

# **GATS Negotiations and India**

Evolution and State of Play

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# Foreword

In the recent past trade in services has emerged as one of the most contentious areas of the multilateral trade negotiations under the ambit of the World Trade Organisation (WTO). The content of the Annex C of the Hong Kong Ministerial Declaration on services as well as the modus operandi of its drafting sparked off an extensive debate. In particular, the plurilateral ‘request-offer’ approach mandated by the Annex C generated a plethora of controversy. Serious concerns emerged as to whether the plurilateral approach was at all development-friendly and compatible with the architecture of the General Agreement on Trade in Services (GATS).

Notwithstanding such controversies, services negotiations since the Hong Kong Ministerial last December had been proceeding primarily on the basis of the plurilateral ‘request-offer’ approach until the Doha Round entered a temporary ‘suspension’ on 24 July 2006. Since then negotiations have been stalled on all areas across the Round, including services. Given the uncertain political climate, it is difficult to predict at this juncture as to when the negotiations would resume, or what implications the suspension of the Doha talks would have on this Round, and on the future of multilateralism.

India’s negotiating position on services has undergone a paradigm shift since the Uruguay Round. From being a leading opponent of the GATS in the early stages, India has now emerged as one of the champions of services trade liberalisation under the GATS. This more recent negotiating stance of India on services is partly owing to the growing importance of the services sector in its economy. With a vast pool of educated and skilled workers in its workforce, the country also has a huge offensive interest in export of Cross-border services (Mode 1) and in the services involving the Movement of Natural Persons (Mode 4).

The present paper tracks down the evolution of the GATS negotiations since its inception and puts forward a concise overview of the state of play. The paper covers extensively the key issues under the purview of the GATS from an Indian perspective. It also makes important policy suggestions for India on certain sensitive sectors like retail, higher education, audio-visual and legal services. In view of the fact that not much forward movement is expected in the near future in market access in Modes 1 and 4 in the key markets of India’s interest, the paper argues that India needs to reconsider and reassess its aggressive policy stance on services. Importantly, the paper stresses that, upon resumption of the Doha negotiations, India should refrain from considering any compromise on its interests in agriculture and Non Agricultural Market Access (NAMA) for pushing through its offensive interests in services.

I hope that this extensive overview, which happens to be Centad’s maiden publication on services, would facilitate development of a better understanding of the GATS from an Indian standpoint, and trigger a healthy debate on some of the key policy recommendations.

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# Abbreviations

ACP	Africa, Caribbean and Pacific
ASEAN	Association of Southeast Asian Nations
ASSOCHAM	The Associated Chambers of Commerce and Industry of India
BCI	Bar Council of India
BIMSTEC	Bangladesh, India, Myanmar, Sri Lanka, Thailand - Economic Cooperation
BPO	Business Process Outsourcing
BV	Business Visitor
CECA	Comprehensive Economic Co-operation Agreement
CPC	Central Product Classification
CRS	Computer and Related Services
CSS	Contractual Service Supplier
CTS-SS	Council on Trade in Services in Special Session
DC	Developed Country
DR	Domestic Regulation
EC	European Communities
ENT	Economic Needs Test
ESM	Emergency Safeguard Measures
EU	European Union
FDI	Foreign Direct Investment
FIPB	Foreign Investment Promotion Board
FTA	Free Trade Area
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCC	Gulf Cooperation Council
GDP	Gross Domestic Product

GE	General Electric Company
GIS	Geographic Information System
GoI	Government of India
GPA	Agreement on Government Procurement
HKMD	Hong Kong Ministerial Declaration
HSBC	Hong Kong and Shanghai Banking Corporation
IBM	International Business Machines Corporation
ICT	Intra-Corporate Transferee
IO	Initial Offer
IP	Independent Professional
IT	Information Technology
ITES	Information Technology Enabled Services
LDCs	Least Developed Countries
LMT	Labour Market Test
LRP	Licensing Requirements and Procedures
MA	Market Access
MFN	Most Favoured Nation
MHRD	Ministry of Human Resource Development
MoC	Ministry of Commerce
MRA	Mutual Recognition Arrangement
MTA	Mid-Term Appraisal
MTN	Multilateral Trade Negotiation
NAMA	Non-Agricultural Market Access
NASSCOM	National Association of Software Services Companies
NT	National Treatment
OECD	Organisation for Economic Co-operation and Development
QRP	Qualification Requirements and Procedures

R&D	Research and Development
RO	Revised Offer
RTA	Regional Trade Agreement
S&DT	Special and Differential Treatment
SC	Scheduled Caste
SEZ	Special Economic Zone
ST	Scheduled Tribe
TRIMS	Trade Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TS	Technical Standards
UGC	University Grants Commission
UNCPC	United Nations Central Product Classification
UNCTAD	United Nations Conference on Trade and Development
UPA	United Progressive Alliance
UR	Uruguay Round
USA	United States of America
USO	Universal Service Obligation
WGTGP	Working Group on Transparency in Government Procurement Practices
WPDR	Working Party on Domestic Regulation
WPGR	Working Party on GATS Rules
WTO	World Trade Organisation

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# Executive Summary

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

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

In order to capture the complex nature and diverse forms of international transactions in services, the GATS adopted a novel approach of classifying the entire range of services trade into four 'modes', as follows: (i) Mode 1 (Cross-border); (ii) Mode 2

(Consumption Abroad) (iii) Mode 3 (Commercial Presence) and (iv) Mode 4 (Movement of Natural Persons).

The GATS, among other elements, consists of a series of general provisions that largely applies across the board to all measures affecting trade in services. However, it also includes a set of 'specific commitments' that applies only to service sectors that are enlisted in a Member's GATS schedule. For each specific sector scheduled by it, a Member undertakes 'specific commitments' on 'Market Access' (MA) and 'National Treatment' (NT), for each mode of services trade. Importantly, it is possible for the Members not to grant full MA and deny NT by inscribing limitations on MA and/or NT in their respective schedules.

Given the flexibilities, in particular, the 'bottom-up' approach adopted by the GATS, the achievement of the UR in terms of the liberalisation of the services trade was rather modest. Members at best bound the *status quo* for the most part and sometimes even backtracked on the *status quo*. Commitments were very restrictive not only in terms of the number of sectors scheduled, but also with respect to the types of sectors in which commitments were undertaken. There was also a significant asymmetry in the 'modal' distribution of both horizontal and 'sector-specific commitments'.

In line with the 'built-in' agenda of the GATS regarding successive rounds of negotiations towards achieving progressive liberalisation in the services trade, a new round of services negotiations, termed 'GATS 2000', was launched in January 2000. The 'Guidelines' for these negotiations had two mandates: (i) Market Access and (ii) Rule-making. The GATS 2000 negotiations were subsequently

subsumed by the Doha Development Agenda in November 2001.

As per the 'Guidelines', market access negotiations on services initially proceeded on the basis of the bilateral 'request-offer' approach'. However, due to various reasons, some technical and some political, the bilateral approach failed to generate sufficient momentum in the GATS 2000 negotiations. In this backdrop, the Hong Kong Ministerial Declaration of December 2005 mandated the adoption of a plurilateral 'request-offer' approach as a complementary method of negotiations with the aim of expediting the market access negotiations on services. Since then the GATS 2000 negotiations were proceeding primarily on the basis of the plurilateral approach until 24 July 2006, when the Doha Round entered a temporary 'suspension' owing to the failure of the G 6 countries (Australia, Brazil, the EU, India, Japan and the US) to arrive at a landing zone on key issues relating to domestic support and market access in agriculture.

India's negotiating position on services has undergone a paradigm shift since the Uruguay Round (UR). From being a leading opponent of the GATS in the early stages, India has now emerged as one of the forerunners of the services trade liberalisation under the GATS. This more recent negotiating stance of India on services is partly attributable to the growing importance of the services sector in its economy. With a vast pool of educated and skilled workers in its workforce, the country also has a huge offensive interest in the export of Mode 1 and Mode 4-based services. Hence India is aggressively participating in the ongoing GATS 2000 negotiations predominantly with the aim of securing its offensive interests in the aforesaid two modes of the services trade. Although India's 'Initial Offer', submitted in January 2004, was rather conservative, India came out with an ambitious 'Revised Offer' in August 2005.

In the post-Hong Kong Ministerial period, India has received plurilateral requests in a range of services. It is learnt that the expectation from India would be to meet the requests primarily in telecommunications, finance, parts of energy, distribution (retail), and courier including express delivery. India has indicated that it can meet requests substantially in sectors like construction and related engineering services, maritime transport services, etc. Requests are likely to be fulfilled partially in energy and telecommunications also. However, as it stands now, it would be difficult for India to meet the requests in legal services, retailing services, private education and audio-visual services, owing to the domestic sensitivities associated with these areas.

As far as India's offensive interests in Modes 1 and 4 go, an assessment of the offers placed by some of the developed countries that constitute the key target markets for the Indian service providers, clearly reveals that there has been very modest movement in India's favour notwithstanding the ambitious 'Revised Offer' placed by the country.

Under these circumstances, India needs to take advantage of the current Doha impasse to reconsider and reassess its aggressive policy stance on services. It would be a better strategy on the part of India to hold back any further ambitious offers in services for the time being so that those offers may be used as a bargaining chip in future negotiations to push through its aggressive agenda in Modes 1 and 4. India should also refrain from considering any compromise on its interests in agriculture and Non Agricultural Market Access (NAMA) for pushing through its offensive interests in services. Given the pessimistic scenario in Modes 1 and 4, there are not enough grounds for India to compromise on the livelihood of millions of vulnerable farmers of the country or to put the survival of many a domestic industry at stake.

# 1. The Backdrop

International trade in services has recorded a rapid growth in the recent past. Global exports of commercial services grew by 18 per cent in 2004, thereby surpassing the US\$2 trillion mark for the first time.<sup>1</sup> The services sector also accounts for an increasing share of the investment flows in the world. While in the early 1970s, services constituted only a quarter of the global Foreign Direct Investment (FDI) flows, in 2002 this share went up to two third of the total FDI. Technological developments, demographics, the growing internationalisation of production processes, and economic liberalisation are among the key driving forces behind the increasing globalisation of services.<sup>2</sup>

While developed countries still dominate trade in services, developing countries are accounting for an increasing share of the global trade in services. Services exports from developing countries have recorded a four-fold increase in the last fifteen years.<sup>3</sup> Five developing countries (China, Hong Kong China, Republic of Korea, India and Singapore) featured among the top twenty exporters of commercial services in 2004.<sup>4</sup> Developing countries are acquiring a clear-cut comparative advantage in a growing number of labour-intensive as well as high-skilled services. With the opening-up of a large number of developing economies to FDI, these countries are also emerging as an increasingly important destination market for services investment. The share of developing countries in the global outward FDI in services climbed from a mere 1 per cent in 1990 to 10 per cent in 2002.<sup>5</sup>

As far as trade liberalisation in services through multilateral negotiations is concerned, the Uruguay Round (UR) of trade negotiations (1986-94) was instrumental in bringing this 'new' area under the ambit of the multilateral trade negotiations (MTNs) for the first time. The UR set in place a sort of a framework agreement, called the General Agreement on Trade in Services (GATS), which brought under its purview the entire range of services trade. However, the achievement of the UR in terms of the actual liberalisation of the services trade was rather modest.

Subsequently, in line with the 'built-in' agenda of the GATS regarding successive rounds of negotiations towards achieving progressive liberalisation in the services trade, a new round of services negotiations was initiated in January 2000. The 'Guidelines' for this negotiation had two mandates: (i) Market Access and (ii) Rule-making. The GATS 2000 negotiations were subsequently subsumed by the Doha Development Agenda in November 2001. Since then the GATS 2000 negotiations are proceeding as a part of the Doha Round.

As per the 'Guidelines', market access negotiations on services were initially following the bilateral 'request-offer' approach. However, due to various reasons, some technical and some political, the bilateral approach failed to generate sufficient momentum in the services trade liberalisation. In this backdrop, the Hong Kong Ministerial Declaration of December 2005 mandated the adoption of a plurilateral 'request-offer' approach as

<sup>1</sup> International Trade Statistics (2005), p.2.

<sup>2</sup> Chanda (2006b).

<sup>3</sup> Mehta (2006).

<sup>4</sup> International Trade Statistics (2005), Table 1.7, p.23.

<sup>5</sup> Mehta (2006).

a complementary method of negotiations with the aim of expediting the market access negotiations on services. Since then the services negotiations at the WTO were primarily following the plurilateral route, until the Doha Round of trade talks entered a deadlock in Geneva on 24 July 2006.

As far as India is concerned, from being one of the prime opponents of the inclusion of services in the UR negotiations, India has of late emerged as a leading proponent of the services trade liberalisation under the GATS. The sea change in the negotiating stance of India on services is in accordance with the growing importance of the services sector in its economy. With a vast pool of educated and skilled workers in its workforce, the country also has a huge comparative advantage in Cross-border services (Mode 1) and in services involving the Movement of Natural Persons (Mode 4). Hence, India is participating aggressively in the ongoing GATS 2000 negotiations with the aim of securing its offensive interests in the aforesaid two modes of services trade.

Given this backdrop, the purpose of the present paper is to assess and analyse the state of play in

the GATS 2000 negotiations in the light of the negotiating history of the GATS and the subsequent evolution of the services negotiations under its purview, with special reference to India.

The structure of the paper is as follows: Section 2 briefly describes the emergence of the GATS under the UR negotiations. Section 3 then goes on to analyse certain key features of the GATS and its typical architecture. Section 4 describes the services trade liberalisation under the UR. Section 5 explores the chronology of major developments under the GATS 2000 negotiations up to the current state of play. Section 6, with an exclusive focus on India, starts by providing a brief outline of the growing importance of the services sector in the Indian economy in the recent years. It then discusses India's participation in different stages of the GATS 2000 negotiations in view of India's offensive interests in Mode 1 and Mode 4. The section ends with policy suggestions on certain domestically-sensitive services sectors in the backdrop of the current negotiating stance of India. Section 7 ends the paper with some concluding observations.

## 2. The Emergence of the GATS

In September 1986, the historic Uruguay Round (UR) of trade negotiations were launched in Punta del Este, Uruguay by the contracting parties of the General Agreement on Tariffs and Trade (GATT) - the 'predecessor' of the World Trade Organisation (WTO). The subsequent eight years (1986-94) bore witness to the largest and most complex negotiations in the history of international economics - the outcome of which was embodied in a document of some twenty six thousand pages. The UR not only laid the foundation of the WTO as a full-fledged legally constituted international organisation, which came into being with effect from 1 January 1995, but also culminated into a range of agreements covering subjects as diverse as agriculture, industrial tariffs, non-tariff barriers, antidumping, subsidies, technical

standards, textiles and clothing, customs valuation, safeguards and so on. If one of the most significant achievements of the UR was the establishment of a unified dispute-settlement system encompassing all the agreements under the purview of the newly-established WTO, another accomplishment was certainly the incorporation of three 'new' areas, heretofore considered to be non-trade issues, within the rule-based system of the GATT, e.g. (i) services, (ii) Trade-Related Aspects of Intellectual Property Rights (TRIPS) and (iii) Trade Related Investment Measures (TRIMS).

There was a great deal of opposition in the early 1980s from a number of countries, particularly from the 'South', to the idea of incorporating these 'new'

subjects under the multilateral trade negotiations (MTNs). However, under tremendous pressure from the developed countries (DCs), which had huge stakes in these 'new' areas, developing countries were left with no option than to accept the inclusion of these 'new' areas (including services), into the UR of trade negotiations. This was largely due to the *quid pro quo* that existed during the UR negotiations between these 'new' issues on the one hand and the 'promised' market access liberalisation on the other.

As far as services are concerned, by the time the UR negotiations were launched, this multifaceted sector had already begun to represent a large proportion of the gross domestic product (GDP) of many an industrialised country of the world. Some of the service providers from these countries were also exploring the possibility of expanding their business in other countries. However, in their endeavour, these service providers from the 'North'

often came across various protectionist measures undertaken by the respective governments of the destination countries, with the aim of preserving businesses for domestic service providers in the latter group of countries. Hence, the service sector lobbies of the developed countries (DCs) began to urge an international cooperative mechanism that would develop rules against such protectionist tendencies.<sup>6</sup> It was the pressure tactics played by these service sector lobbies of the 'North' for liberalisation of services trade and investment that was predominantly responsible for bringing in the services trade under the purview of the MTNs.

The outcome of the UR negotiations on services was the General Agreement on Trade in Services (GATS), which entered into force (along with all other WTO Agreements) on 1 January 1995, with a set of binding rules and disciplines to govern the services trade.

## 3. An Overview of the Key Features of the GATS

### 3.1 Definition and Classification of Services Trade under the GATS

The GATS was formulated as a sort of a framework agreement for the entire landscape of the services trade. During the UR, the Member countries of the WTO drew up the 'Services Sectoral Classification List' (WTO Document MTN.GNS/W/120), generally referred to as W/120, on the basis of the 'United Nations Central Product Classification' (UNCPC). This list covers 161 service activities under 12 broad sector heads (see Box 1). This list includes services trade of diverse nature and categories. Certain services transactions, for instance, may occur across borders (say, via telecommunications media), where there is no need for physical proximity of the service provider and the consumer (analogous to trade in goods). For certain other categories of services, however, it

may be essential for the service provider and the consumer to be at the same place at the same time. This proximity may be achieved either through the physical movement of the consumers to the location of service providers, or via the temporary entry of service providers into the territory of a consumer. In a statistical sense all of these aforesaid categories of services supply are considered to be trade and are registered as such in the balance of payments accounts of a country. However, in the GATS context, trade in services is defined also to include sales by foreign firms that have established a commercial presence in the country where the services are getting delivered.

Notably, the UNCPC, which forms the basis of W/120, has undergone changes over time to keep pace with the technological developments. This

<sup>6</sup> Jackson (1997), p.306.

**Services Sectoral Classification List (W/120)***Broad Sectors and Sub-sectors*

1. **Business Services**
  - A. Professional services
  - B. Computer and related services
  - C. Research and development services
  - D. Real estate services
  - E. Rental/Leasing services without operators
  - F. Other business services
2. **Communication Services**
  - A. Postal services
  - B. Courier services
  - C. Telecommunication services
  - D. Audiovisual services
  - E. Other
3. **Construction and Related Engineering Services**
  - A. General construction work for buildings
  - B. General construction work for civil engineering
  - C. Installation and assembly work
  - D. Building completion and finishing work
  - E. Other
4. **Distribution Services**
  - A. Commission agents' services
  - B. Wholesale trade services
  - C. Retailing services
  - D. Franchising
  - E. Other
5. **Educational Services**
  - A. Primary education services
  - B. Secondary education services
  - C. Higher education services
  - D. Adult education
  - E. Other education services
6. **Environmental Services**
  - A. Sewage services
  - B. Refuse disposal services
  - C. Sanitation and similar services
  - D. Other
7. **Financial Services**
  - A. All insurance and insurance-related services
  - B. Banking and other financial services (excl. insurance)
  - C. Other
8. **Health-related and Social Services (other than those listed under 1.A.h-j.)**
  - A. Hospital services
  - B. Other human health services
  - C. Social services
  - D. Other
9. **Tourism and Travel-related Services**
  - A. Hotels and restaurants (incl. catering)
  - B. Travel agencies and tour operators services
  - C. Tourist guides services
  - D. Other
10. **Recreational, Cultural and Sporting Services (other than audio-visual services)**
  - A. Entertainment services (including theatre, live bands and circus services)
  - B. News agency services
  - C. Libraries, archives, museums and other cultural services
  - D. Sporting and other recreational services
  - E. Other
11. **Transport Services**
  - A. Maritime transport services
  - B. Internal waterways transport
  - C. Air transport services
  - D. Space transport
  - E. Rail transport services
  - F. Road transport services
  - G. Pipeline transport
  - H. Services auxiliary to all modes of transport
  - I. Other transport services
12. **Other Services not Included Elsewhere**

Source: WTO Document MTN.GNS/W/120.

provides testimony to the fact that services is an evolving sector. It may also be underscored here that the GATS has adequate flexibility ingrained into it to accommodate newer categories of services within its purview.

In order to capture the complex nature and diverse forms of international transactions in services, the GATS adopted the novel approach of classifying the entire gamut of services trade into the following four modes as defined in Article I.2 of the GATS:

- Mode 1 (Cross-border supply) refers to delivery of services across countries, i.e. without the physical proximity of the service provider and the consumer. Business process outsourcing (BPO) and services provided across countries through telecom network are classic examples of cross-border supply of services.
- Mode 2 (Consumption Abroad) covers services, which involve the physical movement of the service consumer to the territory of the service provider, such as in the case of tourism services.
- Mode 3 (Commercial Presence) embraces supply of services by a service provider of one country through commercial presence in the territory of another country. In other words, it involves the establishment of representative offices, branches, subsidiaries, joint ventures, partnerships, etc. in the overseas market, analogous to Foreign Direct Investment (FDI) in services.
- Mode 4 (Movement of Natural Persons) refers to the temporary movement of service providers either in an individual capacity or as part of an establishment to provide the service overseas.

As per statistical approximation of the WTO, services supplies in various Modes, i.e. Cross-border supply (Mode 1), Consumption Abroad (Mode 2), Commercial Presence (Mode 3) and Movement of Natural Persons (Mode 4) account for 35 per cent, 10-15 per cent, 50 per cent, and

1-2 per cent, respectively, of the total commercial services flows in the world.<sup>7</sup>

The modal definition of the services trade also brings into the purview of the GATS regulatory issues concerning investment policies, and immigration and labour market legislation hitherto outside the domain of the multilateral trading system.<sup>8</sup>

The GATS disciplines apply to measures taken by the Member countries of the WTO at the central, regional, and local government levels as well as by non-governmental bodies to whom powers have been delegated by the governments or authorities. Article I.3 (b) of the GATS, however, excludes the services supplied in the 'exercise of governmental authority' from the purview of the GATS rules and disciplines. This exclusion encompasses (as per Article I.3 (c)) services which are supplied neither on a 'commercial basis nor in competition with one or more service suppliers'. However, the definitional ambiguities involved in this provision (owing to the lack of clarity in the GATS regarding the matter) has made the coverage of this carve-out clause a highly debatable issue.

### 3.2 The Architecture of the GATS

The structure of the GATS broadly comprises the following four main elements:

- A set of general provisions, principles and rules that largely applies across the board to all measures affecting trade in services.
- A set of 'specific commitments' that applies only to service sectors and sub-sectors that are enlisted in the GATS schedule of a Member country of the WTO.
- An understanding that periodical negotiations will be undertaken with the aim of progressive liberalisation of trade in services.
- A set of attachments and annexes that takes into account sectoral specificities and ministerial decisions pertaining to the implementation of the Agreement.

<sup>7</sup> International Trade Statistics (2005), p.8.

<sup>8</sup> Chanda (2002), p.4.



All these elements are briefly discussed below.

### 3.2.1 General Provisions

The first key element of the GATS consists of a series of general concepts, principles, and rules that is largely applicable across the board to measures affecting trade in services. This includes provisions pertaining to the Most-Favoured-Nation (MFN) treatment (Article II), Transparency (Article III), Domestic Regulation (Article VI), Monopolies and Exclusive Service Suppliers (Article VIII), Emergency Safeguard Measures (Article X), Balance of Payments Safeguards (Article XII), Government Procurement (Article XIII), General Exceptions (Article XIV), and Subsidies (Article XV).

The most generally applicable provisions of the GATS are those of MFN and Transparency. Just like the GATT, a fundamental provision of the GATS is the MFN clause, which is based on one of the core principles of this Agreement, viz. non-discrimination. Under this clause (as enshrined in Article II.1 of the GATS), a Member country is obliged to provide to another Member of the WTO, treatment which is no less favourable than

what it accords to any other country, whether a Member of the WTO or not. The scope of the MFN clause under the GATS is, however, less expansive than its counterpart in the GATT. This is because, although MFN is a general obligation, the GATS contains an annex allowing the Member countries to invoke exemptions to MFN. The coverage of MFN for each GATS Member is therefore determined by a so-called negative list. Such exemptions from unconditional MFN treatment do not exist under the GATT. The MFN exemptions under the GATS may only be made once - upon the entry into force of the Agreement. In principle, MFN exemptions are to continue for no more than ten years and are subject to review in future MTNs, the first of which, as per the stipulations enshrined in the GATS, must take place within five years of the entry into force of the Agreement. (See Box 2 for further discussion on MFN exemptions).

