

WTO - GENERAL AGREEMENT ON TRADE IN SERVICES : AN ANALYTICAL APPRISAL WITH SPECIAL REFERENCE TO INDIA

*V.K. Gupta**

With the establishment of World Trade Organization, the world trade has mainly been organised on three pillars such as, the General Agreement on Tariffs and Trade (GATT), the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) and the General Agreement on Trade in Services (GATS).

In the world of trade, services are among the fastest growing sector. Nearly one - fourth of the world trade is accounted for by services. In 1995, trade in services in the world reached a whopping \$ 1,200 billion. In USA, trade in services partially offset the trade deficit in goods.¹ In European Union (EU) the audio-visual market of \$ 30 billion accounts for almost one - third of the world trade. In India, the services contribute to about 40% of its GDP.² Thus, though the services were always a key sector in the world economy, they were brought within the ambit of multilateral trading system by GATS only in 1994.

The General Agreement on Tariffs and Trade, 1947 did not concern itself with services, however when post -1970 era witnessed a boom in the service sector in the developed world, the issue of its inclusion in GATT was formally raised for the first time during the Tokyo Round of Tariff Negotiations (1973-79). Developing countries like India, Brazil and Mexico although opposed tooth and nail the inclusion of services in the GATT, yet the services continued to be negotiated mainly due to sustained efforts of the developed countries. Uruguay Round of Multilateral Trade Negotiations (URMTN) 1986-94, culminated into GATT, 1994. To meet the deadlines set for GATT, 1994; several annexes to GATS were attached in order to extend the time limit for filing exemptions to Article II (MFN principle).³ This enabled services in various sectors to be further negotiated at later dates. Thus, GATS was finally signed on July 26, 1995 and three protocols have been signed and made effective since then.

I. GENERAL AGREEMENT ON TRADE IN SERVICES — AN ANALYSIS

GATS is a framework agreement. The Agreement required the WTO members to give specific commitments on market - access in various service

sectors. The Agreement immediately applied few general commitments e.g., MFN treatment and transparency. Bulk of the GATS obligations becomes operational only when a member has actually negotiated concessions and made specific commitments.⁴

GATS contains three basic elements: a basic agreement applicable to all members; specific commitments undertaken by various countries; and recognition of special needs of the specific sectors of the member countries.

GATS makes a departure from GATT, where commitments relating to tariffs and non-tariffs are binding in nature. The GATS present a set of voluntary commitments by member countries with an undertaking for further opening of the services which have been left for future negotiations and commitments.

The GATS is divided into six parts. Part I determines the scope of service sector. Part II includes the basic agreement applicable to all members i.e., MFN treatment, transparency, increased participation of developing countries through access to technology, improvements in distribution channels, information network, liberalization of markets and exports. Part III deals with market access commitments, specifically undertaken by member countries. Part IV declares progressive liberalization as the basis of negotiations for the further improvements in national schedules of commitments. Part V includes institutional arrangements for consultation, dispute settlement and establishes a council on services. Part VI clarifies various concepts like measures, supply of a service, commercial presence, monopoly supplier of a service, juridical persons etc. Protocols on Financial Services; Movement of Natural Persons; and Basic Telecommunications have been attached to GATS Agreement.

A. Scope and Definition

Service sector mainly includes the following fields : distribution services including wholesale, retail and on the basis of franchise; educational services; health-care services; communication services like telecommunication, courier and audio-visuals; computer software services; professional services like accounting, auditing, advertising and legal ones; management and consultancy services; architectural, designing, engineering and construction services; international transport services like taxi, rail, bus, truck, air and maritime, travel and tourism; hotels, bars and restaurant services; and financial services such as banking, insurance and securities.

GATS manifest itself into various categories of regulations, laws and procedures applied by governments and authorised non-governmental organizations.⁵ Trade in services is defined as the supply of a service from one member to another; directly to the consumers (for example tourism); commercial

presence (for example banking) or by natural persons (for example computer software, construction or consultancies).⁶ Supply of a service includes the production, distribution, marketing, sale and delivery of a service in any sector.⁷ However, it specifically excludes the services supplied by governments or under their authority as these services are neither on a commercial basis nor carry the element of competition with one or more suppliers.⁸

B. General Obligations and Disciplines

The central theme of the GATS is most favoured nation (MFN) treatment. However, exceptions can be made by individual member countries for specific service sectors. The Agreement provides for review of these exemptions before 2000 A.D. and a general limitation for continuation of exemptions upto 2005 A.D.⁹ WTO allows conferring special advantages to regional groupings like EU, SAARC of which a country is a member, over and above other members. MFN requires that equal treatment should be provided on a non-discriminatory basis and a treatment no less favourable than it accords to like services and service providers of any other country.¹⁰

Equal or national treatment under GATS for services is different than for goods under GATT. In some cases, same requirements for foreign and domestic service suppliers may mean that the foreign suppliers are actually worse off in the sense that the requirement for holding reserves locally for insurance or banking companies or minimum coverage for telecommunication service providers, may not provide foreign suppliers level playing field. Therefore, the national treatment principle in services include *de jure* as well as *de facto* identical treatment.

