and 5
MONOPOLIES AND EXCLUSIVE SERVICE SUPPLIERS

Article VIII is an imposition on Member countries to ensure that monopoly suppliers of services in their territory do not, in the supply of monopoly services in the relevant market act in a manner inconsistent with their obligation under Article II and their specific commitment. Public and private monopolies service suppliers both come under this obligation. Where a monopoly service supplier supplies services outside the scope of its monopolies rights and a Member has taken specific commitments in regard to those services, the obligation imposed on that Member is to ensure that the monopoly service supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with the Member specific commitment. These obligations are laid down aiming to preserve the integrity of specific commitment taken by a Member. If, after 1st January 1995, monopoly rights are granted with regard to services covered by a Member's specific commitment that Member must enter into negotiations with other WTO Members in order to reach into an Agreement on any necessary compensatory adjustment.

The application of the obligations described above in respect of monopoly service suppliers is also extended to cases where a Member formally or in effect authorizes and establishes a small number of service suppliers and substantial prevents competition among those suppliers in its territory. Thus, the obligations of Article VIII apply in the context of oligopolies where the competition is substantially prevented. If business practice restricts or restrains trade in services Article IX of the GATS requires consultation with

---

27 MFN treatment obligation
28 GATS VIII :1
29 Monopoly supplier of a service is defined as any person public or private that in the relevant market of the territory of a member is authorized or establish formally or in effect by that service. GATS Article XXVII (h)
30 GATS Article VIII: 2
31 GATS Article VIII:4 and XXI Paragraph 2 to 4
the view to eliminating practices which can be conducted at the request of any WTO Member. The Member addressed shall cooperate through the supply of publicly available nonconfidential information of relevance to the matter in question.\(^\text{32}\)

**PAYMENTS AND TRANSFERS**

GATS Article XI requires that Members allow international transfers and payments for current transactions relating to specific commitments. It also provides that the rights and obligations of International Monetary Fund (IMF) Members, under the Articles of agreement of the fund, shall not be affected. This is subject to the proviso that, capital transactions are not restricted inconsistently with specific commitments, except under Article XII or at the request of the Fund. Article XVI further circumscribes Members' ability to restrict capital movements in sectors where they have undertaken specific commitments on cross-border trade and commercial presence.

**SAFEGUARDS**

Though GATS laid down specific commitments but they are limited in nature and scope, therefore, emergency safeguard measures has been left to future multilateral negotiations based on the principle of nondiscrimination\(^\text{33}\) restriction to safeguard the Balance of Payment has been provided in the GATS. Provisions relating to restrictions to safeguard the Balance of Payment are laid down in Article XII. The provision of this Article is similar to GATT Article XVIII: b in the event of serious Balance of Payment and external financial difficulties or threat thereof, the WTO Members are allowed to adopt or maintain restriction on trade in services on which it has undertaken specific commitments including on payment for transfer related to such

\(^{32}\)Article IX:2  
\(^{33}\)Article X:1
commitments. Developing countries or economies in economic transition may use such transition to ensure inter-alia, the maintenance of a label of financial reserve adequate for their programme of economic development or economic transition. However these restrictions should be adopted keeping in view the following restriction:

- It shall not discriminate among its Members;
- It shall be consistent with the Articles of Agreement of the International Monetary Fund;
- It shall avoid unnecessary damage to the commercial economic and financial interest of any other Member;
- It must not be more than restricted than necessary in the circumstances; and
- It must be temporary and phased out progressively as the situation improves.

Determining the incidence of restrictions, priority may be given to supply of services which are more essential to their economic or development programmes. However, such restrictions shall not be adopted or maintain for the purposes of protecting a particular service sector. Any restrictions adopted or maintain under Article XII of GATS must be promptly notified in the General Council. Periodic consultations for Members maintaining restriction under Article XII must be undertaken in the WTO, which are governed by rules effectively in the same manner as those for goods and will take place in the single WTO Balance of Payment Committee, which examines all restrictions introduced for this purposes.
SUBSIDIES

Along with safeguards, subsidies represent unfinished business under the Uruguay Round negotiations. Article XV of GATS provides that negotiations shall take place on subsidies affecting services and on the possible need for countervailing duties. The Article recognizes that subsidies can destroy trade in services. Negotiations on subsidies must be recognized in the interest of developing countries. Members that consider themselves adversely affected by subsidies granted by another Member may request consultations under Article XV: 2, the latter Member is called upon to give sympathetic consideration to such requests.

GOVERNMENT PROCUREMENT

WTO Members are exempted from the basic GATS obligations in purchasing services of their own use. However, the same GATS provision that specific Article II (MFN Rule), XVI (Market Access commitments) and XVII () rules are inapplicable to such purchases. The negotiations in Government Procurement Agreement expected to lead to commitments to open up some Government purchases to some Foreign Service suppliers.

GATS EXCEPTION TO GENERAL OBLIGATIONS

The general and security exception is closely similar to its GATT provisions. This represents the facts that overriding considerations which are recognize as allowing a country to ignore specific international obligations will apply as strongly to one aspect of its trade as to another.
GENERAL EXCEPTION

GATS include Article XIV, which was drafted based on the language of Article XX of GATT. It allows Members to take any measures necessary to protect human, animal or plant life or health, as long as these measures do not result in arbitrary or unjustifiable discrimination, or operate as a disguised restriction on trade in services.

Measures necessary to protect public morals or to maintain public order are also permitted, as well as other measures relating to safety, privacy, fraud, tax collection and double taxation. Measures taken under these exceptions are not required to be listed anywhere in a Member's Schedule or in a GATS Annex. Essentially, a Member may take such measures unilaterally and would then rely on an exception if challenged by another Member. The burden of proof falls on the Member seeking to rely on the exception to show that:

• The measure is necessary to achieve the public goal (public order, human health, etc); and
• The measure does not result in arbitrary or unjustifiable discrimination or operate as a disguised restriction on trade.

For a measure to be necessary, it ordinarily must be the least trade-restrictive or least GATS inconsistent measure available to the Member (although the Member does not have to demonstrate that every other possible measure is more trade-restrictive than that taken). Under Article XIV, Members are allowed to take measures that they consider "necessary for the protection of [their] essential security interests ... in time of war or other emergency in international relations". As with the analogous exception in

---

36 Article 14 a and b
37 14 c
38 14 d
GATT, this is a largely self-judging exception, since it is again left to individual Members to decide for themselves what constitutes their essential security interests or an emergency in international relations.

In this case, Members must keep the GATS Council of Trade in Services informed of any measures taken under Article XIV. If challenged, the burden of proof still rests with the Member taking the measures to demonstrate that they conform to the requirements of the exception.\(^3^9\)

**GOVERNMENTAL SERVICES**

Any services provided "in the exercise of governmental authority" are excluded entirely from GATS, meaning that Members make no commitments at all to other Members regarding such services. This relates to services "supplied neither on a commercial basis, nor in competition with one or more service suppliers" and would include services such as police, fire brigade and tax collection. In light of recent trends towards privatization of many traditionally public services such as water, electricity and even prisons, there are suggestions that, the governmental authority exception is much smaller than it appears. Where a fee is charged for these services above their cost, for instance, this may indicate that the service is being provided on a commercial basis (regardless of the margin involved) and would thus be included in the scope of GATS. Also, in cases where a private provider supplies a service alongside a governmental provider (e.g., public and private schools operating in the same environment), it is possible that the Government will then be 'in competition' with the private service provider, with the result that the sector is not covered by the governmental authority

exception and must comply with all general GATS obligations. The scope of this exception is therefore somewhat unclear.

**BILATERAL OR REGIONAL TRADE AGREEMENTS**

In certain circumstances, Members are exempted from the Most Favoured Nation principle where they have concluded bilateral or multilateral/regional Agreements on services trade liberalization. The Agreement must have “substantial sectoral coverage” and must remove “substantially all discrimination” between the countries. The history and context of trade liberalization and economic integration between the countries may be considered in determining whether these conditions have been met. These requirements are also relaxed slightly where the countries developing countries.

This means in practical terms that if, for instance, Member A has concluded a treaty with Member B granting certain services trade privileges to Member B, and that treaty meets the conditions on sectoral coverage and discrimination, then the Most Favoured Nation principle will not apply to Member A. No other Member could challenge Member A claiming that it has breached its Most Favoured Nation obligations under GATS by not extending the privilege granted to Member B to all other Members.

**OTHER SPECIFIC EXCEPTIONS**

The maritime transport sector is excluded entirely from GATS, unless Members decide to make specific commitments in the sector themselves. Measures affecting Air Traffic Rights and directly related services are also excluded, as they are considered to be covered already under the Chicago Convention. Three other services in the Air Transport Industry—aircraft repair
and maintenance, the selling and marketing of air transport services and computer reservation systems – are nevertheless included.

Trade in services may also be restricted in cases of "serious Balance-of-Payments and external financial difficulties". This allows a Member to restrict services trade in appropriate cases in order to maintain domestic financial reserves. The Restrictions Services\textsuperscript{40} must not discriminate among Members. They must be only those which are necessary to deal with the circumstances and must avoid unnecessary damage to other Members’ interests.

\textbf{SPECIFIC COMMITMENTS}

The second major element of substantive obligations under the GATS, called ‘Specific Commitments’, applies only to those services sectors which are scheduled by a Member in its GATS commitments and not to all services sectors covered by the GATS. The provisions pertaining to the ‘Specific Commitments’ lay down the framework following which the Member countries are supposed to commit themselves to liberalize trade in services.

Two main pillars of the ‘Specific Commitments’ are obligations regarding National Treatment (NT) (Article XVII) and the provisions pertaining to Market Access (MA) (Article XVI). The provisions included under these two categories are aimed at creating transparency \textit{vis-à-vis} the barriers that Foreign Service providers may face in a Member Country of the WTO. Barriers on Foreign Service providers may be imposed in diverse ways.

\textsuperscript{40}Government of India (2006a).
Firstly, they may be imposed on the frontier. This refers to measures such as, tariff and non-tariff barriers, exchange controls and other restrictions on transfer of funds, restrictions on the movement of people, etc.

Secondly, barriers may be imposed internally, in the form of differential regulations or taxes imposed on Foreign Service suppliers or their services. The third form of barrier can impede foreign access in ways that do not in themselves discriminate against foreigners, but that impede all access, whether by local or by Foreign Service suppliers. These kinds of barriers - which are non-discriminatory with respect to the nationality or the residence of the service suppliers - come under the purview of ‘National Competition Policy’. Here the term ‘National Competition Policy’ is interpreted broadly to embrace not only restrictive trade practices by firms but also legislated barriers to entry to an activity as well as Government regulation of access to essential facilities where ‘natural monopoly’ elements are present.\textsuperscript{41} The first two categories of barriers (e.g. frontier and internal) enlisted above discriminate against Foreign Service providers. However, in many instances the distinction between frontier and internal barriers becomes quite blurred in the case of services trade. In part, reflecting this, the GATS concept of (NT) (which, like the MFN clause, is also based on the core principle of non-discrimination) does not draw a distinction between frontier and internal but embraces all policies that might discriminate between domestic and foreign suppliers (by all means of supply). In contrast, the NT provision of the GATT (Article III) is headed ‘on Internal Taxation and Regulation’.

The specific commitments on Market Access and are the core of the GATS and the impact of the Agreement depends to a large extent on the commitments made by Members.

Article XVI stipulates that measures restrictive of Market Access which a WTO Member cannot maintain or adopt, unless specified in its Schedule, include limitations on:

\textsuperscript{41}Snape (1999), p. 281

184
the number of service suppliers;\textsuperscript{42}  
the total value of services transactions or assets;\textsuperscript{43}  
the total number of services operations or the total quantity of service output;\textsuperscript{44}  
the total number of natural persons that may be employed in a particular sector;\textsuperscript{45}  
specific types of legal entity through which a service can be supplied;\textsuperscript{46}  
foreign equity participation\textsuperscript{47} (e.g. maximum equity participation)  
with the exception of the measures covered by Article XVI all take the form of quantitative restrictions.

These measures, except for last two, are not necessarily discriminatory, i.e. they may affect national as well as foreign services or service suppliers. Three aspects of Article XVI are important.

Firstly, the Article XVI does not include all measures which could restrict Market Access. Perhaps most significantly, fiscal measures are not covered. Thus, a Member could maintain, without being obliged to Schedule, a high non-discriminatory tax on a particular service which severely limits Market Access.

Secondly, Article XVI has been interpreted in "Scheduling of Initial Commitments in Trade in Services": Explanatory Note 6 to cover both discriminatory and non-discriminatory measures, i.e. measures of the type "only five new foreign banks will be granted licences" and also measures such as "only ten new [foreign and domestic] banks will be granted licences".

Finally, the limitations must be read as "minimum guarantees" rather than "maximum quotas", i.e. a country which has promised to allow five foreign banks is free to grant entry to more than five.

\textsuperscript{42}Article XVI 2 a(b)  
\textsuperscript{43}Article XVI 2 bc  
\textsuperscript{44}Article XVI 2 c(d)  
\textsuperscript{45}Article XVI 2 d(e)  
\textsuperscript{46}Article XVI 2 (e) and (f)  
\textsuperscript{47}Article XVI 2 (f)
Article XVII: 1 states the basic obligation: "In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."

Unlike Article XVI, Article XVII provides no exhaustive list of measures inconsistent with. Nevertheless, Article XVII: 2 make it clear those limitations on cover cases of both de jure and de facto discrimination:

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

The Explanatory Note provides two examples of limitations on. If domestic suppliers of audiovisual services are given preference in the allocation of frequencies for transmission within the national territory, such a measure discriminates explicitly on the basis of origin of the service supplier and thus constitutes formal or de jure denial of. Alternatively, consider a measure stipulating that prior residency is required for the issuing of a licence to supply a service. Although the measure does not formally distinguish service suppliers on the basis of national origin, it de facto offers less favourable treatment for foreign suppliers because they are less likely to be able to meet a prior residency requirement than like service suppliers of national origin.

Article XVII: 3 elaborate on the required standard of treatment: "Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service
suppliers of any other Member." At first sight, it may be difficult to understand why the principle under the GATS is far more limited in scope - confined to scheduled services and subject to possible limitations - than under the GATT where it applies across the board. The reason lies in the particular nature of services trade. Universal for goods does not necessarily imply free trade. Imports can still be controlled by tariffs which, in turn, may be bound in the country's tariff Schedule. By contrast, given the impossibility of operating tariff-type measures across large segments of services trade, the general extension of in services could in practice be tantamount to guaranteeing free access.

Article XVIII of the GATS provides for additional commitments. It states: Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule. In other words, Members may also undertake additional commitments with respect to measures not falling under the Market Access and provisions of the Agreement. Such commitments may relate to the use of standards, qualifications or licences (Article XVIII). Additional commitments are particularly frequent in the telecommunications sector where they have been used by some 60 Members to incorporate into their Schedules certain competition and regulatory self-disciplines. These disciplines are laid out in a so-called Reference Paper, which an informal grouping of Members had developed during the extended negotiations in this sector.

A Member making an additional commitment in a particular sector to subscribe to international standards is an example of the use to which Article XVIII has been put.

A Member's specific commitments can be seen as the outcome of a two-step decision. Each Member first decides which service sectors will be
subject to the GATS Market Access and disciplines. It then decides what measures will be kept in place for that sector which violate Market Access and/or respectively. It is noteworthy, that while Article XVI (Market Access) makes a reference to the "modes of supply", Article XVII and XVIII (additional commitments) do not. Nevertheless, commitments on both Market Access and have been specified by modes of supply.

Entries in the Schedule in a given sector with respect to a particular mode of supply fall into one of four categories:

(i) Full commitment: "none" or "no limitations", which implies that the Member does not seek in any way to limit Market Access or through measures inconsistent with Articles XVI or XVII.

(ii) Commitment with limitations: the Member describes in detail the measures maintained which is inconsistent with Market Access or, and implicitly commits itself to take no other inconsistent measures.

(iii) No commitment: "unbound" indicates that the Member remains free to maintain or introduce measures inconsistent with Market Access or,

(iv) No commitment technically feasible: "unbound" indicates that in the sector in question, a particular mode of supply cannot be used, for instance cross-border supply of hair-dressing services.

**CONTENT OF SCHEDULES**

Article XX requires each Member to submit a Schedule of commitments, but does not prescribe the sector scope or level of liberalization. Thus, while some Members have limited their commitments to
less than a handful of sectors, others have listed several dozens. Further, the Article specifies some core elements to be covered in each Member's Schedule. It also provides that the Schedules form "an integral Article" of the GATS itself.

MODIFICATION OF SCHEDULES

Article XXI provides a framework of rules for modifying or withdrawing Specific Commitments. The relevant provisions may be invoked at any time after three years have lapsed from the date of entry into force of a commitment. (In the absence of emergency safeguard measures, which are still under negotiation, this waiting period is reduced to one year under certain conditions). It is thus possible for Members, subject to compensation, to adjust their commitments to new circumstances or policy considerations. At least three months' notice must be given of the proposed change. The compensation to be negotiated with affected Members consists of more liberal bindings elsewhere that "endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade" than what existed before.

PROGRESSIVE LIBERALIZATION

The third important element of the GATS is a set of provisions dealing with 'Progressive Liberalization'. Article XIX.1 mandates entering into successive rounds of negotiations, beginning no later than five years from the date of entry into force of the WTO Agreement and periodically thereafter. Such negotiations should be aimed at achieving a progressively higher level of liberalization. However, Article XIX.2 clearly states that, the process of liberalization "shall" take place with due respect for national policy objectives and the level of development of individual Member, both overall and in individual sectors. GATS also incorporates certain flexibilities for developing
country Members, which allow them to open fewer sectors, liberalize fewer types of transactions, and increase their MA commitments in compatibility with their development situation.\textsuperscript{48} It is further stipulated that for each round, negotiating guidelines and procedures shall be established for which an assessment of trade in services is to be carried out by the Council for Trade in Services. It is required that, the negotiating guidelines “shall” establish modalities for the treatment of autonomous liberalization undertaken by the Members since previous negotiations, as well as for the special treatment for least-developed countries. GATS further specify three approaches of negotiations, which may be adopted towards achieving the goal of Progressive Liberalization. These are: bilateral, plurilateral and multilateral.

