THE WTO REGIME FOR FINANCIAL SERVICES: IMPLICATIONS FOR INDIA

THE WTO REGIME FOR FINANCIAL SERVICES: IMPLICATIONS FOR INDIA

Dissertation submitted to the Jawaharlal Nehru University
in partial fulfillment of the requirements for
the award of the degree of

MASTER OF PHILOSOPHY

NIRMALYA SYAM

CENTRE FOR INTERNATIONAL LEGAL STUDIES
SCHOOL OF INTERNATIONAL STUDIES
JAWAHARLAL NEHRU UNIVERSITY
NEW DELHI
2005

CENTRE FOR INTERNATIONAL LEGAL STUDIES
SCHOOL OF INTERNATIONAL STUDIES
JAWAHARLAL NEHRU UNIVERSITY
NEW DELHI-110067

29 July 2005

CERTIFICATE

This is to certify that the dissertation entitled "**THE WTO REGIME FOR FINANCIAL SERVICES: IMPLICATIONS FOR INDIA**", submitted by me in partial fulfillment of the requirements for the award of the degree of **MASTER OF PHILOSOPHY** is my own work and has not been previously submitted for the award of any other degree of this or any other university.

Nirmalya Syam
(Nirmalya Syam)

We recommend that this dissertation be placed before the examiners for evaluation.

29/07/05

Prof. Y.K. Tyagi
(Chairperson)
Chairman
Centre for Studies In Diplomacy
International Law and Economics
School of International Studies
Jawaharlal Nehru University
New Delhi-110067

Dr. V.G. Hegde
(Supervisor)
Professor
Centre for Studies In Diplomacy
International Law and Economics
School of International Studies
Jawaharlal Nehru University
New Delhi-110067

Gram: JAYENU Tel: 26704338 (Direct), 26107676, 26167557/**Ext**.4338 **Fax**: 91-011-26165886

ACKNOWLEDGEMENTS

There are many people whose contribution is very germane for bringing this work to fruition. At the very outset, I would like to thank my supervisor, Dr. V.G. Hegde, for his invaluable guidance and support. He has always followed the progress of my work very closely and has offered timely and valuable suggestions, leaving me absolutely free to either accept them or reject them.

I also thank Professor R. P. Anand whose enthusiasm for the subject and affection for his students touches one and all. I also owe a debt of gratitude to my teacher Professor V.S. Mani. I also thank my teacher Professor Yogesh K. Tyagi for his useful suggestions. I am grateful to my teacher Professor B.S. Chimni for his invaluable guidance in course of my studies in international law. I also thank my teacher Professor Bharat H. Desai for his useful suggestions.

I appreciate the support and co-operation of the librarian and the library staff of Jawaharlal Nehru University, the University of Delhi, the Indian Society of International Law, the Indian Council for Research in International Economic Relations and the Reserve Bank of India, New Delhi.

I do not have words to thank my friends for their selfless support. Indeed, I would not have been able to complete this study without their help. I do not want to repay this debt by thanking them.

Least of all, I bow to the feet of my parents for their constant support, love and affection inspite of my inadequacies.

This study is indeed the result of the support, co-operation and valuable inputs of many people. All the credit for the same goes to them. All the inconsistencies and drawbacks in this study are absolutely mine.

Nirmalya Syam

GLOSSARY OF TERMS

ASEAN	Association of South East Asian Nations.
BIMST-EC	Bangladesh, India, Myanmar, Singapore, Thailand-Economic Cooperation
BIS	Bank for International Settlements.
BFS	Board for Financial Supervision.
CECA	Comprehensive Economic Co-operation Agreement.
CTS	Council for Trade in Services.
CRR	Cash Reserve Ratio.
DBS	Department of Banking Supervision.
DNBS	Department of Non-Banking Supervision.
EFTA	European Free Trade Association.
EC	European Commission.
EEC	European Economic Community.
EU	European Union.
FBSEA	Foreign Bank Supervision Enhancement Act.
FLG	Financial Leaders Group.
FSA	Financial Services Agreement.
G-9	Group of Nine Countries.
G-10	Group of Ten Countries.
G-20	Group of Twenty Countries.
GATS	General Agreement on Trade in Services.
GATT	General Agreement on Tariffs and Trade.

GCC	Gulf Cooperation Council.
GDP	Gross Domestic Product.
GNP	Gross National Product.
ICAO	International Civil Aviation Organization.
ITO	International Trade Organization.
ITU	International Telecommunications Union.
LAB	Local Advisory Board.
LDC	Less Developed Countries.
NAFTA	North American Free Trade Agreement.
NIEO	New International Economic Order.
MFN	Most Favoured Nation.
OECD	Organisation for Economic Co-operation and Development.
RBI	Reserve Bank of India.
SAARC	South Asian Association for Regional Cooperation.
SACU	South African Customs Union.
SAFTA	South Asian Free Trade Area.
SEBI	Securities and Exchange Board of India.
SLR	Statutory Liquidity Ratio.
TNC	Transnational Corporation.
UK	United Kingdom.
UNGA	United Nations General Assembly.
UNCTAD	United Nations Conference for Trade and Development.
US	United States.

USTR	United States Trade Representative.
WTO	World Trade Organization.

TABLE OF CONTENTS

CHAPTER I

INTRODUCTION

A service transaction is not amenable to an easy description. A very simple definition of services which is cited often is "Services are something you can buy and sell but cannot drop on your foot."[1] Though this definition is simple, it singularly brings out how difficult it is to define a service transaction. This is because services are an intangible concept, which can hardly be defined in a legal sense.[2] However, this issue of a formal definition of services did not assume much significance for many years and international services transactions went on without any problem. This problem of a legal definition of services assumed significance as theories emerged advocating services as transactions of trade to which rules of international trade should be applied.[3]

The emergence of new theories advocating services as issues of trade marked a paradigm shift in economic thinking. Though services transactions have taken place for centuries, they were regarded as being worthy of little or no value. In accounting parlance, services transactions were classified as *invisible*

---

1 See William J. Drake and Kalypso Nicolaïdis, "Ideas, Interests and Institutionalization: "trade in services" and the Uruguay Round", *International Organization*, vol.46, no.1, 1992, p.43.

2 Economists have tried to provide a working definition of services. According to T.P. Hill, a service is a change in the condition of a person, or of goods belonging to some economic unit, which is brought about as the result of the activity of some other economic unit, with the prior agreement of the former person or unit; ibid.

3 Services was recognised as an issue of trade in the context of its close linkage to trade in goods. It was felt that discrimination in the service sector could directly affect trade in goods because many services were essential factors for the production of goods. For a detailed discussion on the interrelationship between trade in goods and services see Raymond J. Krommenacker, "Trade Related Services and GATT", *Journal of World Trade Law*, vol.13, no.6, 1979, pp.510-22.

transactions. All services sectors were considered to be distinct and international co-operation on the delivery of such services was achieved through separate agreements or through separate functional organisations like the International Civil Aviation Organization (ICAO), the International Telecommunications Union (ITU) and the Universal Postal Union (UPU). However, these functional organisations were only involved in developing technical standards and legal principles necessary for enabling the effective supply of the service.[4] They were not concerned with trade issues like reduction of barriers to market access.

In this context, the re-conceptualisation of services as a tradable concept was driven by the rapid growth in the services sector in the United States (US) and the other developed countries after the end of the World War II. Though there are no reliable statistics on the growth in international services transactions, there is a general consensus that the volume of international services transactions has been growing rapidly since the 1970s.[5] The phrase 'trade in services' was used for the first time in an Organisation for Economic Co-operation and Development

---

[4] For instance, in international civil aviation, countries provided international aviation services through their designated carriers on the basis of bilateral air services agreements while technical standards and legal principles relating to the freedom to provide such services were laid down in the Chicago Convention of 1944 which is administered by the International Civil Aviation Organization (ICAO). Similarly the International Telecommunications Union (ITU) devises technical standards relating to international telecommunications services.

[5] The following reasons explain the growth in services:

i. Technological developments have facilitated the cross-border delivery of various services.
ii. The growing linkage between trade in services and trade in goods was realised.
iii. Liberalisation of trade and capital markets contributed to a growing demand for services at the behest of the transnational corporations (TNCs) from the developed countries. Growing investments allowed TNCs to provide a growing market for traded services.

For a detailed discussion on this aspect see Jeffrey J. Schott and Jacqueline Mazza "Trade in Services and Developing Countries", *Journal of World Trade Law*, vol.20, no.3, 1986, p.255.

(OECD) report in 1972 wherein it was suggested that services transactions could be considered as trade.[6]

1.1 THE WTO AND TRADE IN SERVICES

Following these developments, the US gradually pushed for negotiations on services within the General Agreement on Tariffs and Trade (GATT).[7] Persistent discourse on the tradability of services took place in the developed countries both at the level of the industry as well as the academia.[8] Gradually, services came to be recognised as a tradable transaction. Developed countries realised that they have a comparative advantage in services compared to goods trade where they were witnessing stiff competition from the developing countries. The US, which had realised this earlier than other developed countries, wanted to

---

6 See OECD, *Report by the High Level Group on Trade and Related Problems* (Paris: OECD, 1973) cited in Drake and Nicolaïdis, n.1 p.45.

7 The General Agreement on Tariffs and Trade (GATT) is a multilateral agreement that lays down principles for the regulation of international trade in goods between countries. It came into force in October 1947. For a discussion on legal aspects of the GATT see John H. Jackson, *World Trade and the Law of GATT: A Legal Analysis of the General Agreement of Tariffs and Trade* (New York: Bobbs-Merrill Co., 1969); John H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge: Cambridge University Press, 2000); Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization: Law, Practice and Policy* (Oxford: Oxford University Press, 2003).

8 See, for instance, I. D. Canton, "Learning to Love the Service Economy", *Harvard Business Review*, vol.62, 1984, pp.89-97; H. Peter Gray, "A Negotiating Strategy for Trade in Services", *Journal of World Trade Law*, vol.17, no.5, 1983, pp.377-88; Brian Hindley and Alasdair Smith, "Comparative Advantage and Trade in Services", *The World Economy*, vol.7, 1984, pp.369-90; Harald B. Malmgren, "Negotiating International Rules for Trade in Services", *The World Economy*, vol.8, 1985, pp.11-26; Jeffrey J. Schott, "Protectionist Threat to Trade and Investment in Services", *The World Economy*, vol.8, 1985, pp.195-214; and S. Schultz, "Trade in Services: Its Treatment in the International Forums and the Problems Ahead", *Intereconomics*, November-December, 1984, pp.267-73 cited in Drake and Nicolaïdis, n.1 p.59.

include services within the GATT as early as possible. The other developed countries wanted to do so gradually after developing their competencies in different services sectors. On the other hand, the developing countries refused to recognise services as an item for trade negotiations. They opposed any negotiations on services due to the following reasons: first, the developing countries felt that they had no comparative advantage in services; secondly, they believed that their infant services industries needed protection from competition from the foreign services suppliers; they were apprehensive that liberalisation would impinge on their national sovereignty and security; fourthly, they were skeptical as to how the principles of trade law would apply to services; and finally, they were apprehensive that inclusion of services in the GATT will expose them to new trade disputes and retaliatory action from developed countries on sectors like apparel and steel markets where they have a comparative advantage.[9] However, gradually the opposition of the developing countries gave way in the face of persistent efforts by the developed countries to launch negotiations on services.

Though negotiations on services were launched, it was carried out on a separate track from the GATT under the aegis of the Group for Negotiations on Services (GNS). In spite of the fact that countries had agreed on the tradable nature of services, there was not enough information on the specificities of trade in services. It was realised that trade in services differed fundamentally from trade in goods because of their intangible nature. While trade in goods took place through cross-border supply of a product, services could be delivered through

---

9 See Schott and Mazza, n.5 pp.259-69.

several modes involving the cross-border movement of the factors responsible for the supply of a service.[10] Therefore, a regime similar to the one for trade in goods would not have been feasible in respect of trade in services.

Since any comprehensive understanding of the nuances of trade in services was yet to emerge, a framework agreement on trade in services known as the General Agreement on Trade in Services (GATS) was developed. The GATS is a framework agreement that merely lays down the basic principles for conducting international trade in services in a manner so as to promote the economic growth of all its Members as well as the development of the developing countries.[11] The GATS contains separate annexes that elaborate upon its basic principles with regard to their specific application to the concerned service. Separate annexes were devised for different services in order to suitably adjust the regime with the specific traits of each distinct service. The GATS has separate annexes pertaining to air transport services, financial services, maritime transport services and telecommunications services.

With the creation of the GATS international trade in services came to be governed by the rules made by the WTO. Though services was thus recognised as a tradable activity, a hard law regime like the GATT could not be developed in respect of services under the GATS. This is because of the intangible nature of services due to which trade in services cannot be regulated at the border unlike

---

[10] For a detailed discussion on the nature of trade in services see Aly K. Abu-Akeel, "Definition of Trade in Services under the GATS: Legal Implications", *The George Washington Journal of International Law and Economics*, vol.32, no.2, 1999, pp.189-210. Also see Phedon Nicolaides, "Economic Aspects of Services: Implications for a GATT Agreement", *Journal of World Trade*, vol.23, no.1, 1989, pp.126-7.

trade in goods. Therefore, the GATS defined services in terms of the modes by which it may be delivered. Accordingly, services can be delivered through four modes viz., cross-border trade, consumption abroad, commercial presence and the cross border movement of natural persons for the delivery of a service.[12]

At the start of the Uruguay Round of trade negotiations, the developing countries led by Brazil and India had vehemently opposed the inclusion of services in the agenda of the GATT.[13] This was primarily because the developing countries regarded services to be an investment issue.[14] During the Uruguay Round, even the developed countries gradually realised the need to gather more experience on international trade in services before developing a fully binding legal regime on services. As the developed countries came down from their hard-line positions, the opposition of the developing countries was mellowed down in course of the negotiations. A framework agreement on services that would safeguard the interests of the developing countries while striving for the progressive liberalisation of services through the reduction and elimination of barriers to market access was thus envisaged.

---

[11] *General Agreement on Trade in Services (GATS)*, Preamble. Also see selected provisions of the GATS in Appendix 1.

[12] ibid, Article I, paragraph 2.

[13] For a detailed discussion on the negotiating positions of the developing countries and the developed countries see Murray Gibbs and Mina Mashayekhi, "Services: Cooperation for Development", *Journal of World Trade*, vol.22, no.2, 1988, pp.81-102.

[14] According to Prem Kumar, the former Indian Commerce Secretary, free services trade implied free foreign investment, which could impinge on national sovereignty and economic ambitions. See *New York Times*, 2 October 1985, p. D1, cited in Schott and Mazza, n.5 p.262. For a summary of the statements of India and Brazil at the GNS, see C. Raghavan, "Trade, Services Negotiations Start", *Special UN Service*, no. 1664, 3 March 1987, cited in Gibbs and Mashayekhi, n.13 p.90.

This framework was provided by the GATS. The GATS does not bind any of its Members to allow market access in respect of any service to any extent unless it specifically undertakes to allow market access in respect of the supply of a service through a particular mode, to the extent of such a commitment. This approach is called the positive list approach. In order to exclude a particular service activity from the scope of the GATS, a Member need not take specific exemptions unless it has made a specific market access commitment. The combined effect of this approach and the Most Favoured Nation (MFN) rule is that while a Member has the liberty to decide whether it should make a market access commitment in respect of a particular service activity and the extent of the same, where it decides to do so, by virtue of the MFN rule it cannot allow market access in a discriminatory manner. This is because the MFN rule is a general obligation under the GATS, which applies to all GATS commitments of a Member unless specific exemptions to the rule are taken.

Though the GATS does not obligate its Members to make binding commitments on market access and national treatment, it obligates its Members to launch successive rounds of negotiations for the progressive liberalisation of services through the reduction or elimination of measures that have an adverse effect on trade in services.[15] As envisaged in terms of Article XIX of the GATS, the existing scheme of things could be changed in course of the future rounds of negotiations. Indeed, the GATS did not lead to any substantive dismantling of restrictive regulations on market access. In this context, scholars like Feketekuty

---

15 *GATS*, n.11 Article XIX, paragraph 1.

have observed that the major goal of the first round of negotiations was to obtain binding commitments from countries with the objective of preserving the degree of openness and non-discrimination provided for in current laws and regulations.[16]

Though the GATS has attempted to lay down a framework regime for trade in services, many of its principles require more elaboration. For instance, the GATS does not explain whether commercial presence includes the right to establishment i.e., the right of the foreign service supplier to set up an establishment in the host country. Moreover, the GATS does not address the issue of the relationship between market access in services and investments. The lack of clarity in many of its provisions has made it a very uncertain regime. Therefore, developing countries have been very cautious about making any commitment under the GATS. Many of their commitments do not bind the status quo i.e., they reflect less than the actual extent to which they have liberalised a particular service sector. The one feature of the GATS that allows developing countries to do this is the flexible approach towards market access and national treatment commitments adopted by the GATS. As a consequence of this approach, market access commitments of many countries are not consistent with the actual extent to which they have liberalised their services sectors. In this perspective, the GATS has been criticised by scholars like Feketekuty for its failure to obtain sufficiently high levels of market access commitments from

---

[16] Geza Feketekuty, "Trade in Services – Bringing Services Into the Multilateral Trading System", in Jagdish Bhagwati and Mathias Hirsch eds., *The Uruguay Round and Beyond: Essays in Honour of Arthur Dunkel* (Berlin: Springer, 1998), p.90.

developing countries.[17] However, successive negotiations based on the built in agenda of the GATS for progressive liberalisation could lead to greater market access commitments. Indeed, in respect of some services, negotiations continued even after the Uruguay Round of negotiations were concluded in 1993. In this context, it would be pertinent to study the scope of financial services under the GATS.

1.2 FINANCIAL SERVICES IN THE WTO

The financial services sector is at the centre of a market-based economy. The growth of a market-based economy is closely related to the financial health of the economy. Therefore, a robust financial sector is an imperative for such economies. As many countries gradually shift from a centrally controlled to a market driven economy, the financial sectors of such transitory economies have to provide more resources for growth in the other sectors of the economy. In fulfilling these needs, financial services intermediaries in these countries have to increase their asset base for generating more funds. Scholars like Dobson and Jacquet believe that this can be done by opening up the financial services sector for competition from foreign financial services intermediaries. In their view, financial market development is important from two aspects - first, it changes the speed of capital accumulation and thus it influences the productive efficiency of the economy; and secondly, through the creation of financial institutions they

[17] ibid.

lessen the risks faced by investors in pooling their savings and diversely distributing them among many users.[18]

Financial services necessarily involve the movement of capital. As the series of financial crises in East Asia and Latin America have shown, unrestricted movement of capital can lead to financial instability in economies that do not have strong regulatory systems to check any manipulation of the free market by vested interests.[19] Most developing countries do not have strong regulatory systems. Financial sectors in such economies do not have the same level of maturity as the financial sectors of the developed economies.[20] This is because traditionally the developing countries were mostly agricultural economies. Only after they came out of the bondage of colonialism, proper attention was given to their industrial development. Services was naturally too esoteric a sector for the developing countries.

Nevertheless, in spite of this divergence in the level of maturity between the financial markets of the developed and developing countries, a multilateral framework to liberalise international trade in financial services has been developed under the aegis of the World Trade Organization (WTO). This presents before us the intriguing issue whether financial services should be liberalised within the WTO.

---

[18] Wendy Dobson and Pierre Jacquet, *Financial Services Liberalization in the WTO* (Washington, D.C.: Institute for International Economics, 1998), p.2.

[19] For a very interesting discussion on the East Asian economic crisis see Joseph Stigltz, *Globalization and its Discontents* (New Delhi: Penguin Books, 2002), pp.89-132.

[20] The financial sector is exposed to various risks in a completely deregulated environment. The more mature the system, the better is its ability to bear such risks and withstand untoward losses.

At the end of the Uruguay Round of negotiations, very few countries made commitments on financial services. Nevertheless, an Annex on Financial Services was included in the GATS for elaborating upon the provisions of the GATS in respect of financial services. Some developed countries, most of which are from the Organisation for Economic Co-operation and Development (OECD), were in favour of a more binding regime for financial services. Thus, in order to supplement the GATS' Annex for Financial Services with a more binding regime to be applicable amongst them, an Understanding on Financial Services was adopted.

The Annex defines financial services in an inclusive manner to the effect that all services of a financial nature may come within its ambit. It specifically mentions only insurance and banking services.[21] The Annex applies to any measure that affects the supply of a financial service.[22] The scope of the Annex has been enlarged by its application to any measure that affects the supply of a financial service. This has made it possible for the WTO to interpret this provision in very broad terms.[23]

Paragraph 2.1 of the Annex, which deals with domestic regulations on financial services, seeks to address the regulatory concerns of the countries

---

21 *Annex on Financial Services*, paragraph 5.1. Also see Appendix 2.

22 ibid, paragraph 1.1.

23 This can be concluded on the basis of the decision of the Appellate Body of the WTO Dispute Settlement Body (DSB) in the *EC-Bananas case* wherein the Appellate Body has held in the context of the GATT that the phrase "any measure affecting trade in goods" should be interpreted liberally. See J. Steven Jarreau, "Interpreting the General Agreement on Trade in Services and the WTO Instruments Relevant to the International Trade in Financial Services: The Lawyer's Perspective", *North Carolina Journal of International Law and Commercial Regulation*, vol.25, no.1, 1999, p.36.

making commitments on financial services. According to this provision, domestic regulations that are taken for prudential reasons cannot be invalidated even if the same are not consistent with the provisions of the GATS. However, where these prudential measures are used as a means of avoiding a Member's obligations under the GATS, they cease to enjoy the protection of paragraph 2.1 of the Annex. However, the Annex does not provide any explanation as to how to determine whether a prudential regulation amounts to a trade restricting measure. It is pertinent to note here that though these norms may not be violative of the GATS, they may be deemed as measures that nullify or impair any benefit that accrues or could accrue to a Member under the provisions of the GATS.[24]

In terms of paragraph 3 (b) of Article I of the GATS, services supplied in the exercise of governmental authority are not covered by the GATS. This has a significant implication for financial services in developing countries because in most developing countries, many financial activities are conducted by public entities in the exercise of governmental authority. Thus in effect Article I, paragraph 3 (b) of the GATS would have excluded such financial services from the scope of the GATS. However, the Annex explains the scope of the GATS in respect of financial services supplied in the exercise of governmental authority. While such services are generally kept outside the scope of the GATS in terms of paragraph 1.2 of the Annex, only activities that are conducted in furtherance of macroeconomic policy objectives are excluded completely from the scope of the

[24] In terms of Article XXIII, paragraph 3 of the GATS, the DSB can adjudicate the validity of non-violating measures if the same leads to actual or potential nullification or impairment of any benefit that accrues to a Member under the GATS.

GATS. In terms of paragraph 1.3 of the Annex, in the case of other kinds of financial services activities under governmental authority, where a country allows its private financial service suppliers to compete with the public entity, such services come within the ambit of the GATS. Macroeconomic policy-making activities are essentially governmental functions which cannot be undertaken by private entities. Thus, the exclusion of such activities from the ambit of the GATS is quite natural.

The Understanding on Financial Services adopts an alternative approach to that of the GATS with regard to market access and national treatment commitments. At the very outset, the Understanding lays down a standstill obligation on its adherents to the effect that whenever a GATS commitment is made in terms of the Understanding, it will *ipso facto* bind the status quo. Moreover, in order to effectively facilitate the progressive liberalisation of financial services, the Understanding mandates the Members to enlist in their schedule of commitments all the existing monopoly rights with the objective of eliminating them or reducing their scope through negotiations.[25] The GATS attempts to accommodate many measures that negatively affect the interests of other Members with regard to financial services. In this context, paragraph 10 of Section B of the Understanding obligates Members to try to remove or limit such adverse effects. With regard to national treatment, the Understanding binds its Members to provide financial service suppliers of other Members with access to government paying and clearing systems, official funding, refinance facilities, etc.

---

[25] *Understanding on Commitments in Financial Services*, Section B, paragraph 1. Also see Appendix 3.

Thus, the Understanding reduces the flexibility of the GATS to a large extent. However, the Understanding only applies in respect of those GATS Members who have adopted it. No developing country has adhered to the Understanding.

1.3 FINANCIAL SERVICES IN INDIA

At the end of the Uruguay Round, India also made some commitments on financial services under the GATS. Though these commitments were improved upon in course of the extended negotiations on financial services, which culminated in the Financial Services Agreement (FSA) in 1997, a close perusal of India's commitments after the FSA shows that India has made very few market access commitments on financial services under the GATS. The few commitments that have been made by India are subject to specific limitations. Moreover, Indian commitments on financial services do not cover all financial services activities.[26]

---

[26] For instance, in the insurance sector Indian commitments only cover freight insurance. Reinsurance services can be provided by foreign entities only in respect of the residuary business that remains after statutory placements with Indian insurance companies. Intermediation is allowed only in respect of reinsurance activities. In the banking sector, India has made commitments only in respect of commercial presence of foreign banks. Foreign banks still have to obtain a license from the RBI under the Banking Regulation Act of 1949 in order to establish a branch. Incumbent and new foreign banks in India cannot establish more than twelve new branches every year. Automated Teller Machines (ATMs) are not to be regarded as branches. Limitations have also been imposed in respect of investments by foreign banks in other financial services. The RBI can deny licenses to new foreign banks if the total share of foreign banks exceeds 15 per cent of the total on and off balance sheet assets of the banking sector in India. India also maintains limitations on equity participation by foreign financial services companies in other financial services companies. See World Trade Organization (WTO), *India: Schedule of Specific Commitments*, GATS/SC/42 Suppl.4, 26 February 1998.

India's commitments on financial services do not bind the status quo i.e., they do not reflect the actual extent to which India allows market access to foreign financial institutions. Indeed, in practice India allows greater market access than it is bound to provide in terms of its GATS commitments. In course of the Doha Round of negotiations on services, India has received requests from many countries that address these aspects of India's commitments. Scholars like Aaditya Mattoo and Arvind Subramanian suggest that by making more liberal commitments that at least bind the status quo, among other things, India can demonstrate its unwavering commitment towards financial reforms and thus attract more foreign investment in India.[27]

However, before making any commitment liberalising financial services within the framework of the GATS, the implications of making such commitments should be considered. In this perspective, it would be pertinent to study the WTO regime for financial services and the implications of this regime for financial services for countries like India.

Liberalisation of the financial sector may be helpful to the developing countries. However, the process of liberalisation has to be commensurate with the distinct requirements of each country. It may not be feasible to liberalise to the same extent with all countries. Therefore, many countries including India have liberalised the financial sector on a bilateral or regional basis. This approach has led to greater degree of liberalisation, for instance, under the Comprehensive Economic Co-operation Agreement (CECA) between India and Singapore.

---

[27] Aaditya Mattoo and Arvind Subramanian, "India and the Multilateral Trading System Post-Doha: Defensive or Proactive?", in Aaditya Mattoo and Robert M. Stern eds., *India and the*

1.4 REVIEW OF LITERATURE

The multilateral trade regime is a well-researched area. A substantial amount of literature is available on both the WTO as well as its predecessor, the General Agreement on Tariffs and Trade (GATT). Many scholars have studied the GATS from diverse perspectives.[28] Most of these studies review the scope of the GATS in general from an economic perspective. Nevertheless, they provide useful insights into the WTO regime for services. Sapir concludes that the sectoral approach to multilateral trade in services will be difficult to reverse in the future because the GATS does not sufficiently address the regulatory issues pertaining to services.[29] Analysing the GATS regime from the perspective of developing countries, Neela Mukherjee argues that the GATS is essentially a trade deal that benefits the multinationals from the industrial countries. She points out that though the GATS contains provisions that seek to address the needs of the

---

WTO (New Delhi: Rawat Publications, 2004), pp.329-33.

[28] See Laura Altinger and Alice Enders, "The Scope and Depth of GATS Commitments", *The World Economy*, vol.19, no.3, 1996, pp.307-32; Geza Feketekuty, "Trade in Services: Bringing Services into the Multilateral Trading System", in Jagdish Bhagwati and Mathias Hirsch eds., *The Uruguay Round and Beyond: Essays in Honour of Arthur Dunkel* (Berlin, Springer, 1998), pp.79-99; Aly K Abu-Akeel., "Definition of Trade in Services under the GATS: Legal Implications", *The George Washington Journal of International Law and Economics*, vol.32, no.2, 1999, pp.189-210; André Sapir, "The General Agreement on Trade in Services: From 1994 to the Year 2000", *Journal of World Trade*, vol.33, no.1, 1999, pp.51-66; Peter S Watson and others, *Completing the World Trading System: Proposals for a Millennium Round* (The Hague: Kluwer Law International, 1999); Neela Mukherjee, "GATS and the Millennium Round of Multilateral Negotiations – Selected Issues from the Perspective of Developing Countries", *Journal of World Trade*, vol.33, no.2, 1999, pp.87-102; Andreas F. Lowenfeld, *International Economic Law* (New York: Oxford University Press, 2002).

[29] André Sapir, "The General Agreement on Trade in Services: From 1994 to the Year 2000", *Journal of World Trade*, vol.33, no.1, 1999, pp.51-66.

developing countries, in practice these provisions have not been implemented to any significant extent owing to the indifference of the developed countries.[30]

Abu-Akeel conducts a legal analysis of the GATS from two aspects – the definition of services in the GATS and the application of the MFN rule in the GATS. He points out the inadequacies of these aspects of the GATS and specifically examines their impact in respect of distribution services and the application of the rules of origin.[31]

Some scholars have specifically studied the WTO regime for financial services.[32] Kono and others analyse the GATS regime for financial services from an economic perspective and conclude that the GATS is beneficial in tying in the level of liberalisation, thereby preventing possibilities of backtracking. The commitment to further liberalisation in the future leads to more domestic reforms. Moreover, binding GATS commitments give a signal of policy stability to foreign investors. They argue that financial crises are not brought about by liberalisation.

---

30 Neela Mukherjee, "GATS and the Millennium Round of Multilateral Negotiations – Selected Issues from the Perspective of Developing Countries", *Journal of World Trade*, vol.33, no.2, 1999, pp.87-102.

31 Aly K Abu-Akeel., "Definition of Trade in Services under the GATS: Legal Implications", *The George Washington Journal of International Law and Economics*, vol.32, no.2, 1999, pp.189-210.

32 See Masamichi Kono, and others, *Opening Markets in Financial Services and the Role of the GATS* (Geneva: World Trade Organization, 1997); Wendy Dobson and Pierre Jacquet, *Financial Services Liberalization in the WTO* (Washington D.C.: Institute for International Economics, 1998); Dilip K. Das, "Trade in Financial Services and the Role of the GATS", *Journal of World Trade*, vol.32, no.6, 1998, pp.79-114; J. Steven Jarreau, "Interpreting the General Agreement on Trade in Services and the WTO Instruments Relevant to the International Trade in Financial Services: The Lawyer's Perspective", *North Carolina Journal of International Law and Commercial Regulation*, vol.25, no.1, 1999, pp.1-75; Peter Morrison, "The Liberalisation of Trade in Financial Services and the General Agreement on Trade in Services", *Singapore Journal of International and Comparative Law*, vol.5, 2001, pp.593-617; Eric H Leroux., "Trade in Financial Services under the World Trade Organization", *Journal of World Trade*, vol.36, no.3, 2002, pp.413-42.

