

Interrogating the GATS from an Environment Perspective : The case of tourism EQUATIONS¹

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Abstract

The GATS provides well-defined incentives for increasing tourism investment in India. This paper argues, through an examination of certain contentious GATS clauses, that it however could constrain governments from maintaining and introducing regulations to protect the environment that tourism often envelops as a negative consequence of this increased investment. The paper mentions some areas of regulatory ambiguity in the tourism sector that have a bearing in the context of tourism commitments and ends with certain recommendations, in the context of the sector in the ongoing GATS negotiations, to policy makers.



Introduction

Prior to the establishment of the WTO in 1995, international trade agreements had largely applied to goods not services. Thus trade liberalisation under the GATT regime aimed to increase international trade by reducing border tariffs or quantitative restrictions applied by the importing country; clauses like 'Most Favoured Nation' and 'National Treatment' exemplified this objective. Bringing new trade agreements like the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), the Agreement on Sanitary and Phyto Sanitary Measures (SPS Agreement) and the General Agreement on Trade in Services (GATS) into the WTO has meant that the rules developed to govern trade in goods have been applied to quite a different sort of process.

Unlike trade in goods, international trade in services is not confronted with border tariffs and therefore, non-tariff barriers are considered to be the main obstacle to trade. Thus the aim of the GATS, for example, is the creation of a legally binding framework for liberalisation of international trade in services through the progressive phasing out of government barriers. Thus many domestic regulations are considered barriers to trade, which the process of periodic negotiations aims to eliminate. GATS rules apply to 4 modes of services supply in 12 sectors that are further subdivided into 160 sub sectors². Though many of the general principles and provisions of the GATS are similar to the GATT, the former allows countries a certain degree of flexibility to determine a) the specific sub sectors they want opened up to foreign providers and b) limitations governments want to retain in the opened sectors. (See Box 1)

The ongoing GATS 2000 negotiations (so called since the built in agenda of the Uruguay round of negotiations directed negotiations in services starting in 2000) are expected to take this agenda of trade liberalisation forward. These negotiations received a fillip after the Doha ministerial meeting of the WTO in November 2001. Paragraph 15 of the Ministerial Declaration establishes time-lines for new commitments in the services sector; the

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Members are currently in the process of examining the requests they have received from member countries and are likely to begin tabling their initial offers by the end of March 2003. Negotiations are expected to conclude by January 2005.

Box 1: Bottom – Features of the Gats

Unlike the case with most other WTO Agreements, Members do not have to comply with *all* of the GATS obligations right from the outset. Rather, some obligations only bind Members once the country in question has explicitly agreed to be bound by them for a particular services sub-sector and for a particular mode of supply. Members inscribe these explicit commitments into their specific schedules of commitments (individual country schedules), which form an integral part of the GATS.

This “bottom -up approach” applies to the GATS market access (Article XVI) and national treatment (Article XVII) obligations, both of which are called the GATS “specific” obligations. At the same time, the other two of the GATS main obligations, bind all Members right from the beginning and are thus called “general obligations”. The GATS most favoured nation obligation (Article II) and transparency obligations (Article III) are such “general obligations”.

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These negotiations have increasingly come under scrutiny of both international organisations and civil society³ Developing country delegations as well have submitted various proposals in the WTO pointing out to the need to conduct an assessment of the GATS before a new round of commitments was launched⁴ Much of this apprehension, both by civil society and developing country negotiators, has however focussed on the presence of basic services like the provision of health, education and water.

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The relative lack of concern, by member governments, on the presence of tourism in the GATS is represented by the fact that as of March 2001 commitments under Tourism and Travel Related Services (sector 9 in the classification list) ranked higher than for any other service sector with 120 of the WTO's 142 members opening up at least one of the 4 tourism sub sectors. The sub sectors include hotels and restaurants (including catering), travel agencies and tour operator services, tourist guide services and others.

