Lecture 18: Different Modes of Services

Dear students, in this class, we are going to discuss the different modes of supply and different categories of services. In the last class, we talked about the entire service sector and the bifurcation and contribution to the economy, and also the basic commitments. The services are delivered under different modes, under the WTO.

CONCEPTS COVERED

- · General and Specific Commitments
- · Modes of Services
- GATS Coverage
- · Core Service Areas



Also, we can see that the WTO has GATS coverage as well as core service areas in this particular class.

Introduction

- The General Agreement on Trade in Services (GATS) is the first multilateral trade agreement to cover trade in services.
- Since 1980, world services trade has grown faster, albeit from a relatively modest basis, than merchandise flows.
- Defying wide-spread misconceptions, developing countries have strongly participated in that growth.
- Between 1990 and 2000 their services exports, consisting mainly of tourism and travel services, grew 3 per cent more rapidly per annum, on a balance-of-payments basis, than developed countries' exports.



So, we have already said that the GATS Agreement has been concluded as a new addition to the Uruguay round of negotiations. And even much before that, you can see that some of the services were rapidly growing in certain countries and at a faster pace. And this lead some of the countries to include the service sector and service suppliers as well. But

most of the countries, especially the developing countries, are opposed to the complete inclusion of the services Agreement and then finally, the trade-related service sector. That is why you can see the name of the Agreement itself is the General Agreement on Trade in Services. So, the members agreed to include trade in services. And also, even some of the areas of services have got a quick, you can say, advantage and some of these areas which got advantages were the tourism sectors, travel services, financial sectors etcetera.

GATT & GATS

- Unlike the GATT, the GATS covers measures affecting both the product (service) and the supplier.
- The definition of services trade covers not only cross-border supply, but three additional forms of transaction ("modes of supply").
- While quota-free entry ("market access") and national treatment are generally applicable obligations under GATT, they apply under the GATS on a sector-by-sector basis and only to extent that no qualifications ("limitations") have been scheduled.



So, the quick advantages and then you can see the service sector when compared to the GATS provisions or service sector. Here, we can see that market access has been given to the individual member countries, to decide which sector to open up. So, unlike the GATS, the GATS covers measures affecting both the product service and supplier services. Also, in the last class itself, we explained the product and service, so that means the service sector, as well as the limitations on suppliers, are also included in the service sector GATS Agreement. And also the supply, the modes of supply has been explained under four heads in the GATS Agreement. And as I told you that the market access is subject to national treatment principle, but it is to be decided by the individual countries subject to limitations, and these limitations are included in the schedules - individual country schedules.

Obligations

- · Two groups:
 - 1. General obligations, which apply directly and automatically to all Members and services sectors,
 - 2. commitments concerning market access and national treatment in specifically designated sectors.
- Such commitments are laid down in individual country schedules whose scope may vary widely between Members.



@KDR/RGSOIPL/NPTEL/TRADE LAW

So, here you can see that the obligations are under two heads, that is, the general obligations are directly applicable to all member countries, who have signed the WTO Agreement. And then special commitments with regard to market access and national treatment principles and also the sectors are given to the individual member countries to decide which ones to open. For example, whether you want to open the tourism sector, financial sector or higher education sector or others, by around 161 member countries. So, the sector is given to the individual countries to decide and to be included in the schedules in the country schedules.

General Commitments

- MFN Treatment: Under Article II of the GATS, Members are held to extend immediately and unconditionally to services or services suppliers of all other Members "treatment no less favourable than that accorded to like services and services suppliers of any other country".
- Transparency: GATS Members are required, *inter alia*, to publish all measures of general application and establish national enquiry points mandated to respond to other Member's information requests



So, the general commitments, the two principles are applicable to the GATS Agreement as well. That is one is the MFN treatment, the treatment given to all the member countries should be subject to the MFN principle and then transparency; national enquiry points are

mandated under this particular Agreement as well as are a part of the larger regime of the WTO Agreements.

Special Commitments

- Market Access: Market access is a negotiated commitment in specified sectors. It may be made subject to various types of limitations that are enumerated in Article XVI(2).
- For example, limitations may be imposed on the number of services suppliers, service operations or employees in the sector; the value of transactions; the legal form of the service supplier; or the participation of foreign capital.
- National Treatment: A commitment to national treatment implies that the Member concerned does not operate discriminatory measures benefiting domestic services or service suppliers.