**INSTITUTIONAL PROVISION\textsuperscript{49}**

Each Member shall accord sympathetic consideration to and shall afford adequate opportunity for consultation regarding such representations as may be made by any other Member or the Council for Trade in Service or the Dispute Settlement Body with respecting to any matter affecting the operation of GATS. If any Member considers that, any other Member fails to carry out its obligations or specific commitment under the GATS, it may with the view to reach a mutually satisfactory resolution of the matter have recourse to the dispute settlement understanding. The Council for Trade in Service may be carry out such function as may be assign to it to facilitate the operation of GATS and further its objectives. Technical assistance to the developing countries shall be provided at the multilateral label by the Secretariat and shall be decided upon by the Council for Trade in Services. The General Council shall make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies. A

\textsuperscript{48}Introduction and Overview, in Rupa Chanda (ed.) Trade in Services and India: Prospects and Strategies, Centre for Trade and Development (Centad), (New Delhi: Wiley India Forthcoming (2006b) p.5

\textsuperscript{49}Article XXII to XXIX
Member may deny the benefits of the Agreement to supply of a 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.

ANNEXES AND ATTACHMENTS

The fourth important element of the GATS is a series of Annexes and Attachments added at the end of the legal text. The Annexes comprise regulatory principles agreed upon in specific sectors and decisions on specific issues. These include Annexes on MFN exemptions, movement of natural persons, air transport services, financial services, maritime transport services and basic telecommunications. The Attachments on the other hand, consist of a series of Ministerial Declarations pertaining to the implementation of the GATS. These include decisions on: Institutional Arrangements; Dispute Settlement Procedures; Services Trade and the Environment; Movement of Natural Persons; and Professional Services, among others. The purpose of these Annexes and Attachments is to outline procedural and implementation issues in these areas and to establish a timeframe for future discussions on specific issues.50

PROS AND CONS OF THE GATS FLEXIBILITIES

The coverage of the GATS is in principle much broader than that of the GATT. In this sense, the GATS are a more General Agreement than the GATT. However, this breadth of coverage in the GATS has been secured at a

---

50Introduction and Overview. in Rupa Chanda (ed.) Trade in Services and India: Prospects and Strategies, Centre for Trade and Development (Centad), (New Delhi: Wiley India Forthcoming (2006b). p.6
cost, namely, the ease by which a particular service sector can be excluded from the purview of the major GATS disciplines.\textsuperscript{51} Under the GATT, all products are covered by General Provisions and exclusion of products from such coverage occurs only in special circumstances. Under the GATS, however, many of the most important provisions (e.g., Market Access, Domestic Regulation, etc.) apply only to the service sectors that are specified in the Schedule of a Member Country. For these provisions, the service sectors are negotiated in, rather than out, which is regarded as a much less liberalizing procedure compared to the GATT. Moreover, unlike the GATT, even the MFN Principle can be implemented under the GATS on a conditional rather than an unconditional basis.

All these flexibilities make the GATS a more liberal Agreement than the GATT. The 'bottom-up' approach adopted by the GATS leaves sufficient room for the Member Countries to undertake trade liberalization in services at their own terms and pace. At least legally there is no compulsion on a Member Country to open up a particular sector or a particular mode of supply if there are domestic sensitivities and concerns surrounding the potential impact of such an opening-up. In this regard, the GATS attempt to strike a balance between commercial interests on the one hand and regulatory concerns and public policy objectives of the Member Countries on the other.\textsuperscript{52}

Notwithstanding the scope of retaining sufficient policy space provided by the flexibilities embedded in the GATS, there are certain major drawbacks associated with these flexibilities from the point of view of Progressive Liberalization of the services trade - one of the prime objectives of the GATS.

For instance, given the scope of evoking MFN exemptions together with the positive listing of sectors and the practice of scheduling commitments by mode of supply for each sector, specific sectoral interests and modal


\textsuperscript{52}Introduction and Overview', in Rupa Chanda (ed.) Trade in Services and India: Prospects and Strategies, Centre for Trade and Development (Centad), (New Delhi: Wiley India Forthcoming (2006b). p.6
preferences are likely to dominate the negotiating process. Hence, the outcome is likely to be biased towards certain sectors and modes of supply. This, in fact, was observed to happen during the Uruguay Round (UR) of negotiations.

NEGOTIATIONS BEYOND THE URUGUAY ROUND

Given that much of the work remained to be done in services, negotiations in four areas continued even after the formal completion of the Uruguay Round (UR). These areas were financial services, telecommunications services, maritime transport services and Mode 4 (Movement of Natural Persons). The negotiations on telecommunication and financial services concluded successfully in February and December 1997, respectively. The Telecommunications Agreement was notable for creating new Market Access opportunities and especially for its 'Reference Paper', which contained the principles by which many Members agreed to regulate their telecommunications sectors. This statement of fair and transparent regulatory principles provides an important model for other sectors. The financial services negotiations also concluded successfully after repeated rounds of discussions, with some improvement in the commitments. The end result was the signing of the Financial Services Agreement. Negotiations on maritime transport were, however, suspended.

In Mode 4, only a few Members made nominal improvements in their commitments over and above what they agreed to during the formal completion of the UR.

Article XIX (1) of the GATS provides a 'built-in agenda' requiring the Members to enter into successive rounds of negotiations aimed at progressive liberalization, with the first such round to begin no later than five years after the entry into force of the WTO Agreement. Accordingly, services negotiations were re-launched in January 2000 and this new round of negotiations came to
be known as the GATS 2000 negotiations. In March 2001, the Members adopted the modalities for the services negotiations, referred to as the 'Negotiating Guidelines and Procedures', as per the 'Guidelines', the negotiating agenda under the GATS 2000 negotiations covered two aspects:

(i) Rule-making (completing and improving the GATS framework), and
(ii) Exchange of Market Access concessions.

NEGO Ti ATING GUIDELINES OF GATS 2000

The negotiations shall aim to increase the participation of developing countries in trade in services. There shall be appropriate flexibility for individual developing country Members, as provided for by Article XIX: 2. Special priority shall be granted to least-developed country Members as stipulated in Article IV:3. The process of liberalization shall take place with due respect for national policy objectives, the level of development and the size of the economies of individual Members, both overall and in individual sectors. Due consideration should be given to the needs of small and medium-sized service suppliers, particularly those of developing countries.

The negotiations shall take place within and shall respect the existing structure and principles of the GATS, including the right to specify sectors in which commitments will be undertaken and the four modes of supply.

- Liberalization shall be advanced through bilateral,
- Plurilateral or multilateral negotiations. The main method of negotiation shall be the request offer approach.
- There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending Market Access in line with their development situation and, when making access to their markets
available to Foreign Service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV.53

THE DOHA MANDATE ON SERVICES

The period between early 2000, when the new round of services negotiations was formally launched, and the fourth Ministerial Conference of the WTO held in Doha in November 2001, was mainly spent in desultory discussions of rules and other necessary preconditions for launching the Market Access negotiations on services. By the Doha Ministerial meeting, it had become evident that initiation of a new round of trade negotiations, embracing a broader set of issues, would be necessary if there was to be any serious liberalization in agriculture or services. Hence, the Doha Ministerial Declaration called for the commencement of a new round of multilateral trade negotiations, which came to be known as the Doha Development Agenda. This new round of trade negotiations was meant to address some of the past imbalances in international trade (resulting from the UR), so that developing and the least developed countries could reap some tangible benefits from trade. Article 2 of the Doha Ministerial Declaration stated: “The majority of WTO Members are developing countries. We seek to place their needs and interests at the Article of the Work Programme adopted in this Declaration. Recalling the Preamble to the Marrakesh Agreement, we shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development.”

The GATS 2000 negotiations on services were subsequently subsumed by this wider round of trade negotiations. Thus the GATS 2000 negotiations became an integral part of the Doha Development Agenda since November 2001. The mandate for services negotiations in the Doha

WTO Document (2001)
Declaration was among the least controversial aspects of the engagement leading to that Declaration. Being formulated at the early stages of the GATS negotiations, the mandate was quite general in nature. It reiterated one of the more important objectives of the negotiations, viz. to promote the economic growth of all trading partners and the development of developing and the least developed countries. It reaffirmed the right of the Members (under the GATS) to regulate, and to introduce new regulations on the supply of services. It further reiterated the March 2001 ‘Guidelines and Procedures’ for the services negotiations as the basis for continuing negotiations with a view to achieving the objectives of the GATS, as mentioned in the Preamble, Article IV and Article XIX of the Agreement. Thus it endorsed the ‘request-offer’ approach stipulated in the ‘Guidelines’. The Doha Declaration also set out two important timelines for the negotiations: submission of initial requests by the Members by 30 June 2002, and ‘initial offers’ by 31 March 2003. Notably, under the section on ‘Trade and Environment’, the Doha Declaration agreed to negotiations on reduction or elimination of tariff and non-tariff barriers to environmental services.

In accordance with the time-frame set by the Doha Declaration, the Member Countries of the WTO started submitting their initial bilateral requests at the end of June 2002. Almost all the WTO Members received request/s from one or more trading partners. With respect to sectoral requests, countries did not deviate much from their UR negotiating strategies. The requests were in generally ambitious. Most requests were tailor-made based on the individual situation and the UR commitments of the trading partner. However, there were instances where requests did not quite reflect the areas of trade interests of the requesting Member. For instance, India received requests from Sri Lanka in the telecommunication sector, but did not make requests to Sri Lanka in this sector, whereas the trade between these two

countries in the telecom sector was the other way round. However, during 2003, it became obvious that the services negotiations had no momentum. The majority of the Members had not observed the 31 March 2003 timeline (stipulated by the Doha Declaration) for submission of the 'initial offers'. There was little, if any, serious bilateral negotiation. Not only were the total number of offers less, the quality of offers was also poor; those who made offers did not bind their unilateral liberalization.

The methodological problems associated with the bilateral 'request-offer' approach were often highlighted as one of the prime reasons behind the slow pace of services negotiations at this stage. This was because, this method entailed the excruciating task of extracting commitments trading partner by trading partner, sector by sector, across the entire range of sectors and sub-sectors in which a Member Country sought to obtain new commercial opportunities. Hence, it was a tedious as well as a time-consuming process. However, certain other factors also contributed to the slow progress made in the bilateral 'request-offer' approach, which were identified by the Chairman of the Council on Trade in Services in Special Session (CTS-SS), Ambassador Alejandro Jara. In May 2004, in an effort to identify the reasons behind the slow pace of the negotiations and to stimulate activity, Jara held a series of 'confessionals' with senior representatives of larger Member delegations that were yet to table their 'initial offers'. The March 2003 deadline for the submission of the 'initial offers' could not be met. In fact, by July 2004 only 43 'initial offers' had been tabled by the Member Countries of the WTO.55

THE JULY 2004 FRAMEWORK AGREEMENT AND SERVICES

The fifth Ministerial Conference of the WTO held in Cancun in September 2003 ended in a fiasco owing to the profound divisions between the developed and developing countries over key negotiating issues, such as, the Singapore Issues (investment, competition, trade facilitation and transparency), agriculture, and the sectoral initiative on cotton.

With a view to make up for the Cancun failure, negotiations were continued in Geneva in the subsequent period. With the formation of the G-20 - a strong coalition of developing countries having stakes in agriculture - just prior to the Cancun Ministerial and the crucial role played by this alliance at Cancun, a clear signal was sent to the erstwhile key players in the WTO negotiations (like the EU and the US) that the old structure of power and decision-making at the WTO was up for a major overhaul.

Hence, in order to put the WTO negotiations back on track, the circle of power had to be expanded to accommodate new players in the so-called 'elite' group. The EU and the US's invitation to Brazil and India to be a part along with Australia, of the 'Five Interested Partiers' (FIPs) was a key step in this direction.

EVOLUTION AND STATE OF PLAY

Importantly, it was an Agreement among the FIPs that solved the impasse in the agricultural negotiations in the post-Cancun period. This, ultimately, led to the striking of a package of deals at the General Council meeting in July 2004, which came to be known as the 'July 2004 Framework Agreement'.
Agreement' or the 'July Package'. The 'July Package' succeeded in putting the Doha negotiations back on track by establishing the detailed directions to move the negotiations forward in core areas such as services, agriculture, and Non-Agricultural Market Access (NAMA).

As far as services were concerned, the July Framework reaffirmed the Members' commitment to progress in this area of negotiations in line with the Doha mandate. The General Council adopted a set of recommendations by the Council for Trade in Services in Special Session in Annex C of the Framework Agreement, as the basis for further negotiations. In case of the Market Access negotiations on services, from the Doha mandate in 2001 to the July Framework in 2004, there was a greater emphasis on moving into the second round of offers with an implicit recognition that the 'initial offers' were not as ambitious as desired by the demaneurs in the negotiations. Thus, the 'July Package' stipulated May 2005 as the deadline for the submission of the 'revised offers', while urging the Members to submit the outstanding 'initial offers' as soon as possible. Annex C of the 'July Package' further obliged the Members to aim to achieve progressively higher levels of liberalization with no a priori exclusion of any service sector or mode of supply.

On the rules negotiations, the 'July Package' only called for intensifying efforts to conclude these in line with their mandates and timelines. Stock taking of the progress in the negotiations was also mandated for the Council of Trade in Services in preparation for the sixth Ministerial Conference in Hong Kong.

THE HONG KONG MINISTERIAL DECLARATION ON SERVICES

The Hong Kong Ministerial Declaration on Services (HKMD), which addresses services both in the main text as well as in its Annex C, puts forward quite an aggressive agenda for services. The main text, in
Paragraphs 25 to 27, recall the overall objectives of the negotiations and the objectives and principles set out in the GATS, the Doha Declaration, the negotiating guidelines, the LDC Modalities and the 2004 ‘July Package’. Some of the key provisions of the HKMD on services are enumerated below.

PROGRESSIVE LIBERALIZATION

✓ Negotiations towards achieving a progressively higher level of liberalization,
✓ Intensification of the negotiations by expanding sectoral and modal coverage of the commitments and improving their quality,
✓ Particular attention to be given to sectors and modes of export interest to developing countries,
✓ Appropriate flexibility for developing country Members,
✓ LDCs are not to be expected to make commitments,
✓ Striking a balance between flexibility in commitment process and regulatory autonomy and improving Market Access.

OBJECTIVE OF IMPROVED COMMITMENTS

➢ Binding of the commitments at the existing levels across sectors in Modes 1 and 2,
➢ Commitments to greater levels of foreign equity participation and removal/reduction of use of Economic Needs Tests (ENTs) in Mode 3,
➢ In Mode 4, new or improved commitments on Contractual Service Suppliers (CSSs), Independent Professionals (IPs), and others delinked from Commercial Presence (Mode 3),
➢ New or improved commitments for Intra-Corporate Transferees (ICTs) and Business Visitors (BVs) in Mode 4,
➢ Greater clarity in the commitments.
PLURILATERAL ‘REQUEST-OFFER’ APPROACH

• In addition to the multilateral negotiations, to pursue the ‘request-offer’ approach on a voluntary plurilateral basis,
• Plurilateral requests to be submitted by 28 February 2006,
• Second round of “request-offer” to be submitted by 31 July 2006,
• Final draft Schedules of commitments to be submitted by 31 October 2006.

RULES NEGOTIATIONS

• Call for rules negotiations,
• On Domestic Regulation, specific mandate for development of disciplines before the end of the Doha Round, call to develop texts for adoption. To consider proposals and the illustrative list of possible elements for Article VI: 4 disciplines.
• On GATS Rules (Emergency Safeguard Measures, Subsidies, and Government Procurement), intensification of efforts in all the three areas.

This obligation to ‘consider’ the plurilateral request is an improvement (from a developing country perspective) on the original text of the Annex C, which obliged the Member Countries to enter into negotiations, rather than merely requiring them to ‘consider’ doing so. Notably, all the requesting Members are also deemed recipients, except in the Mode 4 group. Around twenty plurilateral groups had been formed earlier this year, with the involvement of only around 35 countries out of the 149 Member Countries of the WTO. This clearly reflects the fact that only the major players in the services trade have come forward to participate in the plurilateral negotiations on services.
India is one of the leading proponents of the World Trade Organization (WTO) negotiations in services, reflecting the growing importance of this sector in India's economy. Services constitute nearly 50% of India's gross domestic product and roughly a quarter of its trade flows rise in the service sector’s share in GDP marks a structural shift in the Indian economy and takes it closer to the fundamentals of a developed economy. Within the services sector, the share of trade, hotels and restaurants increased from 12.52 per cent in 1990-91 to 15.68 per cent in 1998-99 (Bartaman Patrika, 12th. September, 1999). The share of transport, storage and communications has grown from 5.26 per cent to 7.61 per cent in the years under reference. The share of construction has remained nearly the same during the period while that of financing, insurance, real estate and business services has risen from 10.22 per cent to 11.44 per cent. The country accounts for 1.4% of global service trade compared to 0.9% in the case of global merchandise trade. It has registered the highest growth rate in service exports among all countries in recent years. The fact that, the service sector now accounts for more than half the GDP probably marks a watershed in the evolution of the Indian economy.