Under the Transparency provision (Article III), the Members are required to provide information on all relevant rules and measures having some bearing on the operation of the GATS, in general, or the

#### BOX 2

#### The Uruguay Round Negotiations and MFN Exemptions

The need for an annex on MFN exemptions arose from concerns on the part of some industries that MFN allowed competitors located in countries with relatively restrictive policies to benefit from their sheltered markets while enjoying a free ride in less restrictive export markets. This concern was expressed vividly in the GATS discussions on financial services and telecommunications, prompting industry representatives in relatively open countries to lobby for MFN exemptions as a way to force sectoral reciprocity. At the fag end of the UR negotiations it became clear that a number of participants was ready to invoke the Annex on MFN exemptions for financial services, telecommunications, maritime transport, and/or audio-visual services. Over sixty

countries had submitted MFN exemptions by mid-1994. Rather than allowing a situation to develop where the countries would withdraw already tabled commitments in these areas and/or exempt them from the MFN obligation, a compromise solution was reached under which negotiations in these sectors were to continue after the establishment of the WTO. Negotiations on financial services, basic telecommunications and maritime transport were restarted in the spring of 1994, with those on financial services to be concluded by July 1995 and the others by mid-1996. It was decided that if negotiations were not successful, then Members would be free to invoke an MFN exemption for the sector concerned.

*Source:* Hoekman and Kostecki (1995), p.132.

'specific commitments' undertaken by the Members under this Agreement, in particular. There is also a requirement for establishing enquiry points to supply specific information to other Members and to provide prompt response to any requests for information on relevant rules and regulations affecting the services trade.

Some of the other GATS provisions included under the 'General Obligations and Disciplines', are not really general in the true sense of the term, since their applicability is often subject to certain qualifications. For instance, the provisions on Domestic Regulation (Article VI) are applicable only to those sectors in which a Member has undertaken 'specific commitments'. In the case of Government Procurement (Article XIII) also, there are exceptions to the applicability of MFN, Market Access, and National Treatment provisions under specified conditions. Furthermore, there are exceptions to the Market Access, National Treatment and MFN provisions for measures taken to protect public order, life, for national security reasons and the like.

### 3.2.2 Specific Commitments

The second major element of substantive obligations under the GATS, called 'Specific Commitments', applies only to those services sectors which are scheduled by a Member in its GATS commitments and not to all services sectors covered by the GATS. The provisions pertaining to the 'Specific Commitments' lay down the framework following which the Member countries are supposed to commit themselves to liberalising trade in services. Two main pillars of the 'Specific Commitments' are obligations regarding National Treatment (NT) (Article XVII) and the provisions pertaining to Market Access (MA) (Article XVI). The provisions included under these two categories are aimed at creating transparency *vis-à-vis* the barriers that foreign service providers may face in a Member country of the WTO.

Barriers on foreign service providers may be imposed in diverse ways.

First, they may be imposed on the frontier. This refers to measures such as, tariff and non-tariff barriers, exchange controls and other restrictions on transfer of funds, restrictions on the movement of people, etc.

Second, barriers may be imposed internally, in the form of differential regulations or taxes imposed on foreign service suppliers or their services.

The third form of barrier can impede foreign access in ways that do not in themselves discriminate against foreigners, but that impede all access, whether by local or by foreign service suppliers. These kinds of barriers - which are non-discriminatory with respect to the nationality or the residence of the service suppliers - come under the purview of 'national competition policy'. Here the term 'national competition policy' is interpreted broadly to embrace not only restrictive trade practices by firms but also legislated barriers to entry to an activity as well as government regulation of access to essential facilities where 'natural monopoly' elements are present.<sup>9</sup>

The first two categories of barriers (e.g. frontier and internal) enlisted above discriminate against foreign service providers. However, in many instances the distinction between frontier and internal barriers becomes quite blurred in the case of services trade.<sup>10</sup> In part, reflecting this, the GATS concept of National Treatment (NT) (which, like the MFN clause, is also based on the core principle of non-discrimination) does not draw a distinction between frontier and internal but embraces all policies that might discriminate between domestic and foreign suppliers (by all means of supply). In contrast, the NT provision of the GATT (Article III) is headed 'National Treatment on Internal Taxation and Regulation'.

<sup>9</sup> Snape (1999), p. 281.

<sup>10</sup> *ibid.*

NT is defined under the GATS, as treatment no less favourable than that accorded to like domestic services and service providers.<sup>11</sup> Notably, such treatment may or may not be identical to that applying to domestic service providers, in view of the fact that identical treatment may actually worsen the condition of competition for foreign-based service providers (e.g. a requirement for insurance firms that reserves be held locally).<sup>12</sup> The NT clause is however, applicable only for those service sectors that are inscribed by a Member in its schedule of GATS commitments. Furthermore, NT is also subject to the conditions and qualifications listed by a Member in its schedule.

In order to address the aforesaid third category of barriers to Market Access (MA) as well, Article XVI of the GATS includes specific obligations on MA.<sup>13</sup> Under this Article, access (for each mode of supply) is to be no less favourable than what is specified in a Member's schedule. Furthermore, for all those sectors for which MA commitments are undertaken by a Member, six types of MA restrictions are, in principle, prohibited. However, although prohibited in principle, if a Member wants to impose one or more of these six categories of restrictions on MA, it may do so as long as it specifies them in its schedule of GATS commitments. These MA limitations relate to:

- the number of foreign service suppliers allowed,
- the value of transactions or assets,
- the total quantity of services output,
- the number of natural persons who may be employed,
- the type of legal entity through which a service supplier is permitted to supply a service,

- the extent of foreign capital participation.

It may be noted here that the MA obligation under the GATS partly overlaps with the NT requirement. This is because, prohibited measures with respect to MA may be discriminatory with respect to the nationality or the residence of the service providers and vice versa. For instance, limitations on foreign equity participation violate MA and are at the same time discriminatory against foreign service suppliers. Again, limitations on NT, such as, preferential treatment of domestic service suppliers via taxes or subsidies or government procurement policies also affect MA conditions for foreign service suppliers.<sup>14</sup> This overlap creates potential for confusion and disputes. It can also dilute the value of the commitments made in either.

Certain significant features of the GATS provisions on specific commitments are worth highlighting here:

- A Member is free to decide which service sectors are to be scheduled for undertaking liberalisation commitments under the GATS rules. This is often termed as a positive list approach or a 'bottom-up' approach.<sup>15</sup>
- The 'specific commitments' of the GATS have a distinctive structure given the 'modal' approach of classifying services trade discussed earlier. For each specific sector scheduled by it, a Member makes commitments on MA and NT, for each mode of services trade, under what are known as sectoral schedules of commitments. Members also make MA and NT commitments across the board for all the sectors included in its schedule with respect to each mode of services in what are known as horizontal schedules of

<sup>11</sup> Article XVII of the GATS:

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.
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.

<sup>12</sup> Hoekman and Kostecki (1995), p.132.

<sup>13</sup> Apart from the specific provisions on 'Market Access' as enshrined in Article XVI of the GATS, certain other provisions of this Agreement also deal with this kind of non-discriminatory barrier, e.g. Article VIII on 'Monopolies and Exclusive Service Suppliers', Article IX on 'Business Practices', etc.

<sup>14</sup> Chanda (2002), p.6.

<sup>15</sup> This can be contrasted to the NAFTA, which has a 'top-down' approach, whereby all service sectors are covered unless an exception is tabled.

commitments. The ‘horizontal commitments’ could complement, override, or qualify the ‘sector-specific commitments’.<sup>16</sup> Hence, both sectoral and horizontal schedules have to be read together to understand the extent and the nature of commitments undertaken in a particular sector. However, the possibility of inscribing limitations in the horizontal schedule of commitments implies that it can undermine the sector-specific commitments made, and introduce ambiguities in interpretation.<sup>17</sup>

- As is evident from the above two features, MA and NT provisions are not automatically applicable across the board for all services sectors. These are negotiated obligations particular to each GATS signatory.
- It is possible for the Members not to grant full MA and deny NT by inscribing limitations on MA and/or NT. This is done by recording such conditions and qualifications in the schedule under the horizontal section of commitments and/or under the sector-specific commitments corresponding to each of the four modes of services trade.
- In its schedule, a Member is said to have made a ‘Full’ commitment on the MA/NT in a sector or across the board (i.e. horizontal) in a particular mode of supply of service, if the corresponding entry reads ‘None’. In other words, an entry of ‘None’ in the schedule of a Member means that it is committing itself to not having in place any measure which violates the MA/NT for a particular mode of supply either in a specific sector or across the board. The term ‘Unbound’, when inscribed in a Member’s schedule, implies that ‘no commitment’ is made. In other words, the Member retains the right to impose restrictions in the sector(s) for that particular mode of service delivery. The rest of the entries, which include specification of certain restrictions and limitations, are referred to as ‘partial commitments’.
- The WTO Members may also choose to make commitments, which are outside the scope of

MA and NT as defined in the GATS. These are called Additional Commitments (Article XVIII). This provision provides scope for making commitments in such regulatory areas as licensing, qualifications and standards applicable to services.

The aforesaid ‘bottom-up’ approach to trade liberalisation in services is a significant feature of the GATS framework, which has a bearing on many a challenge posed by the GATS, as will be discussed at a later stage in this paper.

It may also be noted here that it is not necessary for the Member countries to stick to the W/120 classification for making their GATS commitments. However, most Members have done so during the Uruguay Round. Member countries, however, have the liberty to clarify definitions. In due course, as the UNCTAD has undergone changes due to technological developments, some countries have also taken this into account while making their offers in the Doha Round.

### 3.2.3 Progressive Liberalisation

The third important element of the GATS is a set of provisions dealing with ‘Progressive Liberalisation’. Article XIX.1 mandates entering into successive rounds of negotiations, beginning no later than five years from the date of entry into force of the WTO Agreement and periodically thereafter. Such negotiations should be aimed at achieving a progressively higher level of liberalisation. However, Article XIX.2 clearly states that the process of liberalisation ‘shall’ take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. GATS also incorporates certain flexibilities for developing country Members, which allow them to open fewer sectors, liberalise fewer types of transactions, and increase their MA commitments in compatibility with their development situation.

<sup>16</sup> Chanda (2002), p.5.

<sup>17</sup> Chanda (2002), p.6.

It is further stipulated that for each round, negotiating guidelines and procedures shall be established for which an assessment of trade in services is to be carried out by the Council for Trade in Services. It is required that the negotiating guidelines 'shall' establish modalities for the treatment of autonomous liberalisation undertaken by the Members since previous negotiations, as well as for the special treatment for least-developed countries. GATS further specifies three approaches of negotiations, which may be adopted towards achieving the goal of progressive liberalisation. These are: bilateral, plurilateral and multilateral.

### 3.2.4 Annexes and Attachments

The fourth important element of the GATS is a series of annexes and attachments added at the end of the legal text. The annexes comprise regulatory principles agreed upon in specific sectors and decisions on specific issues. These include annexes on MFN exemptions, movement of natural persons, air transport services, financial services, maritime transport services and basic telecommunications. The attachments on the other hand, consist of a series of Ministerial Declarations pertaining to the implementation of the GATS. These include decisions on: Institutional Arrangements; Dispute Settlement Procedures; Services Trade and the Environment; Movement of Natural Persons; and Professional Services, among others. The purpose of these annexes and attachments is to outline procedural and implementation issues in these areas and to establish a timeframe for future discussions on specific issues.<sup>18</sup>

### 3.3 Pros and Cons of the GATS Flexibilities

The coverage of the GATS is in principle much broader than that of the GATT. In this sense, the GATS is a more general Agreement than the GATT. However, this breadth of coverage in the GATS has been secured at a cost, namely, the ease by which a particular service sector can be

excluded from the purview of the major GATS disciplines.<sup>19</sup> Under the GATT, all products are covered by general provisions and exclusion of products from such coverage occurs only in special circumstances. Under the GATS, however, many of the most important provisions (e.g. National Treatment, Market Access, Domestic Regulation, etc.) apply only to the service sectors that are specified in the schedule of a Member country. For these provisions, the service sectors are negotiated in, rather than out, which is regarded as a much less liberalising procedure compared to the GATT. Moreover, unlike the GATT, even the MFN principle can be implemented under the GATS on a conditional rather than an unconditional basis. All these flexibilities make the GATS a more liberal agreement than the GATT.

The 'bottom-up' approach adopted by the GATS leaves sufficient room for the Member countries to undertake trade liberalisation in services at their own terms and pace. At least legally there is no compulsion on a Member country to open up a particular sector or a particular mode of supply if there are domestic sensitivities and concerns surrounding the potential impact of such an opening-up. In this regard, the GATS attempts to strike a balance between commercial interests on the one hand and regulatory concerns and public policy objectives of the Member countries on the other.<sup>20</sup>

Notwithstanding the scope of retaining sufficient policy space provided by the flexibilities embedded in the GATS, there are certain major drawbacks associated with these flexibilities from the point of view of progressive liberalisation of the services trade - one of the prime objectives of the GATS. For instance, given the scope of evoking MFN exemptions together with the positive listing of sectors and the practice of scheduling commitments by mode of supply for each sector, specific sectoral interests and modal preferences are likely to dominate

<sup>18</sup> Chanda (2002), p.6.

<sup>19</sup> Snape (1999), pp. 279-80.

<sup>20</sup> Chanda (2002), p.6.

### BOX 3

#### The Political Economy of the GATS Architecture

The reasons underlying the complicated and to some extent ambiguous architecture of the GATS can be traced back to the negotiating history of this Agreement. Before and during the 1986 ministerial meeting establishing the agenda of the Uruguay Round, many developing countries defended the view that there should not be an MTN addressing services. This position was defended by the so-called G10, which included many of the large and influential developing countries (e.g. India, Argentina, Brazil, Egypt). While these countries could not block the inclusion of services, they managed to put services negotiations on a separate track in an attempt to prevent cross-issue linkages between traditional GATT issues and services. In the course of initial negotiations many developing countries argued that the lack of data on services trade justified excluding service transactions involving establishment by foreign providers from any agreement. In this they were supported by UNCTAD, which proposed that trade in services be defined to occur only when the majority of the value added is produced by non-residents (UNCTAD, 1985). This definition excluded virtually all transactions through FDI, as foreign factors of production that relocate are generally considered to become resident of the host country for statistical purposes. Great emphasis was put on the need for governments to be able to impose conditions on inward FDI and support domestic industries. As a consequence, a generally applicable National Treatment (NT) obligation was considered to be unacceptable. The EU's initial negotiating position was that trade should be defined so as to include all types of transaction necessary in a sector in order to achieve 'effective' market access. According to them, any framework agreement was to involve only limited obligation of a generally binding nature. In particular, NT was to be only an objective. The implication of this was that any binding commitments were to apply on a sector-specific level.

*Source:* Hoekman and Kostecki, 1995, pp.138-39.

The United States' initial proposal was the most liberal: MFN was to apply to all signatories and NT was to be a binding, general obligation. Trade was to be defined broadly, including FDI (commercial presence). All measures limiting market access for foreign service providers were to be put on the table. Thus both the EU and major developing countries expressed an early preference for an agreement with soft obligation - the EU arguing that NT should only apply to specific sectors, major developing countries opposing even that. Only the USA and a number of small open economies – both OECD members and newly industrialised countries like Singapore - were in favour of a hard agreement along the GATT lines from the very beginning, with generally binding obligations and universal sectoral coverage. At the end of the day, the original EU and developing country preference for a soft framework agreement prevailed. In return for acceptance that trade in services be defined to include four possible 'modes of supply' and agreement that certain non-discriminatory measures restricting market access were in principle negotiable, NT became a specific commitment, and it was agreed that scheduling of specific commitments would be on a sector-by-sector and mode-of-supply basis. The softness of the general discipline may also have been a factor underlying the pressure for MFN exemptions. The case for such exemptions would have been much weaker if National Treatment or Market Access had been general obligations. The positive list approach to determining the sectoral coverage of specific commitments emerged in large part because many developing countries apparently felt they did not have the administrative resources required to determine all the measures that currently applied to each sector and to decide which they would want to exempt. As many of these countries did not apparently intend to make very substantial commitments to liberalise access to their service markets in any event, they much preferred a positive-list approach.

the negotiating process. Hence, the outcome is likely to be biased towards certain sectors and modes of supply. This, in fact, was observed to happen during

the Uruguay Round (UR) of negotiations, as discussed below. (See Box 3 for the historical reasons underlying the GATS architecture.)

## 4. Services Trade Liberalisation in the Uruguay Round

The achievement of the UR in terms of services trade liberalisation can at best be termed as modest, if not poor. A close analysis of the schedules of the GATS commitments by the Member countries of the WTO clearly reveals that most of the Members committed themselves to very limited liberalisation. Members at best bound the *status quo* in most of the cases and sometimes even backtracked on the *status quo*.

The level and depth of the UR GATS commitments can be assessed in at least three alternative ways: in terms of the number of Members involved, the

range of sectors covered, and the modes liberalised. However, a cursory look at the UR schedules of commitments by the Member countries of the WTO reveals significant disparities, regardless of the perspective adopted. This is discussed below.

### 4.1 Participation of the Members

Of the 161 odd sectors covered by the Sectoral Classification List (W/120) generally used by the Members for scheduling purposes, one-third of the Members committed on 20 sectors and less, one-third on between 21 and 80, and the remaining third on between 81 and 145 (see Table 1).

TABLE 1  
Sectoral Coverage in the Uruguay Round GATS Commitments

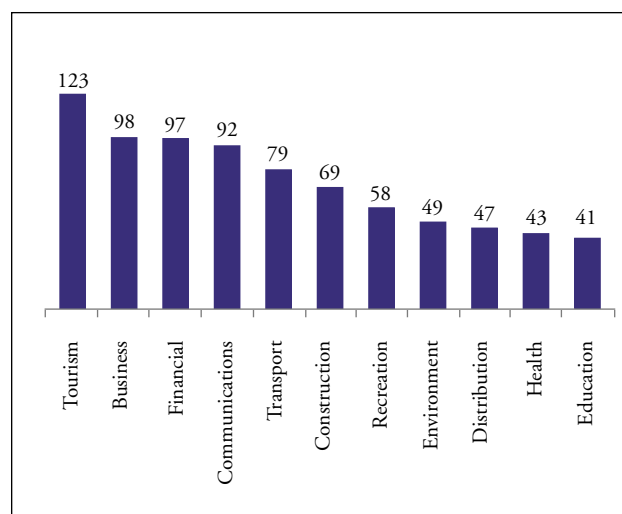
Sectors Committed	Number of the WTO Members	Names of the WTO Members
≤20	44	Angola, Bahrain, Barbados, Benin, Botswana, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Congo (Republic), Costa Rica, Cyprus, Fiji, Gabon, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Madagascar, Malawi, Maldives, Mali, Malta, Mauritania, Mauritius, Mozambique, Myanmar, Namibia, Niger, Paraguay, Rwanda, St. Kitts & Nevis, St. Lucia, St. Vincent & Grenadines, Solomon Islands, Sri Lanka, Suriname, Swaziland, Tanzania, Togo, Uganda, Zambia
21-40	23	Bangladesh, Bolivia, Brunei Darussalam, Burundi, Côte d'Ivoire, Djibouti, Dominica, El Salvador, Ghana, Grenada, Guatemala, Kenya, Macau, Mongolia, Nigeria, Papua New Guinea, Peru, Qatar, Senegal, Sierra Leone, Tunisia, Uruguay, Zimbabwe
41-60	10	Antigua & Barbuda, Belize, Cuba, India, Morocco, Netherlands Antilles, Nicaragua, Pakistan, Trinidad & Tobago, United Arab Emirates
61-80	12	Brazil, Ecuador, Egypt, Hong Kong (China), Israel, Jamaica, Kuwait, Liechtenstein, Poland, Romania, Singapore, Venezuela
81-100	12	Argentina, Chile, Czech Republic, Dominican Republic, Indonesia, Lesotho, New Zealand, Panama, Slovak Republic, Slovenia, South Africa, Turkey
101-120	7	Australia, Bulgaria, Gambia, Canada, Philippines, Switzerland, Thailand
≥121	24	EC (15), Iceland, Japan, Columbia, Korea (Rep. of), Malaysia, Mexico, Norway, Hungary, USA

Source: WTO Document S/C/W/94 of 9 February 1999, Table 1.

## 4.2 Sectoral Coverage

In the UR commitments, certain services were subjected to significantly more liberalisation than others. The sectoral bias in commitment structure becomes evident from Fig.1, which displays the number of countries, which undertook commitments according to the broad sector heads identified in the GATS Sectoral Classification List. Overall, the commitments were biased in favour of sectors, which were relatively open and less controversial, like tourism. Both developed and developing countries were least forthcoming when it came to undertaking commitments in government monopoly or social service type of sectors like, health, education, transport, postal, basic telecom, etc. as shown in Table 2. Barring these services, where

FIGURE 1  
Uruguay Round Commitments by Sector  
(Number of Members)



Source: WTO Document S/C/W/94 of 9 February 1999, Chart 4.

TABLE 2  
Sectoral Distribution of Commitments in the Uruguay Round according to Country Groupings

Sectors (No. of Sub-sectors)	Number of GATS Sectors*4 Modes of Supply	Average Number of Commitments		Percentage of Sectors Committed	
		HIC	LMIC	HIC	LMIC
Construction (5)	20.0	11.2	3.3	56.0	16.5
Motor Vehicle Repair (1)	4.0	1.8	0.3	45.0	7.5
Wholesale Trade (2)	8.0	4.6	0.5	57.5	6.3
Retail Trade (2)	8.0	4.4	0.8	55.0	10.0
Hotel/ Restaurants (1)	4.0	2.8	2.8	70.0	70.0
Land Transport (10)	40.0	9.4	2.3	23.5	5.8
Water Transport (12)	48.0	4.4	3.0	9.2	6.3
Air Transport (5)	20.0	3.7	1.5	18.5	7.5
Auxiliary Transport (5)	20.0	5.1	1.3	25.5	6.5
Postal Services (1)	4.0	1.3	0.6	32.5	15.0
Basic Telecom (7)	28.0	1.5	1.3	5.4	4.6
Value Added Telecom (7)	28.0	18.7	5.0	66.8	7.8
Financial Services (15)	60.0	31.3	12.4	52.2	20.6
Real estate Services (2)	8.0	3.5	0.3	43.8	3.8
Rental Services (5)	20.0	9.5	1.3	47.5	6.5
Computer-Related Services (5)	20.0	15.5	4.2	77.5	21.0
R&D Services (3)	12.0	4.1	1.0	34.2	0.3
Business Services (27)	108.0	56.5	12.2	47.9	11.3
Refuse Disposal (4)	16.0	8.8	1.0	55.0	6.3
Education (5)	20.0	4.7	1.3	23.5	6.5
Health and Social (6)	24.0	5.0	1.9	20.2	7.9
Recreation and Culture (12)	48.0	13.3	4.6	27.9	9.6

Notes: HIC: High Income Countries. LMIC: Low and Middle Income Countries.  
Source: Hoekman (1995), p.345.



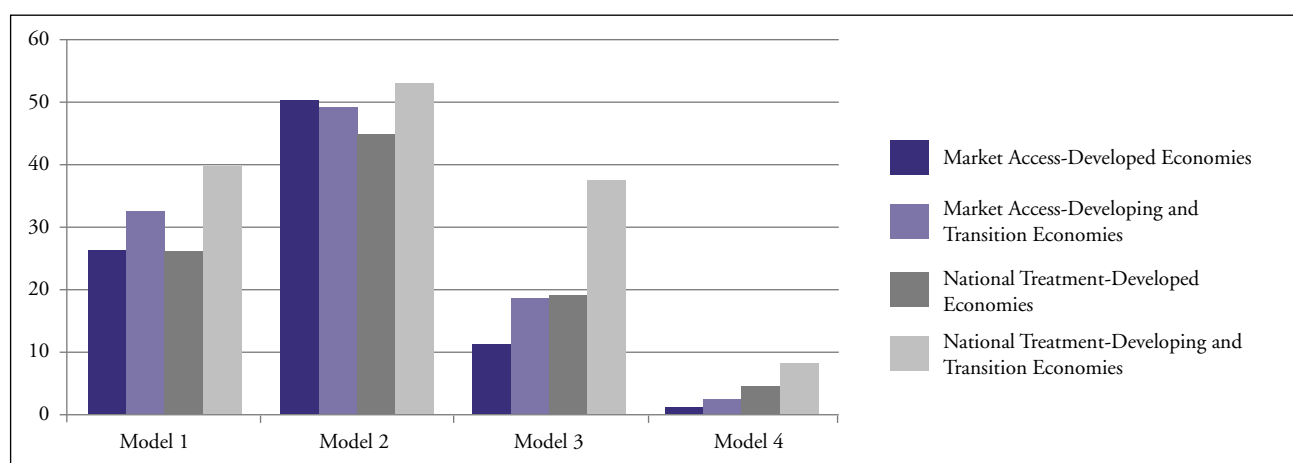
the response was lukewarm across the board, wide-ranging disparities were observed among developed and developing countries in terms of the extent of sector-specific commitments (as is evident from the last two columns of Table 2). Moreover, a number of countries also opted for MFN exemptions in many of the sensitive sectors, including financial services, basic telecommunication services, maritime, air transport, and audio-visual services, further limiting their commitments. As noted by Chanda (2002), the sectoral distribution of the UR GATS commitments closely reflects the regulatory characteristics of individual services, the political economy constraints in scheduling them and the commercial interests and advantages or disadvantages of different countries.