Then, special commitments, which you can see are on market access. So, the GATS Agreement gives, unlike the Goods Agreement, the leeway for the member countries to decide which area to give market access to. So, it is the negotiation between the countries and specific sectors and also various limitations you can find under Article 16.2. So, these limitations need to be put in the schedule. Whether it is the limitation with regard to the service sector or with regard to the service provider. So, in your commitments, you can put limitations, subject to particular conditions, and you accept the schedule which is applicable to your country. These limitations may include service suppliers, service operators, or employees, including foreign employees, value of transactions, legal form of service or supplier, which includes collaborations and capital, all these have to be determined. Then especially the participation of foreign capital. So, whether it is 51 per cent or 49 per cent, you can also put these limitations. Under the national treatment principle, which is the same as any other WTO Agreement, this is also applicable to the Service Agreement.

The GATS

Set of rules covering international trade in services

GATS Pillars Set of general obligations and disciplines

Countries schedules of specific commitments

Annexes on specific issues

Commitments under GATS

By services sectors

By mode of supply





@KDR/RGSOIPL/NPTEL/TRADE LAW

So, if you look into the GATS you can see that the general obligations are applicable to all the members and the schedule of specific commitments are applicable to each country which is annexed as country annexes. All these annexures or country-specific schedules are attached to every country's commitments. And also, commitments are under service sector as well as the mode of supply.

GATS: Modal Structure

MODE EXAMPLE (Health)

Cross-border Trade Tele-diagnosis from Country B

into Country A

Consumption Abroad A's resident obtains hospital

treatment in B

Commercial Presence Hospital operator from B has

subsidiary in A

Presence of Natural F

Persons

Physician from B practices in A

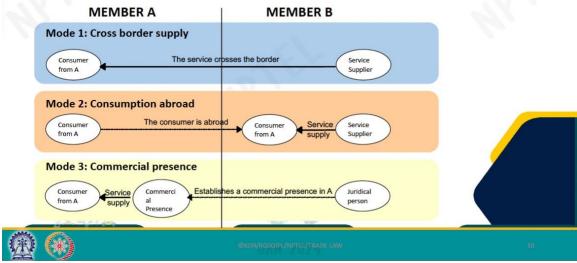


©KDR/RGSOIPL/NPTEL/TRADE LAW

So, we can see that the mode of supply; simply there are four modes of supply. What are these four modes of supply? So, here you can see the cross border trade. Cross-border trade is very simple. So, the service is crossing the borders and people are not crossing the borders. The service is provided from one country to the other country. So, for example, all that is happening online, BPOs business process outsourcing, legal process outsourcing and most of the outsourcing companies in India they do use this method of

cross-border trade. There is not much controversy in the cross-border trade. Out of these four trades, cross border trade is the most popular because there is no question of transfer of natural persons, here only the transfer of trade is happening. Then the second is the consumption abroad. The consumption abroad that residents go abroad for availing the services. For example, people who are coming to India for treatment, students who go abroad to take various courses, and then comes the third mode of supply, which is the commercial persons. For example, all financial institutions, foreign institutions or foreign banks working in India. So, this is a commercial presence. Actually, your business or shop is present in the country. Then the fourth mode is the most controversial, which is the presence of natural persons. So, here also presence of natural persons or movement of natural persons is required. So, that means one person from country A will go to country B and provide services. So, the movement of people is required for the fourth mode.

The 4 Modes of Supply under GATS



So, the first mode is very clear. Service is crossing the borders, and the consumer is in one country and the service supplier is in another country. Consumption abroad: the consumer from country A goes abroad, and the supplier, the service supplier, is in country B, and the service supplies to consumer A from another country. So, we said examples for almost all the students, commercial presence and commercial presence. We said the consumer from country A gets service in his own country from a third member country, from another country. So, a service provider from another country comes to your country to provide services to the consumers in country A. So, this is the commercial presence, and we already discussed it.