The service sector has also played an important role in attracting foreign capital, with key producer services accounting for a growing share of Foreign Direct Investment (FDI) inflows into the Indian economy. Given the service sector's role in facilitating India's integration with the World economy, the WTO's General Agreement on Trade in Services (GATS) has significance for India.
INDIA'S GATS COMMITMENTS IN THE URUGUAY ROUND

India's Uruguay Round (UR) commitments were conservative both in terms of sectoral coverage and modes of delivery. As far as sector-specific commitments were concerned, those did not cover several important sectors, such as, energy, distribution, education, environment, and professional services, such as, accountancy, legal, and architectural services. One striking feature of India's commitments was their high degree of uniformity across different sectors and modes of delivery. For instance, Modes 1 and 2 were left 'unbound' for most of the sectors scheduled by the country. Mode 3 was partially opened up with various restrictions such as foreign equity limits, local incorporation requirements, quota on number of service providers, etc. Just like other countries, India did not undertake any sector-specific commitments in Mode 4.

Even the horizontal commitments undertaken in Mode 4 were limited only to skilled personnel, like Business Visitors (BVs), Intra-corporate Transferees (ICTs), professionals, etc. Again, for these limited categories of natural persons, India's commitments were further subject to various conditions on entry, duration of stay, etc. India was cautious also in undertaking commitments in the case of financial services, for which negotiations continued beyond the UR. Although India removed MFN exemptions in all areas of financial services, a number of regulatory and quantitative disciplines were put in place. For instance, restrictions were in place on the number of bank licenses. The market share of the assets of foreign banks was not allowed to exceed 15 per cent of the total assets of the banking system. A condition was further stipulated that, foreign banks already operating in India could invest no more than 10 per cent of the owned funds in other financial service companies or 30 per cent of the invested company's

\(^{57}\text{Mukherjee, Arpita, 'Distribution Services: India Negotiations Committee', Council for Trade in Negotiations Go Underground' (2004), pp. 242-243}\)
On the whole, the UR commitments did not reflect the autonomous liberalization process, which started in India since the early 1990s. The wedge between the actual degree of openness in different sectors in India during that time and the corresponding GATS commitments clearly reflects the cautious approach adopted by the country during the UR.

The ‘Guidelines’ stipulated the ‘request-offer’ approach as the main method of negotiating new ‘specific commitments’ on Market Access, National Treatment and additional commitments. It further mandated the Members to continue negotiations on the ‘outstanding issues’ relating to rules, which were somewhat incomplete at the end of the Uruguay Round (UR). Notably, the set of rules comprising the GATS framework includes certain important issues, such as:

(a) Emergency Safeguard Measures
(b) Domestic Regulation
(c) Government Procurement
(d) Subsidies.

The ‘Guidelines’ also recognized the need to provide an appropriate flexibility to developing countries.

**THE GATS 2000 NEGOTIATIONS AND INDIA**

In the backdrop of India’s huge potential in the services trade and the aforesaid protectionist barriers encountered by the country in its key services markets, India has started playing a rather proactive role in the GATS 2000 negotiations. The prime objective of this more recent aggressive stance is

totalize the multilateral forum to do away with the Market Access restrictions encountered by the Indian service providers in the developed country markets, particularly in Modes 1 and 4. India's key Agenda in the ongoing Market Access negotiations on services is enumerated below:

- To facilitate the movement of professionals (Mode 4) who have got a contract to supply services abroad;
- To delink the movement of such professionals (Mode 4) from the requirement to set up an office/firm in a foreign country (Mode 3);
- To bind the current level of commitments prevailing in the developed country markets to facilitate supply of services remotely (i.e. ITES, BPO, etc. covered under Mode 1);
- To request countries to do away with Economic Needs Tests (ENTs) and Labour Market Tests (LMTs), which hamper effective Market Access to Indian service providers;
- Enter into discussions for having Mutual Recognition Agreement for educational qualifications and licensing requirements and procedures;
- Disciplining administrative measures; exemption from social security contributions.\(^{59}\)

THE BILATERAL ‘REQUEST-OFFER’ APPROACH AND INDIA

After the initiation of the bilateral ‘request-offer’ process under the GATS 2000 negotiations, India received requests from around 25 countries (including all major developed and developing countries) in a large number of sectors such as distribution, telecommunication, energy, environmental services, financial services, education, tourism and travel, computer and related services, business services, etc.\(^{60}\) The horizontal requests mainly focused on Modes 3 and 4. In Mode 3, the horizontal requests focused on

\(^{59}\)Gupta Krishna, ‘Services Negotiations at the WTO’, Presentation delivered in the seminar organized by The Energy and Resources Institute (TERI), New Delhi on 2 May 2006.

\(^{60}\)Government of India (2003)
transparency in domestic regulation, administrative procedures, clarification of criteria (e.g. for licensing), various definitional issues, etc. The horizontal requests under Mode 4, concentrated on expanding the scope and coverage to include more categories of highly skilled service providers, elimination of Economic Needs Tests (China and the EU), improvement of transparency in visa and administrative procedure (China) and extension of the duration of stay for certain categories of service providers such as 'Business Visitors' and 'Intra-Corporate Transferees'. The sectoral requests to India emphasized on broadening the coverage to include more sectors/sub-sectors, such as, energy, environment, education, distribution, accountancy, architecture, etc. For each sector, most countries asked for full commitments under Modes 1, 2 and 3 stressing on removal of Mode 3 restrictions. As regards Mode 4, there were very few sector-specific requests and most countries referred to the horizontal schedule.\textsuperscript{61}

India submitted requests to more than 60 countries,\textsuperscript{62} including some of the major developed countries (e.g. the USA, the EU, Japan, Australia, Canada, New Zealand) and developing countries (e.g. China, Mexico, Brazil, Malaysia, Indonesia) in sectors such as architectural services, audio-visual services, computer related services, tourism and travel-related services, health and maritime transport services across various modes, with a significant focus on Mode 4. In its horizontal requests under Mode 4, India asked for full commitment in respect of independent professionals delinked from commercial presence. It also requested its trading partners to put in place a visa system to ensure fulfillment of the horizontal and sectoral commitments undertaken, grant multiple entry visa for professionals, allow interim labour mobility, remove Economic Needs Tests and other necessity tests, extend the duration of stay, remove discriminatory taxes on Foreign Service providers and remove quantitative restrictions or quotas (as imposed by some countries, such as, the US) on the movement of professionals.

\textsuperscript{61}Mukherjee Arpita, 'Distribution Services: India Negotiations Committee', Council for Trade in Negotiations Go Underground (2004), pp.245-46
\textsuperscript{62}Government of India (2003)
India's sector-specific requests concentrated on full commitments under Modes 3 and 4. In certain sectors such as architectural services, tourism and travel-related services, computer related services, health services, India requested for 'additional commitments' on mutual recognition of qualifications, training and experiences and licenses to practice.63

Both the horizontal and sectoral requests reflected the country's interest in exporting highly skilled manpower. The requests, however, did not focus on other areas such as cross-border trade (Mode1) in Information Technology (IT) -enabled services (ITES) and Business Process Outsourcing (BPO). For instance, China requested India to allow Chinese teachers engaged in educational or training activities to provide educational services to various foreign entities or individuals. Furthermore, under Mode 3, China requested that joint school or wholly foreign-owned schools should be permitted to be established. Services, although the growing export potential in this Mode of services, delivery was already visible by the time India tabled its requests. A large number of companies from the developed countries, such as the US and the UK had already started outsourcing work to developing countries like India, China, Russia and the Philippines to take advantage of the low-cost trained workforce.

Despite having a clear-cut comparative advantage in the export of ITES and BPO services, at the beginning of the negotiations in 2000, the country focused largely on Mode 4 while cross-border services trade (Mode1) was somewhat neglected. This approach may be due to the fact, that regulations and barriers in the developed countries were not so stringent in the case of Mode 1. However, subsequently, the growing proliferation of outsourcing was confronted by widespread opposition in various developed countries from trade unions, politicians, etc. This opposition stemmed from a fear that, this would lead to job losses and consequently increase the

unemployment rates and aggravate the recessionary trend in those countries.
In the face of such rising protectionist measures in various developed
countries, India subsequently shifted its negotiating focus from Mode 4 alone
to both Modes 1 and 4. It was understood by India, that by pushing for binding
commitments in Mode 1, it was possible to lock in the existing Market Access
and prevent a future protectionist backlash.

ANALYSIS OF INDIA'S 'CONDITIONAL' INITIAL AND REVISED
OFFER

In its 'Conditional' Initial Offer (IO) submitted in January 2004, India
offered to undertake extensive commitments under Modes 1 and 4. In addition
to that, India also offered substantially improved access in critical service
sectors, such as, accounting and book keeping services, engineering
services, computer and related services, medical and dental services,
services provided by midwives, nurses, physiotherapists and para-medical
personnel, construction and related engineering services, financial services,
health services, tourism services and maritime transport services.
Nevertheless, there was a general perception that, India's Initial Offer was
pretty conservative. Subsequently, in August 2005 India submitted its Revised
Offer.

The Indian delegation at the World Trade Organization has submitted a
Revised Offer in August 2005, in the ongoing negotiations under the General
Agreement on Trade in Services (GATS) of the WTO. The Revised Offer is
conditional on other WTO Members.

We have already seen, as part of the ongoing negotiations, offers were
initially made in the Doha Round in sectors/ sub-sectors covered in the
commitments made in the Uruguay Round. The 7 sectors covered were:
— Business services
— Communication services
— Construction and related engineering services
— Financial services
— Health related and social services
— Tourism and travel related services
— Transport services

The Revised Offer includes 4 other sectors in which either Initial Offer were not made in the Doha Round or commitments were not taken in the Uruguay Round. These are distribution services, educational services, environmental services, and recreational, cultural and sporting services. In all, the Revised Offer covers 11 sectors.

Member Countries are at liberty to schedule commitments in one of the following ways:

(i) Full commitment: "None" or "no limitations," which implies that the Member does not seek in any way to limit Market Access or National Treatment through measures inconsistent with Articles XVI or XVII of GATS.

(ii) Commitment with limitations: The Member details the measures maintained that are inconsistent with Market Access or National Treatment, and implicitly commits itself to take no other inconsistent measures.

(iii) No commitment: "Unbound" indicates that the Member remains free to maintain or introduce measures inconsistent with Market Access or National Treatment.

(iv) No commitment technically feasible: "Unbound*" indicates that in the sector in question, a particular mode of supply cannot be used.
SUPPLY MODES

GATS provides for 4 modes of supply of services: Cross-border Supply (Mode 1), Consumption Abroad (Mode 2), Commercial Presence (Mode 3), and Presence/Movement of Natural Persons (Mode 4).

India is more interested in Modes 1 and 4. The Mode 4 interest arises from the presence of a large skilled and competitive workforce. On the other hand, core competence in IT enabled services will enable India to take advantage of Mode 1 or Cross-border Supply of Services. Till now, India had been very conservative in its overall approach. In fact, in areas such as financial services, commitments lagged behind even autonomous liberalization. It is heartening to note that, given the success that India has achieved in respect of services export and the burgeoning foreign exchange reserves, there is now more confidence while conducting international trade negotiations.

LIST OF SECTORS

As mentioned earlier, India has offered extensive commitments in a number of new sectors/sub-sectors. Improvements have also been made in the existing commitments in a number of sectors.

India had already made a substantial Mode 4 Initial Offer by including all categories of natural persons such as intra-corporate transferees, business visitors, contractual service suppliers and independent professionals.

Sectors/ sub-sectors offers include the following:
- Business services: Professional services; accounting & book-keeping services (excluding auditing services); architectural services; integrated engineering services; and urban planning and landscape architectural services.
- Medical and dental services: Veterinary services; and services provided by midwives, nurses, physiotherapists and para-medical services.
- R&D services: R&D in agricultural sciences; and R&D in social sciences and humanities.
- Real estate services: On a fee or contract basis.
- Rental / leasing services (without operators)
- Other business services: Management consulting services; services incidental to fishing; services incidental to energy distribution (excluding energy trading and load dispatch functions); placement and supply of personnel; maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment); building cleaning services; packaging services; convention services; and specialty design services.
- Distribution Services (Excluding Live Animals): Commission agents’ services covering sales on a fee or contract basis of: agricultural raw materials; food products excluding beverages and tobacco; machinery, industrial equipment and vehicles; furniture, household goods, hardware and ironmongery.
  Wholesale trade services: Agricultural raw materials; food products excluding beverages and tobacco; textiles, clothing, and footwear; household appliances, articles and equipment; miscellaneous consumer goods; machinery, equipment and supplies.
- Education Services: Higher Education Services.
- Environmental services: Refuse disposal services; and sanitation and similar services.
- Insurance and insurance related services: Life insurance; and services auxiliary to insurance such as consultancy, actuarial, risk assessment.
- Banking and other financial services (excluding insurance): Asset management such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and other trust services.
- Tourism and travel related services: Tourist guides services.
- Recreational, cultural and sporting services (other than audio-visual services): Entertainment services (including theatre, live bands and circus services); and sporting and other recreational services (excluding lottery, gambling and betting services)
- Transport services: Maritime transport services.
- Maritime auxiliary services: maritime cargo handling services; storage and warehousing services in ports; customs clearance services; container station and depot services; maritime agency services; maritime freight forwarding services; international rental/charter of vessels with crew or on bareboat basis (excluding cabotage and offshore transport); maintenance and repairs of seagoing vessels; ship broking service
- Air transport services: maintenance and repair of aircraft.

After discussing in detail, what India has committed so forth, it is necessary to have a look whether the commitments of Indian Government are in the interest of the Indian people or not. Firstly, we will analyze it in general terms and subsequently we will deal it sector by sector.

GATS provide India with a framework to liberalize services trade in modes and activities where it has comparative advantage. India's main source of comparative advantage in services is its labour endowment. The country has the potential to export labour-intensive services at all skill levels, through cross-border movement of service providers (Mode 4 of GATS).

India's global competitiveness in this regard is striking. In recent years, the country has accounted for 70% of all specialty occupation (H-1B) visas.
granted by the US in computer services. Overall, Indian professionals across services as diverse as accountancy, engineering, consulting, medical, and management accounted for nearly half of all H-1B visas granted to foreigners in the US in the late 1990s.

India is also an important source country for low and semi-skilled service providers in services like construction, domestic work, and transport operations. It also has the potential to export labour-intensive services through technology-enabled data, voice, and information flows, i.e., cross-border supply (Mode 1 of GATS).

The country is ranked as the leading global outsourcing destination in services. In all, 60% of the Fortune 500 companies are outsourcing services to India, ranging from simple back office services like processing and billing, to intermediate services like technical help and systems design, to specialized services, like research and development and technical analysis. The cost-quality advantage in labour-based services combined with its high quality institutions has also enabled the country to considerably diversify its service exports to emerging areas, like health care, research and development, and educational services.

India’s major stakes in Mode 4 and Mode 1 are briefly discussed below:-

- **MODE 4**

  India’s strength in Mode 4 based exports is well established by now. In fact, Mode 4 or temporary movement of natural persons has been the key driving force behind the dramatic growth of India’s software services exports in the last decade. This is because, until recently, the lion’s share of software services exports was through on-site delivery. Although, more recently, there has been a shift towards offshore provisioning of software services, Mode 4
continues to remain an important medium of export of software services from India. India's global competitiveness in Mode 4 based software services exports is evident from the fact that, Indian professionals accounted for 70 per cent of all specialty occupation (H-1B) visas granted by the US in computer services in the late 1990s.

Apart from software services, India also has a comparative advantage in a wide variety of other Mode 4 based professional and business services, including health, engineering, accountancy management, etc. Indian professionals in these diverse categories of services accounted for nearly half of all H-1B visas granted to foreigners in the US in 1999. India has been a major supplier of skilled manpower in services such as, IT, health, and engineering, to markets other than the US as well. The other key destinations include Canada, the UK, Germany, Austria, Singapore, and Japan. India has also emerged as an important source country for low and semi-skilled service providers, mainly to the Middle East and increasingly to South East Asia. A large chunk of low and semiskilled workers from India are engaged in a wide range of occupations in these countries including construction workers, production workers, transport equipment operators, domestic help, nurse's aids, craftsmen, technicians, etc.

- **MODE 1**

Another mode of services delivery, where India has a strong comparative advantage is cross-border or Mode 1. Notably, cross-border trade in business services, especially the IT-enabled services (ITES) is today among the fastest growing areas of international trade. The phenomenal breakthrough in information and communication technology in the recent years has enabled cross-border trade in a range of labour-intensive activities, such as, medical and legal transcription, customer support, human resource management and administration, financial and accounting processes,

---

84. USINS (2002)
technical support, logistics, sales, research and development, etc. The commercial importance of cross-border supply across a wide range of services sectors is gradually growing. The most dramatic achievement of India, in the exports of Mode 1 services can be observed in the Business Process Outsourcing (BPO) segment. India's BPO exports increased from a mere US$ 665 million in 1999-2000 to US$ 3.6 billion in 2002-2003 and are projected to grow to US$ 12 billion in 2008. India has emerged as a leading outsourcing destination not only in terms of the volume and range of services delivered, but also in terms of its firm-level capabilities. About 60 per cent of the Fortune 500 companies of the world are already outsourcing their work to India. These include multinational companies like GE, Intel, Microsoft, HSBC, Accenture, IBM, etc. According to A.T. Kearney (2004), India was the most attractive destination for offshore outsourcing in 2004.

India's attractiveness as an outsourcing destination is primarily attributable to its labour cost advantage. The vast pool of skilled and relatively cheap labour in India enables the outsourcing companies to perform routine to complex operations at a fraction of the cost they would incur in the developed countries and also enables them to scale up their operations easily. It is estimated that, the net savings from offshore outsourcing to India range from 40 to 60 per cent for the developed country firms, after accounting for costs of telecom, overheads, remote management and transaction costs.