Rather, they are caused by the lack of adequate macroeconomic and regulatory policies.[33] Analysing the importance of trade in services for developing countries, James Hodge points out that foreign direct investment (FDI) as the preferred means of delivery of services would be beneficial for the developing countries as FDI will bring in physical and human capital and technology.[34]

Dobson and Jacquet have conducted a very thorough study of financial services under the WTO. They highlight the importance of financial reforms and point out its benefits. They admit that financial reform must be done out of a recognition of national self-interest. However, they argue in this context that financial reforms may never be undertaken in a systematic way if it is left to domestic discretion. They submit that the FSA plants the seeds of a multilateral framework for trade in financial services. Nevertheless, they conclude, the FSA is merely a small beginning in the right direction. It has not achieved much liberalisation by itself. They suggest that efforts should be made to move financial services liberalisation forward by folding financial services negotiations with a wider set of negotiations that address issues pertaining to competition policy and investment.[35] Scholars like Dilip K. Das also criticise the GATS for not going beyond the status quo. He points out the limitations of the GATS that hamper its objective of further liberalisation. Nevertheless, he concludes that a well-

---

[33] Masamichi Kono, and others, *Opening Markets in Financial Services and the Role of the GATS* (Geneva: World Trade Organization, 1997).

[34] See James Hodge, "Liberalization of Trade in Services in Developing Countries", in Bernard Hoekman, Aaditya Mattoo and Philip English eds., *Development, Trade and the WTO: A Handbook* (Washington, D.C.: The World Bank, 2002), pp.221-34.

[35] Wendy Dobson and Pierre Jacquet, *Financial Services Liberalization in the WTO* (Washington D.C.: Institute for International Economics, 1998).

conceived adherence to the GATS can help a developing economy build a more efficient, if not robust, financial system. He suggests that it is in the interest of the Asian economies to make larger commitments to the GATS and open their financial markets rapidly.[36]

Morrison analyses the functioning of the GATS with respect to financial services and its effect on government financial services regulation. He points out that both informational imbalance and the risk of abuse of monopoly power leads governments to regulate service sectors more closely than goods sectors. In financial services, governments are particularly concerned about prudential issues. They may consider *ex ante* approaches more effective than *ex post* ones, since undesirable practices are often difficult to detect and remedy after the fact. In financial services, the effects of undesirable practices are magnified because of the close link between the financial sector and other sectors of the economy. Morrison argues that the GATS takes these regulatory concerns into account. He argues that in spite of the FSA, much remains to be done and further liberalisation of financial services is necessary. He concludes that the WTO now has a basic set of commitments in the financial services sector and a mature dispute settlement system that should ensure that the obligations and commitments are implemented and enforced. He submits that the importance of this achievement goes beyond

---

[36] Dilip K. Das, "Trade in Financial Services and the Role of the GATS", *Journal of World Trade*, vol.32, no.6, 1998, pp.79-114.

the financial services sector since the efficient supply of financial services is a necessary condition for the growth of trade in goods and other services.[37]

In a rare legal study of the subject, Leroux analyses the multilateral rules and disciplines that regulate trade in financial services. He concludes that as Members' commitments on financial services are very limited, improvements on their commitments are dependent upon the co-operation among countries in harmonising their domestic regulations on financial services by following international standards on various financial services.[38] Jarreau closely examines the interrelationship of the GATS and other legal instruments of the WTO financial services trade regime. He identifies the ambiguities of this regime and suggests practical interpretations. He concludes that the GATS and the FSA will bring a measure of predictability and stability to the international trade in financial services only to a limited extent. However, he does not take a stand on the possible future developments of the regime.[39]

In a very interesting study, Trachtman analyses the regulatory mechanisms offered by the GATS in respect of financial services vis-à-vis other international regulatory mechanisms pertaining to specific financial sectors. He concludes that it is difficult to interpret the provisions of the GATS regime on financial services

---

[37] Peter Morrison, "The Liberalisation of Trade in Financial Services and the General Agreement on Trade in Services", *Singapore Journal of International and Comparative Law*, vol.5, 2001, pp.593-617.

[38] Eric H Leroux, "Trade in Financial Services under the World Trade Organization", *Journal of World Trade*, vol.36, no.3, 2002, pp.413-42.

[39] J. Steven Jarreau, "Interpreting the General Agreement on Trade in Services and the WTO Instruments Relevant to the International Trade in Financial Services: The Lawyer's Perspective", *North Carolina Journal of International Law and Commercial Regulation*, vol.25, no.1, 1999, pp.1-75.

pertaining to domestic regulations and suggests that the GATS could play a central role in harmonising the diverse regulatory mechanisms either by deferring to the other regulatory structures or by co-operating and coordinating with them.[40] Stichele examines the provisions of the GATS Annex on Financial Services pertaining to prudential regulations and points out that the lack of clarity in defining prudential regulations keeps many countries away from undertaking prudential measures. This study also points out that restraints imposed by the GATS on the freedom of States to restrict international financial transfers and payments dissuades many developing countries from adopting the WTO regime for financial services.[41]

There are very few studies of the financial services sector in India in the context of the WTO regime for financial services. Some scholars have studied the impact of the GATS for India in general.[42] Rupa Chanda has specifically studied the impact of the GATS on India's financial services sector.[43] Scholars like Mattoo and Subramanian suggest that India should engage more actively with the WTO regime for services because this can facilitate domestic reforms and reflect

---

[40] See Joel P. Trachtman, "Addressing Regulatory Divergence through International Standards: Financial Services", in Aaditya Mattoo and Pierre Suavé eds., *Domestic Regulation and Service Trade Liberalization* (Washington, D.C.: The World Bank, 2003), pp.27-42.

[41] See Myriam Vander Stichele, "Potential Risks of Liberalisation of Financial Services" (Stichting Onderzoek Multinationale Ondernemingen [SOMO], Amsterdam, 2003) at <http://www.somo.nl>.

[42] See Rupa Chanda, *Globalization of Services: India's Opportunities and Constraints* (New Delhi: Oxford University Press, 2002); Aaditya Mattoo and Arvind Subramanian, "India and the Multilateral Trading System Post-Doha: Defensive or Proactive?", in Aaditya Mattoo and Robert M. Stern eds., *India and the WTO* (New Delhi: Rawat Publications, 2004), pp.327-66.

[43] See Rupa Chanda, "Trade in Financial Services: India's Opportunities and Constraints" (Working Paper No. 152, Indian Council for Research in International Economic Relations, New Delhi, 2005).

a commitment to good policies. They argue that the GATS being a rule based system, is of immense benefit to countries like India for in a rule based multilateral system, the weaker party is protected from arbitrary action on the part of the strong.[44] Chanda assesses India's commitments on financial services and suggests that India should at least make more binding commitments that reflect the status quo and explore possibilities for obtaining market access in respect of some financial services activities like financial consultancy services.[45]

The review of literature shows that there is a dearth of sufficient literature that analyses the WTO regime for financial services from a legal perspective. Moreover, the existing literature does not analyse whether the regime sufficiently accommodates the interests of the developing countries in respect of financial services. Thus, there is considerable scope for further research into the legal aspects of the WTO regime for financial services.

1.5 OBJECTIVE AND SCOPE OF THE STUDY

This study seeks to analyse the WTO regime for financial services with the objective of assessing the implications of this regime for India. In this regard, this study explores whether the GATS and its Annex on Financial Services is flexible enough to accommodate the concerns of countries like India with regard

---

[44] Aaditya Mattoo and Arvind Subramanian, "India and the Multilateral Trading System Post-Doha: Defensive or Proactive?", in Aaditya Mattoo and Robert M. Stern eds., *India and the WTO* (New Delhi: Rawat Publications, 2004), pp.327-66.

[45] See Chanda, n.44.

to their financial stability. In examining this basic issue, this study analyses the GATS commitments of India on financial services in the context of the WTO disciplines on financial services. Given the dominance of the banking sector in the financial system of India, in analysing the financial reforms in India in terms of its GATS commitments, this study primarily focuses on the banking sector in India. However, India's GATS commitments in respect of the insurance and other financial sectors are also examined in brief for a better understanding of India's negotiating position on financial services.

Chapter II provides an understanding of the WTO regime for services in general. In this regard, it gives an account of the negotiating history of the GATS. This chapter brings out the salient features of this regime, the flexibilities that it offers and its limitations.

Chapter III specifically analyses the provisions of the Annex on Financial Services and the Understanding on Financial Services. In particular, this chapter analyses whether the regime gives its Members the required space for adopting appropriate regulatory measures for maintaining the stability of their financial systems.

Chapter IV gives an overview of the commitments on financial services that have been made by India under the GATS. This chapter provides an abstract of the regulation of financial services in India with particular reference to the banking sector. It analyses the provisions of the banking regulatory laws in India in respect of the entry of foreign banks in India, in the light of India's GATS commitments on financial services. It points out that in spite of the fact that India

has made substantial reforms in the financial sector and has been allowing a great degree of market access in different financial services, this reality is not reflected in India's commitments on financial services under the GATS. This chapter analyses the reasons for the same.

Chapter V points out how India is making use of the GATS to liberalise on a selective basis at bilateral and regional levels. In this context, it specifically examines the provisions of the CECA between India and Singapore with reference to trade and investment financial services.

On the basis of the analysis of chapters II, III, IV and V, chapter VI of this study attempts to draw conclusions.

CHAPTER II

SERVICES IN THE GATT/WTO

This chapter will give an overview of the multilateral regime for trade in services. In this regard, this chapter will involve an examination of the fundamental principles of the multilateral trade regime in respect of services within the framework of the General Agreement on Trade in Services (GATS). This chapter will also give an account of the multilateral negotiations for the application of principles for the regulation of international trade in respect of services and will provide an overview of the negotiating positions of developed and developing countries. In view of the aforementioned, it will be pertinent to begin with an account of the inclusion of services in the Uruguay Round of Multilateral Trade Negotiations (MTN).[1]

---

[1] The Uruguay Round of Multilateral Trade Negotiations was launched by the Members of the General Agreement on Tariffs and Trade (GATT) of 1947, at Punta del Este in Uruguay on 15 September, 1986. The Uruguay Round was launched with the objective of further reduction of barriers to international trade and commerce. This was the eighth round of such negotiations. The earlier rounds were Geneva (1947), Annecy (1949), Torquay (1951), Geneva (1956), the Dillon Round, (1960-61), the Kennedy Round (1964-67) and the Tokyo Round (1973-79). The Uruguay Round marked the most extensive effort to negotiate reduction or elimination of non-tariff barriers to global trade and to extend the rules of the multilateral trading system to emerging fields of international trade like services. Though the Uruguay Round was mandated to be concluded by 1990, owing to disagreements among the GATT Members, the negotiations were extended beyond 1990 and eventually culminated in 1993 with the conclusion of the Final Act of the Uruguay Round leading to the establishment of the World Trade Organization (WTO) and a set of legal agreements pertaining to specific aspects of global trade including trade in services in 1995. At the time the GATT was made, an International Trade Organization (ITO) was mooted for providing institutional mechanism to this multilateral regime. To this end, a United Nations Conference on Trade and Employment was convened in Havana, Cuba, on 21 November 1947. The Conference adopted a charter for the ITO in 1948, known as the Havana Charter. However, the ITO could not come into existence as the Havana Charter was not adopted by many states including the US. Thus, for many years the GATT existed as an agreement without a proper institutional mechanism for its administration until the WTO came into existence in 1995. See WTO, "The GATT Years: From Havana to Marrakesh", at <http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm>. Also see John H. Jackson,

2.1 THE URUGUAY ROUND NEGOTIATIONS

During the decade of the 1980s, the inclusion of services within the multilateral trading system became a contentious issue. During this period, services came to be recognised increasingly as a tradable commodity.[2] In this context, services were included in the agenda of the Uruguay Round of Multilateral Trade Negotiations. As pointed out by Dobson and Jacquet, the growing share of services – particularly financial services – in world trade during this period suggested that liberalisation of trade in goods achieved through the General Agreement on Tariffs and Trade (GATT) should be replicated in the case of services.[3]

World Trade and the Law of GATT: A Legal Analysis of the General Agreement of Tariffs and Trade (New York: Bobbs-Merrill Co., 1969); John H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge: Cambridge University Press, 2000); Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization: Law, Practice and Policy* (Oxford: Oxford University Press, 2003).

2 Owing to its intangible nature it is very difficult to provide any accurate statistical data on the growing importance of services during this period. However, most statistical surveys on this aspect point towards a steady growth in the share of services in world trade. Trade in services amounted to about $85 billion in the early 1970s and according to OECD statistics, they exceeded $350 billion in 1980. Its volume doubled from 1960-70 and again from 1970-75. In the US, in 1981 services constituted $40 billion in current account surplus and in 1982 it constituted 69 per cent of US GNP and 74 per cent of employment generation. The value of trade in services increased by almost three-fourths from 1986 to 1990 and they constituted nearly 70 per cent of the GDP of the industrialised countries and up to 50 per cent of the GDP in much of the developing world while they made up from 25 to 30 per cent of world trade. In 1994, out of a total world trade of $5.2 trillion, services constituted $1.1 trillion. See William J. Drake and Kalypso Nicolaïdis, "Ideas, Interests and Institutionalization: "trade in services" and the Uruguay Round", *International Organization*, vol.46, no.1, 1992, p.37. See also Steven Benz, "Trade Liberalization and the Global Service Economy", *Journal of World Trade Law*, vol.19, no.2, 1985, p.97; International Economic Accounts, *Sales of Services to Foreign and U.S. Markets through Cross-Border Trade and through Affiliates* at <http:www.bea.gov>. See further World Trade Organization, *International Trade 1995: Trends and Statistics* (Geneva: World Trade Organization, 1995) cited in Wendy Dobson and Pierre Jacquet, *Financial Liberalization in the WTO* (Washington, D.C.: Institute for International Economics, 1998), p.71.

3 Dobson and Jacquet, n.2 p.71.

2.1.1 *Towards the Uruguay Round*

Even before the Uruguay Round of MTN, during the 1970s trade in services became an important issue in the trade agenda of the United States of America (US). While the US enacted domestic legislation on trade in services through the Trade Act of 1974,[4] internationally, it carried the debate over services into the Tokyo Round of MTN and also within the Organisation for Economic Co-operation and Development (OECD).[5] In 1972, the OECD convened a high-level group to consider the long-term outlook for trade in the light of changing industrial structures and the coming Tokyo Round. Without considering the

---

[4] The Trade Act of 1974 gave the US President broad authority to enter into international agreements to reduce import barriers. Major purposes of the Act were to: (a) stimulate U.S. economic growth and to maintain and enlarge foreign markets for the products of U.S. agriculture, industry, mining and commerce; (b) strengthen economic relations with other countries through open and non-discriminatory trading practices; (c) protect American industry and workers against unfair or injurious import competition; and (d) provide "adjustment assistance" to industries, workers and communities injured or threatened by increased imports. The Act allowed the President to extend tariff preferences to certain imports from developing countries and set conditions under which Most-Favoured-Nation Treatment could be extended to non-market economy countries and provided negotiating authority for the Tokyo Round of multilateral trade negotiations. The Trade Act of 1974 included a number of key provisions on trade in services. The most important of these provisions is probably found in Section 102, which gave the US President the authority to negotiate on non-tariff barriers to trade. Paragraph g (3) of Section 102 states that "the term 'international trade' includes trade in both goods and services." By simply expanding the definition of international trade, the Congress thus directed the President to concern himself not only with barriers to trade in goods, but also with barriers to trade in services. A very significant provision of the Act is Section 301 which seeks to provide the United States with leverage to enforce U.S. rights under trade agreements, resolve trade disputes and open foreign markets to U.S. goods and services. It is also aimed at producing equitable conditions for U.S. investment abroad and improving foreign protection of intellectual property rights. Section 301 is the principal statutory authority under which the United States may impose trade sanctions on foreign countries that maintain an act, policy or practice that violates, or denies the U.S. rights or benefits under trade agreements; or which is unjustifiable, unreasonable or discriminatory and burdens or restricts U.S. commerce. See American Information Web, "Trade Act of 1974" at <http://www.usinfo.org/law/majorlaws/tact74.htm>; see also Jean Heilman Grier, "Section 301 of the 1974 Trade Act" at <http://www.osec.doc.gov/ogc/occic/301.html>. See also "The History of a Campaign: How Services Became a Trade Issue" at <http://www.commercialdiplomacy.org/articles_news/trade_inservices13.htm>.

[5] J. Steven Jarreau, "Interpreting the General Agreement on Trade in Services and the WTO Instruments Relevant to the International Trade in Financial Services: The Lawyer's Perspective", *North Carolina Journal of International Law and Commercial Regulation*, vol.25, no.1, 1999, p.11.

unique aspects of cross-border transactions in detail, the group tentatively suggested that services transactions could be considered as trade and the norms regulating international trade in goods might apply to such trade.[6] These developments in the OECD were warmly embraced by the US. The Congress authorised the United States Trade Representative (USTR) to raise the matter of services in the Tokyo Round, through the Trade Act of 1974.[7] At this stage services was pushed mainly by the US with some support from the United Kingdom (UK).[8] According to Dobson and Jacquet, the extension of the US trade policy into the realm of services can be attributed to three factors: first, the US services industries, particularly the financial services industries, were keen to explore markets abroad; secondly, it was widely believed in the US that the US' comparative advantage had shifted from goods to services; and third, trade policy experts believed that the inclusion of services would lend more vigour to the GATT.[9] Indeed, the developed countries could not accept open competition from the newly industrialised countries in textiles and clothing unless they were allowed to exercise in world markets their competitive advantage for services.[10]

---

6 See OECD, *Report by the High Level Group on Trade and Related Problems* (Paris: OECD, 1973), p.63 cited in Drake and Nicolaïdis, n.2 p.45.

7 ibid, pp.46-47.

8 ibid, pp.49-50. According to Trebilcock, it was largely due to US insistence that trade in services came into the Uruguay Round agenda. See Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (London: Routledge, 1999), p.278.

9 Dobson and Jacquet, n.2 pp.70-71.

10 John Croome, *Reshaping the World Trading System: A History of the Uruguay Round* (The Hague: Kluwer Law International, 1999), p.100.

2.1.1.i. *The Tokyo Round*

During the Tokyo Round of MTN from 1973 to 1979, the US tried to bring services on the agenda for negotiations. In 1975, a White House Interagency Task Force on Services and the MTN was established to identify the problems faced by US service industries in international commerce and to develop recommendations for addressing them. The task force proposed in its report that the US Special Trade Representative should be requested to explore the feasibility of introducing trade related service industry problems into the discussion of codes on subsidies and government procurement and of introducing service industries in the broader context of improving the GATT during the Tokyo Round. By following this strategy, the US was successful in inserting references to services in three non-tariff agreements in the Tokyo Round – the Government Procurement Code, the Standards Code and the Subsidies Code.[11]

However, the American efforts did not receive much support from other developed countries and developing countries led by Brazil and India stridently

---

[11] "The History of a Campaign", n.4. The Tokyo Round of MTN resulted in the adoption of nine agreements on the reduction of non-tariff barriers to trade in goods. These are: agreements on Subsidies and Countervailing Measures, Technical Barriers to Trade, Importing Licensing Procedures, Government Procurement, Customs Valuation, Anti-dumping, the Bovine Meat Arrangement and Trade in Civil Aircraft. Since these were not accepted by the full GATT Membership, they were informally called codes. Several codes were eventually amended and turned into multilateral commitments after the Uruguay Round. Only the codes on government procurement, bovine meat, civil aircrafts and dairy products remained plurilateral. The provisions of Code on Government Procurement, which established agreed bidding procedures for purchases made by government in order to assure foreign suppliers that they would not be disadvantaged, were extended to services like transportation and insurance insofar as these were required to sell internationally trade goods to governments. The Standards Code, which laid down rules and procedures for the adoption of government standards on internationally traded goods, included provisions on the recognition of test results provided by foreign testing laboratories. The Subsidies Code, which sought to limit the use of government subsidies with respect to internationally traded goods, laid down that services used to export goods could not be subsidised; ibid. See also WTO, "The GATT Years: From Havana to Marrakesh", n.1. See further Raymond J. Krommenacker, "Trade Related Services and GATT", *Journal of World Trade Law*, vol.13, no.6, 1979, pp.510-22.

opposed the US efforts. There were three reasons why the developing countries opposed the inclusion of services on the agenda of the MTN. First, from the perspective of developing countries, trade in services involved investment issues because foreign service suppliers make major investments in developing countries. Consequently, the developing countries argued that as investment issues are outside the ambit of the GATT, services should not be a part of the GATT. Secondly, developing countries were more interested in negotiations on safeguards, quantitative restrictions and agriculture than services. They argued that inclusion of services in the Tokyo Round agenda would obfuscate these issues of primary concern to the developing countries. Finally, the developing countries apprehended that services negotiations would focus on high technology services where the developed countries have a comparative advantage rather than on labour intensive services where developing countries have a competitive advantage over developed countries.[12]

Though the Tokyo Round of MTN did not bring services onto the negotiating agenda, it sowed the seeds for further deliberations on services in the future by laying down some disciplines for services in relation to trade in goods under the Tokyo Round codes. Indeed, the soil was becoming fertile for deliberations on the new issues that would dominate the discourse in the future – services, intellectual property rights and investments.[13]

---

[12] See Jonathan Aronson, "Negotiating to Launch Negotiations: Getting Trade in services onto the GATT Agenda", in *Pew Case Studies in International Affairs* (Institute for the Study of Diplomacy, School of Foreign Service, Georgetown University, 1992), pp.5,7,15 cited in Jarreau, n.5 p.12.

[13] All GATT negotiations up to the Uruguay Round were concerned only with trade in goods. During the GATT's first fifteen years, up to the Kennedy Round, the GATT Contracting

2.1.1.ii. *Events between the Tokyo and Uruguay Rounds*

The global economy went into a recessionary phase during the early 1980s. This shifted the focus away from the discourse on trade in services which was hitherto lobbied by the US during the Tokyo Round of MTN. Increasingly, the GATT was being honoured more in its violation.[14] As mentioned earlier, the US sought to rejuvenate the GATT by including services within the multilateral trading system. Before the 1982 GATT Ministerial Meeting, the then USTR William E. Brock pointed out the importance of services to international commerce and he advocated the need for an international mechanism for resolving differences between nations concerning treatment accorded to foreign services and service suppliers.[15]

According to Jarreau, the essence of Ambassador Brock's proposals was a three-point programme. First, all nations should have a common political commitment to improve international co-operation in services. Secondly, nations should not legislate new barriers to trade in services. Third, future negotiations

---

Parties were predominantly concerned with reduction or elimination of tariff barriers to trade in goods. The Tokyo Round saw the drive to reduce non-tariff barriers to trade in goods. After the end of the Tokyo Round, the developed countries pushed for the inclusion of the new issues of services, intellectual property rights and investments on the negotiating agenda. Like in services, they saw their strength in the development of technology as a central competitive advantage in the near future. Though the developed countries also pushed for the inclusion of trade related investment measures on the agenda, there was not as much support from their constituencies on this aspect as in the case of services and intellectual property; see Croome, n.10 pp.99-102.

[14] Jarreau, n.5 pp.14-15.

[15] See William E. Brock, "A Simple Plan for Negotiating Trade in Services", *The World Economy*, vol.5, November, 1982, p.229 cited in Jarreau, n.5 p.15.

should be launched for a comprehensive framework of principles and rules for trade in services.[16]

Persistent efforts of the US and its ally Britain gradually led to a general acceptance of services as a tradable concept. The USTR tried to lay down the intellectual groundwork before proceeding to seek negotiations on services. However, other Contracting Parties of the GATT did not have the wherewithal to take preliminary positions. Even many developed countries were still in the process of ascertaining the relevance of services trade for their economies.[17] The developing countries, however, refused to even discuss services. Till then the largely Anglo-American discourse on trade in services was indifferent to development problems. According to Drake and Nicolaïdis,

> Since there were no clear theories or evidence that open markets would promote development, the LDCs (less developed countries) assumed that their services industries would not be competitive globally or locally and assumed that if the United States wanted liberalization, it was simply because huge American firms were prepared to swoop down on the vulnerable LDC markets.[18]

The developing countries were also apprehensive that any deliberation on services would divert attention from the developed countries' protectionism in agriculture and manufacturing.[19] Led by Brazil and India, the developing countries vehemently opposed services negotiations.

---

16 ibid, p.16.

17 The European Commission (EC) was still in the process of establishing an interservices group to assess the issue. See Drake and Nicolaïdis, n.2 p.52.

18 ibid.

19 ibid, p.53. With a competitive advantage in agriculture and textiles, the developing countries were more interested in reducing barriers to market access in these areas.

In spite of the opposition of developing countries led by Brazil and India to the inclusion of services on the agenda for negotiations, the 1982 GATT Ministerial Declaration recommended the GATT Contracting Parties with an interest in services to examine the national issues and invited them to exchange information among themselves through the medium of various international organisations including the GATT.[20] In 1983, an informal group was formed under the chairmanship of Felipe Jaramillo, the ambassador of Colombia to the GATT.[21] The Jaramillo Group held a series of informal discussions which kept alive the discourse on services.

Following the resolution of the 1982 GATT Ministerial Meeting, in the 1984 GATT Ministerial Meeting the GATT Contracting Parties agreed to proceed with the exchange of information on services using the offices of the GATT Secretariat. However, the developing countries opposed the holding of service-related meeting on GATT premises and objected to the involvement of any member of the GATT Secretariat in the process. Therefore, the exchange of information took place through the informal channel of the Jaramillo Group. The exchange of information resulted in a number of national studies including those from the United States, Canada, Denmark, the European Economic Community (EEC), Finland, the Federal Republic of Germany, Italy, Japan, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom (UK). These studies found that services are very heterogeneous in nature and consequently it is very

---

20 Jarreau, n.5 p.16.

21 Drake and Nicolaïdis, n.2 p.55. This group was comprised of academics, representatives from the industries as well as government representatives.

difficult to define them."[22] The US national study stressed the growing importance of services in the global economy and the link between trade in services and trade in goods. Arguing for a multilateral regime for services trade, the US study concluded that GATT was strongly positioned to manage such a framework.[23] The UK national study also stressed the need for examining the need for application to trade in services of the existing international provisions concerning trade in goods.[24]

The exchange of these national studies gave the Jaramillo Group some basis for proceeding with the negotiations. Japan, Britain, Canada, France and Switzerland supported the US cause.[25] Nevertheless, the developing countries still opposed talks on services. They were not certain that services liberalisation would be to their advantage. They were apprehensive that this could lead to a new international division of labour where developing countries would be granted some advantages in certain manufactures but they will be permanently excluded from passing on to a post-industrial or service oriented economy. Moreover, these countries feared a tactical linkage by which they would be forced to make

---

22 For a summary of some of these national studies see United Nations Conference on Trade and Development, *Services and the Development Process* (UNCTAD Secretariat, TD/B/1008, August 1984) cited in A.F. Ewing, "Why Freer Trade in Services is in the Interest of Developing Countries", *Journal of World Trade Law*, vol.19,no.2,1985, pp.147-98.

23 ibid, p.164.

24 ibid, p.166.

25 Drake and Nicolaïdis, n.2 p.57.

concessions in services for securing access to or prevent retaliation in developed markets for goods like textiles.[26]

The developing countries thus raised the issue of services before the United Nations Conference on Trade and Development (UNCTAD). In 1983, UNCTAD asked its Secretariat to undertake studies on the role of services in the development process. All of these studies stressed the problems face by the developing countries.[27] These studies challenged the concept of tradability of services. They maintained that even though some services could be viewed as trade, mostly services trade is linked to issues of foreign direct investment (FDI). According to Gibbs and Mashayekhi, the political pressure to liberalise services in the GATT context came from the transnational corporations (TNC).[28] Clairmonte and Cavanagh raised a concern that a liberal services regime might benefit the large TNCs that dominated the global markets rather than facilitating development.[29] In response to this challenge thrown up by the scholarship from the UNCTAD to the concept of tradability of services, a massive volume of literature was generated from the developed countries citing the importance of

---

26 ibid.

27 See, for example, UNCTAD, *Services and the Development Process*, TD/B/1008 (UNCTAD Secretariat, August 1984); *International Trade in Goods and Services: Protectionism and Structural Adjustment*, TD/B/1008 (Geneva, UNCTAD, 1985); and Frederick F. Clairmonte and John H. Cavanagh, "Transnational Corporations and Services: The Final Frontier", *Trade and Development*, no.5, 1984, pp.215-75, cited in Drake and Nicolaïdis, n.2 p.58.

28 Murray Gibbs and Mina Mashayekhi, "Services: Cooperation for Development", *Journal of World Trade*, vol.22, no.2, 1988, p.85.

29 See Clairmonte and Cavanagh cited in Drake and Nicolaïdis, n.2 p.58.

trade in services for developing countries.[30] However, apart from the forum of the UNCTAD, very little scholarship on this issue was generated from the developing countries. Developing countries were yet to undertake any internal assessment of their strengths and weaknesses in the services sector. Hence, they were not in a position to take any stand on services negotiations other than that of complete opposition to the same. According to Drake and Nicolaïdis, the consequence of this was that

> ... this critical phase of the prenegotiations failed to produce a widespread, intellectually informed oppositional discourse of the sort evident in the debate about the new international economic order[31] and the debate about the new international information order .... In 1984, many LDCs remained opposed to services negotiations, but they did so on a shaky intellectual ground. During the next few years, that ground would progressively give away.[32]

Prior to the commencement of the Uruguay Round of MTN, the number of developing countries that were opposed to negotiations on services was reduced to a 'Group of Ten' (G-10) comprising Brazil, India, Argentina, Cuba, Egypt,

---

30 See, for example, Benz, n.2 pp.95-120. See also I. D. Canton, "Learning to Love the Service Economy", *Harvard Business Review*, vol.62, 1984, pp.89-97; H. Peter Gray, "A Negotiating Strategy for Trade in Services", *Journal of World Trade Law*, vol.17, no.5, 1983, pp.377-88; Brian Hindley and Alasdair Smith, "Comparative Advantage and Trade in Services", *The World Economy*, vol.7, 1984, pp.369-90; Harald B. Malmgren, "Negotiating International Rules for Trade in Services", *The World Economy*, vol.8, 1985, pp.11-26; Jeffrey J. Schott, "Protectionist Threat to Trade and Investment in Services", *The World Economy*, vol.8, 1985, pp.195-214; and S. Schultz, "Trade in Services: Its Treatment in the International Forums and the Problems Ahead", *Intereconomics*, November-December, 1984, pp.267-73 cited in Drake and Nicolaïdis, n.2 p.59.

31 On 1 May 1974, the United Nations General Assembly had adopted a Declaration on the Establishment of a New International Economic Order (NIEO). This Declaration sought to recogise the economic disparities that exist between the developed and the developing countries owing to years of colonial rule and remove the disparities between the developed and developing countries while taking measures for the accelerated development of the developing countries. See the *Declaration on the Establishment of a New International Economic Order*, UNGA Res.3201 (S-IV), 1 May 1974. For a detailed discussion on the NIEO see Mohammed, *Towards a New International Economic Order* (New York: Holmes and Meier Publications, 1979).