But tourism's presence in the GATS also raises important questions notably those on local economy, local and regional government autonomy and the environment. Tourism in the context of GATS is incredibly complex, as by construction tourism has spill over effects in so many other sectors of an economy. For example, if one attempts to limit an analysis of the effects of tourism on the hotel sector, a multitude of other sectors and issues will not be addressed that, due to the linkages between hotel services and other services, are arguably equally as relevant to consider. Any analysis of the hotel sector would also require an analysis of food providers, cleaning service providers, and an examination of the environmental regulations in place and so on. It is precisely these linkages that make negotiations in the GATS so complicated.

This paper intends to examine only one of these questions i.e. to identify how certain clauses in the GATS could constrain governments from maintaining and introducing regulations to protect the environment that tourism often adversely impacts. It should be noted that it however does not intend to provide a comprehensive analysis of all possible issues related to tourism's presence in the GATS and its implications for the environment. For example it does not address the possible conflicts arising out of India's commitment to the Convention on Biological Diversity (CBD)⁷. The paper mentions some areas of regulatory ambiguity in the tourism sector that have a bearing in the context of tourism commitments and ends with certain policy recommendations, to policy makers (at the Ministry of Environment and Forests, Ministry of Tourism and Culture and Ministry of Commerce), in the context of the present Request-Offer phase of negotiations.

GATS clauses with implications for Environmental policies.

The coverage of the GATS is quite comprehensive. Not only does GATS disciplines cover practically all services⁸; it applies also to measures by all levels of government *affecting* trade in services.

Article I: Scope and Definition

1. *This Agreement applies to measures by Members affecting trade in services.....*
3. *For the purposes of this Agreement: (a) "measures by Members" means measures taken by:*
 - a. *central, regional or local governments and authorities; and*
 - (ii) *non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;*

This broad definition is important to note, as the provision of a service often requires the use of a good. For example to consume tourism services in a national park a bus to ferry tourists is crucial. Consequently, regulators might decide to address the environmental damage of the *service* by regulating the *good*. However, such a regulation might have an adverse *impact* on tourism, therefore constitute a ‘measure affecting trade in services’, and would consequently be included in the scope of the GATS. Thus, environmental regulations ‘regulating’ goods, but ‘having an effect on’ trade in tourism services, are not a priori excluded from the GATS, but rather would fall within the scope of the services agreement.

Article VI: Domestic Regulation

GATS proponents often describe the provisions on domestic regulation, found in Article VI, as simply trying to discipline domestic regulations to facilitate trade and nothing more. But far from that, this article, which straddles both general and specific commitments, is likely to pose one of the agreements most dangerous threats to democratic decision-making. It is also interesting to note that the commitments phase continues with no actual consensus on Article VI. Along with negotiations on emergency safeguard mechanisms, government procurement and subsidies, disciplines on domestic regulation remain uncompleted. Article VI.4 states that rules must be formulated with a view to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services. In the tourism context this is very broad policy coverage and could potentially call to question several legitimate policy tools (which would differ from geographical regions) aimed at regulating this industry. For example, it is unclear as to how technical requirements for construction along the beaches in Goa would fare under such disciplines. Government standards, which could include important environmental and social criteria, could be argued to be incompatible with the rules of Article VI.4. In circumventing this, any move to arrive at a mutually acceptable international standards for the tourism sector would be foolhardy, given the fact that standards are often, and rightly so, reflective of environmental and developmental specificities.

A recent document from the Working Party on Domestic regulation tabled in the GATS council on October 18 2002 gives examples of measures that will be addressed by disciplines under Article VI.4 (WTO 2002b). Examples submitted by member countries include under:

- 1) Licensing Requirements – instances when federal and sub-federal licensing and qualification requirements and procedures are different, making a license or qualification recognition obtained in one state not valid in other states;
- 2) Licensing Procedures – when it is necessary to obtain/renew the same license in every regional government;
- 3) Qualification Requirements – when there are different sub-federal regulations for recognition of qualifications;
- 4) Licensing Requirements – when there are restrictive licensing practices (tourism is specifically cited as an example) and permits are required for every single project. Also mentioned are qualification requirements other than education, practical training, experience and language skills; and
- 5) Technical Standards – when national standards diverge from international standards.