The labour cost advantage of developing countries including India is expected to remain at least over the next twenty to thirty years, given the demographic trends and a rising demand-supply gap for services in the developed countries. With a massive human resource base, a large proportion of young people and a strong foundation in technical education, India is in well positioned to capitalize on the worldwide potential in the knowledge economy and the services sector is expected to remain a key driver of economic growth in India.
The Apollo Group of hospitals provides low-cost quality treatment to foreign patients combined with special tourism packages and has also set up overseas franchises to cater to patients in other markets. These constitute Mode 2 (Consumption Abroad) and Mode 3 (Commercial Presence) based exports of healthcare services, respectively, under GATS.

In nursing, India is emerging as one of the leading suppliers of personnel to developed countries. In education services, several Indian higher educational institutions are setting up campuses overseas (Mode 3) to provide training in disciplines, like management, medicine and engineering. Thus, the range of activities, modes, and markets where India has global export opportunities is vast.

However, there remain numerous barriers in the key developed country markets of India's interest, which impede the realization of India's true potential in the services trade. For instance, India's Mode 4 based exports are subject to various quantitative restrictions, cumbersome labour certification procedures, recognition and licensing requirements, Economic Needs Tests (ENTS), etc. in key destination markets, which restrict the movement of Indian service providers for on-site delivery of services in these markets. In the case of Mode 1 exports, there are growing protectionist tendencies in the key developed country markets of India in the form of Government outsourcing bans, federal and state level protectionist legislation, data privacy laws, caller identification requirements, etc. It is apprehended that, such protectionism could spill over to the private sector and to other developed countries.

The boom in the services sector has been relatively "jobless". The rise in services share in GDP has not accompanied by proportionate increase in the sector's share of national employment. Some economists have also cautioned that, service sector growth must be supported by proportionate growth of the industrial sector; otherwise the service sector grown will not be sustainable. India's GATS commitments will seriously compromise India's
policy sovereignty, and render the Indian state powerless to introduce new regulations, and to penalize Foreign Services providers for high costs, poor quality and inadequate access to services by Indian consumers.

Bound commitments under the GATS will limit the ability of the Central and State Governments to enact and enforce domestic regulations in the public interest relating to licensing, technical standards and qualification requirements. GATS clauses of Market Access and non-discrimination to Foreign Services providers will weaken the power of Government to supply essential services to vulnerable sections of society through cross-subsidization. They will also restrict the Government's ability to further develop capacity in the Indian services sector through public procurement of goods & services.

An examination of present negotiations shows that, the aggressive Market Access demands from developed country WTO Members will not be beneficial to developing country Members. Groups such as the EU are demanding aggressive liberalization in Mode 3 (Foreign Direct Investment) and are calling for restrictions on foreign ownership to be removed. Making binding commitments under Mode 3 will seriously undermine the ability of Governments to regulate foreign investment in the services sector.

Also questionable are the gains that, India hopes to get from liberalization through the Mode 4 route (temporary movement of labour). One of India's key demands is that, the US increase the quota of H-1B visas from its present GATS commitment of 65,000 to about 1,00,000. This mirrors the demands of big services corporations in the US. India has narrowed Mode 4 negotiations to the movement of highly skilled professionals and does not take into account unskilled or lower skilled workers. It is indeed unfortunate that, India's Mode 4 positions are 'captured' by business lobbies.
Larger public interest cannot be traded away to maintain the myth of multilateralism through India's commitments in the WTO, or to benefit a handful of domestic commercial enterprises that seek to expand their business opportunities to other countries. We must bear in mind that commitments under the WTO are irreversible and that policy actions have far reaching impacts, some of which may not be visible in the short term. Allowing water, energy, credit and banking to come under a weak regulatory environment that is biased towards corporate control will further undermine the productive capacities of India's communities, workers and farmers (majority of Indian farmers are subsistence oriented peasant producers). Access to affordable services is crucial to building strong, healthy and productive societies. To defend the integrity of the services sector is to defend life.

Though able and intelligent, trade officials in the Commerce Ministry are not the best judges of ground level impacts of possible liberalization commitments. Substantive consultations with regional and local Governments, policy makers in critical sectors such as health, education, water and sanitation, environment, financial services, labour and social welfare, and with a broad cross section of civil society—including workers, unions, farmers, fisher-folk groups, women's organizations and urban poor groups— is absolutely critical to fill these knowledge gaps. But to date, the few attempts by the Ministry of Commerce to engage in such discussions have been restricted to an extremely narrow base of constituencies and biased towards pro-GATS lobbies, while apprehensions voiced by those who would be most negatively affected by GATS commitments are not reflected in the Ministry's positions.
WATER AND ENERGY SERVICE SECTOR

The most serious implications are likely to be in sectors like water, energy, biodiversity, tourism. It should be pointed out that, the EU countries have some of the world's biggest water companies - Suez and Vivendi in France, RWE in Germany, Thames Water in Britain (now taken over by RWE) and so on. So EC is extremely keen on the water supply market. Committing the water sector will mean effectively the privatization of water supply - at least the urban water supply.

All over the world, privatization of urban water supply has resulted in huge increase in water tariffs, which the common people have not been able to pay. This has resulted in cutting off of water supply in many cases. Excessively high tariffs have meant that, people have had to pay over 25% of their earnings for domestic water supply. This has led to widespread resistance and opposition, forcing large number of privatization projects to be abandoned. In the process, however, privatization has locked local and national Government agencies into massive debts, has destroyed efficiently working public systems and has eliminated space for participatory and accountable water supply systems.

In addition, privatization of water supply is invariably accompanied by the effective privatization of the water source - since a private company wants its source to be assured. In India, where privatization of water supply has begun in a small manner (currently outside ambit of GATS), all these problems are being seen. In Chattisgadh, privatization of the Sheonath river for industrial water supply has deprived the locals of access to the river for fishing and for irrigation as the private company claims that, it now "owns" that part of the river.
When water comes under the GATS ambit, the problems will be greatly aggravated. First, GATS rules will heavily constrain the Government with respect to the nature and amount of regulation; it will be able to place on the sector. Regulations imposed by the Government could face challenge from the Foreign Service providers in form of the necessity tests. Secondly, the GATS commitment will lock the Government into this policy. Right now, if it is found that, the policy of privatization of water is not working, the Government will be able to change it. Once the sector is committed under GATS, revoking it will be virtually impossible - even if there are adverse public opinion and mass protests. It is more likely then, that the mass protests will be put down with increased repression and use of state power. Thirdly, when ability of even the Central Government to regulate the sector will be severely constrained, there will be little role for bodies like District Panchayats, Village Panchayats, Municipal Bodies. This will strike a body blow at the democratic structure of our society, which envisages decentralization especially under the 73rd and 74th Amendment. All this will be applicable in sectors other than water also.

It has been well known that, the EC requests would heavily involve water, and hence an international campaign has been active on this issue. Possibly in deference to this, the EC request and specifically mentions that the request "does not imply access to water resources". Yet, it is impossible to believe that, once the Market Access is granted, the companies will not insist on access and even control on water resources. Indeed, the heading of the sector is "Water Collection, purification and distribution services...." Collection is certain to include the water source, and will lead to establishment of control (if not "ownership") on the water resources themselves.

Opening up of the energy services is likely to have a similar impact. Allowing foreign companies into retail sale of wood, as asked for is also a very sensitive issue.
THE TOURISM SECTOR

Tourism, considered as the world's largest industry, is accounting for over one third of the trade of services globally (WTO 1998). The GATS in the context of tourism is incredibly complex, as tourism has spill over effects in so many other sectors of an economy. For example, if one attempts to limit an analysis of the effects of tourism on the hotel sector, a multitude of other sectors will not be addressed, which due to the linkages between hotel services and other services are equally relevant to consider. Any analysis of the hotel sector would also require an analysis of the food providers, cleaning service providers, and so on. It is precisely these linkages that make negotiations in the GATS so complicated, particularly for a country such as India, due to the relatively undeveloped policies that regulate the tourism sector.

Indeed, many arguments have been made that an environment of undeveloped policy, combined with the need to make commitments being made without realizing precisely how the commitments made will play out in the future. These arguments are not baseless. Developed countries, particularly the US, the EU and Australia, have voiced their desire for a "clustering" approach to the liberalization of sectors. The approach dictates that rather than opening up specific sectors, groups of related sectors would be considered as one and treated as such.

Such an approach may be appropriate and possible for countries with well-developed regulatory frameworks related to specific sectors within a cluster, but for a country such as India it would be unfeasible and potentially dangerous given the low level of regulation that exists.

Besides the fact, that regulation in India is low, the data required to determine the extent to which specific sectors can be liberalized may not be
available. Considering that the GATS effects on a multitude of services in a country and that tourism is but merely one, it becomes apparent magnitude of the reforms and commitments that are currently negotiated.

Though it has been argued in many circles that tourism provides a boon to developing countries seeking to acquire more foreign currency reserves, thereby increasing their capacity to import foreign goods and facilitate growth, reality dictates that a substantial portion of any profits earned in this sector are either repatriated outside of the country or are diluted due to leakages in the revenues accrued.

While it is true that tourism does offer employment opportunities and may act as a catalyst to further develop infrastructure, precisely what types of employment generated requires consideration. Also, while new employment may be generated, it requires a counter analysis of employment opportunities and livelihoods being lost [e.g. due to the expansion of tourism within small communities at the expense of other sectors, such as agriculture and fishery].

The GATS National Treatment obligation ensures that, Members do not operate discriminatory measures in favour of domestic tourism suppliers. That, however, could make it difficult for local Governments to pursue policies that would help local communities or protect the environment. Moreover, an influx of new competitors into a market dominated by locally owned Small to Medium Enterprises (SMEs) would force these firms to either become much more efficient or to fall by the wayside; it is difficult for an SME to compete with a large multinational firm offering similar services. The fact that, these SMEs are locally based also implies a significant number of backward linkages into the communities; their disintegration would contribute to further losses of employment as well as diminishing the demand for locally made products to sustain hospitality services.
If we consider example of Goa, a small coastal state in the west coast of India, which is a popular beach tourism destination that drew both domestic and foreign tourists to its relatively pristine beaches. Prodded on by a myopic Tourism Ministry service providers rushed in to meet the demand leading to tourism development beyond the ecological carrying capacity of the region. Needs of tourists and the local populace have often come into conflict over access to local resources such as beach space and drinking water. The history of tourism related infrastructure in Goa is replete with documented cases of regulatory failure. The Coastal Regulation Zone Notification (CRZ), a law (notified by the Indian Central Ministry of Environment and Forests) that bars construction in stipulated zones based on their proximity to the high tide line, has often been a casualty. The numerous violations of the CRZ Notification by the tourism industry in Goa and elsewhere have shown how implementing zoning regulations is fraught with difficulties because of the ambiguities of ruling what areas fall under different zoning rules. There is a pertinent case for strengthening this regulation to protect the coastal ecology from further tourism and related development.

Resorts and related infrastructure like roads and electricity generation plants consume huge amounts of energy, water and generate pollution and wastes often in ecologically fragile destinations that are unsuited to deal with such impacts. The inadequate understanding of tourism in the list of projects requiring environmental clearance in the Environmental Impact Assessment (EIA) Notification of 1994 is again a case of the regulators being institutionally challenged.

Tourism in India is concentrated around eco-sensitive areas and a bound Market Access and National Treatment commitment will accentuate the problems states like Goa face from excessive tourism. It will also lead to a dangerous ‘Environment Policy Freeze’ where Governments hands could be tied from enacting laws to limit tourism development in such areas.
Following the 73 and 74 Amendments to the Indian Constitution, local bodies have been given the mandate to determine developmental processes, which includes the provision of water and regulating developmental processes like Tourism. The challenge for local Governments grappling with providing universal access to water or the varied impacts of tourism is to devise more effective regulations to implement desired public interest objectives. The GATS centralizes decision-making and attempts to create a predictable harmonized deregulatory climate for service providers. It places no value on local democracy.

**INCOMPLETE RULE MAKING**

The WTO-GATS regime has two very important and critical shortcomings: the first is that it reflects more the interests and concerns of richer countries and their private services companies. This fact was underscored in the recently published report of the ILO's Commission on the social dimensions of globalization. The second, on which sadly there is very little attention, is that the GATS framework is still incomplete, leaving several important dimensions unsettled. The meaning of a number of key GATS terms needs to be clarified before developing countries can take informed decisions while bringing their tourism sectors under the ambit of GATS clauses. For example, the text does not provide clarity on several key terms that could be the subject of arbitration. The disciplines on domestic regulation aim to ensure that regulations are "not [more] burdensome than necessary". What is "more burdensome than necessary" is vague; similarly, the issue of National Treatment to "like providers" does not specify what a "like provider" is. In the context of tourism applying broad understandings for "like providers" can have serious implications on public interest and environmental policy making. In the case of tourism different types of tourism providers may deserve different treatment for environmental and other legitimate policy objectives. For example, Governments may decide to provide concessions to hotels that employ local people and source local raw materials and contribute to...
conservation related activities. Or for example, to prevent further damage to the environment a host country may impose restrictions or seek to impose higher standards for foreign tourism providers.

There are several such areas where these clauses could be interpreted broadly by Dispute Settlement Panels. Furthermore, as disciplines are currently being formulated on domestic regulation, it is unclear as to whether they will apply horizontally or to specific sectors. In this ambiguous scenario, it is advisable for negotiators to exercise utmost caution while making commitments. Ambiguity also extends to the clauses that deem the GATS a development friendly Agreement. Article IV remains vague and the compressed timetable for commitments pays scant regard to the development priorities of developing countries.

LOSS OF LOCAL GOVERNMENT CONTROL

As tourism is often very regionally specific, it is optimal that the representative Governments of the area effectively enforce planning, regulating and monitoring of tourism projects. Several national legislations and international instruments such as the Convention on Biological Diversity (CBD) explicitly recognize the need for decentralized tourism planning. It is well recognized that, the GATS will intrude into these democratic spaces. Despite this, local and regional Governments are unaware of the commitments that their trade bureaucracies are inking in Geneva. Given the complicated nature of tourism and the vast array of potential effects it has, as well as the diversity that exists in terms of tourist destinations in several countries and corresponding policy requirements, it is not possible to apply a uniform policy under GATS rules.
RACE TO THE BOTTOM IN ENVIRONMENTAL AND DEVELOPMENTAL STANDARDS

If countries commit tourism services under proposed GATS rules any federal, state or local regulation governing the tourism sector, such as those designed to protect the environment, provide local jobs, as well as those that favour locally owned enterprises, could be challenged as "barriers to trade." While in other sectors these laws may be protectionist in nature, in tourism they often serve as useful instruments to achieve legitimate social and environmental goals. Local Governments would be faced with the difficult task of demonstrating that such policies were necessary, and that no other less trade-restrictive measure could be taken to accomplish the same objective, in order to maintain it.

THE GATS IS A ONE-WAY STREET

Under GATS rules, if a Government wants to introduce new environmental regulations or wants to take back a concession given to a foreign tourism provider it should not only compensate the affected company but also compensate all potentially affected trading partners for their tourism companies lost business opportunities. This ratchet clause in the GATS is geared toward locking-in commitments and preventing local Governments from exercising their democratic rights.

It should be clearly understood that, policy autonomy is what is being sacrificed with commitments in the new round. The need for policy autonomy in tourism is well recognized in international fora like the Convention on Biological Diversity (CBD) and the UN Commission on Sustainable Development. Therefore, it is necessary that the WTO-OMT should partner
with organizations such as the UNCTAD in providing developing countries with correct information on the impacts of unlimited commitments.65

The negative social and environmental impacts, becoming increasingly apparent, are calling to question whether further tourism development in the fragile coastal strip of Goa is a viable pathway for policy-makers to follow. The tourism sector is only indicative of the numerous problems that could arise when such an incipient regulatory environment, in a sector that is not understood by policy-makers, is locked-in under a complex and effectively irreversible legal framework, such as GATS.

CONCLUSIONS

What is required is a better understanding of tourism. More specifically, we are of the opinion that any negotiator must have a holistic view of tourism that allows for more than simply viewing the industry as a vehicle for investment and growth. Tourism must be considered for all its effects, including those on the environment, local job markets, local communities and local economies.

Negotiators must also address the lack of domestic policy that exists in India today regarding tourism, and formulate a policy that provides explicit boundaries rather than objectives. Attempts must be made to rectify the lack of data needed to make these policies.

The decentralized democratic process that is detailed in the Indian Constitution must be adhered to. That is, local Governments need to play a greater role in accepting or rejecting tourism-related investments.

65Why the GATS is a wrong framework through which to liberalise tourism : K.T.Suresh
Before this, however, the general lack of clarity within the GATS requires illumination. Attempts must be made to clarify the terminology of the GATS to allow policy-makers to better understand what the implications of any binding commitments are.

Finally, the Ministry of Commerce alone cannot address tourism as this industry has effects on a wide spectrum of sectors, including the environment, labour and Human Rights. What is required is coordination among the relevant Central Ministries and State Governments in India to deal with the effects of tourism on society before any further commitments are made. The International Covenant for Economic, Social and Cultural Rights and other Human Rights Treaties and Conventions to which India is a signatory can be used as normative frameworks.

Based on the case studies, like Goa, it can be stated that if these recommendations are not adhered to, and tourism is to continue along its current unregulated trajectory, the state of Goa will see a distinct loss in the quality of life of its inhabitants.

The negative social and environmental impacts, becoming increasingly apparent, are calling to question whether further tourism development in the fragile coastal strip of Goa is a viable pathway for policy-makers to follow. The tourism sector is only indicative of the numerous problems that could arise when such an incipient regulatory environment, in a sector that is not understood by policy-makers, is locked-in under a complex and effectively irreversible legal framework, such as GATS.

