

IMPLICATION OF LEGAL AND EDUCATION SERVICES UNDER GENERAL AGREEMENT ON TRADE IN SERVICES

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World Trade Organisation stated that services are sixty percentage of global production and twenty percentage of world commerce. All developed countries wanted to expand their markets. U.S has decline of share in the commerce of goods because there is less competition of their products. There is refusal of some countries to enter into agreement of trade in services. But with passage of time they are concluded that they also can take advantage from the liberalisation and globalisation of trade in services. General Agreement on Trade in services (herein after called GATS) is first multilateral trade agreement cover trade in services and it are inspired from General Agreement on Tariffs and Trade (herein after called GATT).¹ This agreement state how 150 member countries of WTO administer service providers from other countries.² GATS covered 12 sectors and 161 sub sectors of services. It came into effect on April 15, 1994. There are few reasons³ identified by World Trade Organisation (herein after called WTO) for implementing GATS. There is growth of services in economic sectors and service product grows like technical progress, government retrenchment, privatization, commercialisation and important service sector. Services play a very important role in infrastructure area such as transport, communication and transport. These areas promoted the efficiency of economy of the country. Open service environment possible and scope of economics internationally spread.

¹Paula Santos de Abreu , 'GATS – General Agreement on Trade in Services' (2005) 2 International Brazilian Journal of Urology 502

² Martha Neil, 'Gearing up for GATS' (2003) 89 American Bar Association Law journal 18

³Dipankar Dey , *GATS An Introduction* (1st edn ,The Icfai University Press India 2007) p. 13

Historical Background

First international trade agreement was European Economic Community on trade in services as well in goods. This was established under Treaty of Rome. There are efforts made to include trade in services under Tokyo round but not included.⁴ During Uruguay Round Trade in services was governed by the international trade agreement but the historical background of trade in services can be found in 1970. In 1982, there was Ministerial Meeting of GATT and in this meeting there was question raised regarding trade in services. The developed countries like European Union and United states insist on inclusion of services in GATT system whereas developing countries opposed the developed countries and resist that the trade in services should not include in the GATT negotiation.⁵ In this period US wanted to broaden the GATT rules to facilitate the developments of global operation of transitional corporation. Therefore the notion of trade in services is introduced. However the interest of developing countries was boost by U.S negotiation by Trade and Tariff Act 1984. This act includes services as well as investments under the category of trade. In 1986 Uruguay Round launched in Punta Del Este. In this round there is establishment of separate negotiation on trade in services. The main objective of such negotiation is to develop the trade & made transparency, progressive liberalisation. Creator of Uruguay Round does not result of negotiation of trade in services but negotiation commence separately.⁶ First meeting on trade in services is held. The main concept arise in this meeting is defining the trade in services. Many industrial countries raise the points that supplier should present in the foreign market for any form of investment because presence is important part of the services.

In 1988 Montreal midterm ministerial meeting is held on trade in services. Again the discussion came on defining trade in services. In this meeting it was agreed by the parties movement of factors of production is also prominent requirement of supplies. But this definition does not include of permanent establishment of suppliers, immigration .It was achievement of developing countries like Argentina, Colombia, Cuba, Egypt, India, Pakistan, Mexico, Peru because they want movement of factors of production. These countries want harmony between Capital and labour. In 1990, there is long process to clarify the definition of services in the

⁴Autuar Krishna Koul , 'Guide to the WTO & GATT , Economic Law International (4th edn, Satyam Law International 2013) p521

⁵Ibid

⁶Id (p.522)

Ministerial meeting of Montreal and Brussels. The definition covers “the supply of service by the service supplier of one member through commercial presence in the territory of any other member.” Developing Countries proposed the design and format of GATS. Modes of Supply and Measures restricting Market Access were listed in article XVI of GATS. Developing Countries insist that the commitment on national treatment should be based on negotiation of sector and subsector based. Then question rose that commitments by countries should be in form of negative list or positive list. In Negative list each country wants to maintain measures and there is certain exception to common rules whereas in positive list approach each member countries accept all services and allowed market access and national treatment commitments. The negative list achieved by most of member countries. In 1990 “Draft Multilateral framework for trade in services” was launched .This draft is also known as July text and it similar to GATT some extent. It consists of 35 articles, six parts and an annex dealing with commitments. The text noted one thing that still there are provision in trade for services related to developing countries remain unsolved. Such provision like definition, scope, most Favoured nation (herein after called MFN) treatment, Progressive liberalization, commitments and negotiation. There is still some provision absent like dispute settlement, enforcement relationship with other international arrangement & agreement, non-consultation and non-application.⁷ There was clear in July text that some provision related to trade in services is still unclear. Arthur Dunked Director general of GATT reported areas that are unsolved. MFN provision is still unclear. Progress made in annexes like in telecommunication, financial services. In the initial there is more than forty commitments were made. Exemption to MFN treatment leads to delay in the financial service sector. The developed countries want exemption for broadcast & telecommunication and developing countries refuse to introduce their market in the maritime industries. US rejected contention of both countries. In 1991, Arthur Dunkel begun draft text titled “ Draft Final act embodying the result of Uruguay Round of multilateral trade negotiation” which is also known as Dunkel Draft. This draft is an agreement for all negotiated area. It composed of 34 articles & annexes on MFN exemption, financial services, telecommunication, and movement of capital & airport services. This text constituted the two bodies which are institutional and main function of such bodies is to carry