32 Drake and Nicolaïdis, n.2 p.64.

Nicaragua, Nigeria, Peru, Tanzania and Yugoslavia.[33] This was largely because the southern opposition to services negotiations was based on uncertainty rather than any informed-cost benefit calculation. In the words of Felipe Jaramillo, "Whether developing countries would agree to discuss services depended on the degree to which each had studied the problem internally. Most countries had not. In this case it [was] much easier to say 'no' and follow Brazil and India."[34] Many LDCs suspected that Brazil and India were pursuing their own regional spheres of influence in services under the cover of third world solidarity. The US and its allies publicly differentiated between the moderate and hardline developing countries.[35]

The moderates formed a Group of Twenty (G-20) countries under the leadership of Colombia and Jamaica while the G-10 under the leadership of Brazil and India continued its strong opposition to any discussion on services. The G-20 along with a Group of Nine (G-9) countries - largely from the European Free Trade Association (EFTA) - under the leadership of Switzerland, began informal discussions under the label "friends of the new negotiations". The US, the European Commission (EC) and Japan actively participated in the process.[36]

By July 1986, the group drafted a proposal called the *café au lait* proposal, which, *inter alia*, called for multilateral liberalisation for services with due regard for development concerns. Rather than completely adopting the *café au lait*

---

33 Jarreau, n.5 p.19.

34 Drake and Nicolaïdis, n.2 p.66.

35 ibid.

36 ibid, pp.66-67.

proposal, the EC wanted to accommodate national regulations within the overall GATT philosophy, unlike the US which argued for direct application of trade principles. The stand taken by EC was supported by Brazil and India. This gave them an opportunity to mellow down their hardline position from that of complete opposition to services negotiations to that of opposition to the inclusion of services within the GATT framework.[37]

2.1.2 *The Uruguay round*

In 1985, the GATT Contracting Parties established a preparatory committee to lay the foundations for negotiations. In April 1986, the committee agreed that the GATT ministerial session for launching the new round of trade negotiations was to be held at Punta del Este in Uruguay.[38] The Punta del Este Declaration stated that the aim of the negotiations should be to establish a multilateral framework of principles and rules for trade in services with elaboration of possible disciplines on specific service sectors.[39] In order to pursue the negotiations for the inclusion of services within the multilateral trade regime a Group for Negotiations on Services (GNS) was constituted under the chairmanship of Felipe Jaramillo.

The GNS set before itself five initial tasks viz., analysis of the problems of definition and statistics on services and trade in services, examination of the broad

---

37 ibid, p.68.

38 According to Drake and Nicolaïdis, this was a symbolic gesture to assure the developing countries which were still opposed to services negotiations that their special needs would be taken into consideration; ibid, p.65.

39 Croome, n.10 p.103.

concepts on the basis of which principles and rules for trade in services might be developed, studying the extent of the coverage of the services framework, surveying the existing disciplines and arrangements affecting trade in services, and analysing the various factors that facilitated or hindered the growth of trade in services.[40] The definitional problem proved to be a major stumbling block. The GNS quickly realized that there are some fundamental differences between trade in goods and trade in services. Abu-Akeel has pointed out the following differences between trade in goods and services: first, services are intangible in nature; secondly, they can be delivered only through numerous modes unlike goods which can be delivered only through the cross-border mode; third, international trade in services requires the movement of the factors of production either through the commercial presence of the supplier of the service or through the movement of personnel to the location of the consumer; and finally, services are more extensively regulated domestically than goods.[41] Indeed, trade in services hardly involves any tangible crossing of national borders. Therefore, only behind the border regulations i.e., domestic regulations of services are possible. Moreover, as observed by Dobson and Jacquet, "Services are a heterogeneous group of products, but with one common thread: many services are subject to widespread government intervention through regulation and other measures."[42] In

---

40 ibid, p.103.

41 Aly K. Abu-Akeel, "Definition of Trade in Services under the GATS: Legal Implications", *The George Washington Journal of International Law and Economics*, vol.32, no.2, 1999, p.190.

42 Dobson and Jacquet, n.2 p.71.

particular, financial services are very strictly supervised and regulated by governments.

In view of these differences between trade in goods and trade in services, many participants in the Uruguay Round of MTN felt that the principles of the GATT could not be easily extended to trade in services. Thus, negotiations on services continued during the Uruguay Round on a separate track from negotiations on other areas. According to Dobson and Jacquet, this served the following purposes: first, it comforted the developing countries that they may be required to make less demanding market access commitments in services than in goods; and secondly, it assuaged the concerns of the industrialised countries in respect of financial services by not rendering the negotiations on services to trade negotiators, thereby enabling them to substantially retain their own jurisdiction in respect of financial services.[43]

Many countries argued that more information must be gathered before any deliberation on the definitional and statistical aspects could begin. The GNS made more progress on the discussion on the concepts on which principles and rules for trade in services might be based. In particular, the GNS deliberated upon the application of the principles of transparency and non-discrimination. With regard to the extent of sectoral coverage of a services agreement, many countries were skeptical about including some services within a general regime for trade in services, primarily because they wanted to retain regulatory control over such

---

[43] ibid, p.72. The industrial countries wanted to retain their freedom to make their own macroeconomic policies on all areas including financial services, which is central to any macroeconomic policy issue.

services.[44] It was becoming clear that special agreements have to be negotiated for either including or excluding a sector from the ambit of the framework agreement.[45]

By the time of the mid-term review of the Uruguay Round in Montreal in 1988, the GNS was still grappling with the modalities of an agreement for services. While the developed countries like the US pushed for rapid progress in the negotiations, the developing countries were reluctant to proceed further without fully comprehending the issues at stake.[46] At the mid–term review in Montreal, a list of principles for the emerging regime was tentatively drawn out. These were the principles of transparency, progressive liberalisation, national treatment, non-discrimination, market access, increasing the participation of developing countries, safeguards and exceptions, and the regulatory situation.[47] The GNS now concentrated upon deliberating on the implications of these concepts. These deliberations clearly established that in many cases liberalisation would be meaningless unless foreign service suppliers are given the right to establish branch offices or station key personnel in the host countries.[48]

---

44 This concern was raised particularly with regard to financial services. On the other hand, in many countries services like telecommunications services was regarded as a welfare or utility service to be provided by the State.

45 Croome, n.10 pp.104-6.

46 The US pushed for rapid progress in the negotiations because domestic support for a multilateral agreement on services was dwindling very fast since the competitive advantage of the US in many services like banking and financial services was on the decline. See Drake and Nicolaïdis, n.2 p.76.

47 Croome, n.10 p.208.

48 ibid.

The developed countries were particularly eager to secure a right to establishment in the host country for providing services. From the perspective of the developing countries, granting of such a right would have benefited the TNCs of the developed countries that dominated the service industry. Acknowledging such a right would have been to the detriment of the efforts by the developing countries to regulate the TNCs. It was also well recognised that cross-border trade in services involved the movement of factors like capital or labour. For the developing countries, movement of capital involved bringing issues pertaining to FDI within the framework of a services trade agreement.[49] However, the developing countries also saw an opportunity for themselves with regard to the movement of labour. Indeed, these countries have a comparative advantage in providing cheap, labour intensive services. Thus, they were very keen to obtain concessions on the movement of natural persons. India, in particular, was very keen on obtaining significant commitments on the movement of natural persons and even went to the extent of claiming a right to residence abroad. For the developed countries, this involved the touchy issue of migration.[50]

The developing countries linked the issue of concessions on the right to establishment and the movement of capital to the granting of reciprocal concessions from the developed countries on the movement of natural persons. In order to find an acceptable solution to these issues, it was proposed that both the movement of labour and capital be permitted only for a limited duration and for a

---

[49] See Clairmonte and Cavanagh, cited in Drake and Nicolaïdis, n.2 p.58.

[50] See Gibbs and Mashayekhi, n.28 p.91. The US regarded the issue of mobility of labour as primarily an immigration problem rather than a traded service.

specific purpose. The developing countries also realised that the preference for high value-added services owing to the improvements in information and communications technology would gradually erode their comparative advantage in cheap labour intensive services. Thus, they were also interested in ensuring that the new regime for trade in services contains adequate provisions for the transfer of knowledge and technology to the developing countries while the liberalising commitments are phased in.[51]

In October 1989, the first proposal for a framework agreement on trade in services was prepared by the US. The US proposal emphasised on the principles of transparency, market access and non-discrimination. The deliberations within the GNS now shifted to determining whether to treat these principles as general obligations like they are in the GATT or whether to treat them as commitments to be applied specifically to particular service sectors. The GNS decided that market access and national treatment would be negotiable specific commitments rather than general obligations in view of the diverse regulatory objectives and specific characteristics of certain services. Only the principles of transparency and MFN treatment were to be treated as general obligations.[52] According to Drake and Nicolaïdis, the structural placement of the principles of national treatment and market access as negotiable commitments meant that foreign markets could largely remain closed to American TNCs. At the same time, since unconditional MFN was to be treated as a general obligation, the US, which had made many

---

51 Drake and Nicolaïdis, n.2 pp.72-73.

52 ibid, pp.84-85.

liberalising commitments on many services sectors, was exposed to competition with foreign services providers.[53]

According to Jarreau, a consensus was growing among the GATT Contracting Parties that services were important to the entire international community. The developing countries' opposition towards trade in services gradually diminished. Developing countries were encouraged to eventually liberalise their services regimes by gradually incorporating necessary changes in their domestic regulations to make their domestic services industries more efficient and competitive. Developing countries also sought to trade off significant concessions in services in exchange for concessions from developed countries on trade in goods.[54]

However, as the opposition of developing countries diminished, differences came up among the developed countries. Europe had emerged as a competitor to the US in respect of many services including financial services. The United States, which was the most fervent advocate of an agreement on trade in services, began to show unwillingness to negotiate on many service sectors including financial services, telecommunications, marine and air transport services and on cross-border movement of natural persons. On the other hand, the EC was opposed to any agreement that did not include financial services.[55] At the

---

53 ibid, p.86.

54 Jarreau, n.5 p.22.

55 ibid, p.23. According to the EC, all perceived barriers to trade in services could not be liberalised since regulations are the expression of national policy objectives and a distinction is has to be made between appropriate and inappropriate regulations. See speech by W. de Clerq, member of the EC to the General Assembly of the EC Mortgage Federation entitled *The European*

same time, the EU reiterated that the unique characteristics of the different services sectors should be taken into account in any regime for trade in services.

The framework agreement was denounced in the US. In 1990, the then USTR Carla Hills hinted that MFN treatment might have to be made a negotiable specific commitment. In order to mollify US sentiments, market access commitments were made in some services sectors. Though this was below US expectations, the USTR treated this as an evidence of its successful policy and stated that unconditional MFN was acceptable so long as it could be derogated in a few sectors.[56] Since a lot of disagreement existed amongst the GATT Contracting Parties, an agreement was reached to preserve the status quo. This agreement is called the General Agreement on Trade in Services.

2.2 THE GATS

The GATS is a framework agreement for liberalising trade in services. It establishes the first set of binding multilateral rules on trade in services. According to its preamble, the GATS seeks

> ... to establish a multilateral framework of principles and rules for trade in services with a view to expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting

---

Commission and the GATT Negotiations on Trade in Services, 20 June 1986, cited in Gibbs and Mashayekhi, n.28 p.89.

[56] Drake and Nicolaïdis, n.2 pp.87-8.

the economic growth of all trading partners and the development of developing countries; ....[57]

2.2.1 *The Scope of the GATS*

The GATS applies to all *measures* by Members affecting trade in services.[58] The WTO Dispute Settlement Body (DSB) in the *EC-Bananas III* case has interpreted the scope of the GATS. The Panel in *EC-Bananas III* interpreted the scope of the GATS in very broad terms and held that

> [N]o measures are excluded *a priori* from the scope of the GATS as defined by its provisions. The scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether it regulates other matters but nevertheless affects trade in services.[59]

The Appellate Body of the DSB endorsed this view of the Panel and held that the use of the term 'affecting' reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word 'affecting' implies a measure that has 'an effect on', which indicates a broad scope of application.[60]

Article I (3) (a) of the GATS defines 'measures by Members' as measures taken by central, regional or local governments and authorities or by non-governmental bodies in exercise of the powers of such governments and authorities. The GATS defines a 'measure' as any measure whether in the form of

---

57 *General Agreement on Trade in Services (GATS)*, Preamble.

58 ibid, Article I, paragraph 1. Emphasis supplied.

59 See *Panel on EC-Bananas III*, paragraph 7.285 as cited in World Trade Organization (WTO), *The WTO Analytical Index: Guide to WTO Law and Practice* (Geneva: World Trade Organization, 2003), vol.2, edn.1, p.1089. For an interesting on the *EC-Bananas* case and its implications, see Joel P. Trachtman, "Bananas, Direct effect and Compliance", *European Journal of International Law*, vol.10, no.4, 1999, pp.655-78.

60 ibid, pp.1089-90.

a law, regulation, rule, procedure, decision, administrative action, or any other form.[61] This has deep implications for regional and local governments. Many services are regarded as part and parcel of the welfare functions of a State. Particularly in a federal polity, the regional and local governments have wide ranging powers to regulate the provision of many services. To a certain extent, the GATS disciplines can limit the freedom of federal units to regulate the supply of certain services. However, the GATS does not provide any guideline to determine when a particular regulatory measure becomes trade related. A functional approach towards interpreting this issue may not be feasible, since in most services regulatory measures would affect trade in services to some extent.

2.2.2 *Definition of Services and Trade in Services*

The GATS defines services in an inclusive manner. In terms of paragraph 3 (b) of Article I of the GATS, "'Services' includes any service in any sector except services supplied in the exercise of governmental authority; ...." According to paragraph 3 (c), a service supplied in the exercise of governmental authority means any service which is supplied neither on a commercial basis, nor in competition with other service suppliers.[62] This means that a service supplied by a governmental authority can be excluded from the ambit of the GATS if it is a sovereign service. However, governmental authorities also supply some essential services which are not of a sovereign nature, for instance, health services. If such

---

61 *GATS*, n.57 Article XXVIII (a).

62 *GATS*, n.57 Article I, paragraph 3 (c).

services are provided in competition with other suppliers of similar services, even if not on a competitive basis, they come within the ambit of the GATS.

The definition of services under the GATS is open-ended. It includes the services that comprised the Services Sectoral Classification List (SSCL) prepared by the GATT Secretariat during the Uruguay Round of MTN.[63]

The GATS' definition of services, however, is reduced to an empty shell if services cannot be traded. This is because the GATS does not deal with the regulatory aspects of services except insofar as they are related to trade in services. Thus, the GATS defines not only services but also trade in services. The definition of trade in services is fundamental to the GATS' scheme of things because unlike in the case of international trade in goods, international trade in services hardly involves any actual cross-border movement of the service per se, but may involve a cross-border movement of the factors of supply of a service. Therefore, the GATS defines trade in services in terms of the mode by which it may be delivered. These modes are: cross-border movement of the service (mode 1), the consumption of the service abroad (mode 2), through the commercial presence of a service supplier in the territory of a Member (mode 3), and through the presence of natural persons of a Member, who deliver the service on behalf of the service supplier in the territory of another Member (mode 4).[64]

---

63 The SSCL identified twelve service sectors which are divided into sub-sectors and further sub-sectors. The twelve sectors identified are: business services, communication services, construction and related services, distribution services, educational services, environmental services, financial services, health related and social services, tourism and travel related services, recreational, cultural and sporting services, transport services and other services; Jarreau, n.5 pp.6-7.

64 *GATS,* n.57 Article I, paragraph 2 (a), (b), (c), (d).

This definition has been criticised in some quarters. According to Abu-Akeel, by adopting this definition, "... the GATS has failed to provide a definition of what 'services' should mean for the purposes of the agreement and has shed no light on the requirements that a transaction under which services are traded must meet in order to be governed by the GATS."[65] In particular, he points out that this leads to problems in applying the GATS' rules of origin to determine the nationality of a service activity.[66] This is because the GATS does not define trade in services in terms of the national origin of a particular service. Rather, it defines trade in services in terms of its supply from the territory of one Member into the territory of another Member.[67] Thus, it seems that under the GATS a service will be deemed to have originated in a State from whose territory the service is supplied rather than the State where that service actually originated. However, such a conclusion appears to be improbable. As Abu-Akeel observes:

> It is inconceivable that the GATS intended to consider the nationality of services as that of the country of the service supplier. This characterization would deny members the right (enjoyed by them in respect of trade in goods under the GATT) to trace and identify the true economic supplier of the services through appropriate rules of origin.[68]

Citing an article by Edwin A. Vermulst,[69] Abu-Akeel points out that the purpose of the rules of origin, as it evolved in the case of goods, is to identify the producer

---

65 Abu-Akeel, n.40 p.191.

66 ibid, p.201.

67 ibid, p.203.

68 ibid, pp.203-4.

69 Edwin A. Vermulst, "Rules of Origin as Commercial Policy Instruments – Revisited", *Journal of World Trade*, vol.26, no.6, 1992, pp.61-102.

of the goods prior to or at the time the goods cross the border.[70] However, he goes on to state, "A rule of origin for services that connects origin to the nationality of the service supplier ... is not conceptually compatible with the rationale mandating a rule of origin, unless the supplier is the *actual* supplier of the services."[71] However, where a service is produced from inputs from different suppliers from different nations, Abu-Akeel argues that the rule of origin has to look beyond the nationality of the legal supplier to the sources of the different inputs.[72] Thus, it is submitted that the doctrine of substantial transformation should be applied in determining the rules of origin for services.[73]

Among the four modes of supply of a service, the mode of commercial presence is of critical importance for developing countries since this involves the issue of entry of TNCs, as well as the issue of FDI in services. Article XXVIII (d) of the GATS defines commercial presence as

> ... any type of business or professional establishment, including through
> (i) the constitution, acquisition or maintenance of a juridical person, or
> (ii) the creation or maintenance of a branch or a representative office,

---

70 Abu-Akeel, n.40 p.205.

71 ibid, p.206. Emphasis in the original.

72 ibid.

73 According to the substantial transformation doctrine the origin of a tradable commodity should be attributed to the country where it underwent the last substantial transformation. This has been recognised and adopted by the WTO Agreement on Rules of Origin. Article 3 (b) of the Agreement states that

> ... the country to be determined as the origin of a particular good is either the country where the good has been wholly obtained or, when more than one country is concerned in the production of the good, the country where the last substantial transformation has been carried out.

The Agreement on Rules of Origin specifically applies to trade in goods. The WTO has not devised any guideline for determining rules of origin for services and service suppliers. See *Agreement on Rules of Origin*, Article 3 (b). See also Aly K. Abu-Akeel, "The MFN as it Applies to Service Trade: New Problems for an Old Concept", *Journal of World Trade*, vol.33, no.4, 1999, p.116.

within the territory of a Member for the purpose of supplying a service.

As per this definition of commercial presence, commercial presence can be secured through the establishment of a business or profession in the host country either by a juridical person or by branch or representative offices. By definition, commercial presence does not necessarily exclude the presence of natural persons through the establishment of a business or professional establishment. Indeed, branch or representative offices could also be formed by a partnership of natural persons. The GATS does not define a branch or a representative office.

However, the GATS has specifically recognised a separate mode for supply of services through the presence of natural persons. In the context of the GATS' recognition of supply of services through commercial presence, it would seem that commercial presence under Article I, paragraph 2 (c) of the GATS means the commercial presence of juridical persons, because the presence of natural persons is treated as a separate mode. It should be noted, that the presence of natural persons is, by definition, not qualified as *commercial*. However, any kind of presence for the purpose of trade has to be commercial. Thus, the GATS' definition of commercial presence would suggest that even the presence of a natural person under Article I (2) (d) of the GATS would be covered under Article I (2) (c) if the natural person has a business or professional establishment in a host country. The GATS recognised the presence of natural persons as a separate mode for supplying a service in order to satisfy the developing countries, by giving them an opportunity to obtain market access in developed countries for supplying

labour services. This would enable them to supply labour as a service without incurring additional costs for establishing a commercial presence.

2.3 THE FUNDAMENTAL PRINCIPLES OF THE GATS

Like the GATT which applies to trade in goods, the GATS tries to achieve the removal of barriers to international trade in services by applying the principles of Most Favoured Nation (MFN) treatment, transparency, market access and national treatment. However, as already mentioned, the GATS treats these principles differently from the GATT by classifying them into general obligations and specific commitments. While the general obligations are applicable to all services transactions of Members, the principles that are regarded as specific commitments are made applicable only to those services to which they are specifically applied by a Member by way of a GATS commitment.

2.3.1 *MFN Treatment under the GATS*

The MFN rule requires a nation to give equal treatment to economic transactions originating in, or destined for, other countries that are beneficiaries of this rule.[74] Thus, where a country takes a particular measure affecting trade relations with another country, the benefit of the same measure has to be extended to other countries as well. According to Jackson, there are both economic as well as political reasons behind the MFN rule. The economic logic is that this rule

---

[74] John H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge: Cambridge University Press, 2000), p.97.

helps in applying government trade restrictions uniformly without regard for the origin of the goods which in turn leads to greater liberalisation through the interplay of market forces. The MFN rule also prevents bilateral deals between states and prevents a fragmentation of the multilateral trading system.[75]

Article II of the GATS lays down the principle of MFN treatment. Paragraph 1 of this article states,

> With respect to any service covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.[76]

A comparative analysis of the MFN rule under Article II of the GATS with the MFN rule under Article I, paragraph 1 of the GATT brings out some distinct features of the rule under the GATS. The GATT states the MFN rule as follows:

> With respect to customs duties and charges of any kind imposed or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any other contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.[77]

The MFN rule has been stated in greater detail in the GATT than it has been stated in the GATS. While the rule is made specifically applicable to

---

75 ibid, pp.60-61.

76 *GATS*, n.57 Article II (1).

77 *The General Agreement on Tariffs and Trade (GATT)*, Article I, paragraph 1.

helps in applying government trade restrictions uniformly without regard for the origin of the goods which in turn leads to greater liberalisation through the interplay of market forces. The MFN rule also prevents bilateral deals between states and prevents a fragmentation of the multilateral trading system.[75]

Article II of the GATS lays down the principle of MFN treatment. Paragraph 1 of this article states,

> With respect to any service covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.[76]

A comparative analysis of the MFN rule under Article II of the GATS with the MFN rule under Article I, paragraph 1 of the GATT brings out some distinct features of the rule under the GATS. The GATT states the MFN rule as follows:

> With respect to customs duties and charges of any kind imposed or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any other contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.[77]

The MFN rule has been stated in greater detail in the GATT than it has been stated in the GATS. While the rule is made specifically applicable to

---

75 ibid, pp.60-61.

76 *GATS*, n.57 Article II (1).

77 *The General Agreement on Tariffs and Trade (GATT)*, Article I, paragraph 1.

products in the GATT, in the GATS it is applied specifically to services as well as services suppliers. This is because the GATS does not define services in concrete terms. Since the GATS defines trade in services in terms of the modes of supply of a service, the MFN rule had to be applied to the suppliers of services. Where a service supplier of one Member supplies a service originating in the territory of another Member, this could lead to problems in applying the MFN rule due to problems of identifying the origin of an intangible transaction like a service transaction. However, it should be noted that the MFN rule in GATS does not make any reference to the *origin* of a service or service supplier.

The MFN rule applies to ensure that a Member does not discriminate between *like services* of other Members. As mentioned earlier, during the negotiations on a services agreement the GNS had failed to define services in a generic sense because of the dearth of adequate information to determine the unique characteristics of different services. Therefore, it is very difficult to determine the likeness or similarity of a service. The GATS does not provide any guideline for determining the likeness of a service. In the *Canada-Autos* case, the Panel of the WTO DSB interpreted this phrase and held that to the extent that services suppliers concerned supply the same service, they should be considered like services.[78] However, the intangible nature of services and the lack of adequate data on services makes it very difficult to follow this test and determine

[78] WTO, n.56 p.1098. In the *Canada-Autos* case, the European Community (DS/142) and Japan (DS/139) had complained against a Canadian measure of duty exemption to certain motor vehicles. Among other things, it was claimed that the measure violated Articles II and XVII of the GATS as it affected distribution services.

the extent of similarity of different services. Hence, it opens up the MFN rule under the GATS to diverse interpretations in the light of diverse national interests.

In terms of paragraph 2 of Article II, a Member may maintain any measure that is inconsistent with the MFN rule under paragraph 1 of this article if such a measure is listed in the Annex on Article II Exemptions and meets the conditions laid down in that Annex. In terms of paragraph 3 of the GATS' Annex on Article II Exemptions, the Council for Trade in Services (CTS) shall review all exemptions granted for a period of more than five years. In the review, the CTS shall examine whether the conditions that created the need for the exemption still prevail. In this way, while the GATS allows Members to take sector specific exemptions to the MFN rule by listing such exemptions in a schedule, the necessity for the same are to be periodically reviewed by the CTS.

As pointed out by Jarreau, the GATS obligate all WTO Members to extend the MFN treatment to services and service suppliers of "... *any other country.*"[79] He goes on to observe that unless a Member has an exemption that is listed in the Annex on Article II Exemptions and which satisfies the conditions thereof, it will be obligated to extend the same trade in services measure that it accords to the services and service suppliers of any other country (even if that other country is not a WTO Member) to the services and service suppliers of all WTO Members.[80]

However, the MFN obligation does not preclude Members from providing more favourable treatment to a country under an agreement liberalising trade in

---

79 Jarreau, n.5 p.35. Emphasis in the original.

80 ibid.

services if the agreement has substantial sectoral coverage, i.e. it does not provide for the *a priori* exclusion of a service sector or a mode of supply, and it ensures national treatment of all services suppliers of such countries.[81]

2.3.2 *Transparency*

The principle of transparency is laid down in Article III of the GATS. It obligates all Members to promptly publish all relevant measures of general application which pertain to or affect the operation of the GATS. Members are also obligated to publish international agreements that pertain to or affect trade in services, if a Member is a signatory to such an agreement.[82] In effect, this provision casts an obligation on all Members to make all information pertaining to relevant measures of general application or relevant international agreements available in the public domain. However, while this clause requires Members to publish all relevant measures of general application, a Member is required to do so only if a measure pertains to or affects the operation of the GATS. Thus, a relationship has to be established between the measure and the operation of the GATS.

Moreover, Members are also required to inform the CTS promptly, and at least annually, of the introduction of any new law, regulation or administrative guideline, or of changes to any of such existing measures, which significantly affect trade in services covered by its specific commitments.[83] A Member is

---

81 *GATS,* n.57 Article V.

82 ibid, Article II, paragraph 1.

required to do so only if the said measure *significantly* affects trade in a service that is covered by its specific commitments. The GATS does not provide any guideline on how to determine whether a measure significantly affects trade in a service, and if so, which is the appropriate authority to determine the same. A bare reading of Article III paragraph 2 in isolation suggests that a Member has the freedom to determine whether any such measure undertaken by it significantly affects trade in a service covered by its commitments. Only if this issue is determined in the affirmative, the Member has to inform the CTS.

However, the GATS' provisions on transparency do not give Members the unfettered liberty to unilaterally determine whether a measure taken by them significantly affects trade in a service. In terms of paragraph 4 of Article III, if any Member requests any other Member for specific information regarding any measure taken by that other Member, the requested Member has to promptly respond to such a request. Moreover, in order to provide access to information upon request, a Member has to establish enquiry points to facilitate this process.

This process under paragraph 4 enables a Member, which believes that such measures of another Member affects the operation of the GATS, to approach the CTS. Thus, on obtaining the necessary information under the provisions of paragraph 4 of Article III, a Member may notify the CTS under paragraph 5. This implies that the CTS could actually determine whether a particular measure affects the operation of the GATS.

---

[83] ibid, Article III, paragraph 3. The CTS is entrusted to carry out the specific functions assigned to it to facilitate the GATS and further its objectives under Article XXIV (3) of the GATS.

2.3.3 *Disclosure of Confidential Information*

Even though the principle of transparency requires a Member to publish all measures of general application that might affect trade in services, a Member cannot be asked to publish information of a confidential nature in certain circumstances. A member cannot be compelled to do so only if such a disclosure would impede law enforcement, or it would be contrary to public interest, or it would prejudice legitimate commercial interests of legitimate commercial interests of particular enterprises.[84] However, the GATS does not define public interest within the terms of the agreement. It is doubtful whether a determination as to the confidential nature of an information in view of law, public interest or legitimate commercial interest under domestic law by domestic forums would be acceptable to other Members.

2.3.4 *Increased Participation of Developing Countries*

In terms of the preamble of the GATS, the GATS desires to facilitate the increased participation of developing countries in trade in services and the expansion of their service exports.[85] This ideal is pursued in Article IV of the GATS which requires different Members, particularly the developed country Members, to negotiate specific commitments for capacity building, technical, financial and other forms of assistance.[86]

---

84 ibid, Article III *bis.*

85 *GATS,* n.57 Preamble.

86 ibid, Article IV, paragraphs 1, 2.

Nevertheless, this provision of the GATS has remained a dead letter. In the words of Neela Mukherjee, "Article IV ... of the GATS, which aims at creating space for better participation of developing countries, has been virtually ignored in practice."[87] This is because though the GATS formally recognises the mobility of labour (by recognising trade in services through the presence of natural persons), the mobility of labour has been considerably restricted by different trade barriers in comparison to mobility of capital.[88]

2.3.5 *Domestic Regulation*

The preamble to the GATS also recognises the right of Members, particularly the developing countries, to regulate and introduce new regulations on the supply of services within their territories in order to meet the national policy objectives and to balance the asymmetries that exist with respect to the degree of development of services regulations in different countries.[89]

This principle is elaborated upon in Article VI of the GATS. Paragraph 1 of that article states that where Members have undertaken specific commitments they have an obligation to ensure that all measures of general obligation affecting trade in services are administered in a reasonable, objective and impartial manner. Thus, Members have an obligation to regulate domestically those service sectors

---

87 Neela Mukherjee, "GATS and the Millennium Round of Multilateral Negotiations – Selected Issues from the Perspective of Developing Countries", *Journal of World Trade*, vol.33, no.4, 1999, p.96.

88 ibid, p.93.

89 *GATS*, n.57 Preamble.

where they have undertaken specific commitments, in a reasonable and impartial manner.

This provision is complemented by paragraph 2 of Article VI. Accordingly, if it is consistent with the constitutional structure or the legal system of a Member, that Member is required to establish as soon as practicable judicial, arbitral or administrative tribunals or procedures for the prompt review of and appropriate remedies for administrative decisions affecting trade in services.[90]

The CTS is empowered to develop appropriate disciplines through appropriate bodies for ensuring that domestic regulations pertaining to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services.[91] Even where the CTS has not developed such disciplines, a Member cannot apply such requirements and standards in a manner that they constitute a violation of the standards laid down in paragraph 4 viz., they must be based on objective and transparent criteria, they must not be more burdensome than necessary, and in case of licensing procedures, they should not in themselves constitute a restriction on the mode of supply of the service. Moreover, a Member cannot apply such requirements that nullify or impair the specific commitments if the same could not have been expected of the Member when the specific commitments were made. In this regard, international standards of relevant international organisations that are

---

[90] ibid, Article VI, paragraph 2 (a), (b).

[91] ibid, Article VI, paragraph 4. So far the CTS has only adopted a decision on the *Domestic Regulation of Accountancy Sector*; see WTO, S/L/64 of 17 December 1998.

applied by the Member shall be considered in determining whether the aforementioned requirements are being complied with.[92]

The MFN rule will also apply to domestic regulations. However, in terms of Article VII of the GATS, for the authorisation, licensing or certification of service suppliers of another Member, a Member may recognise the qualification requirements or the licenses and certificates granted by that other Member, and accordingly grant different treatment to the service suppliers of that Member.[93] However, a Member has to ensure that its recognition measures do not act as a disguised restriction on trade in services.[94]

A Member may adopt a recognition measure unilaterally or on the basis of an agreement or arrangement with another country. However, where a Member adopts a recognition measure in this manner, it has to provide adequate opportunity to other interested Members to negotiate their accession to such agreements or arrangements or to demonstrate that the qualification, licensing and certification requirements of that other Member should be so recognised.[95]

Measures pertaining to qualifications, standards or licensing matters are not subject to scheduling under Articles XVI and XVII of the GATS. However, in terms of Article XVIII, a Member may bind these qualifications and standards by undertaking additional commitments.

