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Nishith Desai

*Nishith Desai Associates*

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# International Trade Law: The Indian Perspective\*

NISHITH DESAI\*\*

## Scope of the Presentation

- Introduction
- Services
- Intellectual Property Rights
- Anti-Dumping
- India's Bilateral and Multilateral Agreements

## Introduction

- GATT, 1947
- Establishment of the WTO in 1995
  - General Agreement on Tariffs and Trade
  - General Agreement on Trade in Services
  - Trade Related Aspects of Intellectual Property Rights
  - Agreement on Trade Related Investment Measures
  - Dispute Settlement Understanding
  - Agreement on Agriculture
  - Agreement on Anti-Dumping
- Provides Institutional Framework for Multilateral System of Trade
- Objectives of the WTO

Doha Development Agenda (November 2001) – priority to developing countries?

India – an enthusiastic participant

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Editor's Note: The following is a reproduction of presentation slides that accompanied the author's talk. A narrative or prose style text of the presentation was not available. The information contained in the present format is naturally somewhat limited, but it still provides a great deal of valuable information and useful context for the subject.

\*\* The author is the founder of Nishith Desai Associates. He is an international tax and corporate lawyer, researcher, author and lecturer. His practice encompasses an extensive range of tax, corporate and technology matters, with a strong emphasis on private equity and venture capital funds.

### **General Agreement on Trade in Services (GATS)**

- Enhanced “trade-ability” of services
- A landmark achievement of the Uruguay Round (1995)
- Aim: To establish a multilateral framework to promote orderly and transparent trade and investment liberalization in services
- Comprehensive legal framework of rules and disciplines covering 12 classified sectors with 160 sub-sectors
- The GATS defines services trade as occurring via four modes of supply:
  - Mode 1: Cross border delivery
  - Mode 2: Consumption abroad
  - Mode 3: Commercial presence
  - Mode 4: Movement of natural persons
- Obligations under GATS:
  - General obligations (MFN, Transparency)
  - Specific commitments (Market Access, National Treatment)
- Voluntary and flexible commitment structure:
  - Flexibility in choosing sectors to table for negotiations and in type of commitments made
  - No compulsion to open up a sector or a particular mode of supply
  - Attempt to balance between commercial interests and public policy concerns
  - Flexibility to developing countries

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<sup>1</sup> While services currently account for over 60 percent of global production and employment, they represent no more than 20 per cent of total trade (BOP basis). This — seemingly modest — share should not be underestimated, however. Many services, which have long been considered genuine domestic activities, have increasingly become internationally mobile. This trend is likely to continue, owing to the introduction of new transmission technologies (e.g. electronic banking, tele-health or tele-education services), the opening up in many countries of long-entrenched monopolies (e.g. voice telephony and postal services), and regulatory reforms in hitherto tightly regulated sectors such as transport. Combined with changing consumer preferences, such technical and regulatory innovations have enhanced the “tradability” of services and, thus, created a need for multilateral disciplines.

The creation of the GATS was one of the landmark achievements of the Uruguay Round, whose results entered into force in January 1995. The GATS was inspired by essentially the same objectives as its counterpart in merchandise trade, the General Agreement on Tariffs and Trade (GATT): creating a credible and reliable system of international trade rules; ensuring fair and equitable treatment of all participants (principle of non-discrimination); stimulating economic activity through guaranteed

### Services: Gats and India

- From protestor to (active) participant
- Services forming substantial part of GDP – 68.6%  
(source: WT/TPR/S/182 - 18 April 2007)
- Growing component of trade
- India's commitments in Uruguay Round
  - Extremely limited (sector-wise and mode-wise)
  - Sectors such as energy, distribution, education, environmental services excluded
  - No commitments scheduled in many important sub-sectors

### Doha Round

- Received requests from approx 25 countries

policy bindings; and promoting trade and development through progressive liberalization.