### 4.3 Modal Distribution of the Commitments

The UR commitments were characterised by a significant asymmetry in the modal distribution of both horizontal and sector-specific commitments. Commitments were particularly limited in modes where restrictions were prevalent, whereas there was a clear bias in favour of the modes generally considered to be less controversial and politically less sensitive. Commitments were most liberal in Mode 2 (Consumption Abroad), around 50

per cent of the unrestricted commitments being concentrated in this particular mode. It was followed by about 30 per cent in Mode 1 (Cross-border supply), around 20 per cent in Mode 3 (Commercial Presence) and 0 per cent in Mode 4 (Movement of Natural Persons).<sup>21</sup> In Mode 4, virtually none of the countries scheduled sector-specific commitments. Commitments, wherever taken, were restricted to horizontal ones. Moreover, even those horizontal commitments covered only a small subset of service provider categories (e.g. Inter-Corporate Transferees (ICTs) and Business Visitors (BVs)) usually linked to commercial presence (Mode 3). They were also subject to limitations such as quantitative restrictions on entry and other immigration regulations, licensing and qualification requirements, citizenship and residency conditions, needs-based tests, and discriminatory treatment with respect to taxes and subsidies, among others. Mode 4 commitments were particularly restrictive in sectors where developing countries had a comparative advantage, particularly in high and low skill-intensive sectors.<sup>22</sup> The poor nature of the commitments in Mode 4 is attributable to the sensitive nature of this mode of supply since it impinges upon domestic immigration and labour market regulations. The modal bias in the commitment structure irrespective of country

FIGURE 2  
Structure of the Uruguay Round GATS Commitments by Mode (Percentage of Full Bindings)



Source: Chanda (2002), p.10.

<sup>21</sup> Adlung (1999), p.10.

<sup>22</sup> Chanda (2002), pp.9-11.

groupings (i.e. developed/ developing) is clearly visible in Fig.2.

#### 4.4 Negotiations beyond the Uruguay Round

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

#### 4.5 India's GATS Commitments in the Uruguay Round

India's Uruguay Round (UR) commitments were conservative both in terms of sectoral coverage and modes of delivery. As far as sector-specific commitments were concerned, those did not cover several important sectors, such as, energy, distribution, education, environment, and professional services, such as, accountancy, legal, and architectural services.<sup>23</sup> One striking feature of India's commitments was their high degree of

uniformity across different sectors and modes of delivery. For instance, Modes 1 and 2 were left 'unbound' for most of the sectors scheduled by the country. Mode 3 was partially opened up with various restrictions such as foreign equity limits, local incorporation requirements, quota on number of service providers, etc.

Just like other countries, India did not undertake any sector-specific commitments in Mode 4. Even the horizontal commitments undertaken in Mode 4 were limited only to skilled personnel, like Business Visitors (BVs), Intra-corporate Transferees (ICTs), professionals, etc. Again, for these limited categories of natural persons, India's commitments were further subject to various conditions on entry, duration of stay, etc.

India was cautious also in undertaking commitments in the case of financial services, for which negotiations continued beyond the UR. Although India removed MFN exemptions in all areas of financial services, a number of regulatory and quantitative disciplines were put in place. For instance, restrictions were in place on the number of bank licenses. The market share of the assets of foreign banks was not allowed to exceed 15 per cent of the total assets of the banking system. A condition was further stipulated that foreign banks already operating in India could invest no more than 10 per cent of the owned funds in other financial service companies or 30 per cent of the investee company's capital, whichever is lower.<sup>24</sup>

On the whole, the UR commitments did not reflect the autonomous liberalisation process, which started in India since the early 1990s. The wedge between the actual degree of openness in different sectors in India during that time and the corresponding GATS commitments clearly reflects the cautious approach adopted by the country during the UR.

<sup>23</sup> Mukherjee (2004), pp. 242-243.

<sup>24</sup> Jha et al. (2006), p.180.

# 5. The GATS 2000 Negotiations

## 5.1 The Beginning

As mentioned earlier, Article XIX (1) of the GATS provides a ‘built-in agenda’ requiring the Members to enter into successive rounds of negotiations aimed at progressive liberalisation, with the first such round to begin no later than five years after the entry into force of the WTO agreement. Accordingly, services negotiations were re-launched in January 2000 and this new round of negotiations came to be known as the GATS 2000 negotiations.

In March 2001, the Members adopted the modalities for the services negotiations, referred to as the ‘Negotiating Guidelines and Procedures’.<sup>25</sup> As per the ‘Guidelines’, the negotiating agenda under the GATS 2000 negotiations covered two aspects:

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

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

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

Importantly, the ‘Guidelines’ also recognised the need to provide an appropriate flexibility to developing countries (see Box 4).

### BOX 4

#### Negotiating Guidelines of GATS 2000 – Certain Key Provisions

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

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

11. Liberalisation shall be advanced through bilateral, plurilateral or multilateral negotiations. The main method of negotiation shall be the request-offer approach.
12. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalising 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.

Source: WTO Document S/L/93 of 29 March 2001.

<sup>25</sup> WTO Document (2001).

## 5.2 The Doha Mandate on Services

The period between early 2000, when the new round of services negotiations was formally launched, and the fourth Ministerial Conference of the WTO held in Doha in November 2001, was mainly spent in desultory discussions of rules and other necessary preconditions for launching the market access negotiations on services. By the Doha Ministerial Meeting, it had become evident that initiation of a new round of trade negotiations, embracing a broader set of issues, would be necessary if there was to be any serious liberalisation in agriculture or services. Hence, the Doha Ministerial Declaration called for the commencement of a new round of multilateral trade negotiations, which came to be known as the Doha Development Agenda.<sup>26</sup> This new round of trade negotiations was meant to address some of the past imbalances in international trade (resulting from the UR), so that developing and the least developed countries could reap some tangible benefits from trade. Article 2 of the Doha Ministerial Declaration stated:

*“The majority of WTO members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration. Recalling the Preamble to the Marrakesh Agreement, we shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development.”*

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

The mandate for services negotiations in the Doha Declaration was among the least controversial aspects of the engagement leading to that Declaration.

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

Notably, under the section on ‘Trade and Environment’, the Doha Declaration agreed to negotiations on reduction or elimination of tariff and non-tariff barriers to environmental services.

## 5.3 The Bilateral ‘Request-Offer’ Approach

In this approach, a country requests other countries to undertake commitments in sectors and modes of commercial interest. The process continues with a view to submitting revised requests and subsequent offers by all the Members until the commitments can be adopted as final schedules. Hence, the bilateral ‘request-offer’ approach involves a process of repeated reiteration – offer, negotiation, revision, resubmission, etc.<sup>27</sup>

In accordance with the time-frame set by the Doha Declaration, the Member countries of the WTO started submitting their initial bilateral requests at the end of June 2002. Almost all the WTO Members received request/s from one or more trading partners. With respect to sectoral

<sup>26</sup> Vastine (2005), pp.3-4.

<sup>27</sup> South Centre (2005), p.2.

requests, countries did not deviate much from their UR negotiating strategies. The requests were in general ambitious. Most requests were tailor-made based on the individual situation and the UR Commitments of the trading partner. However, there were instances where requests did not quite reflect the areas of trade interests of the requesting Member. For instance, India received requests from Sri Lanka in the telecommunication sector, but did not make requests to Sri Lanka in this sector, whereas the trade between these two countries in the telecom sector was the other way round.

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

The methodological problems associated with the bilateral 'request-offer' approach were often highlighted as one of the prime reasons behind the slow pace of services negotiations at this stage. This was because, this method entailed the excruciating task of extracting commitments trading partner by trading partner, sector by sector, across the entire range of sectors and sub-sectors in which a Member country sought to obtain new commercial opportunities. Hence, it was a tedious as well as a time-consuming process. However, certain other factors also contributed to the slow progress made in the bilateral 'request-offer' approach, which were identified by the Chairman of the Council on Trade in Services in Special Session (CTS-SS), Ambassador Alejandro Jara. In May 2004, in an effort to identify the reasons behind the slow pace of the negotiations and to stimulate activity, Jara held a series of 'confessionals' with senior representatives of larger Member delegations that were yet to table

their 'initial offers'. He subsequently reported that the meetings gave him a fuller understanding of the political and technical difficulties being faced by the Member countries in the field of services negotiations. Some of the difficulties identified, among others, were the technical complexities involved in preparing an offer, the necessary domestic coordination process involving government departments and other stakeholders, the overwhelming effect of voluminous requests, etc.<sup>28</sup> Whatever might be the reasons, the March 2003 deadline for the submission of the 'initial offers' could not be met. In fact, by July 2004 only 43 'initial offers' had been tabled by the Member countries of the WTO.<sup>29</sup>

#### 5.4 The July 2004 Framework Agreement and Services

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

With a view to make up for the Cancun failure, negotiations were continued in Geneva in the subsequent period. With the formation of the G-20 - a strong coalition of developing countries having stakes in agriculture - just prior to the Cancun Ministerial and the crucial role played by this alliance at Cancun, a clear signal was sent to the erstwhile key players in the WTO negotiations (like the EU and the US) that the old structure of power and decision-making at the WTO was up for a major overhaul. Hence, in order to put the WTO negotiations back on track, the circle of power had to be expanded to accommodate new players in the so-called 'elite' group. The EU and the US's invitation to Brazil and India to be part, along with Australia, of the 'Five Interested Parties' (FIPs) was a key step in this direction.

<sup>28</sup> Vastine (2005), p.8.

<sup>29</sup> Vastine (2005), p.5.

Importantly, it was an agreement among the FIPs that solved the impasse in the agriculture negotiations in the post-Cancun period.<sup>30</sup> This, ultimately, led to the striking of a package of deals at the General Council meeting in July 2004, which came to be known as the 'July 2004 Framework Agreement' or the 'July Package'. The July Package succeeded in putting the Doha negotiations back on track by establishing the detailed directions to move the negotiations forward in core areas such as services, agriculture, and Non-Agricultural Market Access (NAMA).

As far as services were concerned, the July Framework reaffirmed the Members' commitment to progress in this area of negotiations in line with the Doha mandate. The General Council adopted a set of recommendations by the Council for Trade in Services in Special Session in Annex C of the Framework Agreement, as the basis for further negotiations.

In the case of the market access negotiations on services, from the Doha Mandate in 2001 to the July Framework in 2004, there was a greater emphasis on moving into the second round of offers with an implicit recognition that the 'initial offers' were not as ambitious as desired by the demandeurs in the negotiations. Thus, the July Package stipulated May 2005 as the deadline for the submission of the 'revised offers', while urging the Members to submit the outstanding 'initial offers' as soon as possible. Annex C of the July Package further obliged the Members to aim to achieve progressively higher levels of liberalisation with no *a priori* exclusion of any service sector or mode of supply. It also required the Members to strive for a high quality of offers aimed at ensuring effective market access to all Members, particularly, in sectors and modes of supply of export interest to developing countries, with special attention to the least-developed countries. Members also noted the interest of developing countries, as well as other Members, in Mode 4.

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

## 5.5 Alternative Approaches: The Issue of Benchmarking

Although the July Framework urged the Members to come forward with their 'revised offers', even the 'initial offers' were yet to be submitted by a large number of the Member countries. Moreover, the quality of the offers, which had already been submitted, was also considered to be less than satisfactory by many Members, especially from the developed world. In this context, the Chairman of the Council on Trade in Services in Special Session (CTS-SS), Ambassador Alejandro Jara, in a Report to the Trade Negotiations Committee in July 2005 commented:

*"If current offers were to enter into force, the average number of sub-sectors committed by Members would increase only from 51 to 57.... Less than half of the schedules would contain commitments of any kind in sectors such as distribution, postal-courier, or road transport.... Less than half of the offers envisage improvements...on mode 4 [temporary movement of people].... the overall quality of initial and revised offers is unsatisfactory. Few, if any, new commercial opportunities would ensue for service suppliers."<sup>31</sup>*

This statement subsequently became the basis for development of alternative approaches to the market access negotiations. In particular, the EU started vouching for the idea of 'benchmarking'.

This was not the first occasion though, when the issue of 'benchmarking' came up for a discussion. There was considerable debate on this issue during

<sup>30</sup> Bello (2006).

<sup>31</sup> CTS-SS (2005).

the course of the negotiations, which ended in establishing the Negotiating Guidelines for the GATS 2000 negotiations. At that point, the developed country Members including the US, the EC and Japan had expressed their preference for having a formula-based approach to the negotiations – which was basically similar to the concept of ‘benchmarking’. However, this approach did not find support from developing countries, which wanted to retain the flexible nature of undertaking the GATS commitments based on the positive listing model followed thus far. Hence the issue could not be pursued any further by the developed countries at that stage of the negotiations. Although it appeared at that juncture that the debate was settled once and for all with the adoption of the Negotiating Guidelines in 2001, the same issue resurfaced in 2005 in the context of the so-called ‘crisis’ in the quality of the offers.<sup>32</sup>

In its new *avatar*, the ‘benchmarking’ proposals tended to have quantitative as well as qualitative dimensions. The EC proposal, for instance, called on the developed countries to have a sum of 139 sub-sectors and developing countries a sum of 93 appearing in a schedule of commitment to meet its quantitative target. The modal benchmarks provided a predefined prescription for the removal of specific limitations for each mode of supply and called for binding of the commitments at status quo (i.e. existing levels of market access).

Whilst the new round of the ‘benchmarking’ debate was ignited by the EC in the early 2005, numerous proposals were submitted by various other Members, which set out the possible features of such an approach. Some of the common features and hence related problems of the ‘benchmarking’ approach from the perspective of developing countries included modal prescriptions; credit for the Uruguay Round commitments by the developed countries; weaker flexibilities for developing countries than the existing ones;

focus on infrastructure-related sectors and hence disregard of the weak regulatory frameworks within developing countries; focus on aggregate level of commitments through numbers. Other problems of the ‘benchmarking’ proposals included the failure to consider other issues, such as, lack of a common agreement on classification issues and little progress in the rules negotiations, which amongst other things were supposed to conclude negotiations in areas such as subsidies, emergency safeguard measures and develop disciplines for domestic regulation, prior to the market access negotiations.<sup>33</sup>

Given such inherent problems, the renewed discussion on ‘benchmarking’ since early 2005 was once again confronted with severe opposition on the part of developing countries. One of the foremost reasons underlying this stiff opposition to ‘benchmarking’ was the fact that ‘benchmarking’ was radically different from the bilateral ‘request-offer’ approach followed thus far. This existing approach was considered to be much more development-friendly as compared to the proposed ‘benchmarking’ approach. It was argued by developing countries that ‘benchmarking’ ran counter to the spirit and letter of the GATS, especially Article XIX that provides developing and the least developed countries with more flexibility in liberalising sectors and modes of supply. It was also criticised on grounds that it was not compatible with the GATS ‘positive list’ scheduling process, which allowed the Members to choose the sectors in which they wished to make ‘specific commitments’.

Due to vehement opposition on the part of developing countries, the proposal on ‘quantitative benchmarking’ could not go too far. However, the Hong Kong Ministerial Declaration (HKMD) did include certain stipulations on improved commitments, which came to be regarded as some kind of qualitative benchmarking.

<sup>32</sup> South Centre (2005), pp.3-4.

<sup>33</sup> South Centre (2005), p.4.

## 5.6 Run-Up to Hong Kong and the Controversy surrounding the Annex C

In the lead-up to the Hong Kong Ministerial, a new informal grouping known as the 'New Quad' was formed. This grouping, which included the EU, the US, Brazil, and India, apparently played the decisive role in setting the agenda and the direction of the negotiations in the Hong Kong Ministerial. The role played by India and Brazil before and during the Hong Kong Ministerial as Members of the 'New Quad' attracted huge criticism. A view emerged that the main objective of the 'New Quad' in Hong Kong was to save the WTO and that the role of Brazil and India was to extract the assent of developing countries to an unbalanced agreement that would make this possible in the face of the reluctance of the EU and the US to make substantive concessions in agriculture.<sup>34</sup>

The Hong Kong Ministerial attracted a huge criticism for its failure to put adequate emphasis on the development concerns of developing and the least-developed countries, which were supposed to be at the centrestage of the Doha Development Agenda. It was widely argued that some minor gains in agriculture<sup>35</sup> in the Hong Kong Ministerial were more than offset by anti-development texts in services and industrial tariffs (NAMA).<sup>36</sup>

Services turned out to be one of the most controversial issues of the Hong Kong Ministerial Declaration. During the Ministerial, India adopted an aggressive negotiating position on services, which was to a great extent determined by its own offensive interests in services. So much so that India broke ranks with some long-standing developing-country-allies and supported, and in fact drafted,

alongside the developed countries, key sections of the infamous Annex C of the HKMD that sanctioned the controversial plurilateral 'request-offer' approach. It was widely argued that India failed to pay adequate attention to its interests in agriculture and NAMA due to its excessive pre-occupation with services during the Hong Kong Ministerial.

It is not only the content of the Annex C that attracted huge criticism, the *modus operandi* of its drafting also sparked off a heated debate. The drafting process of the HKMD started in Geneva in October 2005 when the Chairs of the relevant negotiating groups began producing texts and reports for the Ministerial. The first draft Hong Kong text was produced on 26 November 2005. Because of the lack of agreement in the agriculture and NAMA negotiations, the Chairs of these negotiating groups in Geneva produced 'progress reports' on the current status of the talks. In contrast, the Chairs of services, rules and trade facilitation forwarded 'negotiating texts'. The one on services was particularly contentious. Notably, the Annex C was drafted not by the Members but by the Chair of the CTS Special Session (the Ambassador of Mexico) on his own responsibility. Hence, the Annex C was not a negotiated document and did not enjoy the consensus of the Members. Besides, the services Chair portrayed a much greater level of convergence where none existed. Although, many developing countries objected to large parts of the Annex C, the Chair insisted on keeping the text for the Ministerial. Consequently, a covering letter was attached to the draft text stressing that the 'text does not purport to represent agreement overall, and it is without prejudice to any delegation's position on any issue.'

<sup>34</sup> Bello (2006).

<sup>35</sup> The minor gains in agriculture included setting of a 2013 end-date for export subsidies, and providing developing countries with extra flexibility (in terms of 'Special Products' and 'Special Safeguard Mechanism' to protect their small farmers. There was some progress on preventing the abuse of 'food aid' as a disguised form of dumping, but on cotton, the steps agreed fell short even of those required by the cotton panel ruling against the USA (Oxfam, 2005, p.2).

<sup>36</sup> In the NAMA negotiations, developed countries had pushed hard for a tariff reduction formula, known as the 'Simple Swiss Formula' that cuts higher tariffs more than it cuts lower ones. This puts developing countries at a disadvantage since their tariffs are generally higher, and is in direct contradiction of the 'less than full reciprocity' promised in Doha. The so-called 'Core Group' comprising nine developing countries successfully fended off the attempts led by the rich countries to push for a 'Simple Swiss Formula', and managed to get some more general language, e.g. 'Swiss Formula with coefficients'. This opened up the possibility of using a different, more pro-developing country formula, such as that proposed by the ABI (Argentina, Brazil, India) group. However, even this toned-down version of the NAMA text was widely criticised as inimical to development for various reasons (Oxfam, 2005, pp.2 and 13).



Until the last day of the HK Ministerial, the reference to the Annex C in the main text was ‘bracketed’, thereby indicating lack of consensus. The brackets were placed during the General Council meeting of 2 December 2005, as many developing countries (including the ACP Group) had expressed their disagreement with many points in the Annex C. Many had rejected the text that came out of Geneva but became increasingly frustrated that their views were not being taken into account, despite having made written submissions about their concerns and proposed amendments.<sup>37</sup> In particular, a revised services proposal by the G90 was effectively ignored by the Facilitator. However, the widespread opposition on the part of developing countries did succeed in initiating a discussion on the Annex C, which ultimately resulted in certain amendments in this Annex, thereby moderating its approach to some extent. However, even the moderate version attracted a lot of criticism. A view emerged that in approving even a toned-down version of the original Annex C, the WTO was altering the structure of the GATS negotiations half way through the Round, moving away from a more development-friendly ‘bottom-up’ approach agreed to by developing countries as the basis for including services in the WTO, towards something more closely resembling other areas of the negotiations.<sup>38</sup>

Notably, the aforesaid brackets in the main text, which had reference to the controversial Annex C, were abruptly removed in the Ministerial draft of 18 December 2005 despite strong opposition on part of several developing countries and ultimately this paragraph became paragraph 27 in the main text of the final HKMD (which came out late on 18 December but was dated 22 December 2005). This paragraph established Annex C as the basis for future negotiations on services.<sup>39</sup>

## 5.7 The Hong Kong Ministerial Declaration on Services

The HKMD, which addresses services both in the main text as well as in its Annex C, puts forward quite

an aggressive agenda for services. The main text, in paragraphs 25 to 27, recalls the overall objectives of the negotiations and the objectives and principles set out in the GATS, the Doha Declaration, the Negotiating Guidelines, the LDC Modalities and the 2004 July Package. Some of the key provisions of the HKMD on services are enumerated below.

### *Progressive Liberalisation*

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

### *Objective of Improved Commitments*

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

### *Plurilateral ‘Request-Offer’ Approach*

- In addition to the multilateral negotiations, to pursue the ‘request-offer’ approach on a

<sup>37</sup> TWN (2005).

<sup>38</sup> Oxfam (2005), p.14.

<sup>39</sup> Talpur and Rice (2006), p.8.

- voluntary plurilateral basis,
- Plurilateral requests to be submitted by 28 February 2006,
- Second round of ‘revised offers’ to be submitted by 31 July 2006,
- Final draft schedules of commitments to be submitted by 31 October 2006.

### *Rules Negotiations*

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

## 5.8 The Plurilateral ‘Request-Offer’ Approach

The plurilateral ‘request-offer’ approach has emerged as the predominant method of the services negotiations post-the Hong Kong Ministerial. In this approach, a group of WTO Members (called demandeurs) may place a collective request directly on a country, which is the target of that request. A plurilateral request may be focused on a specific sector or a particular mode. As per the HKMD, a recipient country of a plurilateral request is ‘obliged’ to ‘consider’ that request while submitting a new round of ‘revised offers’. However, the offer emanating from a plurilateral request is to be given on an MFN basis to all the WTO Members and not only to the demandeurs of that particular request. This obligation to ‘consider’ the plurilateral request is an improvement (from a developing country perspective) on the original text of the Annex C, which obliged the Member countries to enter into

negotiations, rather than merely requiring them to ‘consider’ doing so. Notably, all the requesting Members are also deemed recipients, except in the Mode 4 group.

Around twenty plurilateral groups had been formed earlier this year, with the involvement of only around 35 countries out of the 149 Member countries of the WTO. This clearly reflects the fact that only the major players in the services trade have come forward to participate in the plurilateral negotiations on services.

It is learnt from various Geneva sources, including the WTO secretariat that formulating plurilateral requests turned out to be more complicated than first expected, in terms of defining the parameters for the collective requests. There is also a perceived risk that the plurilateral process may result in a lower common denominator compared to the bilateral approach. In the bilateral ‘request-offer’ approach, the demandeurs can ask for far reaching commitments from the recipient countries in the areas that interest them. In a plurilateral process, however, formulating the plurilateral request itself involves negotiations among the demandeurs; all the Members of a plurilateral group have to agree to what they are asking for before the request can actually be made. Moreover, the proposed requests have to be assessed by each Member of the plurilateral group to determine their willingness to match the offers themselves. With different regulatory regimes in place and different interests to be taken care of in the domestic context, the level of ambition may vary among the Members of a plurilateral group themselves. Hence the risk of ending up with a lower common denominator as compared to the bilateral approach.<sup>40</sup>

As mentioned earlier, various doubts have also been expressed regarding whether the plurilateral approach is at all development-friendly and commensurate with the GATS architecture. As noted before, the HKMD did not explicitly introduce an element

<sup>40</sup> Strickner and Smaller (2006), p.4.

of compulsion in its mandate on the plurilateral 'request-offer' approach. Instead, Members are only obliged to 'consider' such requests. However, due to the reality of power imbalances in the WTO, it is widely apprehended that developing countries, which are the recipients of the plurilateral requests, would be under tremendous pressure to undertake commitments that might not necessarily be commensurate with their national development policy objectives or situation.

It is further argued that the adoption of the plurilateral approach would create the ground for a more aggressive liberalisation of services trade, which would focus on a certain list of sub-sectors (or modes) and very specific pre-determined (in terms of coverage) services within those, as well as deeper levels of commitments. Clearly this is a way for the plurilateral groups to gain a 'critical mass' in sectors of interest. This has been indicated in various proposals on the plurilateral approach as well as an EC paper on obtaining a critical mass (i.e. through targeting certain developing countries) in sectors/sub-sectors, such as, construction, financial, telecommunications, computer and related services, distribution, business, environmental, legal, accounting, etc.