Administration of laws, regulations and guidelines in respect of specific commitments must be carried out in a transparent manner coupled with objectivity and reasonableness. Notion of transparency connotes that border measures should be explicit, changes in the relevant laws and guidelines or introduction of measures should be promptly published, and notified to Council for Trade in Services.¹¹ A machinery should be set up by a member, to review administrative measures/decisions, within a reasonable period of time. These measures¹² relate to the purchase, payment or use of a service, the access to and use of services which are offered to the public directly, the commercial presence of a member in the territory of another.¹³ Commercial presence means and includes any business or professional establishment constituted, acquired or maintained through a juridical person, or the creation or maintenance of a branch or a representative office; within the territory of a member for supplying the service.¹⁴

If any specific information in respect of any measure or agreement, whether bilateral or international is requested by any member, it should be

supplied promptly. Members, especially developed countries should establish enquiry point/s to provide specific information to other members, especially to developing and least-developed members. They should provide information, in respect of their markets; commercial and technical aspects related to the supply of services; requirements in respect of professional qualification recognition and registration, availability of the technology in service sectors.¹⁵

Transparency provisions are considered an onslaught on the economic sovereignty of a member, as they are required ultimately to amend its laws and regulations. They are also discriminatory in nature in the sense that while governments are required to provide disclosures, the commercial interests of multinational corporations are fully protected in the garb of confidentiality.¹⁶

Developed countries are under general obligation to increase participation of the developing countries in world trade, by making technology available on commercial basis so as to strengthen domestic service capacity; to increase efficiency and competitiveness in providing services; to improve service distribution channels and information networks; and to liberalize market access in sectors of export interests.¹⁷

Article 5 of GATS deals with custom union and free trade areas. The article is analogous to Article XXIV of GATT, 1994. The Agreement does not prevent members to establish full integration of economies or labour markets.¹⁸ For example, European Union provides citizens of the parties concerned with a right of free entry to the employment markets of the parties and includes measures concerning conditions of pay employment and social benefits.

GATS puts general obligation on members that they must not constitute unnecessary barriers to the trade. However, it does not defer a member to lay down disciplines relating to qualifications, such as competence and the ability to supply the service; and technical standards to ensure quality of service. Procedure for licensing should not result into a disguised restriction on the supply of service itself.¹⁹ In disciplining professional services, the emphasis should be on achieving international standards and to encourage co-operation with the relevant international organizations. Due importance should be accorded to professional bodies regulating the services, whether they are governmental or non-governmental ones.²⁰ The Agreement visualises that recognition requirements should be achieved through harmonization and internationally agree criteria.²¹

The Agreement provides that member should ensure that monopoly and exclusive service providers do not abuse their positions.²² Monopoly service supplier means any person, public or private who has effectively become as the sole supplier of that service, in the market of a member.²³ Monopoly conditions

prevail when a member formally or effectively (a) authorizes or establishes a small number of service suppliers and (b) substantially prevent competition among those suppliers, in its territory.

The Agreement recognizes that certain restrictive practices of service suppliers may restrain competition.²⁴ Restrictive practices should be subject to consultation between members with a view to eliminate them. However, GATS, does not contain any anti-dumping remedy, as they sometimes even throttle legitimate competition. The Agreement simply provides that an emergency safeguard mechanism should be negotiated.²⁵

The GATS conceives that in the event of serious balance of payments conditions, free flow of services may be restricted by a member, even in those areas in which they have taken specific commitments. In such a situation, the members may give priority to the supply of services which are more essential to their economic or development programmes. However, these restrictions should be non-discriminatory and consistent with the Articles of Agreement of IMF. The restrictions should be applied in a manner so as to avoid unnecessary damage to the commercial, economic and financial interests of the other members. The restrictions should be minimum for dealing with situation. They should be temporary in nature and must be progressively phased out as the situation improves.²⁶ Data assessed by IMF relating to foreign exchange, money reserves, and balance of payments shall be the basis for imposing or continuation of these restrictions. Member imposing the restrictions, is under general obligation to notify them to the General Council of WTO and to the Committee on BOP Restrictions.

The member country must enter into consultation with these bodies, with a view to progressively phase out such restrictions, taking into account, *inter alia* such factors as: (a) the nature and extent of the BOP and the external financial difficulties; (b) the external economic and trading environment, and (c) alternative corrective measures that may be available.

The GATS does not prevent to adopt or enforce the following measures necessary; (a) to protect public morals or to maintain public order in case of genuine and sufficiently serious threat to the fundamental interests of the society; (b) to protect human, animal or plant life or health; (c) to secure compliance with laws or regulations consistent with the Agreement, to prevent deceptive or fraudulent practices or default on service contracts; or to protect privacy of individuals, records and accounts and maintain safety standards in the society. The Agreement contains both general and security exceptions which are similar to Articles XX and XXI of GATT, 1947. It allows discriminatory treatment to domestic and foreign service providers for ensuring equitable or effective imposition or collection of direct taxes. It also

permits to apply provisions inconsistent with MFN principles, where the discriminatory treatment is necessary to implement any double taxation avoidance agreement (DTA).²⁷

Members are not obliged to supply any information, disclosure of which is contrary to its essential interests. Security interests are taken care of relating to the supply of services provided to military establishments; fissionable or fusionable materials; during war or other emergency conditions in international relations; or to maintain international peace and security, under UN Charter.²⁸