Modes of Service

- Cross-border supply is defined to cover services flows from the territory of one Member into the territory of another Member (e.g. banking or architectural services transmitted via telecommunications or mail, consultancy or market research reports, tele-medical advice, distance training.
- Consumption abroad refers to situations where a service consumer (e.g. tourist or patient, students) moves into another Member's territory to obtain a service;



@KDR/RGSOIPL/NPTEL/TRADE LAW

So, cross-border supply is very famous. So, you do not have to, there is no movement of natural persons. So, you can see that whatever is happening is through the internet and even telemedicines, distance learning training, online programs, and online courses; everything will come under the cross-border supply. And in consumption abroad basically includes tourists, patients, and students. These are the three main categories where people go abroad to take services. So, it is consumption abroad.

Modes of Service

- Commercial presence implies that a service supplier of one Member establishes a territorial presence, including through ownership or lease of premises, in another Member's territory to provide a service (e.g. domestic subsidiaries of foreign insurance companies or hotel chains or construction companies); and
- Movement of natural persons consists of persons of one Member entering the territory of another Member to supply a service (e.g. accountants, doctors or teachers).
- The Annex on Movement of Natural Persons specifies, however, that Members remain free to operate measures regarding citizenship, residence or access to the employment market on a permanent basis.



And you can see that the commercial presence is the other mode, the most popular mode of services: commercial presence. So, it means the supplier comes to your territory to provide services. So, I already said that all subsidiaries of foreign banks, insurance companies, construction companies or any other company come to your country and provide services to your people. The last category or mode of supply is the most

controversial. Why is it controversial? Because there is a movement of people. A movement of people is involved, whether it is doctors, professionals, lawyers, teachers, IT personnel or other natural persons. So, most countries put a lot of restrictions on the movement of natural persons because it depends upon migration, it depends upon visa requirements, it depends upon professional qualifications, and there are a lot of issues which is involved with the movement of natural persons. So, this is mostly restricted by the countries.

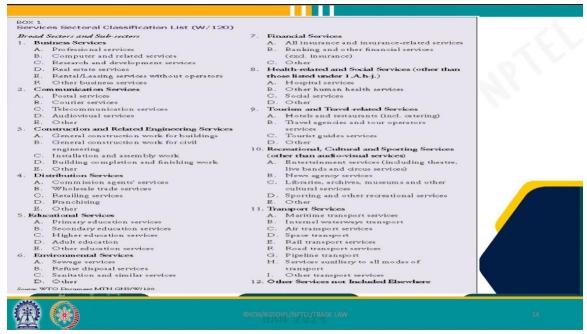
12 Core Service Areas - 161 Services

- 1. Business services (including professional services and computer services)
- 2. Communication services
- 3. Construction and related engineering services
- 4. Distribution services
- 5. Educational services
- 6. Environmental services
- 7. Financial services (including insurance and banking)
- 8. Health-related and social services
- 9. Tourism and travel-related services
- 10. Recreational, cultural and sporting services
- 11. Transport services
- 12. Other services not included elsewhere



@KDR/RGSOIPL/NPTEL/TRADE LAW

So, I was talking about the core supply areas. So, this core supply area is considered 161, in 161 services. These 161 services are identified by the United Nations Product Classification System. So, the important 12 divisions are business services, communication services, construction-related engineering services, distribution services, education services, environmental services, financial services, health-related social services, social tourism and travel-related services, recreational, cultural and sports services, transport services, and other services not included elsewhere.



These 12 areas you can find are subdivided into various other areas, in a total of 161 areas. So, you can see here what business services include. It includes professional services, research and development services and real estate services. All these will come under the first business sector, or you can say that broad sector of business services and construction and engineering services, which has already been opened up in India, as well as distribution services. So, you can find 'n' number of distribution services are advertising. Education services are divided into primary, secondary, higher education, adult education and other education services. So, education services is also one of the categories and then environmental services. For example, sewage service. So, and also the reuse, disposal services, sanitation and similar services all these come under the environmental service. Then comes the financial services and banks. So, insurance companies will come under the business or financial services, financial institutions. So, then comes the health related social service and other than those who are listed under other areas. So, hospital services and also you can see social services. Then comes tourism, and one of the most popular methods which is mentioned is tourism and travel services, and most of the countries get their income from the hotel and tourism services. Then comes the recreational, cultural and sporting services. So, entertainment service. So, news agency services, libraries, and sporting events are other categories. Then comes the transport services. Transport services include all, that is, maritime services, internal waterways, air transport services and space transport and then other rail transport, road transport, pipeline transport and then services auxiliary to all of the above. So, it means that transport services are also opened up, but we can see here that the air transport is absolutely controlled by individual countries through bilateral negotiations.