Notwithstanding such skepticism surrounding the plurilateral approach, it may be mentioned here that this approach is not inconsistent with either the legal text of the GATS or the Negotiating Guidelines of the GATS 2000 negotiations. Article XIX.4 of the GATS requires the successive rounds of GATS negotiations aimed at progressive liberalisation to be carried out through bilateral, plurilateral or the multilateral approach. Paragraph 11 of the Guidelines (S/L/93) also states that:

*"Liberalisation shall be advanced through bilateral, plurilateral or multilateral negotiations. The main method of negotiation shall be the request-offer approach".*

However, the negotiating pressure is likely to be much more in the plurilateral approach compared

to the bilateral one. It remains to be seen whether the plurilateral approach indeed succeeds in increasing the momentum of the market access negotiations on services.

## 5.9 Negotiations on Rule Making

At the end of the Uruguay Round (UR), the set of rules comprising the GATS Agreement remained incomplete with regard to certain important aspects, such as Emergency Safeguard Measures (Article X), Government Procurement (Article XIII), Subsidies (Article XV), and Domestic Regulation (Article VI.4). The future shape of the GATS will be determined by these rules to a great extent. Rules also assume significance in determining the effectiveness of the market access commitments undertaken by a Member country. A Member's choice of domestic reforms is also likely to get influenced by rules. The negotiations on rules however, have progressed quite slowly so far. This is partly due to the divergent views of the Members in different areas of rules and partly due to technical and conceptual difficulties involved in each aspect of rules. The present status of the negotiations on rules, and the issues therein, are discussed briefly in the following paragraphs.

### 5.9.1 Domestic Regulation

Disciplining Domestic Regulation (DR) comprises one of the most critical areas of the rules negotiations under the GATS, where some progress in the negotiations is already visible. The GATS explicitly recognises the right of the Members to regulate and to introduce new regulations on the supply of services within their territories in order to meet their national policy objectives. Article VI:4 of the GATS mandates the Members to develop disciplines aimed at ensuring that domestic regulatory measures do not constitute unnecessary barriers to trade in services. This mandate covers the following issues:

- Qualification Requirements and Procedures (QRP)
- Licensing Requirements and Procedures (LRP)
- Technical Standards (TS).

Given the relatively advanced level of discussions on this issue, the Hong Kong Ministerial Declaration (HKMD) instructed the Members to finalise the disciplines on DR before the end of the Doha Round and as part of the single undertaking.

Disciplining DR can go a long way in complementing market access particularly in the areas of interest to developing countries (including India). Challenges for enhancing market access in the developed countries under both Cross-border services trade (Mode 1) and Movement of Natural Persons (Mode 4) lie in the range of state-imposed regulatory barriers, including burdensome visa formalities, registration and licensing requirements, fee structure, stringent quotas and qualification requirements, discriminatory taxes, levies, and standards faced by the service providers from developing countries.<sup>41</sup> Whereas lack of specific disciplines on DR creates uncertainty and leaves room for disputes, disciplines on DR may provide incentives for the much needed domestic reforms.

In the recent past, the developed and developing countries alike have submitted a 'critical mass' of formal and informal proposals on a range of issues relating to the disciplines on DR.<sup>42</sup> As a result, negotiations have now moved on from proposals to textual language proposals. Text-proposals submitted by different Members have covered a range of issues, including, QRP, LRP, TS, transparency, special and differential treatment, general principles including the right to regulate, etc. Discussions in the Working Party on Domestic Regulation (WPDR) on the text-proposals have revealed that Members still hold divergent views on many proposed elements. Hence, more discussions and negotiations are still needed. However, upon a request by the Members, the Services Chair, Ambassador Fernando de Mateo (of Mexico) has come up in July 2006 with the first consolidated *Working Paper*<sup>43</sup> of possible regulatory disciplines under Article VI:4 of the GATS. It is

meant to help the Members to move forward in the negotiations with the objective of fulfilling the mandate contained in the HKMD.

As it stands now, there still exist differences in the levels of ambition, both overall and on specific elements. Some of the key issues that have come up from the on-going negotiations are discussed briefly below.

The prime concern of many Member countries in the area of DR revolves around the issue of regulatory autonomy. It is widely apprehended that disciplines on DR under the GATS negotiations may encroach upon the sovereignty of the Member countries by requiring the trade considerations to supersede the legitimate domestic policy objectives. A counter concern is that regulatory autonomy may end up taking the form of disguised barriers to trade. The issue becomes all the more complex due to the interlinkages of DR (Article VI) with Market Access (Article XVI) and National Treatment (Article XVII) obligations under the GATS. Given this backdrop, all the submissions stress the need to strike a balance between respecting a Member's right to regulate, and curbing regulatory measures that could potentially undermine market access. One area where this conflict is particularly evident is in the sensitive debate over the so-called 'necessity test' for regulatory measures. The WTO Secretariat has characterised the Article VI: 4 'necessity test' as the means by which an effort is made to balance between two potentially conflicting priorities: promoting trade expansion *versus* protecting the regulatory rights of governments.<sup>44</sup> It is widely apprehended that any 'necessity test' would obstruct developing countries' policy space and national priorities, as the necessity test would subordinate these objectives to the demands of liberalisation. Whether a country has struck the right balance could then be subjected to the decision of a WTO dispute panel, discounting any democratic decision-making process at the national level.

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<sup>41</sup> Karmakar (2006).

<sup>42</sup> BRIDGES (2006).

<sup>43</sup> WTO Document JOB (06)/225.

<sup>44</sup> Kwa (2006).

While the GATS mandate stipulates that qualification and licensing requirements should not be 'more burdensome than necessary to ensure the quality of a service', some Members are concerned that such a test may constrain their ability to introduce regulations, which seek to implement national policy objectives that go beyond simply ensuring the quality of a service. A number of developing countries including Colombia and Philippines had previously sought to assuage this concern by expanding the 'necessity test' so that regulatory measures in pursuit of such national policy objectives would be deemed 'necessary' and thus permissible. Others, such as the group of African, Caribbean, and Pacific (ACP) countries, proposed doing away with the necessity test entirely, in addition to exempting LDCs from the obligation to comply with any eventual disciplines. On the other hand, Members such as Hong Kong, Chile, Korea, Australia, New Zealand and Taiwan argue that disciplines that do not subject regulatory measures to a 'necessity test' may prove largely 'toothless' in ensuring that they do not unduly restrict trade. However, what may spell the death knell for the 'necessity test' is that Brazil and the US - two major Members from opposing sides of the services talks - remain firmly opposed to the incorporation of such a test in the disciplines.

It is revealed from the aforementioned *Working Paper*<sup>45</sup> that transparency of regulatory measures and easy availability and accessibility of information on these are some of the key areas of the negotiations, where divergent views have emerged on certain specific issues. Various alternative proposals have come up on the issue of application of licensing procedures as well. Consensus is yet to be reached on the issue of qualification procedures and related documentation requirements.

It is learnt that the Member countries have more or less reached an understanding that DR disciplines

would apply to measures by Members in sectors where 'specific commitments' are undertaken. They would not apply to measures, which constitute limitations subject to scheduling under Articles XVI (Market Access) and XVII (National Treatment) of the GATS.<sup>46</sup>

As far as India is concerned, the country supports the need for reaching an agreement on disciplines on DR in the interest of enhancing market access in services, in particular in Mode 4. Hence, India is actively participating in the ongoing negotiations on DR. Along with Chile, Mexico, Pakistan and Thailand, India has submitted a detailed proposal on 1 May 2006<sup>47</sup> on the disciplining of QRP, which assumes particular relevance for effective market access in Mode 4. This latest 'Room Document' is in continuation of an earlier document e.g. JOB(05)/50. India's thrust is to ensure that the market access it gets in Modes 1 and 4 is not nullified by domestic regulations, but rather is complemented by it.<sup>48</sup> However, while countries such as India are pushing hard for disciplines on qualification, licensing procedures, etc. the US's prime focus is on the transparency in DR.

### 5.9.2 Emergency Safeguard Measures

Safeguard measures are well-established trade defence mechanisms in the sphere of goods trade under the purview of the GATT/WTO. These measures allow an importing country, which is a Member of the WTO, to temporarily suspend its commitments when imports are shown to be causing serious injury to domestic producers of like or directly competitive goods.<sup>49</sup>

Article X.1 of the GATS mandates Members to enter into 'multilateral negotiations on the question of Emergency Safeguard Measures (ESM), based on the principle of non-discrimination'. The results of those negotiations were to enter into effect no later than January 1998. Although the negotiations

<sup>45</sup> WTO Document JOB (06)/225.

<sup>46</sup> WTO Document (2006), p.3.

<sup>47</sup> Room Document (2006).

<sup>48</sup> Kuruvilla (2006), p.4.

<sup>49</sup> Jha et al. (2006), p.170.

have been underway since 1996, the aforesaid deadline was missed, as were many others that were subsequently set. Progress in the negotiations has been slow both because of differences of views among the Members on the desirability of a safeguard and the technical and conceptual difficulties in developing an ESM for services. The nature and coverage of any safeguard mechanism is yet to be determined. The debate among the WTO Members has yet to identify precise examples of potential circumstances where an ESM might be required.

There is a number of conceptual and practical challenges in applying the GATT-type safeguards paradigm to trade in services. Some of these difficulties are enumerated briefly below:<sup>50</sup>

- The application of the concept of ‘imports’ is not straightforward in the services context. The complications emanate from the fact that there are four modes of service delivery. While Mode 1 can be regarded as ‘imports’ in the traditional sense without difficulty, it is not so in case of the other three modes.
- Since the traditional purpose of an ESM is to provide a short-term import relief to the domestic industry, the right to bring a complaint should lie with the ‘domestic industry’. In the services context, the question arises as to whether the term ‘domestic industry’ should include all service suppliers located within the territorial limits of a country or whether the locally established service suppliers of foreign companies should be excluded.
- The next problem confronting the WTO Members is to sort out what constitute ‘like or directly competitive services’.
- Establishing what constitute the ‘domestic industry’ and ‘like services’ is critical to credibly determining whether imports may be causally linked to whatever an injury is suffered by a domestic industry of the importing country.
- The creation of an escape clause for services is

technically impossible in most sectors, because escape clause actions depend on findings of an injury or likely injury as a result of increased imports.<sup>51</sup> But the determination of an injury also raises challenges of its own, including the necessity to establish causality.

- Equally daunting challenges arise in attempting to demonstrate whether there has been a ‘surge’ in imports of the like or directly competitive product, particularly due to the fact that services imports are generally very hard to measure. This is owing to the genuine weaknesses in the statistical reporting of the services trade. Official statistics are estimates based on samples and surveys. Proving increased imports makes a service safeguard very difficult to make operable.
- There are many challenges involved in the administration and enforcement of an ESM as well.

The main opponents of ESM include the US and the EU. These countries are of the view that an emergency safeguard for services is neither feasible nor desirable. It is not feasible, according to them, due to the conceptual and statistical problems associated with it. It is not desirable, as it creates uncertainty regarding the value of the commitments, according to this group of countries. It is also argued that ESM is not necessary, as there is already sufficient flexibility in the GATS.

The main proponents of ESM are the ASEAN countries. This group, led by Thailand, has argued that services liberalisation can have unforeseen consequences on national economies. Citing the example of the effects of financial liberalisation in the Asian financial crisis of the late nineties, the ASEAN countries argue that countries should have recourse to an emergency safeguard to restrain foreign service providers. ESM, it is argued, creates a mechanism for emergency action to prevent injury in the case of unforeseen developments.

<sup>50</sup> Sauve (2006), pp.311-13.

<sup>51</sup> Vastine (2005), p.13.

It is also argued that provision for ESM may result in more liberal commitments on the part of developing countries. A number of developing countries has actually indicated that the quality of their offers will be influenced by the availability or otherwise of a system of ESM.

However, the arguments in favour of ESM do not enjoy full support among developing countries, some of which have voiced concerns over the fact that a GATS-ESM could most easily lend itself to imposing restrictions on the Movement of Natural Persons (Mode 4) - one of the modes of services delivery that many such countries seek to liberalise further in the ongoing GATS negotiations.

India, in particular, is apprehensive that emergency safeguards will in fact not serve developing countries but may be used against them when it comes to the supply of services through Mode 4.<sup>52</sup> This apprehension is not without grounds since, among the four modes of service supply that the safeguard could potentially restrict, delivery via the Mode 4 may indeed be the easiest to restrict, for example by imposing entry quotas. It is also apprehended by India that ESM may be difficult to use against Mode 3, in case of which the need for an ESM is likely to be the foremost for India. Hence, India is in an ambivalent position.

### 5.9.3 Subsidies

The treatment of subsidies was not settled during the framework negotiations in the Uruguay Round (UR). No timeframe was fixed for completing the negotiations on the subject either. Article XV of the GATS only mandates the Members to enter into negotiations with a view to developing the necessary multilateral disciplines to avoid the trade-distorting effects of subsidies. Article XV also mandates the exchange of information between Members concerning all subsidies related to trade in services for the purpose of these negotiations.

According to the 'Guidelines' (S/L/93), the WTO Members 'shall aim to complete' negotiations on the necessary multilateral disciplines on subsidies in services prior to the conclusion of the market access negotiations. The negotiations on subsidies in services have made little progress. Few Members have notified their services subsidies programmes or subsidies to the WTO. In 1996, a questionnaire was developed asking the WTO Members to identify any subsidies that they thought were relevant. However, the survey elicited relatively few responses. Only a handful of Members have so far responded to the WPGR questionnaire about their domestic services support programmes. This is mainly because of the difficulties experienced by the Members in identifying what might constitute a subsidy and particularly in identifying a subsidy with trade-distorting effects in services.<sup>53</sup>

There is a lack of comprehensive information both in respect of the existence of subsidies in the services sectors and the extent to which such subsidies may have adverse effects on international trade. However, anecdotal evidence and a review of information contained in the WTO Trade Policy Reviews suggests that subsidies are granted most often in the following services sectors: audio-visual services, construction, distribution, educational services, environmental services, financial services, health-related services, transport services (maritime, air transport, railway, road), research and development services, and tourism. Direct grants are the most common form of subsidies in the developed countries, followed by tax incentives. In contrast, tax incentives are found to be the most common form of subsidies the developing countries. A large number of WTO Members also provides subsidies relating to telecommunications services, many of which are in the form of grants relating to the fulfillment of universal service obligations (USOs). A significant number of countries used duty-free inputs and free-zone incentives, which sometimes

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<sup>52</sup> BRIDGES (2001).

<sup>53</sup> Jha et al. (2006), pp.167-68.

appeared to be linked to exports. However, there exists limited analysis of the impact of all these subsidies on the services trade.<sup>54</sup>

Beyond the challenge of better documentation of the country-wise and the sectoral incidence of subsidy practices in the services trade lies the equally overwhelming task of defining, measuring, and if necessary, disciplining such measures under the GATS. This is indeed a challenging job, given the lack of available information, the inherent difficulty in measuring trade in services and the special characteristics of the services trade, including the multiple modes of delivery that such trade entails.<sup>55</sup>

Very little debate has taken place so far on issues such as the definition of subsidies in the field of services, the role of subsidies in the pursuit of public policy objectives, the need for special and differential treatment (S&DT) for developing countries, or the appropriateness of a countervailing mechanism. One of the key concerns of all the Members is how to retain flexibility for the provision of public funding to key public services. India, for instance, is in favour of continuing with subsidies in certain important sectors. India has included subsidies as a National Treatment limitation under the horizontal section of its Conditional Initial and Revised Offers. The provision, which relates to Mode 3 (Commercial Presence), clearly states that 'Subsidies, where granted, shall be available only to domestic service suppliers'. It may be noted here that unlike the GATT, in case of the GATS, subsidies can be listed as National Treatment limitations if they are discriminatory between domestic and foreign service suppliers. During the Uruguay Round (UR), it was also possible to include subsidies under MFN exemptions, in case subsidies were selectively given to some countries.

#### 5.9.4 Government Procurement

There are three areas of work in the WTO on government procurement.<sup>56</sup>

##### *(i) Plurilateral Government Procurement Agreement*

This is a plurilateral agreement signed by a limited number of WTO Members so far. The Government Procurement Committee oversees the work of the Agreement on Government Procurement (GPA). The Agreement covers such issues as transparency and non-discrimination.

An Agreement on Government Procurement was first negotiated during the Tokyo Round and entered into force on 1 January 1981. Its purpose is to open up as much of this business as possible to international competition. It is designed to make laws, regulations, procedures and practices regarding government procurement more transparent and to ensure that they do not protect domestic products or suppliers, or discriminate against foreign products or suppliers. The Agreement has 28 members.

The present Agreement and commitments were negotiated in the UR. These negotiations achieved a 10-fold expansion of coverage, extending international competition to include national and local government entities whose collective purchases are worth several hundred billion dollars each year. The new Agreement also extends the coverage to services (including construction services), procurement at the sub-central level (for example, states, provinces, departments, and prefectures), and procurement by public utilities. The new Agreement took effect on 1 January 1996.

##### *(ii) Transparency*

A multilateral working group (involving all the WTO members) was set up by the first Ministerial Conference of the WTO held in Singapore in December 1996. It is called the Working Group on Transparency in Government Procurement Practices (WGTGP).

As indicated by the name, the focus of the group's work was on transparency in government

<sup>54</sup> Jha et al. (2006), p.168.

<sup>55</sup> Sauve (2006), p.325.

<sup>56</sup> Source: [www.wto.org](http://www.wto.org).



procurement practices. The group did not look at preferential treatment for local suppliers, so long as the preferences were not hidden. The first phase of the group's work was to study transparency in government procurement practices, taking into account national policies. The second phase was to develop elements, which could be included in a future agreement on transparency.

*(iii) Services (Working Party on GATS Rules):*

The multilateral Working Party on GATS Rules (WPGR) was established by the Council for Trade in Services. Among its responsibilities are negotiations on government procurement of services, as required under Article XIII: 2 of the GATS.

The GATS defines government procurement as 'the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale'. Article XIII.2 of the GATS requires the Members to enter into multilateral negotiations on government procurement of services within two years of the entry into force of the WTO Agreement (i.e. within two years of 1 January 1995) without any timeframe for their conclusion. The Negotiating Guidelines of GATS 2000 (S/L/93) envisage completion prior to the conclusion of the negotiations on 'specific commitments'. The negotiations are being held in the WPGR, as per the work programme of 22 July 2002, based on submissions from the Members

and other available materials. However, to date there has been relatively limited interest in these negotiations.

Most developing countries, including India, are of the view that the GATS Article XIII.1 excludes government procurement of services from GATS disciplines on non-discrimination, national treatment and market access issues, and that only issues linked to transparency and due process should be addressed in the WPGR. However, some developed countries, in particular the EU, disagree, arguing that GATS Article XIII.2 provides for negotiations on government procurement in services, including market access and national treatment.

Government procurement has not, however, received anywhere near as much consideration in the WPGR as ESM. There are many reasons for this difference in attention, one of them being the cross-cutting nature of the issue between goods and services under the plurilateral Government Procurement Agreement. Some other major difficulties include the lack of desegregated data on a cross-country basis, procurement at various sub-national levels, etc. The discussions have covered a range of issues including the desirability and feasibility of disciplines on government procurement under the GATS, the scope of the negotiating mandate and the relationship between the work of the WPGR and that of the Working Group on Transparency in Government Procurement (WGTGP), etc.

## 6. The GATS 2000 Negotiations and India

### 6.1 Services Sector in the Indian Economy

India's negotiating position on services has undergone a paradigm shift since the Uruguay Round (UR). During the UR, India had a clearly defensive stance on services. The country was one of the prime opponents of the inclusion of services

in the ambit of the multilateral trade negotiations. It was apprehended that any concessions gained in traditional sectors like agriculture or textiles would be offset by the opening up of the protected and government dominated services, such as, banking, insurance, and telecommunications.<sup>57</sup> However, since the beginning of the GATS 2000 Negotiations

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<sup>57</sup> Chanda (2005), p.21.

and particularly after the Doha Ministerial in 2001, India has emerged as a leading proponent of the services trade liberalisations at the multilateral arena.

The sea-change in India's approach towards trade and investment liberalisation in services may be attributed partly to the growing importance of the services sector in India's economy and its trade and investment flows in the recent years. India's services sector recorded an average annual growth rate of 9 per cent in the 1990s, while India's GDP grew at an average annual rate of 7.5 per cent during the same period.<sup>58</sup> The average growth rate of services attained a still higher mark during the last five years e.g. 8.6 per cent. According to the latest *RBI Annual Report*, in 2005-06, the services sector has recorded a growth rate of 10.3 per cent, contributing almost three-fourths of the overall real GDP growth of India.<sup>59</sup>

The share of the services sector in India's GDP has increased consistently over the years as depicted in Table 3. From a mere 38 per cent in 1970-71, the share of services (including construction) in the overall GDP of the economy went up to 54 per cent in 2000-01 and crossed the 60 per cent mark in 2005-06.<sup>60</sup> Notably, the rising share of the services sector in India's GDP is in line with the general pattern of growth observed in the developed and in some of the emerging market economies. As an economy matures, the share of services in its GDP is likely to increase consistently. To begin with, the share of services generally increases along with an increase in the share of industry. Thereafter, the services share grows more rapidly, accompanied by a stagnant or declining share of the industrial sector. Consistent with this trend, India's growth experience has also been characterised by a decline in the share of agriculture in its GDP and an

TABLE 3  
**Sectoral Shares in India's GDP**

(As Percentage of GDP at Factor Cost at 1993-94 Prices)

Year	Agriculture	Industry	Services
1970-71	46	16	38
1980-81	40	18	43
1990-91	32	22	46
2000-01	24	22	54

Source: RBI, Handbook of Statistics on the Indian Economy (Various Issues).

increase in the shares of industry and services (see Table 3). Of particular note are the changes during the 1990s, when the share of services in India's GDP climbed by about 8 percentage points, while that of industry remained constant.<sup>61</sup>

The services sector is increasingly contributing to India's trade flows. During the 1990s, with an average annual growth rate of 17.3 per cent for services exports, India occupied the top most rank among all countries of the world (in terms of growth of services exports). Between 2000 and 2005 also, India's services exports grew at an average annual rate of as high as 33 per cent.<sup>62</sup> As a result of sustained high growth in services exports, India's share in world export of services has more than trebled from 0.6 per cent in 1995 to 1.9 per cent in 2004.<sup>63</sup> The relative ranking of India as an exporter of commercial services has also improved significantly from 34 in 1995 to 15 in 2004 and 10 in 2005.

FDI in services in India has grown significantly in the recent past. In tune with the economic reform and liberalisation exercise undertaken by the country since the early 1990s, many hitherto closed and public sector-dominated services have been opened up to FDI in varying degrees and in varying forms. For the most part, the ceiling on foreign equity participation has also been gradually relaxed.<sup>64</sup> As revealed by World Bank (2004), FDI in

<sup>58</sup> World Bank (2004), Figure 1, p.9.

<sup>59</sup> RBI (2006), p.10.

<sup>60</sup> RBI (2006), p.11.

<sup>61</sup> Gordon and Gupta (2004), pp. 4-5.

<sup>62</sup> Srinivasan (2006).

<sup>63</sup> The corresponding share of India in the global merchandise exports was 0.8 per cent in 2004.

<sup>64</sup> Chanda (2006b).

services has been growing more rapidly than FDI in manufacturing in India as a result of the deregulation and liberalisation of important services, such as, banking, insurance, and telecommunications.

The above discussion reveals that since the 1990s, India's services exports have grown faster than its services output, which reflects a strong outward orientation of the services sector in India in the recent past. The most impressive growth in services exports has been recorded by the Information Technology (IT) sector, which itself has demonstrated an unambiguous outward-orientation with the lion's share of its revenues being generated from exports.

According to NASSCOM<sup>65</sup> statistics, Indian IT-ITES industry has consistently registered remarkable

double-digit growth in the recent past and is expected to exceed US\$36 billion in annual revenue in 2005-06. The industry has recorded a compound annual growth rate of over 28 per cent since 1999-00. Over the same period, the industry's contribution to the national GDP has risen from 1.9 per cent in 1999-00 to a projected 4.8 per cent in 2005-06. IT services account for the lion's share of the Indian IT-ITES industry, contributing over 47 per cent of the total industry revenue in 2004-05.

The revenue situation of the Indian IT industry in the recent years, with a sectoral break-up as per the latest NASSCOM classification<sup>66</sup> is reported in Table 4. The strong export-orientation of Indian software and services exports is evident from the statistics reported in this table. Export earnings accounted for 64 per cent of the total IT-ITES aggregate in 2004-05.

TABLE 4  
Revenue Situation in the Indian IT Industry: Sector-wise Break-up

Category		Revenue (US \$ billion)	2003- 2004	2004-2005	2005-2006 (Estimates)
<b>1. SOFTWARE AND SERVICES</b> (IT Services + ITES-BPO + Engineering Services and R&D, Software Products)		<b>Total Revenue</b>	<b>16.7</b>	<b>22.6</b>	<b>29.5</b>
		<b>Of which Exports</b>	<b>12.9</b>	<b>17.7</b>	<b>23.4</b>
1 (A)	IT Services	Total Revenue	10.4	13.5	17.5
		-Exports	7.3	10.0	13.2
		-Domestic	3.1	3.5	4.3
1 (B)	ITES-BPO	Total Revenue	3.4	5.2	7.2
		-Exports	3.1	4.6	6.3
		-Domestic	0.3	0.6	0.9
1 (C)	Engineering Services and R&D, Software Products	Total Revenue	2.9	3.9	4.8
		-Exports	2.5	3.1	3.9
		-Domestic	0.4	0.7	0.9
<b>2. HARDWARE</b>		<b>Total Revenue</b>	<b>5.0</b>	<b>5.9</b>	<b>6.9</b>
<b>TOTAL IT INDUSTRY</b> [(1) Software and Services + (2) Hardware]		<b>Total Revenue</b>	<b>21.6</b>	<b>28.4</b>	<b>36.3</b>

Note: Total may not match due to rounding off.