The general MFN principle, market access commitments and national treatment provisions do not apply to procurements of services by government agencies provided they are for governmental purposes and are not for commercial sale or resale.²⁹

GATS does not discipline subsidies. It calls for negotiations to develop disciplines on trade-distorting subsidies. Members should also look into appropriateness of countervailing procedures. However, flexibility is accorded in negotiations in cases where subsidies play a role in development programmes of developing countries. Members should exchange information concerning all subsidies provided to their domestic service suppliers. If a member is adversely affected by a subsidy provided by another member, it may request consultations, and is entitled to sympathetic consideration.³⁰

C. Specific Commitments

Members have submitted national schedules as part of the GATS, and thus have made certain binding commitments in respect of market-access and national treatment. Several members have maintained their stand still positions in these schedules i.e. continuation of current policies, even then such prepositions have a salutary effect on the service scene; as they restrain members to impose no more negative conditions.

In the case of market access each member shall accord services and service providers of other members treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its schedules.³¹

Specific commitments regarding market access must be extended on MFN basis. The Agreement contains a "black list" of six types of restrictions such as (a) limitations on the number of service suppliers allowed; (b) limiting the total value of assets or transactions; (c) restricting the total number of service operations or total service output; (d) fixing the quota for natural persons to be employed in a particular sector; (e) measures restricting or requiring specific types of legal entity or joint ventures through which the service is supplied (for

instance, a branch, but not a subsidiary); (f) limiting foreign equity capital in terms of maximum percentage limit or on total value of individual or aggregate foreign investment.³²

Licensing requirements are subject to proportionality tests, such as: (a) objectivity and transparency should be maintained; (b) licensing should not be aimed, as a restriction on supply; (c) licensing should not restrict unnecessarily; and (d) licensing may be used to ensure quality of service.

The market - access and national treatment are complimentary to each other in the sense that while the former seeks to secure entry of foreign service suppliers into the market of a member, irrespective of the position of national suppliers, the later tries to ensure that a foreign service supplier should be treated like local suppliers.³³ Furthermore, the market - access and national treatment obligations overlap each other as the limitations with respect to one also applies to another.³⁴

National or equal treatment to foreign and domestic service suppliers is applicable only to the specific services negotiated and included in the schedule to the agreement of each member, subject to such terms and conditions as may be stipulated in schedules.³⁵ Thus, the Agreement accepts the principle of parity between domestic and foreign players but allows countries to assess cost and benefit analysis and take necessary measures before opening any field. The Agreement does not exclude the possibility of two different sets of regulations for domestic and foreign service suppliers, provide the condition of competition is not modified in favour of service providers.

Although no timetable has been finalised, these deviations are to be reviewed periodically, and finally abolished by 1 January 2005.³⁶

D. Progressive Liberalization

Part IV of the Agreement establishes the basis of progressive liberalisation in the services area through successive rounds of negotiations and the development of national schedules.

The specific commitments of members are provided in country schedules. In these schedules, members have specified terms, limitations and conditions for market-access; conditions and qualifications for national treatment.³⁷

The schedules bind members in respect of market access and national treatment. A distinction is made between horizontal commitments that cut across all service sectors and vertical commitments that are made for a particular sector. Commitments in both categories are then sub-divided according to four different modes of supply : cross - border supply, directly to customers from abroad, commercial presence and temporary entry of natural persons.

The GATS permits for modification of schedules. Article XXI permits that after a period of three years, parties can withdraw or modify commitments made in their schedules. However, such measure would require negotiations with interested parties and offer them compensatory package in lieu of withdrawal or modification. For example, if India makes any modification in its schedule of commitments say by increasing duty on the import of second hand tyres from USA, it may offer compensation to make up for the loss to the USA by reducing duty on almonds which are imported mainly from USA.³⁸ The affected party, if dissatisfied with the measures offered in the package, may ask for arbitration proceedings to determine compensation to be paid by defaulting members. If no affected member has requested arbitration, the modifying member shall be free to implement the proposed modification or withdrawal.

Progressive Liberalisation in the Field of Specific Commitments

The Agreement seeks from members to enter into periodic negotiations, among themselves to achieve progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services or measures as a means of providing effective market-access. Efforts shall be made with a view to promote the interests of all members on a mutually advantageous basis, and to secure an over all balance of rights and obligations.

The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual members, both overall and in individual sectors. There shall be appropriate flexibility for developing countries for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and when opening markets to foreign service suppliers. The Agreement provides for special treatment to least developed countries.³⁹

E. Institutional Provisions

Part V of the Agreement contains institutional provisions, including consultation, dispute settlement and enforcement, establishment of a Council for Trade in Services, technical cooperation and relationship with other international organizations. The responsibilities of the Council are set out in Ministerial Decisions.⁴⁰

(i) Consultation, Dispute Settlement and Enforcement

Each member should consider and provide opportunity for, consultation on any representation received from any other member with respect to any matter affecting the operation of the Agreement. The Dispute Settlement

Understanding (DSU) applies to such consultations. In case no satisfactory solution is arrived through consultation, then the Council for Trade in Services or the Dispute Settlement Body (DSB) may take up the matter, at the request of a Member, for consultation with any member or members. When two members enter into Double Taxation Avoidance (DTA) agreement and in case of disagreement between them as to whether a measure should be resolved under DTA provisions or under GATS rules, it shall be open to either member to bring this matter before the Council of Trade in Services. The Council shall refer the matter to arbitration. The decision of the arbitrator shall be final and binding on the Members.⁴¹

