

ADDRESSING THE CHALLENGES IN THE CONTEMPORARY INTERNATIONAL TRADING SYSTEM: THE LIMITATIONS OF GENERAL AGREEMENTS ON TARIFFS TRADE (GATT) AND GENERAL AGREEMENTS ON TRADE IN SERVICES (GATS)*

Abstract

International Trade was designed with the objective to foster the economic growth of nations and improve the standard of living of the people. The rules of international Trade have over time formed the framework on which the global trading system is run. The global trading system has survived the Cold War, the World War, the Middle East uprising, the Libyan Crisis and most recently, the COVID-19 pandemic and has evolved into the complex system that it is today. Commercial transactions have indeed gone beyond the traditional face to face level to electronic commerce. Today, goods and services are exchanged over the internet and this is commonly referred to as digital trade. Digital trade which is simply defined as economic transactions over the Internet employing ICT means has taken over every sector of the economy right down to retail commerce and materially transformed the way trade is conducted. This has led to a number of concerns on the continued practicality of GATT and GATS, and the continued sustenance of International Trade as well as guiding principles on digital Trade. As trade relations evolve and expand beyond the scope of GATT and GATS, it has become imperative to review the provisions of GATT and GATS in order to ensure their relative usefulness in contemporary international trade.

Keywords: GATT, GATS, International Trading System, Challenges

1. Introduction

The COVID-19 Pandemic, especially, has in no small measure disrupted the traditional rules of trade and has created challenges which have made changes in the legal framework of the global trading system, a matter of priority. The contemporary global trading system has evolved to be one where the individual through digital technology is an active player in the global trading arena. These disruptive changes have in no small measure become the new face of trade. Digital trade refers to the cross-border transfer of data, products, or services by electronic means, usually the Internet. The Fourth Industrial Revolution has already had a profound impact on the way we trade, and digital trade in services is among the most dynamic sectors in the global economy.¹ It is associated with rapid technological change and digitalization, and could be further harnessed for the recovery process as evidenced in the role of digital payments and cross-border data flows in response to COVID-19. However, despite the tech development, barriers to digital trade continue to exist. Those include outdated rules and regulations, new forms of protectionism, and the lack of international collaboration on global digital governance, to name just a few.² These challenges are, however, not insurmountable. It begins with a legal framework, in this case, an additional protocol to the global trade agreements to provide for these disruptive factors of trade and services which have changed the face of trade. Secondly, the challenges have established a fact, that for the primary objectives of international trade to be achieved and sustained, the laws need be amended to reflect the current realities in international trade. To navigate the opportunities and challenges associated with digital trade, a legal framework that addresses this new phenomenon is a matter of priority. The need for a legal framework which is contemporary to the traditional global trade agreements is long overdue. A formula that addresses these disruptive, emerging factors of trade and which seeks to address immediate concerns which would directly address the living conditions of the people is advocated. It is against this backdrop that an additional protocol is advocated to address the human and non-human factors of international trade.

2. The General Agreement on Tariff and Trade (GATT)

The General Agreement on Tariffs and Trade (GATT) which was signed on the 30th day of October 1947 and came into effect on the 1st day of January 1948 is a legal agreement minimizing barriers to international trade by eliminating or reducing quotas, tariffs, and subsidies while preserving significant regulations. The General Agreement on Tariffs and Trade (GATT) was a multilateral agreement regulating international trade. It was signed in 1947 and was replaced by the World Trade Organization (WTO) in 1995. The GATT 1994 is contained in Annex 1A of the WTO Agreement and incorporates by reference the provisions of the GATT 1947, a legally distinct international treaty that applied provisionally from 1948 to 1995. The GATT 1994 is administered by the Council for Trade in Goods and the Committees reporting to it.³ The GATT was designed to boost economic recovery after World War II by reconstructing and liberalizing global trade. In simpler terms, The GATT was set up to eliminate protectionism, get countries to trade freely among themselves, and help restore economic prosperity following the devastation of World War II.⁴ GATT was a multilateral trade agreement created with the aim of promoting free trade and reducing barriers to international trade.

The legal framework of GATT was based on a set of key principles, including the most-favored-nation (MFN) principle, which required each member country to treat all other member countries equally in terms of trade. This means that any trade concessions or benefits granted to one member country must also be granted to all other member countries.⁵ The principle of national treatment requires member countries to treat imported goods in the same way as domestically produced goods, once they enter the domestic market. This key achievement remains the most enduring legacy of GATT. The Most-Favoured-Nation (MFN) principle in global trade guarantees that every signatory member of GATT is to be treated as equal to another and to trade without discrimination.⁶ In addition to these principles,

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¹ 'Digital technologies and trade.' https://www.wto.org/english/tratop_e/dtt_e/dtt_e.htm, accessed on 20th November, 2023

² *Ibid*

³ 'General Agreement on Tariffs and Trade (GATT) 1994' https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_e.htm, accessed on 18th November, 2023.