Source: www.nasscom.org.

<sup>65</sup> NASSCOM is the acronym for the National Association of Software Services Companies - the representative industry body in India.

<sup>66</sup> The NASSCOM had earlier classified the IT industry into the following broad categories: (a) IT services and software, (b) IT enabled services (ITES) and business process outsourcing (BPO), and (c) hardware segments. However, to better reflect how the industry and customer markets view the portfolio of services sourced from India, this year NASSCOM has re-classified the manner in which it reports the various segments included within IT-ITES. For instance, this year onwards, engineering and R&D services are being identified as an independent service line and will be reported separately. Consequently, some of the services (e.g. GIS) earlier included under ITES-BPO will now be reported under engineering and R&D services.

IT-ITES exports from India grew from US\$13.3 billion in 2003-04 to US\$18.2 billion in 2004-05. While the software and services exports (excluding hardware) are projected to grow at 32 per cent in 2005-06, it is estimated that the total IT-ITES exports from India will exceed US\$23.9 billion this year. According to a report by NASSCOM and McKinsey, exports of IT-related services from India are expected to reach US\$57 billion by 2008-09.

While the increase in services exports has been most dramatic in software and other business services (included in the category of miscellaneous services), certain other sub-sectors (such as, travel and transport services) have also registered rapid growth in exports. However, owing to the growing importance of software and other business services in India's export basket, there has been a significant compositional shift in India's services exports away from traditional services like travel and transport to miscellaneous services, which include software and other business services,<sup>67</sup> as depicted by Fig.3.

A striking feature of the services boom in India is its relatively 'jobless' nature. Although the services

TABLE 5  
Sectoral Shares in India's Employment

(Casual Daily Status Basis)

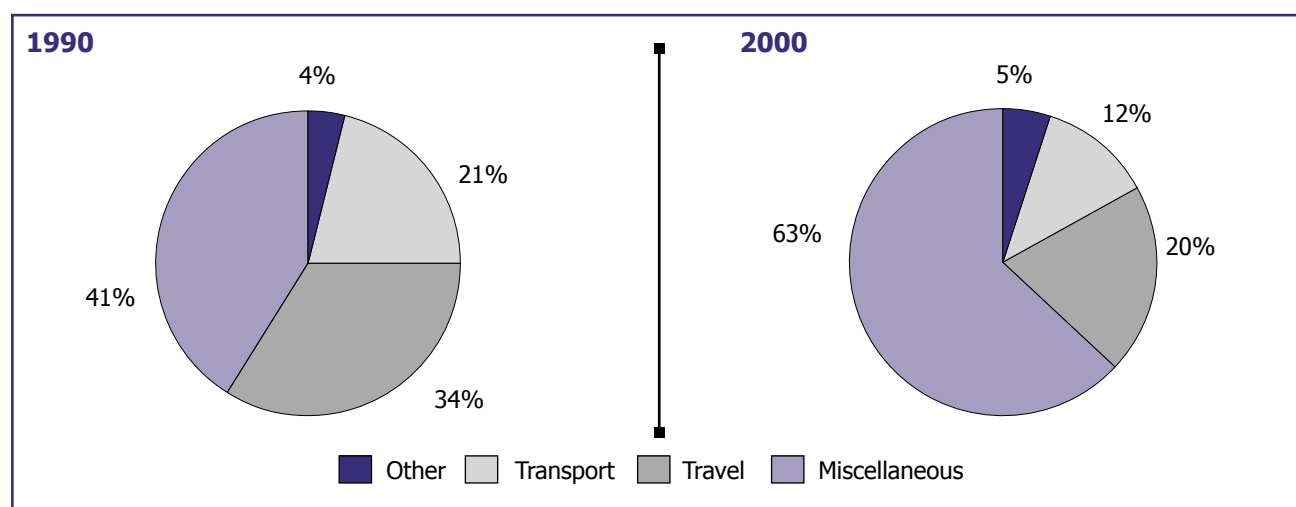
Year	Agriculture	Industry	Services
1983-84	63.2	15.6	21.2
1987-88	60.1	17.6	22.3
1993-94	60.4	15.8	23.8
1999-00	56.7	17.6	25.7

Source: Economic Survey, Government of India, 2002-03.

sector has recorded vigorous growth in the 1990s, thereby registering a significant increase in its share in India's GDP (see Table 3), the share of services in India's employment has not depicted a commensurate growth (see Table 5). Thus, while output generation has shifted to services, employment creation in services has lagged far behind.

This slower growth of jobs in the Indian services sector is in sharp contrast with the experience of many developed countries, where the services sector's share in employment rose faster than its share in national output.<sup>68</sup> An in-depth investigation of the reasons underlying India's relatively job-less services boom and the socio-economic implications of this phenomenon is beyond the scope of the present

FIGURE 3  
Composition of India's Services Exports



Source: Gordon and Gupta (2004), Fig. 10, p.27.

<sup>67</sup> Other business services consist of a wide variety of business services like advertising, exhibitions, engineering, accountancy, health services, etc.

<sup>68</sup> As per International Labour Organisation (ILO), the number of people employed in the service sector in the world has increased from 34.5 per cent in 1995 to 38.9 per cent in 2005. 'Shifting from the agriculture sector' has been another trend that has come to the fore in the international employment scene. While the agriculture sector continues to employ the highest number of people in the world - the number is gradually decreasing. In 1995, 44.4 per cent of the workforce in the world was working in the agriculture sector. The percentage declined to 40.1 per cent in 2005. (Source: <http://www.dakotta.com>).

paper. Nevertheless, it may be pointed out that such socio-economic implications need to be taken on board while determining the process and pace of liberalisation in services as well as the negotiating position of the country in the international trade negotiations involving services.

## 6.2 India's Key Interests in the GATS 2000 Negotiations<sup>69</sup>

India's offensive interests in the GATS 2000 negotiations are restricted primarily to two modes of services delivery: Mode 4 involving movement of natural persons and Mode 1 encompassing cross-border trade in services. India's major stakes in these two modes are briefly discussed below.

### *Mode 4*

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

Apart from software services, India also has a comparative advantage in a wide variety of other Mode 4-based professional and business services, including health, engineering, accountancy management, etc. Indian professionals in these diverse categories of services accounted for nearly half of all H-1B visas granted to foreigners in the US in 1999.<sup>70</sup>

India has been a major supplier of skilled manpower in services such as, IT, health, and engineering, to markets other than the US as well. The other key destinations include Canada, the UK, Germany, Austria, Singapore, and Japan.

India has also emerged as an important source country for low and semi-skilled service providers, mainly to the Middle East and increasingly to South East Asia. A large chunk of low and semi-skilled workers from India are engaged in a wide range of occupations in these countries including construction workers, production workers, transport equipment operators, domestic help, nurse's aids, craftsmen, technicians, etc.

### *Mode 1*

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

The most dramatic achievement of India in the exports of Mode 1 services can be observed in the business process outsourcing (BPO) segment. India's BPO exports increased from a mere US\$ 665 million in 1999-00 to US\$ 3.6 billion in 2002-03 and are projected to grow to US\$ 12 billion in 2008.

India has emerged as a leading outsourcing destination not only in terms of the volume and

<sup>69</sup> Data and information used in sub-section 6.2 draws heavily on Chanda (2005), pp. 29, 36, 37, 39, 40, 50, 51.

<sup>70</sup> USINS (2002).

range of services delivered, but also in terms of its firm-level capabilities. About 60 per cent of the Fortune 500 companies of the world are already outsourcing their work to India. These include multinational companies like GE, Intel, Microsoft, HSBC, Accenture, IBM, etc. According to AT Kearney (2004), India was the most attractive destination for offshore outsourcing in 2004.

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

It may be noted here that the labour cost advantage of developing countries including India is expected to remain at least over the next twenty to thirty years, given the demographic trends and a rising demand-supply gap for services in the developed countries. With a massive human resource base, a large proportion of young people and a strong foundation in technical education, India is well positioned to capitalise on the worldwide potential in the knowledge economy and the services sector is expected to remain a key driver of economic growth in India. However, there remain numerous barriers in the key developed country markets of India's interest, which impede the realisation of India's true potential in the services trade. For instance, India's Mode 4-based exports are subject to various quantitative restrictions, cumbersome labour certification procedures, recognition and licensing requirements, Economic Needs Tests (ENTs), etc. in key destination markets, which restrict the movement of Indian service providers for on-site delivery of services in these markets. In the case of

Mode 1 exports, there are growing protectionist tendencies in the key developed country markets of India in the form of government outsourcing bans, federal and state level protectionist legislation, data privacy laws, caller identification requirements, etc. It is apprehended that such protectionism could spill over to the private sector and to other developed countries.

In the backdrop of India's huge potential in the services trade and the aforesaid protectionist barriers encountered by the country in its key services markets, India has started playing a rather proactive role in the GATS 2000 negotiations. The prime objective of this more recent aggressive stance is to utilise the multilateral forum to do away with the market access restrictions encountered by the Indian service providers in the developed country markets, particularly in Modes 1 and 4.

India's key agenda in the ongoing market access negotiations on services is enumerated below:

- To facilitate the movement of professionals (Mode 4) who have got a contract to supply services abroad;
- To delink the movement of such professionals (Mode 4) from the requirement to set up an office/firm in a foreign country (Mode 3);
- To bind the current level of commitments prevailing in the developed country markets to facilitate supply of services remotely (i.e. ITES, BPO, etc. covered under Mode 1);
- To request countries to do away with Economic Needs Tests (ENTs) and Labour Market Tests (LMTs), which hamper effective market access to Indian service providers;
- Enter into discussions for having Mutual Recognition Agreement for educational qualifications and licensing requirements and procedures;
- Disciplining administrative measures;
- Exemption from social security contributions.<sup>71</sup>

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<sup>71</sup> Gupta (2006).

Given this background, the rest of the discussion in Section 6 focuses on India's participation in various stages of the GATS 2000 negotiations.

### 6.3 The Bilateral 'Request-Offer' Approach and India

After the initiation of the bilateral 'request-offer' process under the GATS 2000 negotiations, India received requests from around 25 countries (including all major developed and developing countries) in a large number of sectors such as distribution, telecommunication, energy, environmental services, financial services, education, tourism and travel, computer and related services, business services, etc.<sup>72</sup>

The horizontal requests mainly focused on Modes 3 and 4. In Mode 3, the horizontal requests focused on transparency in domestic regulation, administrative procedures, clarification of criteria (e.g. for licensing), various definitional issues, etc. The horizontal requests under Mode 4 concentrated on expanding the scope and coverage to include more categories of highly skilled service providers, elimination of economic needs tests (China and the EU), improvement of transparency in visa and administrative procedure (China) and extension of the duration of stay for certain categories of service providers such as 'Business Visitors' and 'Intra-Corporate Transferees'.

The sectoral requests to India emphasised on broadening the coverage to include more sectors/sub-sectors, such as, energy, environment, education, distribution, accountancy, architecture, etc. For each sector, most countries asked for full commitments under Modes 1, 2, and 3 stressing on removal of Mode 3 restrictions. As regards Mode 4, there were very few sector-specific requests<sup>73</sup> and most countries referred to the horizontal schedule.<sup>74</sup>

India submitted requests to more than 60 countries,<sup>75</sup> including some of the major developed countries (e.g. the USA, the EU, Japan, Australia, Canada, New Zealand) and developing countries (e.g. China, Mexico, Brazil, Malaysia, Indonesia) in sectors such as architectural services, audio-visual services, computer and related services, tourism and travel-related services, health and maritime transport services across various modes, with a significant focus on Mode 4.

In its horizontal requests under Mode 4, India asked for full commitment in respect of independent professionals delinked from commercial presence. It also requested its trading partners to put in place a visa system to ensure fulfillment of the horizontal and sectoral commitments undertaken, grant multiple entry visa for professionals, allow inter-firm labour mobility, remove economic needs tests and other necessity tests, extend the duration of stay, remove discriminatory taxes on foreign service providers and remove quantitative restrictions or quotas (as imposed by some countries, such as, the US) on the movement of professionals.

India's sector-specific requests concentrated on full commitments under Modes 3 and 4. In certain sectors such as architectural services, tourism and travel-related services, computer-related services, health services, India requested for 'additional commitments' on Mutual Recognition of Qualifications, training and experiences and licenses to practice.<sup>76</sup>

Both the horizontal and sectoral requests reflected the country's interest in exporting highly skilled manpower. The requests, however, did not focus on other areas such as cross-border trade (Mode 1) in Information Technology (IT)-enabled services (ITES) and Business Process Outsourcing (BPO)

<sup>72</sup> Government of India (2003).

<sup>73</sup> For instance, China requested India to allow Chinese teachers engaged in educational or training activities to provide educational services to various foreign entities or individuals. Furthermore, under Mode 3 China requested that joint school or wholly foreign-owned schools should be permitted to be established.

<sup>74</sup> Mukherjee (2004), pp.245-46.

<sup>75</sup> Government of India (2003).

<sup>76</sup> Mukherjee (2004), p.247.

services, although the growing export potential in this Mode of services delivery was already visible by the time India tabled its requests. A large number of companies from the developed countries such as the US and the UK had already started outsourcing work to developing countries like India, China, Russia, and the Philippines to take advantage of the low-cost trained workforce.

Despite having a clear-cut comparative advantage in the export of ITES and BPO services, at the beginning of the negotiations in 2000, the country focused largely on Mode 4 while cross-border services trade (Mode 1) was somewhat neglected. This approach may be due to the fact that regulations and barriers in the developed countries were not so stringent in the case of Mode 1. However, subsequently, the growing proliferation of outsourcing was confronted by widespread opposition in various developed countries from trade unions, politicians, etc. This opposition stemmed from a fear that this would lead to job losses and consequently increase the unemployment rates and aggravate the recessionary trend in those countries.<sup>77</sup> In the face of such rising protectionist measures in various developed countries, India subsequently shifted its negotiating focus from Mode 4 alone to both Modes 1 and 4. It was understood by India that by pushing for binding commitments in Mode 1, it was possible to lock in the existing market access and prevent a future protectionist backlash.

#### 6.4 Analysis of India's 'Conditional' Initial and Revised Offer

Before getting into a discussion on India's 'conditional' initial and revised offer, the significance of the word 'conditional' is worth examining. In both the offers, it is clearly stated that this offer is conditional on other WTO Members making substantive and satisfactory offers in sectors and modes of supply where India has indicated its interests. It is further clarified that India reserves

the right to withdraw, modify or reduce any part of this offer and any subsequent conditional offers that could follow, in whole or in part, at any time on or prior to the conclusion of the current services negotiations if offers made by India's negotiating partners are not satisfactory. India further reserves the right to make any technical amendments or corrections to this initial conditional offer and any subsequent conditional offer that could follow. This offer is also conditional on the outcome of the negotiations underway on the development of disciplines on domestic regulations.

Thus, none of these offers indicates the GATS commitments on part of India. India's GATS commitments are so far restricted only to those scheduled by the country during the Uruguay Round (UR) of negotiations. The 'conditional' initial or revised offers are only an intermediate stage of arriving at a new set of GATS commitments that would be undertaken by the country by the end of the new round of negotiations (i.e. the GATS 2000 negotiations). The following discussion should be judged in that light.

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

Nevertheless, there was a general perception that India's Initial Offer was pretty conservative. Subsequently, in August 2005 India submitted its Revised Offer (RO), which, however, came to be

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<sup>77</sup> New Jersey was the first US state to initiate legislation that would outlaw the state contracting of services to developing countries. Many other states such as Maryland, Connecticut, Wisconsin, and Missouri have also initiated similar legislations. In the UK, trade unions in British Telecom went on strike in protest against the export of jobs after the company opened two call centres in India (Mukherjee, 2004, p.248).



regarded as one of the most ambitious ROs ever submitted by a WTO Member. In this RO, India offered to undertake extensive commitments in a number of new sectors/sub-sectors including architectural, integrated engineering and urban planning and landscape services; veterinary services; environmental services; distribution services; construction and related engineering services; tourism services; educational services; life insurance services; services auxiliary to insurance; recreational, cultural and sporting services, and air-transport services. New commitments were also offered to be undertaken in cross-border supply (Mode 1) in a range of other business services; professional services; research and development services; rental and leasing services; real-estate services; etc. Annexure 1 of this paper, which is self-explanatory, provides a clear picture of the current status of India's offers on sector-specific commitments (subsequent to India's RO) in different modes of supply in the whole range of sectors which were included by India for the first time in its RO.

In the RO, improvements were also made in some of the sectors/sub-sectors, which were already included by India in its IO. This included sectors, such as, engineering, services; computer and related services; research and development services; basic telecommunications; value added telecommunications; construction and related engineering services, banking services, asset management services and other non-banking financial services. Annexure 2 of the paper depicts the current status of India's offers (subsequent to India's RO) in all the sectors/sub-sectors, which were already enlisted by the country under its IO. This table further indicates the sectors/sub-sectors and the corresponding modes of supply in which there has been an improvement in India's offers in its RO as compared to its IO.

### *Analysis of the Horizontal Section in India's Revised Offer*

A close look at the Horizontal Section of India's RO reveals certain features. India has not inscribed any Market Access (MA) or National Treatment (NT)

restrictions in Modes 1 and 2 under the horizontal section. Even for Mode 3, there is no MA limitation across the board. Notably, in the IO India kept its option open for denying market access to Scheduled areas and Tribal areas covered under Schedule V and VI of the Constitution of India. However, this discretion has been waived under the RO. Although India has maintained some horizontal limitations on NT under Mode 3, there has been substantial improvement in its NT commitments in this sphere compared to what was provided under the IO. For instance, in the IO, there was a requirement that acquisition of shares in Indian companies would be subject to FIPB approval. Repatriation of sales proceeds of immovable property was also subject to prior approval of RBI. Both these restrictions have now been removed under the RO. Furthermore, there is no longer any horizontal NT limitation in Mode 3 on the ground of special treatment to SC/STs or weaker sections of society, or for restricting access to Scheduled areas and Tribal areas. The only horizontal NT limitations in Mode 3 that India has included in its RO are aimed at creating room for differential treatment among domestic and foreign service providers regarding tax provisions and for restricting subsidies only to domestic service providers.

As far as Mode 4 is concerned, India has also improved its horizontal commitments under this mode substantially. Just like in Mode 3, access can no longer be denied to Scheduled areas and Tribal areas. Apart from this there are various other features of India's Mode 4 commitments under the horizontal section that are worth discussing.

First of all, an attempt has been made by India in its RO to bring the definitions and parameters of various categories of natural persons in line with the common categories paper submitted by a number of countries, including India. This is an important aspect given the lack of clarity and commonality in the definitions of different categories of natural persons that have been followed by various countries in their respective GATS schedules.

Coming to MA commitments, it may be recalled at the outset that India had already made a substantial initial offer under the horizontal section in Mode 4, by including a wide range of categories of natural persons in its schedule of commitments. This included categories like Intra-Corporate Transferees (ICTs), Business Visitors (BVs), Contractual Service Suppliers (CSSs) and Independent Professionals (IPs). Further improvements have been made in the sectoral coverage of the MA commitments for both CSSs and IPs under the RO. The new sectors/sub-sectors that have been included in the RO under the aforesaid two categories are listed below:

- integrated engineering services,
- architectural services,
- urban planning and landscape architectural services,
- R & D services - management consulting services (excluding all services relating to legal consultancy),
- services related to management consulting (excluding all services relating to legal consultancy),
- tourist guides services.

However, just like the IO, the RO also clearly states that MA shall be available for both CSSs and IPs only in the specific service sector for which the contract has been entered into. It seems, this provision has been included as a safeguard against the possibility of foreign nationals entering into the permanent labour market of India. It may be mentioned here that in principle, Mode 4 deals with 'temporary' movement of natural persons, as distinct from permanent labour migration. However, there exists a perceived risk of this apparent distinction getting blurred due for instance, to the lack of clarity in the definition of the term 'temporary' or for some other reasons. Such risk makes Mode 4 a very sensitive issue from the point of view of employment implications in the host country. While this kind of restriction on the inter-sectoral movement of foreign service providers may be justified on the grounds of labour-market-related sensitivities in the host country, a counter argument that is often put forward is that such restrictions may limit the

flexibility of moving service personnel to various client sites to perform the service, thereby acting as a disincentive to hiring foreign nationals.

In addition to maintaining the aforesaid restriction, in the case of CSSs, another new MA restriction has been added in the RO of India, which asks for appropriate educational and professional qualifications relevant to the services to be provided. While these kinds of qualification requirements are often put forward with public policy objectives like ensuring quality of services, thereby protecting the consumer and national interests, they can sometimes act as market access barriers depending on the way they are implemented. Nevertheless, these are very common restrictions in the case of CSSs.

Another restriction that was included in the IO in the case of CSSs, has now been removed. This relates to the possibility of suspending the MA commitments in case of labour-management disputes.

In the case of IPs, India maintains the qualification requirements and the need to obtain registration with the professional body, wherever necessary. However, for IPs who travel to India for the purpose of performing services contracted between them and some Indian clients, there is now the possibility of getting an extension of up to three months on the duration of stay, over and above the initial period of twelve months (which was granted by India under the IO itself).

For the category of BVs, India has increased the duration of stay from 90 days (stipulated in the IO) to 180 days (in the RO). For ICTs, however, the duration of stay has been stipulated to be a maximum of five years, as in the IO.

As far as limitations on National Treatment (NT) are concerned, India has streamlined these in Mode 4 under the RO. For all categories of natural persons to whom MA has been offered under the RO, there is the requirement of a requisite visa and the conditions attached to entry and temporary

stay under such a visa. Furthermore, for each category scheduled under the RO, there is the need for fulfillment of specific requirements regarding information in support of the application and required documentation. Unlike in the IO, under the RO, there is the need for possession of requisite educational and professional qualifications as well as the necessity of producing the proof of contract only in case of CSSs and IPs. Notably, under the IO these requirements were attached to BVs and ICTs as well.

## 6.5 Services Negotiations Post-Hong Kong Ministerial and India

### 6.5.1 Status of the Plurilateral Market Access Negotiations and India's Participation

As the coordinator of the plurilateral groups on Mode 1 and Mode 4, India has put forward aggressive plurilateral requests under both the modes. India has also submitted requests for opening up of markets in 'computer and related services' and in 'architectural, engineering and integrated engineering services'. India has received 'requests' in the following sectors/modes of services: Mode 3, telecommunications, finance, distribution (retail), legal, postal and courier, energy, private education services, environmental services, construction, maritime transport, air transport, logistics, audio-visual, and MFN (audio-visual).

### 6.5.2 Outlines of the Plurilateral Requests where India is a Demandeur

The key features of the plurilateral requests where India is one of the co-sponsors are discussed briefly below.

#### *Cross-border*

India is the coordinator of the plurilateral group on cross-border services. The target group (recipients) of this plurilateral request comprises the US, the EC, Canada, Japan, Korea, China, Malaysia, the Philippines, Indonesia, Brazil, Argentina, Egypt, South Africa, Peru, Colombia, Uruguay, Brunei Darussalam, United Arab Emirates, Australia, and Norway.

As discussed earlier, some services, which were hitherto technologically infeasible to be provided cross-border, have of late become feasible owing to technological breakthroughs in the recent years. However, a number of services sectors and sub-sectors relevant to cross-border supply have still not been offered by the key countries of India's interest in their 'revised offers'. These include various support services, R&D services, medical and dental services, etc. There have also been gaps in the Modes 1 and 2 commitments, particularly for professional services (including health, accounting, etc.), other support services (including call centre services, credit reporting services, mailing list compilation services, etc.), other business services, R&D services, etc.

In this context, the plurilateral request focuses on a wider sectoral coverage. It lists a range of sectors/sub-sectors of interest where gaps in commitments exist in the Member's schedules. This is in line with the Annex C of the HKMD, which asked the Members to bind commitments under Modes 1 and 2 at the existing levels of market access on a non-discriminatory basis across sectors of interest to Members. This list includes sectors like professional services, computer-related services, R&D, telecom, tourism, distribution, financial, other business services, etc. The plurilateral request aims at obtaining full MA and NT commitments for all these sectors/sub-sectors for both Modes 1 and 2.

The proposal to lock in the current level of liberalisation is aimed at precluding the possibility of imposition of protectionist measures in future by the importing countries to curb offshoring. This assumes significance in light of the huge media and political attention that the issue of outsourcing of services to India has received in a number of key developed countries including the USA, Europe, and Australia.