If any Member is of the opinion that any other Member fails to carry out its obligations or specific commitments, it may reach for DSU, so that the matter may be resolved with mutual satisfaction. If any member considers that it is not getting any expected benefit from the other member, under specific commitment, it may have recourse to DSB. If DSB, determines the matter in its favour, then the affected member shall be entitled to a mutually satisfactory adjustment.⁴²

Ministerial meeting decided that a roster of panelist should be maintained to select the panelists. Members may suggest names of individuals for inclusion in the panel. Panels shall be composed of well-qualified governmental and non-governmental individuals who have experience in issues related to GATS and/or trade in services, including associated regulatory matters. Panels for disputes regarding sectoral matters shall have the necessary expertise relevant to the specific services sectors to which the dispute concerns. Panelists shall serve in their individual capacities and not as representatives of any government or organization. The secretariate shall maintain the roster and shall develop procedures for its administration in consultations with the Chairman of the Council.⁴³

(ii) The Council

The highest decision-making body of the WTO is the Ministerial Conference, which is to meet at least once in every two years. It is authorized to take decisions on all matters under any of the Agreements under WTO. During the intervals between the meetings of the ministerial conference, the General Council will conduct its functions. For the three main instruments of WTO, three separate councils have been formed, besides the General Council : Council for Trade in Goods, the Council for TRIPs and the Council for Trade in Services.

The Council for Trade in Services (The Council) is responsible for facilitating the operation of the Agreement and advance its objectives. The

Council under GATS is authorised to set up subsidiary bodies, as required for the effective discharge of its functions.⁴⁴ Any subsidiary bodies that the Council may establish shall report to the Council annually or more often as necessary. Each such body shall establish its own rules of procedure, and may set up its own subsidiary bodies as appropriate.

Any such sectoral committee with respect to the sector concerned shall be responsible:

- (a) to keep under continuous review and surveillance the application of the Agreement;
- (b) to formulate proposals or recommendations for consideration by Council;
- (c) if there is an annex pertaining to the sector, to consider amendments to that annex, and to make appropriate recommendations to the Council;
- (d) to provide a forum for technical discussion, to conduct studies on measures of the members and examine any other technical matters;
- (e) to provide technical assistance to any developing country negotiating accession to the Agreement;
- (f) to co-operate with other subsidiary bodies.⁴⁵

In addition to this, there shall be a separate committee for over seeing the working under GATS.

The Council under GATS shall ensure that measures related to qualification requirements, procedures, technical standards, and licensing requirements do not constitute unnecessary barriers to trade and services.

(iii) Technical Co-operation

Member in need of technical assistance to developing countries shall have access to the services of contact points set up under para 2 of Article IV. Technical cooperation to developing countries shall be provided at the multilateral level by the Secretariat and shall be decided by the Council.⁴⁶

(iv) Relationship with Other Organizations

The General Council of WTO shall make appropriate arrangements for consultation and co-operation with UN and its specialised agencies as well as with other inter-governmental organizations concerned with services.⁴⁷

F. Final Provisions

(i) Denial of Benefits

Benefits of GATS may be denied if any service is being supplied from or in the territory of a non-member; or in the case of maritime service, the vessel

is registered or operated by a person from a non-member country.⁴⁸

(ii) Amendments

Any member or the Council for Trade in Services may initiate a proposal to amend the provisions of the GATS by submitting such proposals to the Ministerial Conference. The Conference, unless it so decides, within 90 days of the submission of the proposal to it, shall take a decision, preferably by consensus, otherwise by a two - third majority, whether to submit the proposed amendment to the members for acceptance.⁴⁹

Amendment to Article II (1) of GATS shall take effect only upon acceptance by all members. Amendments to parts I, II and III of the GATS and the respective annexes shall take effect for the members that have accepted them upon acceptance by two-third of the members. The ministerial conference may decide by a three-fourth majority when any amendment made effective is of such a nature that any member which has not accepted it within a period specified by ministerial conference in each case is free to withdraw from the WTO or to remain a member with the consent of the Ministerial Conference. Amendments to Parts IV, V and VI of the GATS and the respective annexes shall take effect for all members upon acceptance by two-third of the members.⁵⁰

(iii) Successive Round of Negotiations

There shall be successive rounds of negotiations to achieve progressive liberalisation of trade in services. Next round shall begin not later than 5 years from the start of the Agreement on Services *i.e.* July 1, 1995.

With respect to on-going or future negotiations, priority objective of the developed world is to reduce barriers to foreign direct investments in the service sectors. Countries like India are for liberalising movement of natural persons while developed countries insist more on recognition of professional qualifications.

II. PROTOCOL ON FINANCIAL SERVICES

A financial service is any service of a financial nature offered by a financial service supplier of a member. Financial services include insurance banking and services provided by other financial institutions.⁵¹ They may be supplied either by the private sector or by the public sector. Services supplied in the exercise of governmental authority shall not be covered by the Agreement. They include:

- (i) activities conducted by a central bank or monetary authority in pursuit of monetary or exchange rate policies;

- (ii) activities forming part of a statutory system of social security or public retirement plans; and
- (iii) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the government services.⁵²

Any commitment under this Agreement is to be implemented on MFN basis; however it allows exemptions to the MFN principle.⁵³ It means that a country is not obliged to open its doors automatically in the field of financial services. It may still require bilateral negotiations. No presumption has been created as to degree of liberalization to which a member is committing itself and the Agreement.⁵⁴ The provision takes care of worries of countries like India; whether its banks and financial institutions will get as much easy access to the highly advanced markets of the developed countries, as the latter will get in India.