---

92 ibid, Article VI, paragraph 5.

93 ibid, Article VII, paragraph 1.

94 ibid, Article VII, paragraph 3.

95 ibid, Article VII, paragraphs 1, 2.

2.3.6 *Payments and Transfers*

Article XI of the GATS precludes a Member from applying any restriction on international transfers and payments for current transactions relating to its specific commitments unless such restrictions are imposed in accordance with its rights and obligations under the Articles of Agreement of the International Monetary Fund (IMF) or unless they are imposed in accordance with the provisions of Article XII of the GATS.[96] However, affected Members cannot impose restrictions on any capital transaction in respect of a committed service unless they are taken at the request of the IMF or they are taken under Article XII. Article XII allows a Member to impose restrictions on trade in services on which it has made GATS commitments, in the event of serious balance of payments and external financial difficulties.[97] Specifically in respect of financial services, this restriction can have significant implications for the financial health of the host economy.[98]

2.4 SPECIFIC OBLIGATIONS

The GATS, being a framework agreement, tries to embrace within its folds the specificities of different services sectors and sub-sectors. As the

---

96 ibid, Article XI.

97 ibid, Article XII.

98 For a discussion on this aspect see chapter III.

comparative advantages of countries vary from sector to sector, all countries do not want to make general commitments accepting trade law principles in services sectors and sub-sectors. Hence, one facet of the principle of non-discrimination in international trade law –national treatment – is only applied to countries which specifically adopt the same in respect of a particular service sector or sub-sector. This approach of specific adoption is called the positive list approach.[99] This approach is also followed with regard to granting market access and any other additional commitment.

2.4.1 *Market Access and National Treatment*

Paragraph 1 of Article XVII of the GATS states:

> 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.[100]

This provision implies that Members may give more favourable treatment to foreign service suppliers than that given to domestic service suppliers, but they cannot give foreign service suppliers less favourable treatment than that given to domestic service suppliers. Where more favourable treatment is given to foreign service suppliers the same has to be given on an MFN basis.

---

[99] Under the positive-list approach an obligation is applicable only when it is specifically adopted by way of a market access commitment. Unless a specific commitment is made adopting an obligation, it is deemed to be exempted.

[100] ibid, Article XVII, paragraph 1. Footnote omitted.

The principles of market-access and national treatment under the GATS do not apply universally to all trade in services through the modes of supply specified in Article I in respect of all the Members. Article XVI of the GATS states the principle in the following words:

> With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.[101]

The GATS does not impose any general obligation on Members to grant market access in any service sector or sub-sector. Even where a Member allows market access, it may do so subject to certain terms, limitations and conditions. Where a Member agrees to grant total or partial market access in respect of any service sector or sub-sector and seeks to submit the same to the rules of the GATS, it undertakes specific commitments (which are arrived at after considerable negotiations). Unless a Member makes any specific commitment it cannot be obligated to provide market access.

Nevertheless, paragraph 2 of Article XVI of the GATS adopts the negative-list approach in a limited way. Accordingly, a Member cannot adopt or maintain the following measures unless they are specifically mentioned in its Schedule:

i) limitations on the number of service suppliers;

ii) limitations on the total value of service transactions or assets;

---

[101] ibid, Article XVI, paragraph 1. Footnote omitted.

iii) limitations on the total number of service operations or the total quality of service output;

iv) limitations on the total number of natural persons that may be employed and who are necessary for, and directly related to the supply of a specific service;

v) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service;

vi) limitations on the participation of foreign capital.

On the face of it, it seems that Article XVI allows Members the discretion on whether to bind the extent to which it allows market-access in a service sector or sub-sector within the framework of the GATS. If it chooses to do so, a Member has to allow market-access on the specified sector or sub-sector subject to any limitations, on an MFN basis. However, this does not imply that a Member is not fettered by the GATS if it allows market-access outside the ambit of the GATS by not making any commitment. This is because the MFN rule applies to all trade in services. As pointed out by Abu-Akeel:

> ... for the purposes of applying the MFN clause to any given member, services and service suppliers of any other member will be matched against the like services and service suppliers of any other country (whether a WTO member or otherwise) to determine if they are treated alike with respect to any measure, ... that is claimed to affect, positively or negatively, service trade. If the member concerned has a schedule of commitments in place, the description of services and suppliers included in that schedule should be used as the benchmark for determining if the services or service suppliers are alike ....[102]

---

[102] Abu-Akeel, n.71 p.112.

Thus, even where a Member permits market-access without making a specific commitment, the MFN rule of the GATS will apply to it.

Significantly, if a Member makes a market access commitment in respect of the supply of a service through the mode of cross-border supply, and if the service essentially involves the cross-border movement of capital, it will be conclusively presumed that the Member is committed to allow such movement of capital. Similarly, where market access through commercial presence is allowed, the Member has to allow related transfers of capital into its territory.[103] By including this provision, the GATS guarantees foreign investment insofar as they are *essentially* required for the provision of a service. In a glaring contrast, there is no such provision which guarantees mobility of labour in respect of delivery of a service.

2.5 PROGRESSIVE LIBERALISATION

In terms of the preamble of the GATS, the GATS also seeks to achieve progressively higher levels of liberalisation of trade in services.[104] Part IV of the GATS contains provisions that are aimed to secure progressive liberalisation of trade in services. Thus, paragraph 1 of Article XIX mandates that Members must enter into successive rounds of negotiations within five years of the entry into force of the WTO Agreement i.e., within the year 2000. The objective of such

---

103 *GATS,* n.57 Article XVI, paragraph 1, footnote 8.

104 ibid, Peamble.

negotiations shall be "... the reduction or elimination of the adverse effects on trade in services as a means of providing effective market access."[105] In compliance with this mandate a new round of negotiations has been launched for which the CTS has developed guidelines and procedures in terms of paragraph 3 of Article XIX.

An important issue which comes up in this context is whether a Member can modify its existing commitments either during future negotiations or at any other time to the extent of reducing or withdrawing them. In terms of Article XXI, paragraph 1 (a), a Member may modify or withdraw any commitment in its schedule after a lapse of three years since the date that commitment entered into force. It may be argued that a reduction of a commitment is also a modification. However, this provision has to be interpreted in the light of the preamble's objective of early achievement of progressive liberalisation. In view of this objective it seems that Article XXI 1 (a) permits modification as a process of securing more market opening commitments and seeks to complement this by allowing the withdrawal of exemptions to market opening commitments.

The GATS does not declare that a reduction or withdrawal of positive commitments is not permissible. Indeed, this remains the sovereign right of every Member State. However, Article XXI puts in place some disincentives in order to dissuade States from doing so. Therefore, if the benefits of another Member under the Agreement are likely to be affected by a proposed modification or withdrawal, the modifying Member is bound to enter into negotiations with the affected Member upon its request for reaching an agreement on any necessary

---

105 ibid, Article XIX, paragraph 1.

compensatory adjustment.[106] In order to enable the affected Member to collect necessary information in this regard, paragraph 1 (b) of Article XXI mandates that the modifying Member has to give at least three months' notice to the CTS about its intention to modify or withdraw a commitment. In terms of paragraph 2 (b), compensatory adjustments have to be made on an MFN basis. Moreover, if no agreement is reached during such negotiations on compensatory adjustments, the affected Member may seek arbitration.[107] If the modifying Member goes ahead and implements its modification or withdrawal without complying with the findings of the arbitration, any affected Member may modify or withdraw substantially equivalent benefits in conformity with those findings.[108] The entire process of modification of schedules is to be guided by appropriate procedures established by the CTS.[109]

Moreover, the GATS encourages countries to undertake progressive liberalisation by making additional commitments under Article XVIII for developing, *inter alia*, appropriate regulatory and institutional mechanisms for the concerned service sector.[110]

---

106 ibid, Article XXI, paragraph 2(a).

107 ibid, Article XXI, paragraph 4 (a).

108 ibid, Article XXI, paragraph 4 (b).

109 ibid, Article XXI, paragraph 5.

110 For instance, in respect of basic telecommunications services some Members have adopted the pro-competitive regulatory principles contained in an informal Reference Paper by way of additional GATS commitments.

2.6 DISPUTE SETTLEMENT

The effectiveness of a rule-based institution like the GATS is, to a great extent, determined by its provisions pertaining to dispute settlement. In terms of Article XXII of the GATS, each Member has to accord sympathetic consideration and afford adequate opportunity for consultation on the basis of any representation from any other Member with respect to any matter affecting the operation of the GATS. The Dispute Settlement Understanding (DSU) of the WTO is made applicable to such consultations.[111] If a satisfactory solution is not found through this process, the CTS or the WTO DSB may consult with any Member or Members at the request of another Member.[112]

Besides this procedure of settlement of disputes or differences through consultations, an adversarial system of settlement of disputes is laid down by Article XXIII. Accordingly, if any Member considers that another Member has failed to carry out its obligations or specific commitments under the GATS, it may take recourse to the DSU for resolving the matter. The DSB may authorise a Member to suspend the application of its obligations and specific commitments in respect of the violating Member in accordance with Article 22 of the DSU, if the DSB considers that circumstances are serious enough to justify such action. Moreover, non-violation disputes are also admissible if it can be established that a measure which does not violate the GATS actually nullifies or impairs any benefit

---

111 *GATS,* n.57 Article XXII, paragraph 1.

112 ibid, Article XXII, paragraph 2.

that a Member could have reasonably expected to accrue to it under a specific commitment of another Member.[113]

2.7 THE GATS: AN APPRAISAL

The GATS reflects the minimum agreement that could be reached on trade in services at the conclusion of the Uruguay Round of MTN. It tried to balance the interests of both the developed and the developing countries by adop ing a framework agreement that could accommodate further developments in the services sector as experience of all nations with regard to trade in services increased with time.

One novel achievement of the GATS has been its structural segregation of the fundamental principles of international trade law into general obligations like MFN treatment, transparency, facilitating increased participation of developing countries through capacity building, etc., and specifically adoptable obligations like market access and national treatment. The GATS was concluded in spite of the lack of adequate information on the capabilities of many countries on trade in services as well as the modalities of trade in services. While compulsions to keep the negotiations alive led to the hasty adoption of the GATS, this structural positioning of principles gave the GATS a remarkable degree of flexibility.

Nevertheless, the information deficiency that inflicted the Uruguay Round negotiations on services has resulted in a number of legal ambiguities in the

[113] ibid, Article XXIII.

GATS. Perhaps this was because the GATS was primarily negotiated by diplomatic trade specialists and economists.[114] The GATS envisages the CTS as the principal organ for facilitating the operation of the Agreement. However, till date the CTS has not developed adequate guidelines for interpreting the provisions of the Agreement. Indeed, this gives great deal of latitude to countries to auto-interpret the provisions of the GATS to suit their ends. As the competence of countries grow in various services, the lack of proper interpretative guidelines could lead to a plethora of trade disputes in the future.

Over the years the GATS has been criticised for under-achieving in liberalising trade in services. The process of liberalisation under the GATS has been dubbed as being too slow. Thus, suggestions have been made that the GATS should be restructured with an over-arching emphasis on the negative-list approach.[115] However, according to Feketekuty, while the GATS can be improved as a legal document, it serves as a working model for integrating a wide range of policy instruments in a coherent way. He advocates a bottom-up approach to liberalisation of international trade in services by incorporating necessary domestic regulatory reforms.[116]

It is submitted that in its present form the GATS provides the developing countries the opportunity to negotiate without making too many commitments. Apart from this, there is very little flexibility in the GATS for the developing

---

[114] Jarreau, n.5 p.4.

[115] Peter S. Watson and others, *Completing the World Trading System: Proposals for a Millennium Round* (The Hague: Kluwer Law International, 1999), pp.291-2.

[116] Geza Feketekuty, "Trade in Services – Bringing Services into the Multilateral Trading System", in Jagdish Bhagwati and Mathias Hirsch eds., *The Uruguay Round and Beyond: Essays in Honour of Arthur Dunkel* (Berlin: Springer, 1998), p.99.

countries. Any future round of GATS negotiations should focus on increasing the competencies of developing countries in the services sector rather than any ossification of the regime. In particular, interests of the developing countries should be addressed by securing market access for labour services in the developed countries. Moreover, the GATS must retain its flexibility in order to enable developing countries to develop regulatory capabilities in key sectors like financial services.

CHAPTER III

FINANCIAL SERVICES AND THE GATS

As observed in the previous chapter, the WTO regime for services under the General Agreement for Trade in Services (GATS) is a framework agreement designed to embrace in its folds various services sectors with a flexible mechanism to adjust the regime to the specific requirements of that sector. At the conclusion of the Uruguay Round of negotiations, many services remained substantially outside the ambit of the GATS regime and hence further negotiations were launched in respect of some services sectors including the financial services sector. Though the Uruguay Round concluded without any agreement to liberalise trade in financial services, an Annex on Financial Services was adopted as an integral part of the GATS, which elaborates upon the provisions of the GATS in respect of financial services. Besides the Annex, an Understanding on Commitments in Financial Services was also concluded. These instruments, together with the GATS and the specific commitments of the Members in respect of financial services constitute the WTO regime for financial services. This chapter will analyse this legal regime for trade in financial services. In particular, this chapter will examine whether this regime accommodates the interests of the developing countries in the financial services sector. Moreover, it will analyse whether this regime provides the necessary flexibility to the

Members to undertake appropriate regulatory measures in order to protect their macro-economic interests in the financial sector.

3.1 THE FINANCIAL SERVICES AGREEMENT

At the conclusion of the Uruguay Round of multilateral trade negotiations (MTN) there was considerable difference primarily between the United States (US) and the European Union (EU) on an agreement on trade in financial services. Moreover, many developing countries were unwilling to make substantial binding commitments in financial services. As mentioned in the previous chapter, the US was dissatisfied with the structural division of principles of international trade law into general obligations and negotiable obligations in the GATS. In its eagerness to achieve absolute liberalisation of all trade in services, the US took the lead in opening up many of its services sectors including financial services during the 1980s. Indeed, during the 1980s a substantial amount of literature was produced arguing for the liberalisation of various services including financial services.[1] However, in the financial services sector, the comparative advantage of the US gradually diminished in the face of stiff competition from the financial services companies from Europe. Jarreau observes

[1] See, for example, Brigid Gavin, "A GATT for International Banking?", *Journal of World Trade Law*, vol.19, no.2, 1985, pp.121-35. See also Ingo Walter, *Global Competition in Financial Services: Market Structure, Protection and Trade Liberalization* (Cambridge, Mass.: Ballinger Press, 1988), cited in William J. Drake and Kalypso Nicolaïdis, "Ideas, Interests and Institutionalization: "trade in services" and the Uruguay Round", *International Organization*, vol.46, no.1, 1992, pp. 37-100.

that domestic pressure motivated the US negotiators to indicate that among other services, financial services might be withdrawn from the negotiating table. The US approach to financial services was a negotiating tactic prompted by domestic pressures for the purpose of obtaining significant market access commitments from its trading partners.[2]

The US was dissatisfied with the level of market access commitments at the end of the Uruguay Round. Particularly in respect of banking and securities, the US sought to apply the MFN principle on the basis of reciprocity.[3] The trading partners of America led by the EU opposed this. Indeed, the application of the MFN principle on the basis of reciprocity would have generated a complex web of bilateral regimes within the multilateral framework. Though eventually countries agreed to conclude the Annex on Financial Services and the Understanding on Commitments in Financial Services, disagreements remained on how to apply the MFN rule to financial services.

Years of negotiations could have been undone if the negotiating countries had taken broad MFN exemptions owing to their disagreements. Since the determination of the sufficiency of a Members market access commitment was left to the subjective satisfaction of individual Members, a trade war in services could have ensued through the means of MFN exemptions. Thus, a compromise was arrived at. On 15 April 1994, a Decision on Financial Services was adopted,

---

2 J. Steven Jarreau, "Interpreting the General Agreement on Trade in Services and the WTO Instruments Relevant to the International Trade in Financial Services: The Lawyer's Perspective", *North Carolina Journal of International Law and Commercial Regulation*, vol.25, no.1, 1999, pp.23-24.

3 ibid, pp.25-26.

which extended the negotiating period for financial services. By engaging the US and the EU on extended negotiations, they were prevented from taking broad MFN exemptions for the time being. The Decision extended the negotiating period for six months from the commencement of the WTO to June 1995.[4]

However, the US was not satisfied with the level of commitments on financial services at the end of the extended negotiations. Though a number of countries had significantly improved their market access commitments, the US was of the view that the commitments of key developing countries were insufficient. Hence, the US regarded the overall package of commitments as too inadequate to warrant any MFN undertaking. According to Garten, since the US had the most competitive and sophisticated financial services industry in the world with the most open markets, the US firms stood to benefit most when other governments lowered their barriers. Therefore, unless the offers from other countries liberalising their financial markets suited American interests substantially, the US refused to engage multilaterally.[5] The US' apprehension was that due to the unconditional application of the MFN rule under Article II of the GATS, the US would be compelled to make the same market access commitments in respect of all WTO Members, thereby allowing countries with relatively closed financial services markets to have a free ride and have access to America's open financial services markets. However, the US ignored the fact that the developing countries hardly have any export potential in financial services. The US adopted

---

4 ibid, pp.26-27.

5 Jeffrey E. Garten, "Is America Abandoning Multilateral Trade?", *Foreign Affairs*, vol.74, no.6, 1995, pp. 56-57.

this stand in order to bargain hard and open up financial services markets in developing countries.

3.1.1 *The Second Protocol to the GATS*

On 30th June 1995 the US announced that it was withdrawing its offer of unconditional MFN treatment in financial services and that it was withdrawing from the negotiations. The US only agreed to grant MFN treatment to existing financial services investments. However, the EU sought a one-month extension to the negotiations on financial services. The negotiations led by the EU resulted in the Second Protocol to the GATS. This is commonly called an interim agreement as it was to be replaced ultimately by a permanent financial services accord.[6] The US did not become party to this since the US

> ... did not want to grace the insufficient offers from other countries with the imprimatur of a multilateral agreement that would have required U. S. commitments to automatically allow all foreign firms into the American market even if their home governments kept our (American) companies out.[7]

The hard-line position of the US was motivated by the desire to negotiate access to financial markets in developing countries on a bilateral basis. Indeed, opening up their financial markets to developing countries did not pose a challenge to the US, since developing countries do not have any significant export potential in financial services. However, they offered large markets to be tapped for American financial institutions. The bilateral approach would have allowed

---

6 Jarreau, n.2 pp.28-29.

7 Garten, n.5 p.57.

the US to deny financial institutions from EU to access US markets. The unconditional application of the MFN rule under GATS would not have allowed the US to do this.

However, the developing countries had their own concerns on financial liberalisation. They were apprehensive that competition from foreign financial institutions would threaten their control of the key levers of the national economy as well as weaken the national financial institutions.[8]

In terms of paragraph 3 of the Second Protocol to the GATS, if the protocol did not enter into force by 1 July 1996, the Members who accepted it before that date could decide on its entry into force within thirty days thereafter.[9] By virtue of paragraph 1 of the Decision on Commitments in Financial Services adopted by the CTS on 21 July 1995, if the protocol did not duly enter into force, within a period of sixty days from the 1 August 1996, a Member could modify or withdraw all or part of its commitments on financial services and it could also take MFN exemptions. The commencement of this sixty-day period was postponed to 1st November 1997 by the Second Decision on Financial Services adopted by the CTS on the same day.

The WTO Members met for the first time after its inception at the Singapore Ministerial Conference in 1996. It was agreed during this Ministerial Conference that negotiations on financial services would resume in April 1997, in order to achieve significantly improved market access commitments with a

---

8 World Trade Organization (WTO), "Financial Services and the WTO", *Speech by WTO DG Mike Moore at the Bank for International Settlements, Basel on 11 September 2000*, at <http://www.wto.org/english/news_e/spmm_e/spmm36_e.htm>.

9 The protocol could enter into force only after all the Members accepted it.

broader level of participation. The reconciliation between Europe and America on financial services came about largely because of the efforts of the financial services firms of the two continents. They formed the Financial Leaders Group (FLG) in 1996, which lobbied for co-operation between their governments on financial services negotiations.[10] The renewed negotiations resulted in the adoption of the Fifth Protocol to the GATS on 13th December 1997, which is known as the Financial Services Agreement (FSA). About 102 WTO Members extended commitments in financial services under the FSA. Even the US withdrew its broad MFN exemptions in case of all financial services except insurance services.[11] With the entry into force of the FSA, almost nine-tenths of the global trade in financial services has come under the WTO regime for financial services.

The FSA was adopted largely because of the co-operation between the US and the EU financial services institutions. There was unanimity on the point that developing countries should not be allowed to take advantage of the transatlantic differences.[12] However, the fact that many developing countries made improved commitments under the FSA is even more singular, particularly because the FSA was adopted in the aftermath of the East Asian financial crisis. According to the former WTO Director-General Mike Moore, there are three reasons behind this stand of the developing countries: first, the GATS regime for financial services

---

.0 Wendy Dobson and Pierre Jacquet, *Financial Services Liberalization in the WTO* (Washington, D.C.: Institute for International Economics, 1998), p.84.

11 Jarreau, n.2 p.30.

12 Dobson and Jacquet, n.10 p.84.

assuaged the concerns of the developing countries by not binding them to make capital account liberalisation;[13] secondly, the regime provided the necessary flexibility and safeguards to address their regulatory concerns; and third, these particular negotiations were mostly about allowing foreign institutions to establish in the market – entailing foreign direct investment – to provide services and bring technology, capital and expertise with them. Commitments in the WTO provide a guarantee that the terms and conditions on which investment decisions are made, and trade is carried on, are not going to change overnight and hence attract more foreign investment.[14] Moreover, the economies beleaguered by the East Asian financial crisis became dependent on international financial organisations like the International Monetary Fund (IMF) for tiding over the crisis. As observed by Dobson and Jacquet, the situation made the IMF demands for liberalisation of the financial sector more acceptable.[15]

3.2 THE ANNEX ON FINANCIAL SERVICES

The Annex on Financial Services is an integral part of the GATS.[16] The Annex supplements the provisions of the GATS in respect of financial services

---

[13] Capital account transactions refer to the net amount of public and private international investment flowing in and out of a country. Current account transactions are made up of the difference between a nation's total exports of goods, services, and transfers, and its total imports of them. Current account balance calculations exclude transactions in financial assets and liabilities.

[14] WTO, n.8.

[15] Dobson and Jacquet, n.10 p.85.

[16] *General Agreement on Trade in Services (GATS)*, Article XXIX. Also see selected provisions of the GATS in Appendix 1.

and it serves as a useful tool for interpreting its provisions. It does not contain any specific liberalisation commitment.

3.2.1 *The Scope of the Annex*

The scope of the Annex is laid down in paragraph 1 of the Annex. Accordingly, the Annex applies to measures that affect the supply of financial services.[17] According to Leroux, the scope of the Annex has been made very broad by the use of the term 'affect' in this provision.[18] Though this term has not been defined in the Annex, as pointed out by Jarreau, reliance may be placed on the interpretation given to this term in the Panel Report of the Appellate body of the WTO DSB in the *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III)* case wherein the Panel had concluded that the term 'affecting' should be interpreted broadly.[19]

In terms of Article I, paragraph 3 (b) of the GATS, services that are supplied in the exercise of governmental authority do not come within the scope of the GATS. This provision is explained in respect of financial services in paragraph 1.2 of the Annex on Financial Services. As per this provision, financial services supplied in the exercise of governmental authority that are outside the purview of the GATS means activities conducted by a central bank, a monetary authority or any other public entity in the pursuit of monetary or exchange rate

---

17 *Annex on Financial Services*, paragraph 1.1. Also see Appendix 2.

18 Eric H. Leroux, "Trade in Financial Services under the World Trade Organization", *Journal of World Trade*, vol.36, no.3, 2002, p.128.

19 Jarreau, n.2 pp.51-52, 55. Also see World Trade Organization (WTO), *The WTO Analytical Index: Guide to WTO Law and Practice* (Geneva: World Trade Organization, 2003), vol.2, edn.1, p.1089.

policies; activities that are a part of a statutory system of social security or public retirement plans; and other activities that are conducted by public entities for the account of the government, or with the guarantee of the government, or by using the financial resources of the government.[20] However, paragraph 1.3 of the Annex puts a qualification on the exclusion of services supplied in the exercise of governmental authority. It states that except in case of activities conducted in pursuance of macro-economic policy-making activities, other kinds of financial services supplied in the exercise of governmental authority will be included within the scope of the GATS, if such activities are allowed to be conducted by the financial service suppliers of a Member in competition with a public entity or another financial service supplier.[21] Thus, such financial services can be carved back into the ambit of the GATS if a Member introduces competition in respect of such services.

3.2.2 *Definition of Financial Services*

The Annex defines financial services in very broad terms as any service of a financial nature which is offered by a financial service supplier of a Member.[22] This definition is open-ended and it is not self-explanatory. Specifically, all insurance and insurance-related services and all banking and non-banking financial services including insurance come within the definition of financial

---

20 *Annex*, n.17 paragraph 1.2.

21 ibid, paragraph 1.3.

22 ibid, paragraph 5.1.

services.[23] The Annex gives an illustrative list of various kinds of activities pertaining to insurance and related services and banking and non-banking services that come within the scope of the definition of financial services.[24]

According to Trebilcock and Howse, the clear intent of this provision is to include as many services as possible under the rubric of financial services.[25] In this regard, it is interesting to note that even services that are auxiliary in nature to these financial services, e.g., consultancy, data processing, risk management, etc., come within the purview of the regime. Such auxiliary services can also be deemed as professional services. As the definition of financial services given in the Annex defines a financial service in terms of its *financial nature*, the financial nature of such auxiliary service has to be established in order to bring them within the ambit of the GATS disciplines on financial services. However, neither the GATS nor the Annex on Financial Services provides any guideline for determining the financial nature of auxiliary services. This makes the definition of financial services rather nebulous.

The provisions of the GATS apply not only to the supply of services but also to the suppliers of such services. In this regard, paragraph 5.2 of the Annex defines a financial service supplier as "... any natural or juridical person *wishing to supply* or supplying financial services ... (other than a) public entity."[26] Leroux points out that unlike the concept of service supplier under the GATS, this

---

23 ibid.

24 ibid.

25 Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (London: Routledge, 1999), p.296.

26 *Annex*, n.17 paragraph 5.2. Emphasis added.

provision includes potential suppliers of financial services who wish to supply such services. Therefore, in order to be eligible as a financial service supplier under the GATS, the supplier need not be already engaged in the supply of such services.[27]

The definition of a financial service supplier has significant implications where market access is allowed through commercial presence. As discussed in the previous chapter, during the Uruguay Round negotiations the developing countries acknowledged the right of establishment of service suppliers in the host country only to the extent of a limited duration and for a limited purpose. For instance, a service supplier allowed to establish commercial presence for providing insurance services cannot be deemed to have a right to provide banking services.[28] However, by including financial service suppliers who wish to supply a financial service within the definition of financial service suppliers, the Annex seems to stretch the limits of the right of establishment to that of expanding to provide other financial services.

A public entity is not considered as a financial service supplier. In terms of paragraph 5.3, a public entity means a government, central bank or a monetary authority of a Member, or an entity that is owned or controlled by a Member and which performs governmental functions but does not supply financial services on commercial terms, and a private entity which is performing the functions of a central bank or monetary authority.

---

27 Leroux, n.18 p.429.

28 See Drake and Nicolaïdis, n.1 p.72.

3.2.3 *Domestic Regulation of Financial Services*

Given the central role of the financial services sector for the development of a market-based economy, countries naturally seek considerable space for developing their own policies for regulating the financial services sector in the overall interest of the national economy. Indeed, Members can develop appropriate domestic regulations in accordance with Article VI of the GATS. Paragraph 2.1 of the Annex on Financial Services elaborates upon this provision of the GATS. It states that

> Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.[29]

According to scholars like Kono and others, there are four types of government intervention that could have an impact on the financial services sector. These are: first, actions taken in pursuit of macroeconomic policy objectives; second, intervention through prudential regulations developed to protect the financial sector, preserve the stability of the economy and promote the welfare of consumers; third, intervention through non-prudential measures in order to make the financial sector work towards the fulfillment of social objectives; and fourth, trade restrictions designed to shield domestic institutions

---

[29] *Annex*, n.17 paragraph 2.1.

from competition from foreign institutions. According to them, the GATS primarily focuses on the reduction and elimination of trade restricting barriers.[30]

3.2.3.i. *Prudential Regulations*

According to Leroux, the most sensitive issue in the context of financial services is the preservation of the ability of Members to adopt and maintain measures for prudential reasons.[31] Prudential measures are those measures that have to be taken for the prudent management of the financial assets by the suppliers of financial services. The objective of prudential norms is to protect the interests of investors and depositors.[32] Governments regulate the financial services markets by prescribing prudential norms which may make a differentiation between domestic and foreign suppliers of financial services.[33]

A rationale for the prudential regulations is found in the general exception to the provisions of the GATS in terms of Article XIV (c) of the GATS. This provision empowers Members to adopt measures that are necessary to secure compliance with laws or regulations relating to, among others, the prevention of deceptive or fraudulent practices, if such laws are not inconsistent with the other

---

30 Masamichi Kono and others, *Opening Markets in Financial Services and the Role of the GATS*, (Geneva: World Trade Organization, 1997), p.5.

31 Leroux, n.18 p.430.

32 ibid.

33 Particularly countries that do not have very mature financial markets tend to be wary about the possibilities of capital flight. Therefore, sometimes they may prescribe stricter prudential norms for foreign suppliers of financial services.

provisions of the GATS.[34] Paragraph 2.1 of the Annex on Financial Services makes laws and regulations relating to prudential measures consistent with the GATS.

Paragraph 2.1 of the Annex permits Members to prescribe prudential norms without being constrained by any provision of the GATS.[35] However, this general freedom is qualified by a rider to the effect that Members taking prudential measures have to ensure that they are not used as a means of avoidance of commitments or obligations under the GATS. Leroux calls this an anti-avoidance provision which seeks to prevent the abuse of the exception for prudential measures.[36]

Though the Annex does not prevent any country from taking prudential measures, it does not explicitly define what constitutes a prudential measure in the context of the GATS. In terms of paragraph 2.1 of the Annex, prudential measures include measures for the protection of investors, depositors, policy holders and persons towards whom financial service suppliers have a fiduciary duty. Thus, it can be implied that the common understanding of a prudential measure as any measure that has the objective of protecting the interests of depositors or investors in the financial market against fraudulent or unscrupulous practices is accepted under paragraph 2.1 of the Annex.

---

34 *GATS*, n.16 Article XIV (c).

35 However, the obligation under Article VI, paragraph 1 of the GATS to apply the regulations in a reasonable, objective and impartial manner remains even if there is no conflict between the GATS and the Annex; Leroux, n.18 p.431.

36 ibid, pp.430-1.

provisions of the GATS.[34] Paragraph 2.1 of the Annex on Financial Services makes laws and regulations relating to prudential measures consistent with the GATS.