The lack of data and other deficits – developmental, environmental and democratic – are entrenched in the GATS negotiations. A standstill in the negotiations and devoting time for bridging these deficits, we believe, is the rational choice for India.
THE DISTRIBUTION SERVICES SECTOR

The distribution services sector contributes a significant portion of India’s GDP and employment. Being the second largest employer after agriculture and contributing 14 per cent to GDP, the retail industry has emerged as a mainstay of the Indian economy.66

However, the sector is largely unorganized and suffers from poor access to capital, lack of management skills, fragmented supply chain and unfavourable regulations.67 Retail trade in India is characterized by the wide prevalence of family-run shops. An estimated 1.2 Core small and medium sized shops have around 96 per cent share of the market, compared to 80 per cent in China, 60 per cent in Thailand and less than 1 per cent in the United States.68 Thus the organized sector currently occupies close to 4 per cent of the retail market only. However, this share is expected to reach 10 per cent by 2010, throwing up big opportunities for new players.69

India is witnessing a period of boom in retail trade with the sector having an estimated market size of about US $80 billion. India has been ranked 5th in the Global A. T. Kearney Retail Development Index, second to China in Asia, making it the focal point of many foreign players. This is primarily attributable to a large and affluent middle-class population in the country. India’s middle-class, about 445 million strong, is greater than the entire population of the US and its consumerist aspirations are yet to peak. Moreover, 45 per cent of all Indians are aged around 20 years - a far cry from the OECD’s increasingly geriatric societies.70

---

66Kumar, Lalit, ‘Riding high on FDI, retail sector set for quantum leap’, The Financial Express, 14 July 2006
68People’s Voice (2006)
69Kumar Lalit, ‘Riding high on FDI, retail sector set for quantum leap’, The Financial Express, 14 July 2006
70Mitra Soumya Kanti, ‘Competition is the Key’, The Economic Times, 2 July 2006
Soaring economic growth, an increasingly affluent middle class with its growing aspirations and a craving for newer consumer experiences - all these taken together make India an attractive market for domestic and international retailers.\(^{71}\)

Given that India did not undertake any commitments in retail during the Uruguay Round, the country does not have any WTO obligations as of now to allow FDI in the retail sector. However, in a scenario of the growing attractiveness of India as a retailer’s paradise and the consequent interests on the part of the global retail giants like Wal-Mart, Carrefour, Tesco and Casino, etc., a heated debate is going on in the country as to whether the time is ripe for opening-up of the retail sector to FDI. It is argued by the proponents of FDI in retail that throwing the retail sector open to FDI would be advantageous in terms of improved employment quality, growth of organized format, augmented investment in supply chains besides assuring consumers of better product quality and services.

Furthermore, the advent of FDI is also expected by the proponents to boost quality standards and cost-competitiveness of Indian producers. This would benefit not only the Indian consumer but would also open the door for Indian products to enter the wider global market, according to them. However, a large chunk of the India’s population is severely opposed to the proposal of FDI in retail. This is attributable primarily to the potential adverse livelihood implications of FDI in retail on the small players who comprise the lion’s share of the retail business in the country. In a scenario of ever-growing unemployment and lack of opportunities in the formal sectors, Crores of small shop owners and small and medium traders have been pushed into the retail market.\(^{72}\)

\(^{71}\)Kumar Lalit, ‘Riding high on FDI, retail sector set for quantum leap’, The Financial Express, 14 July 2006

\(^{72}\)Datta Kingsuk, ‘FDI in Retail Trade: A Ruinous Prospect’
It is apprehended that overseas competition would lead to job losses and drive smaller domestic operators out of business. Hence, the question of the quantum of displacements from livelihood due to the potential invasion of foreign corporate investment in retail business has come up as a highly contentious issue not only among the civil society organizations but also in the political circle. Although 100 per cent FDI in retail looked farfetched, in the early 2006, it seemed that the Government of India was likely to open up a portion of the lucrative retail market to foreign players with certain riders attached. Wal-Mart and other global retail majors had been intimated by the Government that they would be allowed to invest subject to certain stringent conditions.73

However, recently there has been a shift in this policy stance of Government, purportedly attributable to the staunch opposition put forward by the left parties (who are supporting the present Congress-led United Progressive Alliance (UPA) Government at the Centre from outside) as well as a strong section within the Congress Party. This shift is also reflected in the approach paper to the Eleventh Five-Year Plan (2007-12). The paper, released recently by the Planning Commission of India, is silent on the issue of FDI in retail. Interestingly, the same Planning Commission had made a strong case for allowing FDI in modern retailing a few months ago in the Mid-Term Appraisal (MTA) of the Tenth Five-Year Plan. FDI in retail was also identified as one of the key ‘action points’ are emerging from the MTA.74

Notwithstanding such initiatives in the not-so distant past, the Government is apparently planning to rely, for the time being, on domestic

---

73 In early 2006, Prime Minister Dr. Manmohan Singh indicated that India was mulling over the issue of FDI in retail and a positive outcome was expected in the next 5-6 months. Finance Minister Mr. P Chidambaram and Commerce Minister Mr. Kamal Nath had also said that the first steps to open India’s retail market to FDI could be taken during the first quarter of 2006. (Rediff, 2006)

entrepreneurs such as Reliance, RPG, Bharti, Pantaloon, etc., to modernize the Indian retail sector instead of seeking foreign investments immediately.\textsuperscript{75}

Most importantly, Reliance Retail is coming up in a big way. The Reliance Industries Ltd. of Mukesh Ambani has set up this subsidiary (Reliance retail) with equity of US $2.24 billion to propel 'a retail revolution in the country'. The first 11 of a planned 5,500 retail outlets have already been opened in Hyderabad. The new retail chain would sell food, clothes, footwear, consumer durables, home essentials, farm supplies, travel services, health care products, and even educational and entertainment products. Reliance is also in talks with global luxury brands like Giorgio Armani and Manolo Blahnik to bring them to India. Reliance retail plans to cover 1,500 Indian cities and towns with a network of neighborhood convenience stores, supermarkets, specialty stores, and hypermarkets. With the aim of catering to both mass market and luxury segments, Reliance retail is already preparing to take the lion's share of the market ahead of the entry of foreign competition.\textsuperscript{76}

The present policy stance of opposing FDI in retail is likely to give the domestic retail giants like Reliance a head start. According to the latest findings of industry chamber ASSOCHAM, an overwhelming majority of the domestic retail firms is in favour of allowing 49 per cent FDI in a calibrated manner in retailing, instead of 100 per cent foreign equity. In a note submitted to the Ministry of Commerce and Industry, ASSOCHAM suggested that the Government first consult the domestic industry.\textsuperscript{77}

\textsuperscript{75}According to a senior government official, 'Our purpose is to develop a modern retail sector in the country. Companies like Wal-Mart would set up limited number of stores in major metros, whereas Indian firms (Reliance) would open 350 stores at a time. This would help in creating necessary infrastructure including developing an efficient supply chain and marketing network. Our objective is to modernise retail sector and not to allow FDI in retail.' (Jayaswal Rajeev, 'Wal-Mart's India Dream Hits FDI Wall', \textit{The Economic Times}, 5 July 2006)

\textsuperscript{76}Rai, Saritha, 'In India, Reliance looks for 'lion's share' of retail', \textit{International Herald Tribune}, 27 June 2006.

\textsuperscript{77}Datta Kingsuk, 'FDI in Retail Trade: A Ruinous Prospect'
In early 2006, Prime Minister Dr. Manmohan Singh indicated that, India was mulling over the issue of FDI in retail and a positive outcome was expected in the next 5-6 months. Finance Minister Mr. P. Chidambaram and Commerce Minister Mr. Kamal Nath had also said that, the first steps to open India's retail market to FDI could be taken during the first quarter of 2006.

According to a senior Government official, 'Our purpose is to develop a modern retail sector in the country. Companies like Wal-Mart would set up limited number of stores in major metros, whereas Indian firms (Reliance) would open 350 stores at a time. This would help in creating necessary infrastructure including developing an efficient supply chain and marketing network. Our objective is to modernize retail sector and not to allow FDI in retail.' Before finalizing and announcing the entry of the overseas mega malls in the country, it is learnt that in response to an ASSOCHAM questionnaire circulated to domestic players, one of the leading retailing firms, which runs value-buying chains throughout the country and is expanding very fast, wanted a period of two to three years for the domestic industry to consolidate.78

A view has emerged among the proponents of FDI in retail that the policy stance of opposing 'only' FDI in the retail trade might actually end up serving the interests of the Indian capitalist giants such as Reliance Industries, who would like to establish their own controlling positions before letting in the foreign companies.79 This view is primarily attributable to the apprehension that, Reliance's deep pockets would not be matched by any other prospective Indian entrant into the retail sector.80

78 The Financial Express (2006)
79 People's Voice (2006)
80 Mitra Soumya Kanti, 'Competition is the Key', The Economic Times, 2 July 2006
Hence, the best possible way to avert such developments, it is maintained, is to allow FDI in retail and create an atmosphere of competition for the domestic retail giants.

From the point of view of the employment and livelihood of small players in the retail sector, it is unlikely that the impact of corporatization through domestic capital would be substantially different from that of foreign capital. Nevertheless, the solution does not necessarily lie in opening up the floodgates to foreign players. Rather, the Government needs to undertake appropriate regulatory and safeguard measures to shelter the small players from the potential exploitation and other adverse livelihood implications of corporatization of retail sector, even if that takes place through entry of domestic capital. As far as the GATS commitments are concerned, there is no reason why India should bind even its existing policy regime if it does not get anything in return.

FINANCIAL SERVICES SECTOR

The term ‘financial services’ is broadly used for a set of services provided to ensure efficient mobilization and allocation of funds towards the overall growth of an economy. By directing investment funds to their most productive use, an efficient financial services sector can significantly promote growth and income. As a result, the effective provision of these services is a basic prerequisite for a dynamic and modern economy. Across most developing countries, including India, financial services constitute part of the regulatory system that manages inflow and outflow of foreign capital, reduces exchange rate volatility and provides credit to socially desired sectors.

Countries such as the United States, Japan, as well as some members of European Union have, over the years, been vocal demanding liberalization of different financial services, arguing that barriers to entry hinder economic
progress and financial stability. They also have well-developed financial service industries that stand to benefit from access to international markets. However, the rapid flow of money out of developing countries in the aftermath of the Latin American crisis in 1980s and the East Asian crisis in 1997, demonstrated that liberalizing financial markets sans proper planning and management of investment is not a recipe of success. In fact, given their immense importance in overall stability of an economy, there is a broad disagreement among various countries about further liberalization of financial services. These disagreements range from both liberalization in additional financial services sector as well as deeper liberalization in a particular sector.

Liberalization of financial services at a multilateral level is largely governed by the General Agreement on Trade in Services (GATS) under the World Trade Organization (WTO). By the time, official negotiations under the Uruguay Round were over in 1993, negotiations on financial services remained unfinished. These negotiations continued for two more years and an interim Agreement was reached in 1995. The negotiations again reopened in April 1997 and a revised set of commitments in financial services by 70 Member Countries was agreed on December 1997, and annexed to the GATS as the Fifth Protocol. GATS also required WTO Members to restart negotiations on service liberalization after the fifth year of its implementation. The current round of negotiations has therefore started in 2000, with the objective of further liberalization of trade in all services, including financial services. Under these negotiations, India submitted its revised offers in August 2005 and agrees to open its financial services to foreign countries.

CURRENT LEVELS OF LIBERALIZATION AND ONGOING NEGOTIATIONS UNDER WTO

In the financial services, Annex to the GATS Agreement, India undertook commitments under various sub-sectors within financial services,
mostly in Mode 3.\textsuperscript{81} In the banking sector, India committed to allow establishment of branch operations of a foreign bank subject to a licence limit of 12 per year. However, India retained the option of restricting entry of foreign banks if their market share exceeded 15 per cent. Apart from this, the foreign banks were also allowed to install ATMs at branches and other places. It also allowed licensed foreign bank branches to invest in other financial services up to certain limit. The foreign banks were required to constitute a Local Advisory Board, the Chairman and Members of which had to compulsorily be Indian nationals.

Finally, public sector banks could invest their surplus funds in term deposits only with scheduled commercial banks in India. Within the insurance sector, India allowed foreign insurers to insure goods in transit to and from India. Foreign re-insurers were also allowed to take reinsurance but only that part of the risk that was left as residual after statutory placements domestically with Indian insurance companies. This part of the reinsurance could be placed with foreign insurers through overseas brokers. These brokers were also allowed to have resident representatives and representative offices to procure reinsurance business from Indian companies. However, these representatives and offices were not allowed to undertake any other activity in India and their expenses were to be entirely met by remittances from abroad.

Though these commitments signalled some improvement over the original commitments made in 1993, they were well short of the existing regime in 1997. Consequently, in the current round of negotiations, India's trading partners made several liberalization requests to India, both under the bilateral `request-offer' mode as well as under the plurilateral collective requests. In February 2006, India received plurilateral requests for liberalizing trade in financial services from a number of developed and developing

\textsuperscript{81}WTO (1998) India's Schedule of Specific Commitment Supplement 4, GATS/SC/42/Suupl.4
Some of the major demands made in the banking sector included: undertaking full Market Access and National Treatment commitments in Modes 1 and 2 for all sub-sectors, removal of restrictions on preferred form of presence, numerical quotas, monopolies, exclusive service suppliers, use of foreign capital and equity ceilings and investment by public sector utilities in foreign banks. Foreign Service providers also expressed the desire for removal of the priority sector lending requirement as well as restrictions on land acquisition by foreigners and 'discriminatory' regulations affecting income tax, solvency ratios and borrowing limits.

In the insurance sector, other Members requested India to undertake full Market Access and National Treatment commitments in Mode 1 and 2 for marine, aviation and transport insurance, reinsurance, insurance intermediation and insurance auxiliary services. They have expressed a desire for removal of restrictions on the choice of the form of commercial presence and partner for Foreign Service providers as well as limitation on equity participation. They asked for greater transparency in the development and application of domestic regulations.

In the current round of talks, India has offered to further open up this sector provided other WTO Members make substantive and satisfactory offers in sectors and modes of supply where India has indicated its interests.\footnote{Indonesia has received Financial Services Collective Request on behalf of Australia, Canada, European Communities, Ecuador, Hong Kong, Japan, Republic of Korea, Norway, Macau and United States} Within the financial services, India has requested developed countries like Australia, Canada, European Communities and United States to liberalize restrictions on Market Access and National Treatment for data processing of financial services under Mode 2. India has also made several country/member specific requests. For e.g. India has requested Australia to allow bank branches to accept retail deposits and remove the requirement of approval of Australian authorities for setting up of bank branches of parent banks where a

\footnote{WTO (2005) India’s Revised Offer TN/S/O/IND/Rev.1}
single shareholder holds 15 per cent or more share. In the case of European Community, India has requested that a bank subsidiary incorporated in any one of the Member States be accepted as incorporated within the EC and be authorized to render financial services in entire EC. In United States, the form of commercial presence, i.e. bank branch or bank subsidiary, depends on individual state regulations and India has requested the removal of such restrictions as they restrict provision of financial services.

India’s conditional revised offer for banking services is largely guided by RBI’s Roadmap for Presence for Foreign Banks in India. The Roadmap has divided further liberalization into two phases. During the first phase, between March 2005 and March 2009, foreign banks will be permitted to establish presence by way of setting up a Wholly Owned Banking Subsidiary (WOS) or conversion of the existing branches into a WOS. Consistent with the Roadmap, India has offered to allow foreign banks to enter through branch operations or wholly owned subsidiary of a foreign bank. Given that, the number of branches permitted each year has been higher than the WTO commitments; India has agreed to offer up to twenty licences per year, both for new entrants and existing banks. The minimum start-up capital requirement for these WOS would be Rs. 3 billion ($ 73 million) and they have to maintain a capital adequacy of 10 per cent. India has also offered to allow WOS of foreign banks to hold surplus funds of public sector utilities as term deposits, subject to guidelines by RBI.

India has also agreed to allow foreign banks to invest in private sector banks through the FDI route subject to foreign equity ceiling of 49 per cent. However, the combined foreign equity (through FDI, FII and NRI routes) is capped more liberally at 74 per cent.

The resource allocation requirements will be applicable to the foreign banks on a non-discriminatory basis. While public and Indian private sector

---

84RBI (2005) Road map for presence of foreign banks in India
banks have to ensure that 40 per cent of their net bank credit goes to the priority sector, the limit is only 32 per cent for foreign banks. Finally, India has offered to replace the Local Advisory Board requirement with guidelines on the composition of the board of directors.

In the case of insurance, for life and non-life insurance as well as reinsurance and retrocession, India has offered to allow foreign equity up to 26 per cent. This is in concordance with the existing regime in India, although an Amendment to increase the restriction to 49 per cent is under consideration. In the case of auxiliary services like consultancy, actuarial and risk assessment, foreign equity up to 51 per cent has been allowed. Moreover, India has offered to impose no National Treatment limitations on foreign players in life and non-life insurance.

ROADMAP FOR FUTURE

The Revised Offer on financial services signals a substantial improvement on what was committed in the Uruguay Round. Across most sectors, India has offered to bind the existing trade and investment regime. However, India has been shy of making pre-commitments in certain areas where further reforms are in India's own interest. In the insurance sector, increasing the FDI investment limit up to 49 per cent over the next 3 years will allow greater infusion of capital, introduction of new instruments, market expansion and deeper penetration of insurance services. India can also undertake pre-commitments for merger and acquisitions between foreign banks and Indian private sector banks, especially as RBI's Roadmap envisions foreign banks entering into mergers and acquisitions with Indian private sector banks after 2009, subject to the 74 per cent investment limit.