Some of the other key aspects of the proposals included in the plurilateral request in cross-border services are enlisted below:

- It calls for removal of commercial presence, nationality/residency requirements, and national treatment limitations;
- It seeks similar commitments wherever possible for Modes 1 and 2, with the aim of taking care of the uncertainty regarding classification of electronic delivery of certain services as either Mode 1 or Mode 2;
- It aims at ensuring that commitments address the inadequacy of the GATS classification system and adequately cover commercially meaningful opportunities, while at the same time taking into account rapid technological developments in future;
- Specifically, commitments are sought at two digit level to take into account future technological progress.

However, the plurilateral request does not specifically cover domestic regulation-related issues, although regulatory issues constitute one of the main market access impediments in cross-border supply, as discussed earlier.

#### *Mode 4*

India is the coordinator of the plurilateral group on Mode 4, covering movement of natural persons. As discussed earlier, this is an area where commitments have not been very impressive either under the UR or under the GATS 2000 negotiations so far. As noted before, commitments were restricted mainly to horizontal ones. The categories of natural persons covered by commitments were also limited. These were restricted primarily to categories linked to commercial presence (Mode 3).

Therefore, the plurilateral request put forward by India and others in Mode 4 aimed at:

- Substantial improvement in the coverage of categories delinked from commercial presence, and
- Substantial removal of market access limitations for each of these categories.

The request is addressed to the US, the EC, Australia,

Canada, Japan, New Zealand, Switzerland, Norway, and Iceland.

Some of the key features of this plurilateral request are enlisted below.

- Commitments in categories of Contractual Service Suppliers (CSSs)/Independent Professionals (IPs), delinked from commercial presence,
- Emphasis on the usefulness of arriving at common definitions of CSS and IP categories,
- Qualifications commensurate with the job requirement - based on diploma or university degree or demonstrated experience,
- Wage parity not to be used as a precondition of entry,
- Removal/substantial reduction of Economic Needs Tests (ENTs),
- Even if ENTs are not fully removed, transparency and non-discrimination in their application,
- Increased duration of stay and possibility of renewal,
- Positive-listing of sectors to which IP and CSS categories are applicable,
- Transparency in Mode 4 commitments for CSS and IP,
- Disciplining of domestic regulation and ensuring its transparency, particularly in those relating to administrative procedures pertaining to the temporary entry of natural persons, etc.

#### *Computer and Related Services*

Computer and related services (CRS) sector has recorded enormous growth in the recent past and has become one of the prime driving forces behind the development of a knowledge-based economy. With the aim of ensuring effective liberalisation in this sector, India along with other demandeurs has put forward the following proposals in the plurilateral request:

- Scheduling of commitments at the highest (2-digit) level, considering the rapid technological advancement and possibilities for creation of new business model;
- For each of Modes 1, 2, and 3, full market

access and national treatment commitments for the sector as a whole (i.e. CPC 84), with no limitation;

- Commitments on relevant categories of service suppliers as per Paragraph 1(d) of Annex C of HKMD;<sup>78</sup>
- Not to exclude CRS services from horizontal Mode 4 commitments;
- Not to inscribe any additional limitations beyond horizontal limitations.

The plurilateral request also includes a model schedule with the aim of facilitating scheduling of commitments in this sector. The target group of countries of this request comprises Argentina, Brazil, China, Colombia, Ecuador, Egypt, Indonesia, Israel, Paraguay, Panama, the Philippines, South Africa, Switzerland, Thailand, Turkey, and Uruguay.

### *Architectural, Engineering and Integrated Engineering Services*

Liberalisation of trade in architectural, engineering and integrated engineering services is said to carry particular benefits for developing countries, which often gain from spontaneous technical knowledge transfer among firms and individuals, including through voluntary training courses and on-the-job training. Given the linkages that often exist between these service categories and other related sectors, liberalisation of trade in architectural, engineering and integrated engineering services may also contribute to liberalisation of trade in related sectors such as construction services, environmental services, and energy services.

In this context, the plurilateral request in architectural, engineering and integrated engineering services, in which India is one of the demanders, urges the recipient countries to undertake commitments with the widest possible sectoral coverage, i.e. by covering all sub-sectors listed under CPC 8671 (architectural services), CPC 8672 (engineering services), and CPC 8673 (integrated engineering services).

The recipients of this request are: Argentina, Bolivia, Brazil, China, Colombia, Ecuador, Guatemala, HKC, India, Indonesia, Jamaica, Kuwait, Malaysia, Nicaragua, Pakistan, Panama, Paraguay, Peru, the Philippines, Qatar, Chinese Taipei, Singapore, Sri Lanka, Thailand, Turkey, United Arab Emirates, and Uruguay.

Under Modes 1 and 2, recipients are requested to make meaningful commitments. With this aim in view, recipients are further requested to reduce or eliminate, to the greatest extent possible, certain restrictions such as, commercial presence requirements, nationality/citizenship requirements, residency requirements, etc. The recipients are urged to seek either complete elimination of these restrictions or replacement of these requirements with less restrictive measures, e.g. collaboration with locals, bonding requirements, etc.

Recipients are also requested to undertake meaningful Mode 3 commitments in architectural, engineering and integrated engineering services. In particular, they are urged to eliminate or substantially reduce certain restrictions, such as, those:

- Limiting types of legal entity,
- Limiting the participation of foreign capital,
- On establishment of joint ventures,
- Nationality/citizenship requirements,
- Residency requirements, etc.

In Mode 4, requests are put forward for commitments in all categories with a special emphasis on contract service suppliers including independent professionals. Recipients are also urged to consider removal or substantial reduction of Economic Needs Tests (ENTs). Even where ENTs are maintained, they are requested to be scheduled following the Scheduling Guidelines pursuant to the Decision of the Council for Trade in Services adopted on 23 March 2001.

Recipients are requested to eliminate any existing MFN exemptions in these sectors. Finally, they are

<sup>78</sup> For a discussion on Annex C on Mode 4, see Section 5.7 above.

also requested to give due consideration to ensuring clarity, certainty, compatibility and coherence in the scheduling and classification of commitments.

### 6.5.3 Outlines of the Plurilateral Requests where India is a Recipient

The requests that India (along with other recipients) has received from various plurilateral groups are discussed briefly below:

#### *Mode 3*

The plurilateral request in Mode 3, in which India is one of the recipients, is co-sponsored by the European Community and its Member States, Hong Kong China, Japan, New Zealand, Switzerland, and the USA. It emphasises the need for the GATS Mode 3 commitments to reflect, at a minimum, the significant liberalisation that has taken place in domestic regulatory regimes relating to commercial presence over the past few decades. It highlights the importance of drafting of Mode 3 commitments in a clear, transparent and precise manner. The request then emphasises the need to improve upon the Mode 3 commitments on a sector-by-sector basis. It underscores the importance of ensuring that sectoral commitments in Mode 3 do not get undermined by particularly trade restrictive MA and NT limitations inscribed in the horizontal section of a country's schedule of GATS commitments. Hence, as a complement to sectoral requests in Mode 3, recipients are requested to remove Mode 3 limitations in the horizontal sections of their respective schedules. In particular, recipients are urged to eliminate certain specific restrictions affecting the establishment and operation of a commercial presence, including:

- Limitations on foreign equity participation,
- Economic needs tests,
- Limitations on the type of commercial presence (subsidiary, branch, representative office) chosen by foreign service suppliers,
- Requirement of joint ventures,
- Limitations on foreign exchange and profit repatriation.

#### *Telecommunication Services*

The requesting Members in the plurilateral group on telecommunication services are Australia, Canada, the European Communities, Hong Kong China, Japan, Republic of Korea, Norway, Singapore, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and the United States of America.

Recognising the vital role played by telecom services, the plurilateral request in general urges for strong and commercially meaningful commitments for all telecom services. It clarifies that, as per the Annex C of the HKMD, Members, while scheduling their commitments in this sector, should ensure to the maximum extent possible, clarity, certainty, comparability and coherence of commitments through adherence to the Scheduling Guidelines of 23 March 2001.

It calls for commercially meaningful coverage of sub-sectors, especially voice and data transmission services, leased circuit services, and value-added services.

In Mode 1, recipients are requested to ensure no NT limitations and no substantial market access limitations. Specifically, the following are requested:

- No unbound entries,
- No requirement to use networks of specific suppliers,
- No requirement of commercial presence,
- No requirement for commercial arrangements.

In Mode 2, requests are put forward to ensure that there are no market access or national treatment limitations.

In Mode 3, also the plurilateral request urges for no national treatment limitations and no substantial market access limitations. Specifically, the following are underscored:

- No limitations on establishment or number of service suppliers,
- No economic needs tests,

- No restrictions on types of legal entity allowed,
- No limitations on nationality or residency,
- Majority foreign capital participation and effective control to be allowed.

In Mode 4, the request calls for commitments on categories of Intra-Corporate Transferees (ICTs) and Business Visitors (BVs). It further seeks to ensure that there are no additional limitations beyond horizontal limitations and that telecom services are not excluded from horizontal Mode 4 commitments.

The plurilateral request furthermore calls for removal of all MFN exemptions in telecom. Finally, it urges commitments to all provisions of the reference paper developed in the Negotiating Group on Basic Telecommunications.

### *Financial Services*

The collective request on financial services is presented to India (and other recipients) on behalf of Australia, Canada, the European Communities, Ecuador, Hong Kong China, Japan, the Republic of Korea, Norway, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and the United States.

Urging Members to use the agreed definitions in the GATS Annex on Financial Services for scheduling commitments, the plurilateral request puts forward certain specific proposals under each mode of services delivery.

In Mode 1, recipients are requested to undertake commitments in certain sub-sectors, e.g. insurance, advisory, information and data processing, etc. In Mode 2 also commitments are requested in various insurance services and all non-insurance financial services. In Mode 3, requests are made to undertake commitments for all financial services sectors, encompassing rights to establish new and acquire existing companies in the form of wholly owned subsidiaries, joint ventures, and branches.

Under each of Modes 1, 2 and 3, requests are put forward to remove discrimination between domestic

and foreign suppliers regarding application of laws and regulations. Further, removal of limitations such as monopolies, numerical quotas, economic needs tests, etc. are also requested in each of these three modes.

Finally, the plurilateral request suggests that transparency in development and application of rules and regulations, transparent and speedy licensing procedures and other regulatory issues should be addressed in the negotiations.

### *Distribution Services*

The plurilateral request in distribution services is co-sponsored by Chile, the European Communities, Japan, the Republic of Korea, Mexico, Singapore, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and the United States.

With the aim of achieving a progressively higher level of liberalisation of trade in distribution services, the recipients are requested to make new and improved commitments covering all sub-sectors (commission agents' services, wholesale trade services, retailing services, and franchising). However, it clarifies that flexibility concerning exclusion of a limited number of sensitive products would be discussed on an individual WTO Member basis and that such exclusion shall be clearly specified in the schedule of specific commitments.

Under each of the Modes 1, 2, and 3, in general, the request calls for market access and national treatment without any limitations. However, it leaves room for discussion, on an individual basis, on the following issues:

- A transition period of certain years (to be decided),
- A limited number of non-discriminatory economic needs tests with clear, specific main criteria as regards Mode 3,
- A limited number of other exceptions.

Under Mode 4, the plurilateral request calls for market access and national treatment with no limitations beyond those indicated in the horizontal

section, ensuring, in particular, access for ICTs and BVs.

Finally, it reiterates the HKMD Annex C instruction that when scheduling commitments in distribution services Members should ensure, to the maximum extent possible, clarity, certainty, comparability and coherence through adherence to, *inter alia*, the Scheduling Guidelines of 23 March 2001.

### *Environmental Services*

The demandeurs in the environmental services group comprise Australia, Canada, the European Communities, Japan, Korea, Norway, Switzerland, The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and the United States.

Environmental goods and services were singled out for liberalisation in Paragraph 31(iii) of the Doha Declaration. As mentioned elsewhere in this paper, the Doha Declaration agreed to negotiations on reduction or elimination of tariff and non-tariff barriers to environmental services.

As far as the plurilateral request in environmental services is concerned, it clearly clarifies that liberalisation in these sectors will not impair the ability of governments to impose performance and quality controls on environmental services and to otherwise ensure that service suppliers are fully qualified and carry out their tasks in an environmentally sound manner. It further says that as under current obligations, each WTO Member can establish, maintain and enforce its own levels of protection, *inter alia*, for consumers, health-safety, and the environment.

Importantly, the plurilateral request keeps outside its purview water for human use (i.e. the collection, purification, and distribution of natural water).

It includes detailed discussion on the differences existing between classification of environmental services under W/120 and CPC, and the resultant

problems of scheduling commitments. While W/120 comprises only four sub-sectors of activity, CPC contains several other sub-sectors. In this backdrop, the plurilateral request urges the recipients to undertake commitments across all sub-sectors under environmental services using the corresponding provisional CPC 94 classifications.

As the technological developments in recent years have made cross-border delivery of certain environmental services technically feasible, the plurilateral request calls for full commitment in Mode 1, where possible. Full commitments are sought in Mode 2 as well, for all sub-sectors.

Environmental services are predominantly supplied via Mode 3. Therefore, recipients are requested to undertake ambitious commitments under this mode. In particular, recipients are urged to remove barriers to commercial presence, e.g. foreign equity limitations, joint operation requirements, restrictions or requirements on type of legal entity for foreigners (such as joint venture). At a minimum, recipients are requested to expeditiously phase out barriers to commercial presence.

The plurilateral request further proposes that in cases where a Member country awards exclusive rights contracts to environmental service suppliers for supply of certain environmental services at central or local level, foreign service providers should also be allowed to participate in the supply of the service. However, it leaves outside its purview cases of non-commercial government procurement of environmental services.

In Mode 4, the request urges the recipients to schedule commitments either in the sectoral or horizontal section to ensure mobility of service suppliers involved in the supply of environmental services, with a particular emphasis on specialised knowledge and skills.

### *Private Education Services*

India has received a request on private education services from the plurilateral group consisting of



Australia, Japan, Malaysia, New Zealand, Chinese Taipei, and the US.

Trade in private education services has seen rapid growth in recent years. Estimated at somewhere between US\$40-50 billion, private education services have become a major tradable service sector in a wide range of countries. In this context, the co-sponsors of the plurilateral request seek new or improved commitments in relation to 'private' higher education and/or 'private' other education only. Commitments in 'public' education are not requested at all. The request clarifies that making a commitment in education, especially in private education, does not necessarily mean committing government resources to private institutions. Attachment 1 added at the end of the request further elaborates on the perceived difficulty in crafting a commitment in private education only, that arises from the complexities involved in arriving at a clear-cut and universal definition of the terms 'public' and 'private' in the context of education. Hence, the attachment, which is indicative only and does not form part of the actual request, (informally) suggests the recipients to individually define the scope of commitments in education as per their respective domestic structure and policy sensitivities, without necessarily defining what is 'public' and what is 'private'. Attachment 2 also provides a possible format following which a Member country could inscribe its commitments only in private higher education and/or private other education, while at the same time keeping adequate flexibility in inscribing certain national treatment restrictions commensurate with domestic sensitivities in education.

However, the actual request calls for no MA or NT limitations in Modes 1 and 2. In Mode 3, it requests for no MA or NT limitations other than scheduling a time bound limitation in respect to foreign capital participation/shareholdings. In Mode 4, it calls for horizontal commitments that allow natural persons who are education providers to enter.

### *Legal Services*

The plurilateral request in legal services is co-sponsored by Australia, Canada, the EC, Japan, New Zealand, Norway, and the USA.

The request calls for new and improved MA, NT and additional commitments that would allow foreign lawyers and law firms to provide legal services covering laws of multiple (foreign, international and domestic) jurisdictions. In particular, the request seeks commitments in all four modes including the entire range of Mode 4 categories, with special emphasis on coverage for lawyers under CSSs and IPs. It makes several requests regarding the right of the foreign lawyers to provide legal services in foreign and international law, and also possibly domestic law (subject to satisfying domestic licensing requirements). It seeks allowance for commercial association between foreign and domestic lawyers or law firms. The request also lists out a series of barriers to MA and NT and urges the recipient countries to remove those restrictions to the maximum extent possible, in case those were currently scheduled by them in their respective MA and NT columns.

The co-sponsors of the legal services group also request the recipients to eliminate any current MFN exemptions in these services. With the aim of helping the Members to schedule their commitments in legal services, the request includes two possible model schedules. The attached 'Joint Statement on Legal Services' (TN/S/W/37) provides further guidance, including terminology, on scheduling meaningful legal services commitments using either of the two model schedules that meet the requirements of individual Members.

### *Construction and Related Engineering Services*

Construction and related engineering services represent fundamental economic activities that permeate all economic sectors and provide them with infrastructure. Given the linkages that often exist between construction services and other related services, such as, engineering, architectural and integrated engineering services, the plurilateral request in this category notes that liberalising

trade in engineering, architectural and integrated engineering services may contribute to liberalisation of trade in construction services.

Coming to sector-specific commitments, the request urges the recipients to undertake their commitments based on the CPC classification, with a substantial coverage of sub-sectors from CPC 511 through 518. Given that construction services are strongly inter-related, commitments are requested in as many sub-sectors as possible.

Full MA and NT commitments are sought in Mode 2.

MA and NT commitments in Mode 3 are requested with particular emphasis on the following objectives:

- Elimination of foreign equity limitations (in Market Access (MA)),
- Elimination of restriction on types of commercial presence and joint venture and joint operation requirements (in MA/National Treatment (NT)),
- Elimination of discriminatory registration requirement and licensing procedures (in NT),
- Elimination of restrictions on types of projects undertaken by foreign service suppliers, including size of projects assessed by total project value (in MA/NT),
- Elimination of burdensome asset requirements.

The plurilateral group on construction and related engineering services comprises Australia, Canada, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, the EC, Japan, the Republic of Korea, Malaysia, Mexico, New Zealand, Norway, Singapore, Turkey, and the US.

### *Energy Services*

The plurilateral request in energy services is co-sponsored by Australia, Canada, the European Communities, Japan, Norway, The Kingdom of Saudi Arabia, Republic of Korea, Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Singapore, and the United States.

The request is primarily aimed at ensuring that the ongoing negotiations result in a high level of liberalisation for the supply of services relevant for a country's energy sector. The request underscores that GATS recognises the right of the Member countries to regulate services and to introduce new regulations to meet national policy objectives. However, it emphasises that regulatory measures that are important in the energy sector must be clearly defined, transparent, and non-discriminatory. It is clarified that the plurilateral request does not extend to the ownership of energy resources, which remains under the full sovereignty and sovereign rights of each Member country, and is outside the scope of the GATS negotiations.

Since, energy services constitute a closely inter-related set of activities, the absence of commitments in some of these services, it is noted, undermines the value of the commitments undertaken in other energy services. Hence, the co-sponsors urge the recipients to undertake commitments with the widest possible sectoral coverage, particularly in a range of sectors listed in the request. In order to achieve a progressively higher level of liberalisation of trade in energy services, recipients are urged to schedule new or improved commitments in the listed sectors, with particular emphasis on certain modal objectives as discussed below.

Given that a number of energy services may be and are currently often provided cross-border (Mode 1), for those services the request calls for a substantial reduction of market access limitations and the removal of existing requirements of commercial presence.

In Mode 2, commitments, wherever technically feasible, are requested.

Given that commercial presence (Mode 3) constitutes an essential mode of delivery for most energy service activities, the plurilateral request urges:

- Removal or substantial reduction of foreign equity limitations,
- Substantial elimination of joint ventures and joint operations requirements for foreign service suppliers,
- Removal or substantial reduction of economic needs tests,
- Elimination of discriminatory licensing procedures.

In Mode 4, commitments are sought in categories of CSSs and IPs. It also urges the recipients not to inscribe general exclusion of energy services from horizontal Mode 4 commitments.

### *Postal and Courier Services including Express Delivery*

The plurilateral group on postal and courier services comprises only four interested countries: the EC, Japan, New Zealand and the US. The plurilateral request recognises that government intervention may be necessary to ensure the universal supply of quality basic postal services, including through direct government-supplied services and the designation of monopolies and exclusive suppliers. In this context, it is appreciated by the co-sponsors of the request that the extent to which the Members may be able to offer commitments on universal postal services will vary from one Member to another. However, the recipients are expected to be more forthcoming with strong commitments for activities that are carried out under competitive conditions.

In formulating new and improved commitments, Members are encouraged to consider certain key objectives. For instance, recipients are urged to provide a basis to obtain specific commitments covering those activities captured by 'Postal Services' and 'Courier Services', including 'Express Delivery Services' from as many WTO Members as possible.

Recipients are requested to clarify the scope of application by confirming that the sector description encompasses all competitive service suppliers,

including holders of postal monopoly rights if they should compete to supply the scheduled service. Clarification of the parameters of covered postal services is also urged to ensure that express delivery or other high value services are distinguished from universal postal services.

Requests are put forward to provide clear descriptions of covered activities. It is further urged to achieve the fullest coverage of:

- Basic delivery of all items, and
- Express delivery of all items.

Recipients are requested to undertake substantially unrestricted MA commitments and effective NT commitments for the supply of postal and courier services, including express delivery that are carried out under competitive conditions.

Finally, certain additional commitments are sought.

### *Maritime Transport Services*

The co-sponsors of the plurilateral request on maritime transport services are Australia, Canada, the EC and its Member states, Hong Kong China, Iceland, Japan, Republic of Korea, Mexico, New Zealand, Norway, Panama, Switzerland, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

The recipients of this request, including India, are urged to undertake new and improved commitments in these services in accordance with the Maritime Model Schedule, with particular reference to certain points enlisted in the request. These include, for instance:

- Specific requests for elimination of certain restrictions in international freight transport (less cabotage) (CPC 7212) in Modes 1, 2, and 3,
- Requests for elimination of certain restrictions in maritime auxiliary services in Modes 1, 2, and 3 and full commitments in Modes 1 and 2, subject to technical feasibility,
- Certain additional commitments,

- Elimination of MFN exemptions, etc.

### *Air Transport Services*

The plurilateral request in air transport services is co-sponsored by Australia, Chile, the EC, New Zealand, Norway, and Switzerland.

The request is aimed at certain air auxiliary services, such as, aircraft repair and maintenance services, selling and marketing services, computer reservation system services, ground handling services, and airport operation services.

With the aim of achieving a progressively higher level of liberalisation of trade in air transport services, the recipients are requested to make new or improved commitments. In particular, full commitments, where possible and technically feasible, are requested to be undertaken in Mode 1. In Mode 2 also full commitments are urged for all identified air transport services.

In Mode 3, recipients are requested to undertake ambitious commitments with particular emphasis on elimination of certain restrictions, for example, the:

- Economic Needs Tests (ENTs),
- Limitations on foreign equity participation,
- Contracts with local firms for doing business from abroad,
- Discriminatory measures against foreign service providers in certain services,
- Residency requirements for undertaking certain services, etc.

In Mode 4, recipients are requested to schedule their commitments either under sectoral or under horizontal schedule in such a manner as to ensure mobility of service suppliers involved in the provision of air transport services, with particular emphasis on persons with specialised skills and high technical expertise.

The plurilateral request also seeks the removal or reduction of MFN exemptions affecting air transport services, to the extent possible.

Finally, Member countries are urged to provide due consideration to ensuring clarity, certainty, comparability and coherence in the scheduling and classification of commitments through adherence to, *inter alia*, the Scheduling Guidelines of 23 March 2001.

### *Logistics Services*

Recognising that many of the services essential or related to logistics services are being addressed individually through the plurilateral process, including for example, maritime transport, air transport, postal and courier including express delivery services, etc., the plurilateral request in logistics services focuses on core freight logistics services, freight transport services, other related logistics services, non-core freight logistics services. The request includes in the Appendix a checklist, which aims to provide a comprehensive picture of all activities relating to the supply chains for freight. The checklist is intended to be used as a tool for assisting the Members in making liberalisation commitments essential or related to logistics services. With the aim of achieving substantive liberalisation commitments in logistics services, recipients are urged to undertake new or improved commitments across a broad range of services related to logistics with reference to the checklist. Noting that certain services (e.g. maritime transport, air transport, etc.) in the checklist are being pursued in other plurilateral negotiations, the request clarifies that those services will not be the focus of the plurilateral negotiations on logistics services.

For core freight logistics services and freight transport services, new or improved commitments are sought covering a wide range of services. In particular, commitments are requested in Mode 1, Mode 2 (where technically feasible), and Mode 3 (with no substantial limitation).

New or improved commitments covering a wide range of activities are also requested in 'other-related logistics services'. It is further required that such commitments should include, in particular,

the right to commercial establishment (Mode 3) with no substantial limitations and commitments in other Modes of supply, as appropriate.

In the case of non-core freight logistics services, it is mentioned that, as far as practicable, commitments should also be included in such services, which are desirable for a comprehensive offer on freight logistics services.

The demandeurs of logistics services are Hong Kong China, Australia, Chile, Japan, New Zealand, Switzerland, and Chinese Taipei.

