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Маълумот олиш учун қуйидагиларга мурожаат этиш
сўралади:

Гулямов Саид Саидахарович,
Рустамбеков Исламбек Рустамбекович
ТДЮУ, Халқаро хусусий ҳуқуқ кафедраси,
Ўзбекистон Республикаси, Тошкент ш., 100047,
Сайилгоҳ кўчаси, 35. Тел: 233-66-36

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Alamonova Shoira Ergash kizi

Lecturer of Tashkent State University of Law

REVISITING PUBLIC SERVICES UNDER GATS: A LEGAL ANALYSIS OF COMMITMENTS AND STATE DISCRETION

Abstract. The General Agreement on Trade in Services (GATS) has been a subject of debate regarding its impact on the liberalization of essential public services, particularly in sectors such as healthcare, education, and water. Critics argue that GATS could pressure states into privatizing these services, undermining governmental control and social welfare protections. This article critically examines the legal framework of GATS, clarifying its scope, commitments, and limitations concerning public services. It explores the voluntary and flexible nature of GATS commitments, analyzing key provisions such as market access, national treatment, and exceptions under Article I:3. The findings suggest that careful scheduling of commitments, strategic use of exemptions, and regulatory safeguards are essential to preserving national autonomy over vital public services.

Keywords: GATS, governmental control, commitments, key provision, national autonomy

Annotatsiya. Xizmatlar savdosi bo'yicha Bosh kelishuv (GATS) muhim davlat xizmatlarini, xususan, sog'liqni saqlash, ta'lim va suv ta'minoti kabi sohalarni erkinlashtirishga ta'siri bo'yicha munozaralarga sabab bo'ldi. Tanqidchilarning ta'kidlashicha, GATS davlatlarni ushbu xizmatlarni xususiy lashtirishga majbur qilishi, hukumat nazorati va ijtimoiy himoyaga putur etkazishi mumkin. Ushbu maqola GATSning huquqiy bazasini tanqidiy ko'rib chiqadi, uning doirasi, majburiyatlari va davlat xizmatlariga nisbatan cheklovlarini aniqlaydi. U GATS majburiyatlarining ixtiyoriy va moslashuvchan xususiyatini o'rganadi, bozorga kirish, milliy rejim va I:3-moddadagi istisnolar kabi asosiy qoidalarni tahlil qiladi. Topilmalar shuni ko'rsatadiki, majburiyatlarni puxta rejalashtirish, imtiyozlardan strategik foydalanish va tartibga soluvchi kafolatlar muhim davlat xizmatlari ustidan milliy avtonomiyani saqlab qolish uchun muhim ahamiyatga ega.

Kalit so'zlar: GATS, hukumat nazorati, majburiyatlar, asosiy shartlar, milliy avtonomiya.

Аннотация. Генеральное соглашение по торговле услугами (ГАТС) стало предметом дебатов относительно его влияния на либерализацию основных государственных услуг, особенно в таких секторах, как здравоохранение, образование и водоснабжение. Критики утверждают, что ГАТС может оказать давление на государства с целью приватизации этих услуг, подорвав государственный контроль и защиту социального обеспечения. В этой статье критически рассматривается правовая база ГАТС, разъясняются его сфера применения,

обязательства и ограничения, касающиеся государственных услуг. В ней исследуется добровольный и гибкий характер обязательств ГАТС, анализируются ключевые положения, такие как доступ к рынку, национальный режим и исключения в соответствии со статьей I:3. Результаты показывают, что тщательное планирование обязательств, стратегическое использование исключений и нормативные гарантии имеют важное значение для сохранения национальной автономии в отношении жизненно важных государственных услуг.

Ключевой слов: ГАТС, государственный контроль, обязательства, ключевое положение, национальная автономия

I. Introduction

There have been concerns raised about the WTO expanding its influence, into service areas like healthcare, education and the environment through the General Agreement on Trade in Services (GATS). The main criticism revolves around the fear that GATS could compel nations to liberalize their services, including sectors such as healthcare and education for trade and investment purposes due to pressures from lobbies in developed countries: 'This would result in a 'corporate takeover' of the service sector by foreign multinationals and establishments and force privatisation of services. Another scholar supports this argument by noting that in developing countries it may be necessary for the government to set prices that appropriately limit business opportunities simply by providing free access to essential services such as education, health, or water.