GATS applies to measures taken at all levels of government and by non-governmental bodies to whom powers delegated by governments or authorities

It excludes services supplied in the exercise of governmental authority - services which are supplied neither on a commercial basis nor in competition with one or more service suppliers

Mode-wise classification reflects complex nature of international transactions in services

Brings into purview of the GATS investment, labour market, immigration policies, and wide range of domestic regulations

Cross-border supply is defined to cover services flows from the territory of one Member into the territory of another Member (e.g. banking or architectural services transmitted via telecommunications or mail);

Consumption abroad refers to situations where a service consumer (e.g. tourist or patient) moves into another Member's territory to obtain a service;

Commercial presence implies that a service supplier of one Member establishes a territorial presence, including through ownership or lease of premises, in another Member's territory to provide a service (e.g. domestic subsidiaries of foreign insurance companies or hotel chains); and

Presence of natural persons consists of persons of one Member entering the territory of another Member to supply a service (e.g. accountants, doctors or teachers). The Annex on Movement of Natural Persons specifies, however, that Members remain free to operate measures regarding citizenship, residence or access to the employment market on a permanent basis.

The supply of many services is possible only through the simultaneous physical presence of both producer and consumer. There are thus many instances in which, in order to be commercially meaningful, trade commitments must extend to cross-border movements of the consumer, the establishment of a commercial presence within a market, or the temporary movement of the service provider himself.

- Horizontal and Sectoral
- Submitted requests to approx 60 countries
  - Interest in exporting high-skilled manpower (Mode 4)
- Initial offer (Jan 2004)
  - 7 sectors and 47 sub-sectors
  - Mode 4 – all categories of natural persons included
- Revised offer
  - 11 sectors and 94 sub-sectors
  - Mode 3
  - Mode 4 – improvements in sectoral coverage contractual services suppliers and independent professionals
  - Commitments on FDI levels enhanced in sectors such as computer related services, tourism, engineering, telecom, etc.
  - Restrictions in legal, postal services, etc.

#### **Domestic Regulatory Framework**

- Financial Services
  - Banking, Insurance, Securities
- Telecommunications
- Transport
  - Railway, Maritime Transport, Air Transport
- Professional Services
  - Engineering Services, Legal Services, Medical and Healthcare Services
- Autonomous Liberalization in services
- Aggressive interest in Mode 4
- Wide ranging demand in Mode 1
- GATS – India’s trophy

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<sup>2</sup> New commitments include, *inter alia*, air transport services; architectural, integrated engineering and urban planning and landscape services; construction and related engineering services; distribution services; educational services; environmental services; life insurance services and services auxiliary to insurance; recreational, cultural and sporting services; tourism services; and veterinary services.

Improvements to existing commitments include asset management services and other non-banking financial services; banking services; computer and related services; construction and related engineering services; engineering services; research and development services; basic telecommunications and value-added telecommunications services.

### **Intellectual Property Rights: Trade Related Aspects of Intellectual Property Rights (TRIPS)**

Minimum level of intellectual property rights which must be provided by all member states

- Reduction of distortion and impediments to international trade
- Effective and adequate protection of IPRs
- Ensure that measures and procedures of enforcing IPRs do not themselves become barriers to legitimate trade
- Promotion of technological innovation
- Transfer and dissemination of technology
- TRIPS enacted despite dissatisfaction of India and other developing countries
- TRIPS part of a larger package of economic agreements which were beneficial to India
- India still in the wake of the Neem Tree incident

#### **Patents**

- Article 27 - Patents for products and processes
- Exceptions to unlimited patent rights
  - Public order and morality
  - Plants and animals and essential biological processes
  - Limited exceptions to exclusive rights (compulsory licensing)
- India's compliance with TRIPS
  - Patent Amendment Act 2002: Compulsory licensing
  - Patent Amendment Act 2005: Mailbox applications to Product patents

#### **Geographical Indications**

- Article 22 of TRIPS –
  - "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.*
- Geographical Indications Act 2003
  - E.g. Basmati Rice, Darjeeling Tea, Kanchipuram Silk Saree, Alphanso Mango, Nagpur Orange, Kolhapuri Chappal, Bikaneri Bhujia, Agra Petha