### *Audio-visual Services*

India, along with a host of other target countries, has received a plurilateral request in audio-visual services from Hong Kong, China, Japan, Mexico, Singapore, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and the US.

The plurilateral request in audio-visual services urges the recipients to undertake new and improved commitments with the aim of achieving a progressively higher level of liberalisation. In particular, the request urges the recipients to undertake commitments in a range of sub-sectors, such as, advertising services, motion picture production and distribution services, videotape production and distribution services, etc.

Commitments in Modes 1 and 2 are to reflect the level of *de-facto* openness. Commitments in Mode 3 should strive to eliminate certain restrictions to the greatest extent possible, e.g.:

- Content quotas,
- Foreign equity restrictions,
- Restrictions on the number of suppliers,
- Nationality or residency requirements,
- Economic Needs Tests (ENTs),
- Restrictions on the type of legal entity,
- Discriminatory tax treatment,
- Discriminatory licensing requirements,
- Discriminatory local production, employment, and sponsorship requirements, etc.

Given that in the case of audio-visual services, a number of Member countries inscribed MFN exemptions, the plurilateral request urges the recipients to reduce the scope and number of MFN exemptions in the sub-sectors identified in the request. It further calls for clarification of remaining MFN exemptions in terms of scope of application and duration.

Finally, the request leaves room for discussion on certain flexibilities (e.g. subsidies, co-production agreements, phase-outs, etc.) during the course of the plurilateral negotiations in audio-visual services.

### *MFN Exemptions (Audio-visual Services)*

India has received a collective request on MFN exemptions. This request aims at removal, reduction and clarification of MFN exemptions with a particular focus on MFN in audio-visual services. The demandeurs are the People's Republic of China, Hong Kong China, Japan, Mexico, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

The aforesaid co-sponsors of this request ideally seek to achieve the elimination of MFN exemptions from the list of MFN exemptions in the offers put forward by the recipient countries. However, where the immediate removal of the MFN exemption is considered as not possible the request underscores the following objectives:

- (i) To set down a specific expiry date for the exemption;
- (ii) To reduce the scope of measures, which are inconsistent with Article II of the GATS (relating to MFN) and which require the exemption; and/or
- (iii) To undertake to eliminate the conditions, which created the need for the exemption or phase out the measures, which require the exemption by a specific timeframe; and/or
- (iv) To undertake to review the exemption on a regular basis with a view to its reduction and eventual elimination.

The request also suggests clarification of any MFN exemption that remains in the list of MFN exemptions in respect of:

- (i) Description of measures,
- (ii) Countries to which the measure applies,
- (iii) Intended duration,
- (iv) Conditions which created the need for the exemption.

## 6.6 India's Current Negotiating Stance on Services

As mentioned earlier, the deadline for the submission of another round of 'revised offer' by the Member countries of the WTO was scheduled to be 31 July 2006. Given this deadline, the Ministry of Commerce (MoC) of the Government of India (GoI) had prepared a new round of 'revised offers'. The details of this new round of offers are yet to be made public. However, according to highly placed sources in the MoC, in view of the fact that India had already submitted one of the most ambitious 'revised offers' in 2005, the country is unlikely to come out with another round of ambitious offers this time. A lot would also depend on what India gets in return in areas of its own interest.

It is learnt that the expectation from India would be to meet the request primarily in telecommunications, finance, parts of energy (services incidental to mining and related scientific and technical consulting services), distribution (retail), and courier including express delivery.<sup>79</sup> India has indicated that it can meet requests substantially in sectors like construction and related engineering services, maritime transport services, etc. Requests are likely to be fulfilled partially in energy and telecommunications also. However, as it stands now, it would be difficult for India to meet the requests in legal services, retailing services, education and audio-visual services.<sup>80</sup> A detailed analysis of the nature of domestic sensitivities involved in these four sectors is outside the scope

of the present paper. Nevertheless, an attempt is made below to briefly outline some of the core issues involved.

### *Higher Education Services*

India has no multilateral obligation under the GATS to open up higher education services to foreign participation, as it did not schedule any commitment in education services during the Uruguay Round (UR). Whatever liberalisation has occurred in this area, such as allowing 100 per cent FDI on automatic route and permitting foreign participation through twinning, collaboration, franchising, and subsidiaries, has been autonomously driven.<sup>81</sup>

In its Revised Offer, India had included higher education services (CPC 923). According to the offer, service providers under Mode 1, would be subject to regulations as applicable to domestic providers in the country of origin. The market access offer under Mode 3 is subject to the condition that fees to be charged can be fixed by an appropriate authority and that such fees do not lead to charging of capitation fees or to profiteering. It is also subject to the existing regulations or the ones to be prescribed by the appropriate regulatory authority. The offer also stipulates that in case of foreign investors having prior collaboration in that specific service sector in India, FIPB approval would be required.

Notwithstanding the inclusion of higher education in its Revised Offer, there continue to exist substantial reservations on the opening-up of higher education in India to foreign players. Apprehensions exist that this would open the floodgates for entry of the foreign higher education providers into India. Their entry is opposed on grounds of their being insensitive towards the cultural and educational ethos of India, and the fear that this would lead to the commodification of education in India. It is also

<sup>79</sup> Gupta (2006).

<sup>80</sup> Mukherjee (2006).

<sup>81</sup> Jha et al. (2006), p.191.

apprehended that education could be positioned as a 'trade off' for gains in another sector.<sup>82</sup>

Interestingly, there is a lack of unanimity among the two relevant ministries of the Government of India, e.g. the Ministry of Commerce (MoC) and the Ministry of Human Resource Development (MHRD), on a host of issues concerning higher education services. This includes the question of the opening up of the higher education sector to foreign players and FDI, the nature and extent of government control, the operations of the foreign education providers in India, etc. The MoC, in line with its stand in favour of a more liberalised environment in the services sector, maintains that the foreign universities should be kept outside the purview of the University Grants Commission (UGC). The MoC hopes that a relaxation in Mode 3 would help India to bargain for more liberalised visa regimes and allow more professionals to work in the US and the EU markets.<sup>83</sup> The MHRD, on the other hand, is grossly opposed to the Commerce Ministry's proposal of removing the fees of the students and the salaries of the professors from the purview of the UGC. While the MoC has been pitching for 100 per cent FDI in higher education, even suggesting education Special Economic Zones (SEZs) for foreign education providers, the HRD ministry has argued that it does not want to allow the use of concessions in the education sector as a bargaining chip for gains in other services sectors at the WTO negotiations. So much so that the HRD Ministry is keen on a withdrawal of even the existing offer on higher education services made under India's Revised Offer in August 2005.

Notably, the MHRD has introduced a bill to regulate the operations of the foreign educational institutions in India. The bill, titled 'The Foreign Educational Institutions (Regulation of Entry and Operation, Maintenance of Quality and Prevention of Commercialisation) Bill, 2005', was introduced in response to the absence of a clear-cut policy and an

appropriate legal framework for foreign education providers in India. Among other things, it aims to regulate entry, operation and maintenance of quality and prevention of commercialisation of education by foreign educational institutions imparting higher education in India. It also proposes to treat foreign education providers in India as deemed universities under the UGC. Owing to the differences of opinion among the MHRD and the MoC, the bill had to be referred to a 'Group of Ministers', headed by the HRD minister, Mr. Arjun Singh, before getting introduced in the parliament. As it stands now, it is unlikely that the passage of the bill in the parliament would be an easy task.

Meanwhile, the MoC has come up with a Consultation Paper on higher education in India and the GATS, with the aim of initiating debates among the stakeholders on questions pertaining to the opening up of higher education in India to foreign education providers for tapping the trade potential in education services under the WTO regime. It attempts to initiate a debate on how the country should allow foreign education providers in the sector.

The Consultation Paper seeks to identify markets for Indian education services abroad, the barriers faced by Indian institutions, the role of regulatory bodies like the UGC and finalise India's response to the requests made by other countries for opening up of the higher education sector.

The Consultation Paper makes a strong case for liberalising the higher education sector for greater private and foreign participation so as to create enough skilled manpower in the country.

It remains to be seen whether the Consultation Paper succeeds in generating sufficient debate among the stakeholders on this sensitive issue. However, it may be asserted that before taking any GATS commitments, which are generally irreversible, it is extremely important to undertake an objective and

<sup>82</sup> Government of India (2006b), p.17.

<sup>83</sup> Reported in *The Times of India*, 15 July 2006.

rigorous assessment of the possible pros and cons of the opening up of higher education to foreign players. If the mandate turns out to be in favour of opening up, it would also be of utmost importance that India puts in place an appropriate domestic regulatory regime that would ensure quality service from the foreign education providers and would also keep adequate discretionary power in the hands of the Government to take care of the domestic sensitivities involved in education.

### *Retail*

The distribution services sector contributes a significant portion of India's GDP and employment. Being the second largest employer after agriculture and contributing 14 per cent to GDP, the retail industry has emerged as a mainstay of the Indian economy.<sup>84</sup> However, the sector is largely unorganised and suffers from poor access to capital, lack of management skills, fragmented supply chain and unfavourable regulations.<sup>85</sup> Retail trade in India is characterised by the wide prevalence of family-run shops. An estimated 1.2 crore small and medium sized shops have around 96 per cent share of the market, compared to 80 per cent in China, 60 per cent in Thailand and less than 1 per cent in the United States.<sup>86</sup> Thus the organised sector currently occupies close to 4 per cent of the retail market only. However, this share is expected to reach 10 per cent by 2010, throwing up big opportunities for new players.<sup>87</sup>

India is witnessing a period of boom in retail trade with the sector having an estimated market size of about US\$80 billion. India has been ranked 5th in the Global A T Kearney retail development Index, second to China in Asia, making it the focal point of many foreign players.<sup>88</sup> This is primarily attributable to a large and affluent middle-class population in the country. India's middle-class,

about 445 million strong, is greater than the entire population of the US and its consumerist aspirations are yet to peak. Moreover, 45 per cent of all Indians are aged around 20 years - a far cry from the OECD's increasingly geriatric societies.<sup>89</sup> Soaring economic growth, an increasingly affluent middle class with its growing aspirations and a craving for newer consumer experiences - all this taken together make India an attractive market for domestic and international retailers.<sup>90</sup>

Given that India did not undertake any commitments in retail during the Uruguay Round, the country does not have any WTO obligations as of now to allow FDI in the retail sector. However, in a scenario of the growing attractiveness of India as a retailer's paradise and the consequent interests on the part of the global retail giants like Wal-Mart, Carrefour, Tesco and Casino, etc., a heated debate is going on in the country as to whether the time is ripe for opening-up of the retail sector to FDI.

It is argued by the proponents of FDI in retail that throwing the retail sector open to FDI would be advantageous in terms of improved employment quality, growth of organised format, augmented investment in supply chains besides assuring consumers of better product quality and services. Furthermore, the advent of FDI is also expected (by the proponents) to boost quality standards and cost-competitiveness of Indian producers. This would benefit not only the Indian consumer but would also open the door for Indian products to enter the wider global market, according to them.

However, a large chunk of the India's population is severely opposed to the proposal of FDI in retail. This is attributable primarily to the potential adverse livelihood implications of FDI in retail on the small players who comprise the lion's share of the

<sup>84</sup> Kumar (2006).

<sup>85</sup> Mukherjee (2002a), p.44.

<sup>86</sup> People's Voice (2006).

<sup>87</sup> Kumar (2006).

<sup>88</sup> *ibid.*

<sup>89</sup> Mitra (2006).

<sup>90</sup> Kumar (2006).



retail business in the country. In a scenario of ever-growing unemployment and lack of opportunities in the formal sectors, crores of small shop owners and small and medium traders have been pushed into the retail market.<sup>91</sup> It is apprehended that overseas competition would lead to job losses and drive smaller domestic operators out of business. Hence, the question of the quantum of displacements from livelihood due to the potential invasion of foreign corporate investment in retail business has come up as a highly contentious issue not only among the civil society organisations but also in the political circle.

Although 100 per cent FDI in retail looked far-fetched, in the early 2006 it seemed that the Government of India was likely to open up a portion of the lucrative retail market to foreign players with certain riders attached. Wal-Mart and other global retail majors had been intimidated by the government that they would be allowed to invest subject to certain stringent conditions.<sup>92</sup> However, recently there has been a shift in this policy stance of government, purportedly attributable to the staunch opposition put forward by the left parties (who are supporting the present Congress-led United Progressive Alliance (UPA) Government at the Centre from outside) as well as a strong section within the Congress Party. This shift is also reflected in the approach paper to the Eleventh Five-Year Plan (2007-12). The paper, released recently by the Planning Commission of India, is silent on the issue of FDI in retail. Interestingly, the same Planning Commission had made a strong case for allowing FDI in modern retailing a few months ago in the Mid-Term Appraisal (MTA) of the Tenth Five-Year Plan. FDI in retail was also identified as one of the key 'action points' emerging from the MTA.<sup>93</sup>

Notwithstanding such initiatives in the not-so-distant past, the government is apparently planning to rely, for the time being, on domestic entrepreneurs such as Reliance, RPG, Bharti, Pantaloon, etc., to modernise the Indian retail sector instead of seeking foreign investments immediately.<sup>94</sup>

Most importantly, Reliance Retail is coming up in a big way. The Reliance Industries Ltd. (of Mukesh Ambani) has set up this subsidiary (Reliance Retail) with an equity of US\$2.24 billion to propel 'a retail revolution in the country'. The first 11 of a planned 5,500 retail outlets have already been opened in Hyderabad. The new retail chain would sell food, clothes, footwear, consumer durables, home essentials, farm supplies, travel services, health care products, and even educational and entertainment products. Reliance is also in talks with global luxury brands like Giorgio Armani and Manolo Blahnik to bring them to India. Reliance Retail plans to cover 1,500 Indian cities and towns with a network of neighborhood convenience stores, supermarkets, specialty stores, and hypermarkets. With the aim of catering to both mass market and luxury segments, Reliance Retail is already preparing to take the lion's share of the market ahead of the entry of foreign competition.<sup>95</sup>

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

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<sup>91</sup> Datta (2006).

<sup>92</sup> In early 2006, Prime Minister Dr. Manmohan Singh indicated that India was mulling over the issue of FDI in retail and a positive outcome was expected in the next 5-6 months. Finance Minister Mr. P Chidambaram and Commerce Minister Mr. Kamal Nath had also said that the first steps to open India's retail market to FDI could be taken during the first quarter of 2006. (Rediff, 2006).

<sup>93</sup> Jayaswal (2006).

<sup>94</sup> According to a senior government official, 'Our purpose is to develop a modern retail sector in the country. Companies like Wal-Mart would set up limited number of stores in major metros, whereas Indian firms (Reliance) would open 350 stores at a time. This would help in creating necessary infrastructure including developing an efficient supply chain and marketing network. Our objective is to modernise retail sector and not to allow FDI in retail.' (Jayaswal, 2006).

<sup>95</sup> Rai (2006).

before finalising and announcing the entry of the overseas mega malls in the country. It is learnt that in response to an ASSOCHAM questionnaire circulated to domestic players, one of the leading retailing firms, which runs value-buying chains throughout the country and is expanding very fast, wanted a period of two to three years for the domestic industry to consolidate.<sup>96</sup>

A view has emerged among the proponents of FDI in retail that the policy stance of opposing 'only' FDI in the retail trade might actually end up serving the interests of the Indian capitalist giants such as Reliance Industries, who would like to establish their own controlling positions before letting in the foreign companies.<sup>97</sup> This view is primarily attributable to the apprehension that Reliance's deep pockets would not be matched by any other prospective Indian entrant into the retail sector.<sup>98</sup> Hence, the best possible way to avert such developments, it is maintained, is to allow FDI in retail and create an atmosphere of competition for the domestic retail giants.

From the point of view of the employment and livelihood of small players in the retail sector, it is unlikely that the impact of corporatisation through domestic capital would be substantially different from that of foreign capital. Nevertheless, the solution does not necessarily lie in opening up the floodgates to foreign players. Rather, the government needs to undertake appropriate regulatory and safeguard measures to shelter the small players from the potential exploitation and other adverse livelihood implications of corporatisation of retail sector, even if that takes place through entry of domestic capital.

As far as the GATS commitments are concerned, there is no reason why India should bind even its existing policy regime if it does not get anything in return.

### *Audio-visual Services*<sup>99</sup>

The audio-visual services sector is one of the fastest growing sectors in the Indian economy. India is the largest film-producing country in the world. The country on an average produces 800 feature films and 900 short films annually in 52 different languages and dialects. The music industry in India is the third largest in Asia and ranks nineteenth in the world. India is also the third largest producer of original entertainment software. Indian radio and terrestrial broadcasting network is one of the largest in the world. Given that there is a large and growing overseas market for Indian films, music, and entertainment software, India has a tremendous potential for exporting these services. In order to encourage the inflow of advanced technology and development of skills, India has significantly liberalised the audio-visual service sector since the 1990s.

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

<sup>96</sup> *The Financial Express* (2006).

<sup>97</sup> *People's Voice* (2006).

<sup>98</sup> Mitra (2006).

<sup>99</sup> Data and information on audio-visual services included in this part of the paper draws heavily from Mukherjee (2002b), pp. 2, 9, 10, 20, 49, 55 and 56.

In its Revised Offer, India has offered to remove all National Treatment restrictions it had included in its Mode 3 commitment in the UR. However, no offer has been made to schedule new sub-sectors from the category of audio-visual services.

However, India is not the only country, which has adopted a conservative approach towards opening-up of the audio-visual sector to foreign players. During the UR, the Member countries of the WTO were, in general, very reluctant to undertake liberalisation commitments in audio-visual services. Even major players such as the EU, Australia and Canada did not make any commitment, while commitments of some others (like India) were very restrictive both in terms of sectoral coverage and modes of delivery on account of the sensitivities involved in this particular services sector. In view of the fact that the audio-visual services sector is an important and influential medium for cultural expression, trade in this sector is often heavily regulated for preservation of the cultural identity and social values of any country. It is maintained by a substantial chunk of the WTO Member countries that the overwhelming presence of foreign cultural products causes the erosion of cultural values and identities in the receiving country. Apart from such social and cultural sensitivities, regulations on audiovisual services are often put in place for the promotion of domestic industry by providing protection against foreign competition.

Given the vital role played by the audio-visual media in preserving cultural democracy, the main objective of the India Government's policy on audio-visual services is to strike a balance between preservation of the rich cultural heritage of the nation and offering a wider choice of services to the consumer through liberalisation and increased privatisation. Since a large part of the audio-visual and related services has already been privatised, government meets the objectives of liberalisation and cultural protection through appropriate regulatory measures, which are revised from time to time in keeping with the global developments in this sector. Hence, the

availability of sufficient policy space assumes great significance for India in order to be able to revise the policy stance including the regulatory measures from time to time in accordance with the changing scenario of this culturally and socially sensitive sector. Undertaking fresh GATS commitments may deprive the country of such policy space in future. Hence, if the opening up of the audio-visual services to foreign players is indeed regarded as the need of the hour (for technological improvements and a host of other reasons) then autonomous liberalisation would be a better alternative, at least at the initial stages, rather than undertaking fresh GATS commitments, which are generally irreversible.

### *Legal Services*

With a bandwagon of more than 600,000 lawyers, the Indian legal services sector is the second largest in the world. According to available statistics, the Indian commercial law practice is approximately in the region of Rs.600-650 crore per annum. The service providers are individual lawyers, small or family-based firms. The Advocates Act, 1961 and the Bar Council of India Rules, 1975 are the legislations, which regulate the legal services sector in India while the Bar Council of India (BCI) constituted under the Advocates Act is the final regulatory body. In India, legal services can be provided only by natural persons who are citizens of India and who are on the rolls of the advocates in the states where the service is being provided. The service provider can either be a sole proprietorship or a partnership firm consisting of persons similarly qualified to practise law. In order to be eligible for enrolment as an advocate, a candidate has to be citizen of this country or a country, which allows Indian nationals to practise as per the reciprocity treatment. S/he has to hold a degree in law from an institution/university recognised by the BCI and has to be twenty-one years of age at least.<sup>100</sup>

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

Domestic policy on legal services has also been quite conservative thus far. FDI is not permitted in this sector. Indian advocates are not permitted to enter into profit-sharing arrangements with any person other than Indian advocates. Foreign law firms are not permitted to open offices in India (as per the Advocates Act, 1961) and they are also prohibited from providing any legal advice that could constitute practising of Indian law. There is a strong sentiment among a large segment of the Indian legal professionals that permitting foreign law firms even in a limited way would lead to the shrinking of the opportunities available to domestic lawyers. The Bar Council of India, the apex body representing the interest of the Indian advocates has on various occasions expressed its apprehensions in allowing foreign lawyers/law firms into India.<sup>101</sup>

The Ministry of Commerce (MoC) has recently hosted on its website a Consultation Paper<sup>102</sup> on the opening up of the legal services sector in India. The stated purpose of this document is to increase awareness on the core issues, challenges, and, most importantly, opportunities that are relevant to the legal services sector. It also seeks to gather inputs on the kind of approach India should take and the types of goals the legal services sector would like to see achieved in the services negotiations. It is indicated that comments provided in response to this document would assist the Indian government in its negotiations. The Consultation Paper maintains that it is important that we look into the immense trade potential of the Indian legal profession, but without compromising on the interests of Indian advocates.

However, the Consultation Paper points out that development of the legal profession has been restricted in India on account of the number of

impediments in the current regulatory system, which hinders Indian law firms from competing effectively with foreign firms. Some of the current restrictions, which severely limit the scope of growth in the legal profession are:

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

It is further observed (in the aforesaid Consultation Paper) that having functioned in such a limiting framework for the past fifty-years, the Indian legal profession is today ill-equipped to compete on par with international lawyers, who have grown their practices in liberalised regimes and have vast resources at their disposal. It is also noted that there are only a few firms in India that possess the expertise to handle commercial work for multinationals.<sup>103</sup>

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

<sup>100</sup> Government of India (2006a), p.12.

<sup>101</sup> Government of India (2006a), p.12.

<sup>102</sup> Government of India (2006a).

<sup>103</sup> Government of India (2006a), pp.13-14.

## 7. Concluding Observations

Shortly before the Hong Kong Ministerial Declaration (HKMD) deadline of 31 July 2006 for the submission of a new round of 'revised offers' on services, the Doha Round entered a crucial juncture on 24 July in Geneva. The trade Ministers and heads of delegations of G6 countries (Australia, Brazil, the EU, India, Japan, and the US) had gathered there for intensive negotiations on possible template agreements, known as 'modalities' for trade in agriculture and Non Agricultural Market Access (NAMA). Given the failure of the Member countries to move forward on key issues relating to domestic support and market access in agriculture, Mr. Pascal Lamy, the Director General of the WTO, had to declare that the Doha Round was up for a 'suspension'. Thus, talks were suspended in all subjects across the round as a whole and all work in all negotiating groups also came to a halt. As a result, all the deadlines that various negotiating groups were facing before the suspension, including the ones on services, lost their significance.

A vigorous blame-game has ensued as an aftermath of this collapse. The US has held the EU and developing countries responsible for the impasse on grounds of their alleged unwillingness to provide enhanced market access. According to the US, any reforms it committed on trade-distorting agricultural subsidies had to be coupled with substantive reduction commitments by the EU and with commercially meaningful market access commitments by major developing countries across sectors. Further, the US has blamed the EU for applying non-tariff measures on US agri-exports. The US has also criticised India and China for limiting genuine market access to their countries, insisting that they cut tariffs on farm products by 55 per cent. The EU, on the other hand, has pointed its fingers at the US for being inflexible on farm subsidy cuts. It

has claimed that it was willing to lower subsidies by as much as 75 per cent, provided the US also moved significantly in that direction.<sup>104</sup> Even the Indian government sources have gone on record to attribute the Doha impasse predominantly to the intransigent position adopted by the US on the question of agricultural subsidies. It has further been pointed out that the US's negotiating stance was primarily attributable to the pressure created by the strong domestic commodity lobbies that were strongly opposed to any reduction in domestic farm support provided by the US. Given that these lobbies fund the ruling party's election campaign, the policy space of the US government, it has been argued, was considerably curtailed owing to the impending Congressional election due in November 2006.

Various alternative scenarios have emerged from the deliberations in the post-Doha-suspension period regarding the future of the Doha Round. Without going into the details of those alternative views, it may be asserted that the present deadlock has only resulted in a postponement of the Doha Round and not its termination. This view finds credence from the fact that impasses are not new, nor unusual in the history of multilateral trade negotiations under the aegis of the WTO. Even the Uruguay Round (UR) was witness to many such impasses, before finally delivering a comprehensive set of agreements. Nevertheless, in view of the uncertain political climate in the multilateral arena, it is difficult to predict at this juncture as to when and how the Doha negotiations are likely to get resurrected!