⁴ Christina Majaski 'What Was the General Agreement on Tariffs and Trade (GATT)?' <https://www.investopedia.com/terms/g/gatt.asp>, accessed on 12th October, 2022

⁵ *Ibid*

⁶ *Ibid*

GATT also established a framework for the negotiation of trade agreements, including provisions for the reduction of tariffs and other trade barriers. GATT also created a dispute settlement mechanism, which provided a way for member countries to resolve disputes related to trade. GATT remains a cornerstone trade agreement with respect to trade in goods. However, a cursory look at the treaty shows that digital trade is not within its contemplation. This is a loophole in the treaty in the light of contemporary international trade.

3. The General Agreement on Trade in Services (GATS)

The General Agreement on Trade in Services (GATS) is the first multilateral agreement covering trade in services. It was negotiated during the last round of multilateral trade negotiations called the Uruguay Round, and came into force in 1995. The GATS provides a framework of rules governing services trade, establishes a mechanism for countries to make commitments to liberalize trade in services and provides a mechanism for resolving disputes between countries. GATS contains both a framework of rules for trade in services and a set of country-specific commitments concerning the conditions for services trade in each member nation. Thus, the agreement is a parallel to GATT, which covers goods.⁷ Similar in principle to the General Agreement on Tariffs and Trade (GATT), which deals with trade in goods, the GATS has two primary objectives: a) to ensure that all signatories are treated equitably when accessing foreign markets; b) to promote progressive liberalization of trade in services (over time, eliminating trade barriers to enable further participation in one another's markets).⁸ The General Agreement on Trade in Services (GATS) is a trade agreement of the World Trade Organisation (WTO) that entered into force in 1995 and is binding on all members of the WTO. The fundamental principles of GATS apply to all service sectors.⁹

The GATS is designed to ensure that the laws and regulations that WTO member governments apply to services trade are transparent and fair. The core principles of GATS include: a) *The Most-Favoured-Nation Principle*: This principle ensures that each signatory nation treats services and service suppliers of any other member nation without discrimination;¹⁰ b) *The National Treatment*: This principle states that each member Nation treats services of another member Nation no less different than its own national products. Contrary to the MFN obligation in Article II GATS, the National Treatment obligation of Article XVII GATS does not apply generally to all measures affecting trade in services, but only comes into play if Members choose to commit service sectors or sub-sectors in their Schedules of Specific Commitments. GATS follows the so called 'positive list' approach, whereby national treatment obligations extends only to those service sectors that Members have actually (ie, positively) inscribed in their individual schedules. In order to determine the actual level of GATS 'national treatment' commitments, it is therefore necessary to examine each Member's schedule of specific commitments which will indicate the range of activities covered in each service sector and sub-sector and the limitations on national treatment entered by Members pertaining to the different modes of supply. Subject to each Member's specific commitments, Article XVII GATS sets out a three-tier test of consistency which requires the examination of whether (1) the measure at issue affects trade in services, (2) the foreign and domestic services and service suppliers are 'like' services or service suppliers, and (3) the foreign services or service suppliers are granted treatment no less favourable.¹¹ There are five protocols to GATS:

- a. The 2nd Protocol – which outlines the revised schedule of commitment on financial services and which was adopted on 1st September, 1996.
- b. The 3rd Protocol – Which created a schedule for the movement of natural persons across borders for the purpose of providing services. This was adopted on 30th January, 1996.
- c. The 4th Protocol – Which deals with increased market access to Telecommunication services. This was adopted on 5th February, 1998.
- d. The 5th Protocol- which deals with Insurance companies, banks and securities Firms. This was adopted on 1st March, 1999.

The General Agreement on Trade in Services is a first line Trade Agreement in trade in services. However, just like its sister treaty, the General Agreement in Tariffs and Trade (GATT), economic transactions in services via electronic and ICT means were not envisaged in this treaty. This has proven to be a limitation to GATS in its practicability in contemporary international trade.