A more pertinent question would be on the ability of future governments to pass such regulations if the need arises based on an assessment. While local governments may successfully defend such regulations, it is likely that they would be obliged to subject

existing regulations to arbitration and prove they are legitimate if a trading partner challenges it. Given that the present and future negotiations are likely to intrude into internal policy making spaces it is crucial that local regulators are made aware and consulted on the possible implications of binding commitments.

Article XIV – General Exceptions

Similar to Article XX in the GATT, the GATS contains a general exceptions clause in Article XIV. Trade policy researchers have argued that although this article is drawn from Article XX in the GATT the provisions in the GATS are far more limited in scope (Fuchs and Tuerk 2001). In particular, Article XIV of the GATS does not contain a provision similar to Article XX (g), which under the GATT has been interpreted as the ‘environmental exception’. In fact nothing in Article XIV or the GATS as such, explicitly mentions ‘the environment’ as a legitimate policy objective.

Article XVI - Market Access

Market access disciplines fall under vertical obligations and apply only in sectors in which commitments are made. Limitations and conditions can be indicated in their schedules. Bound or unlimited commitments are made when a country inscribes ‘none’ in its schedule implying that it agrees not to limit:

- the number of service suppliers
- the total value of transaction or assets
- the total number of service operations or quantity of service output
- the total number of natural persons
- the requirement of a certain type of legal entity or joint venture
- the participation of foreign capital

The ability of policy makers to arrive at possible limitations, given that prudential regulation on limiting tourism activity varies in response to the ecological fragility of areas, requires enormous capacity and the ability to foresee future development. The inability of trade negotiators who are unskilled at environmental policies (and who have not consulted with their respective Ministries of Environment as in the case of India during the 1994 commitments) to do this is evident. Consider that only Egypt deemed it necessary to specify that inland water passenger and/or local tours are subject to the physical capacity of the Nile River⁷.

Table 1: India’s Vertical Commitments in the Tourism Sector

Sector	Limitations on Market Access	Limitations on National Treatment
Hotels and Other Lodging Services (CPC Ex.641)	1) Unbound*	1) Unbound*
	2) Unbound	2) Unbound
	3) Only through incorporation with a foreign equity ceiling of 51 per cent	3) None
	4) Unbound except as indicated in the horizontal section	4) Unbound except as indicated in the horizontal section

Travel Agency and Tour Operator Services (CPC 747)	1) Unbound	1) Unbound
	2) Unbound	2) Unbound
	3) Only through incorporation with a foreign equity ceiling of 51 per cent	3) None
	4) Unbound except as indicated in the horizontal section	4) Unbound except as indicated in the horizontal section

NOTE: The modes of supply corresponding to the commitments are: 1) Cross-border, 2) Consumption Abroad, 3) Commercial Presence, and 4) Presence of Natural Persons. SOURCE: <http://gats-info.eu.int/gats-info/nwtosvc.pl?COUNTRY=India> and <http://www.wto.org>.

Prominent trade policy analysts have concluded that a close analysis of India's commitments in a traditionally liberal and *less sensitive* sector such as tourism shows that India has adopted a highly cautious approach to liberalisation during commitments made during the Uruguay round⁸. If this was the intention of trade negotiators, our examination of Indian commitments in tourism shows that either this conclusion is wrong or there have clearly been erroneous entries under the hotels and restaurants sub sector. While six possible limitations are possible, India's entry under Mode 3 (commercial presence) shows that it has chosen to invoke only item 6, a limitation on the participation of foreign capital. This could imply that henceforth any regional or local government policy that could limit the number of service suppliers, total value of transaction or assets; the total number of service operations or quantity of service output; the total number of natural persons and require a certain type of legal entity or joint venture can possibly be challenged as violating India's market access commitments. Governments may successfully defend their policies as legitimate but it leaves them open to challenges under the WTO dispute settlement system, which may not be the appropriate body to deal with the pros and cons of democratically evolved domestic policies. It is also important to mention that in the present negotiations the only way forward for India is to either maintain the status quo or remove item 6. Addition of any further limitation implies the long and arduous process of modification of its schedules, which incidentally has no precedence in the GATS. Article XXI allows for modification or withdrawal of a commitment after a notice of three months is given after the commitment has been in place for three years. It requires negotiations with all the affected members and is subject to compensation by the affected parties. Affected countries are also allowed to retaliate, across other agreements within the WTO framework, within the rules of the dispute settlement body.