Notwithstanding such uncertainties, India is not likely to be greatly affected by the current deadlock at the multilateral level. First of all, India is in the process of undertaking autonomous liberalisation and this process is not likely to get hampered by the Doha suspension. Moreover, the country has

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<sup>104</sup> Chanda (2006a).

already started exploring the regional routes to trade liberalisation. The Commerce Minister, Mr. Kamal Nath himself has gone on record to declare that Regional Trade Agreements (RTAs) would henceforth receive greater impetus in face of the deadlock at the multilateral level. Although India is a late entrant in the regional setting, there is already substantial movement in terms of RTAs and Comprehensive Economic Co-operation Agreements (CECAs).

As far as services are concerned, until mid 2006, excluding working groups, amongst 15 RTAs, India was a party to just one services RTA, the India-Singapore Comprehensive Economic Co-operation Agreement (CECA).<sup>105</sup> However, in line with the global trends, India is moving towards a policy of incorporating a services chapter in its ongoing FTA (Free Trade Area) negotiations with the Gulf Cooperation Council (GCC) and Mauritius. Joint Study Groups on CECA are also in progress with Indonesia, Mauritius and Korea.<sup>106</sup> India is furthermore pursuing the incorporation of a services agreement in RTAs concluded in the past, for instance with Thailand, Sri Lanka and BIMSTEC (Bangladesh, India, Myanmar, Sri Lanka, Thailand – Economic Cooperation).<sup>107</sup> Preliminary explorations have also been initiated with both the US and the EU on a services agreement.

A comparison of the Indo-Singapore CECA and the GATS schedules reflects a difference in ambition. While the GATS schedules of both countries are far below the current level of autonomous liberalisation in services in these two countries, both countries have for the most part,<sup>108</sup> bound their autonomous levels of liberalisation in the CECA. Moreover, while at the multilateral level, there has been very little progress in Mode 4 - one of India's main areas of interest - despite

a significantly improved Revised Offer on part of the country, the CECA has succeeded in making some forward movement in this mode beyond the GATS, by encouraging mutual recognition arrangements (MRAs). Article 7.11 of the Services Chapter of the CECA is a step ahead of the GATS Article VII on recognition. The former Article deals with arrangements that result in the recognition of qualifications within contracting parties. Importantly, just like other services RTAs signed by Singapore (with the US, Australia, for instance) the recognition arrangements cannot be contested in the dispute settlement. Hence they can at best be regarded as *de-facto* best endeavour clauses. Nevertheless, MRAs for select professional services under the India-Singapore CECA are proceeding towards conclusion. This is expected to increase the recognition of Indian qualifications in Singapore, thereby facilitating higher labour mobility. In addition to MRAs, the CECA also promotes a stable regime for temporary entry of natural persons. This will result in a greater mobility of labour, particularly from India to Singapore.<sup>109</sup>

This is not to suggest that RTAs are a better route to trade liberalisation compared to the multilateral forum under the aegis of the WTO. On the contrary, it is observed that RTAs, especially those between developed and developing countries often include various WTO-plus obligations for developing countries. However, there is no denying the fact that regionalism has already emerged as an alternative to multilateralism on the trade front, especially during the last few years. In fact, the emergence of RTAs as an alternative (and often preferred) route to push an aggressive trade liberalisation agenda bypassing the WTO has often been cited as one of the key reasons underlying the lack of urgency in making a breakthrough in the multilateral negotiations.

<sup>105</sup> The CECA was signed in June 2005 between India and Singapore and came into effect in August 2005. The Agreement was arrived at after thirteen rounds of negotiations spanning nearly two years since the signing of the Declaration of Intent in April 2003. The CECA is India's first comprehensive agreement and Singapore's first agreement with a developing country.

<sup>106</sup> Government of India (2006c).

<sup>107</sup> Kulkarni and Choudhary (2006).

<sup>108</sup> In select sectors like financial services, India and Singapore have liberalised beyond autonomous levels, in a small set of sectors the liberalisation is less than autonomous while for most sectors the level of liberalisation is equivalent to the autonomous levels; hence the generalisation.

<sup>109</sup> Kulkarni and Choudhary (2006).

Coming back to the multilateral level, an assessment of the offers placed by some of the developed countries that constitute the key target markets for India clearly reveals that there has been very modest movement in India's favour. Very little improvement in horizontal offers in Mode 4 in some of the key destinations of Indian natural persons has been observed. For instance, there has been partial recognition of categories like Contractual Service Suppliers (CSSs) and Independent Professionals (IPs), de-linked from commercial presence in countries such as the EU, Australia, New Zealand, Korea, and Canada. The EU has expanded its coverage under Mode 4 to include CSSs, IPs, graduate trainees. Canada and the EU have further removed/relaxed the requirement of Economic Needs Tests (ENTs) for Intra-Corporate Transferees (ICTs), professionals and Business Visitors (BVs). Canada and New Zealand have also extended the period of stay for BVs, executives, senior managers, specialists. There have also been minor changes in Japan's approach. But the US - the most crucial market for India in Mode 4 - has shown no improvement in its offer.

Under these circumstances, India needs to take advantage of the current deadlock in the Doha talks to reconsider and reassess its aggressive policy stance

on services. In view of the fact that the country had already come out with one of the most ambitious 'revised offers' in August 2005, undertaking another round of ambitious offers would not be conducive to the best interests of India at this juncture. More so because, it is already quite clear that even with the plurilateral 'request-offer' approach in place, not much forward movement is expected in the near future in market access in Modes 1 and 4 in the key destinations of India's interest, particularly the US. Hence, a better strategy on the part of India would be to hold back any ambitious offers in services for the time being, so that those offers may be used as a bargaining chip in future to push through its aggressive agenda in Modes 1 and 4. Upon resumption of the Doha talks, India should also refrain from considering any compromise in its interests in agriculture and NAMA for pushing through its offensive interests in services. Given the pessimistic scenario in Modes 1 and 4, there are not enough grounds for India to compromise on the livelihood of millions of vulnerable farmers of the country or to put the survival of many a domestic industry at stake. Therefore, instead of concentrating its negotiating capital predominantly on services, India needs to pay adequate attention to agriculture and NAMA negotiations as well, so as to ensure the maximum possible benefits in these two crucial areas of the Doha Development Agenda.

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# Annexures

## ANNEXURE 1

### India's Proposed Sector-specific GATS Commitments under the 'Revised Offer' in the Newly Offered Sectors/Sub-sectors

Sl. No.	GATS W/120 Broad Classification	Sl. No.	Sector/Sub-sector as per GATS Classification and the Corresponding CPC Code	Mode 1		Mode 2		Mode 3		Mode 4	
				MA	NT	MA	NT	MA	NT	MA	NT
1.	BUSINESS SERVICES										
A.	Professional Services	d.	Architectural services (CPC 8671)	F	F	F	F	P	F	NX	NX
		f.	Integrated engineering services (CPC 8673)	F	F	F	F	P	F	NX	NX
		g.	Urban planning and landscape architectural services (CPC 8674)	F	F	F	F	P	F	NX	NX
		I.	Veterinary services (CPC 932)	F	F	F	F	P	F	NX	NX
B.	Computer and Related Services	e.#	Other computer services (CPC 849)	F	F	F	F	P	F	NX	NX
C.	Research and Development Services	a.#	R&D services in agricultural sciences (CPC 85104)	F	F	N	N	N	N	NX	NX
		b.#	R&D services in social sciences and humanities (CPC 852)	F	F	F	F	F	F	NX	NX
D.	Real Estate Services	b.	On a fee or contract basis (CPC 822)	F	F	F	F	P	F	NX	NX
E.	Rental/Leasing Services without Operators	a.	Rental/leasing services without operators relating to ships (CPC 83103) [excluding the services of actual international transport of Cargo]	F	F	F	F	P	P	NX	NX
		b.	Rental/leasing services without operators relating to aircraft (CPC 83104)	F	F	F	F	P	P	NX	NX
		c.	Rental/leasing services without operators relating to other transport equipment (CPC 83101+83102+83105) [excluding railroad transport and multimodal transport]	N	N	N	N	P	P	NX	NX
		d.	Rental/leasing services without operators relating to other machinery and equipment (CPC 83106-83109)	N	N	N	N	F	P	NX	NX
		e.	Rental/leasing services concerning personal and household goods (CPC 832)	N	N	N	N	P	P	NX	NX
F.	Other Business Services	c.	Management consulting services excluding all services relating to legal consultancy (CPC 86501**, 86502**, 86503**, 86505**, 86506**, 86509**)	F	F	F	F	P	F	NX	NX
		d.	Services related to management consulting (CPC 86601)	F	F	F	F	P	F	NX	NX
		g.	Services incidental to fishing (CPC 882)	F	F	F	F	P	F	NX	NX
		j.	Services incidental to energy distribution (CPC 887 ** excluding energy trading and load dispatch functions)	F	F	F	F	P	F	NX	NX
		k.	Placement and supply services of Personnel (CPC 872)	F	F	F	F	P	F	NX	NX

**ANNEXURE 1: India's Proposed Sector-specific.... (Contd..)**

Sl. No.	GATS W/120 Broad Classification	Sl. No.	Sector / Sub-sector as per GATS Classification and the Corresponding CPC Code	Mode 1		Mode 2		Mode 3		Mode 4	
				MA	NT	MA	NT	MA	NT	MA	NT
		n.	Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment) (CPC 633)	F	F	F	F	P	F	NX	NX
		o.	Building-cleaning services (CPC 874)	F	F	F	F	P	F	NX	NX
		q.	Packaging Services (CPC 876)	F	F	F	F	P	F	NX	NX
		s.	Convention services (CPC 87909*)	F	F	F	F	P	F	NX	NX
		t.	Specialty design services (CPC 87907*)	F	F	F	F	P	F	NX	NX
		p.	Photographic Services excluding aerial photography, satellite pictures and satellite enabled photography (CPC 875**)	F	F	F	F	P	F	NX	NX
3			<b>CONSTRUCTION AND RELATED ENGINEERING SERVICES</b>								
A.	General construction work for buildings	A.	General construction work for buildings (CPC 512)	F	F	F	F	P	F	NX	NX
B.	General Construction work for civil engineering	B.	General Construction work for civil engineering (CPC 513)§	F	F	F	F	P	F	NX	NX
C.	Installation and assembly work	C.	Installation and assembly work (CPC 514+516)	F	F	F	F	P	F	NX	NX
D.	Building completion and finishing work	D.	Building completion and finishing work (CPC 517)	F	F	F	F	P	F	NX	NX
E.	Other	E.	Other (CPC 511+515+518)	F	F	F	F	P	F	NX	NX
4			<b>DISTRIBUTION SERVICES (EXCLUDING LIVE ANIMALS)</b>								
A.	Commission agents' services		Sales on a fee or contract basis of agricultural raw materials (CPC 62111**)§	F	F	F	F	P	F	NX	NX
			Sales on a fee or contract basis of food products excluding beverages and tobacco (CPC 62112**)§	F	F	F	F	P	F	NX	NX
			Sales on a fee or contract basis of machinery, industrial equipment and vehicles other than motor vehicles, bicycles and motorcycles (CPC 62114)	F	F	F	F	P	F	NX	NX
			Sales on a fee or contract basis of furniture, household goods, hardware and ironmongery (CPC 62115)	F	F	F	F	P	F	NX	NX

**ANNEXURE 1: India's Proposed Sector-specific.... (Contd..)**

Sl. No.	GATS W/120 Broad Classification	SI. No.	Sector/Sub-sector as per GATS Classification and the Corresponding CPC Code	Mode 1		Mode 2		Mode 3		Mode 4	
				MA	NT	MA	NT	MA	NT	MA	NT
B.	Wholesale trade services		Agricultural raw materials (CPC 6221**)	F	F	F	F	P	F	NX	NX
			Food excluding beverages and tobacco (CPC 6222**)	F	F	F	F	P	F	NX	NX
			Textiles, clothing and footwear (CPC 6223)	F	F	F	F	P	F	NX	NX
			Household appliances, articles and equipment (6224)	F	F	F	F	P	F	NX	NX
			Miscellaneous consumer goods (6226)	F	F	F	F	P	F	NX	NX
			Machinery, equipment and supplies (CPC 6228)	F	F	F	F	P	F	NX	NX
5	EDUCATIONAL SERVICES										
C.	Higher Education Services	C.	Higher Education Services (CPC 923)	P	F	F	F	P	F	NX	NX
6	ENVIRONMENTAL SERVICES										
B.	Refuse Disposal Services	B.	Refuse Disposal Services (CPC 9402)	F	F	F	F	P	F	NX	NX
C.	Sanitation and Similar Services	C.	Sanitation and Similar Services (CPC 9403)	F	F	F	F	P	F	NX	NX
7	FINANCIAL SERVICES (The sectors/sub-sectors listed below are in accordance with the listing in the Annex on Financial Services. Hence corresponding CPC codes are not mentioned here.)										
	Insurance and insurance-related services	5(a) (i) (A)	Life Insurance	N	N	N	N	P	F	NX	NX
5(a) (i) (B)		Non-life insurance\$	N	N	N	N	P	F	NX	NX	
Ex. 5(a) (iv)		Services auxiliary to insurance, such as consultancy, actuarial, risk assessment	F	F	N	F	P	N	NX	NX	
5(a)(xiii)		Asset Management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services\$	N	N	N	N	P	P	NX	NX	
	Banking and other financial services (excluding insurance)										

**ANNEXURE 1: India's Proposed Sector-specific.... (Contd..)**

Sl. No.	GATS W/120 Broad Classification	SI. No.	Sector / Sub-sector as per GATS Classification and the Corresponding CPC Code	Mode 1		Mode 2		Mode 3		Mode 4	
				MA	NT	MA	NT	MA	NT	MA	NT
9	TOURISM AND TRAVEL RELATED SERVICES										
C.	Tourist Guides Services	C.	Tourist Guides Services (CPC 7472)	N*	N*	F	F	P	F	P	NX
10	RECREATIONAL, CULTURAL AND SPORTING SERVICES (OTHER THAN AUDIO-VISUAL SERVICES)										
A.	Entertainment Services (including Theatre, Live bands and circus services)	A.	Entertainment Services (including Theatre, Live bands and circus services (CPC 9619))	N	N	F	F	P	F	P	NX
D.	Sporting and other recreational services	D.	Sporting and other recreational services (CPC 964**) (excluding lottery, gambling and betting services)	F	F	F	F	P	F	P	NX
11	TRANSPORT SERVICES										
A.	Maritime Transport Services		Ship Broking Service (CPC 748**)	N	N	F	F	P	P	P	NX
C.	Air Transport Services	d.	Maintenance and repair of aircraft (CPC 8868**)	F	F	F	F	P	F	P	NX

Source: Author's Analysis (based on India's proposed sector-specific commitments under the Initial and the Revised Offer).

Notes: MA: Market Access. NT: National Treatment.

\*: Indicates 'No Commitment' due to technical infeasibility.

F= Full Commitment (indicated by 'None' in the 'Market Access' or 'National Treatment' column of the schedule).

N= No Commitment (indicated by 'Unbound' in the Market Access or National Treatment column of the schedule).

P = Partial Commitment (when limitations are inscribed in the Market Access or National Treatment column of the schedule).

NX = No Sector-specific Commitment (Indicated by 'Unbound except as indicated in the horizontal section' written in the MA or NT column of the schedule).

# : Indicates that the sector/sub-sector mentioned under Column 4 refers to only a part of the sector/sub-sector indicated by the corresponding W/120 classification mentioned in Column 3. For instance, 'R&D services in Agricultural sciences' is only a part of the Sl.No. 1.C.a. indicated in Column 3.

\*\* : Indicates that the sector/sub-sector specified under Column 4 constitutes only a part of the total range of activities covered by the CPC concordance (e.g. 'Maintenance and repair of aircraft' is only a component of the CPC item 8868, which refers to 'Repair services of other transport equipment on a fee or contract basis').

§: Indicates that this sector/sub-sector was included in the Initial Offer, but with clear mention of the categories for which commitments were undertaken. Under the Revised Offer, the entire sector/sub-sector has been committed.

## ANNEXURE 2

## India's Proposed Sector-specific GATS Commitments under the 'Revised Offer' in the Sectors/Sub-sectors Already Included under the 'Initial offer'

Sl. No.	GATS W/120 Broad Classification	SI. No.	Sector/Sub-sector as per GATS Classification and the Corresponding CPC Code	Mode 1		Mode 2		Mode 3		Mode 4	
				MA	NT	MA	NT	MA	NT	MA	NT
1	BUSINESS SERVICES										
A.	Professional Services	b.	Accounting and Book Keeping Services (CPC 862) (excluding Auditing Services)	F	F	F	F	N	N	NX	NX
		e.	Engineering Services (CPC 8672)	F	F	F	F	P	F	NX	NX
		h.	Medical and Dental Services (CPC 9312)	P	F	F	F	P	P	NX	NX
		j.	Services provided by Midwives, Nurses, Physiotherapists and para-medical personnel (CPC 93191)	P	F	F	F	P	P	NX	NX
B.	Computer and Related Services	a.	Consultancy services related to the installation of computer hardware (CPC 841)	F	F	F	F	P	F	NX	NX
		b.	Software implementation services (CPC 842)	F	F	F	F	P	F	NX	NX
		c.	Data processing services (CPC 843)	F	F	F	F	P	F	NX	NX
		d.	Database services (CPC 844)	F	F	F	F	P	F	NX	NX
		e.#	Maintenance and repair services of office machinery and equipment including computers (CPC 845)	F	F	F	F	P	F	NX	NX
C.	Research and Development Services	a.#	R&D services on natural sciences [Heat, light, electromagnetism, astronomy, but excluding atomic energy and related matters (CPC 85101)]	N	N	N*	N*	P	F	NX	NX
		a.#	R&D services on natural sciences [Engineering and technology, including applied science and technology for casting, metal, machinery, electricity, communications, vessels, aircrafts, civil engineering, construction, information, etc. (CPC 85103)]	N	N	N*	N*	P	F	NX	NX
F.	Other Business Services	e.	Technical testing and analysis services (CPC 8676)	F	F	F	F	P	F	NX	NX
2	COMMUNICATION SERVICES										
C.	Telecommunication Services	a.	Voice telephone service (CPC 7521**)	N	N	F	F	P	N	NX	NX
		b.	Packet Switched Data Transmission Services (CPC 7523**)	N	N	F	F	P	N	NX	NX
			Radio Paging Services (CPC 7523**)	N	N	F	F	P	N	NX	NX
		c.	Circuit switched data transmission services (CPC 7523**)	N	N	F	F	P	N	NX	NX
		f.	Facsimile services (CPC 7521** + 7529**)	N	N	F	F	P	N	NX	NX
		g.	Private Leased Circuit Services (CPC 7522** + 7523**)	N	N	F	F	P	N	NX	NX



ANNEXURE 2 : India's Proposed Sector-specific... (Contd.)

Sl. No.	GATS W/120 Broad Classification	Sl. No.	Sector /Sub-sector as per GATS Classification and the Corresponding CPC Code	Mode 1		Mode 2		Mode 3		Mode 4		
				MA	NT	MA	NT	MA	NT	MA	NT	
		h.	Electronic mail (CPC 7523**)	F	F	F	F	P	F	P	NX	NX
		I	Voice mail (CPC 7523**)	F	F	F	F	P	F	P	NX	NX
		j.	On-line information and database retrieval (CPC 7523**)	F	F	F	F	P	F	P	NX	NX
		l.	Enhanced / value added facsimile services, including store and forward, store and retrieve (CPC 7523**)	F	F	F	F	P	F	P	NX	NX
		n.	On-line information and/or data processing (CPC 843**)	F	F	F	F	P	F	P	NX	NX
		o.#	V-Sat Services	N	N	F	F	P	F	P	NX	NX
		o.#	Cellular mobile telephone	N	N	F	F	P	F	P	NX	NX
D.	Audiovisual Services	a.	Motion picture or video distribution services (CPC 96113)	N	N	N*	N*	P	F	P	NX	NX
7	FINANCIAL SERVICES (The sectors/sub-sectors listed below are in accordance with the listing in the Annex on Financial Services. Hence corresponding CPC codes are not mentioned here.)											
	Insurance and Insurance Related Services	5(a)(ii)	Reinsurance and retrocession	P	N	P	N	P	N	P	NX	NX
		Ex. 5(a)(iii)	Insurance intermediation, limited to reinsurance	P	N	P	N	P	N	P	NX	NX
	Banking and other financial services (excluding insurance)	5(a)(v)	Acceptance of deposits and other repayable funds from the public	N	N	N	N	P	P	P	NX	NX
		Ex. 5(a)(vi)	Lending of all types, including consumer credit, mortgage credit and financing of commercial transactions (but excluding Factoring and Venture Capital)	N	N	N	N	P	P	P	NX	NX
			Factoring	N	N	N	N	P	P	P	NX	NX
			Venture Capital	N	N	N	N	P	P	P	NX	NX
		5(a)(viii)	All payment and money transmission services including credit, charge and debit cards, travellers cheques and bankers' drafts	N	N	N	N	P	P	P	NX	NX
		5(a)(ix)	Guarantees and commitments	N	N	N	N	P	P	P	NX	NX
		Ex. 5(a)(x)(A) (B) (E)	Trading for own account of the following: Money market instruments (including cheques, bills, certificates of deposits); Foreign exchange; Transferable securities	N	N	N	N	P	P	P	NX	NX
		Ex. 5(a)(xiv)	Clearing services for other banks for cheques, drafts and other instruments	N	N	N	N	P	P	P	NX	NX
		5(a)(vii)	Financial leasing	N	N	N	N	P	F	P	NX	NX

ANNEXURE 2 : India's Proposed Sector-specific... (Contd.)

Sl. No.	GATS W/120 Broad Classification	Sl. No.	Sector /Sub-sector as per GATS Classification and the Corresponding CPC Code	Mode 1		Mode 2		Mode 3		Mode 4	
				MA	NT	MA	NT	MA	NT	MA	NT
		5(a)(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	N	N	N	N	P		NX	NX
		5(a)(xii)	Money broking	N	N	N	N	N		NX	NX
		5 (a) (xv)	Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services	F	F	F	F	F		NX	NX
		Ex. 5(a)(xvi)	Financial consultancy services, i.e. 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	N	N	N	N	P		NX	NX
8	HEALTH RELATED AND SOCIAL SERVICES										
A.	Hospital Services	A.	Hospital Services (CPC 9311)	P	F	F	F	P		F	NX
9	TOURISM AND TRAVEL RELATED SERVICES										
A.	Hotels and Restaurants (including catering)		Hotels and other lodging services (CPC 641)	F	F	F	F	P		F	NX
B.	Travel Agency and Tour Operator Services	B.	Travel agency and tour operator services (CPC 7471)	F	F	F	F	P		F	NX
11	TRANSPORT SERVICES										
A.	Maritime Transport Services										
	International Transport (Freight and Passengers excluding cabotage and offshore transport)		Liner Shipping	P	P	F	F	P		F	N (for ship crews)
			Bulk shipping	P	P	F	F	N		N	N (for key shore personnel)
			Passenger	F	F	F	F	N		N	N

**ANNEXURE 2 : India's Proposed Sector-specific... (Contd.)**

Sl. No.	GATS W/120 Broad Classification	Sl. No.	Sector/Sub-sector as per GATS Classification and the Corresponding CPC Code	Mode 1		Mode 2		Mode 3		Mode 4		
				MA	NT	MA	NT	MA	NT	MA	NT	
	Maritime Auxiliary Services		Maritime cargo handling services	N*	N*	F	F	P	P	F	F	
			Storage and warehousing services in ports	N*	N*	F	F	P	P	F	F	
			Customs clearance services	N*	N*	F	F	N	N	N	N	
			Container station and depot services	N*	N*	F	F	P	P	F	F	
			Maritime agency services	F	F	F	F	P	P	F	F	
			Maritime freight forwarding services	F	F	F	F	P	P	F	F	
			International rental/charter of vessels with crew or on bareboat basis (excluding cabotage and offshore transport)	N	N	P	P	N	N	N	N	
			Maintenance and repairs of sea going vessels	F	F	F	F	P	P	F	F	

Source: Author's Analysis (based on India's sector-specific commitments under the Initial and Revised Offer).

Notes: A highlighted entry under any MA/NT column (under any Mode) indicates that India has improved its proposed MA/NT Commitments for that particular sector/sub-sector in that particular mode of service delivery.

MA: Market Access.

NT: National Treatment.

\*: Indicates 'No Commitment' due to technical infeasibility.

F= Full Commitment (indicated by 'None' in the Market Access or National Treatment column of the schedule).

N= No Commitment (indicated by 'Unbound' in the Market Access or National Treatment column of the schedule).

P = Partial Commitment (when limitations are inscribed in the Market Access or National Treatment column of the schedule).

NX = No Sector-specific Commitment (indicated by 'Unbound except as indicated in the horizontal section' written in the MA or NT column of the schedule).

#: Indicates that the new sector/sub-sector mentioned under Column 4 refers to only a part of the sector/sub-sector indicated by the corresponding W/120 classification mentioned in Column 3.

\*\* : Indicates that the sector/sub-sector specified under Column 4 constitutes only a part of the total range of activities covered by the CPC concordance (e.g. radio paging services is only a component of the CPC item 7523, which refers to 'Data and message transmission services').

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