GATS allows its members to take measures for the protection of investors including institutional ones, deposit holders and policy holders to ensure the integrity and stability of its financial system.⁵⁵ GATS permits the use of temporary non-discriminatory restrictions on transfers in the event of serious BOP or financial difficulties. The Agreement does not require a member to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information in possession of public entities.⁵⁶

However, a further understanding on financial services would allow those members who choose to do so to undertake commitments on financial services through a different route. With reference to market access, the understanding contains more detailed obligations on monopoly rights, financial services, purchase by public entities, cross-border trade e.g., insurance and re-insurance services; financial data processing and transfer of information, the right to establish or expand a commercial presence and the temporary entry of personnel.⁵⁷

Each member shall list existing monopoly rights and shall make efforts to eliminate them or at least reduce their scope.⁵⁸ In case of purchase or acquisition of financial services by public entities, MFN and national treatment policies shall be adopted.⁵⁹ In the case of cross-border trade in services like insurance of risks relating to maritime shipping and commercial aviation and space launching and freight including satellites, insurance will cover any or all of the followings : the goods transported, the vehicle transporting the goods and any liability arising therefrom, goods in international transit, and re-insurance business. Each member shall permit non-resident service suppliers

to supply as a principle or through an intermediary, and under terms and conditions that accord national treatment.⁶⁰

Each member shall grant financial service suppliers of any other member the right to establish a commercial presence or expand within its territory, including the acquisition of existing enterprises.⁶¹ A member may, however, impose terms and conditions and procedures for authorization of the establishment and expansion of a commercial presence in so far as they do not circumvent the members' obligations and are consistent with the other obligations of this Agreement.⁶²

No member shall take measures that prevent transfer of information, including transfer of data by electronic means, or that, subject to importation rules consistent with international agreements, prevent transfer of equipment which are necessary for the conduct of the ordinary business of a financial service supplier. However, every member has a right to protect its personal data, personal privacy and the confidentiality of individual records and accounts so long as such right is not used to circumvent the provisions of the Agreement.⁶³

Each member shall permit temporary entry of senior managerial personnel possessing proprietary information essential to the establishment, control, and operation of or specialists in the operation of the financial service supplier, which is establishing or has established commercial presence in the territory of the member. Commercial presence means an enterprise within a member's territory for the supply of financial services and includes wholly or partly owned subsidiaries, joint ventures, partnerships, sole proprietorships, franchise operations, branches, agencies, representative offices or other organizations.⁶⁴ Each member shall permit, subject to the availability of qualified personnel in its territory, temporary entry of specialists in computer services, telecommunication services and accounts, actuarial and legal specialists associated with a commercial presence of financial services supplier.⁶⁵

The provision on national treatment refer to access to payments and clearing systems operated by public entities and to official funding and re-financing facilities. They also refer to membership of, participation in, self-regulatory bodies, securities or further exchanges and clearing agencies.⁶⁶

Ministerial meeting has established a committee on financial services to monitor the progress on liberalization in the field and to report it periodically.⁶⁷

A WTO study lists the following benefits of liberalization in financial sectors:

- (i) enhance competition and improve efficiency, leading to lower costs, better quality;

- (ii) improve financial intermediation and investment opportunities through better resource allocation and through better means of managing risks and absorbing shocks; and
- (iii) induce governments to improve management, interventions in credit markets and financial sector regulation and supervision.⁶⁸

Insulation from competition and over protected banking and insurance brings inefficiencies. Liberalization and opening of financial sector to global winds in place of closed regimes have brought faster growth for developed and developing countries. Many developing countries like Pakistan, Indonesia, Argentina, Brazil, Ghana and Hungary have integrated their financial sector with world markets.⁶⁹

India has opened up services sector where there are spin off benefits by way of technology transfer, investment or employment. On Insurance our offer is limited to insurance of freight and re-insurance. On retail banking the offer is limited to a stand still and the commitment being undertaken is not more than five licence a year for foreign banks.

III. PROTOCOL ON MOVEMENT OF NATURAL PERSONS

Developing countries interests lies in export of services to developed countries through the modality of movement of natural persons skilled as well as unskilled ones. Developed countries are eager to exploit vast untapped service markets of developing countries, where competition is almost nil and profits are high, through their commercial presence in the form of foreign direct investments.

Higher education in countries like India is highly subsidised, producing annually a vast pool of skilled professionals. The cost of training in developed countries is comparatively high. Due to lack of adequate infrastructure, services of highly skilled persons cannot be fully utilized; while West faces a shortage of such personnels. Similarly, due to high living standards of the West, their nationals do not find it lucrative enough to indulge in jobs requiring hard or unpleasant work. Neo rich Arab World is also in need of unskilled or semi skilled workers from the developing countries. Developing countries were ready to supply cheap labour for these jobs. This created a situation, where developed and rich Arab countries allowed temporary movement of natural persons and even carried liberal immigration policies for skilled persons.