⁷ Rudgeir Wolfurm, Peteir -Tobias stoll and Clemens Feinaugle , Max Planck, *Commentaries on World Trade Law* (Volume 6 , Martius Nijhoff Publisher Leiden Boston 2008) p 9

out joint action. These bodies are council of representation and an authority. Schedule of commitment does not lay down in text.⁸

In 1993 the Trade Negotiation Committee (herein after called TNC) approves the final act of Uruguay round multilateral trade negotiating. It is outcome of the all negotiation, Ministerial decision and declaration, draft text. Till 1994 contracting parties of GATT does not include in the schedule of WTO. Then there is suggested that correction should be made in the schedule and it should be examined and solve the question whether they should include in the negotiation or not. There are still area which are not solved and not included in the financial services like telecommunication and maritime transport. TNC meetings held in 1993 to draw up several declaration and ministerial decision. The main purpose of this meeting is to enable WTO members to carry out negotiation in unsatisfactory service sector. The outcome of Uruguay round is GATS negotiation and this agreement is annexed to WTO funding instrument. There is submission of 356 MFN exemptions and 97 schedule of service commitment.⁹Some general principals agreed such as transparency and national treatment. Trade in services plan is carry out with US efforts only on two aspects: First GATS Set general principles on trade in services Secondly the agreement which is proposed should consist of only specific service sector and which state services should be contained in the negotiation. Main aim of GATS is to remove hurdle and impediment to trade. Progressive liberalisation is choose by the member countries and they decided what sectors should be liberalized. They also take decision what is best mode of supply to provide the services. They also take into consideration to limit the liberalisation of services in own country and other country.

Objective of GATS

Services are part of sixty percentage of global production and twenty percentage of total trade. Trend of trade in services in increasing day by day and new transmission technology expand their business by introducing the electronic banking, health or tale education services.¹⁰ Landmark achievements of Uruguay Round are to creation of GATS. Objective of GATS is counterpart of objectives of GATT. It made a conclusive and reliable system of international

⁸ Ibid (p 11)

⁹Id (p 15)

¹⁰ World Trade Agreement , 'The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines' <https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm> accessed 28 January 18

trade rules. It gives fair and equitable treatment to all market participants by introducing the principle of non-discrimination. Preamble of GATS states the objective of it and state the objective has to be fulfilled by the member states of GATS organisation. First one objective is to recognizing the growing importance and significance of trade in service in world economy because it promotes the development of economy of the globalized world. Second one objective of GATS is to create rule and principles for trade in services. Main intention is to create such rules is to expand the trade in services under the condition of transparency and progressive liberalisation. Such rules and procedure should be to encourage the economic growth of the all member state and make development of developing countries.

It aims to encourage the interest of all participants by achieving higher level of progressive liberalisation and by conducting multilateral negotiations. It wants to maintain rights and obligation and give respect to all objectives of national policies. Another objective of this organisation is to recognize the rights of members to regulate the supply of services in their jurisdiction for the purpose to meet the requirements of national policy objectives. GATS want to introduction of new regulation and development of service regulation in different countries. It desires to facilitate and expand trade in services of developing countries. It desire to encourage developing countries to expand service export by strengthening domestic services capacity, efficiency and competitiveness. It also desires to take into consideration the least developed Countries faces the serious difficulties in regard to the economy of their countries. Main objective is solving their development, trade and financial needs like difficulties.