Paragraph 2.1 of the Annex permits Members to prescribe prudential norms without being constrained by any provision of the GATS.[35] However, this general freedom is qualified by a rider to the effect that Members taking prudential measures have to ensure that they are not used as a means of avoidance of commitments or obligations under the GATS. Leroux calls this an anti-avoidance provision which seeks to prevent the abuse of the exception for prudential measures.[36]

Though the Annex does not prevent any country from taking prudential measures, it does not explicitly define what constitutes a prudential measure in the context of the GATS. In terms of paragraph 2.1 of the Annex, prudential measures include measures for the protection of investors, depositors, policy holders and persons towards whom financial service suppliers have a fiduciary duty. Thus, it can be implied that the common understanding of a prudential measure as any measure that has the objective of protecting the interests of depositors or investors in the financial market against fraudulent or unscrupulous practices is accepted under paragraph 2.1 of the Annex.

---

34 *GATS*, n.16 Article XIV (c).

35 However, the obligation under Article VI, paragraph 1 of the GATS to apply the regulations in a reasonable, objective and impartial manner remains even if there is no conflict between the GATS and the Annex; Leroux, n.18 p.431.

36 ibid, pp.430-1.

services within their territories for meeting national policy objectives.[39] In the absence of any guideline for determining the relevance of a prudential measure, even the application of the principle of good faith becomes difficult because of this dual objective of the GATS.

3.2.3.ii. *Other Regulations*

In terms of Article VI of the GATS, Members who have made commitments on financial services can also develop domestic regulations of a non-prudential nature. Besides Article VI, a Member may also apply restrictions on transfers and payments in the event of balance of payments and external financial difficulties.

As pointed out by Stichele, foreign financial services tend to bring instability in two ways. First, by lending in foreign currencies they lead to the outflow of foreign exchange for the repayment of loans which brings pressure on the foreign exchange reserves of a country in the short-term. Since, this increases the rate of inflow and outflow of international capital it can increase the exchange rate between local and foreign currencies and thus lead to a balance of payments deficit and financial instability in the host economy. Secondly, foreign financial services can also lead to financial instability by encouraging outflow of capital by offering services that involve allocating money abroad.[40] Since Article XI of the GATS does not allow a country to impose restrictions on international transfers and payments for current transactions, Stichele observes that in effect a country

---

39 *GATS*, n.16 Preamble.

40 Stichele, n.37 p.2.

services within their territories for meeting national policy objectives.[39] In the absence of any guideline for determining the relevance of a prudential measure, even the application of the principle of good faith becomes difficult because of this dual objective of the GATS.

3.2.3.ii. *Other Regulations*

In terms of Article VI of the GATS, Members who have made commitments on financial services can also develop domestic regulations of a non-prudential nature. Besides Article VI, a Member may also apply restrictions on transfers and payments in the event of balance of payments and external financial difficulties.

As pointed out by Stichele, foreign financial services tend to bring instability in two ways. First, by lending in foreign currencies they lead to the outflow of foreign exchange for the repayment of loans which brings pressure on the foreign exchange reserves of a country in the short-term. Since, this increases the rate of inflow and outflow of international capital it can increase the exchange rate between local and foreign currencies and thus lead to a balance of payments deficit and financial instability in the host economy. Secondly, foreign financial services can also lead to financial instability by encouraging outflow of capital by offering services that involve allocating money abroad.[40] Since Article XI of the GATS does not allow a country to impose restrictions on international transfers and payments for current transactions, Stichele observes that in effect a country

---

39 *GATS*, n.16 Preamble.

40 Stichele, n.37 p.2.

cannot prevent profit repatriation in sectors where it has made market access commitments.[41] Thus, while in terms of footnote 8 to Article XVI of the GATS, where market access is granted through commercial presence and the cross-border movement of capital is an essential part of the service – as in financial services – the Member granting such market access has to allow such movement of capital, it cannot impose any restriction on its outward movement under Article XI of the GATS. This goes squarely against the interests of the developing countries in the financial services sector viz., that of obtaining more foreign investment, i.e. inward flow of capital. in order to fund growth in the other sectors of the economy, rather than any outward movement of capital.

3.2.4 *Recognition of Prudential Measures*

As mentioned hereinbefore, the GATS permits Members to recognise measures pertaining to qualification, licensing or certification requirements for service suppliers in a particular country and to grant differential treatment to the service suppliers of that country in terms of Article VII of the GATS. In terms of paragraph 3 of the Annex, Members may recognise prudential measures of another country even if the latter is not a WTO member, and apply them in respect of financial services in accordance with the provisions of Article VII of the GATS. This is a limited exception to the MFN rule and it is subject to the requirement that where recognition is accorded through a negotiated agreement or

---

[41] ibid. Article XI, paragraph 1 of the GATS states that except under the circumstances envisaged in Article XII, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.

arrangement, a Member must provide opportunity to other Members to accede to the agreement or arrangement or to negotiate a comparable deal.[42]

3.2.5 *Settlement of Disputes*

In view of the highly specialised knowledge that is required for dealing with disputes pertaining to financial services, the Annex states that the panels for settlement of such disputes must have relevant expertise in respect of each specific financial service. Till date no dispute concerning financial services has come up before the WTO DSB.

3.3 THE UNDERSTANDING ON COMMITMENTS IN FINANCIAL SERVICES

Another instrument pertaining to financial services that was made at the conclusion of the Uruguay Round of MTN is the Understanding on Commitments in Financial Services. Unlike the Annex on Financial Services, the Understanding is not an integral part of the GATS.[43] It arose out of a desire of a number of countries to have a more far-reaching set of rules and disciplines in the financial services sector than that provided under the GATS. Thus, the rules and disciplines

---

42 Trebilcock and Howse, n.25 p.296.

43 Jarreau, n.2 p.39; Leroux, n.18 p.432.

of the Understanding go far beyond those contained in the GATS.[44] The Understanding is optional in nature and all the GATS Members are not bound to follow it. It becomes binding on a Member only when a Member adheres to it voluntarily.[45] A Member may adhere to the Understanding by declaring in its Schedule of Specific Commitments that the same are subjected to the principles contained in the Understanding. The commitments in the Understanding gain legal force only from their presence in the schedules of commitments.[46] Mostly countries that are members of the OECD have followed the Understanding.

The Understanding follows an alternative approach to that taken in Part III of the GATS i.e., with regard to specific commitments. The preamble to the Understanding lays down the conditions under which this alternative approach could be taken. Accordingly, the alternative approach should not come into conflict with the provisions of the GATS, it should be without prejudice to the right of a Member to follow the approach under Part III of the GATS, the specific commitments that arise out of this approach must be applied on an MFN basis, and the adoption of this approach should not lead to any presumption as to the degree of liberalisation to which a Member is committing itself under the GATS. It should be noted that as the Understanding has to be applied on an MFN basis, a Member that adheres to the same must comply with the higher levels of obligations which it accepts thereunder not only in respect of Members that follow the Understanding, but also in respect of other Members as well.

---

44 Leroux, n.18 p.433.

45 ibid.

46 Trebilcock and Howse, n.25 p.297.

The Understanding contains a standstill obligation besides obligations pertaining to market access and national treatment.

3.3.1 *The Standstill Obligation*

Section A of the Understanding states that any conditions or limitations made in terms of the Understanding shall be limited to existing non-conforming measures. This means that when a country chooses to follow the Understanding, it has to make commitments which reflect the extent to which it actually allows market access and national treatment in practice. This marks a significant change from the GATS' scheme of things. Under the GATS, the Members are left free to make commitments that bind them at below the status quo and many countries, including India, have done this. This flexibility is not available to a Member that adheres to the Understanding.

3.3.2 *Market Access*

Article VIII of the GATS only requires that a monopoly supplier of a service in a Member's territory has to comply with the Member's obligations under Article II and its specific commitments. The Understanding goes beyond this and obligates its adherents to list in their schedules on financial services their existing monopoly rights and mandates them to either eliminate them or reduce their scope. This provision also applies to financial services supplied in the

exercise of governmental authority in terms of paragraph 1.2.3 of the Annex on Financial Services.[47]

By virtue of Article XIII of the GATS, the provisions of the GATS on market access and national treatment are not applicable to services purchased by way of government procurement. However, the Understanding mandates its Members to apply the MFN and national treatment rules to purchase of financial services by way of government procurement.[48]

Moreover, the Understanding obligates its Members to permit the supply of financial services through the cross-border and consumption abroad modes of supply either as a principal through an intermediary, or as an intermediary.[49] In this regard, it would be pertinent to analyse the definition of a non-resident supplier of financial services given in the Understanding. As per this definition, a non-resident supplier of financial services is a supplier of a Member, which supplies a financial service from an establishment located in the territory of another Member, regardless of whether such a financial service supplier has or has not a commercial presence in the territory of the Member wherein the financial service is supplied.[50] Jarreau concludes that this definition implies that a financial service supplier located in the territory of one member need not establish

---

47 *Understanding on Commitments in Financial Services*, Section B, paragraph 1. Also see Appendix 3.

48 ibid, Section B, paragraph 2.

49 ibid, Section B, paragraph 3.

50 ibid, Section D, paragraph 1.

a commercial presence in the territory of another Member before offering financial services to persons who are residents of the latter Member.[51]

Commercial presence is essential for the supply of some financial services. Thus, the Understanding specifies that each Member must grant financial service suppliers of any other Member the *right to establish or expand* within its territory a commercial presence.[52] Thus, the Understanding goes beyond the right to establishment and explicitly stretches its folds to cover the right to expand. Commercial presence may be established through the acquisition of existing enterprises.[53] The Understanding defines commercial presence in very broad terms and includes within its ambit wholly or partly-owned subsidiaries, joint ventures, partnerships, sole-proprietorships, franchising operations, branches, agencies, representative offices or other organisations.[54] As pointed out by Leroux, the Understanding gives foreign financial service suppliers the right to establish a commercial presence and the right to expand the same through either internal growth or the acquisition of other enterprises.[55]

The Understanding also obligates Members to permit financial service suppliers of other Members that are established in its territory, to offer any new financial service.[56] Where a foreign financial service supplier is established in the

---

51 Jarreau, n.2 p.58.

52 *Understanding*, n.47 Section B, paragraph 5. Emphasis added.

53 ibid.

54 ibid, Section D, paragraph 2.

55 Leroux, n.18 p.436.

56 *Understanding*, n.47 Section B, paragraph 7.

territory of another Member, it can offer a new financial service. According to Leroux, neither the GATS nor the Understanding defines the term 'established' and hence there is legal uncertainty as to whether it means having a mere commercial presence or otherwise in the territory of a host Member.[57]

A new financial service is not a service that did not exist before. The Understanding defines a new financial service as a service of a financial nature that is not supplied by any financial service supplier in the territory of a particular Member but which is supplied in the territory of another Member.[58] Leroux observes that the obligation under paragraph 7 of Section B of the Understanding is aimed at preserving the competitive advantage of the financial service suppliers of a Member over the financial service suppliers of the host Member.[59]

The Understanding also prevents Members from taking measures that prevent the transfer of information, or the processing of financial information, or the transfer of equipment, where the same are necessary for the conduct of the ordinary business of the financial service supplier. This obligation is subject to importation rules consistent with international agreements and regulations pertaining to the protection of personal data, privacy and the confidentiality of individual records and accounts. However, this latitude cannot be used for circumventing the provisions of the GATS.[60]

---

57 Leroux, n.18 p.437.

58 *Understanding*, n.47 Section D, paragraph 3.

59 Leroux, n.18 p.437.

60 *Understanding*, n.47 Section B, paragraph 8.

The GATS does not provide for any minimum level of market access with regard to the temporary entry of personnel necessary for the establishment of a commercial presence.[61] However, the Understanding states that Members must permit such entry of natural persons for establishing or expanding a commercial presence. It also provides a list of the personnel who are to be provided such entry.[62] It should be noted that a Member is bound to permit the entry of senior managerial personnel who possess proprietary information that is essential for the establishment, control and operation of such services, and of specialists in the operation of the particular financial service. However, the entry of specialists in telecommunications services, computer services and accounts of the financial service supplier, and of actuarial and legal specialists may be permitted subject to the unavailability of such personnel in the territory of the host Member.[63] This provision effectively incorporates a right of temporary entry for financial services personnel.[64] This approach of clubbing the movement of natural persons with commercial presence would enable developed countries to send their financial services professionals to countries where their financial services institutions have a commercial presence without negotiating for the same under the mode of supply through the movement of natural persons, which would entail making significant concessions on movement of labour from the developing countries.

---

61 Leroux, n.18 p.438.

62 *Understanding*, n.47 Section B, paragraph 9.

63 ibid.

64 Trebilcock and Howse, n.25 p.297.

Moreover, even if the measures of a Member are in compliance with the GATS and the Understanding, the Understanding calls upon Members to make best endeavours to remove or limit such measures if they have any significant adverse effect on the liberalisation of trade in financial services.[65] This applies even to measures that are non-discriminatory. Thus, any Member can plead that a particular measure of another Member is having an adverse effect on its financial services and thus call upon it to remove the same. There is nothing to stop the application of this provision even to prudential measures.

3.3.3 *National Treatment*

For having an effective access to the financial services markets of a country, foreign financial services suppliers must have access to certain institutions, e.g. stock exchanges.[66] The Understanding obligates members to grant access to payment and clearing systems operated by public entities and to official funding and refinancing facilities that are available in the ordinary course of business, if such access is given to domestic players.[67] This right is available only to those foreign financial service suppliers that are established in the territory of the host Member.[68] Usually central banks of countries act as lenders of the last resort to prevent the failure of national financial service suppliers. This provision effectively prevents the public authorities of a country from resuscitating the

---

65 ibid, Section B, paragraph 10. Leroux, n18 p.438.

66 Leroux, n.18 p.439.

67 *Understanding*, n.47 Section C, paragraph 1.

68 ibid. Leroux, n.18 p.440.

national financial institutions through protective discrimination. Given the fact that national financial institutions have traditionally played a key role in the growth of the developing economies, this obligation is detrimental to the interests of the developing countries. Moreover, this provision seeks to guarantee capital account transactions of foreign financial institutions by giving them the right to access facilities like the stock markets if the same are accessible to domestic institutions.

3.4 TRADE, REGULATIONS AND INVESTMENT INTERFACE

As with any other service, financial services can be effectively regulated through regulations that can reach the suppliers of the service. It is in this respect that governments play a crucial role in influencing the course of trade in financial services. Since financial services play a very central role in a country's economic growth by providing the funds or capital necessary for the same, governments have an obligation to regulate this sector in order to prevent its manipulation by vested interests. Moreover, since the financial sector is a vital source of capital for the other sectors of the economy, they naturally attract a lot of investment, which in turn encourages speculative behaviour and consequently, it has to be regulated. As already discussed, the WTO regime for financial services does not prevent governments from taking regulatory measures that are in the interest of

macroeconomic welfare and prudential needs, unless they are disguised as trade restricting measures. Thus, there is an interface between trade, regulatory and investment measures that may have to be dealt with by the WTO and its Dispute Settlement Body as well as by governments and other functionally oriented international organisations that try to harmonise regulatory norms for the benefit of international financial services. According to Morrison, the internationalisation of financial services must be squared with regulatory role of governments since regulatory measures of governments may hinder trade.[69]

The regulation of any service can be effective only in those jurisdictions where the supplier of the service is present. On the other hand, in the case of cross-border trade in financial services, the regulation can be most effective only at the home country of the supplier while in the case of supply through commercial presence the regulations of the host country will have greater effect. The home country, however, may not be very concerned about the international operations of their financial institutions other than avoiding their bankruptcy. Thus, host country regulators may not have access to the information that may be necessary for them to take effective regulatory steps.[70] Unless there is a bilateral arrangement on this aspect like, for instance, a Mutual Legal Assistance Treaty between the home country and the host country, these jurisdictional problems could become hard to reconcile. In such situations, trade restrictive measures may have to be adopted in the garb of regulatory sanctions.

---

[69] Peter Morrison, "The Liberalisation of Trade in Financial Services and the General Agreement on Trade in Services", *Singapore Journal of International & Comparative Law*, vol.5, 2001, pp.593-4.

[70] Stichele, n.37 p.4.

The GATS does not provide for any mechanism for reconciling the possibilities of conflict of regulatory jurisdictions. Though ostensibly the GATS does not concern itself with the regulatory aspects of a service unless they are discriminatory, as pointed out by Trachtman, every financial regulation is always an intervention in the free market.[71] The GATS disciplines suffer from gross inadequacies in this respect. This is because, many countries have adopted non-binding norms for regulation of specific financial services prescribed by various functional international organisations on various financial services like, for instance, the norms devised by the Basel Committee of the Bank for International Settlements (BIS).[72] For instance, the US examines the extent to which a foreign bank's home country regulates in compliance with the Basel Core Principles for Effective Banking Supervision under the Foreign Bank Supervision Enhancement Act (FBSEA) and imposes trade restrictions on those countries that do not comply with the norms.[73] The GATS cannot wish away the necessity of addressing this aspect.

---

71 Joel P. Trachtman, "Addressing Regulatory Divergence through International Standards: Financial Services", in Aaditya Mattoo and Pierre Suavé, *Domestic Regulation and Service Trade Liberalization* (Washington, D.C.: The World Bank, 2003), p.28.

72 The Basel Committee was established by the central bank Governors of the Group of Ten countries at the end of 1974, in response to two large international bank failures. The committee's members are the central banks or other bank supervisory authorities of Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, the United Kingdom, and the United States. The Basel Committee has taken a leading role in developing capital adequacy standards for financial institutions (the Basel Accord), in organizing an understanding of the allocation of supervisory jurisdiction and responsibility with respect to international banking organizations (the Basel Concordat), in developing minimum standards for regulation of international banking organizations (the Basel Minimum Standards), and in developing core principles for bank supervision (the Basel Core Principles); ibid, pp.32-33.

73 ibid, p.36.

Financial services also involve the movement of capital as a vital factor for its supply. Particularly, where financial services are provided through commercial presence, it entails a right of establishment through various means. Indeed, a foreign financial institution can effectively establish itself by investing capital. In terms of footnote 8 to Article XVI of the GATS, any movement of capital that is related to the supply of a service through commercial presence has to be allowed, where market access through commercial presence is allowed. Brazil has contended that this provision amounts to capital account liberalisation even if a country has not fully liberalised its capital account system.[74] The requirement for allowing movement of capital in the case of commercial presence has to be met wherever such movement is *related* to the commercial presence. It is interesting to note that in the case of cross-border supply, movement of capital has to be allowed only where it is *essential* to such supply. Thus, in the case of commercial presence a foreign financial institution must be allowed to transfer capital if any sort relationship is established between the transfer and the commercial presence, even if the same is not essential for the commercial presence.

While the GATS allows governments to take macroeconomic welfare and prudential measures, it is not clear whether macroeconomic measures restricting investment will stay outside its ambit. Compared to the GATS, Article 1401 of the North American Free Trade Agreement (NAFTA) brings investors of another Party, and investments of such investors in financial institutions in the Party's

---

74 Stichele, n.37 p.3.

territory, within the scope of that agreement.[75] Moreover, in terms of Article 1405 of the NAFTA, each party is obligated to extend national treatment to *investors* of another party in respect of the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of financial institutions and investments in financial institutions in its territory.[76] The GATS needs to clarify whether investments in financial services are also to be accorded the benefit of national treatment. This will make the GATS more transparent and enable Members to take informed positions on financial services liberalisation under the WTO.

The provisions of the GATS and the Annex on Financial Services need to be interpreted authoritatively in order to bring more clarity to the WTO regime for financial services. In particular, the scope of the regime in respect of investments related to financial services has to be clarified. Moreover, the WTO has to lay down the criteria for distinguishing between a regulatory measure and a trade restricting measure. In this respect, particular attention should be given to the specific regulatory needs of developing countries. While the necessity for the movement of capital in financial services has been recognised, in view of the potential of the developing countries in providing auxiliary financial services like financial data processing, consultancy, etc., the right to mobility of labour should be similarly recognised.

---

75 *North American Free Trade Agreement (NAFTA)*, Article 1401 (1) (b).

76 ibid, Article 1405 (1) and (2).

CHAPTER IV

REGULATION OF FINANCIAL SERVICES IN INDIA

This chapter will examine the regulatory regime for financial services in India in the context of the commitments made by India under the General Agreement on Trade in Services (GATS) in respect of financial services. Since the banking sector constitutes the largest segment of the financial services sector in India, this chapter will focus on the banking regulatory laws of India in the context of India's commitments on financial services under the GATS. In view of the fact that the distinction between banking and non-banking financial services is getting increasingly blurred, this chapter will also dwell upon some aspects of the regulation of non-banking financial services in India. However, a study of the regulation of the insurance and capital markets in India is outside the scope of this chapter.[1]

4.1 INDIA'S COMMITMENTS ON FINANCIAL SERVICES

The GATS commitments of India in respect of financial services can be studied with reference to two sectors – the insurance sector and the banking and

[1] The financial services intermediaries comprise of banking and non-banking financial institutions. The banking sector comprises both commercial banks and co-operative banks. The non-banking financial services sector is comprised of different kinds of financial services activities e.g., insurance, mutual funds, etc. The financial services markets in India are comprised of money markets, credit markets and capital markets. Often separate regulators are established for specific financial service activities. For a general overview of the structure of the financial sector in India, see Rupa Chanda, "Trade in Financial Services: India's Opportunities and Constraints", (Working Paper No.152, Indian Council for Research on International Economic Relations, New Delhi, 2005), pp.16-17.

other financial services sector excluding insurance. It should be noted that India does not follow the Understanding on Financial Services. Moreover, India has made no binding commitment in respect of supply through the presence of natural persons (mode 4).

India's commitments on financial services are subject to the entry requirements, domestic laws, rules, regulations, and the regulatory directives of the RBI, SEBI and other competent regulatory authorities of India.[2] The GATS allows Members to make specific commitments in respect of any service sector subject to the terms, limitations and conditions set by the Member.[3] However, in terms of paragraph 2 of Article XVI of the GATS, Members making market access commitments in respect of any service cannot impose limitations on the number of service suppliers, the total value of service transactions, the quantum of service operations, the total number of natural persons that may be employed, requirements as to specific types of legal entity or joint venture needed for providing a service and limitations on the participation of foreign capital unless such limitations or restrictions are specifically mentioned in the schedules of commitment. Therefore, the entry requirements, laws, rules, regulations and directives of the regulatory authorities will prevail over GATS obligations only insofar as they are not of the nature mentioned in paragraph 2 of Article XVI.

Financial services are mainly provided either through the mode of cross-border supply or through the mode of commercial presence, which requires the

---

2 World Trade Organization (WTO), *India: Schedule of Specific Commitments: Supplement 4*, GATS/SC/42 Suppl.4, 26 February 1998.

3 See *General Agreement on Trade in Services (GATS)*, Articles XVI (1) and Articles XVII (1). Also see selected provisions of the GATS in Appendix 1.

free movement of capital as well as the establishment of commercial presence through investment. Though the commitments of India in respect of financial services are subject to entry requirements, domestic law, rules and regulations, India's schedule of commitments do not specify the kind of entry requirements, laws, rules and regulations subject to which the scheduled commitments on financial services must be read.[4] Thus, even requirements pertaining to foreign investment limits in financial services may be brought within the scope of this stipulation. However, in terms of footnote 8 to Article XVI, paragraph 1 of the GATS, the movement of essential capital has to be allowed in the case of cross-border supply and the movement of related capital has to be allowed in the case of commercial presence. Therefore, even if an entry requirement, law, rule or regulation does not come within the ambit of paragraph 2 of Article XVI, they would have to satisfy the requirements of footnote 8 to Article XVI, paragraph 2.

4.1.1 *Commitments in the Insurance Sector*

In the insurance sector, India has made specific liberalising commitments in respect of three areas – non-life insurance, reinsurance and retrocession and insurance intermediation. In all these sub-sectors India has made limited market access and national treatment commitments. India has not made any additional commitment in the insurance sector.

---

[4] However, a general provision of this nature is not peculiar to India's Schedule of Commitments. See, for example, the commitments of Singapore on financial services in WTO, *Singapore: Schedule of Specific Commitments*, GATS/SC/76/Suppl.1/Rev.1, 26 February 1998.

4.1.1.i. *Non-Life Insurance*

India's commitment in the non-life insurance sector is limited to insurance of freight. India has made unbound entries in this sub-sector.[5] Specific limitations on market access are laid down in the case of cross-border supply of such services. The limitation is to the effect that when an Indian importer or exporter assumes the responsibility for the insurance of freight in accordance with the terms of a contract, the insurance has to be taken only through an Indian company.[6] All other entries in this sub-sector are unbound.

4.1.1.ii *Reinsurance and Retrocession*

India has also made commitments on reinsurance and retrocession.[7] India has laid down specific limitations on market access under the modes of cross-border supply and consumption abroad of such services. India has obligated to allow market access in respect of reinsurance business only to a limited extent. Reinsurance can be taken with foreign reinsurers only to the extent of the residual uncovered risks after making the obligatory or statutory placements domestically with Indian insurance companies.

---

5 An unbound entry in the Schedule of commitments means that in respect of the mode of supply against which that entry is made the Member making such an entry does not make any specific commitment.

6 WTO, n.2 Section A.

7 Reinsurance is the process of insurance companies insuring underwritten policies with other financial institutions in order to offset the risks undertaken by the latter by exposing their assets in the market. It is like an insurance of an insurance policy.

Retrocession is the process by which all or part of the risks assumed by a reinsurer in an insurance contract are reassigned or ceded by a reinsurer to another insurance company.

The distinct feature of India's commitments on reinsurance is that Indian insurance companies are given preferential treatment. Foreign insurance companies have to first place their business with Indian insurance companies. Only the value of the risks that are not covered after reinsuring the risks with the Indian insurance companies can be placed with foreign insurance companies. Therefore, India has made no commitment on giving national treatment to foreign insurance companies in this sub-sector.

This requirement of mandatory placement of reinsurance business with Indian insurance companies helps India to retain control over the international transfer of capital from India. This also explains why commercial presence is not allowed in this sector because allowing commercial presence would entail permitting any transfer of capital that is related to the commercial presence of the service supplier in terms of footnote 8 to Article XVI, paragraph 1 of the GATS.

In the sub-sector of insurance intermediation, Indian commitments are limited only to intermediation in reinsurance. In respect of market access, India has specific limitations on intermediation in the reinsurance business through the modes of cross-border supply and consumption abroad which complements the limitations under these modes in respect of reinsurance and retrocession. Accordingly, reinsurance of domestic risks can be placed with foreign intermediaries only after their placement with Indian intermediaries, to the extent of the residue remaining after such placement.

India also maintains some market access limitations in respect of the commercial presence of such intermediaries. Thus, overseas brokers (foreign

insurance companies) may establish resident representatives or representative offices to procure reinsurance business from Indian insurance companies. Such intermediaries with a commercial presence in India cannot undertake any other activity in India and all of their expenses have to be met by remittances from abroad.[8] In this way, the right of establishment of representative offices has been recognised only for the limited purpose of reinsurance intermediation. India has made no national treatment commitment with regard to reinsurance intermediation.

The market access commitments of India in respect of reinsurance have been made against the entry – 'reinsurance and retrocession'. However, the commitments do not mention anything about retrocession. It is not clear whether any reference to reinsurance in the commitment would include retrocession. Moreover, while commercial presence of overseas brokers is allowed in the reinsurance business through the establishment of representative offices, there is no requirement for local incorporation of the representative offices. Therefore, there is nothing in India's commitment on financial services to prevent other foreign financial institutions with a commercial presence in India, for instance foreign banks, from acting as a representative office of an overseas broker. In this context it is worth noting that the commitment of Singapore in respect of insurance intermediation permit market access through commercial presence only to those brokers who are locally incorporated subsidiaries of the foreign brokers.[9]

---

8 WTO, n.2 Section A.

9 WTO, n.4 Section A.

4.1.2 *Commitments in Banking and Other Sectors*

India has also made specific commitments with regard to banking services and other financial services excluding insurance. Commitments in this sub-sector have been made in respect of seven kinds of services viz., general banking functions, participation by banks in the issue of securities and the provision of underwriting and placement agency services, stock broking, financial consultancy services, factoring, financial leasing and venture capital services. In respect of banking and other financial sectors, India has made commitments only in respect of commercial presence. There is no commitment from India in respect of the other modes of supply of such services.

4.1.2.i *General Banking Functions*

In terms of India's Schedule of Specific Commitments on financial services under the GATS, general banking functions are comprised of the following: acceptance of deposits and other funds that are repayable to the public, lending of all types excluding factoring services, all payment and money transmission services, guarantees and commitments, trading of money market instruments, transferable securities and foreign exchange for own account, portfolio management, custodial and trust services and clearing services for cheques, drafts and other instruments of other banks.[10]

Limitations on Direct Market Access - In respect of commercial presence of foreign banks in India, certain limitations on market access have been incorporated in the Schedule. Thus, a foreign bank can have a commercial

[10] WTO, n.2 Section B.

presence in India only through the establishment of branch operations in India if that foreign bank is licensed and supervised as a bank in its home country Moreover, foreign banks can operate in India only if they obtain a license for the same under India's domestic law.[11]

The limitations on market access in the banking sector satisfies the requirements of Article XVI, paragraph 2 of the GATS because they have been specifically mentioned in the Schedule. It is evident that the ceiling of twelve licenses per year for establishing new branches is a limitation on the number of service suppliers under Article XVI, paragraph 2 of the GATS.

Limitations on Indirect Market Access - The limitations on direct market access through commercial presence in this sector have been supplemented by the limitations maintained by India on indirect market access. Thus, branches of foreign banks with a license to do business in India cannot individually invest up to 10 per cent of their own funds, or more than 30 percent of the invested companies capital, whichever is lower, in other financial services companies. In this way the ability of foreign banks to gain controlling stake in other financial services companies has been restrained. Moreover, India retains the liberty to deny licenses for new foreign banks when the maximum share of foreign banks in India exceeds 15 per cent of the total assets in the banking system in India. Foreign banks are also subject to non-discriminatory resource allocation

---

[11] The Schedule of Specific Commitments of India provides for a limit of twelve licenses per year for both new entrants and for existing foreign banks. However, the Schedule does not make it clear whether this limit of twelve licenses per year is the maximum ceiling permissible for new entrants and existing banks. Foreign banks can install Automated Teller Machines (ATM) at branches as well as other places identified by them. An ATM installed at a place other than a licensed branch is treated as a new place of business for which a license is required. However, licenses issued for ATMs of foreign banks do not come within the ceiling of twelve licenses per year; ibid.

requirements.[12] Therefore, foreign banks can be asked to channelise a certain portion of their resources towards financing the requirements of the priority sectors in India.

India maintains certain limitations on national treatment of foreign banks in India. As foreign banks are subjected to non-discriminatory resource allocation requirements, they are required to constitute Local Advisory Boards (LAB), which should include professionals and persons with expertise in areas like small-scale industry and exports. Only the Chief Executive Officer (CEO) of the LAB may be a foreign national. The Chairman and all other Members of the LAB must be resident Indian nationals whose appointment must be approved by the RBI. Another limitation on national treatment is that the public sector enterprises in India can invest their surplus funds in term deposits only with public sector banks in India.

It is evident that India is not keen on allowing foreign banks to gain substantial control in the banking sector though entry of foreign banks is required for generating more financial resources. This is because lending activities of foreign banks are generally conducted in foreign currency. As the loan taken in foreign currency has to be returned in foreign currency, they lead to outflow of foreign currency, which puts pressure on the host country's foreign exchange reserves.[13] In economies like those in East Asia where there is very little restriction on the inflow and outflow of foreign exchange, a huge amount of

---

12 ibid.