### Other Legislation<sup>3</sup>

- At the same time the incentive for FDI in the Pharma sector has enhanced due to product patent

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<sup>3</sup> The Parliament passed the Protection of Plant Varieties and Farmers' Rights Act in 2001. Criteria for the registration of new plant varieties include novelty, distinctiveness, uniformity, and stability. Applications must be made to the Registrar-General of Plant Varieties; applications that comply with the requirements of the Act, are advertised. Opposition to the registration must be made within three months of advertisement; the applicant has two months to respond. If there is no opposition, or if the opposition is rejected, the variety is registered in the Plant Varieties Registry and an official certificate given to the applicant. For registration of essentially derived varieties, the Registrar must forward the application and supporting documents to the Protection of Plant Varieties and Farmers' Rights Authority for examination. If the Authority is satisfied that the essentially derived variety has been derived from the initial variety, it directs the Registrar to register the new variety.

The variety is novel if, at the date of filing, the propagating or harvested material has not been sold or otherwise disposed of by or with the consent of its breeder for exploitation in India, earlier than one year before the date of filing of the application, or, outside India, earlier than six years for trees and vines and earlier than four years for other varieties.

The term of protection is nine years for trees and vines and six years for other crops, renewable for a further nine years (for extant varieties of trees and vines, or a total of 15 years for annual crops from the date of notification under the Seeds Act 1966). However, under Chapter VI of the Act, a farmer is entitled to save, use, sow, re-sow, exchange, share or sell his farm produce, including seed (except branded seed), of a variety protected by the Act.

The Act also provides for benefit sharing.

- **The Semiconductor Integrated Circuits Layout-Design Act** was passed in September 2000. There have been no changes to this legislation since the previous Review. Applications should be made in writing to the Registrar and filed at the office of the Semiconductors Integrated Circuits Layout-Design Registry, although it appears that the Registry is not yet functional.

Infringement is defined as unauthorized reproduction, whether by incorporating in a semiconductor integrated circuit or otherwise, a registered layout-design or any part of it, or unauthorized import, sale, or distribution for commercial purposes of a registered layout-design or a semiconductor integrated circuit incorporating a semiconductor integrated circuit with a registered layout-design. However, reproduction is permitted for scientific evaluation, analysis, research or teaching. In addition, if a person creates another original layout-design on the basis of scientific evaluation or analysis of a registered layout-design, that person has the right to reproduce, sell or incorporate this layout-design in a semiconductor, while if a person independently develops a layout-design that is identical to a registered one, that person may use it as desired without infringing

- Novartis case – Section 3(d) of the Patents Act 2005
  - Domestic courts to respect the jurisdiction of a dispute settlement mechanism provided under an International agreement (having a basic nature of any ordinary contract),
  - Article 14 can be invoked only when there is a possibility of real and substantial discrimination

#### **Agreement On Agriculture (AOA)**

- Distortion of international trade in agriculture
- Massive domestic subsidies by the industrialized countries and import restrictions
- Excessive production and dumping in international markets
- Need for:
  - Establishment of a fair agricultural trade regime
  - Reduction of domestic production subsidies
  - Reduction in the volume of subsidized exports
  - Minimum market access opportunities for agricultural producers world-wide
- Objectives:
  - Reform of trade in agriculture and establishment of a fair and market-oriented agricultural trading system

#### **Disciplines in AOA**

- Market access: “Tariffication” of all non-tariff barriers
  - Tariffs to replace non-tariff barriers (quantitative restrictions, export and import licensing, etc.)
  - Minimum level for imports of agricultural products by member countries as a share of domestic consumption
- Domestic subsidy or support:
  - Identify acceptable measures that support farmers
  - Deny unacceptable, trade-distorting support to the farmers
  - Domestic support (to each agricultural product) quantified by the mechanism of total Aggregate Measurement of Support (AMS)
- Export Subsidy:
  - Direct subsidies (including payments-in-kind) contingent on export performance
  - Sale/disposal for export by governments of noncommercial stocks of agricultural products
  - Payments on the export of an agricultural product that are financed by virtue of governmental action
  - Subsidies to reduce the costs of marketing exports of agricultural products