This led to brain drain from developing countries, which was considered as an unfair practice. However, economic boom of sixties and seventies changed to slowing down of the economics of the West in the eighties and nineties, with the result of growth in unemployment in developed countries.

With the changed scenario, where West was having less and less jobs to offer; and also due to increase in social tensions in developed world, it started imposing strict measures in respect of recognition of professional qualifications.

Countries like India are keen that restrictions on service operator's movement should be relaxed in some categories of skilled personnel to a range of labour intensive service, in the key target markets. Developed countries may allow India to get greater access in the fields like consultancy services, construction, engineering and computer software. The repatriation earnings from the natural persons have proved to be a boon for India. India considers that provisions for mobility of personnels are not adequate, and gains can further increase through negotiations on give and take basis.

In this context the Agreement under GATS concerning the movement of natural persons gains importance for both the spheres of the world, as it is linked with opening of markets. It permits members to negotiate specific commitments applying to the movement of people. It recognises that people covered by a specific agreement shall be allowed to provide the service in accordance with the terms of commitments.⁷⁰ The Agreement permits exemptions from MFN rule under specific sectors. It recognises to impose restrictions in terms of qualifications, recruitment procedures, technical standards, visa and other requirements.

A footnote to the Agreement says that integration of such services provides citizens of the parties concerned with a right of free entry to the employment market of the members and includes measures concerning conditions of pay, other conditions of employment and social benefits. However, it recognizes the need for temporary movement of the skilled personnel to the developed countries. The Agreement does not cover areas like citizenship, residence or employment on permanent basis.⁷¹ Ministerial meeting decided to form a group to carry on negotiations on further liberalization of movement of natural persons for the purposes of supplying services, beyond the conclusion of Uruguay Round, with a view to allowing the achievement of higher levels of commitments by participants under GATS. The group shall establish its own procedure and shall report periodically to the Council on Trade in Services.⁷²

Recognition of the right of cross-border movement of personnels, leads to a situation, where specific commitments can be negotiated with industrialized world. The Agreement does not prevent a country from applying measures to regulate the entry of natural persons into, or their temporary stay, in its territory. In 1994, the US offered a quota of 65,000 persons per year for 'speciality occupations' in the bilateral negotiations with India. But a condition was attached to it that US employer who would so wish to employ the

foreign personnel would have to undertake the obligation of recruiting and training sufficient number of US personnel in the speciality occupation. This condition has effectively nullified the contents of the offer.

It would be in the interest of our country to link opening of sectors like financial services and sectors for foreign direct investments with the opening of opportunities for opening the west for movement of natural persons, skilled as well as unskilled ones.

GATS provide for a “right of establishment” for capital, but the ‘right of residence’ in the case of labour - intensive services has not been given.

IV. PROTOCOL ON BASIC TELECOMMUNICATIONS

Protocol on Basic Telecommunications was signed on 15 february 1997.⁷³ Protocol has become effective from January 1, 1998.

Telecommunications means the transmission and reception of signals by any electromagnetic means.⁷⁴ Public telecommunication services include, *inter alia*, telegraph, telephone, telex and data transmission typically involving the infrastructure which permits telecommunication between and among defined net work termination points.

Telecommunication has a dual role :

- (i) as a distinct sector of economic activity; and
- (ii) as transport means for other economic activities.

The Protocol relates to measures that affect access to use of telecommunication services and networks. Its scope does not extend to cable or broadcast distribution of radio or television programmes.

The Protocol apply only if the member has bound himself through its schedules in the fields of establishing, constructing, acquiring, leasing, operating or supplying telecommunication services and networks.

It provides that service suppliers of other countries may be permitted to purchase or lease terminals, inter connect private leased or owned circuits with public networks for the movement of information within and across borders. It further provides that conditions attached to the use of public networks should be no more, than is necessary to safeguard the public service responsibilities of their operators, to protect the technical integrity of the network and to ensure that foreign service suppliers do not supply services unless permitted to do so through a specific commitment in the schedule.

The Agreement encourages technical cooperation to assist developing countries in strengthening of their own domestic telecommunication sectors;

and to participate in the development programmes of international and regional organizations, including the International Telecommunication Union (ITU), United Nations Development Programme (UNDP) and the International Bank for Reconstruction and Development (IBRD or World Bank).⁷⁵

It was proposed to include a clause in the annex on pricing of basic telecommunication services. Though the clause was not binding, it concerned India, as it would have enabled issues concerning pricing for coming in for discussion, even though pricing policies are outside the purview of GATS. The proposal was however, dropped.

Telecom accord is expected to eliminate telecom monopolies and ensure full play of market forces. It has opened up global market of US \$ 600 billion. India has offered to allow 25% foreign equity participation in domestic companies, although under the present policy parameters, 49% equity may be allowed for the equipments brought in by these companies, as equity participation. Similarly through holding companies foreign service suppliers may retain 74% equity. Now major issue before the country is whether reduction of tariff will help IT - Telecom equipment component industry, especially when non-tariff barriers are increasing.