Classification

- 12 core services
- UN Central Product Classification
- Subdivided into a total of some 160 sub-sectors. Under this
 classification system, any service sector may be included in a
 Member's schedule of commitments with specific market access
 and national treatment obligations.
- Each WTO Member has submitted such a schedule under the GATS.

So, we already talked about this UN product classification system, which has already been accepted by all the WTO members as a part of market access commitments. Especially these services are for the specific purpose of market access commitments.

Uruguay Round Commitments by Sector (Number of Members) Major No. 123 Over the Sector of Members of Members

So, this is a little bit of old data, but what does it say? So, the largest commitments were made by the year 2000, 1999, within a period of 1995 to 1999, which shows that the largest commitments are made by members in the tourism sector and second, only in business and third is financial and fourth is communication services. So, if you take the first five services, it is basically, one tourism – a movement of people is involved, business - may or may not, financial services that are included in mode three, that is, a commercial presence and communication services again, you can see that communication services which completely change the Indian scenario, then construction, recreation and it is going so and so forth, all the 12 services. So, the tourism sector is one of the preferred service sectors of all the member countries.

Governance & Transparency

- Members publish promptly all measures pertaining to or affecting the operation of the GATS.
- Moreover, there is an obligation to notify the Council for Trade in Services at least annually of all legal or regulatory changes that significantly affect trade in sectors where specific commitments have been made.
- Service suppliers in all sectors must be able to use national tribunals or procedures in order to challenge administrative decisions affecting services trade (Article VI:2a).



@KOR/RGSOIPL/NPTEL/TRADE LAW

And how we are looking into it. So, these are the four modes of supply under the GATS Agreement. So, if you look at governance and transparency, you can see that it prescribes that every member country should publish all laws relating to the service sector or any change, any change in guidelines from time to time. For example, if a particular country is increasing visa fees, entry fees, etc., all this will need to be published and reported to the WTO. So that every country knows about it and also the regulatory changes to be published in advance. So that every person knows about the entry requirements to that particular country and then rules and regulations with regard to service suppliers. Formation of national tribunals and other procedural aspects, administrative decisions and administrative appeals will go to the tribunals from administrative decisions. So, all these facilities are to be made along with the particular adoption of specific schedules.

MFN Principle

- In the context of the GATS, the MFN obligation (Article II) is applicable to any measure that affects trade in services in any sector falling under the Agreement, whether specific commitments have been made or not.
- Exemptions could have been sought at the time of the acceptance of the Agreement (for acceding countries: date of accession).
- They are contained in country-specific lists, and their duration must not exceed ten years in principle.

And the MFN principle, we talked about it in the market access commitments, and here in the service sector, in the goods sector, you cannot make any exceptions, but certain exceptions can be made; certain exceptions can be made in the MFN principle. So, all these commitments are made, or the specific reservations are made in the country-specific list or schedules.

Conditional Market access & National Treatment

- The market access provisions of GATS, laid down in Article XVI, cover six types of restrictions that must not be maintained in the absence of limitations.
 - > the number of service suppliers
 - > the value of service transactions or assets
 - > the number of operations or quantity of output
 - **▶** the number of natural persons supplying a service
 - > the type of legal entity or joint venture
 - > the participation of foreign capital



So, any country can put certain restrictions, for example, conditional market access principles, exceptions to national treatment can be made, and you can put limitations on the number of service suppliers, and value of total transactions, the number of operations or the quantity of output. So, these quantitative restrictions or number of operations, number of natural persons supplying a service, fourth mode, the type of legal entity, what type of legal entity you will permit that also to be mentioned, then the participation of foreign capital. So, what is the Cap of the FDI that restriction also you can put, and finally, you put it in the individual schedules, or the commitments.

National Treatment

- The national treatment obligation applies regardless of whether or not foreign services and suppliers are treated in a formally identical way to their national counterpart.
- What matters is that they are granted equal opportunities to compete.
- However, such measures must not lead to arbitrary or unjustifiable discrimination or constitute a disguised restriction to trade.