13 See Myriam Vander Stichele, *Potential Risks of Liberalisation of Financial Services in GATS* (Amsterdam, Stichting Onderzoek Multinationale Ondernemingen [SOMO], 2003), p.2.

outflow of foreign exchange in the short-term led to financial instability. India was relatively untouched by the financial crisis that hit the East Asian economies largely because the financial sector in India was not fully liberalised.[14]

4.1.2.ii *Issuing of Securities and Related Services*

Foreign banks can also participate in issuing all kinds of securities as well as undertake underwriting and placement agency activities besides providing related services. Market access through commercial presence is allowed in this sub-sector for foreign banks which have branches that are licensed to do banking business in India. However, even foreign financial services companies besides banks can provide such services through these modes. This is because these services are not banking services per se as they do not involve the traditional deposit taking and lending activities of banks. All foreign financial services companies, including banks that do not have a license to operate branches in India, may obtain market access through commercial presence in this segment by way of incorporation with foreign equity participation not exceeding 51 per cent. Entities that come within the scope of these limitations on market access have to comply with similar limitations on national treatment.[15] Foreign banks can also participate in financial consultancy, factoring and venture capital services in a

---

[14] For a discussion on the ill effects of large volumes of capital inflows into developing countries and the experience of liberalization of inward capital flows in India see *Business Line* (Internet edition), January 29, 2003, at <http://www.blonnet.com >.

[15] WTO, n.2 Section B.

similar way. Significantly, in the case of venture capital services, the entire funding has to be done out of the equity.[16]

4.1.2.iii *Stock Trading Business*

Market access is allowed only through the establishment of locally incorporated joint venture company with foreign equity participation not exceeding 49 per cent. Moreover, only recognised foreign stock broking companies are eligible to participate in such joint ventures.

4.1.2.iv *Financial Consultancy Services*

. As in the case of participation in the issuing of securities, market access through commercial presence for providing financial consultancy services is allowed both for foreign banks and for other foreign financial services companies.[17]

4.2 INDIA'S POSITION ON FINANCIAL SERVICES IN THE WTO

It is apparent from India's schedule of commitments on financial services that by and large India has been very cautious about making any commitment on financial services. That is why India has few binding GATS commitments on

---

16 ibid.

17 The Schedule defines financial consultancy services as "... financial advisory services provided by financial advisers, etc.to customers on financial matters, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy."; ibid.

financial services, thereby excluding measures pertaining to particular modes of supply of a financial service from the scope of the commitment. Moreover, India's commitments do not deal with the entire spectrum of financial services activities. Indeed, many areas of financial services like life insurance, mutual funds, etc., are still not covered by India's GATS commitments.

By making limited commitments, India has tried to demonstrate its willingness to reduce barriers to trade in financial services while retaining the option to impose suitable restrictions on the trade in such services in order to protect its interests. The financial sector in India is being gradually liberalised. As this process evolves over time, many new regulatory problems might challenge the authorities in India. The regulatory authorities must be given a great deal of flexibility to tackle such unforeseen situations. The GATS provides some flexibility in this regard by allowing its Members to make market access commitments on its own terms. India is rightly making use of this flexibility. By not making commitments of liberalisation within the GATS to the extent that it does in practice India can easily retract any wrong step that it might take inadvertently in the future while pursuing the liberalisation of the financial sector because as pointed out by Kono and other scholars, the GATS restrains the chances of any backtracking from the commitments once they are made binding.[18]

Nevertheless, India's existing commitments on financial services marks an improvement over its initial commitments at the end of the Uruguay Round of the

---

[18] Masamichi Kono and others, *Opening Markets in Financial Services and the Role of the GATS*, (Geneva, World Trade Organization, 1997), p.5.

Multilateral Trade Negotiations (MTN).[19] In spite of the improved commitments, India's position under the GATS still falls short of the extent to which India actually allows market access in various financial services.[20] India's schedule of commitments is silent on the extent to which foreign investment is permissible in the banking sector in India. The *Economic Survey* points out that in practice, a foreign bank may operate in India through branch presence, or through wholly owned subsidiaries or by establishing a subsidiary with aggregate foreign investment up to 74 per cent in a private bank.[21] Indeed, India pursues a more liberal policy on foreign entry in the financial sector than is revealed in India's GATS commitments.

This clearly shows that financial sector liberalisation involves to a large extent issues pertaining to FDI especially where supply of the financial service through commercial presence is involved. Translating the extent to which FDI participation is allowed in a particular financial sector into binding GATS

---

19 The existing set of commitments was made by India at the conclusion of the Financial Services Agreement (FSA) in 1997. At the conclusion of the Financial Services Agreement (FSA), India enlarged the scope of its commitments on financial services by extending its sectoral coverage to include areas like stock broking services and by removing its restrictions on the banking sector by undertaking a liberalised commitment on ATMs, which are henceforth not regarded as a separate branch and by increasing the maximum number of branches that can be opened every year by a foreign bank. For a critical discussion on India's commitments on financial services from an economic perspective see Chanda, n.1 pp.65-66.

20 While India is committed to allow a maximum of twelve new branches every year to foreign banks, at the time of making the commitment, many foreign banks in India had more than twelve branches. Moreover, foreign banks hold more than 15 per cent of the total assets in the banking system in India; ibid, p.69.

21 India, *Economic Survey 2003-2004*, p.53. As stated in the *Economic Survey* for 2003-2004 India has raised the limit of Foreign Direct Investment (FDI) in private banks to 74 per cent from the existing 49 per cent. The FDI limit in public sector banks is pegged at 20 per cent. Moreover, foreign banks have a lower Priority Sector Lending (PSL) requirement of 32 per cent compared to that of Indian banks, which is set at 40 per cent.

commitments would deny India the flexibility to amend its FDI policy in a particular financial sub-sector from time to time.

4.3 INDIA AND THE DOHA ROUND OF NEGOTIATIONS

As mandated by Article XIX of the GATS, a new round of negotiations on services was launched in the year 2000 which has been subsumed under the Doha Round of negotiations following the Doha Declaration of 2001 at the WTO Ministerial at Doha in Qatar.[22] In course of the ongoing Doha Round of negotiations, India has received requests from all the major developed countries for improved commitments on financial services.[23] The thrust of the requests

---

[22] Services have been included in the Doha Development Agenda pursuant to paragraph 15 of the Doha declaration. The Doha Development Agenda is an action plan incorporated in the Doha Declaration that has been drawn up to achieve the objectives of the Doha Declaration. Paragraph 15 of the Doha Declaration states that:

> The negotiations on trade in services shall be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least-developed countries. We recognize the work already undertaken in the negotiations, initiated in January 2000 under Article XIX of the General Agreement on Trade in Services, and the large number of proposals submitted by members on a wide range of sectors and several horizontal issues, as well as on movement of natural persons. We reaffirm the Guidelines and Procedures for the Negotiations adopted by the Council for Trade in Services on 28 March 2001 as the basis for continuing the negotiations, with a view to achieving the objectives of the General Agreement on Trade in Services, as stipulated in the Preamble, Article IV and Article XIX of that Agreement. Participants shall submit initial requests for specific commitments by 30 June 2002 and initial offers by 31 March 2003.

[23] Rupa Chanda has observed three fundamental objectives of these requests. First, to obtain full commitments in the first three modes on insurance, banking and non-banking financial services with particular focus on commercial presence; secondly, to extend the sectoral coverage on financial services to activities like life insurance, financial information processing, pension and fund management, trading in derivatives, etc.; third, to eliminate discriminatory treatment of foreign service providers and clarification of rules and criteria for applying certain restrictions e.g., restrictions on investments by branches of foreign banks in other financial institutions, removal of nationality requirements of members of LABs of foreign banks, removal of discriminatory

made to India is on opening more sectors, further liberalised on in those sectors where India has existing commitments, and creation of a more transparent regulatory mechanism. For instance, the European Union (EU) has requested India to eliminate the 15 per cent ceiling on assets of foreign banks in the total assets of the banking system in India. The EU, in particular, has requested India to open its market for derivative financial transactions.[24] Another aspect of the requests made to India is highlighted by the request of the United States (US), which asks India to make the regulatory regime more transparent.[25]

A perusal of the requests made to India reveals that the EU and the US, which together constitute the major segment of international financial services, are keen on securing market access into markets like India through the establishment of commercial presence. This is reflected in the requests for access to sectors like derivatives trading where domestic financial service suppliers do not have much strength in comparison to their international rivals. Such requests completely ignore the fact that speculative behaviour encouraged by such transactions can lead to financial instability. Moreover, there is very little recognition of the national, local, economic, social and political distinctiveness of the countries to which such requests are made, for the requests made to all

---

treatment against foreign banks requiring public sector enterprises to invest surplus funds in term deposits only with public sector banks. See Chanda, n.1 pp.71-72.

[24] Brigitte Young, "Conflicts between Regionalisation and the WTO Governance Structure" (Paper prepared for the Fifth-Pan European International Relations Conference, *Constructing World Order*, The Hague, September 9-11, 2004), p.17.

[25] Chanda, n.1 p.70.

developing countries have a similar tenor.[26] Young rightly concludes that this indifference towards the distinct characteristics of developing countries is a major drawback of the requests.[27]

India does not have any significant export interest in financial services. Nevertheless, India has made some conditional offers on financial services.[28] In spite of the fact that India's existing commitments and its offers on financial services in the Doha Round of negotiations fall short of the status quo, it is submitted that this is in the best interest of India. The financial services sector is at the heart of India's industrial development in the post-liberalisation economy. Substantial foreign control of this sector can be allowed only when the domestic financial services institutions become strong competitors to their foreign rivals.

India must also have strong regulatory and supervisory institutions in place before ushering in more liberalistion. Since the liberalised on of the economy, India has witnessed some failures of the capital market, which could not be prevented by the regulators like the Reserve Bank of India (RBI) and the Securities and Exchange Board of India (SEBI). Often the lines of jurisdiction of the regulators are not drawn out clearly. Perhaps this requires a number of institutional changes like turning the RBI into a super-regulator of the money and

---

26 For a comparative overview of the requests made by the European Union (EU) to various developing countries see Young, n.39 pp.16-8.

27 ibid, p.19.

28 India has also offered to allow foreign banks to invest in private banks through FDI route subject to a ceiling of 49 per cent. However, even this falls below the status quo since India has been allowing FDI in private banks up to 74 per cent. India is also contemplating to introduce FDI in the public sector banks up to 40 per cent. Moreover, India's commitments on national treatment remain mostly unchanged. See WTO, *India: Conditional Intial Offer*, TN/S/O/IND, 12 January 2004. See also Chanda, n.1 p.73.

capital markets with delegation of powers to liberalised regulators like the SEBI.[29] Without incorporating the necessary institutional changes, India cannot fully liberalise the financial sector. Even where the financial sector has been largely liberalised, India has rightly refrained from incorporating the same in its GATS commitments because there always remains the possibility that a particular policy may not work advantageously and consequently it should be easy to retract the same. A binding GATS commitment would deter any expeditious movement in this respect.

4.4 DOMESTIC REGULATION AND SUPERVISION

India's commitments on financial services are subject to the general qualification that the foreign financial services suppliers have to comply with entry requirements, domestic laws, rules and regulations and the terms and conditions laid down by the appropriate regulatory authorities from time to time. In this perspective, it would be pertinent to examine certain legal aspects of the regulation of the banking sector in India.

4.4.1 *The Regulation of the Banking Sector in India*

The banking sector in India is regulated under the provisions of the Banking Regulation Act of 1949 and the Reserve Bank of India Act of 1934. Substantial powers to regulate the banking sector are vested in the RBI under the

---

[29] For a general discussion on the financial regulatory structure in India see, Manas Chakravarty, *Regulatory Structure for Financial Sector: Emerging Trends* (New Delhi: Asian Institute of Transport Development, 2001).

Banking Regulation Act while the RBI has been given some supervisory powers under the RBI Act.

4.4.1.i *The Banking Regulation Act*

The Banking Regulation Act applies to the business of banking in India. This Act defines banking as the accepting of deposits of money from the public for the purpose of lending, which is repayable on demand or otherwise, and which may be withdrawn by cheque, draft, order or otherwise.[30] Any entity that is primarily engaged in this type of business may be regarded as a banking company. In terms of Section 22 of the Act, no company can carry on the business of banking in India without obtaining a license for the same from the RBI.[31] Section 22 of the Act lays down certain conditions on which the RBI may issue a license. This section also lays down specific conditions pertaining to the grant of a license to foreign banks under Section 22 (3A) of the Act. Foreign banks operating in India that wants to establish a new place of business in India have to obtain the permission of the RBI.[32]

The RBI can refuse a license to a foreign bank in terms of sub-section 3A of Section 22 of the Banking Regulation Act if it determines that the carrying on of the banking business in India by the foreign bank is not in the public interest. Refusal of a license on this ground is permissible in terms of paragraph 2.1 of the Annex on Financial Services, which states that:

---

30 *The Banking Regulation Act, 1949*, Section 5 (6).

31 ibid, Section 22 (1)

32 ibid, Section 23 (1).

> Notwithstanding any other provisions of this Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or *to ensure the integrity and stability of the financial system*....[33]

Paragraph 2.1 of the Annex not only permits measures taken for prudential purposes, but it also permits measures that are taken to ensure the integrity and stability of the financial system. It is submitted that this latter part of paragraph 2.1 of the Annex includes measures taken in view of the public interest. Certainly a financial service that will be detrimental to the public interest will be detrimental to the integrity and stability of the financial system.

The Banking Regulation Act defines a branch as a place where deposits are received, cheques are cashed or moneys are lent.[34] Technically, even ATMs come within the ambit of this definition. Though ATMs are not treated as separate branches as a matter of policy as reflected in India's GATS commitments on financial services, the same is not reflected in this definition.

4.4.1.ii *The RBI as a Regulator and Supervisor*

In terms of the preamble of the Reserve Bank of India Act of 1934, the basic function of the RBI is to regulate the issue of bank notes and the keeping of reserves for securing monetary stability in India, and generally, to operate the currency and credit system of the country to its advantage. This makes the RBI responsible for operating the monetary policy for maintaining price stability,

---

33 *Annex on Financial Services*, paragraph 2.1. Emphasis added. Also see Appendix 2.

34 *The Banking Regulation Act*, n.30 Section 5 (cc).

ensuring the availability and allocation of adequate financial resources for developmental purposes, and the promotion of an efficient financial system and meeting the currency requirements of the public.[35]

During the era of nationalisation,[36] the RBI discharged these functions by subjecting the commercial banks in India to various interest rate controls and pre-emptive regulations like the Cash Reserve Ratio (CRR) and the Statutory Liquidity Ratio (SLR) norms.[37] Besides the CRR and SLR, the RBI also stipulates priority sector lending requirements for commercial banks. The *Economic Survey*

---

[35] Reserve Bank of India (RBI), *Reserve Bank of India: Functions and Working 2001*, (Chennai: Reserve Bank of India, 2001), edn.5, p.4.

[36] Before 1969 the banking sector in India operated in a more or less deregulated environment. Most of the commercial banks were privately owned. In 1946 the State Bank of India and its associate banks were already under the supervision of the RBI. In furtherance of this objective, a law relating to the regulation of the banking sector called the Banking Companies Act was enacted in 1949. When a number of banks failed in the 1960s, it was felt necessary to amend the Banking Companies Act to enable the RBI to seek and obtain relevant information to regulate the activities of banks in India. These amendments were carried out in 1965 and the Banking Companies Act was renamed as the Banking Regulation Act. Government control over the banking sector appeared to be a very attractive option for mobilising financial resources for this purpose. Gradually, banking regulations were tightened. In the context of this state of affairs in the financial sector in India dominated by the public sector banks, the Indian economy is being gradually liberalised since 1991. Consequently, the financial sector is also being liberalised. India has made commitments under the GATS on liberalising the financial services sector. See Kunal Sen and Rajendra R. Vaidya, "India", in José M. Fanelli and Rohinton Medhora eds., *Financial Reform in Developing Countries* (Ottawa: International Development Research Centre, 1998), pp.57-89; S. Venkitaraman, "Regulation and Supervision Issues: Banks and Non-Banks", in James A. Hanson and Sanjay Kathuria eds., *India: A Financial Sector for the Twenty-First Century* (New Delhi: Oxford University Press, 1999); and Chanda, n.1. See also Rakesh Mohan, "Financial Sector Reforms in India: Policies and Performance Analysis", *Economic and Political Weekly*, vol. 40, no.2, 2005, pp.1106-21.

[37] RBI, n.35 p.14. The RBI exerted control over the deposits of banks by making it mandatory for them to maintain a high percentage of their deposits with the RBI in the form of the Statutory Liquidity Ratio (SLR) and the Cash Reserve Ratio (CRR). The SLR is a statutorily fixed percentage of the Net Demand and Time Liabilities (NDTL) of banks that have to be maintained either in cash or in approved securities or both. CRR is a percentage of NDTL that has to be maintained in cash. By 1991, the CRR and SLR together constituted 63.5 per cent of the total bank deposits while the priority sector lending requirements rose to 40 per cent. Since the liberalisation of the economy in 1991, the RBI has gradually relaxed these requirements.

for 2004-2005 states that the CRR now stands at 5 per cent.[38] Foreign banks have to comply with priority sector lending requirements as stipulated by RBI from time to time.

The RBI also acts as a supervisor for ensuring the systemic health of the financial sector. For this purpose, the RBI established the Board for Financial Supervision (BFS) supported by its Department of Banking Supervision (DBS). At present, the BFS has two wings – the DBS and the Department of Non-Banking Supervision (DNBS).[39] Thus, the RBI also supervises the non-banking financial institutions. It has been specifically empowered in this regard in terms of Chapter III B of the RBI Act.

As the distinction between banking and non-banking financial services becomes blurred with the entry of banks into the domain of non-banking financial services like insurance, mutual funds, etc, the RBI has to supervise the non-banking financial services as well. Thus, banks have to obtain the permission of the RBI before amalgamating or merging with a non-banking financial company.[40] Indeed, a comprehensive legislation on the regulation of non-banking financial services institutions has been mooted and the Financial Companies Regulation Bill, 2000 has been introduced in the Indian Parliament. This draft legislation incorporates most of the provisions of Chapter III B of the RBI Act. As the RBI emerges as a super regulator of financial services in India, its relationship

---

38 India, *Economic Survey 2004-2005*, p.56.

39 Reserve Bank of India, n.35 p.23.

40 Reserve Bank of India, *RBI Circular No. RBI/2004/237 DBOD.BP.BC. 89/21.02.043/2003-04, DATED 9-6-2004.*

with other regulators of specific financial services has to be analysed. However, that may be the subject of a separate study.

In performing its functions as a supervisor, the RBI is at liberty to devise its own systems and procedures. However, the RBI has been closely adhering to international standards like the Basle Core Principles for Effective Banking Supervision in pursuit of its supervisory functions.[41] Following the recommendations of the Committee on Banking Sector reforms in 1997, the RBI has gradually implemented the Basle norms.

The moot question is not whether India should liberalise its financial sector but rather whether India should liberalise this sector under the GATS regime for financial services. Indeed, some scholars have argued that by liberalising within the GATS, India can get some advantages. According to Mattoo and Subramanian, India has been very defensive in international trade negotiations in spite of undertaking autonomous reforms and a growing stake in

---

[41] These principles were developed by the Basle Committee on Banking Supervision, which was established in 1975 by the central bank governors of the Group of Ten (G-10) countries. India has been closely associated with the work of this committee though India is formally not a part of the Committee. The Committee meets at the Bank for International Settlements (BIS) at Basle in Switzerland. The Basle Core Principles comprise twenty-five basic principles relating to pre-conditions for banking supervision, licensing and structure, prudential norms, methods of supervision, information requirements, formal powers of supervisors and cross-border banking. For the purpose of effective banking supervision, the Basle Core Principles lay stress on the assessment of risk profiles of banks on an individual basis by the supervisors, which should also form the licensing criteria. Thus, banking laws must set out minimum standards that must be met by banks. Among other things, Principle 6 of the Basle Core Principles states that supervisors must set prudent minimum capital adequacy ratios for banks in accordance with the extent of the risks that they undertake. In this regard, the Basle Committee has agreed on a set of norms for capital adequacy called the Basle Capital Accord. Following the recommendations of the Committee on Banking Sector reforms in 1997, the RBI has gradually implemented the Basle norms. See Basle Committee on Banking Supervision, "Basle Core Principles for Effective Banking Supervision", *International Legal Materials,* vol.37, no.2, 1997, pp.405-32. For a discussion on the Basle norms see Rupa Nege Nitsure, "Basel II Norms: Emerging Market Perspective with Indian Focus", *Economic and Political Weekly*, vol. 40, no.2, 2005, pp.1162-6. See alsoSunanda Sen and Soumya Kanti Ghosh, "Basel Norms, Indian Banking Sector and Impact on Credit to SMEs and the Poor", *Economic and Political Weekly*, vol. 40, no.2, 2005,pp.1167-80.

more open markets abroad because of the desire to retain discretion in the design of domestic reforms, and pessimism about the ability of multilateral trade negotiations to deliver improved access in areas of export interest.[42] Crticising this approach of India, they give four reasons for engaging multilaterally. First, multilateral commitments will facilitate domestic reforms. Secondly, they submit that being a rule-based system, the WTO's dispute settlement system protects weaker countries in situations of inequality between developed and developing countries. Third, the WTO commitments send out a signal of a Member's commitments towards good policies. Finally, the WTO acts as a bulwark against the tendency of countries to liberalise on a regional basis thereby leading to a fragmentation of the multilateral trade regime.[43]

In spite of the benefits that the GATS promises, it is submitted that India should make a GATS commitment only when it is satisfied with the reforms that it has undertaken on its own terms. Indeed, this satisfaction has to be based on subjective criteria in view of the importance of the financial sector to the overall health of the economy. Instead of ushering in development, rapid liberalisation in financial services can lead to financial instability since India does not have adequate safety nets in place to withstand the shock of a major banking crisis as has been witnessed during the crises that hit the financial markets in India since

---

42 Aaditya Mattoo and Arvind Subramanian, "India and the Multilateral Trading System Post-Doha: Defensive or Proactive?", in Aaditya Mattoo and Robert M. Stern eds., *India and the WTO* (New Delhi: Rawat Publications, 2004), p.346.

43 ibid, pp.329-33.

liberalisation.[44] Moreover, as the analysis of the provisions of the GATS and the Annex on Financial Services has shown, the lack of clarity in many of the provisions of the GATS and the Annex make it difficult to predict as to how a WTO panel would interpret such provisions in the event of a dispute. Therefore, the lack of clarity in the rules makes the system more uncertain for the developing countries. Hence, it is submitted that India should not pre-commit its reforms under the GATS for the sake of sending a signal of its unwavering commitment towards financial sector reforms.

[44] For a discussion on how rapid liberalisation can destabilise an economy that does not have adequate regulatory systems in place see Joseph Stiglitz, *Globalization and its Discontents* (New Delhi: Penguin Books, 2002) pp.69-70.

CHAPTER V

FREE TRADE AGREEMENTS AND FINANCIAL SERVICES

Though the GATS provides a framework for the progressive liberalisation of trade in services, many countries have refrained from making any far reaching commitment liberalising their services sectors. Rather, many countries have opted for liberalising different services sectors on a selective basis through bilateral and regional free trade agreements (FTA) or through economic co-operation agreements. It is interesting to note that while India has been very cautious about making any far reaching commitment on financial services in the General Agreement on Trade in Services (GATS), India has been entering into regional trade agreements that include provisions pertaining to trade in financial services. This chapter will examine the regime for financial services under the FTAs concluded by India in the light of India's obligations under the GATS.

5.1 INDIA AND FTA's

Over the last few years India has concluded framework agreements on economic co-operation and on establishing free trade areas on a regional basis with the Association of South East Asian Nations (ASEAN),[1] the Bangladesh, India, Myanmar, Sri Lanka, Thailand – Economic Cooperation (BIMST-EC) and

the Gulf Cooperation Council (GCC), the MERCOSUR[2] and the South African Customs Union (SACU). India is also negotiating with the countries of the South Asian Association for Regional Cooperation (SAARC) for establishing an Agreement on South Asian Free Trade Area (SAFTA). Moreover, India has also entered into bilateral framework agreements for establishing free trade areas with Thailand, Chile and Egypt. In terms of these framework agreements, India has agreed to engage in negotiations with their trading partners on various issues including trade in services. India's framework agreements with the ASEAN, the BIMST-EC and Thailand contain deadlines for negotiating on trade in services. However, so far India has concluded an economic cooperation agreement comprising detailed provisions on trade in services only with Singapore.

5.2 THE INDIA-SINGAPORE AGREEMENT

The recently concluded Comprehensive Economic Co-operation Agreement between the Republic of India and the Republic of Singapore contains specific provisions pertaining to trade in services as well as an Annex on Financial Services.[3] In respect of trade in services, such agreements for economic co-operation are permissible in terms of Article V of the GATS if such

---

1 See *Framework Agreement on Comprehensive Economic Co-operation between the Republic of India and the ASEAN* at <http://commerce.nic.in>.

2 The MERCOSUR is a South American trading bloc comprising Brazil, Argentina, Paraguay and Uruguay.

3 See *Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore*, Chapter 7 and Annex 7C at <http://commerce.nic.in>. Also see selected provisions of the Agreement in Appendix 4.

agreements have substantial sectoral coverage and they do not provide for the *a priori* exclusion of any sector, and they provide for the substantial elimination of all discrimination.[4] The India-Singapore Agreement has been made in accordance with Article V of the GATS.[5]

5.2.1 *Services in the Agreement*

In respect of trade in services, the India-Singapore agreement applies to measures taken by either India or Singapore affecting trade in services between them.[6] The Agreement defines services and trade in services in the same manner as it has been defined in the GATS. However, unlike the GATS, this Agreement defines *measures affecting trade in services* as

1) measures in respect of the purchase, payment or use of a service;
2) measures pertaining to the access to, and the use of services which are required to be offered to the public generally; and
3) measures in respect of commercial presence and the presence of natural persons.[7]

Another novel feature of the Agreement is that only services transactions of those entities that have a substantial level of business operations are covered by the Agreement. This is laid down in Article 7.2 (3) (b), which states that the

---

4 *General Agreement on Trade in Services (GATS)*, Article V, paragraph 1. Also see selected provisions of the GATS in Appendix 1.

5 In terms of Article 1.1 (2) (a) of the Agreement, the Agreement has the objective of liberalising and promoting trade in services in accordance with Article V of the GATS.

6 *Comprehensive Economic Cooperation Agreement*, n.3 Article 7.2 (1).

7 ibid, Article 7.1 (h).

provisions of Chapter 7 of the Agreement, which deals with trade in services, shall not apply, to a shell company. A shell company is any legal entity falling within the definition of a juridical person, which is established or located in the territory of either India or Singapore, with negligible or no business operations, or with no real and continuous business activity in either of such territories.[8]

The provisions of the Agreement pertaining to national treatment are similar to that of the GATS. However in relation to investments by a service supplier the Agreement has a specific clause which protects such investments. Accordingly, Article VII.4 (2) states that any subsequent establishment, acquisition and expansion of investments by a service supplier that is duly constituted under the law of the either India or Singapore, which is owned by a service supplier of other party, shall be regarded as investment of the other party. This provision is explained by way of a footnote, which states that such service suppliers shall be entitled to be accorded any better treatment which is available under the regime of the host state. However, any such better treatment accorded to investments in services is not to be construed as a commitment by India under this Agreement.[9]

The provisions of the Agreement in respect of domestic regulations are similar to those of the GATS. In order to ensure that domestic regulations do not constitute unnecessary barriers to trade in services, both the parties have agreed to jointly review the results of negotiations on disciplines with regard to domestic

---

8 ibid, Article 7.2 (3) (b).

9 ibid, Article 7. 4 (2).

regulations pursuant to Article VI, paragraph 4 of the GATS.[10] In order to assess that the domestic regulations are in conformity with the provisions of this Article as well as Article VI of the GATS, account shall be taken of the international standards of relevant international organisations that are applied by the Party. Relevant international organisations mean international bodies whose membership is open to relevant bodies of both the parties.[11]

It is interesting to note that the Agreement provides for certain safeguards for ensuring that services that owe their origin to a third party do not enter either country through this Agreement. Thus, the parties to the Agreement may deny the benefits arising out of Chapter 7 of the Agreement to services that are supplied from or in the territory of a third party, and to services supplied through commercial presence, where the ownership or control of the service suppler is in the hands of persons of other countries.[12]

5. 2. 2. *Financial Services under the Agreement*

A perusal of the provisions of the Agreement between India and Singapore reveals that the provisions of that Agreement tend to promote a greater degree of liberalisation than provided for in the GATS. Annex 7C of the agreement in respect of financial services is very similar to the GATS Annex on Financial Services. However, while India has not become a party to the Understanding on

---

10 ibid, Article 7. 10 (5).

11 ibid, Article 7. 10 (7).

12 ibid, Article 7.23.

Financial Services, in Annex 7C of this agreement it specifically incorporates elements of the Understanding by incorporating the provision of the Understanding pertaining to new financial services.

One unique feature of the India-Singapore Agreement in respect of trade in services is that Chapter 7 of the Agreement, dealing with trade in services, contains specific provisions on financial services. The definition of juridical persons in Article 7. 1 of the Agreement specifically states that for the purposes of supply of financial services through commercial presence, juridical persons include specific banks of Singapore. Each of such banks may nominate one legal entity owned or controlled by it to enter into the financial services sector in India. Such entry must be through local incorporation under the Indian law. However, if such banks only seek to establish a branch presence in India, local incorporation is not required.[13]

The agreement also envisages the inclusion of new financial services within its scope in the future. Annex 7C of the Agreement, which elaborates upon the provisions of Chapter 7 of the Agreement with regard to financial services, defines a new financial service as a financial service that is not supplied by any financial service supplier in the territory of one party but which is supplied in the territory of the other party. This includes existing or new financial products or the manner of delivery of a financial product or service.[14] The definition of new

---

13 ibid, Article 7. 1 (e).

14 ibid, Annex 7C, paragraph 4 (a).

financial services in the Annex corresponds to the definition of such services in the Understanding on Financial Services.[15]

The Annex also lays down transparent procedures to be followed by financial regulators. [16] Moreover, for the purpose of securing co-operation between the regulatory authorities of India and Singapore, letters of agreement exchanged between the two countries on this matter have been made a part of this agreement by including them in a separate annex (Annex 9).

In respect of financial services, both parties can adopt or maintain both prudential and non-prudential measures. In terms of Article 7.21 of the Agreement, the parties can take measures that are necessary to maintain public order. The public order exception may be invoked only if there is a genuine and sufficiently serious threat to a fundamental interest of the society.[17] Moreover, the parties can also adopt measures for security reasons in terms of Article 7.22 of the Agreement. Such measures include measures taken for protecting the essential security interests of the party.

The overview of the agreement between India and Singapore also points out that while India is not hesitant to allow foreign entry in the financial sector, it wants to do this on a selective basis, which cannot be done under the GATS. This is because the universal and unconditional application of the MFN obligation

---

15 See *Understanding on Commitments in Financial Services*, paragraph D (2). Also see Appendix 3.

16 *Comprehensive Economic Cooperation Agreement*, n.3, Annex 7C, paragraph 5(d). In terms of this provision, a regulatory authority is required to make an administrative decision on a completed application of an applicant relating to the supply of a financial service within 120 days, and it must promptly notify the applicant of the decision.

17 ibid, Article 7.21 (1) (a).

compels countries to give equal treatment to services from all other countries, in respect of service sectors where market access is allowed.

5.2.3 *The Services-Investments Linkage*

Since trade in financial services involves issues pertaining to investments, any effective regime for services will have to address this linkage. Given the fact that investment has been a very contentious issue in the WTO,[18] the flexibility given by Article V of the GATS allows developing countries to address this linkage on a bilateral or regional basis.