Another area where pre-commitment would send a positive signal to India's trading partners would be regarding provision of National Treatment to foreign banks involving solvency ratios, income tax, borrowing limits, etc.
These would again be consistent with what has been outlined in the Roadmap. Such pre-commitments would signal direction of future reforms and give domestic service providers and regulators time to prepare themselves for competition and put in place the required regulatory regime.

Finally, given the move towards greater capital account convertibility and the advent of e-commerce in financial services, it would be advisable for India to undertake some commitments in Mode 1 and 2 across most financial services. This would also strengthen India’s case as it demands that developed countries provide full Market Access and National Treatment commitment in Mode 1 and data processing of financial services under Mode 2.

CONCLUSION

While liberalizing the financial services sector undoubtedly provides greater opportunities for mobilization and efficient allocation of resources, it is extremely important to have a proper regulatory structure in place along with opening up of the economy. Perhaps in no other sector can imprudent regulations because more damage than the financial sector which enjoys strong linkages with the rest of the economy. Financial sector irregularities were a prime cause of several recent crises, like the Tequila Crisis (1994), Asian Crisis (1997) and Argentine Crisis (2001).

As India opens its doors to a large number of global banks, some of which have assets comparable to India’s GDP, steps must be taken to strengthen the Indian banks to be able to compete with these banks as well as generate greater international presence. These would include further deregulation of interest rates, reduction in pre-emption of banks’ resources through Statutory Liquidity Ratio (SLR) and Cash Reserve Ratio (CRR) among others. With greater international presence there will be overlaps and
potential conflicts between home country regulators of Foreign Service providers and host country regulators. A mechanism needs to be set in place to resolve such conflicts. India must also meet the deadlines it has imposed on itself to conform to the Basel II Norms. Currently, foreign banks operating in India and Indian banks having presence outside India are required to migrate to the standardized approach for credit risk and the basic indicator approach for operational risk under Basel II with effect from 31 March 2008. All other scheduled commercial banks are encouraged to migrate to these approaches under Basel II in alignment with them but in any case not later than 31 March 2009.

Public sector dominance in insurance companies also needs to be lowered to allow greater level playing field between all players. Resources of these companies must be freed so that they can undertake investment in long term infrastructure projects with market determined returns. More capital needs to be encouraged into the sector as current rates of insurance penetration in India are well below the international average.

**AUDIO-VISUAL SERVICES SECTORS**

The audio-visual services sector is one of the fastest growing sectors in the Indian economy. India is the largest film-producing country in the world. The country on an average produces 800 feature films and 900 short films annually in 52 different languages and dialects. The music industry in India is the third largest in Asia and ranks nineteenth in the world. India is also the third largest producer of original entertainment software. Indian radio and terrestrial broadcasting network is one of the largest in the world. Given that, there is a large and growing overseas market for Indian films, music, and

---

86 Liberalization of Financial Services under GATS: The Indian Experience by Abhijit Sen Gupta
87 Data and information on audio-visual services draws heavily from Arpita Mukherjee (2002b), pp. 2, 9, 10, 20, 49, 55 and 56

241
entertainment software, India has a tremendous potential for exporting these services. In order to encourage the inflow of advanced technology and development of skills, India has significantly liberalized the audio-visual service sector since the 1990s.

India’s Uruguay Round (UR) commitments only included motion picture or videotape distribution services. Even within this sub-category, India scheduled only partial commitments in commercial presence (Mode 3) and left all other modes unbound. India imposed both quantitative and qualitative restrictions on film imports. The import of foreign films, for instance, was restricted to 100 titles per year. The National Treatment limitation stipulated that, foreign films needed certification before display in Indian theatres. The certification, however, was subject to certain conditions. Foreign distributors in India were allowed to set up only representative offices to function as branches of companies incorporated outside the country. India had also enlisted an MFN exemption in its UR commitment that allowed it to accord preferential treatment to motion pictures and television programmes from countries with which its hardcore-production agreements. This exemption was undertaken to promote cultural exchange and was applicable for an unspecified period of time.

In its Revised Offer in August, 2005, India has offered to remove all National Treatment restrictions, it had included in its Mode 3 commitment in the UR. However, no offer has been made to schedule new sub-sectors from the category of audio-visual services. However, India is not the only country, which has adopted a conservative approach towards opening-up of the audio-visual sector to foreign players. During the UR, the Member Countries of the WTO were, in general, very reluctant to undertake liberalization commitments in audio-visual services. Even major players such as the EU, Australia and Canada did not make any commitment, while commitments of some others (like India) were very restrictive both in terms of sectoral coverage and modes of delivery on account of the sensitivities involved in this particular services
sector. In view of the fact, that the audio-visual services sector is an important and influential medium for cultural expression, trade in this sector is often heavily regulated for preservation of the cultural identity and social values of any country. It is maintained by a substantial chunk of the WTO Member Countries that the overwhelming presence of foreign cultural products causes the erosion of cultural values and identities in the receiving country. Apart from such social and cultural sensitivities, regulations on audiovisual services are often put in place for the promotion of domestic industry by providing protection against foreign competition.

Given the vital role played by the audio-visual media in preserving cultural democracy, the main objective of the Indian Government's policy on audio-visual services is to strike a balance between preservation of the rich cultural heritage of the nation and offering a wider choice of services to the consumer through liberalization and increased privatization. Since a large part of the audio-visual and related services has already been privatized, Government meets the objectives of liberalization and cultural protection through appropriate regulatory measures, which are revised from time to time in keeping with the global developments in this sector. Hence, the availability of sufficient policy space assumes great significance for India in order to be able to revise the policy stance including the regulatory measures from time to time in accordance with the changing scenario of this culturally and socially sensitive sector.

Undertaking fresh GATS commitments may deprive the country of such policy space in future. Hence, if the opening up of the audio-visual services to foreign players is indeed regarded as the need of the hour (for technological improvements and a host of other reasons) then autonomous liberalization would be a better alternative, at least at the initial stages, rather than undertaking fresh GATS commitments, which are generally irreversible.
HEALTH SERVICES SETOR

When GATS was adopted in 1994, few countries were aware of the challenges it would bring. Very few Government departments other than Trade and Finance Ministries were involved in the negotiations, and several countries committed all or part of their health services to GATS liberalization without the knowledge of their Health Ministries.

According to the WTO Secretariat, 42 countries have already committed their hospital services to GATS. In addition, 15 have made commitments under the category of ‘other human health services’, which include laboratory, epidemiological and residential health services, as well as pediatric and chiropody services supplied in clinics and elsewhere.

Health services are also included under the GATS heading of ‘professional services’, which covers medical and dental services as well as the category of ‘services provided by midwives, nurses, physiotherapists and paramedical personnel’. Already 52 countries have made liberalization commitments in the former category and 28 in the latter.

GATS also cover insurance services, including health insurance, and 78 countries have already committed those services to liberalization under GATS. This has caused particular concern in those countries which base their health systems on social insurance programmes, since few Health Ministries were informed that, their trade negotiators had committed their health insurance sectors to GATS. India has committed partly its health sectors in Doha Development Agenda, but in its Revised Offer of August 2005, it has fully liberalized the sector. Let us see, what impact it has on developing countries, particularly in India.
The most important example of cross-border supply or trade in health services is telemedicine: the provision of medical services from a practitioner in one country to a patient or practitioner in another, predominantly via the Internet or satellite transmission of medical images. While still at an early stage, the potential benefits of telemedicine are already evident, especially for remote diagnosis and treatment. Based on evidence of its use among remote rural communities in Japan and Australia, telemedicine could expand the capacities of doctors in developing countries like India.

But the effective implementation of telemedicine projects presupposes a communications infrastructure developed to a level far higher than is currently found in India. However, several examples already exist of non-commercial telemedicine projects working within India on an experimental basis. While a growing body of evidence attests to the clinical benefit and cost effectiveness of telemedicine, there is less proof of its commercial sustainability.

Telemedicine includes the remote provision of medical education. Teleconferencing has already been established between institutions in Canada, Kenya and Uganda to enable health care workers in Africa to benefit from the latest medical knowledge. Internet sites such as the University of Iowa’s Virtual Hospitals provide free online information on a wide range of adult and child health problems—a valuable resource for doctors otherwise reliant upon outdated collections of medical journals. In all these cases, the expansion of cross-border supply of telemedicine offers potential gains for health care. However, concerns remain about the confidentiality of patients and the applicability and relevance of medical information generated in industrialized countries to situations in the developing world.
In addition, there is the problem of regulatory control over telemedicine, as noted by the 50th World Health Assembly in its 1997 Resolution on the uncontrolled sale of prescription drugs over the Internet. The resolution focused on the public health hazard of counterfeit products being passed off as genuine, and on the inappropriate use of potentially dangerous medicines without medical supervision. (The WHO had already exposed 4 companies selling prescription drugs over the Internet without the detailed information that should accompany the sales). Telemedicine poses regulatory challenges on the demand as well as the supply side. Even the most advanced regulatory systems will be unable to prevent doctors or clinics from ordering medicines over the internet which are not included in a country's essential drugs list. Such practices might give those practitioners a perceived commercial edge over rivals who keep within treatment guidelines, but would undermine national policies promoting the rational use of drugs.

The potential drain which commercial cross-border trade in telemedicine could have on limited health care budgets in India is also a matter of great concern. At present, almost all trade in remote health care is from north to south, and the expense of entering into commercial relationships would be prohibitive for poorer nations like India. While the technology of telemedicine offers potential benefits in some cases, few would suggest its commercial development offers more general solutions to the health problems of the majority.

Of more immediate significance is the development of cross-border private medical insurance and managed health care. Private health insurance is mostly provided by companies with a commercial presence in the country (and thus covered by Mode 3, or Commercial Presence, under GATS), and the potential is increasing for such services to be provided across national borders. However, the issues remain substantially the same in connection with Mode 3: the increased commercialization of health care and the growing involvement of the private sector.
MODE 2: CONSUMPTION ABROAD

Patients consuming medical services abroad represent a more significant source of international trade in health services. They may have travelled abroad especially to seek medical treatment in another country or happen to need treatment while visiting that country for other reasons. The majority of the USA’s estimated $872 million in health care exports in 1996 came from foreigners being treated in the country.

The potential for India to gain economic benefit from attracting foreign consumption of their health services is limited. However, India offers significant cost advantages for patients traveling from industrialized countries, with major treatments such as liver transplants or coronary bypass surgery priced at a tenth of what individuals would be charged in the USA. For e.g., the Apollo Group of hospitals provides low-cost quality treatment to foreign patients combined with special tourism packages and has also set up overseas franchises to cater to patients in other markets. In addition, India also offer culturally specific health services, a growing number of individuals who have turned away from the western medical tradition. India has a similar advantage in its extensive network of ayurvedic practitioners, who attract a steady trickle of foreigners every year. States like Kerala are already encouraging health tourism based on traditional knowledge.

Another aspect of consumption of health services abroad is the training of medical students at foreign educational institutions. Countries such as the UK and USA have long traditions of providing such education to foreign students on a commercial basis. India has the ability to attract foreign students for culturally specific courses, such as training in Ayurveda. In these limited cases, the consumption of domestic services by foreigners represents a potential source of export earnings for India.
However, these benefits will be outweighed by the social costs if limited investment is drawn away from national health priorities. In the developing countries like India, an expanding private sector will draw medical personnel away from the public sector. Favouring foreign patients will come at the expense of the local population. While extra investment financed by charges on foreign consumers has the potential to upgrade services for local users, in practice the two groups often use separate facilities, with little opportunity for crossovers. Worse still, the public sector often has to bear the cost of building the new hospitals and clinics to treat foreign patients, which is a further diversion of resources away from public health needs.

Ultimately, there may emerge a parallel threat to that experienced by patients: reduced opportunity of access for domestic students and a consequent contraction in the numbers of qualified nationals. The reverse situation also witnessed in India because we send medical students for training abroad. In such cases, the training represents an import in Balance of Payment terms, but can be seen as an investment in terms of the obvious potential for skills transfer. However, the extent to which those skills can be deployed to the benefit of the wider society depends on how many of the trainees return to their home country once their courses are over. Only half of the Indian doctors trained in Europe and the USA return home at the end of their training.

MODE 3: COMMERCIAL PRESENCE

The establishment of commercial presence in a foreign country differs from the other 3 modes of GATS, in that it is essentially an issue of investment. In health care, this investment relates primarily to foreign commercial presence in hospitals, health clinics and health insurance, and to a lesser extent to the provision of medical education. As noted, GATS aims to generate new opportunities for companies to invest and operate in the service sectors of other countries. But the prospect of increased foreign commercial
presence in the health sector has raised serious concerns about people's right to health, given the negative experience of fees in the sector.

In India, much of this experience has come as a result of the liberalization process, which has involved structural adjustment programmes under the IMF and the World Bank. The introduction of cost recovery programmes in the health sector is now widely accepted to have been disastrous, forcing many poor families and their children into a "medical poverty trap" characterized by untreated illness and long-term impoverishment. Even the World Bank, while it continues to support user fees for health in its national poverty-reduction strategy papers, has acknowledged that they are responsible for denying poor families access to health care.

Structural adjustment programmes have introduced cost recovery principles into the health care sector in India. Yet GATS goes one stage further, as it represents the commoditization of health care for trade on the open market. Just as internal liberalization prepares the way for commercialization of the health sector, so too external liberalization locks in commercialization through the long-term presence of foreign investment.

For India with failing health systems, this foreign investment may seem an attractive source of capital and medical technology at a time when other sources are thin on the ground. Yet involvement by the foreign private sector in health care has the potential to marginalize the poor even further. Companies seek markets in which they can be assured sufficient returns and this typically concentrates investment in more affluent areas. Loans granted to private health care providers by the World Bank's International Finance Corporation, for instance, are predominantly directed towards facilities for the richer communities of the country or for expatriates, not the majority of the population. This practice of "cream skimming" by the private sector is already familiar in the field of private health insurance, where insurance companies and Health Maintenance Organizations (HMOs) typically favour the healthy
and wealthy over high-risk customers, excluding the latter by means of prohibitive premiums.

In terms of direct health care provision, similarly, the private sector's profit-making imperative limits its relevance to those sections of society which are unable to pay for its services, even though it is they who need the extra investment the most. Yet private investment in health care is not irrelevant to poor people. In India as noted, an expanding private sector will draw personnel away from public health systems and exacerbate shortages of trained and qualified staff. Often it is the most skilled staff that makes the move to the private sector, lowering the overall quality of personnel in the public health system. Worse still, “cream skimming” undermines the very ability of public health systems to sustain themselves financially, as it denies the basic principles of cross-subsidization and risk-pooling by which the healthy support the ill, the young, the old, and the poor:

Foreign investment also brings with it the risk of domination by transnational corporations to the exclusion of domestic development. In the hospital sector, the overwhelming majority of these corporations are powerful companies based in Europe and the USA. Only Singapore's Parkway Holdings and South Africa's Healthcare are exceptions.

As well as the equity issues raised by commercialization, liberalization also risks compromising the quality of health care delivery. The introduction of private sector companies into public health systems raises potential conflicts of interest between commercial pressures and public health goals. In industrialized countries, this has commonly meant a reduction in quality as a result of cost cutting, often through a substitution of casual for skilled labour amongst nursing and ancillary staff. It has also led to the planning of hospitals on the basis of financial rather than clinical need, with accompanying reductions in the clinical workforce and service capacity.
In developing countries like India, commercial pressures lead to similar profit maximization strategies. One study of private clinics in Malaysia revealed that, many fail to assess new clients properly in their provision of family planning services, and cervical screening is undertaken only if requested. Conversely, private practitioners in Egypt, have been found to be less likely than public sector workers to administer (inexpensive) oral dehydration solution, and more likely to prescribe anti-diarrhoeal drugs even though the latter are contra-indicated in the country's national programme. India is no exception.

The decision to involve foreign companies in the health sector requires very definite structural conditions, if it is not to damage the quality of health care delivery in systems, which are already under severe strain. As many commentators have stressed, national and regional health authorities need highly developed regulatory, analytical and managerial capacity if they are to see any benefit from the challenges of working with foreign companies.

In India, however, this capacity is simply non-existent. As a result, the introduction of private sector investment threatens to divert care away from public health priorities and to further compromise the quality of health care delivery. Concerns that, profit-led health care is excessively focused on curative rather than preventive measures are familiar and longstanding, as are fears of over-prescription and unnecessary treatment undertaken for financial motives. Even joint public-private initiatives based on donations or price discounts have revealed their own shortcomings, distorting national health strategies and diverting funds towards non-priority areas, as well as hindering the development of national health systems as a whole.

The acknowledged difficulties of integrating private sector companies into public health care have shown doubts among even the most pro-liberalization commentators.
Moreover, as far as the objectives of health services are concerned, the efficiency of the private sector is unsubstantiated. Patterns of health care consumption resemble those for luxury goods, with high-income households spending a higher proportion of their income on health care than poor households. Poor households therefore account for the majority of health needs but a disproportionately minority share of health expenditure, so that the use of resources in the private health care market is doubly skewed away from need. Precisely this inverted relation between supply and demand renders the market inefficient in India.

**MODE 4: PRESENCE OF "NATURAL PERSONS"

If the establishment of commercial presence is primarily of interest to transnational corporations from industrialized countries, the temporary movement of "natural persons" to provide a service abroad has generated most interest among developing countries like India. There is already substantial movement of medical personnel from south to north and between countries of the developing world (health services, unlike many other professional services, being largely based on universal principles). However, the perceived economic benefits of this trade raise serious concerns about people's right to health, especially in the poorest countries.