V. GATS : A CRITICISM

According to critics, GATS Agreement is not in the national interest. Indian service sector is still at a nascent stage and it needs protection from giants. It does not provide anti-dumping protection in services. There is no adequate provision for mobility of labour; there is no mention of consultancy services. Our banking services are threatened, and telecom services have security implications. Sectors once opened up for access cannot be controlled and provisions relating to equity participation and transfer of funds would limit the control of the Government of India.

Inadequate provisions have been made in case of BOP difficulties. Takeover of services by MNCs is apprehended, under the guise of liberalisation. MNCs will control and use services in the following fields: financial, shipping, transport, telecom, health, education, professional services and media.

It seeks India to give up the right to determine the policies and regulations for the mobilisation and creation of resources for development. Banks and Insurance sectors in India are dependable source of finance capital and a major channel of mobilising public savings. They would come under an un-equal competition and will be swamped by the much vaster resources that the MNCs can muster. Transparency provisions mean introducing changes in laws and regulations. The clearance by trading members is a violation of economic

sovereignty. There seems to be nothing included by way of obligations on the part of foreign investors.

The Agreement provides that members shall not be required to provide confidential information which would prejudice legitimate commercial interests of particular enterprises. It means that while Government of India will be required to amend its laws and regulations, the commercial interests of MNCs would be fully safeguarded. It will cause distortions in financial services, health-care system, education, media, telecom and transport systems.

Government's ability to take measures to support the weak and vulnerable sections of the society would be curtailed seriously. MNCs would not only get control over the utilization of Indian savings and investments, but also get hold on education, health-care culture and communication.

VI. GATS : OPPORTUNITIES FOR INDIA

Enlarged opportunities would arise for India, in the following sectors : foreign investments; technology; exports; GDP increase; inter-linkages in other countries, contact points, designing and evolving of training programmes.

The action plan for academicians, research institutes, trade, industry and government is as follows:

There is a need to assess the overall benefits that could accrue to India from GATS. The academicians need to undertake study at micro level to identify segments in services where prospects for India are bright. The concerns about the ability and speed with which Indian suppliers would be able to establish commercial presence in other countries to deliver services have been expressed in view of the fact of very high cost of office space, communication cost and staff salaries in foreign countries. It requires study of cost-benefit analysis.

Several new investors will enter India for the first time, this opportunity should be taken full advantage of by Indian services sector. The essential prerequisite for such favourable opportunities to be harvested would be the ability of the Indian service suppliers to be competitive, provide timely services and ensure a high quality performance.

Government should establish counter post agencies in India and tap contact points in developed countries to assess wide range of information in the areas of service sector and ensure diffusion of such information through appropriate measures to a wide range of suppliers of services to enable efficient diffusion system which will reduce unit cost of such information to Indian customer. Government can entrust carefully designed responsibilities to some institutions.

VII. CONCLUSION

GATS sets out the framework under which governments can negotiate market access in various sectors. It provides that MFN principle and national treatment can be differed in certain sectors, by individual countries, on a temporary basis. Conditional offers are permissible in individual service sectors. GATS does not oblige its members to provide access across the board to foreign service providers. It has to be negotiated between members on the basis of reciprocity. It provides scope to members to seek concessions on movement of personnel as well as on investments in the service sector. Greater access for the movement of skilled and professional people to render services in developed countries will enable India to increase the export earnings from the service sector. Punjab and Kerla are examples of prosperity brought in through repatriation of savings, by people employed in Gulf countries.

Further, GATS does provide for imposition of restrictions for BOP reasons. Modification or withdrawal of concessions is provided and procedures have been prescribed for such modifications.

The International Trade Commission (ITC) of the US, recently investigated into schedules of commitments submitted by Australia, Hong Kong, India, Indonesia, Korea, Malayasia, New Zealand, Phillipines, Singapore, and Thailand. The investigation was requested by US Trade Representative, for examination of Asia Pacific trading partner's schedules of commitments, under GATS.⁷⁶ The report concludes that the schedules include few liberalising commitments and are generally in the nature of stand still positions *i.e.* continuation of current policies. Though they do not liberalize trade, such commitments establish benchmarks that identify trade impediments. Moreover they deter implementation of further restrictions.⁷⁷

The report indicates that services in sectors like tourism, telecommunication, architectural, engineering and construction are not heavily restricted. However, Asia and Pacific countries appear more reserve to commit to open markets for professional services, audio-visual services and social services such as education and health care. Foreign direct investment in service sector include several restrictions in the schedules. Five of the ten trading parties limit the foreign equity participation, ranging from 30% in Malayasia to 60% in the Phillipines.⁷⁸ It is interesting to note that developing countries have tried to trade offs between different issues to their advantage. For example, Thailand linked reforms in telecommunication with concessions on other issues, such as agriculture.⁷⁹ This suggests that, in future rounds of negotiations to reduce market access barriers, the technique of negotiating package deals may find favour again.⁸⁰

India has offered access in those sectors only where it has economic advantage in foreign enterprises established in India. During transit period, India has given certain advantages to domestic enterprises. For example, 1998-99 budget has opened up insurance sector for domestic private service providers.⁸¹

It is interesting to note that in the field of movement of natural persons across the borders, India's approach is not in self interest. The country should tackle the issue with realism and caution. It is a double edged weapon. On the one hand, it opens the doors to developed world for our skilled labour; on the other hand it may result into flooding of citizens from neighbouring countries like Bangladesh. Ultimately, it may cause more harm than good on the economic front.