- Internal transport and freight charges on export shipments on more favorable terms than for domestic shipments
- Subsidies on agricultural products contingent on their incorporation in exported products

#### **India's Commitment**

- Quantitative Restrictions (QR) have been eliminated
- QR replaced with appropriate tariffs by 31.3.2003
- Domestic support for agricultural inputs - 10% of the total value of agricultural produce
- Unaffected by disciplines on export subsidy
- Support given for food security, food aid, R&D, relief from natural disasters, etc.

#### **Doha Round (2001)**

Objects:

- Substantial improvements in market access
- Reductions/ phasing out export subsidies
- Substantial reductions in domestic support
- Regard to needs of developing countries (including food security and rural development)
- Special and differential treatment for developing countries and non-trade concerns as an integral part of negotiations

Stagnation of discussions due to deadlock between developed nations and developing nations and other political reasons

India's concerns were:

- Balance between market opening & development needs
- Non-trade concerns such as food security
- Anti-dumping measures taken by developing countries against dumping of agricultural produce by developed countries

Lowering of tariff rates by the developing countries

#### **ANTI-DUMPING**

- Article VI of GATT
- What is "Dumping?"
  - Imports of a product at a price below its "normal value"
  - Material injury to a domestic industry
  - Causal link between the dumped imports and the injury
- Article 1 – Anti Dumping Agreement:

- Member may not impose an anti-dumping measure unless above conditions fulfilled
- Article 2 - Determination of dumping calculated on the basis of an “unfair comparison” between normal value and export price
- Article 3 - Determination of material injury
  - Objective examination
  - Based on positive evidence
  - Consequent impact of dumped imports on the domestic industry.

### **India and Anti-dumping**

- Amendments to Customs Tariff Act, 1975
- Enactment of Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and For Determination of Injury) Rules, 1995
- Provision in the Finance Bill, 2001, 2003 & 2004
- A designated authority is established by the Government of India to implement anti-dumping rules

Duties of the Designated Authority are:

- Investigate existence, degree and effect of any alleged dumping
- Identify article liable for anti-dumping duty
- Submit findings, provisional or otherwise to Central Government as to
  - normal value, export price and the margin of dumping in relation to the article under investigation
  - the injury or threat of injury to an industry established in India or material retardation to the establishment of an industry in India consequent upon the import of such article from the specified countries
- Recommend anti-dumping duty to remove the injury to the domestic industry
- Review the need for continuance of anti-dumping duty

### Statistics

COUNTRIES ALLEGED FOR DUMPING						
S. No.	Country	Investigations Initiated	Investigation closed after initiation	Under Investigation	Duty Recommended/ Withdrawn/ Lapsed	Measures in force
1.	China PR	88	3	11	29	44
2.	EU (including 25 member Countries)	57	3	2	29	22
3.	Japan	22	0	0	12	10
4.	USA	23	1	1	10	11
5.	Singapore	19	3	0	8	8
6.	Indonesia	17	1	2	7	7

Source: Directorate General Report 2006

PRODUCTS ALLEGED TO BE DUMPED		
S.No.	Product Category	Number of Cases
1.	Chemicals & Petrochemicals	82
2.	Pharmaceuticals	29
3.	Textiles/ Tiles/ Yarns	21
4.	Steel & Other Metals	14
5.	Consumer Goods	15
6.	Other Products	27
	<b>Total</b>	<b>188</b>

Source: Directorate General Report 2005 -06

### Cases on Anti-Dumping

#### Imports of 1-Phenyl-3-Methyl-5-Pyrazolone from China PR

Applicants: M/s Prima Chemicals and Polygon Chemicals, Ahmedabad

Goods used in: dye and pharmaceutical industry for manufacture of Analgin, Solvent Dyes and Pigment Dyes, and Pigment Orange 13

Decision of the Designated Authority under Customs AD Rules, 1995:

- Domestic industry suffers material injury due to such dumped imports.