However in our view, a lot of these concerns stem from misconceptions about the liberalization process in this agreement. This paper aims to address these concerns by emphasizing some relevant solutions within the scope of GATS.

II. Navigating GATS: Scope and Modes of Supply

2.1. Scope of GATS. GATS comprises a set of regulations and guidelines that govern 161 service sectors within 12 specified sectors. The term 'sector' mentioned here pertains to the categories listed in the Services Sectoral Classification List, which is a compilation of all services sectors and sub sectors ranging from financial to the environmental services created by the GATT Secretariat in 1991. Thus, this agreement provides a description of services, in Article I:3(b) mentioning that services encompass all services, across sectors excluding those provided under governmental authority. The definition of 'service' makes sense. But what about public services and their vital one? To go deeper into these terms, it is important to first clarify the scope of GATS.

It is notable that, there are two types of services that fall outside the scope of the GATS. As per the Article I:3(c) of the GATS, the initial exception pertains to services offered under the governmental authority as 'any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers' while the

second one is sector specific which excludes any regulations that impact air traffic rights and services closely linked to the operation of those rights in an Annex to the GATS.

Regarding the former one, the governmental service exclusion of Article I:3 does not contain any reference to particular sectors or legal forms of establishment. The relevant provisions, in Article I:3(c), relate to 'any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers' Regarding the 'commercial basis', it is highly related to profitability as for my view. Krajevski correctly said that if the supply does not purpose to gain profit, this service is not commercial. As per the competition, the panel report, on 'Mexico – Measures Affecting Telecommunications Services' refers the definition from the Oxford English Dictionary: 'rivalry in the market, striving for custom between those who have the same commodities to dispose of'. As Adlung concluded, the presence of competition would rely on how each supplier behaves, whether they are competing or not without considering the actions of others within or, outside a country's jurisdiction.

Concluding from the above, we can define the term 'public service' within the framework of GATS that any service related to the exercise of governmental authority which is supplied either on a commercial basis or in competition. Thus, it is clear that as vital public services which are socially sensitive to population we mean for instance, water, education, health care or electricity services with commercial basis or competition.

2.2. Modes of supply

Pursuant to GATS Article I:2, trade in services are consisted of 4 modes of supply: Cross-border (Mode 1), consumption abroad (Mode 2), commercial presence (Mode 3), and movement of natural person (Mode 4). Modes 1 and 2 involve the service supplier coming to the consumer's country, with Mode 3 linked to foreign direct investment and Mode 4 involving temporary provision of services. Mode 4 is distinct from immigration issues, focusing on temporary work rather than permanent employment or residency.

III. Organizing GATS Commitments: A Guide to General and Specific Scheduling

The GATS' structure is contained with general principles suitable for all services to promote overall service liberalisation and national schedules to allow countries to move forward at their own speed in liberalizing services.

3.1. The 'General Obligations and Disciplines' of GATS includes a most-favoured-nation (MFN) obligation and other obligations related to 'good trade governance', like basic rules on domestic regulations and transparency. The principle of MFN (Article II) requires that trading benefits be equal to all member states of the WTO. Members of the WTO are obligated not to give different countries less favourable treatment. To evaluate a measure's consistency with Article II:1 of GATS, firstly, it should be started by checking determine if the rule pertains to 'trade in services' in any of the four modes and if it impacts this trade accord-

ing to Article I:1. If it does compare how 'services and service providers from one country are treated compared to services and providers, from countries. Under the transparency requirement, states should provide information bearing on the agreement and on their commitments under the GATS.