NOTES & REFERENCES

- * Reader, Law Centre II, Faculty of Law, University of Delhi, Delhi.
1. WORLD TRADE SCANNER, Delhi, August 1-15, 1997 at 3.
 2. K.V. Swaminathan *Emerging opportunities in the Service Sector* in V. Ramachandriah ed., GATT ACCORD : INDIA'S STRATEGIC RESPON (New Delhi : Commonwealth Publishers, 1994) at 309.
 3. GENERAL AGREEMENT ON TRADE IN SERVICES (GATS) Time limit was extended to file Exemptions under Article II.
 4. The GATS provides a framework for specific commitments; see Part III (Articles XVI to XVIII) and Part IV (Articles XIX to XXI).
 5. *Id.*, Article XXVIII (a) read with Article I (3)(a).
 6. *Id.*, Article I (2).
 7. *Id.*, Article XXVIII (b) read with Article I (3) (b).
 8. *Id.*, Article I(3) (b) and Article I(3) (C) read together.
 9. *Id.*, Annex on Article II Exemptions 3 and 6 read together.
 10. *Id.*, Article II (1).
 11. *Id.*, Article III(3).
 12. *Id.*, Article III bis.
 13. *Id.*, Article III (4) read with Article XXVIII (c).
 14. Article XXVII (d).
 15. *Id.*, Article IV read with Article VIII.
 16. *Id.*, Article IV.
 17. *Id.*, Article V read with Article XXVIII (e).
 18. *Id.*, Article VI (1) & (2)(a).
 19. *Id.*, Article VI(4).
 20. Ministerial Decision on Professional Services (2) read with Article VI (4) and (6) of GATS.

21. GATS, Article VII (1) and (3).
22. *Id.*, Article VIII (2) and (5).
23. *Id.*, Article XXVIII (h).
24. *Id.*, Article IX.
25. *Id.*, Article X (1).
26. *Id.*, Article XII.
27. *Id.*, Article XIV.
28. *Id.*, Article XIV bis.
29. *Id.*, Article XIII.
30. *Id.*, Article XV.
31. *Id.*, Article XVI (1).
32. *Id.*, Article XVI (2) (a) to (f).
33. Marco C.E.J. Bronckers and Pierre Larouche, *Telecommunication Services and the WTO*, 31 JOURNAL OF WORLD TRADE (JUNE, 1997) at 16.
34. GATS, Article XX (2).
35. *Id.*, Article XXVIII.
36. *Id.*, Article II, paragraph 2 in conjunction with paragraphs 3 and 6, Annex on Article II Exemptions.
37. *Id.*, Article XX.
38. WORLD TRADE SCANNER, India Notifies Safeguard Rules, September 1-16/August 16-31, at 32.
39. *Id.*, Article XIX.
40. Ministerial Decisions and Declarations : Decision on Institutional Arrangements for the General Agreement on Trade in Services.
41. GATS, Article XXII.
42. *Id.*, Article XXIII.
43. Decisions on certain dispute settlement procedures for the GATS.
44. GATS, Article XXIV.
45. *Id.*, Article XXIV read with Ministerial Decisions and Declarations : Decision on Institutional Arrangements, paragraphs (1) and (2).
46. *Id.*, Article XXV.
47. *Id.*, Article XXVI.
48. *Id.*, Article XXVII.
49. AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, Article X (1).
50. *Id.*, Article X (5).
51. First Annex on Financial Services, para 5(a).
52. *Id.*, para 1(b) read with para 1 (d).
53. Ministerial Decision on Financial Services, para (1).
54. Understanding on Commitments in Financial Services, para 1 (4).

55. First Annex on Financial Services, para 2(a).
56. *Id.*, para 2(b).
57. Understanding on Commitments in Financial Services, para B.
58. *Id.*, para B(1).
59. *Id.*, para B(2).
60. *Id.*, para B(3).
61. *Id.*, para B(5) read with para B(7).
62. *Id.*, para B(6).
63. *Id.*, para B(8).
64. *Id.*, para D(2).
65. *Id.*, para B(9).
66. *Id.*, para C.
67. Decision on Institutional Arrangements for the GATS, para 3.
68. WTO, OPEN MARKETS IN FINANCIAL SERVICES AND THE ROLE OF GATS (Geneva : WTO Publication, 1997).
69. WORLD TRADE SCANNER, October 1-15/September 16-30, 1997 at 18.
70. Annex on Movement of Natural Persons Supplying Services under the Agreement, para 3.
71. *Id.*, para 2.
72. Ministerial decision on negotiations on movement of natural persons.
73. *Id.*, *supra* n. 34 at 16.
74. Annex on Telecommunications, para 3(a).
75. *Id.*, para 6(a).
76. Investigation No. 332-374. USTIC Publication 3053, August 1997.
77. WORLD TRADE SCANNER, *USTR needs better offers*, September 1-15 and August 16-31 at 23.
78. *Ibid.*,
79. J. Ridding, *Looking East for a Telecom Accord*, FINANCIAL TIMES, November 1996, Quoted by Bronckers and Pierre Larouche, 31 JOURNAL OF WORLD TRADE (June, 1997) at 10.
80. See Bronckers and Larouche, *supra* n. 34 at 10.
81. Finance Budget 1998-99, presented on June 1, 1998.