@KDR/RGSOIPL/NPTEL/TRADE LAW

And national treatment principles, we already talked about, you should give equal opportunity to, regardless of whether they are foreign service suppliers or domestic service suppliers. So, the national treatment principle also strictly applies to the service Agreement. So, you can see these principles are applicable.

Specific Commitments

- In addition to respecting the general obligations referred to above, each Member is required to assume specific commitments relating to market access (Article XVI) and national treatment (Article XVII) in designated sectors.
- The relevant sectors as well as any departures from the relevant obligations of Articles XVI and XVII are to be specified in the country's Schedule of Commitments.



@KDR/RGSOIPL/NPTEL/TRADE LAW

So, we talked about the specific commitments. The specific commitments or general obligations are related to market access, and these market access principles are attached to individual country schedules. So, every country negotiates with each other, and they agree to open up specific sectors to each other. So, you open up your sector, and I will open up my sector. This is the way the negotiations are going on, and finally, this list will be attached to the schedules and country schedules.

Sample Schedule of Commitments Limitations on Market Sector/ Sub-Sector **Limitations on National** Treatment Commitments I. HORIZONTAL COMMITMENTS All Sectors included in this Unbound, other than for (a) Authorization is required for Schedule temporary presence, as in intraacquisition of land by corporate transferees of essential senior executives and specialists and (b) presence for up to 90 days of representatives of a service provider to negotiate sales of service. II. SECTOR-SPECIFIC COMMITMENTS Distribution Services 1) Unbound (except for mail 1) Unbound except for mail order: none). Retailing Services (CPC 631, order: none) None None. Foreign Equity participation 3) Investment grants are available only to limited to 51% Unbound, except as companies controlled by Arcadian nationals. indicated in horizontal 4) Unbound section

A schedule looks like this. So, you can see the sector and horizontal commitments and other commitments, sectoral-specific commitments and limitations on market access, limitations on national treatment and additional commitments, if any. So, they can put it specifically; bound or unbounded. For example, for limitations on national treatment, foreigners require authorization to acquire land. This is one of the Indian conditions. So, you can see these are the types of schedules which are attached to all WTO Agreements.

Restrictions

1. What could be an example of a market access restriction in these sectors?

Existence of exclusive or monopoly operators. Prescribed forms of legal incorporation (e.g. joint stock companies). Ouantitative restrictions on presence of natural persons.

2. What could be an example of a national treatment restriction?

Restrictions on foreigners' participation in company boards. Prohibition of foreign land ownership. Discriminatory minimum capital or minimum reserve requirements.



Then what are the restrictions? What could be an example of market access restrictions? For example, exclusive or monopoly operators. So, joint stock companies, monopolies, state monopolies, quantitative restrictions on the presence of natural persons, how many H1B visas will be issued by the US per year and also restrictions on national treatment can be looked into, and restrictions on foreigners' participation in company boards. So,

you make restrictions on company boards, prohibition of foreign land ownership, discriminatory minimum capital or minimum reserve requirements. All these can be included in the country-specific schedules.

State Monopolies

- Article VIII:1 requires Members to ensure that monopolies or exclusive service providers do not act in a manner inconsistent with the MFN obligation and commitments.
- Article XXVIII(h) specifies, in turn, that a "monopoly supplier" is an entity that has been established by the Member concerned, formally or in effect, as the sole supplier of a service.
- E.g. telephony, postal services, rail and road transport, etc.



And specific provisions are related to state monopolies. So, Article 8.1 requires the members to ensure that monopolies or exclusive service providers do not act in a manner inconsistent with the MFN obligations and commitments. So, it is very simple. All the members or monopolies should act according to the market principles. It means that subject to competition provisions. So, Article 28(h), it talks about monopoly supplier. So, monopoly supplier created by a particular member should be the sole supplier of a particular service. For example, most of the state enterprises, the BSNL, telephone companies, postal services, rail, road transport, etcetera can become a monopoly in this category, monopoly supplier. And slowly, we are opening up sectors one by one, and you can find state monopolies in this particular area.