Scope

GATS established with WTO agreement. As per Sector classification list GATS covered 161 services under twelve broad sectors. It is clear from the preamble is that the main objective of GATS is to form such multilateral framework of principles encourage progressive liberalization and regulate member countries. In GATS social services are in the majority number like education services, Health care services, and communication and environment services.¹¹ Article I elucidates that it applies to measure taken by member states of trade in

¹¹ Parashar Kulkarni, 'Impact of the GATS on Basic Social Services Redux' (2009) 2 Journal of World Trade 249<<<https://www.kluwerlawonline.com/document.php?requested=document.php%3Fid%3DTRAD2009011%26type%3Dhitlist%26num%3D1%23xml%3Dhttp%3A%2F%2Fwww.kluwerlawonline.com%2Fpdfhits.php%3E>> accessed 3 february 2018

services under this agreement. Trade in services is different from the trade in goods because it is intangible.¹²

Definition of Service

Paragraph 3(b) of Article I not defines the services but state what we can include in services for the agreement. It provides that service may be supplied to any sector to exercise such sector but exclude such services provided to the government authority. Paragraph 3 (c) of Article I deals with “a service supplied in exercise of government authority” state that such service is supplied with no commercial basis and competition with service suppliers. WTO members include 12 major sectors in GATS for commitments in such services. Such sectors have 161 sub sectors.

Modes of supplying services

In this agreement there is no meaning of services is given but definition of services is stated as mode of supplying services. Paragraph 2 of Article I deals with the modes of supply of services. The GATS discuss four modes of supplying services:

1. Cross border Supply
2. Consumption abroad
3. Commercial Presence
4. Presence of natural persons

These modes can be explained in below:

- **Cross border Supply**

Cross border supply is defined as such services which flow from the territory of member country to territory of another member country.¹³ Like banking or architectural services are provided by one member to another through telecommunication or e mail. In other words we can say that there is no need of physical presence of person to provide and give service in other country.

¹² Aly L. Abu – Akeel , ‘ Definition of Trade in Services under the GATS : Legal Implications’ (1999) 32 George Washington Journal of International law & Economics 189,190

¹³Pp.2(a) of Article I of GATS

- **Consumption abroad**

Consumption abroad is defined as service consumer for the purpose to attain the service move into the territory of another member country.¹⁴ Like tourist, patient moves to abroad other countries for obtaining service.

- **Commercial presence**

Commercial presence means service supplier of one member establish commercial presence in the territory of other member country for providing a service.¹⁵ For example subsidiary of foreign insurance companies or hotel chains established in territory of other member states for provide the services.

- **Presence of Natural persons**

It is such type of services persons of one member for supply a service to another member state enter into territory of such member state.¹⁶ Like accountant and doctors enter into territory of other member states for providing services to such member states.

Impacts of GATS on Higher Education

There are different categories of education in service. United Nations provisional central product Classification categorizes the education into five heads:

1. **Primary education** – includes preschool and other primary education services but does not include child care services.
2. **Secondary education** –include higher secondary, technical and vocation services. Such educational services are also available for the disabled.
3. **Higher education** – post secondary technical and vocational education services and such higher education services such as lead to university degree.
4. **Adult education** –include education for adults outside the regular education system.
5. **Other Education** – other education which is not covered elsewhere.

¹⁴Pp. 2(b) of Article I of GATS

¹⁵Pp 2 (c) of Article I of GATS

¹⁶Pp2(d) of Article I of GATS

There is criticized of such classification of education services. As many critics say that such classification is not exist in today world. New technologies are used by the universities. Many countries add their classification and qualification regarding education services in UN Central Product Classification scheme.¹⁷ There are forty four member of WTO member made commitment to provide education in service and only 21 members made commitments on higher education. On higher education services commitments are unconditional made by the Congo, Lesotho, Sierra Leone and Jamaica. There countries mainly focus on develop the higher education system to foreign provider themselves. Private tertiary education services including university level is higher level education services is provided by the Australia. Limitation and condition is imposed on all modes of trades in service except Consumption abroad means foreign tuition paying students. Other education is east frequent committed sector. Negotiating proposal about commitments on higher education is only submitted by four members of WTO Australia, New Zealand, USA and Japan. There is always barrier to trade in services in almost all sectors and in same way there is barrier to higher education service. Exporter country have majority of barrier to provide education service in its own country.

Limitation on mode 1-There is no limitation on primary and secondary education service commitments. Higher and adult education is higher share in all existing commitments and there is no condition on such education. Barrier on Trade of education Services is there is e education, distance delivery of education of different universities but the barrier of higher education in services in cross border supply . There is restriction imposed electronic transfer of course material and such restriction is inappropriate. If institution grants degree then member has lack of opportunity to qualify such degree. Fees and taxes imposed on services are excessive. There is restriction on use and import of educational materials.

Limitation on mode 2- There is very less limitation on consumption abroad education service sector as member see less need for preventing trade of education services other than mode of supply. Barrier under Mode 2 is Rules and regulation restricts the entry and temporary stay of

¹⁷ Dr Jane Knight, Report on Trade in Higher Education Services: The Implications of GATS (2001) United Economic Social Council
<http://www.unesco.org/education/studyingabroad/highlights/global_forum/gats_he/jk_trade_he_gats_implications.pdf> accessed 2 February 2018

students. Quotas of international student in particular educational institution while studying impose restriction on employment.