- Definitive measure is required to be imposed to offset dumping and injury
- AD duty on the goods at the rate of \$ 1.218 per Kg

#### **Import of Tires (used for buses & lorries) from China PR & Thailand**

Applicants: Automotive Tire Manufacturer's Association (ATMA)  
New Delhi

Goods used for: Tires used in Locomotives

Decision of the Designated Authority under Customs AD Rules, 1995:

- Domestic industry suffers material injury
- Definitive measure is required to be imposed to offset dumping and injury
- AD duty on the goods at different rates for different combination & permutations, ranging from \$ 3.92 to \$ 121.67 depending on the goods being imported

#### **Import of White Cement from UAE and Iran**

Applicants: M/s Grasim Industries Ltd. and M/s JK Synthetics Ltd

Goods used for: White Cement used in construction

Decision of the Designated Authority under Customs AD Rules, 1995:

- Domestic industry suffered material injury
- Definitive measure is required to be imposed to offset dumping and injury
- AD duty on the goods at the rate of US \$ 32-38 per/MT

#### **Bilateral & Multilateral Trade Agreements**

*Multilateral and Bilateral trade agreements: friends or foes?*

- Pascal Lamy

- WTO allows Bilateral or Regional Trade Agreements (RTA)
- Conditions:
  - Overall impact of RTA over the Non Members of RTA (i.e. Members of WTO)
  - External requirement – members of RTA should harmonize the external trade policies of its members and compensate non members accordingly
  - Internal dimension – tariffs & other restrictive regulations of commerce must be phased out substantially on all trade
- WTO vehemently opposes RTAs & Bilateral Agreements

**US-India Strategic Partnership**

- Historic agreement on Civil Nuclear Cooperation
  - it addresses India's surging energy needs for its growing economy
- Economy - US-India cooperation to:
  - enhance job creation and economic growth
  - support economic reform and liberalization
  - develop a bilateral business climate supportive of trade and investment
  - improve market access for goods and services

**India-EU Relationship**

- Develop and preserve a dynamic agricultural sector
- Joint Working Group on Sanitary and Phytosanitary (SPS) and Technical Barriers to Trade (TBTs)
- High Level Trade Group to study their bilateral trade and investment relationship
- Exchange information and initiate a dialogue on regulatory policy including Mutual Recognition Agreements (MRAs) and domestic regulations and market access issues related to services

**India-China Relationship**

- Endeavour to raise volume of bilateral trade to US\$ 40 bn by 2010
- Joint efforts to diversify their trade basket and strengthen bilateral commercial and economic cooperation
- Agreement on Bilateral Investment Protection and Promotion
- Memorandum of Understanding between Forward Markets Commission of India and China Securities Regulatory Commission regarding Commodity Futures Regulatory Cooperation
- Memorandum of Understanding between the Indian Council of Agricultural Research and the Chinese Academy of Agricultural Sciences

**South Asian Free Trade Area -- (SAFTA)**

- 12th South Asian Association for Regional Cooperation (SAARC) summit in 2004
- Free trade zone in India, Pakistan, Nepal, Sri Lanka, Bangladesh, Bhutan and the Maldives, coming into effect from 2006
- India, Pakistan and Sri Lanka to reduce duties to 20% before year ending 2007. 20% duty will be reduced to zero in phase ending 2012
- Nepal, Bhutan, Bangladesh and Maldives (least developed nations) have additional 3 years to reduce tariffs to zero

**Other Treaties**

- World Trade Organization

- General Agreement on Trade & Tariff
- General Agreement on Trade & Services
- Asia Pacific Trade Agreement (APTA)
- Comprehensive Economic Cooperation Agreement with Singapore
- India-Maldives Trade Agreement
- India-Korea Trade Agreement
- India-Japan Trade Agreement
- India-MERCOSUR Preferential Trade Agreement
- Comprehensive Economic Cooperation Agreement between The Republic of India and the Republic of Singapore