The potential for exchange of medical personnel between countries is attested by experience from across the world. Developing countries, particularly in Asia — supply over half of all migrating physicians, with about 1,00,000 doctors of Indian origin settled in the USA and UK alone. Active international recruitment by national health systems has generated a particularly high level of cross-border mobility among nurses. A large number of countries which export doctors or nurses experience severe shortages themselves, and can ill afford to send their services abroad. Increased trade in health services risks exacerbating this transfer of medical personnel from India to western countries, thereby placing an even greater strain on health
systems in India. Since, India with the most acute health crises, the public health consequences of expanded trade can be considerable. Weighed against these losses, the remittances that medical personnel send home and the enhanced skills they bring with them, if and when they return are poor compensation.

TRADE IN WATER AND SANITATION

In addition to trade in health care, trade in water and sanitation services also raises significant issues for people's right to health. In India, the Pepsi and Coca Cola companies have already been marketing "mineral water". Here there are no Balance of Payment incentives encouraging developing countries to engage in increased trade: almost all the transnational corporations in the water and sanitation sectors are European and none are from the developing world like India. Clean water and proper sanitation facilities play a particularly important role in maintaining health during infancy and early childhood. Yet 1.1 billion people across the developing world still lack access to safe drinking water and 2.4 billion people – two fifths of the world's population – do not have adequate sanitation. As a result, more than two million children die from sanitation-related diseases every year.

As with health care, commercialization has further restricted poor families' access to water and sanitation in many parts of the world. Cost recovery and water privatization schemes have typically involved significant price rises, often putting water beyond the reach of low-income households. Such developments raise similar problems of equity to those encountered in health care – except that with water, as with education, demand for the service is continual, not intermittent.
MOST FAVOURED NATION AND NATIONAL TREATMENT

Apart from the problems discussed above regarding the various modes of supply, there are other provisions in GATS that can adversely affect the interests of poorer nations. According to the WTO Agreement, if favoured treatment is given to one country it should be extended to all the countries which have signed the Agreement under WTO. The principle is: favour one, favour all. Most favoured nation means treating each trading partner equally. Under this provision of the GATS, if a country allows foreign competition in a sector, equal opportunities in that sector should be given to service providers from other WTO Member Countries. This in effect means that, a country cannot be selective in permitting a foreign country in offering services based on its national interest.

The Principle of National Treatment relates to treating one’s own nationals and foreigners equally. In services, it implies that once a Foreign Service provider has been allowed to provide a service in one country there should be no discrimination between Foreign Service supplier and the national/local service provider. For example, if a foreign group is allowed to set-up a hospital in India, it should be given the same treatment that is given to national/local health service providers in the country. This means that, they may have to be given all the facilities like the subsidies a national institution is entitled to. Since the public health system is already starving for funds, this provision can further take away the meagre Government funds they receive. In this situation the easier option for the Government would be to withdraw subsidy altogether from public sector.

BALANCE SHEET: MEAGRE GAINS, HIGH RISKS

GATS aim to increase the global trade in services with Progressive Liberalization. An increase in trade in health services offers to India, limited
set of export opportunities, predominantly in attracting foreign consumers to their health facilities and in sending their own health professionals abroad. Yet these gains look trivial when compared with the effects, which increased trade in health services could have on people's right to health. While there may be individual cases in which patients benefit from the development of telemedicine, the potential impacts of increased trade in health services are overwhelmingly negative. If India divert health care resources and personnel towards foreign consumers for the sake of Balance of Payment gains, whether in their own health facilities or abroad, it can only lead to increased pressure on health systems which in India are already overstretched.

Attracting foreign investment in the health, water and sanitation sectors may initially seem like a more promising option. Yet the commercial presence of private sector companies is unable to address the central problems of access and quality, which challenge health, water and sanitation systems across the world. Instead of adding extra capacity to beleaguered public services, the private sector threatens to undermine them by taking over the most profitable parts of the system and drawing key personnel away from the public sector. In addition, it threatens to increase existing inequalities, given that the poor are commonly excluded from services provided on a commercial basis.

Trade in health services, then, risks exacerbating many of the problems, which already plague health systems across the world. The main thrust of GATS towards increasing trade and greater liberalization seems inappropriate for the health sector and the damage may outweigh the benefits, particularly for those with little ability to pay more for publicly provided health care.

The financing of health systems faces a similar challenge from GATS liberalization. National health insurance systems can be seriously undermined by such liberalization, as competition from foreign providers threatens the
sustainability of programmes designed to spread costs across society and provide affordable health care for all.

**GATS AND PUBLIC HEALTH REGULATION**

GATS have gone further than any other multilateral trade Agreement to bring the WTO's liberalization Agenda into the heart of national policy. This is particularly true of the GATS rules on domestic regulation, which are still being developed at the WTO.

GATS states that, domestic regulations in WTO Member Countries must not pose "unnecessary barriers to trade". It also mandates the WTO's Council for Trade in Services to develop new GATS rules to ensure that technical standards or licensing requirements in WTO Member Countries are "not more burdensome than necessary to ensure the quality of the service".

Yet there is widespread concern that, these GATS rules will threaten key public health regulations in WTO Member Countries. The GATS requirement that regulations must be 'necessary' in WTO terms could expose any domestic health policy to challenge at the WTO.

India's progressive new regulations on the marketing of baby foods are just one example of the type of 'restrictions' which could be under threat. The new regulations, approved by India's Parliament in May 2003, in order to support breastfeeding, prohibit the promotion of breast milk substitutes, feeding bottles and all foods for babies under the age of two years.

Yet such regulations could be interpreted as 'unnecessary' if the WTO decided that, there were other ways of achieving the same public health objectives – even if there were specialist evidence to the contrary.
This has raised fears that, other key public health controls, such as restrictions on the marketing of alcohol and tobacco or regulations governing private hospitals, could also be threatened by GATS rules on domestic regulation, once they have been adopted at the WTO.

WHO officials have openly voiced their opinion that, the WTO cannot be trusted to uphold legitimate public health provisions, and many other organizations have called for a halt to the domestic regulation negotiations at the WTO.

CONCLUSION

Several organizations like 'Save the Children', 'Medicines Sans Frontieres', the 'International Peoples Health Council', 'Oxfam', etc., have responded to the challenges posed by developing countries and the poor in the developed countries in relation to GATS and have suggested recommendations. These include a full and independent impact assessment of GATS and other WTO Agreements, recognition of national sovereignty over liberalization commitments, stronger exemption for public services and exemption of subsidies from National Treatment standards.

The expansion of trade liberalization poses serious challenges to people's right to health. While some people may benefit from the increased economic opportunities which globalization brings, many more stand to remain marginalized from its gains. Communities whose food security is undermined by exposure to international markets are directly at risk from increased trade liberalization and measures must be taken in the context of the Agreement on Agriculture and elsewhere to protect their livelihoods. As all commentators acknowledge, it is the most vulnerable who are most at risk.
Increased trade in health services offers meagre economic benefits to a handful of developing countries. Diverting resources and personnel towards foreign consumers threatens to put extra pressure on health systems which in many countries are already at breaking point. The commercial presence of transnational health corporations risks exacerbating existing problems of equity, quality and capacity. Given the low level of regulatory capacity in India, increased foreign investment in the health sector may well be a poisoned chalice. These conclusions argue against the suitability of the trade liberalization model for basic services as a whole.

An international call for a full and independent assessment of GATS and trade in services is necessary. In view of the effective irreversibility of GATS-related Market Access and National Treatment commitments, countries should not come under pressure to liberalize their basic services like health. Developing countries, in particular, should avoid making liberalization commitments on basic services under GATS. A reassessment of GATS should form part of a wider review of WTO Agreements, a review called for by the Government of developing countries and civil society organizations around the world. India could lead such review.

Health is a Human Right and a public good whose positive externalities cannot be captured through market mechanisms. As such, it is not suitable to commit health services to binding liberalization under GATS.

**LEGAL SERVICES SECTOR**

With a bandwagon of more than 6,00,000 lawyers, the Indian legal services sector is the second largest in the world. According to available statistics, the Indian commercial law practice is approximately in the region of Rs.600-650 Crore per annum. The service providers are individual lawyers, small or family-based firms. The Advocates Act, 1961 and the Bar Council of
India Rules, 1975 are the legislations, which regulate the legal services sector in India while the Bar Council of India (BCI) constituted under the Advocates Act is the final regulatory body. In India, legal services can be provided only by natural persons who are citizens of India and who are on the rolls of the advocates in the states where the service is being provided. The service provider can either be a sole proprietorship or a partnership firm consisting of persons similarly qualified to practice law. In order to be eligible for enrolment as an advocate, a candidate has to be citizen of this country or a country, which allows Indian nationals to practice as per the reciprocity treatment. She/he has to hold a degree in law from an institution/university recognized by the BCI and has to be twenty-one years of age at least.87

India has not undertaken any commitment in the legal services sector during the Uruguay Round (UR) of negotiations. It has also not offered to undertake any commitments in legal services either in its Initial Offer or in its Revised Offer.

Domestic policy on legal services has also been quite conservative so far. FDI is not permitted in this sector. Indian advocates are not permitted to enter into profit-sharing arrangements with any person other than Indian advocates. Foreign law firms are not permitted to open offices in India (as per the Advocates Act, 1961) and they are also prohibited from providing any legal advice that could constitute practicing of Indian law. There is a strong sentiment among a large segment of the Indian legal professionals that permitting foreign law firms even in a limited way would lead to the shrinking of the opportunities available to domestic lawyers. The Bar Council of India, the Apex Body representing the interest of the Indian advocates has on various occasions expressed its apprehensions in allowing foreign lawyers/law firms into India.

The Ministry of Commerce (MoC) has recently hosted on its website a consultation paper on the opening up of the legal services sector in India. The stated purpose of this document is to increase awareness on the core issues, challenges, and most importantly, opportunities that are relevant to the legal services sector. It also seeks to gather inputs on the kind of approach India should take and the types of goals the legal services sector would like to see achieved in the services negotiations. It is indicated that, comments provided in response to this document would assist the Indian Government in its negotiations. The consultation paper maintains that, it is important that, we look into the immense trade potential of the Indian legal profession, but without compromising on the interests of Indian advocates.

However, the consultation paper points out that, development of the legal profession have been restricted in India on account of the number of impediments in the current regulatory system, which hinders Indian law firms from competing effectively with foreign firms. Some of the current restrictions, which severely limit the scope of growth in the legal profession, are:

(i) Partnerships are the only permitted models of practice for law firms in India,
(ii) Other modes of practice, such as, limited liability partnerships or limited liability corporations are not permitted,
(iii) The number of partners is restricted to 20, which limits the growth and size of Indian law firms,
(iv) Practice of law is treated as a profession and not as an industry, resulting in lack of finance for the lawyers,
(v) Ban on advertising,
(vi) Multidisciplinary practicing firms are not allowed.

It is further observed (in the aforesaid consultation paper) that, having functioned in such a limiting framework for the past fifty-years, the Indian legal profession is today ill-equipped to compete on par with international lawyers,

---

88Government of India (2006a), pp.13-14
who have grown their practices in liberalized regimes and have vast resources at their disposal. It is also noted that, there are only a few firms in India that possess the expertise to handle commercial work for multinationals.88

Given the domestic sensitivities involved, it seems that the stage is yet to be set in the country for opening up of the legal services to Foreign Service providers. Without sufficient groundwork on the part of the stakeholders and substantial domestic regulatory reforms, any attempt to open-up the legal services to foreign players would not be conducive to the best interests of the country.

EDUCATIONAL SERVICES SECTOR

Precedence for trade in educational services goes back in antiquity. In the Golden Age of India, Universities at Nalanda and Takshashila were famous the world over, attracting students from foreign lands. In fact, Universities (Vishwavidyalayas), by definition, have to be international in character. Prior to independence, children of the rich and students earning fellowships did go to United Kingdom (UK) for higher education and returned with a wider worldview of things.

After independence, students went abroad on Commonwealth and Fulbright Scholarships and returned home to transplant their training and experience to the domestic conditions. And, the latest phase began when (post) graduate students started going to the United States (US) for higher studies with dollar assistantship in their pocket, never to return as if they had entered Alibaba’s Cavel Of late, there are many Indian students going abroad for undergraduate education as well. Moreover, there are many Indian high schools run in various parts of the world where there is significant presence of

88Government of India (2006a), pp.13-14
overseas Indians. Liberalization, since there are already many institutes, colleges, high schools, and coaching classes operating in private sector in India. These private service providers are in direct competition with the Government-run institutions. Moreover, one must not forget that the leading public educational institutions like the IITs, IIMs and agricultural universities were funded primarily by foreign funds.

The shrinking budgetary resources for education are in no way helping the cause of promoting knowledge in India. The per capita total Government expenditure on education for 1995 was less than $10 per year in India as against $1400 in United States. Moreover, share of higher education in total planned resources has decreased continuously from 1.24% in the fourth Five-Year plan to 0.35% in the eighth Five-Year plan. As a result, the state of affairs in the Government educational institutions is pathetic. Even if Government substantially increases its educational spending via deficit financing, it amounts to an inflation tax. Hence, private sector participation and trade in educational services seems imperative.

The paucity of funds points out the fact that, capital is a scarce factor and human resource an abundant factor in India. According to the celebrated Heckscher-Ohlin (1933) 'Theory of Trade', products/services that use abundant factor more intensively get exported and abundant factor gains from such trade. With abundant qualified human resource, India must export educational products that use our human resources intensively. To achieve this, India needs to create favourable circumstances domestically and negotiate effectively at the WTO forum.

An argument is always made that India is experiencing brain-drain i.e., although the ownership of the knowledge inputs (read human resource) is Indian, ownership of the generated knowledge is with the West. This is a one-way argument. Hasn't India benefited from the knowledge generated

---

90 UNESCO, 1998
elsewhere? Alarm-clock that wakes one up in the morning to the zero-watt electricity bulb one uses at night, and, everything one uses during the day was mostly developed elsewhere and not by Indians. The Indian concept of zero, scientific principles of Newton, and economic ideas of Keynes and Friedman are available to all. Moreover, those who go abroad to provide educational services on contractual basis contribute to India’s Gross National Product. Similarly, foreign educational institutions operating in India will contribute significantly to India’s Gross Domestic Product, and, even more so if Indian Government stipulates a minimum requirement on hiring of Indian faculty and staff.

In the second half of the twentieth century, economists like Solow (1957) and Schumpeter (1967) emphasized capital and managerial entrepreneurship respectively, as the critical factors for growth and development of economies. However, later developments in the endogenous growth theory questioned the erogeneity of these critical factors. Romar (1986) and Lucas (1988) questioned the narrow definition of capital and broadened it to include human capital as well. Investment in education and knowledge is being considered as an integral factor of growth. In the last decade, awareness of knowledge as an engine of growth has gained ground and education is now looked upon as a tradable service. Developed countries are also keen to use this opportunity to avoid under utilization of infrastructure that exists in their educational institutions.

Empirical studies show that, contribution of Total Factor Productivity (TFP) to GDP growth is quite significant in an open economy. This happens because of competition, and, as the endogenous growth theorist would argue, due to improvement in physical and human capital, and access to knowledge. In the post-liberalization period, India’s GDP growth-rate is relatively high, and almost half of this growth-rate is accounted for by increase in total factor productivity. Trade in educational services will further contribute to the total factor productivity leading to a higher growth-rate in GDP.
The efforts of WTO, to include education in the GATS Agreement should be seen in the above-discussed context. Therefore, India has to pay a serious attention to the GATS Agreement as applicable to educational services, identify opportunities and competitiveness in various sub-sectors, and negotiate WTO commitments accordingly. GATS define services trade as occurring via 4 modes of supply all of which are relevant to education:

• **Mode 1**: Cross border delivery: Delivery of education services via internet. (Distance education, tele-education, and education testing services)
• **Mode 2**: Consumption abroad: Movement of students from one country to another for higher education (foreign students in US universities)
• **Mode 3**: Commercial Presence: establishment of local branch campuses or subsidiaries by foreign universities in other countries, course offerings by domestic private colleges leading to degrees at foreign universities, twinning arrangements, franchising.
• **Mode 4**: Movement of natural persons: Temporary movement of teachers, lecturers, and educational personnel to provide education services overseas.

The main sub sectors under the GATS in the area of education are:

1. Primary education
2. Secondary education
3. Higher education
4. Post secondary technical and vocational, University degree or equivalent
5. Adult education
6. Other educational services

It should be noted at the outset that, the Government had given Revised Offers at the WTO on August 24, 2005, opening higher education
sector in various respects despite the protests by the people at large. The Government did not resort to any consultation process at that time. Now it seems the Commerce Ministry has come out with this consultation paper in order to make a case for further strengthening what it has already committed at the WTO.

The consultation paper of the Commerce Ministry has once again raised the debate as to whether higher education is a merit good or a private good. According to it, education is generally considered more of a merit good than a public good. However, this is based on the assumption that "the Government steps in to provide education services, because it is 'good' for society. If this assumption is relaxed, education could as easily be considered a private good."

Thus a case is being made to relax the aforesaid 'assumption' in order to shift higher education from the category of even 'merit to goods' to 'private goods,' more so because "higher education does display many characteristics of private goods in a number of countries." This would lead to further degeneration of our higher education system rather than solving its problems.

Today, India is the third largest higher education system in the world (after China and the USA) in terms of enrolment which in 2005-2006 was over one Crore five lakhs. However, in terms of the number of institutions, India is the largest higher education system in the world with 17,973 institutions (348 Universities and 17,625 colleges). Of these, there are 63 unaided Deemed Universities with enrolment of 60,000 students, and 7,650 unaided private colleges with enrolment of 31,50,000 students. Thus nearly one-third of total students are studying in unaided private institutions. Therefore, the consultation paper concludes that, unaided institutions are 'growing rapidly' and others are 'not growing.'
Even with such a huge system in place, higher education in India is in a miserable condition. Student enrolment grew at an estimated rate of 7 per cent between 1987 and 1993 but has now declined to 5.5 per cent compound rate of growth. Even then, after nearly six decades of independence, higher education is not accessible to the poorest groups of the population. Hardly 7 or 8 per cent of the population in the age group of 17-23 years is enrolled in the institutions of higher education.