4. Digital Trade and the Limitations of GATT and GATS

Digital Trade as the name implies are economic transactions conducted over the internet. The Handbook on measuring digital trade which sets out a conceptual and measurement framework for digital trade defines digital trade as all international trade that is digitally ordered and/or digitally delivered. The nature of the transaction is its defining characteristic and nature.¹² Digital technology has transformed the way trade is conducted, and the need to modernize trade agreements to reflect this reality is long overdue. Digital trade transactions are a subset of existing trade transactions, as measured in international merchandise trade statistics and in international trade in services statistics.¹³ This has posed many challenges to our traditional understanding of international trade. In particular, there is no single recognized and accepted definition of digital trade. The concept is generally understood in a broad sense that encompasses international trade enabled by digital technologies. The term 'digital trade' is often used interchangeably with terms such as 'electronic commerce' or 'trade aspects of e-commerce.' In addition, underpinning digital trade is the movement of data, which can itself be traded and also serve as a means to deliver services.

⁷ Anders Ahnlid. 'Comparing GATT and GATS: Regime Creation under and after Hegemony.' *Review of International Political Economy*, vol. 3, no. 1, 1996, pp. 65–94. *JSTOR*, <http://www.jstor.org/stable/4177174>. Accessed 18 Oct. 2022.

⁸ General Agreement on Trade in Services (GATS), Global Affairs Canada, <https://www.international.gc.ca/trade-agreements-accords-commerciaux/wto-omc/gats-agcs/index.aspx?lang=eng>, accessed on 15th Oct., 2022

⁹ The GATS applies to all services rendered or procured by all levels of government; the central, regional and local governments; except services supplied in the exercise of government authority on a non-commercial basis and services related to air transport. However, governments at all levels are at liberty to decide which services they actually liberalise with respect to their respective economies. All members of WTO are parties to GATS.

¹⁰ This Principle under GATS is however, subject to the conditions and limits mentioned in the Schedule of Specific Commitments.

¹¹ Ortino, Federico, 'The Principle of Non-Discrimination and its Exceptions in GATS: Selected Legal Issues' (September 2006). Available at SSRN: <https://ssrn.com/abstract=979481> or <http://dx.doi.org/10.2139/ssrn.979481>

¹² IMF et al. (2023), 'Handbook on Measuring Digital Trade, Second Edition', OECD Publishing, Paris/International Monetary Fund./UNCTAD, Geneva 10/WTO, Geneva, <https://doi.org/10.1787/ac99e6d3-en>. accessed on 28th September, 2023

¹³ *Ibid*

The cross-border supply of services has equally grown rapidly over the past few decades. The capacity of the broadband internet to carry 'data' has greatly increased the extent and the types of services that can be traded. Services which once required physical proximity between consumers and suppliers can now be easily traded cross-border by electronic means. This is increasingly becoming the norm for almost all service sectors. At the same time, the explosive volume of data collected and processed today is unprecedented. The technological ability to collect, aggregate, and process an ever-greater volume and variety of data continues to grow, which in fact means that we are now living in a world of ubiquitous data collection.¹⁴ The General Agreement on Tariffs and Trade (GATT) faces limitations in addressing digital trade due to its historical focus on traded goods and its shallow-integration approach: a) *Shallow-Integration Features*: GATT, which primarily applies to traded goods, has shallow-integration features that can, in principle, be applied to digital policies impacting goods trade. However, the existing structure and level of market access commitments in GATT may not fully accommodate the complexities of digital trade;¹⁵ b) *Classification Challenges*: Digital products are difficult to classify within the GATT-GATS framework due to their hybrid nature, possessing characteristics of both goods and services. This classification challenge arises from the traditional distinctions between goods and services, which may not adequately encompass the unique characteristics of digital products.¹⁶ The limitations of GATT in addressing digital trade stem from its historical focus on goods, shallow-integration features, and the challenges in classifying digital products within its framework. These limitations highlight the need for a reevaluation of trade agreements to better accommodate the complexities of digital trade.