Given the GATS endeavour to progressive liberalisation, limitations are likely targets for removal as was evident in the leaked EU draft requests to India⁹. Reliance on the limitation mechanism is deeply problematic because of the recent trend in India of creating tourism zones inside protected areas, such as national parks, wildlife sanctuaries, and Tiger reserves. The Periyar Tiger Reserve, located in the Western Ghats in the state of Kerala, among the 18-biodiversity hot spots in the world, is only one example. There are three state run hotels operated by the Kerala Tourism Development Corporation (KTDC) functioning inside the Reserve in contravention to the law. It has been over six years since the lease agreement with the Kerala Forest Department expired but the hotels continue to operate. Added to this, the

families of forest officials and the employees of the hotel reside inside the reserve. Private operators have not managed to get a foothold inside the Reserve but with the ongoing disinvestments process, both within the central and the regional level, the government run tourism departments are likely to be acquired by the private sector. The unravelling of the market access clause commitment without any limitation on operation in protected areas is surely an issue of serious concern. This is further complicated by the fact that there are many such protected areas where tourism is not practiced at all, despite tremendous economic potential. For example, Goa's Tourism policy states the need to diversify its tourism portfolio from the present beach destination to new areas such as eco-tourism, clearly implying that the protected areas in the interiors are likely to be targeted. While the setting up of a Tourism promotion board is envisaged, there is no mention of setting up a tourism regulatory authority. Given the policy diversity across regions and states it is difficult to predict both the full implications of India's GATS commitments as well as what prudential regulations can be put in place that could escape GATS challenges.

Article XVII - National Treatment

The national treatment obligation stipulates that a WTO Member government must accord "equal"¹⁰ conditions of competition to foreign services and service suppliers from other Members, as it accords to its own "like" services and services suppliers.¹¹ A recent document points out the dangers of the lack of guidance and clarity from the WTO secretariat on the issue of 'likeness' to determine the applicability of the National Treatment clause (Fuchs and Tuerk 2001). The scheduling guidelines state that members must accord the same 'equal' conditions of competition to foreign services and service suppliers of other Members, as it accords to its own "like" services and services suppliers¹². The document notes that the jury is still out on the issue of likeness given that there has been only one brief examination of the issue in the EC-Bananas case, which arrived at a rather tautological conclusion. The appellate body confirmed the Panel's statement that entities providing 'like' services should be considered as 'like' service suppliers. Adopting such broad definitions for national treatment commitments could also make it difficult to pursue many policies that have important developmental objectives. In the context of tourism, governments may wish to reserve the first right of refusal with local communities or indigenous people. In the case of tourism different types of tourism providers may deserve different treatment for environmental and other legitimate policy objectives. For example governments may decide to provide concessions to hotels that employ local people and source local raw materials and contribute to conservation related activities. Or for example to prevent further damage to the environment a host country may impose restrictions or seek to impose higher standards for foreign tourism providers. For example in the Periyar Tiger Reserve in Kerala presently private operators are not allowed to set up operations inside. There are numerous cases across protected areas in India where are incumbent tourism providers.

An examination of the 1994 commitments under national treatment shows that there are no limitations scheduled, both for hotels and restaurants as well as travel agencies and tour operators under Mode 3. While non-discrimination may seem like a rational objective in a scenario where powerful domestic firms enjoy several undue benefits thereby resulting in low-quality, high cost and outdated services, such a simplistic template cannot be applied to the tourism sector. As evidence of tourism's adverse impacts on the environment and local communities have mounted the language of informed consent, local participation and benefit sharing are increasingly finding acceptance within governments.

It is unclear as to how a bound national treatment clause will unravel if a private tourism provider wants to set up a hotel in the tourism zone of a national park. In these cases it is crucial that any specific commitments under national treatment will not curtail the regional governments right to restrict tourism development in such areas.