3.2. Specific commitments which are negotiated undertakings particular to each GATS signatory. These commitments, upon the conclusion of negotiations should be written in national schedules of each country and considered a component of the GATS. The Appellate Body in US-Gambling examined the context provided by the structure of the GATS in interpreting the specific commitments made by the US in its GATS Schedule. The Appellate Body stated that from the definition of 'services' and 'sector' found in GATS, it follows that, firstly, a Member may schedule commitments in respect of any service and secondly, that a particular service cannot fall within two different sectors or sub sectors of a Member's Schedule. In this turn, there is one relevant question may be arised: (A) What items should be entered on a schedule, and (B) how should they be entered?

A) Relevant items for schedule

Schedules under GATS should only contain legally binding commitments and include: "Each schedule consists of four columns. The heading of each column reads: (i) sectors or sub-sectors; (ii) limitations on market access; (iii) limitations on national treatment; and (iv) additional commitments. (e.g., qualifications, standards, licensing). For each committed sector and mode of supply, limitations and additional commitments must be detailed. When using attachments it's important to indicate the sections they relate to. For example definitions should be in the first column, market access commitments in the second column, national treatment commitments in the third column and additional commitments in the fourth column. There is no GATS requirement to schedule limitations on customs duties for goods associated with service provision, which are governed by GATT disciplines.

B) How should items be organized in a schedule?

Because schedules are legally enforceable commitments of each Member, it is really important that 'schedules be clear, precise and based on a common format and terminology.' To ensure clarity and precision, firstly, it is paid attention to the description of committed sectors and sub-sectors. Commitments should be described with the highest possible degree of clarity, often using the Secretariat's Services Sectoral Classification List, which includes CPC (Central Product Classification) numbers. If Members use their own classifications, they must provide a detailed definition to avoid ambiguity. Regarding the fourth mode of supply, many participants list commitments as additional undertakings, specifying entry and stay terms for natural persons. If no stay duration is noted, it implies no binding duration. Article XX:1(a) mandates that schedules detail market access terms, including stay duration, without impairing other Members' benefits. States should know how to record the commitments properly as well.

Horizontal Commitments, for instance, apply across all sectors listed in the schedule unless specified otherwise. They should describe any general limitations or conditions, such as foreign investment restrictions or regulations on land acquisition and are typically listed at the beginning of the schedule. SPCs, however, apply to particular sectors and should detail any limitations on market access or national treatment. Each measure that contravenes Articles XVI (Market Access) or XVII (National Treatment) must be described concisely.

Furthermore, there are specific levels of commitment. Full Commitment is indicated by 'None' in the appropriate columns, meaning no limitations are imposed. In US – Gambling, Panel concluded that 'when a Member has the inscription 'None' in the market access column of its schedule, it must maintain 'full market access' within the meaning of the GATS, i.e. it must not maintain any of the six limitations and measures listed in the second paragraph of Article XVI'. However if states wish to commit to restrictions they must provide details, on the existing limitations or any potential relaxations while ensuring that some constraints are maintained. When making a commitment a Member has the option to specify limitations in either of the two categories; 'limitations on market access or 'limitations, on treatment'. In cases where a limitation impacts both market access and national treatment according to the guidelines outlined in Article XX;2 of the GATS (to avoid duplicating entries) it should only be listed under the market access category. There is also no requirement implied by the term 'Unbound' giving the Member the freedom to implement or uphold measures, without restrictions. While the GATS does not provide a definition, for 'Bound' it is understood in language to mean 'compelled or obliged.' This interpretation is backed by a dictionary, which defines it as 'constrained by a contractual or other obligation.' Therefore 'unbound' suggests a lack of constraint or obligation. 'We point out that our conclusion on the relationship of the inscription 'Unbound' under Article XVI with that of 'None' under Article XVII preserves the freedom of WTO Members, when taking services commitments, to choose the combination of market access and national treatment limitations, if any, that they wish to maintain.