The linkage between services and investments is vital to financial services in particular because financial services essentially involve the movement of capital. A unique feature of the India-Singapore Agreement is that it specifically addresses the linkage between services and investments. Indeed, the Agreement is not merely a trade agreement, but it also constitutes an investment agreement.[19] Chapter 6 of the Agreement deals with investments. Article 7.24 of the Agreement states that in respect of measures affecting the supply of services through commercial presence, certain provisions of Chapter 6 of the Agreement would apply to such services only to the extent that they relate to an investment.

---

[18] For a discussion on WTO and investments, see generally, Nagesh Kumar, "WTO's Emerging Investment Regime and Developing Countries: The Way Forward for TRIMS Review and the Doha Ministerial Meeting", *Economic and Political Weekly*, vol.36, no.33, 2001, pp.3151-58; "Developing Country Concerns Emerge at WTO Investment Group", *Bridges Weekly Trade News Digest*, 18 September 2002, at <http://www.ictsd.org/weekly/02-09-18/story3.htm>.

[19] The objective of the Agreement is to ensure high and steady growth in real incomes through the expansion of trade and investment flows. See *Comprehensive Economic Cooperation Agreement*, n.3, Preamble.

Thus, it would be pertinent to examine what constitutes an investment for the purposes of the Agreement. Article 6.1 of the Agreement defines an investment in very broad terms to mean every kind of asset.[20] Therefore, even financial assets can come within the definition of investments in Chapter 6 of the Agreement.

The provisions of the Agreement pertaining to expropriation of investments and the repatriation of returns from investments are very significant in respect of financial services. The host country can expropriate an investment from the other party to the Agreement only if the expropriation is on a non-discriminatory basis, for a purpose authorised by law, in accordance with the due process of law and against the payment of compensation. Such compensation has to be prompt, adequate and effective, it should be equivalent to the fair market value of the investment and it should carry an appropriate interest. The term expropriation includes nationalisation. [21] This implies that where a party expropriates an investment related to commercial presence in financial services in accordance with its domestic regulations, it has to comply with these provisions of the Agreement.

---

20 ibid, Article 6.1 (1).

21 ibid, Article 6.5 (1) and (2).

Moreover, each party has to ensure the free transfer of capital and returns from investments to the investors from the other party.[22] However, parties may prevent repatriation of returns from investments on an equitable and non-discriminatory basis by applying its laws in good faith in respect of bankruptcy, insolvency, protection of the interests of the creditors, securities transactions, social security measures, etc.[23]

India's commitments on financial services under the Agreement are more liberal than its GATS commitments on financial services.[24] The fact that India has been more liberal in respect of financial services[25] in the bilateral agreement with Singapore than in the GATS tells us something about the GATS and its regime for financial services. The GATS offers some flexibility to developing countries like India by giving them the freedom to selectively stay out of the regime. At the

---

22 ibid, Article 6.6 (1).

23 ibid, Article 6.6 (2).

24 For details on India's commitments on financial services under the Agreement see *Comprehensive Economic Cooperation Agreement*, n.3, Annex 7A.

25 On trade in services, India has taken commitments in nine sectors that include professional services (including accounting, taxation (advisory only), architecture, engineering, medical and dental, services by nursing, midwives and veterinary services, computer and related services, R&D services, real estate services (for consultancy), rental or leasing services without operators, other business services such as advertising services, management consulting services, technical testing and analysis services, services incidental to fishing, mining, manufacturing; energy distribution, placement and supply of services of personnel, maintenance and repair of equipment, photographic services, packaging services, telecommunication and audiovisual services, construction and related engineering services, financial services, health, tourism, recreational, cultural and sporting services, maritime transport services and some sectors of air transport services. On the other hand, Singapore has offered partial or full commitments in all the services sectors in which India has offered commitments. Such sectors include legal (for consultancy) services, under other business services areas such as market research and public opinion polling, services incidental to agriculture, forestry, security consultations, alarm monitoring, unarmed guard services, telephone answering services, retail trading and franchising under distribution services, education services, environment and health. Singapore has offered qualified full bank (QFB) status to three Indian banks. See Amarendra Bhushan, "India-Singapore Economic Treaty", at <http://ezinearticles.com/?Indo-Singapore-Economic-Treaty&id=48917>.

same time it also allows them to go for progressive liberalisation on a bilateral or regional basis outside the ambit of the GATS, in terms of Article V of the GATS. The GATS Annex on Financial Services does not provide sufficient autonomy to developing countries like India to regulate the financial sectors on a selective basis. Moreover, the GATS is ambiguous on many issues pertaining to financial services, which makes the regime a very uncertain one. Therefore, India has utilised the mechanism of Article V of the GATS to liberalise its financial services sectors on a selective basis.

CHAPTER VI

CONCLUSIONS

The growth in the volume of international services transactions over the last few decades has brought it within the multilateral trading system. The inclusion of services within the multilateral trading system has significant implications for the economies of the developing countries. The services sector is important for them from a developmental context. This is because many service sectors, like financial services, are important for facilitating growth in the manufacturing and agricultural sectors. Moreover, services like financial services are important from a social perspective as well since they serve as a source of funds for the people.

Rapid liberalisation of the financial sector without developing appropriate regulatory mechanisms can have negative repercussions on an economy. Thus, while liberalising the financial services sector, the developing countries must have the freedom to do so in a gradual manner in accordance with their own interests and on their own terms. The issue of whether developing countries should liberalise financial services within the GATS has to be examined in the context of whether the regime offers the desired flexibility.

The negotiating history of the GATS and the analysis of its salient features in Chapter II has shown that though services transactions are generally regarded as tradable transactions, it is very difficult to define trade in services in a generic sense. This is because of the heterogeneous nature of the service sector and the

lack of sufficient information on the specificities of different service sectors. Secondly, owing to historical reasons, there is a rigid categorisation between developed and developing countries, particularly in respect of financial services. While the developed countries are mostly net exporters of services, the developing countries are primarily services importing countries. Except in labour-intensive services, the developing countries have very little competitive strength in technology and capital-intensive services. Therefore, for the developing countries, the domestic regulation of services is of utmost importance since market access in services involves foreign investments and the establishment of commercial presence by the transnational corporations (TNCs).

Thus, services are at the same time a trade issue as well as a regulatory issue. The regulatory issues are left outside the ambit of the GATS except insofar as they affect trade in services. However, the GATS suffers from some inconsistencies in this respect. First, the GATS does not provide any guideline for determining when a regulatory measure affects trade in services. Secondly, since the GATS does not define trade in services in a generic sense, it becomes difficult to distinguish between a trade restricting measure and a regulatory measure.

While the GATS purportedly seeks to accommodate the interests of the developing countries in order to ensure their participation in further liberalisation of trade in services, Article IV of the GATS has remained a dead letter. There has been little progress on the issue of movement of natural persons while the negotiations have progressed substantially in respect of technology and capital-intensive sectors like telecommunications and financial services. Footnote 8 to

Article XVI, paragraph 1 of the GATS guarantees the inward mobility of capital to a certain extent, while Articles XI and XII of the GATS curbs the freedom of the Members to impose restrictions on outward transfer of capital. Thus, the interests of the developing countries have been undermined in the GATS.

The study of the GATS disciplines on financial services in Chapter III points out that the Annex on Financial Services is very broad in its scope. Even auxiliary financial services, like financial consultancy services, which can be regarded as professional services, can come within its ambit. Secondly, the Annex applies to potential financial service suppliers, which implies that where commercial presence is allowed, the right to establishment includes the right to expand to provide financial services. This is explicitly recognised in the Understanding on Financial Services. Third, though countries are free to adopt regulatory measures for prudential reasons and for macroeconomic or general welfare, the lack of definition of prudential measures, and the requirement in paragraph 2.1 of the Annex that such measures should not be trade restrictive, makes it uncertain as to how a WTO panel would interpret such measures. This dissuades many countries from devising appropriate regulatory measures. The regime provides no mechanism for bringing about co-operation between regulators of different countries.

The analysis of the regulation of financial services in India in the context of India's GATS commitments in Chapter IV suggests several conclusions. First, India has made very few market access commitments on financial services. Nevertheless, India voluntarily allows a greater degree of market access than it is

bound to provide under the GATS. By allowing market access in financial services to a greater degree while making minimum commitments under the GATS, India gives itself the flexibility to experiment with financial sector reforms with the freedom to reverse the reforms if necessary, without being restrained by any binding GATS commitment.

Secondly, though India's GATS commitments are subject to entry requirements in terms of laws, rules and policies framed by appropriate authorities, in respect of foreign entry in the banking sector, there is no local incorporation requirement either in India's GATS commitments, or in the Banking Regulation Act. Third, while there are various regulators present in the financial sector, like the Reserve Bank of India (RBI) and the Securities and Exchange Board of India (SEBI), the relationship between them is not clearly defined. Moreover, while India has committed to allow market access only for foreign banks that are licensed and supervised as a bank in their home countries, this requirement is not reflected as a specific criteria to be met by a foreign bank for providing banking services in India under the Banking Regulation Act.

The survey of the regulatory regime of the banking sector in India suggests that though India has been gradually making changes in its regulatory regime by adopting international standards like the norms prescribed by the Bank for International Settlements (BIS) known as the Basel norms, the change is yet to be reflected substantially in the existing laws regulating the banking sector. While the Basel norms lay down standards for banking supervision, the principles of the Basel norms are not reflected in the Banking Regulation Act. While the RBI has

been implementing the Basel norms voluntarily, the same are being implemented without being transformed into statutory obligations under domestic law. Moreover, the relationship between the international standards like the Basel norms and the WTO disciplines on trade in financial services is not clear.

The inconsistencies of the GATS regime for financial services have prompted many countries to liberalise their financial sectors on a bilateral or regional basis. The study of the Comprehensive Economic Co-operation Agreement (CECA) between India and Singapore in Chapter V suggests that the bilateral approach is most suited to address the specific interests of countries like India in respect of financial services. This is evident from the fact that while the Agreement has lead to a greater degree of liberalisation of financial services than under the GATS, it has been balanced by developing mechanisms for co-operation between the financial regulators of the two countries. Moreover, by recognising the linkage between services and investments and by laying down norms in respect of expropriation and repatriation of foreign investments which accommodate the interests of the investors and the host state, the Agreement points out that issues pertaining to the linkage between services and investments can be most effectively addressed on a bilateral basis.

In the light of the findings of this study, we can draw the following conclusions:

1. There exists a divergence of interests between the developed and developing countries on financial services in the WTO. While the developed countries are more interested in securing greater access to the

financial markets in the developing countries, the developing countries want more freedom to devise appropriate legal disciplines in order to promote socio-economic welfare objectives.

2. The WTO regime for financial services does not provide the desired flexibility for accommodating the interests of the developing countries. The freedom of countries to regulate the financial sector is curbed by the requirement that they should not be trade restrictive. Indeed, any regulatory measure can be regarded as trade restrictive.
3. The regime compels countries that have made GATS commitments on financial services to allow the entry of essential or related capital while it does not allow them to impose restrictions on the outward transfer of capital. This effectively exposes the developing economies without adequate regulatory laws and institutions to the risk of a sudden outflow of capital.
4. Though India's GATS commitments are subject to the requirements of domestic law, there is scope for modification in the commitments as well as in the law in respect of the banking sector. Thus, it is submitted that local incorporation under Indian law may be made an entry requirement in the banking sector. Moreover, the Banking Regulation Act should clearly define a foreign bank as stated in India's GATS commitments.
5. The financial sector in India is regulated by different regulators like the RBI, SEBI, etc. There is scope for streamlining their relationship by clearly defining the same.

6. By not making substantial liberalising commitments under the GATS, India has retained the flexibility to liberalise gradually outside the ambit of the GATS. India has utilised this flexibility to liberalise on a bilateral basis as evidenced by the CECA between India and Singapore.
7. Unlike the GATS, the India-Singapore Agreement recognises the linkage between services and investments. Since investments have been a contentious issue in the WTO, it has been left out of the GATS. It is submitted that since investments are closely related to trade in services, this linkage can be effectively addressed on a bilateral basis.

It has been argued by some scholars that multilateralism offers the developing countries the benefit of negotiating within a rule-based system.[1] The assumption behind such a premise is that a rule-based system can effectively protect the weaker nations from giving away concessions in the face of coercion by stronger nations. However, this can be possible only where the rules of the regime specifically address the inequalities that exist between the developed and the developing countries. Where the rules merely give equal treatment to unequals, it effectively exacerbates the inequality. Rather than binding themselves to a system that gives legal recognition to the inequalities between the developed and the developing countries, it is submitted that the developing countries would be better served to liberalise on a bilateral basis.

From a legal perspective, the issue is not whether countries should liberalise their services sectors. Rather, the issue is, if a country decides to

---

[1] See, for instance, John H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge: Cambridge University Press, 2000), pp.6-10.

liberalise, should a particular service sector be liberalised within the GATS? There is no exact answer to this since this has to be determined in the context of the implications of liberalising within the GATS regime in respect of each particular service sector and their relevance to each country. The analysis of the WTO regime for financial services and its implications for India suggest that India should not broaden the scope of its GATS commitments on financial services. Rather, it should gradually liberalise the financial sector on a bilateral basis with its regional trading partners while incorporating appropriate legal and institutional changes in order to protect the stability of the financial system.

While this study analyses the implications of the rules of the WTO regime in respect of financial services, it does not attempt an exhaustive analysis of the different regional agreements that deal with international trade in financial services. It is our understanding that there is considerable scope for further research into the bilateral and regional arrangements relating to trade in financial services. Moreover, considering the movement of foreign direct investment (FDI) along with services, it appears to us that there is also scope for examining the intrinsic relationship between the emerging investment regimes and services. The WTO regime for services is still in its evolution. As this regime evolves, the extent to which it accommodates the interests of the developing countries will have immense significance for the developing countries.

APPENDIX 1: SELECTED PROVISIONS FROM THE GATS

Members,

Recognizing the growing importance of trade in services for the growth and development of the world economy;

Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries;

Desiring the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives;

Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right;

Desiring to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports including, *inter alia*, through the strengthening of their domestic services capacity and its efficiency and competitiveness;

Taking particular account of the serious difficulty of the least-developed countries in view of their special economic situation and their development, trade and financial needs;

Hereby *agree* as follows:

PART I

SCOPE AND DEFINITION

Article I

Scope and Definition

1. This Agreement applies to measures by Members affecting trade in services.

2. For the purposes of this Agreement, trade in services is defined as the supply of a service:

   (a) from the territory of one Member into the territory of any other Member;

   (b) in the territory of one Member to the service consumer of any other Member;

   (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;

   (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

3. For the purposes of this Agreement:

(a) "measures by Members" means measures taken by:

(i) central, regional or local governments and authorities; and

(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;

(b) "services" includes any service in any sector except services supplied in the exercise of governmental authority;

(c) "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.

PART II

GENERAL OBLIGATIONS AND DISCIPLINES

Article II

Most-Favoured-Nation Treatment

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

2. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.

3. The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.

Article III

Transparency

1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.

2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.

3. Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.

4. Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the "WTO Agreement"). Appropriate flexibility with respect to the time-limit within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations.

5. Any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement.

Article III bis

Disclosure of Confidential Information

Nothing in this Agreement shall require any Member to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

Article IV

Increasing Participation of Developing Countries

1. The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members pursuant to Parts III and IV of this Agreement, relating to:

(a) the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia* through access to technology on a commercial basis;

(b) the improvement of their access to distribution channels and information networks; and

(c) the liberalization of market access in sectors and modes of supply of export interest to them.

2. Developed country Members, and to the extent possible other Members, shall establish contact points within two years from the date of entry into force of the WTO Agreement to facilitate the access of developing country Members' service suppliers to information, related to their respective markets, concerning:

(a) commercial and technical aspects of the supply of services;

(b) registration, recognition and obtaining of professional qualifications; and

(c) the availability of services technology.

3. Special priority shall be given to the least-developed country Members in the implementation of paragraphs 1 and 2. Particular account shall be taken of the serious difficulty of the least-developed

countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.

Article V

Economic Integration

1. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:

(a) has substantial sectoral coverage[1], and

(b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:

(i) elimination of existing discriminatory measures, and/or

(ii) prohibition of new or more discriminatory measures,

either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.

2. In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.

3. (a) Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.

(b) Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.

4. Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement.

5. If, in the conclusion, enlargement or any significant modification of any agreement under paragraph 1, a Member intends to withdraw or modify a specific commitment inconsistently with the terms and conditions set out in its Schedule, it shall provide at least 90 days advance notice of such modification or withdrawal and the procedure set forth in paragraphs 2, 3 and 4 of Article XXI shall apply.

6. A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.

---

[1] This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply.

7. (a) Members which are parties to any agreement referred to in paragraph 1 shall promptly notify any such agreement and any enlargement or any significant modification of that agreement to the Council for Trade in Services. They shall also make available to the Council such relevant information as may be requested by it. The Council may establish a working party to examine such an agreement or enlargement or modification of that agreement and to report to the Council on its consistency with this Article.

(b) Members which are parties to any agreement referred to in paragraph 1 which is implemented on the basis of a time-frame shall report periodically to the Council for Trade in Services on its implementation. The Council may establish a working party to examine such reports if it deems such a working party necessary.

(c) Based on the reports of the working parties referred to in subparagraphs (a) and (b), the Council may make recommendations to the parties as it deems appropriate.

8. A Member which is a party to any agreement referred to in paragraph 1 may not seek compensation for trade benefits that may accrue to any other Member from such agreement.

Article VI

Domestic Regulation

1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

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

(b) The provisions of subparagraph (a) shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.

3. Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application.

4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;

(b) not more burdensome than necessary to ensure the quality of the service;

(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

(i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and

(ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

(b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations[2] applied by that Member.

6. In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.

Article VII

Recognition

1. For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

2. A Member that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Member's territory should be recognized.

3. A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.

4. Each Member shall:

(a) within 12 months from the date on which the WTO Agreement takes effect for it, inform the Council for Trade in Services of its existing recognition measures and state whether

[2] The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.

such measures are based on agreements or arrangements of the type referred to in paragraph 1;

(b) promptly inform the Council for Trade in Services as far in advance as possible of the opening of negotiations on an agreement or arrangement of the type referred to in paragraph 1 in order to provide adequate opportunity to any other Member to indicate their interest in participating in the negotiations before they enter a substantive phase;

(c) promptly inform the Council for Trade in Services when it adopts new recognition measures or significantly modifies existing ones and state whether the measures are based on an agreement or arrangement of the type referred to in paragraph 1.

5. Wherever appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases, Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.

Article X

Emergency Safeguard Measures

1. There shall be multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination. The results of such negotiations shall enter into effect on a date not later than three years from the date of entry into force of the WTO Agreement.

2. In the period before the entry into effect of the results of the negotiations referred to in paragraph 1, any Member may, notwithstanding the provisions of paragraph 1 of Article XXI, notify the Council on Trade in Services of its intention to modify or withdraw a specific commitment after a period of one year from the date on which the commitment enters into force; provided that the Member shows cause to the Council that the modification or withdrawal cannot await the lapse of the three-year period provided for in paragraph 1 of Article XXI.

3. The provisions of paragraph 2 shall cease to apply three years after the date of entry into force of the WTO Agreement.

Article XI

Payments and Transfers

1. Except under the circumstances envisaged in Article XII, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.

2. Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article XII or at the request of the Fund.

Article XII

Restrictions to Safeguard the Balance of Payments

1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, *inter alia,* the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.

2. The restrictions referred to in paragraph 1:

(a) shall not discriminate among Members;

(b) shall be consistent with the Articles of Agreement of the International Monetary Fund;

(c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other Member;

(d) shall not exceed those necessary to deal with the circumstances described in paragraph 1;

(e) shall be temporary and be phased out progressively as the situation specified in paragraph 1 improves.

3. In determining the incidence of such restrictions, Members may give priority to the supply of services which are more essential to their economic or development programmes. However, such restrictions shall not be adopted or maintained for the purpose of protecting a particular service sector.

4. Any restrictions adopted or maintained under paragraph 1, or any changes therein, shall be promptly notified to the General Council.

5. (a) Members applying the provisions of this Article shall consult promptly with the Committee on Balance-of-Payments Restrictions on restrictions adopted under this Article.

(b) The Ministerial Conference shall establish procedures[3] for periodic consultations with the objective of enabling such recommendations to be made to the Member concerned as it may deem appropriate.

(c) Such consultations shall assess the balance-of-payment situation of the Member concerned and the restrictions adopted or maintained under this Article, taking into account, *inter alia,* such factors as:

(i) the nature and extent of the balance-of-payments and the external financial difficulties;

(ii) the external economic and trading environment of the consulting Member;

(iii) alternative corrective measures which may be available.

[3] It is understood that the procedures under paragraph 5 shall be the same as the GATT 1994 procedures.

(d) The consultations shall address the compliance of any restrictions with paragraph 2, in particular the progressive phaseout of restrictions in accordance with paragraph 2(e).

(e) In such consultations, all findings of statistical and other facts presented by the International Monetary Fund relating to foreign exchange, monetary reserves and balance of payments, shall be accepted and conclusions shall be based on the assessment by the Fund of the balance-of-payments and the external financial situation of the consulting Member.

6. If a Member which is not a member of the International Monetary Fund wishes to apply the provisions of this Article, the Ministerial Conference shall establish a review procedure and any other procedures necessary.

Article XIV

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a : ieans of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or to maintain public order;[4]

(b) necessary to protect human, animal or plant life or health;

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(iii) safety;

(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective[5] imposition or collection of direct taxes in respect of services or service suppliers of other Members;

---

[4] The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

[5] Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Member under its taxation system which:

(i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Member's territory; or

(ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Member's territory; or

(iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or

(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

PART III

SPECIFIC COMMITMENTS

Article XVI

Market Access

1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.[6]

2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;

(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;[7]

(iv) apply to consumers of services supplied in or from the territory of another Member in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Member's territory; or

(v) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or

(vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Member's tax base.

Tax terms or concepts in paragraph (d) of Article XIV and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Member taking the measure.

[6] If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(a) of Article I and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital. If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of Article I, it is thereby committed to allow related transfers of capital into its territory.

(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;

(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

Article XVII

National Treatment

1. 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.[8]

2. 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 to its own like services and service suppliers.

3. 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.

Article XVIII

Additional Commitments

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.

PART IV

PROGRESSIVE LIBERALIZATION

Article XIX

Negotiation of Specific Commitments

---

[7] Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.

[8] Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

1. In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.

2. 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 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.

3. For each round, negotiating guidelines and procedures shall be established. For the purposes of establishing such guidelines, the Council for Trade in Services shall carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of this Agreement, including those set out in paragraph 1 of Article IV. Negotiating guidelines shall establish modalities for the treatment of liberalization undertaken autonomously by Members since previous negotiations, as well as for the special treatment for least-developed country Members under the provisions of paragraph 3 of Article IV.

4. The process of progressive liberalization shall be advanced in each such round through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement.

Article XX

Schedules of Specific Commitments

1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:

(a) terms, limitations and conditions on market access;

(b) conditions and qualifications on national treatment;

(c) undertakings relating to additional commitments;

(d) where appropriate the time-frame for implementation of such commitments; and

(e) the date of entry into force of such commitments.

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

3. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof.

Article XXI

Modification of Schedules

1. (a) A Member (referred to in this Article as the "modifying Member") may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.

(b) A modifying Member shall notify its intent to modify or withdraw a commitment pursuant to this Article to the Council for Trade in Services no later than three months before the intended date of implementation of the modification or withdrawal.

2. (a) At the request of any Member the benefits of which under this Agreement may be affected (referred to in this Article as an "affected Member") by a proposed modification or withdrawal notified under subparagraph 1(b), the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the Members concerned shall endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations.

(b) Compensatory adjustments shall be made on a most-favoured-nation basis.

3. (a) If agreement is not reached between the modifying Member and any affected Member before the end of the period provided for negotiations, such affected Member may refer the matter to arbitration. Any affected Member that wishes to enforce a right that it may have to compensation must participate in the arbitration.

(b) If no affected Member has requested arbitration, the modifying Member shall be free to implement the proposed modification or withdrawal.

4. (a) The modifying Member may not modify or withdraw its commitment until it has made compensatory adjustments in conformity with the findings of the arbitration.

(b) If the modifying Member implements its proposed modification or withdrawal and does not comply with the findings of the arbitration, any affected Member that participated in the arbitration may modify or withdraw substantially equivalent benefits in conformity with those findings. Notwithstanding Article II, such a modification or withdrawal may be implemented solely with respect to the modifying Member.

5. The Council for Trade in Services shall establish procedures for rectification or modification of Schedules. Any Member which has modified or withdrawn scheduled commitments under this Article shall modify its Schedule according to such procedures.

PART V

INSTITUTIONAL PROVISIONS

Article XXII

Consultation

1. 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 with respect to any matter affecting the operation of this Agreement. The Dispute Settlement Understanding (DSU) shall apply to such consultations.

2. The Council for Trade in Services or the Dispute Settlement Body (DSB) may, at the request of a Member, consult with any Member or Members in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

3. A Member may not invoke Article XVII, either under this Article or Article XXIII, with respect to a measure of another Member that falls within the scope of an international agreement between them relating to the avoidance of double taxation. In case of disagreement between Members as to whether a measure falls within the scope of such an agreement between them, it shall be open to either Member to bring this matter before the Council for Trade in Services.[9] The Council shall refer the matter to arbitration. The decision of the arbitrator shall be final and binding on the Members.

Article XXIII

Dispute Settlement and Enforcement

1. If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU.

2. If the DSB considers that the circumstances are serious enough to justify such action, it may authorize a Member or Members to suspend the application to any other Member or Members of obligations and specific commitments in accordance with Article 22 of the DSU.

3. If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply.

Article XXIV

Council for Trade in Services

1. The Council for Trade in Services shall carry out such functions as may be assigned to it to facilitate the operation of this Agreement and further its objectives. The Council may establish such subsidiary bodies as it considers appropriate for the effective discharge of its functions.

2. The Council and, unless the Council decides otherwise, its subsidiary bodies shall be open to participation by representatives of all Members.

3. The Chairman of the Council shall be elected by the Members.

Article XXV

Technical Cooperation

---

[9] With respect to agreements on the avoidance of double taxation which exist on the date of entry into force of the WTO Agreement, such a matter may be brought before the Council for Trade in Services only with the consent of both parties to such an agreement.

1. Service suppliers of Members which are in need of such assistance shall have access to the services of contact points referred to in paragraph 2 of Article IV.

2. Technical assistance to developing countries shall be provided at the multilateral level by the Secretariat and shall be decided upon by the Council for Trade in Services.

Article XXVI

Relationship with Other International Organizations

The General Council shall make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies as well as with other intergovernmental organizations concerned with services.

PART VI

FINAL PROVISIONS

Article XXVII

Denial of Benefits

A Member may deny the benefits of this Agreement:

(a) to the 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;

(b) in the case of the supply of a maritime transport service, if it establishes that the service is supplied:

(i) by a vessel registered under the laws of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement, and

(ii) by a person which operates and/or uses the vessel in whole or in part but which is of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement;

(c) to a service supplier that is a juridical person, if it establishes that it is not a service supplier of another Member, or that it is a service supplier of a Member to which the denying Member does not apply the WTO Agreement.

Article XXVIII

Definitions

For the purpose of this Agreement:

(a) "measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;

(b) "supply of a service" includes the production, distribution, marketing, sale and delivery of a service;

(c) "measures by Members affecting trade in services" include measures in respect of

(i) the purchase, payment or use of a service;

(ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally;

(iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member;

(d) "commercial presence" means any type of business or professional establishment, including through

(i) the constitution, acquisition or maintenance of a juridical person, or

(ii) the creation or maintenance of a branch or a representative office,

within the territory of a Member for the purpose of supplying a service;

(e) "sector" of a service means,

(i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule,

(ii) otherwise, the whole of that service sector, including all of its subsectors;

(f) "service of another Member" means a service which is supplied,

(i) from or in the territory of that other Member, or in the case of maritime transport, by a vessel registered under the laws of that other Member, or by a person of that other Member which supplies the service through the operation of a vessel and/or its use in whole or in part; or

(ii) in the case of the supply of a service through commercial presence or through the presence of natural persons, by a service supplier of that other Member;

(g) "service supplier" means any person that supplies a service;[10]

(h) "monopoly supplier of a service" means any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service;

(i) "service consumer" means any person that receives or uses a service;

(j) "person" means either a natural person or a juridical person;

---

[10] Where the service is not supplied directly by a juridical person but through otner forms of commercial presence such as a branch or a representative office, the service supplier (i.e. the juridical person) shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under the Agreement. Such treatment shall be extended to the presence through which the service is supplied and need not be extended to any other parts of the supplier located outside the territory where the service is supplied.

(k) "natural person of another Member" means a natural person who resides in the territory of that other Member or any other Member, and who under the law of that other Member:

(i) is a national of that other Member; or

(ii) has the right of permanent residence in that other Member, in the case of a Member which:

1. does not have nationals; or

2. accords substantially the same treatment to its permanent residents as it does to its nationals in respect of measures affecting trade in services, as notified in its acceptance of or accession to the WTO Agreement, provided that no Member is obligated to accord to such permanent residents treatment more favourable than would be accorded by that other Member to such permanent residents. Such notification shall include the assurance to assume, with respect to those permanent residents, in accordance with its laws and regulations, the same responsibilities that other Member bears with respect to its nationals;

(l) "juridical person" means any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association;

(m) "juridical person of another Member" means a juridical person which is either:

(i) constituted or otherwise organized under the law of that other Member, and is engaged in substantive business operations in the territory of that Member or any other Member; or

(ii) in the case of the supply of a service through commercial presence, owned or controlled by:

1. natural persons of that Member; or

2. juridical persons of that other Member identified under subparagraph (i);

(n) a juridical person is:

(i) "owned" by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member;

(ii) "controlled" by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions;

(iii) "affiliated" with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person;

(o) "direct taxes" comprise all taxes on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on

estates, inheritances and gifts, and taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

Article XXIX

Annexes

The Annexes to this Agreement are an integral part of this Agreement.

APPENDIX 2: GATS ANNEX ON FINANCIAL SERVICES

1. Scope and Definition

(a) This Annex applies to measures affecting the supply of financial services. Reference to the supply of a financial service in this Annex shall mean the supply of a service as defined in paragraph 2 of Article I of the Agreement.

(b) For the purposes of subparagraph 3(b) of Article I of the Agreement, "services supplied in the exercise of governmental authority" means the following:

(i) activities conducted by a central bank or monetary authority or by any other public entity 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.

(c) For the purposes of subparagraph 3(b) of Article I of the Agreement, if a Member allows any of the activities referred to in subparagraphs (b) (ii) or (b) (iii) of this paragraph to be conducted by its financial service suppliers in competition with a public entity or a financial service supplier, "services" shall include such activities.

(d) Subparagraph 3(c) of Article I of the Agreement shall not apply to services covered by this Annex.

2. Domestic Regulation

(a) Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.

(b) Nothing in the Agreement shall be construed to require a Member to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information in the possession of public entities.

3. Recognition

(a) A Member may recognize prudential measures of any other country in determining how the Member's measures relating to financial services shall be applied. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

(b) A Member that is a party to such an agreement or arrangement referred to in subparagraph (a) , whether future or existing, shall afford adequate opportunity for other interested Members to negotiate their accession to such agreements or arrangements, or to negotiate comparable ones with it, under circumstances in which there would be equivalent regulation, oversight, implementation of such regulation, and, if appropriate, procedures concerning the sharing of information between the parties to the agreement or arrangement.

Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that such circumstances exist.

(c) Where a Member is contemplating according recognition to prudential measures of any other country, paragraph 4(b) of Article VII shall not apply.

4. Dispute Settlement

Panels for disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial service under dispute.

5. Definitions

For the purposes of this Annex:

(a) A financial service is any service of a financial nature offered by a financial service supplier of a Member. Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance) . Financial services include the following activities:

Insurance and insurance-related services

(i) Direct insurance (including co-insurance) :

(A) life

(B) non-life

(ii) Reinsurance and retrocession;

(iii) Insurance intermediation, such as brokerage and agency;

(iv) Services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.

Banking and other financial services (excluding insurance)

(v) Acceptance of deposits and other repayable funds from the public;

(vi) Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction;

(vii) Financial leasing;

(viii) All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;

(ix) Guarantees and commitments;

(x) Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:

(A) money market instruments (including cheques, bills, certificates of deposits) ;

(B) foreign exchange;

(C) derivative products including, but not limited to, futures and options;

(D) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;

(E) transferable securities;

(F) other negotiable instruments and financial assets, including bullion.

(xi) Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;

(xii) Money broking;

(xiii) Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;

(xiv) Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;

(xv) Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;

(xvi) Advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (v) through (xv) , including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

(b) A financial service supplier means any natural or juridical person of a Member wishing to supply or supplying financial services but the term "financial service supplier" does not include a public entity.

(c) "Public entity" means:

(i) a government, a central bank or a monetary authority, of a Member, or an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or

(ii) a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions.

APPENDIX 3: UNDERSTANDING ON COMMITMENTS IN FINANCIAL SERVICES

Participants in the Uruguay Round have been enabled to take on specific commitments with respect to financial services under the General Agreement on Trade in Services (hereinafter referred to as the "Agreement") on the basis of an alternative approach to that covered by the provisions of Part III of the Agreement. It was agreed that this approach could be applied subject to the following understanding:

(i) it does not conflict with the provisions of the Agreement;

(ii) it does not prejudice the right of any Member to schedule its specific commitments in accordance with the approach under Part III of the Agreement;

(iii) resulting specific commitments shall apply on a most-favoured-nation basis;

(iv) no presumption has been created as to the degree of liberalization to which a Member is committing itself under the Agreement.

Interested Members, on the basis of negotiations, and subject to conditions and qualifications where specified, have inscribed in their schedule specific commitments conforming to the approach set out below.

A. *Standstill*

Any conditions, limitations and qualifications to the commitments noted below shall be limited to existing non-conforming measures.

B. *Market Access*

Monopoly Rights

1. In addition to Article VIII of the Agreement, the following shall apply:

Each Member shall list in its schedule pertaining to financial services existing monopoly rights and shall endeavour to eliminate them or reduce their scope. Notwithstanding subparagraph 1(b) of the Annex on Financial Services, this paragraph applies to the activities referred to in subparagraph 1(b)(iii) of the Annex.

Financial Services purchased by Public Entities

2. Notwithstanding Article XIII of the Agreement, each Member shall ensure that financial service suppliers of any other Member established in its territory are accorded most-favoured-nation treatment and national treatment as regards the purchase or acquisition of financial services by public entities of the Member in its territory.

Cross-border Trade

3. Each Member shall permit non-resident suppliers of financial services to supply, as a principal, through an intermediary or as an intermediary, and under terms and conditions that accord national treatment, the following services:

(a) insurance of risks relating to:

(i) maritime shipping and commercial aviation and space launching and freight (including satellites), with such insurance to cover any or all of the following: the goods being transported, the vehicle transporting the goods and any liability arising therefrom; and

(ii) goods in international transit;

(b) reinsurance and retrocession and the services auxiliary to insurance as referred to in subparagraph 5(a)(iv) of the Annex;

(c) provision and transfer of financial information and financial data processing as referred to in subparagraph 5(a)(xv) of the Annex and advisory and other auxiliary services, excluding intermediation, relating to banking and other financial services as referred to in subparagraph 5(a)(xvi) of the Annex.

4. Each Member shall permit its residents to purchase in the territory of any other Member the financial services indicated in:

(a) subparagraph 3(a);

(b) subparagraph 3(b); and

(c) subparagraphs 5(a)(v) to (xvi) of the Annex.

Commercial Presence

5. Each Member shall grant financial service suppliers of any other Member the right to establish or expand within its territory, including through the acquisition of existing enterprises, a commercial presence.

6. A Member may impose terms, conditions and procedures for authorization of the establishment and expansion of a commercial presence in so far as they do not circumvent the Member's obligation under paragraph 5 and they are consistent with the other obligations of the Agreement.

New Financial Services

7. A Member shall permit financial service suppliers of any other Member established in its territory to offer in its territory any new financial service.

Transfers of Information and Processing of Information

8. No Member shall take measures that prevent transfers of information or the processing of financial information, including transfers of data by electronic means, or that, subject to importation rules consistent with international agreements, prevent transfers of equipment, where such transfers of information, processing of financial information or transfers of equipment are necessary for the conduct of the ordinary business of a financial service supplier. Nothing in this paragraph restricts the right of a Member to protect 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.

Temporary Entry of Personnel

9. (a) Each Member shall permit temporary entry into its territory of the following personnel of a financial service supplier of any other Member that is establishing or has established a commercial presence in the territory of the Member:

(i) senior managerial personnel possessing proprietary information essential to the establishment, control and operation of the services of the financial service supplier; and

(ii) specialists in the operation of the financial service supplier.

(b) Each Member shall permit, subject to the availability of qualified personnel in its territory, temporary entry into its territory of the following personnel associated with a commercial presence of a financial service supplier of any other Member:

(i) specialists in computer services, telecommunication services and accounts of the financial service supplier; and

(ii) actuarial and legal specialists.

Non-discriminatory Measures

10. Each Member shall endeavour to remove or to limit any significant adverse effects on financial service suppliers of any other Member of:

(a) non-discriminatory measures that prevent financial service suppliers from offering in the Member's territory, in the form determined by the Member, all the financial services permitted by the Member;

(b) non-discriminatory measures that limit the expansion of the activities of financial service suppliers into the entire territory of the Member;

(c) measures of a Member, when such a Member applies the same measures to the supply of both banking and securities services, and a financial service supplier of any other Member concentrates its activities in the provision of securities services; and

(d) other measures that, although respecting the provisions of the Agreement, affect adversely the ability of financial service suppliers of any other Member to operate, compete or enter the Member's market;

provided that any action taken under this paragraph would not unfairly discriminate against financial service suppliers of the Member taking such action.

11. With respect to the non-discriminatory measures referred to in subparagraphs 10(a) and (b), a Member shall endeavour not to limit or restrict the present degree of market opportunities nor the benefits already enjoyed by financial service suppliers of all other Members as a class in the territory of the Member, provided that this commitment does not result in unfair discrimination against financial service suppliers of the Member applying such measures.

C. *National Treatment*

1. Under terms and conditions that accord national treatment, each Member shall grant to financial service suppliers of any other Member established in its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business. This paragraph is not intended to confer access to the Member's lender of last resort facilities.

2. When membership or participation in, or access to, any self-regulatory body, securities or futures exchange or market, clearing agency, or any other organization or association, is required by a Member in order for financial service suppliers of any other Member to supply financial services on an equal basis with financial service suppliers of the Member, or when the Member provides directly or indirectly such entities, privileges or advantages in supplying financial services, the Member shall ensure that such entities accord national treatment to financial service suppliers of any other Member resident in the territory of the Member.

D. *Definitions*

For the purposes of this approach:

1. A non-resident supplier of financial services is a financial service supplier of a Member which supplies a financial service into the territory of another Member from an establishment located in the territory of another Member, regardless of whether such a financial service supplier has or has not a commercial presence in the territory of the Member in which the financial service is supplied.

2. "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, franchising operations, branches, agencies, representative offices or other organizations.

3. A new financial service is a service of a financial nature, including services related to existing and new products or the manner in which a product is delivered, that is not supplied by any financial service supplier in the territory of a particular Member but which is supplied in the territory of another Member.

APPENDIX 4: SELECT PROVISIONS FROM THE INDIA-SINGAPORE AGREEMENT

ARTICLE 1.2: OBJECTIVES

The objectives of this Agreement are:

(c) to liberalise and promote trade in services in accordance with Article V of the General Agreement on Trade in Services, including promotion of mutual recognition of professions;

(d) to establish a transparent, predictable and facilitative investment regime;

CHAPTER 7

TRADE IN SERVICES

ARTICLE 7.1: DEFINITIONS

For the purposes of this Chapter:

(b) **commercial presence** means any type of business or professional establishment, including through:

(i) the constitution, acquisition or maintenance of a juridical person, or

(ii) the creation or maintenance of a branch or a representative office,
within the territory of a Party for the purpose of supplying a service;

(e) **juridical person of the other Party** means a juridical person which is either:

(i) constituted or otherwise organised under the law of the other Party or

(ii) in the case of the supply of a service through commercial presence, owned or controlled by:

(1) natural persons of the other Party; or

(2) juridical persons of the other Party identified under paragraph (e)(i);

Provided, however, that for the purposes of supply of audio-visual, education, financial and telecommunications services through commercial presence, except as otherwise agreed by the Parties, a "juridical person of the other Party" means a juridical person that is owned or controlled by:

(i) the other Party; or

(ii) natural persons of the other Party; or

(iii) juridical persons constituted or organized under the laws of the other Party that are owned by natural persons of the other Party or the other Party, whether directly or indirectly, or controlled by natural persons of the other Party or the other Party;

Provided, further, that for the purposes of supply of financial services through commercial presence in India, except as otherwise agreed by the Parties, a "juridical person of the other Party" includes DBS Group Holdings Limited, United Overseas Bank Limited and Oversea- Chinese Banking Corporation Limited (hereinafter collectively referred to as "Singapore Banks"), each of which may, respectively, nominate not more than one legal entity from among its holding companies, successors in title that it may designate, or

entities which it owns or controls, or itself, to enter into the financial services sector in India, provided that any such entry by each of the Singapore Banks will be by means of incorporation of a separate legal entity in India, and will be restricted respectively to one legal entity each in respect of banking, asset management and insurances services; except that in respect of the remaining financial services, the restriction to one entity will not apply and in respect of bank branches, incorporation in India will not be required.

(h) **measures by Parties affecting trade in services** include measures in respect of:

(i) the purchase, payment or use of a service;

(ii) the access to and use of, in connection with the supply of a service, services which are required by the Parties to be offered to the public generally;

(iii) the presence, including commercial presence, of persons of a Party for the supply of a service in the territory of the other Party;

ARTICLE 7.2: SCOPE AND COVERAGE

3. This Chapter shall not apply to:

(a) a service supplied in the exercise of governmental authority; and

(b) a shell company, which is any legal entity falling within the definition of "juridical person" in this Chapter which is established and located in the territory of the either Party with negligible or nil business operations or with no real and continuous business activities carried out in the territory of either Party.

4. New services, including new financial services, shall be considered for possible incorporation into this Chapter at future reviews held in accordance with Article 16.3, or at the request of either Party immediately. The supply of services which are not technically or technologically feasible when this Agreement comes into force shall, when they become feasible, also be considered for possible incorporation at future reviews or at the request of either Party immediately.

ARTICLE 7.4: NATIONAL TREATMENT

2. Any subsequent establishment, acquisition and expansion of investments by a service supplier that is incorporated, constituted, set up or otherwise duly organized under the law of a Party, and which is owned by a service supplier of the other Party, shall be regarded as an investment of the other Party, for the purpose of determining the applicable treatment to be accorded under this paragraph.[7-5]

ARTICLE 7.10: DOMESTIC REGULATION

1. In sectors where specific commitments are undertaken, each Party shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

[7-5] The Parties understand that such service suppliers shall be entitled to be accorded any better treatment which is available under the regime of that Party, at the time of such subsequent establishment, acquisition and expansion of investments. Any such better treatment accorded shall not be construed as an automatic addition to the commitments scheduled in India's Schedule of Specific Commitments in Annex 6A or the Parties' respective Schedules in Annex 6B.

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

3. The provisions of paragraph 2 shall not be construed to require a Party to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.

4. Where authorisation is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Party shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Party shall provide, without undue delay, information concerning the status of the application.

5. With the objective of ensuring that domestic regulation, including measures relating to qualification requirements and procedures, technical standards and licensing requirements, do not constitute unnecessary barriers to trade in services, the Parties shall jointly review the results of the negotiations on disciplines on these measures, pursuant to Article VI.4 of the WTO General Agreement on Trade in Services (GATS), with a view to their incorporation into this Chapter. The Parties note that such disciplines aim to ensure that such requirements are *inter alia*:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;

(b) not more burdensome than necessary to ensure the quality of the service;

(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

6. Pending the incorporation of disciplines pursuant to paragraph 5; for sectors where a Party has undertaken specific commitments and subject to any terms, limitations, conditions or qualifications set out therein, a Party shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

(a) does not comply with the criteria outlined in paragraphs 5(a), 5(b) or 5(c); and

(b) could not reasonably have been expected of that Party at the time the specific commitments in those sectors were made.

7. In determining whether a Party is in conformity with the obligation under paragraph 6, account shall be taken of international standards of relevant international organisations[7-6] applied by that Party.

8. In sectors where specific commitments regarding professional services are undertaken, each Party shall provide for adequate procedures to verify the competence of professionals of the other.

ARTICLE 7.21: GENERAL EXCEPTIONS

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party, or a disguised restriction on trade in services, nothing in this Chapter shall be construed to prevent the adoption or enforcement by either Party of measures:

[7-6] The term "relevant international organisations" refers to international bodies whose membership is open to the relevant bodies of both Parties.

(a) necessary to protect public morals or to maintain public order;[7-7]

(b) necessary to protect human, animal or plant life or health;

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(iii) safety;

(d) inconsistent with Article 7.4, provided that the difference in treatment is aimed at ensuring the equitable or effective7-8 imposition or collection of direct taxes in respect of services or service suppliers of the other Party.

2. Nothing in this Agreement shall prevent a Party from adopting or maintaining measures under which it accords more favourable treatment to persons of a non-Party than that accorded to persons of the other Party to this Agreement as a result of a bilateral double taxation avoidance agreement between the Party and such
non-Party.

ARTICLE 7.23: DENIAL OF BENEFITS

1. Subject to prior notification and consultation, a Party may deny the benefits of this Chapter:

(a) to the supply of a service, if it establishes that the service is supplied from or in the territory of a country that is not a Party to this Agreement;
(b) in the case of the supply of a maritime transport service, if it establishes that the service is supplied:

(i) by a vessel registered under the laws of a non-Party, and

(ii) by a person which operates and/or uses the vessel in whole or in part but which is of a non-Party;

(c) to the supply of a service through commercial presence, if the Party establishes at any time that persons of a non-Party own or control, or have acquired ownership or control over through subsequent transactions, the service supplier;

(d) to the supply of a service from or in the territory of the other Party, if the Party establishes that the service is supplied by a service supplier that is owned or controlled by a person of the denying Party.

ARTICLE 7.24: SERVICES-INVESTMENT LINKAGE

1. For the avoidance of doubt, the Parties confirm, in respect of Chapter 6, that:-

---

[7-7] The public order exception may be invoked by a Party, including its legislative, governmental, regulatory or judicial bodies, only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

(a) the following articles of Chapter 6 apply, *mutatis mutandis*, to measures affecting the supply of service by a service supplier of a Party through commercial presence in the territory of the other Party, only to the extent that they relate to an investment, regardless of whether or not such service sector is scheduled in a Party's Schedule of Specific Commitments in Annex 7A or 7B :

(i) Article 6.4;

(ii) Article 6.5;

(iii) Article 6.6;

(iv) Article 6.8;

(v) Article 6.10;

(vi) Article 6.14;

(vii) Article 6.18;

(viii) Article 6.19;

(ix) Article 6.22; and

(x) Article 6.23.

(b) Article 6.21 apply, *mutatis mutandis*, to measures affecting the supply of service by a service supplier of a Party through commercial presence in the territory of the other Party, only to the extent that they relate to an investment and an obligation under Chapter 6, regardless of whether or not such service sector is scheduled in a Party's Schedule of Specific Commitments in Annex 7A or 7B; and

(c) the provisions relating to entry into force, duration and termination in Article 6.24 shall apply to the provisions of Chapter 6 that are made applicable under paragraphs (a) and (b) above.

ANNEX 7 C

FINANCIAL SERVICES

1. Scope and Definition

(a) This Annex applies to measures affecting the supply of financial services. Reference to the supply of a financial service in this Annex shall mean the supply of a service as defined in paragraph (r) of Article 7.1.

2. Domestic Regulation

(a) Notwithstanding any other provisions of this Agreement, a Party shall not be prevented from adopting or maintaining measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of Chapter 7, they shall not be used as a means of avoiding the Party's commitments or obligations under Chapter 7.

(b) Nothing in Chapter 7 shall be construed to require a Party to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information in the possession of public entities.

4. New Financial Services

(a) For the purposes of paragraph 4 of Article 7.2, a "new financial service" is a financial service that is not supplied by any financial service supplier in the territory of the first Party but which is supplied within the territory of the other Party and includes existing and new financial products or the manner in which a financial product or service is delivered. Commitments on such new financial services will be based on the principles outlined in Articles 7.3 to 7.6.

(b) Each Party shall permit a financial service supplier of the other Party who is authorised to do business and regulated or supervised by a public entity under the law of the Party in whose territory it operates to supply any new financial service that the first Party would permit its own financial institutions, in like circumstances, to supply. Notwithstanding paragraph 4 of Article 7.2 and subparagraph 2(e) of Article 7.3, a Party may determine the institutional and juridical form through which the new financial service may be supplied and may require authorisation for the supply of the service. Where a Party requires such authorisation of the new financial service, a decision shall be made within a reasonable time and the authorization may only be refused for prudential reasons.

Cooperation on Financial Services (Annex 9)

1. The Parties, with a view to having mutual co-operation and periodic consultations to strengthen and maintain the stability, efficiency and integrity of the securities and futures market in India and Singapore, shall, subject to the agreement of the Parties, encourage cooperation in the securities and futures market in India and Singapore.

2. The Parties, with a view to preventing and suppressing money-laundering offences, shall, subject to the agreement of the Parties, encourage co-operation in the investigation and prosecution of money laundering offences.

3. The provisions of the Agreement shall not apply to any dispute related to co-operation in the securities and futures market and co-operation in the investigation and prosecution of money laundering offences.

BIBLIOGRAPHY

PRIMARY SOURCES

Government Documents

India, *The Banking Regulation Act, 1949.*

India, *The Reserve Bank of India Act. 1934.*

India, *Economic Survey, 2003-2004.*

India, *Economic Survey, 2004-2005.*

India, *Comprehensive Economic Co-operation Agreement between the Republic of India and the Republic of Singapore.*

WTO Documents

The General Agreement on Trade in Services.

Annex on Financial Services.

Second Annex on Financial Services.

Understanding on Commitments in Financial Services.

Decision on Financial Services.

Second Protocol to the GATS.

Fifth Protocol to the GATS.

India: Schedule of Specific Commitments: *Supplement 4*, GATS/SC/42 Suppl.4, 26 February 1998.

Singapore: Schedule of Specific Commitments, GATS/SC/76/Suppl.1/Rev.1, 26 February 1998.

India: Conditional Initial Offer, TN/S/O/IND, 12 January 2004.

Doha Ministerial Declaration, WT/MIN (01)/DEC/1, 20 November 2001.

Other Documents

Bank for International Settlements, "Basle Committee on Banking Supervision: Basle Core Principles for Effective Banking Supervision, 1997", *International Legal Materials,* vol.37, no.2, 1997, pp.405-32.

International Economic Accounts, *Sales of Services to Foreign and U.S. Markets through Cross-Border Trade and through Affiliates*, at <http://www.bea.gov>.

NAFTA Secretariat, *North American Free Trade Agreement.*

Reserve Bank of India, *Circular No. DBOD, BP. BC. 89/21.02.043/2003-04, DATED 9-6-2004.*

United Nations, *Declaration on the Establishment of a New International Economic Order*, UNGA Res.3201 (S-IV), 1 May 1974.

WTO Publications

World Trade Organization, "The GATT Years from Havana to Marrakesh", at <http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm>.

World Trade Organization, *The WTO Analytical Index: Guide to WTO Law and Practice* (Geneva: World Trade Organization, 2003), vol.2, edn.1.

RBI Publications

Reserve Bank of India, *Report on Trend and Progress of Banking in India 2003-2004* (Mumbai: Reserve Bank of India, 2004).

Reserve Bank of India, *Reserve Bank of India: Functions and Working 2001* (Chennai: Reserve Bank of India, 2001), edn.5.

Reserve Bank of India, *Statutory Guide for Non-Banking Financial Companies* (New Delhi: Taxmann, 2005).

Research Papers

Chanda, Rupa, "Trade in Financial Services: India's Opportunities and Constraints" (Working Paper No. 152, Indian Council for Research in International Economic Relations, New Delhi, 2005).

Stichele, Myriam Vander, "Potential Risks of Liberalisation of Services" (Stichting Onderzoek Multinationale Ondernemingen [SOMO], Amsterdam, 2003), at <http://www.somo.nl>.

Young, Brigitte, "Conflicts between Regionalism and the WTO Governance Structure" (Paper prepared for the Fifth Pan-European International Relations Conference, *Constructing World Order*, The Hague, September 9-11, 2004).

Speeches

World Trade Organization, "Financial Services and the WTO", *Speech by WTO DG Mike Moore at the Bank for International Settlements, Basel on September 11 2000*, at <http://www.wto.org/english/news_e/spmm_e/spmm36_e.htm>.

SECONDARY SOURCES

Books

Bedjaoui, Mohammed, *Towards a New International Economic Order* (New York: Holmes and Meier Publications, 1979).

Bhagwati, Jagdish and Mathias Hirsch eds., *The Uruguay Round and Beyond: Essays in Honour of Arthur Dunkel* (Berlin: Springer, 1998).

Chanda, Rupa, *Globalization of Services: India's Opportunities and Constraints* (New Delhi: Oxford University Press, 2002).

Chakravarty, Manas, *Regulatory Structure for Financial Sector: Emerging Trends* (New Delhi: Asian Institute of Transport Development, 2001).

Croome, John, *Reshaping the World Trading System: A History of the Uruguay Round* (The Hague: Kluwer Law International, 1999).

Dobson, Wendy and Pierre Jacquet, *Financial Services Liberalization in the WTO* (Washington D.C.: Institute for International Economics, 1998).

Fanelli, José M. and Rohinton Medhora eds., *Financial Reform in Developing Countries* (London: Macmillan Press Limited, 1998).

Hanson, James A. and Sanjay Kathuria eds., *India: A Financial Sector for the Twenty-First Century* (New Delhi: Oxford University Press, 1999).

Hoekman, Bernard, Aaditya Mattoo and Philip English eds., *Development, Trade and the WTO: A Handbook* (Washington, D.C.: The World Bank, 2002).

Jackson, John H., *World Trade and the Law of GATT: A Legal Analysis of the General Agreements on Tariffs and Trade* (New York: Bobbs-Merrill Co., 1969).

_____, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge: Cambridge University Press, 2000).

Kono, Masamichi and others, *Opening Markets in Financial Services and the Role of the GATS* (Geneva: World Trade Organization, 1997).

Lowenfeld, Andreas F., *International Economic Law* (New York: Oxford University Press, 2002).

Matsushita, Mitsuo, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization: Law, Practice and Policy* (Oxford: Oxford University Press, 2003).

Mattoo, Aaditya and Pierre Suavė eds., *Domestic Regulation and Service Trade Liberalization* (Washington, D.C.: The World Bank, 2003).

Mattoo, Aaditya and Robert M. Stern eds., *India and the WTO* (New Delhi: Rawat Publications, 2004).

Newman, Peter ed., *The New Palgrave Dictionary of Economics and the Law* (London: Macmillan Reference Limited, 1998), vol.1.

Stiglitz, Joseph, *Globalization and its Discontents* (New Delhi: Penguin Books, 2002).

Trebilcock, Michael J., and Robert Howse, *The Regulation of International Trade* (London: Routledge, 1999).

Watson, Peter S. and others, *Completing the World Trading System: Proposals for a Millennium Round* (The Hague: Kluwer Law International, 1999).

Articles

_____, "The History of a Campaign: How Services Became a Trade Issue", at <http://www.commercialdiplomacy.org/articles_news/trade_inservices 12.htm>.

_____, "Developing Country Concerns Emerge at WTO Investment Group", *Bridges Weekly Trade News Digest*, 18 September 2002, at <http://www.ictsd.org/weekly/02-09-18/story3.htm>.

American Information Web, "Trade Act of 1979", at <http://www.usinfo.org/law/majorlaws/tact74.htm>.

Abu-Akeel, Aly K., "Definition of Trade in Services under the GATS: Legal Implications", *The George Washington Journal of International Law and Economics*, vol.32, no.2, 1999, pp.189-210.

_____, "The MFN as it Applies to Service Trade: New Problems for an Old Concept", *Journal of World Trade*, vol.33, no.4, 1999, pp.103-29.

Altinger, Laura, and Alice Enders, "The Scope and Depth of GATS Commitments", *The World Economy*, vol.19, no.3, 1996, pp.307-32.

Benz, Steven F., "Trade Liberalization and the Global Service Economy", *Journal of World Trade Law*, vol.19, no.2, 1985, pp.95-120.

Bhushan, Amarendra, "India-Singapore Economic Treaty", at <http://ezinearticles.com/?Indo-Singapore-Economic-Treaty&id=48917>.

Das, Dilip K., "Trade in Financial Services and the Role of the GATS", *Journal of World Trade*, vol.32, no.6, 1998, pp.79-114.

Drake, William J., and Kalypso Nicolaïdis, "Ideas, Interests and Institutionalization: "trade in services" and the Uruguay Round", *International Organization*, vol.46, no.1, 1992, pp.37-100.

Ewing, A.F., "Why Freer Trade in Services is in the Interest of Developing Countries", *Journal of World Trade Law*, vol.19, no.2, 1985, pp.147-69.

Feketekuty, Geza, "Trade in Services: Bringing Services into the Multilateral Trading System", in Jagdish Bhagwati and Mathias Hirsch eds., *The Uruguay Round and Beyond: Essays in Honour of Arthur Dunkel* (Berlin, Springer, 1998), pp.79-99.

Freiburg, Kenneth, "World Trade Organization: Second Protocol to the General Agreement on Trade in Services and Related Decisions: Introductory Note", *International Legal Materials*, vol.35, no.2, 1996, pp.199-202.

Garten, Jeffrey E., "Is America Abandoning Multilateral Trade?", *Foreign Affairs*, vol.74, no.6, 1995, pp.51-62.

Gavin, Brigid, "A GATT for International Banking?", *Journal of World Trade Law*, vol.19, no.2, 1985, pp.121-35.

Gibbs, Murray, "Continuing the International Debate on Services", *Journal of World Trade Law*, vol.19, no.3, 1985, pp.199-218.

Gibbs, Murray, and Mina Mashayekhi, "Services: Co-operation for Development", *Journal of World Trade*, vol.22, no.2, 1988, pp.81-108.

Grier, Jean Heilman, "Section 301 of the 1974 Trade Act", at <http://www.osec.doc.gov/ogc/occic/301.html>.

Hodge, James, "Liberalization of Trade in Services in Developing Countries", in Bernard Hoekman, Aaditya Mattoo and Philip English eds., *Development, Trade and the WTO: A Handbook* (Washington, D.C.: The World Bank, 2002), pp.221-34.

Jarreau, J. Steven, "Interpreting the General Agreement on Trade in Services and the WTO Instruments Relevant to the International Trade in Financial Services: The Lawyer's Perspective", *North Carolina Journal of International Law and Commercial Regulation*, vol.25, no.1, 1999, pp.1-75.

Krommenacker, Raymond J., "Trade Related Services and GATT", *Journal of World Trade Law*, vol.13, no.6, 1979, pp.510-22.

Kumar, Nagesh, "WTOs Investment Regime and Developing Countries: The Way Forward for TRIMS Review and the Doha Ministerial Meeting", *Economic and Political Weekly*, vol.36, no.33, 2001, pp.3151-58.

Leroux, Eric H., "Trade in Financial Services under the World Trade Organization", *Journal of World Trade*, vol.36, no.3, 2002, pp.413-42.

Mattoo, Aaditya and Arvind Subramanian, "India and the Multilateral Trading System Post-Doha: Defensive or Proactive?", in Aaditya Mattoo and Robert M. Stern eds., *India and the WTO* (New Delhi, Rawat Publications, 2004), pp.327-66.

Mohan, Rakesh, "Financial Sector Reforms in India: Policies and Performance Analysis", *Economic and Political Weekly*, vol.40, no.2, March 19-25, 2005, pp.1106-21.

Morrison, Peter, "The Liberalisation of Trade in Financial Services and the General Agreement on Trade in Services", *Singapore Journal of International and Comparative Law*, vol.5, 2001, pp.593-617.

Mukherjee, Neela, "GATS and the Millennium Round of Multilateral Negotiations – Selected Issues from the Perspective of Developing Countries", *Journal of World Trade*, vol.33, no.2, 1999, pp.87-102.

Nicolaides, Phedon, "Economic Aspects of Services: Implications for a GATT Agreement", *Journal of World Trade*, vol.23, no.1, 1989, p.125-36.

Nitsure, Rupa Nege, "Basel II Norms: Emerging Market Perspective with Indian Focus", *Economic and Political Weekly*, vol.40, no.2, 2005, pp.1162-66.

Sapir, André, "The General Agreement on Trade in Services: From 1994 to the Year 2000", *Journal of World Trade*, vol.33, no.1, 1999, pp.51-66.

Schott, Jeffrey J., and Jacqueline Mazza, "Trade in Services and Developing Countries", *Journal of World Trade Law*, vol.20, no.3, 1986, pp.253-73.

Sen, Kunal and Rajendra R. Vaidya, "India", in José M. Fanelli and Rohinton Medhora eds., *Financial Reform in Developing Countries* (London, Macmillan Press Limited, 1998), pp.57-89.

Sen, Sunanda, and Soumya Kanti Ghosh, "Basel Norms, Indian Banking Sector and Impact on Credit to SMEs and the Poor", *Economic and Political Weekly*, vol.40, no.2, 2005, pp.1167-80.

Trachtman, Joel P., "Bananas, Direct Effect and Compliance", *European Journal of International Law*, vol.10, no.4, 1999, pp.655-78.

_____, "Addressing Regulatory Divergence through International Standards: Financial Services", in Aaditya Mattoo and Pierre Suavé eds., *Domestic Regulation and Service Trade Liberalization* (Washington, D.C.: The World Bank, 2003), pp.27-42.

Venkitaraman, S., "Regulation and Supervision Issues: Banks and Non-Banks", in James A. Hanson and Sanjay Kathuria eds., *India: A Financial Sector for the Twenty-First Century* (New Delhi, Oxford University Press, 1999), pp.132-63.

Vermulst, Edwin A., "Rules of Origin as Commercial Policy Instruments – Revisited", *Jour ıal of World Trade*, vol.26, no.6, 1992, pp.61-102.

Newspapers

Business Line (Internet).

The Economic Times (New Delhi).

The Hindu (New Delhi).

Websites

http://www.bis.org

http://www.wto.org

http://www.finmin.nic.in

http://commerce.nic.in

http://www.ppl.nl

http://www.nafta-sec-alena.org

http://blonnet.com