Limitation on Mode 3- In half of the schedule there are no limitation on primary, secondary and higher education. In this mode there is barrier regarding requirement of nationality and subsidies provided only to local institution by the government. Monopolies of Government and Service supplier member have to difficult established facilities and obtaining authorisation in foreign countries. There is prohibition of different category of education service like higher education, adult education and training service provided by the foreign entities.

Limitation on Mode 4- there is unbound commitment of every country in regard coeducation service sector. Countries impose condition and limitation in mode 3 and mode 4 more than the mode 1 and mode 2. Barrier like rules and regulation restrict the entry and temporary stay and work for the service supplier. Repatriation of earnings is subject to excessively costly fees or taxes for currency conversion.

GATS and legal service

GATS have also provided legal service to the service provider. If lawyers client establish location abroad then lawyers have good incentive from their clients by practising abroad. As we know that the major concern of the law firms to establish its foreign presence in different countries as well as Asian region. There are also trade barrier to trade in legal service. There is not set definition of legal services under GATS but to understand the agreement of particular service there should be clear meaning of service. However WTO secretariat has commented that legal services include would include advisory and representation services as well as the activities relating to the administration of justice like judges, court clerks, public prosecutors, state advocates etc.¹⁸ As WTO secretariat wrote a note paper on legal services and said that

“Most of the demand for legal services in the field of business law and international law come from businesses and organization involved in international transactions. These institutional actors will look for the legal service provider who gives them guarantee as to its knowledge of the firm’s activities and of place of businesses as well as the quality of service it can deliver, regardless of its place of its origin. It is clear that a legal service supplier from the firm’s

¹⁸P Satyanarayana Prasad, *GATS A legal debate* (1st edn 2007 The Icfai Universit Press India) p.158

country of origin (the firm 's habitual lawyer) would have comparative advantage with respect to clients business while a local service supplier would have comparative advantage with respect to the knowledge of local business and regulatory environment.”

It consists of supply of legal advice or legal product to another country by mail or electronically under Mode 1. Person takes the legal services from the foreign lawyers and such person is lived in abroad country in Mode two. Lawyers open branch office in another country for providing legal services in Mode three. Lawyers enter or visit another country for providing legal service in Mode 4. There is also barrier to trade in services and report made by the US government regarding which explaining can follow be as:

Denial of Access to Market

If foreign law firms wanted to establish office in foreign country and provide legal services then such legal firms unable because there is qualification and regulation of domestic country and compliance with these regulation and qualification of foreign country is very difficult. There is also restriction on admission of bar. If service provider is citizen of country then they can enrol as advocate in the bar council. There is also impediment that in many cases there is requirement of citizenship if Foreign Service provider wants to give bar examination of particular country. In some countries foreign lawyers is job only for legal advisor that means they are not allowed to represent the case of his before the court. They are consulting the clients on legal issues only. In many other countries there is also difficult to become legal advisor because they want specific local education or training from the foreign lawyers.

- Restriction on local attorney with association foreign lawyers

There are restriction on the foreign lawyers and local attorney to entry into partnership or make association. There are also some countries allow the local attorney associate and enter in partnership with foreign lawyers but condition that foreign lawyer in subservient role. Local attorney are not associate with foreign lawyer in normal way and foreign lawyer not easily enter into partnership with local firms. There is certain condition and qualification is very difficult to comply.¹⁹

¹⁹ Lourdes A. Sereno , ‘GATT and GATS: Implication on the Legal Profession and Legal Education ‘ (1995) 11 The World bulletin 58,70

Conclusion

There are also anti-globalization commenters who criticized the GATS and liberalisation agenda with respect to trade in services and it causes a serious threat to domestic countries. These services are such as water, health care and education services. But defenders of GATS ensure that member states may make commitments on such services by scheduling market access and national treatment.²⁰ If developing countries want to avail the new opportunities of different modes of supplying services then such countries have to adopt different strategies and plans. Majority of developing countries have not the national policy on the service sector. If these countries formulate national service policies then they will be able to specify the strengths and weaknesses of all service sectors. Developing countries should know the use of different provisions under GATS and have good knowledge to use of general exceptions under GATS. If legal professions are categorised into different sub-sectors then it shall be taken into consideration that it should be based on the realities of trade, not based in abstract. As there should be ensured that higher education services expand in around the world and supporters of higher education services' voice is heard.

<http://heinonline.org/HOL/Page?handle=hein.journals/wrldbull1&collection=journals&id=230&startid=&endid=252> accessed 7 February 2018

²⁰Micheal J. Trebilcock, *Advanced Introduction to International trade law* (2nd edn, Edward Elgar Publishing Ltd 2015) p 125