3.3. Based on the aforementioned discussions, we can say that three key aspects define the commitment process. The first aspect is that countries have the freedom to choose which service sectors they want to put up for negotiation. Therefore if countries are hesitant or not ready to open a service sector they have the option to refrain from doing. The second important feature of the commitment structure allows countries to outline in their both horizontal and sector-specific schedules the limitations and exceptions they want to uphold regarding market access and national treatment. They also highlight additional commitments or qualifying conditions to their commitments if they have specific concerns on some services. But they should be careful that, under the market access obligation, it is impossible to impose market access barriers that are

more restrictive than those specified under its limitations in the market access commitments. There are six types of market access restrictions, which though prohibited in principle, can be applied if specified in the schedule. These include limitations on the number of foreign service suppliers; the value of transactions or assets; the total quantity of services output; the number of natural persons who may be employed; the type of legal entity; and the extent of foreign capital participation. In China – Publications and Audiovisual Products, the Panel also confirms: '... in six sub-paragraphs, the measures that a Member, having inscribed a specific sectoral commitment, must not adopt or maintain 'unless otherwise specified in its Schedule'.

Regarding the national treatment requirement a country is not allowed to show discrimination, against foreign service providers than what is outlined in its restrictions under the national treatment agreements. Common restrictions on treatment involve treating foreign service providers compared to local ones, through subsidies, taxes, government purchasing regulations and offering different advantages. One more aspect to consider is that market access and national treatment promises are established for each of the four supply methods. This means there are a total of eight promises, for each subsector or activity in both the general schedules. Specific restrictions and terms can be included in the schedules, for each supply method. Thus, countries generally much discretion when it comes to deciding how much liberalization to pursue and the specific distribution of their commitments. They also have the freedom to choose which sectors they want to focus on during negotiations.

IV. Lessons from cases on privatisation of vital public services

It must be admitted that the experience of complete liberalization of trade and transfer to the private sector has not fully justified itself. In the experience of developing countries, there are many cases where they opened vital public services, realized the negative consequences of this, regretted it, and re-municipalized as a result. These cases call on WTO accession countries to avoid over-promising public services that are sensitive to the population.

Privatisation does not necessarily offer a guaranteed solution to water access problems, for example. In developed countries privatization efforts have led to significant price hikes and social upheaval making it increasingly difficult for the most vulnerable members of society to access essential water services. Even The World Bank has suggested to rethink privatization strategies acknowledging the challenges, in regulating water companies and observing the impact of profit focused service delivery, on employees, low income families and the environment. Therefore, I am in favour of the view of Mukhopathaya that some measure of flexibility is important to protect the water rights.

Tanzania faced with the privatization failure and subsequent remunicipalisation of Dares Salaam's water ser-

vices. Initially, City Water Services (CWS), a joint venture, failed due to poor preparation, inadequate employee training, and financial mismanagement, leading to contract termination by the Tanzanian government. The public entity DAWASCO took over, improving coverage and leak management but still struggled with infrastructure and revenue issues.

During an incident, in Cochabamba, Bolivia, a situation unfolded where the International Water led group accepted a 40 year concession in September 1999. This decision led to a surge in water prices by much as 200%. The community reacted strongly with protests, against the price hike, which were met with intervention resulting in one fatality and numerous injuries. Eventually the concession was revoked in April 2000 and control of the service was returned public hands.

Similar cases were repeated in the countries of France, Canada, Argentina, Malaysia, and they regretted the privatization of water and remunicipalized it.

In GATS, it is really complicated to remunicipalize of privatized services, each country should approach very carefully for each service, especially for vital public services that are sensitive to the population, and avoid over-promising in the schedule while entering the WTO.

V. Conclusion

In conclusion, the GATS' commitment structure is highly voluntary and flexible in nature. There is no compulsion on member countries to open up a particular sector or subsector/activity or a particular mode of supply if there are sensitivities or concerns involved about the potential impact. In this regard, the GATS commitment structure tries to strike a balance between commercial interests on one hand and regulatory concerns and public policy objectives on the other.

Therefore, by carefully scheduling commitments and limitations based on recommendations above, it can be ensured that its sensitive public services are protected while complying with WTO guidelines. This strategic approach will facilitate a smooth negotiation process and eventual accession to the WTO, ensuring both adherence to international trade rules and the safeguarding of essential public services.

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