QUALITY MANPOWER

In order to strengthen the case for trade in educational services, the consultation paper quotes a recent McKinsey-NASSCOM study that, “the total addressable global off-shoring market is approximately US 300 billion dollars, of which US 110 billion dollars will be off shored by 2010.” It asserts that, India has the potential to capture about 50 per cent of this market and in the process “generate direct employment for about 2.3 million people and indirect employment for about 6.5 million people. However, high quality manpower would be required for such jobs.”

The consultation paper further refers to this study to point out that, “only 25 per cent of Indian engineers, 15 per cent of its finance and accounting professionals and 10 per cent of Indian professionals with general degrees are suitable to work for multinational companies.” Therefore, reforms in higher education have been advocated for “better human resource development.” However, it has not been justified as to how trade in educational services would lead to the production of quality manpower.

THE FINANCIAL SITUATION

Interestingly, the consultation paper points out that, since higher education has low price elasticity, “cost recovery through higher fees will not
reduce enrolments. Hence, private funding of higher education is not only more efficient, but also more equitable." We have been arguing all along that even with the existing fee structure, only about 7 or 8 per cent of the population in the age group of 17-23 years is enrolled in the institutions of higher education. Raising the fees will not lead to equity; rather it will further decrease the enrolment. The public investment in higher education is just about 0.37 per cent of the GDP and is much below the required levels.

In the context of reservations in higher educational institutions, raising the seats in the institutions of higher learning by about 50 per cent would require about Rs 20,000-25,000 Crore. Since this huge amount cannot be provided by the public exchequer at one go, the consultation paper recommends "a mix of the following steps would seem to be necessary: Increasing seats in Government colleges/universities in a phased manner, allowing these institutions to raise their own resources and finally provide a more liberal regime for private and foreign education providers."

This recommendation is clearly in line with its thinking that, higher education can be converted into a 'private good.' The institutions of higher education are being called upon first to increase the number of seats and then raise their own resources. It is childish to believe that, with these recommendations, the institutions of higher education can survive. It is also not understandable as to how a more liberal regime for private and foreign education providers would help to solve the reservation problem.

**INDIA'S IMPORT INTERESTS IN EDUCATIONAL SERVICES**

**Mode 2:**
- Indian students studying in foreign Universities (US, UK, Australia)
- Over 40,000 studying in US courses (This is more like 75,000 added per year)
- Several thousands in Europe
Mode 3:
- Foreign institutions entering India through twinning and franchise arrangements
- Indian students getting foreign degrees, doing professional courses at local branch campuses of foreign institutions in India
- UK-based Wigan and Leigh College
- Indian School of Business tie-up with Kellogg, Wharton, and London Business School
- Western International University, Arizona
- NIIT tie-up with IT Educational Services, USA
- Tata InfoTech tie-up with Hertfordshire University, UK

Mode 1:
- Prospects for distance education and degrees from foreign academic institutions

Mode 4:
- Foreign faculty and scholars teaching in India

INDIA'S EXPORT INTERESTS IN EDUCATIONAL SERVICES

Mode 1:
- Prospects for tele-education in management and executive training.
- Experience with distance learning, use of new technologies (IGNOU).
- Educational process outsourcing with remote tutoring from India.
- Along the lines of efforts by Career Launcher, Educomp, Datamatics, etc.

Mode 2:
- Students from developing countries studying in Indian engineering and medical colleges.
Around 5,500 students from neighbouring developing countries (2001).
Exchange programmes and twinning arrangements.

Mode 3:
- Setting up of overseas campuses, franchising by Indian institutions.
- MAHE, BITS, Central Institute of English and Foreign Languages.
- Over 100 CBSE schools abroad, catering to Diaspora.

Mode 4:
- Indian teachers, lecturers teaching abroad in Middle East, Africa.
- Researchers/scholars on visiting arrangements abroad.
- Some 10,000 secondary school teachers overseas.
- Recruitment of Indian teachers in Mathematics, Science, English.
- Potential as a regional hub for exporting higher educational services.

COMPETITIVENESS OF INDIAN EDUCATIONAL SERVICES

For the ensuing negotiations on trade in services, Indian authorities not only need to respond to the proposals and commitments made by others, but put forward India's own proposal and select commitments that are in the best interest of our country. A pre-requisite for that is to generate adequate data on the status of educational service providers and users and its aspects related to trade. Based on that, authorities will be fully able to comprehend India's competitiveness in various sub-sectors of educational services. However, based on the information available at this time, critical observations on India's competitiveness can certainly be made.
EDUCATIONAL TESTING SERVICES

US hope educational testing services (and training) to be included in the country commitments. This is not surprising as US already has well established educational testing service providers and they would like to utilize the potential outside of the country. India too has a long experience of providing educational testing services. Quality of testing services is well demonstrated by all-India qualifying tests such as the CAT (Common Admissions Test) of the IIMs, JEE (Joint Entrance Examination) of IITs, NET examination of CSIR-UGC, and GATE (Graduate Aptitude Test in Engineering). If the experience of these services is adapted for various fields, and, if such services can be offered on a year round basis with sufficient computerization and use of internet facilities, India stands to gain from liberalization of such services. However, markets for such services will have to be actively sought. Hence, India may commit to liberalize these services, but an adjustment period of at least 6 years is necessary for up gradation and marketing of these services to potential clients. Moreover, willingness of stakeholders to conduct this activity in the private sector needs to be assessed. Only then India can become competitive both in foreign and domestic markets.

STUDENTS ON FOREIGN CAMPUSES

31,743 Indian students had enrolled for courses in US in the year 1995-1996 (UNESCO, 1998). Currently, however, the number must have already exceeded 40,000. Moreover, there are a few more thousand Indian students studying in Europe. However, one may not worry too much about such imports of services. A significant proportion of these students would be (post) graduate students on teaching/research assistantships and fee waivers. Moreover, value must be attached to foreign educational experience which certainly widens the horizons of young minds.
As far as export of such service by India is concerned, i.e., foreign students coming to India for study, the current prospects are not too bright. India already gets some 5,455 international students from neighbouring developing countries.91

However, getting students from developed countries, even from East European countries, would be very difficult as our standards of campus facilities are very poor in general. However, there is a scope for developing high-value niche market for some of the programmes that India may offer. Marketing of programmes on education in Arts and Culture, Sanskrit and other languages and literature, and traditional medicinal sciences like Ayurveda could be effectively done by upgrading the campus facilities for some of the specialized institutions in India. A glaring example of this is the programme offered in Ayurveda by the Department of Ayurveda at University of Pune. It has twinning agreements with Universities in Italy, Germany and many other countries to send their students here for part of the study.

Moreover, there may be niche market for management education as well. India has one of the best management schools in the Asia-pacific region. Indian Institute of Management, Ahmedabad, although does not have any foreign students enrolled in its two-year programmes, it has a successful exchange programme for students. More than 45 students go abroad for a term for which they do not have to pay fees. One must also remember that, fees in western countries are much higher than those in India. Promoting such exchange programmes on reciprocal fee-waiver basis will certainly be useful to India both in terms of not losing foreign exchange and, providing Indian students an opportunity to broaden their worldview. In doing so, Indian institutes will move towards up gradation of their facilities and infrastructure in the near future. And, with that, the institutes can also attract foreign students for their regular post-graduate programmes in the long-run.

91NIEPA, 2001
ESTABLISHING EDUCATIONAL INSTITUTES ABROAD

At present, many countries including US are only looking inwards as far as secondary education is concerned. However, Indian proposal should include scope for commercial presence of institutions in the secondary education. India's CBSE system of secondary education is quite robust as compared to the state-board systems. In fact, there are more than 100 (Indian) CBSE schools abroad. With ever increasing Indian Diaspora spreading rapidly all over the world, there would be a great demand for CBSE-like schools in UK, USA, Fiji, and many other parts of the world. Of course, some initial groundwork will have to be made by identifying and bringing together private providers and the prominent figures from the non-resident Indian community. In the long-run, the school system could be expanded away from the ethnic Indian focus that will be required in the short-run. On the import side, India need not worry much as our system of secondary education is both cost and quality competitive.

As far as establishing institutions of higher education abroad is concerned, India's competitiveness is very much in doubt as she needs to address the core issues of capital expenditure requirements. In fact, instead, domestic higher educational problems are addressed first to stay import-competitive.

However, one exception must be brought to our notice. Central Institute of English and Foreign Languages (CIEFL), Hyderabad, has successfully launched English Language Teaching (ELT) programme in Kirgizistan. The institute won the contract in succession although there was strong competition from other countries. India must capitalize on such experiences and duplicate the efforts elsewhere.

92Kolhatkar, 1999
As far as presence of foreign higher-educational institutions in India is concerned, India should allow it. Hue and cry started when the Commerce Ministry recommends "services negotiations (in WTO — could be used as an opportunity to invite foreign Universities to set up campuses in India, thereby saving billions of dollars for the students traveling abroad." Therefore, the consultation paper recommends striking "a balance" between "domestic regulation and providing adequate flexibility to such Universities in setting syllabus, hiring teachers, screening students and setting fee levels."

The WTO has identified certain barriers to trade. These barriers/obstacles include the restrictions on free movement and nationality requirements of students and teachers, immigration regulations, types of courses, movement of teachers, modalities of payments or repatriation of money, conditions concerning use of resources, direct investment and equity ceilings, existence of public monopolies, subsidies to local institutions, economic need tests, exchange controls, non-recognition of equivalent qualifications, etc. The goal of 'free trade' regime under the WTO is to get these barriers removed in order to further liberalize the World economy. Therefore, the 'adequate flexibility' and a 'balance' between domestic regulations and 'removal of barriers' will prove disastrous for the Indian higher educational system.

The foreign education providers have been and are insensitive towards cultural and educational ethos of any country. And India is no different for them. This shall lead to the killing of the indigenous nature and functions of Indian Universities. Another problem is while there are reputed foreign educational institutions operating, there are numerous less reputed, second or third tier ones as well who charge high fees for programmes of dubious quality. Given India's capacity constraints in higher education, substandard foreign institutions are able to survive in India. But the problem is not liberalization per se, but the lack of a supportive domestic regulatory framework, which can ensure that liberalization, is beneficial.
This is not to suggest that, one should add more layers of regulation in higher education. Already there’s a plethora of Regulatory Bodies duplicating each other’s functions. What’s required is more effective registration and certification systems, which prevent unapproved institutions from partnering, which protect and inform consumers, enable good quality foreign institutions to enter the Indian market, and which create a level playing field between domestic and foreign institutions so that the former can compete effectively in a liberalized environment. Once such a regulatory framework is in place, India needn’t fear scheduling educational services under GATS. It could even inscribe additional conditions on the nature of foreign participation in higher education, something permitted under GATS commitment structure.

Notably, the MHRD has introduced a bill to regulate the operations of the foreign educational institutions in India. The bill, titled ‘The Foreign Educational Institutions (Regulation of Entry and Operation, Maintenance of Quality and Prevention of Commercialization) Bill, 2005’, was introduced in response to the absence of a clear-cut policy and an appropriate legal framework for foreign education providers in India. Among other things, it aims to regulate entry, operation and maintenance of quality and prevention of commercialization of education by foreign educational institutions imparting higher education in India. It also proposes to treat foreign education providers in India as Deemed Universities under the UGC. Owing to the differences of opinion among the MHRD and the MoC, the bill had to be referred to a ‘Group of Ministers’, headed by the HRD Minister, before getting introduced in Parliament. As it stands now, it is unlikely that, the passage of the bill in Parliament would be an easy task.

Prof. Manoj Pant of JNU, writing in The Financial Express (May 28, 2005), provides more background on the options open to India in formulating its strategy for opening up of educational services under the GATS and the need to protect and inform consumers’ (students) about the quality of the various Foreign Service providers and enable them to verify their claims.
However, the process of liberalization must be gradual so that our domestic educational institutions are capable of effectively competing with the foreign institutions. India will need a transition period of at least 6 years to upgrade our campus facilities. Upgrading facilities in all institutions will be difficult; however, select import-competing institutions must be able to upgrade their facilities. Among other things, these facilities will include: availability of course schedules on internet, telephone registration system for various courses, option of payment of fee through credit cards, well equipped dormitories, classrooms, libraries and sports facilities of international standards, and facilitating growth of off-campus housing infrastructure in the private sector for faculty, staff and students. Moreover, accreditation system for foreign educational institutions will have to be developed. Indian authorities may need to study how foreign, developed country Government manages the accreditation system in their own countries.

TEACHERS AND RESEARCHERS WORKING ABROAD

Although the Annex to GATS mentions that, movement of natural persons is excluded from GATS, it clearly provides scope for negotiating commitments on movement of persons in specific services. India must put in its proposal to include commitments on movement of teachers and researchers both at the secondary and higher education level. Already, about 10,000 secondary school teachers are working outside the country for sometime now, and, increasingly there is a growing demand for Indian teachers, especially in Mathematics, sciences, and English. The trend will continue given the scarcity of teachers in developed world and the sufficient supply of qualified teachers in India.

Nevertheless, there is a need for making projections of export of this educational service. The export of teachers need not be construed to imagine that Indian schools will be deprived of their valuable asset. In fact, a healthy
market for teachers will encourage many more to join the profession domestically as well. Moreover, it must be remembered that, many of the Indian (post) graduate students who go abroad for higher studies receive teaching and/or research assistantships and tuition waivers. This is a form of export of educational service in the form of movement of natural persons. The fact that western countries need foreign (post) graduate students to teach independent courses in their Universities shows the need for qualified University-level teachers abroad.\(^{13}\)

### AVAILABILITY OF SAFEGUARDS

While India seeks to liberalize trade in educational services and offer specific commitments in its proposals for negotiations, Indians must understand that, they are not trading-off their rights and controls on issues that are integral to their nationhood, cultural ethos and security. There are many exemptions and safeguards allowed in GATS which can be effectively utilized to protect Indian interests.

Article II.1 introduces the Most Favoured Nation (MFN) clause by mentioning that a country will accord another Member country treatment no less favourable than that it accords to any other country. However, in the same breath, Article II.2 allows countries to negotiate exemption from this commitment and those exemptions must be mentioned in the schedule of commitments made. For example, India can give special treatment to

\(^{13}\)Mehta Pradeep S., ‘Balancing the Objectives of Different Developing Countries’, Presentation delivered in the ‘International Seminar on Developing Countries and Services Negotiations’, New Delhi, organised by the Indian Council for Research on International Economic Relations (ICRIER), 6-7 June 2006
students of SAARC and NAM countries without giving the same special treatment to others, provided this is mentioned in the commitment schedules.

Article XII.1 allows countries to take measures to control the Balance of Payments problems (BOP). This may include restrictions on transfer of payments and foreign exchange until the BOP situation improves. India does not face BOP problem at this time. However, if it does in the future, India can exercise the option of restricting trade in educational services to prevent flight of foreign exchange from the country. Moreover, Article XIV allows measures to protect public morals, maintain public order and national security, and prevent fraudulent practices. For example, if Indian authorities believe that some of the educational material coming into the country is not according to the mores and values of this land, restrictions may be imposed to protect public morals. In fact, Article X even provided for emergency safeguard measures as well.

Indian authorities must request for assistance from UNESCO and/or other world bodies for improving educational infrastructure in the country. This has been done in other WTO Agreements such as Agreement on Sanitary and Phyto-Sanitary measures (SPS) and Agreement on Technical Barriers to Trade (TBT). Moreover, such assistance must be provided in a structured, time-bound fashion. The motivation for such request is that developing countries such as India will find it extremely difficult to cope-up with abrupt issues that will arise if commitments were to be adhered-to immediately after an agreement is reached.

**STRATEGIES FOR DOMESTIC REFORM**

1. Authorities must develop a database on information on all categories of education regarding number of educational institutions, their enrolments
(domestic and foreign), faculty strength, financial sources, and quality and accreditations. Further, market intelligence regarding situation in other countries be sought through our diplomatic attaché in the Indian Embassies abroad.

2. Existing reputed educational testing services will have to be modernized. To compete with testing service such as say, GRE, GMAT, and TOEFL, our reputed testing services such as CAT, GATE, JEE, NET and others must be upgraded and modernized. A committee is constituted to suggest up gradations and implementation of the suggested up gradation. The up gradation will be in terms of year round availability of the testing service, computer-aided and internet-based testing, and universal acceptability of the tests by various academic institutions including foreign institutions. Moreover, assessment will have to be done whether or not private providers can take on the mantle of running such services for its efficient functioning.

3. Improvement in the educational infrastructure must take priority. The following items need to be addressed if the infrastructure of import-competing institutions has to be of international standard:
   a. University course schedules must be available through internet.
   b. Automated telephone course registration for every term must be available to students.
   c. Payment of fees by credit-card should become a standard option.
   d. Classrooms, libraries, dormitories, sports facilities should be of international standards.
   e. Off-campus housing arrangements must be facilitated through private sector for faculty, staff, and students.

4. Authorities must study the system of regulation and accreditation of educational institutions in foreign countries. Our own accreditation system and laws for foreign institutions must be developed taking into account the treatment given to them in their respective countries.
To sum up, a lot of homework needs to be done to derive mileage from the negotiations on trade in educational services. The WTO framework and structure need not be construed as the Laakshya-Griha, where Pandavas would have been reduced to ashes by the Kauravas. Instead, it should be considered as the Mayasabha of Pandavas. Once one manages to figure out where the water is and where the floor is, one can certainly enjoy and benefit from the stay.