Demands in Mode 1

- Commitments across a wide range of sectors including professional services, computer-related services, health services and education
- - Similar commitments, where possible, for Mode 1 and Mode 2 (consumption abroad)
- · Removal of commercial presence requirements.
- - Ensure that commitments address the inadequacy of GATS classification list to cover all Mode 1 and Mode 2 services and takes into account technological developments in future.



So, the railway will also come under state monopolies. And what are the basic demands in mode one? We already explained that mode one is where the services travel borders and services cross borders. So, commitments in sectors include professional services, especially computer-related services, health services, education, etc. So, you can see the removal of commercial presence requirements: In commercial presence requirements, most of the countries now require, for example, Make in India program, which insists that you should manufacture the products in the country, in our country. So, presence of commercial presence, we require commercial presence. Also, you can see that for Mode One and Mode Two, services and technological developments in future also we have to take into consideration, and these are some of the demands under Mode One.

Demands in Mode 4

- · H-1B visas from the present 65,000 annually to about 115,000.
- · Demands under Mode 4: -
- - Expansion of coverage to include contractual service suppliers (CSS) and independent professionals (IP)
- - De-linking of Mode 4 commitments from Mode 3 (commercial presence)
- · Removal of conditions such as wage parity
- Abolition, or at least expansion of, quotas
- Removal of economics needs test (ENT) or make them transparent
- · Disciplining domestic regulation





So, if you look into mode 4, mode 4 is the most controversial because of the movement of people involved. So, I have mentioned certain numbers, and these numbers are reviewed or renewed by the United States every year, from time to time, and how many H1B visas are issued annually. And in mode four, there are a lot of requests. A lot of requests are under the mode 4 service supply. And one is the de-linking of mode 4 supply with mode 3 because if you have a commercial presence, then your person, the foreign person, should come for running, at least with some limitations. So, the people are asking for de-linking from this movement of people under mode 4 to mode 3 commercial presence. So, if you allow commercial presence and if you do not allow a foreign person to come and sit here, then I think this is connected. So, the argument for de-linking mode 3 and mode 4 services is the removal of conditions and wage parity. And we know that a foreigner is not going to come to India and work for a salary which is at par with Indian workers because there are a lot of issues involved, such as maybe his country's status and then the money is involved, the exchange rates involved and the wage code of that particular country are involved, the labour laws of that particular country are involved. So, I do not think there is any justification in asking for parity in salary and other things under mode 3 or mode 4. So, most of the countries avail services under mode 4 because they are always looking for cheap labour. For example, the Indian IT people those who work with H1B visas in the US. They are not only working in Indian companies and Indian-origin companies, but they also work in foreign companies because they are the cheapest manpower in the world. And also some of the *Economic Need Test* (ENT). So, removal of the economic need test is required to become more transparent. And then domestic regulations: Domestic regulations always play a crucial role because most of the countries do not look into the commitments under the GATS, and they increase visa fees enormously. Many times, India has protested against the United States for increasing the professional visa services charges. So, now, that will also come under the demands, under mode 4.

Conclusion

- It is observed that GATS is quite different from GATT, as GATS is the first multilateral trade agreement to cover trade in services, exclusively.
- The proliferation of trade in service has been boosted by the strong participation of the developing countries, which enhanced tour and travel services of these developing countries.
- India is also an active participative member of GATS, under which India develops its service sector and merged it with global trade in service.



commitments are up to the members to decide. They discuss things with other members, and finally, you mutually agree and open up. So, these specific commitments are bound and unbound, under each individual country's schedule. So, the basic GATS commitments include the general commitments and specific commitments under the schedule. So, every country has the freedom to decide whether to open or not to open a particular sector. For example, India so far has not opened up the higher education sector and the legal service sector is not opened up. So, in the next class, we are going to discuss specifically the legal service sector and why India is not opening it, what are the basic commitments and also the pros and cons of opening the legal service sector. So, we saw in this particular class the different modes of supply and also a total of 161 areas of the mode source supply. So, this product classification is according to the UN classification system and is mandatory to be accepted by all countries. They have accepted, and I think opening up the service sector has benefited. Some of the countries have vastly benefited, and one such country is India because our IT personnel and other professionals can go abroad and give services, and the opening up of more foreign supply is expected, and the proposals are submitted by India to the WTO from time to time. So, in the next class, we will see the opening of the legal service sector. Thank you.