From the perspective of the GATS, those economic activities related to the service sectors are far broader and much more varied than was generally perceived in the early 1990s. Evidently, electronic delivery has added a significant dimension to the international market. The term 'data flow' is therefore also a closely connected term with digital trade.¹⁷ The position of the GATS Council on Services is that 'much of e-commerce falls within the GATS' scope' and that 'GATS obligations cover measures affecting the electronic delivery of services.' The GATS applies even as technology changes a service's delivery method, namely, from non-digital to digital means. The GATS does not contain such a concise statement of its purpose, but its preamble does highlight the agreement's dual goals of expanding trade liberalization to services while also protecting the national interests of developing countries. The GATS preamble makes particular note of 'the right of Members to regulate . . . the supply of services within their territories in order to meet national policy objectives' and recognizes 'asymmetries existing with respect to the degree of development of services regulations in different countries.'¹⁸ It is argued, however, that digital trade or (more broadly worded, e-commerce) cannot be adequately regulated by the existing GATT and GATS framework. The modalities of digital trade stretch the existing GATT and GATS framework too much and can hardly be subsumed into the principle of technology neutrality.¹⁹ The GATT provides no specific definition of 'goods' and the GATS circularly defines services as 'any service in any sector except services supplied in the exercise of governmental authority.' For digital products in particular, neither the agreements themselves nor other WTO initiatives provide a robust definition of 'digital trade,' 'digital goods,' or 'digital services.' This conflict highlights the need for a neutral Framework that classifies digital products and provides for the modalities in digital trade in International Trade.²⁰ The growth of technology in general and the Internet in particular has presented a challenge of classification of digital trade in goods and services in international trade law. The practice of Digital Trade has created systems which under the GATT and GATS are completely outdated and inefficient. There is therefore, need for a novel framework to not only complement GATT and GATS in International Trade but equally to create an efficient and standardized system for digital Trade.

5. The Way Forward

GATT and GATS have regulated traditional and physical trade in goods and services until the disruption brought by COVID-19. COVID-19 and its aftermath created a new form of trade, trade in goods and services using electronic and ICT means. This digital trade in goods and services operates in a structure with little or no framework to meet the unique needs. This reliance on ICT infrastructure in trade in goods and services introduced novel measures of trade that threaten the continued practicality of GATT and GATS. It is recommended that negotiations be commenced with an objective to establishing an Additional Protocol to GATT and amending Article 1(3) of GATS. The World Trade Organisation, which is the principal institution which regulates trade, is saddled with the responsibility in ensuring that this project be a reality. This is geared towards making the international trading system a more equitable and accommodating one and one that aligns with the core objectives of international trade. It is further recommended that the proposed Additional Protocol to GATT specifically provides for amongst others:

- a. An international policy coordinating digital trade to drive global adoption and scalability. There is need for rules and guiding principles in Digital Trade in goods and services. This is to provide a legal framework to nations and citizens that undertake economic transactions over the internet daily. Provisions are therefore needed that will protect developing economies in digital trade in services.
- b. Trade policies providing for end to end trade digitalization where trade rules relating to electronic data and documents need be clearly defined and unambiguous.
- c. Trade policies are necessary for addressing regulatory barriers to international digital trade in goods and services and establishing collaboration on global digital trade governance, transfer of data across border/ Data transmission and Data privacy.

¹⁴ Shin-yi Peng, 'Digital Trade', Bethlehem, Daniel, and others (eds), *The Oxford Handbook of International Trade Law (2e)*, 2nd edn, Oxford Handbooks (2022; online edn, Oxford Academic, 19 Dec. 2022), <https://doi.org/10.1093/oxfordhb/9780192868381.001.0001>, P. 772, accessed 28 Sept. 2023.

¹⁵ Robert W. Staiger W. Robert, Does Digital Trade Change The Purpose Of A Trade Agreement?, Nber Working Paper Series, https://www.nber.org/system/files/working_papers/w29578/w29578.pdf, accessed on 14th November, 2023.

¹⁶ Fleuter Sam 'The Role of Digital Products under the WTO: A New Framework for GATT and GATS Classification', <https://cjlil.uchicago.edu/print-archive/role-digital-products-under-wto-new-framework-gatt-and-gats-classification>, accessed on 18th November, 2023.

¹⁷ *Ibid*,

¹⁸ *Ibid*

¹⁹ Weber, R.H. (2020). 'A New International Trade Framework for Digital Assets'. In Lewis, M.K., Nakagawa, J., Neuwirth, R.J., Picker, C.B., Stoll, PT. (eds) *A Post-WTO International Legal Order*. Springer, Cham. (2020) https://doi.org/10.1007/978-3-030-45428-9_16

²⁰ *Ibid*

- d. The provision of guiding principles for cross-border Tele-services in Education and Healthcare is a *sine qua non*. This is to cushion the devastating effects of human capital and knowledge migration from developing economies and ensure that access to education is not hampered.
- e. There is need for the amendment of GATS by removing educational and health care services from the schedule of commitments under GATS to liberalize them and guarantee market access to these services which would be of benefit to developing economies.

Adopting these recommendations aligns with the core objectives of International Trade: a) to improve the standard of living of people; b) to foster economic growth and development of nations; c) to drastically reduce unemployment; and d) to promote free and fair trade.