Conclusion

In the tourism requests that have been submitted to India, a country identifies the change in domestic policies it expects its trading partner to undertake. India will then communicate its willingness to undertake such policy changes in the form of its offer. It is important that the present requests that India has received be assessed to identify the implications at the domestic level, both in terms of direct environmental, social or developmental impacts as well in terms of limitations on a state government's present policy flexibility, which may result from the implementation of a request. Inputs from environmental policy makers and local regulators will be crucial in terms of assessing the requests and influencing requests. It is clear that this requires a new focus in India's trade policy. Considerable research and consultations are required before the commerce ministry can take informed decisions in the context of tourism and GATS.

In this context it is also useful to recall that the GATS Negotiating Guidelines mandates the GATS council to carry out an assessment of trade in services in overall terms and on a sectoral basis. This is yet to happen. Developing countries should continue to push for this assessment as they have previously done and the ambit of such an exercise should not only be quantitative, i.e. of an economic nature, but should also address qualitative aspects, such as the GATS' impact on social, environmental and developmental realities in individual WTO Member countries. India should also begin a national assessment, on similar parameters, of the liberal autonomous regime in the tourism sector.

Given that such assessments are yet to begin and there is considerable ambiguity on the impacts of binding commitments the rational policy option for India is use the flexibility in the agreement and maintain the 1994 status quo of commitments in the tourism sector.

Notes

¹ EQUATIONS is a developmental NGO based in Bangalore, India. This paper was researched and written by Benny Kuruvilla, EQUATIONS

² The modes of supply are cross-border, consumption abroad, commercial presence in the consuming country (i.e. Foreign Direct Investment), and presence of natural persons. The 12 categories under the GATS Classification list (W/120) of services are Business; Communication; Construction; Distribution; Educational; Environmental; Financial; Health- related and social; Tourism and travel related; Recreational and Cultural; Transport and Other

³ or example UNHCHR Mary Robinson's report mentions that GATS liberalisation may conflict with human rights obligations of member countries. Available at <http://www.unhchr.ch/pdf/9AV.pdf>. Also in April 2001 over 400 organisations from 53 countries called on their governments to immediately invoke a moratorium on the GATS 2000 negotiations and devote the remaining two years of the scheduled talks to conducting a comprehensive sectoral assessment and removing clauses in the GATS that tie the hands of governments. Can be accessed at <http://www.gatswatch.org/StopGATS.html>

⁴ On 6 December 2001 a communication from Cuba, Senegal, Tanzania, Uganda, Zimbabwe and Zambia to the members of the Council for Trade in Services (CTS) reinforced the call to commence assessment of trade in services and asked that a first initial assessment be carried out by March 2002. The communication mentions that further negotiations may only commence after conclusions from this first assessment have been drawn, and negotiations should be adjusted in accordance with these conclusions. Can be downloaded from www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm

⁵ In the CBD efforts have intensified at the international level to develop tourism projects that are in agreement with the three objectives of the CBD, contained in Article 1, namely a) the conservation of biological diversity b) the sustainable use of its components and c) fair and equitable sharing of the benefits and in particular to encourage the knowledge and practices of indigenous people.

⁶ As mentioned in Box 1 specific obligations i.e. market access (Article XVI) and national treatment (Article XVII) only apply to those services sub-sectors and modes of supply in which a country has made a commitment.

⁷ See Egypt, Schedule of Specific Commitments, GATS/SC/30, 15 April 1994.

⁸ Emphasis added. See for example Chanda (2002), 157-164.

⁹ On April 16, 2002, Corporate Europe Observatory (CEO), an NGO in Europe, leaked copies of draft requests by the European Commission to 29 countries¹. Under tourism the EU's requests to India were to eliminate all limitations and schedule bound commitments.

¹⁰ Note that a Member is obliged to provide "not less favorable treatment" to foreign service providers. It is however, allowed to provide "less favorable treatment" to its domestic service suppliers.

¹¹ Scheduling guidelines, Para 13.

¹² See WTO document on guidelines for the scheduling of specific commitments.

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